

## COUNTING VIOLENCE COMMITTED BY THE POLICE : RAW FACTS AND NARRATIVES

*In this paper, researcher Fabien JOBARD describes the effort made by the European Committee for the Prevention of Torture to measure acts which are usually either presented as isolated occurrences ("case X or Y") or as undifferentiated denunciations ("Police everywhere, justice nowhere") : that is to say, unlawful violence by the police.*

"A non-negligible risk of being mistreated": this is the conclusion reached by the European Committee for the prevention of torture and inhuman or degrading punishment or treatment (CPT) following its visit to France (from October 27 to November 8, 1991)<sup>1</sup> to determine the probability of occurrence of improper use of force by the police<sup>2</sup>. prior to the June 15, 2000 French Act on the presumption of innocence, the CPT had the rare privilege of being allowed to make surprise visits to police stations, and on the basis of its first-hand testimony, to question the government. Whereas organisations such as Amnesty International must rely on the publicly available press as their source of information, the members of the CPT have complete freedom to discover actual practices, behind the clauses in official documents on the legal use of force.

The CPT is an independent organisation created by the signatory States of the Council of Europe to ensure the effective enforcement of paragraph 3 of the European convention of human rights ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"). The originality and strength of the CPT reside in the fact that its members, named by the Council of ministers of the Council of Europe, are allowed to visit any place in which people are held against their will (prisons, police stations, holding centres for immigration detainees, psychiatric institutions, etc.) at any time, and with no hindrance. Its reports are confidential, but may be published, along with the responses of the governments involved, with the consent of the latter. France has been visited 5 times so far (in 1991, twice in 1994, in 1996 and 2000).

"A non-negligible risk of being mistreated". This sounds like both an evaluation and a warning : like a value judgement (a moral judgement) and a factual judgement (a scientific judgement). Is the approximation "non-negligible" a sufficient expression of the gap between recorded facts and those acts that are unknown but believed to exist ? How can a judgement (scientific and moral) be pronounced on events that are invisible ?

Like many others, this question evidently touches on some of the implications of knowledge. But unlike most of these, it is directly addressed to the government. For while the bold reform of the code of criminal procedure attempted by the January 1993 Act was bolstered by a series of dramatic battles between youths and the police, in Mantes-la-Jolie in particular (where two youths and one police officer were killed in the space of a few weeks), from the outset the decisive reform represented by the Act on the presumption of innocence was depicted, in its explanatory

statement, as a response to the repeated allegations of the CPT, and over and beyond that, of the European Court of Human Rights, which had condemned France for "torture" in July 1999, for the mistreatment of a person held in custody by the Bobigny criminal investigation service.

The CPT assessment raises the issue of its particular way of evaluating the probability that unlawful violence is exerted by some law enforcement officers. This issue of *Penal Issues* addresses the evaluation of this probabilistic approach. Firstly, by looking at how this judgement was generated: what are its foundations ? Next, by following the conflicts of interpretation between the French government, opposed to the verdict, and the CPT, which maintained it. What are the rules governing the calculations of probability used on each side ? Finally, we will attempt to determine whether the two views may be reconciled, and at what cost.

*"(...) The delegation heard a considerable number of allegations of more or less serious mistreatment inflicted on individuals in police custody. The allegations voiced mainly accused the police. They included: punching and slaps; biting on the head with a phone book; psychological pressure; insults; deprivation of food and medication (...). The existence of this type of mistreatment was corroborated by several reliable sources.*

*To illustrate this, the CPT mentions the case of a woman drug abuser seen during its visit to the Marseille-Baumettes prison who had allegedly been beaten during interrogation by the police early in 1991. Her medical record showed that when she arrived at the prison she was heavily bruised and presented hematomas consonant with her allegations. The woman claimed to have filed a complaint.*

*(...) The CPT was led to the conclusion that a person taken into custody by the police runs a non-negligible risk of being mistreated"<sup>3</sup>.*

Here, then, are the grounds on which the CPT founded its evaluation of the risk of unlawful violent acts: "a considerable number of allegations" (...) "corroborated by reliable sources" and by one testimony cited "to illustrate this".

The French government made its response known promptly. Citing the conditional terms used by the Committee (the lady "had allegedly been beaten" and "claimed to have filed a complaint") it recalled that a duly founded judgement requires proof, which distinguishes it from a simple slanderous charge. It was therefore opposed to this formulation<sup>4</sup>. In its opinion, the *guarantees* surrounding the use of force by police officers in France, and especially the code of ethics of the National Police department (1986) and the Declaration of human and civil rights (1789) considerably reduce the *risk* of mistreatment. Mistreatment is subject to preventive action defined by official texts, thanks to which it is quite infrequent, and the French government stressed the small number of allegations of violent acts reported to the department of control and disciplinary action of the National Police (about 250 to 300 annually) in France. Consequently, the government did not feel obliged to take action against this supposed risk:

*"The Committee does point out that the expression "non-negligible risk" was intentionally used instead of the expression "serious risk"*

<sup>3</sup> *Ibid*, 13 (stress placed by the CPT itself).

<sup>1</sup> *Rapport au gouvernement de la République française relatif à la visite effectuée par le CPT en France*, Strasbourg, 1992, 13.

<sup>2</sup> The investigation discussed here focused exclusively on the National Police, in spite of the expression "police forces" used by the CPT. In fact, the CPT notes the absence of "allegations" or "other indications" that the Gendarmerie inflicted any mistreatment on individuals held by it, and this was true not only at the time of its 1991 visit.

employed for other countries, so as to relativise its conclusion; nonetheless, the minute number of cases of this type brought to the knowledge of the judicial authorities in comparison with the total number of officers of the police and gendarmerie and the number of individuals held in police custody necessarily further accentuates this relativization. Moreover, for lack of details on the elements on which the Committee bases its assertion, the French government is unable to provide any valid response, and this leads it to express its reservations with respect to this assessment, which should be supported by more explicit and detailed arguments, at the very least"<sup>5</sup>.

The conflict between the European Committee and the government went on for months and years in the same terms. The government waited for the Committee to furnish *proof* that the woman had definitely been the victim of materially identifiable assaults and that similar assaults had been observed on a sufficient *number* of victims for the expression "non-negligible risk" to be *attested by material facts*. In response, the Committee could only brandish its conviction of the *probability* of all sorts of other unlawful forms of assaults on the body or breaches of the dignity of individuals held in police custody. In its last follow-up report on the 1991 inspection, the government draws the following conclusion: "The French government notes that the Committee has still not given it the means to provide concrete evidence so that it may defend itself against allegations which continue to be formulated in very elliptic terms"<sup>6</sup>.

A charge that is not supported by any element of proof is an allegation, and an unlawful one if it insults the honour or the dignity of the person concerned. The French government, accused by the CPT, asserts the need for proof as a guarantee that individuals are accountable and responsible for their acts. It refuses, and rightly so, to conceive of a *charge* unless an *act* has been committed. And the charge must then involve a duly recorded *offence*, and not a *probability* adducing a risk. This defines the gap between two judgments on a particular state of affairs: the illegitimate use of force by police officers in France. On the one hand, the government refuses anything other than established facts. On the other hand, the European Committee wishes to establish probabilities.

This disagreement led the CPT to refine its evaluation tools. During its visit in 2000, in particular, it went to the Paris medical/judicial emergency unit. "Of the 2,980 individuals brought there by the police between December 1999 and January 2000, 137 showed injuries of traumatic origin and at least 39 showed injuries (hematomas, bruises, scratches, fractures) compatible with their allegations of mistreatment by the police". The report actually added "that a significant number of imprisoned individuals seemed frightened and refused to explain the causes of their injuries". By concentrating its investigations on this medical unit in charge of providing first aid for individuals taken in by the police in Paris, the Committee proceeded by pre-selection, thus obtaining a double zoom effect. Firstly, it focused on a period coming immediately after interaction with the police, thus leaving little time for the different parties to advance any *post hoc* reconstructions. The Committee thus was able to correct the temporal distance separating it from the time when the individual was arrested – impossible to observe, by definition, except by placing an observer behind every police officer, which would modify the usual occurrence of the phenomenon.

Secondly, it investigated individuals defined by two specific features : they had been victims of violence, and had been arrested by the police. This gave the Committee the possibility of learning that a non-negligible number of individuals taken in by the police impute that violence, precisely, to their interaction with the police.

A non-negligible number ? Let us return to the precise figure for complaints filed for "unlawful violence": between 250 and 300 annually in France (289 in 1995, 269 in 1996)<sup>8</sup>. There is undeniably a difference here. If we extrapolate from the CPT findings (137 physical problems compatible with the allegations of unlawful violence over a two-month period in Paris and the three surrounding suburban *départements*), and if we set aside the number – unspecified, of course, but "significant" – of individuals too "frightened" to make such allegations, we may estimate that over the year, for these four *départements*, approximately 1,000 individuals showed bodily damage compatible with their allegations of unlawful violent acts. We are far from the 250-300 complaints filed in all of France. But we are even farther from the number of undismissed cases (by the criminal justice system or by the administrative justice). If we take the year 1995, 232 of the 253 cases closed had been dismissed by the judiciary bodies. The *risk* of having a complaint filed for unlawful violence result in dismissal of one sort or another is therefore *considerable* in the case in point.

It is these various aspects specific to allegations of unlawful violence that must be pieced together. On the one hand, according to the CPT, "a non-negligible risk of being mistreated". According to the government, a small number of filed complaints (250-300) and an almost negligible number of proved acts (20-25). On the other hand, a number – five to six times as high as the number of proved acts established by the justice system for the entire country – found for individuals who are victims of violence and taken in by the police (for Paris only) and whose allegations are made plausible by the immediate visibility of their bodily injuries and the fact that the action had taken place recently.

It is precisely by following the repeated exchanges between the French government with its insistence on convincing proof and the CPT with its desire to go beyond appearances that we may identify the line that separates light from shadow, the visible from the invisible. The decisive gap, of course, is the difference between the twenty-odd proved acts and the 500 plausible ones, which only represent a bottom estimate, since they do not consider frightened individuals who are afraid to testify, and are restricted to four *départements*. If we study the distinguishing features between those acts of unlawful violence that remain in the shadows and those that come into the limelight, those that manage to achieve recognition by the justice system or by public opinion via the press<sup>9</sup>, we find that those acts that reach the light are subjected to serious constraints on the way.

The first requirement is that the acts must be depicted as having been dramatically disproportionate to the circumstances of the arrest. The second is that the injuries suffered must be extremely visible and potentially imputable to the action of police officers. These two constraints are some of the most dissuasive factors for bringing an act into the limelight. Unless there is some perfectly obvious, immediately identifiable damage (a person, handcuffed, sitting on a chair in the main room of a police station, killed by a firearm at point-blank range or actually touching), these *bodily conditions change rapidly and are not eloquent in*

<sup>7</sup> CPT, 2001, Rapport (...) relatif à la visite de mai 2000, *ibid*, 16.

<sup>8</sup> CPT, 1998, Rapport (...) relatif à la visite effectuée en France du 6 au 16 octobre 1996, Conseil de l'Europe, Strasbourg, 15.

<sup>4</sup> Réponse du Gouvernement de la République française, 19 janvier 1993, Strasbourg, 3.

<sup>5</sup> *Ibid.*, 4.

<sup>6</sup> Rapport de suivi du gouvernement français, 17 février 1994, Strasbourg, 7.

themselves. Several days before France was condemned for "torture" by the European Court of Human Rights, a French court of appeals, sitting on the same case with the same testimonies and certificates as proof, certainly did sentence (to suspended sentences) three of the police officers judged guilty of exactions, but it expressed the opinion that the causes of the assaults were still too uncertain for them to be considered a crime of torture.

These two requirements for gaining passageway are in fact requirements for the formatting of the narrative recounting the interaction. As we have said, what made the CPT tally forceful was the short lapse of time between interaction with the police and the hearing of the people attending the medical/judiciary unit. The state of their body was immediately visible, without the mediation of any narrative depicting it. A third party (the doctor or the CPT) intruded into a relationship in which the victim and the putative author of the violence are normally cloistered together from the time of arrest to the end of police custody. During this period, the police officers usually construct a narrative along two lines. First they define the person, by writing up a police record recording every element useful for his or her penal follow-up. But they also define the interaction : was force needed to make the arrest ? Did the person rebel, and refuse to be arrested or to comply with a legitimate order ? It is these arranged narratives that constitute the facts, both for the justice system and for the media. So that the quantitative differential between proved acts, alleged facts and probable acts is simply the illustration of the difference between the raw facts and their formatting by the police narrative. From this viewpoint, the fright mentioned in the CPT report is precisely linked to the cloistered relationship between the police officer and the person in his or her custody. The outcome of this essentially dissymmetrical relationship is the penal definition of the person, and thus, to some extent, his or her entire future. The dissymmetry in the relationship between the police officer and the arrested person installs fear as a driving force weighing on the formulation of the narrative, and therefore on the facts exposed to the public, the justice system or the State.

The conflict between the European Committee and the government as to how facts with little visibility may be grasped led the former to tighten the scale of its observations. By doing so, what it brought to light was not any raw figure (the impossible "dark figure" for police violence), but a gap, and it is this difference between the recorded facts and the almost immediate observation of physical interactions that yields a comprehension of what is at work in the procedure by which unlawful violent acts committed by the police are formatted and made public. By the same token, this defines a legitimate procedure for evaluating probable facts. What must be brought to light and evaluated is the social and situational forces affecting the relationship between the police officer and the arrested person, especially when they influence the narration of the facts. As shown by the battles around the bill on the presumption of innocence and its revision by the March 4, 2002 Act, there are considerable stakes behind the presence or absence of a third party (be it a lawyer, a doctor or the public prosecutor), the technical and formal requirements for the writing of police records and the real or fictional nature of checks on the credibility of these police records by the public prosecutor in charge of controlling the action of the criminal police. Corresponding to these stakes, there are forces weighing on interaction with the police and the introduc-

tion of a third party; it is they which maintain arrests and police custody in the dark or give them some chance of gaining access to the public scene, as well as to accountability, as in so many other fields in which the government intervenes.

Our attention was drawn by one expression : that "non-negligible risk of being mistreated". The expression, referring to the abusive use of force by the French police, has fed a lasting conflict between the French government and a European inspection agency. We have followed the successive attempts of the CPT to shed light on these consistently obscure facts through the different phases of this conflict. In doing so, we found that the CPT policy of making its investigations as soon as possible after the events themselves shows that much of what we learn actually depends on the concrete situations that determine what formulation of the factual narrative is legitimate. The minute but nonetheless decisive struggles between the parties involved for the formulation of the legitimate narrative contain the truth about those facts, which are never visible, and they point to the true point of departure for any investigation intent on using the appropriate fact-finding means.

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For further information :

JOBARD (F.), *Bavures policières ? La force publique et ses usages*, Paris, la Découverte, 2002.

<sup>9</sup> JOBARD (F.), *Bavures policières ? La force publique et ses usages*, Paris, la Découverte, 2002, pp. 125-178.