

# AN ONGOING PRACTICE: TORTURE IN TURKEY

Kerim Yildiz and Frederick Piggott



August 2007







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KURDISH HUMAN RIGHTS PROJECT

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Kurdish Human Rights Project is an independent, non-political human rights organisation founded and based in London, England. A registered charity, it is dedicated to promoting and protecting the human rights of all people in the Kurdish regions of Turkey, Iraq, Iran, Syria and elsewhere, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include Kurdish and non-Kurdish people.





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of International Humanitarian Law*

## Glossary

CaT	Convention against Torture
CCP	Code of Criminal Procedure
CEDAW	UN Convention on the Elimination of all forms of Discrimination Against Women
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
DTP	<i>Demokratik Toplum Partisi</i> [Democratic Society Party]
ECtHR	European Court of Human Rights
ECHR	European Convention of Human Rights
ESP	Socialist Platform of the Oppressed
EU	European Union
EUTCC	EU-Turkish Civil Commission
FCO	Foreign and Commonwealth Office
FMI	Forensic Medical Institution
HRB	Human Rights Boards
HRC	UN Human Rights Council

HRCB	Human Rights Consultation Board
HRFT	Human Rights Foundation of Turkey
HRIB	Human Rights Investigative Board
HRP	Human Rights Presidency
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IDP	Internally Displaced Person
IHD	the Human Rights Association
IHF	International Helsinki Foundation
IRCT	International Rehabilitation Centre for Torture Victims
KADAV	Women's Solidarity Foundation
KHUM Centre	Istanbul Bar Association Women's Rights Enforcement
LESSM	Law on execution of sentences and security measures
OECD	Organisation for Economic Cooperation and Development
OMCT	<i>Organisation Mondiale Contre la Torture</i> [World Organisation Against Torture]
OPCAT Torture	Optional Protocol to the UN Convention against
OSCE	Organisation for Security and Co-Operation in Europe
PKK	Kurdistan Workers Party
SSC	State Security Courts

TAYAD	Solidarity Association of Prisoners' Families
TBMM	<i>Türkiye Büyük Millet Meclisi</i> [Turkish Grand National Assembly]
TIHAK	Human Rights Institute of Turkey
TIHV	Human Rights Foundation of Turkey
TMY	2006 Turkish anti-terror law
TPG	Torture Prevention Group
UN	United Nations
UNCAT	United Nations Convention Against Torture
USDOS	United States Department of State





## Foreword

This report addresses the continuing practice throughout Turkey of the torture and ill-treatment of detainees in light of the reforms of the early 2000s.

Over the years, the international community has condemned the practice of torture in Turkey, and while the government has made significant progress toward reform, inadequate implementation, legislative loop-holes and a surviving mentality conducive to the practice, see the torture, cruel, inhuman and degrading treatment of detainees persist as systematic.

The Kurds in Turkey have suffered killings, disappearances, torture, severe limitations on freedom of expression and association, denial of their culture and their right to use their own language, and numerous other violations of human rights that have been documented by KHRP and others.<sup>1</sup> Perpetrators are usually law enforcement officials and members of the security services. Yet victims of torture who try to bring their complaints to court continue to face severe obstacles. Detainees are frequently blindfolded preventing identification of the perpetrator and medical evidence of torture is frequently suppressed, either at the instigation of the security forces or by the ineptitude of medical staff, effectively undermining the regime for the documentation of torture by the Istanbul Protocol.

The KHRP has assisted hundreds of individuals in bringing their cases to the European Court of Human Rights (ECtHR). For the past fifteen years, the KHRP has reported the torture, rape sexual assault and extra-judicial killings of detainees in Turkey. KHRP has found that despite the ECtHR having found Turkey in breach of Article 3 of the Convention in a number of cases, the state has failed to implement the Court's judgments effectively.

In light of reform having slowed, the report looks at the approach of the EU and other countries pressing for Turkish accession and the influence of geo-political strategic concerns that see a 'margin of latitude' afforded to Turkey in meeting the objective criteria for accession. Nationalist sentiment antagonistic to EU accession has been fuelled by perceptions that the EU has been 'one-sided' on the Cyprus issue, as well as by recent European moves on the Armenian issue, in particular a

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1 A full publications list is available from KHRP.

recent law passed by the lower house of the French parliament making it a crime to deny the Armenian genocide. Turkey's parliamentary elections have seen political parties emphasize their nationalist credentials and distance themselves from the currently unpopular accession negotiations.

Assessing the *impact* of the reforms carried out in the early 2000s, this report identifies firstly a shift from flagrant to more subtle forms of ill-treatment, leaving few traces or long-term physical signs, as well as an increase in incidences of ill-treatment outside official detention centres, betraying progress reflected by official figures, and secondly an increasingly 'two tier' criminal justice system, with increased procedural and custodial safeguards for those detained for 'regular' offences and the simultaneous erosion of custodial safeguards for those held under anti-terror legislation.

### *Torture, Cruel, Inhuman and Degrading Treatment*

The torture and ill-treatment of detainees is usually carried out while the victim is cut off from outside contact, a situation known as 'incommunicado detention', and can last weeks or months. Custodial and judicial safeguards serve to minimise or eliminate the risk of incommunicado detention, yet the suspension of legal rights afforded to detainees held under anti-terror legislation, such as rights to immediate legal and medical assistance and judicial supervision, and the right to notify a third party of their detention, represents one of the main threats to the prohibition on all forms of ill-treatment.

Having previously been reluctant to find the ill-treatment of detainees in Europe to constitute more than 'cruel, inhuman or degrading treatment'<sup>2</sup>, the first case in which the European Court of Human Rights *did* consider ill-treatment inflicted by a European State sufficiently severe as to constitute 'torture' involved Turkey<sup>3</sup>. Since then cases against Turkey have been central in the development of the Court's jurisprudence on Article 3.

While the Court has traditionally found the distinction '*to derive principally from a difference in the intensity of the suffering inflicted*'<sup>4</sup>, it is clear that purpose, intent and context all go towards the categorization of ill-treatment as either 'torture' or 'cruel, inhuman and degrading treatment'.

With *all forms* of ill-treatment prohibited under Article 3 of the European Convention, contemplating only the increased 'stigma' attached to a finding of 'torture', the

2 See the *Greek Case*, 1969 Yearbook of European Convention on Human Rights (1969) and *Ireland v. UK judgment* 18 January 1978, ECHR ser A, No 25 (2 EHRR25)

3 *Aksoy v. Turkey* 21987/93, 18/12/1996 (100/1995/606/694)

4 *Ireland v. UK judgment* 18 January 1978, ECHR ser A, No 25 (2 EHRR25)

threshold at which ‘inhuman treatment’ becomes ‘torture’ is perhaps less important than the point at which Article 3 is engaged, however *outside* the European context the distinction is more crucial in the provision of specific legal consequences under the United Nations Convention against Torture (UNCAT), obliging State parties to provide for, and exercise, *universal jurisdiction* over perpetrators of ‘torture’ but not ‘other acts of cruel, inhuman or degrading treatment’.

Judicial and quasi-judicial regimes, such as those of the ECtHR and the UN Committee against Torture, focusing on the determination of State responsibility, can be distinguished from more preventative mechanisms like those of the European Committee for the Prevention of Torture and the Optional Protocol to the UNCAT seeking to identify and address factors and practices *potentially* conducive to any form of ill-treatment. However, the European Convention regime, with oversight of the execution of the Court’s judgments by the Committee of Ministers, *does* seek to address such systemic factors through supervision of ‘general’ measures beyond those that seek to redress the individual violation<sup>5</sup>.

Despite indicating in 1999 that ‘*the increasingly high standard being required in the area of the protection of human rights and fundamental liberties...*’ requires the reclassification of treatment previously defined ‘inhuman and degrading’ to be classified in the future ‘torture’,<sup>6</sup> the Court has consistently adopted a ‘minimum threshold’ or ‘minimum severity’ requirement for treatment to fall under article 3, contemplating a *degree* of suffering to fall outside of the scope of the prohibition *where it does not meet the requisite level of severity*. Given the absolute nature of the prohibition, the precise point at which article 3 is engaged is taking on new significance in the context of non-refoulement where governments seek to argue that, not only the degree, but also the *nature of the risk* on return should be balanced against the risk to the state’s national security.<sup>7</sup>

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5 See Chpt.3 below

6 *Selmouni v. France* (Application no. 25803/94) 28 July 1999

7 See *Saadi v. Italy & observations of the governments of Slovakia, United Kingdom et al.* in *Ramzy v. Netherlands*



## I. The Kurds in Turkey

### *Background*

The Turkish Government's policy and practice of oppressing the Kurdish minority in the Southeast has a long history. The new Turkish State that emerged from the break-up of the Ottoman Empire in the aftermath of the First World War contained significant numbers of Kurds, mainly living in the Southeast.<sup>8</sup> Following the establishment of the Turkish republic in 1923, the Kemalists (Kemal Atatürk and his followers) implemented a radical programme of secularisation in an attempt to replace the "Arabized Ottoman identity" of the old order with the idea of Turkish nationalism.<sup>9</sup> The Kemalists advocated an indivisible, unified state based on one people and one language, in an attempt to convert ethnically heterogeneous peoples into a homogeneous population of Turks. The process involved the suppression of the cultural identity and expression of non-Turkish peoples within Turkey, particularly the Kurds. At the heart of Atatürk's project of "Turkification" lay a plan to dissolve a cohesive community of Kurds residing in Southeast Turkey.<sup>10</sup>

### *State of Emergency*

The Turkish Government thus began the practice of mass exile and village destruction in the Southeast, which continued until 1946<sup>11</sup>. In response to the widespread and systematic oppression of the Kurdish people by Turkish security forces, the Kurdistan Workers Party (PKK) emerged. From 1984 until 1999, the Government was engaged in an armed conflict with the PKK.

After the military coup of 1980, thousands of people were taken into custody by security forces under Martial Law. From March 1984 to July 1987 Martial Law was gradually replaced by a State of Emergency. Under the State of Emergency, the

8 David McDowall, *A Modern History of the Kurds*, I.B.Tauris, 1996, pp.105-6

9 Edip Yuksel, *Cannibal Democracies, Theocratic Secularism: The Turkish Version*, 7 *Cardozo Journal of International and Comparative Law* 423 (Winter 1999), p. 448. From this period comes Atatürk's famous slogan: "ne mutlu Turkum diyene" (Happy is he who can call himself a Turk).

10 Martin van Bruinessen, *Uprising in Kurdistan, A Democratic Future for the Kurds of Turkey: Proceedings of the International Conference on North West Kurdistan, March 12-13, 1994, Brussels*. Medico International and Kurdish Human Rights Project (1995), p.33.

11 David McDowall, *The Destruction of Villages in South-East Turkey: A Report by Medico International and the Kurdish Human Rights Project*, (London June 1996), p. 3.

regional Governor exercised quasi-martial law powers, which included restrictions on the press and village evacuations. The operations of the Turkish security forces that took place between 1984 and 1999 primarily targeted the PKK and the Kurdish rural population in the state of emergency areas in Southeast Turkey, during which an estimated 37,000 people were killed and millions more uprooted from their homes.

By September 1984, 178,565 people had been taken into custody by security forces for preliminary investigation<sup>12</sup>. The number of torture allegations and reported deaths increased dramatically during this time. In subsequent years, as the number of arrests declined, the number of allegations of torture and ill-treatment by security forces also decreased.

On 6 August 1990 Turkey, notifying the Council of Europe, declared itself;

...exposed to threats to its national security in South East Anatolia which have steadily grown in scope and intensity over the last months so as to (sic) amounting to a threat to the life of the nation in the meaning of Article 15 of the Convention. During 1989, 136 civilians and 153 members of the security forces have been killed by acts of terrorists, acting partly out of foreign bases. Since the beginning of 1990 only, the numbers are 125 civilians and 96 members of the security forces.’

‘to cope with a campaign of harmful disinformation of the public, partly emerging from other parts of the Republic of Turkey or even from abroad and with abuses of trade-union right the Government of Turkey, acting in conformity with Article 121 of the Turkish Constitution, has promulgated on May 10, 1990 the decrees with force of law No. 424 and 425. These decrees may in part result in derogating from rights enshrined in the following provisions of the European Convention for (sic) Human Rights and Fundamental Freedoms: Articles 5, 6, 8, 10, 11 and 13.

The state of emergency saw the use of draconian powers justified in the name of national security such as Article 3 (c) of Legislative decree N° 430, making it possible, in provinces subject to a state of emergency, for prisoners whose statements are needed during the investigation of crimes which caused the declaration of the state of emergency to be taken out of prison, by court decision, for renewable periods of up to ten days. The provision, initially intended for use in relation to prisoners agreeing to co-operate with the authorities (the so-called “confessors”), was increasingly used to return prisoners to police/gendarmerie premises immediately after the decision to remand in custody, without them even being admitted to prison; a

<sup>12</sup> *Milliyet*, 21st September 1984.

practice, conducive to torture, resembling a de facto (and very lengthy) extension of the initial period of police/gendarmerie custody, with certain persons being held on police/gendarmerie premises for periods of up to 40 days on the basis of this provision.

On 12 May 1992 Turkey partly rescinded its derogation, stating;

most of the measures described in...decree...425 and 430 that might result in derogating from rights guaranteed by Articles 5, 6, 8, 10, 11 and 13 of the Convention, are no longer being implemented...*Turkey limits henceforward the scope of its Notice of Derogation with respect to Article 5 of the Convention only.*

By the second half of 1999, the level of violence had begun to decline, yet the situation in the Southeast remained a concern and the conflict between government security forces and the PKK continued. Security forces continued to target active PKK units as well as those persons they believed supported or sympathized with the PKK, and the State of Emergency continued in the four South eastern provinces<sup>13</sup> that had seen substantial PKK conflict.

In 2002, following constitutional amendments that saw the period of detention cut, the derogation under Article 5 was revoked.

Although the state of emergency has been officially lifted in all provinces, the Turkish Government's human rights record remains poor in the Southeast this inflamed by the recent flaring of violence in the region in 2006. Torture, beatings, and other abuses by security forces remain widespread, and the fact that most cases of torture go unreported indicates that current statistics fall far below real levels of torture. Police and Gendarmerie employ torture and abuse detainees during 'incommunicado' detention and interrogation. In the Southeast, torture has been exacerbated by substantially curtailed freedoms of expression and association. The lack of immediate access to a lawyer (reintroduced by new anti-terror law legislation), prolonged detention periods, and a culture of impunity are major factors contributing to the ongoing practice of torture in Turkey.

#### *Village Guards & Gendarmerie*

As a result of the 1984 - 1999 conflict with the PKK, the Government continued to organize, arm, and pay a civil defence force of more than 65,000 guards in the Southeast region. This force is known as the Village Guard. Village Guards have a reputation for being the least disciplined of the Government's security forces and

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13 Diyarbakır, Hakkari, Sırnak, and Tunceli provinces

have been accused repeatedly of drug trafficking, rape, corruption, theft, and other human rights abuses. Inadequate supervision and lack of compensation to victims have contributed to this problem, and in some cases the Gendarmerie have even protected Village Guards from prosecution. In addition to the Village Guards, the Gendarmerie and police “special teams” are viewed as those most responsible for abuses.

The actions of the security forces has warranted the attention of both the Committee of Ministers of the Council of Europe and the Parliamentary Assembly, looking at the measures taken by the Turkish government to address various *systemic problems* brought to light by continuing violations of the European Convention by the Turkish security forces, so as to effectively execute European Court of Human Rights (ECtHR) judgments. Committee appraisal has so far been sympathetic to Turkey’s reform efforts, although has not yet had the opportunity to publicly comment on the impact of the 2006 anti-terror law (TMY) discussed below. The Committee’s assessment of this is, however, eagerly anticipated with the law having been described elsewhere as; ‘*surrender[ing] personal rights and freedoms to the conscience of the security forces...eliminate[ing] basic human rights.*’<sup>14</sup>

Following the constitutional amendment of October 2001, in an effort to bring Turkish laws in line with EU standards, eight “EU Harmonization Packages” were adopted by the Turkish Grand National Assembly (*Türkiye Büyük Millet Meclisi* – TBMM) between February 2002 and May 2004. All eight packages included impressive changes in legislation enlarging the domain of citizens’ rights *vis-à-vis* previously security-oriented state structures. Parliament passed the first three harmonisation packages in February, March and August 2002, aimed at implementing the constitutional amendments of 2001, followed by a further five reform packages passed the following year. These reform packages have since seen *further* reform; with the introduction in 2005 of new criminal and criminal procedure codes and in 2006 of the new controversial Anti-Terror law (TMY); the impact of which is assessed more fully in the following chapter.

Despite these efforts the military continues to exercise indirect influence over government policy, acting as the constitutional protector of the State. The Gendarmerie (special armed forces under the joint control of the Interior Ministry and the Military) continue to operate under the control of the military and have responsibility for security functions in the countryside. Although civilian and military authorities remain publicly committed to the rule of law and respect for human rights, the continuing and sustained attention of the Council of Europe both by the Committee for the Prevention of Torture and the Committee of Ministers to

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14 Quoted in Desmond Fernandes “*A Step Backwards: The Effects of the new Anti-Terror law on Fundamental Rights and Freedoms*”



their actions shows that members of the security forces, including police “special teams” and anti-terror squads, village guards, and Gendarmerie continue to commit serious human rights abuses.

*The Kurdish Regions (Southeast Turkey)*

Progress in the Kurdish Regions has been slow with the security situation arguably having deteriorated in recent months and a resumption of hostilities between the PKK and Turkish security forces. While the Turkish government has no official policy addressing the political and socioeconomic problems in the Kurdish region, Prime Minister Erdogan *has* expressed his intention to resolve the problems in a democratic manner. Despite the lifting of the state of emergency, it has been suggested that a *de facto* state of emergency remains in place, given the prevalence of such security measures as roadblocks and checkpoints in some provinces and there are concerns about the alleged use of disproportionate force in response to unrest. The Kurdish Human Rights Project sent a Fact-Finding Mission to the region in April 2006 to investigate a series of violent clashes that had taken place between demonstrators and security forces<sup>15</sup>. The violence was precipitated by the funerals of four out of 14 pro-Kurdish guerrilla fighters killed by the Turkish army in the mountains in Diyarbakır, on Tuesday 28 March 2006. The funerals, which passed peacefully, attracted thousands of mourners in Diyarbakır and Siirt. Demonstrations that took place after the funerals attracted the attention of security forces, resulting in what has widely been regarded as disproportionate force against unarmed demonstrators. Protests in Batman and Kiziltepe followed in response to the violence and met with excessive and disproportionate force from security officials. This response seems to reflect a hard-line approach, seemingly emanating from Ankara, perhaps in an effort to prevent the spread of unrest. KHRP concluded from this mission that in the absence of the use of disproportionate force by security officials, the loss of life and injury could likely have been avoided in Batman and Kiziltepe. According to an investigation and observation report into the events by İHD, 563 persons were arrested and of those, 382 were charged and detained.<sup>16</sup> İHD reported receiving 350 applications detailing torture and ill treatment during detention in Diyarbakır. The Diyarbakır Bar Association concurred with these reports of torture and ill treatment, and added that lawyers endeavouring to visit those detained have been subject to both verbal and physical abuse.

15 'Indiscriminate Use of Force: Violence in south-east Turkey - Fact-Finding Mission Report', September 2006, KHRP.

16 Human Rights Association (Insan Hakları Derneği- Komeleya Mafên Mirovan); 'Investigation and Observation Report into Human Rights Violations which occurred during the funeral on 28 March 2006 in Diyarbakır'; 6 April 2006.

According to the Institute of Journalists, 110 people were arrested following protests in Batman with 92 of them detained, including the Chairman of the DTP, two members of the City Council and 10 children. Again allegations of torture and ill-treatment were common. In total, 52 people from Kiziltepe this were taken into custody and face severe charges. In all cases, the mission heard credible accounts that many, if not most of those injured, did not seek hospital treatment for fear of being detained by the police. According to reports from the Prisoner's Organisation in Kiziltepe, *'The people who were arrested were taken to central police station and really badly beaten. They were then sent to the anti terror branch and the beating and swearing continued there. One was injured with firearms but was not taken to hospital. Two others were seriously injured, one with a broken nose, another with a broken hand. None have had hospital treatment – even those wounded with firearms.'*<sup>17</sup>

There is nothing to suggest that any serious efforts have been made to investigate these deaths or hold those responsible to account. With 34 investigations into allegations of torture and ill-treatment having been initiated by prosecutors and 72 complaints the subject of administrative investigation, no prosecution has been brought against any member of the security forces.

### *Torture*

#### *Number of Cases*

While it is difficult to report with accuracy numbers of complaints, prosecutions and acquittals due to different sources publishing different figures<sup>18</sup>, the general trend is the same.<sup>19</sup> Despite high figures, the Turkish authorities repeatedly denying that torture is systematic, maintaining that all complaints of torture are investigated with responsible prosecuted.

#### *Methods of Torture*

Commonly employed methods of torture (reported by the Human Rights Foundation of Turkey (TIHV<sup>20</sup>)) included repeated beatings, stripping and blindfolding, exposure to extreme cold or high-pressure cold water hoses, electric shocks, beatings on the soles of the feet (falaka) and genitalia, suspension from the arms, food and

17 *'Indiscriminate Use of Force: Violence in south-east Turkey - Fact-Finding Mission Report'*, September 2006, KHRP.

18 The CPT has expressed scepticism over figures provided by the General Security Directorate, CPT report following visit of 2004 CPT/Inf(2005)18, para.22

19 See below, section *Impunity* in Chapter II *Legal Reforms* for figures regarding investigation, prosecution and conviction.

20 TIHV was set up to help rehabilitate and seek redress for victims of torture and ill-treatment. Between its foundation in 1990 and 2005, TIHV has received applications from, and medically treated, 10,449 torture victims.

sleep deprivation, heavy weights hung on the body, water dripped onto the head, burns, hanging sandbags on the neck, near-suffocation by placing bags over the head, restraint in the ‘hogtie’ position (the arms being bound behind the back with the wrists bound to the ankles – inducing positional asphyxia), vaginal and anal rape with truncheons and, in some instances, gun barrels, squeezing and twisting of testicles, and other forms of sexual abuse. In some cases, multiple methods (e.g., hanging and electric shocks) are employed at the same time.

The ECtHR in *Aksoy v Turkey*<sup>21</sup> ruled that ‘Palestinian hangings’ (positional torture, in which victims are suspended from their wrists tied behind their back with severe lasting nerve, ligament, or tendon damage) amounted to torture and in *Aydin v Turkey*<sup>22</sup> that rape constituted a form of torture. There have been numerous reports of a technique where the victims are made to lie on their backs with their arms and legs wrapped in blankets while their shoulders and knees are sat on, inducing loss of consciousness.

Security officials increasingly use methods less conducive to forensic detection, including hosing, food and sleep deprivation and psychological forms of torture, such as threats of physical ill-treatment or to take into custody other members of the detained person’s family. These, as well as beatings of detainees with weighted bags instead of clubs or fists, forced prolonged standing, isolation, loud music, forced witnessing or hearing incidents of torture, being driven to the countryside for a mock execution, and threats to detainees or their family members or applying electric shocks to a metal chair where the detainee sits, rather than directly to the body all betray the officially registered reduction in torture and ill-treatment in Turkey.

### *Victims*

Anyone can be a victim of torture, man or woman, young or old. The determining factor may be membership of a particular political or religious, or ethnic group or minority, although no one is immune. In Turkey, with what is increasingly becoming a ‘two tier’ criminal justice system with increased procedural and custodial safeguards for those detained for ‘regular’ offences and the *simultaneous erosion of custodial safeguards for those held under anti-terror legislation*, the determining factor is increasingly categorisation under anti-terror legislation, with

21 21987/93, 18/12/1996 (100/1995/606/694)

22 23178/94, 25/09/1997 (57/1996/676/866)

those suspected, arrested and/or detained for ‘terrorist’ offences increasingly more at risk.<sup>23</sup>

In Turkey those ‘traditionally’ targeted under ‘anti-terror’ laws include those suspected of pro-Kurdish, Islamist or leftist activities or often those who have applied for Kurdish language education, with torture being used by police or gendarmes in order to extract confessions, elicit information about illegal organizations, intimidate detainees into becoming police informers or as unofficial punishment for presumed support of illegal organizations. However with the ‘wide and arbitrary’ definition of terrorist offences under the new Anti-Terror Law (TMY), seeing amendments which extend the list of what constitutes a terrorist offence and maintain a wide definition of terrorism, the pool of potential victims caught up in the ‘alternative regime’ and the Turkish US backed war on terror is increased.

The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism informed Turkey by letter on 21 May 2006 that provisions of the TMY ‘fail to meet the requirement of proportionality in the use of force by security forces...and reflect the danger of punishing civilians not involved in violence’<sup>24</sup>; having the capacity to criminalise the non-violent activities of many Kurdish and non-Kurdish people by ‘indiscriminate use of the terms terrorism and terrorist’.<sup>25</sup>

### *High-security prisons*

F-type prisons are high security establishments intended primarily for persons held under the Law to Fight Terrorism or under Law No. 4422 (organised crime) with certain categories of prisoners placed in single cells, including; newly-arrived prisoners undergoing an observation period; prisoners subject to a disciplinary sanction; prisoners segregated for reasons related to maintaining good order within the establishment; and prisoners who have requested to be held apart from others. The Committee for the Prevention of Torture of the Council of Europe (CPT) has expressed particular concern over the situation of prisoners sentenced to “aggravated life imprisonment” and held in single cells by virtue of Article 25 of the *Law on execution of sentences and security measures* (LESSM). The sentence of “aggravated life imprisonment” is applied to prisoners in respect of whom a death

23 The UN Working Group on Arbitrary Detention, in a statement by the chairperson of the working group on arbitrary detention, at the conclusion of the working group’s visit to Turkey, Ankara, 20 October 2006, has referred to what effectively amounts to ‘two criminal justice systems in Turkey, one for common offences and the other for terrorism related crimes’ [http://www.ohchr.org/english/press/docs/WGADpress\\_en.doc](http://www.ohchr.org/english/press/docs/WGADpress_en.doc)

24 UN Special Rapporteur, referenced in Desmond Fernandes “A Step Backwards: The Effects of the new Anti-Terror law on Fundamental Rights and Freedoms”

25 Ibid.

sentence has been commuted to life imprisonment, and is also foreseen in the Penal Code for a certain number of crimes. Article 25 of the LESSM sets out the main conditions of execution of such a sentence; the very first being that the prisoner is to be held in an “individual room”.

The application of such an isolation-type regime is a step that can have very harmful consequences for the person concerned, potentially leading to inhuman and degrading treatment, and should be based on an individual risk assessment, not the automatic result of the type of sentence imposed.<sup>26</sup>

In protest, 816 prisoners in F-type prisons started a hunger strike in October 2000 and a total of 128 prisoners have died from death fasts since October 2000. According to the Solidarity Association of Prisoners’ Families (TAYAD), seven people in Turkey are currently taking part in death fasts to protest prison conditions.<sup>27</sup> A further 500 people are now permanently disabled as a result of hunger striking.

Prisoner protests against F-type prisons and isolation led to ‘prison operations’ in 20 prisons on 19<sup>th</sup> December 2000 which left 28 prisoners were left dead after.<sup>28</sup> After the operations, many prisoners and convicts, including those who were not carrying out a hunger strike or a death fast, were forcibly transferred to F-type prisons.

A group of protestors, named the ‘Cengiz Soydas Death Strike Team’ after the first F-type prison hunger strike protester to lose his life, started a hunger strike to death on 1 May, 2006. The Prisoners’ Family Association (TAYAD) started a campaign of 30-day hunger strikes across Europe in June 2006 to raise awareness for the prison conditions, and ongoing protests in Turkey.

Recently the public prosecutor launched an investigation into allegations of the torture of 10 prisoners in Izmir Kırıklar F-type Prison. In two reports prepared by “Prison Monitoring Committee”,<sup>29</sup> it was announced that 31 prisoners had recorded complaints of torture.

It was alleged in the reports that officials take the prisoners to a sponge covered room to beat and insult them with the tacit or worse acceptance of the 1st and 2nd directors of the prison reportedly join the torture. The location and inside of the torture room was defined in detail in the reports. Provincial Human Rights

26 Committee of Ministers Recommendation Rec (2003) 23 on the management of life sentence and other long-term prisoners.

27 [www.bianet.org](http://www.bianet.org), ‘İHD Calls For End to F-Type Prisons’, 6 June 2006.

28 [www.bianet.org](http://www.bianet.org), ‘180 ‘Death Strikers’ Pardoned by President’, 19 June, 2006.

29 Formed by Izmir Medical Chamber, TIHV, İHD and Contemporary Lawyers’ Association

Council went to the prison and interviewed with the prisoners after the reports announced to public. Contemporary Lawyers' Association asked the "room covered with sponge" to Ministry of Justice.

The Ministry stated that it is the "Observation Room" founded according to the Article 49 of the Law on Execution of the Sentences (Law No 5275), providing as follows: "In the case of profound danger threatening the order of the institution and security of people preventive measures that are not openly defined in the law can be taken in order to ensure the security and order. Application of the measures does not obstruct the disciplinary sentences."

Testimony of one of the prisoners reported: "They took me out of the cell on 21 December 2005. They tied my hands and feet at back. They laid me on the ground. Afterwards they brought M. and S. They tied M. in the same way. "Sudden Intervention Squad" tied us in the command of the 2nd Director K and hit my eyebrow when they attacked on me in the room No A-6. We were waited in a tied way from 08.00 to 08.00 on the next day."; "They stuck tape onto the handcuffs after making me kneel down. They tied my feet with my handcuffed hands upon the order of the 1st Director Z.U. I stayed in the 'sponge room' for one day. We used our teeth to open other prisoners' zippers when they needed to go to toilet."<sup>30</sup>

### *Incommunicado Detention*

It is again the promotion of a 'twin' system in Turkey for the detention and prosecution of 'criminals' that steers the analysis of reforms impacting on the practice of incommunicado detention.

Reforms of the early 2000's aimed at the elimination of incommunicado detention; with detainees being afforded access to a lawyer in all circumstances, notified of the reasons for their arrest, having their detention recorded in a register and notified to a third party, and being granted the possibility of medical examination. These reforms represented significant progress in the fight against incommunicado detention and consequential ill-treatment. However the CPT has recorded its concern over delays in the notification or registering of detention, with detainees held 'in limbo' at the initial stage. Furthermore, a re-introduction of incommunicado detention, without legal right of access to a lawyer for the first 24 hours, for those held under new anti-terrorism laws amounts to positive regression in combating ill-treatment of detainees.

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30 TIHV human rights reports

### *Impunity*

The Kurds in Turkey have suffered killings, disappearances, torture, severe limitations on freedom of expression and association, denial of their culture and their right to use their own language, and numerous other violations of human rights that have been documented by KHRP and others.<sup>31</sup> Yet victims of torture who try to bring their complaints to court continue to face severe obstacles. Detainees are frequently blindfolded, preventing identification of the perpetrator and medical evidence of torture is frequently suppressed, either at the instigation of the security forces or by the ineptitude of medical staff, effectively undermining the regime for the documentation of torture by the Istanbul Protocol.

A scarcity of convictions and the light sentences imposed on police and Gendarmerie for killings and torture, along with the intimidation of victims and witnesses (the opportunity for which is increased under provisions of the TMY allowing for the prosecution of members of the security forces to continue while the defendants remain on bail) has fostered the received climate of impunity. Police and Gendarmerie continue to carry out arbitrary arrests and detentions assisted by prosecutors' reluctance, in contravention of international standards, to investigate the conduct of members of the security forces. Prolonged detention and lengthy trials combined with inappropriate limitation statutes continue to hamper improvements in human rights standards and fail to deter future ill-treatment and torture. Statements reportedly extracted under torture are placed in court records and judges often refuse to investigate allegations of torture.

Official figures provided by Turkish government agencies are inconsistent, having been queried by the CPT<sup>32</sup> which noted the figures recorded by the Council of Europe Memorandum to be between 15 and 30% lower than those recorded by the Ministry of Justice. Exact figures are hard to establish. The Minister of Interior reported that in the first quarter of 2005, 1 239 law enforcement officials had been charged with either "mistreatment" or "torture" of detainees and only 447 prosecutions were pursued. Of the 1 831 cases concluded in 2004, 99 led to imprisonment, 85 to fines and 1 631 to acquittals. Only 531 cases launched during previous years were finalized, with courts convicting 232 officers and acquitting 1,005.

31 See for example *Intimidation in Turkey*, KHRP and others, May 1999, *Cultural and language rights of Kurds*, KHRP, February 1997, *Due process: State Security Courts and emergency powers in South-east Turkey*, KHRP and others, 1997, *Profile on torture in Turkey*, KHRP, 1996, *Disappearances: A report on disappearances in Turkey*, KHRP, November 1996, *The current situation of the Kurds in Turkey*, KHRP, November 1994, and the series of case reports of KHRP cases brought before the European Court of Human Rights. All the above, and a full publications list, are available from KHRP.

32 CPT report on its March 2004 visit, remarking '...the CPT wonders whether the statistics provided are accurate...' CPT/Inf (2005) 18





## II. Legal Reforms

Turkey's Constitution was adopted in 1982 when the country was under military rule and contains numerous restrictions on individual fundamental rights and freedoms. Reforms began in October 1998, and in December 2000, in order to prepare Turkey for accession to the European Union (EU), the European Commission proposed various Accession Partnership priorities, breaking down the Copenhagen criteria—the preconditions for accession negotiations – into a list of long and short-term priorities in order to improve human rights standards. The EU stipulated that undertaking all necessary measures to reinforce the fight against torture practices was a short-term priority. The Council formally adopted certain measures on 8th March 2001, giving priority to a review of the Constitution.

In October 2001, some major constitutional reforms were adopted, including a reduction in the maximum period a person could be kept in police custody without appearing before a judge, ending Turkey's derogation under Article 5 of the ECHR. Police training was extended from nine months to two years, and a unit on Human Rights Law established. The police academy also began to translate a collection of ECtHR judgements.

Following the constitutional amendment of October 2001, eight “EU Harmonization Packages” were adopted by the Turkish Grand National Assembly (*Türkiye Büyük Millet Meclisi* – TBMM) between February 2002 and May 2004. All eight packages included impressive changes in legislation that enlarged the domain of citizens' rights *vis-à-vis* the previous security-oriented state structures, in an effort to bring Turkish laws in line with EU standards. Parliament passed the first three harmonisation packages in February, March and August 2002, aimed at implementing the constitutional amendments of 2001, a move which represented a major change in the attitudes of Turkey's political leaders to conform to the values and standards of the EU, particularly as the reforms encroached upon typically sensitive issues.

The adoption of the first harmonization package, Act 4744, in February 2002 amended the Code of Criminal Procedure (CCP), and the *Act on Establishment of and Proceedings at State Security Courts*, reducing the maximum length of police and gendarmerie detention for detainees suspected of *collective crimes under the jurisdiction of State Security Courts* (SSC) before being brought before a judge to four days (the procedure for the extension of the detention period to seven days at

the request of the Public Prosecutor and the decision of the judge was abolished, although the possibility of this being extended to seven days *under a state of emergency* remained). The maximum for those held for *individual* offences under the jurisdiction of the State Security Court being 48 hours<sup>33</sup>. The right to see a lawyer was also assured, technically abolishing *incommunicado* detention.

Article 128 of the CCP, regulating the regime for the detention and judicial control of those held for *regular* offences (those outside the jurisdiction of the State Security Courts) was amended so that the maximum extended detention was capped at four days for collective offences (the period for individual offences being 24 hours). The law also amended the restrictions on notification of detention so that detention, and any decision to extend the period of detention, '*shall be notified without delay to a relative.*'<sup>34</sup>

The second reform package amended Article 13 of the *Civil Servants Law* to make civil servants found guilty of torture or ill-treatment liable to pay the compensation ordered by the ECtHR as a deterrent. In May 2002, blindfolds in custody were banned.

The third harmonization package of August 2002 instituted reforms that were particularly far-reaching, including the abolition of the death penalty during peace-time, the possibility of Kurdish broadcasting in TV and Radio, and widening freedom of expression. The package of reforms also amended the *Law on the Duties and Competencies of the Police*, providing safeguards against abuses by police by limiting their discretionary authority, including notification where possible in writing of the reasons for arrest, restrictions on the permissible use of force in apprehension, medical examination and judicial control of detention. Amendments to the Code of Civil Procedure and the Code of Criminal Procedure (introducing articles 445/a to the *Law on Legal Procedures* and 327a to the CCP) made retrial possible for civil and criminal law cases, in light of the decisions of the ECtHR finding violations of the Convention, where 'the results of this violation cannot be compensated for as provided for in Article 41 of the Convention.'

### 2003 Reforms

In a speech in 2003 the Turkish Prime Minister declared a Governmental 'zero tolerance policy towards torture', and the Supreme Court called torture and ill-treatment a 'crime against humanity'<sup>35</sup>. Parliament adopted 143 new laws, and in September 2003, ratified the International Covenant on Civil and Political Rights,

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33 Articles 5 & 6

34 Article 6, amending Article 107 of the Code of Criminal Procedure

35 EU, '2003 Regular Report on Turkey's Progress Towards Accession', November 2003

the International Covenant on Economic, Social and Cultural Rights, and Protocol Number 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The latter Protocol abolishes the death penalty.

In January 2003, by Act No. 4778 of the fourth harmonisation package, amendments to Articles 243 and 245 of the Criminal Code prohibited the conversion of sentences of torture or ill-treatment to fines or their suspension<sup>36</sup>. Parliament also extended the five-year Statute of Limitations on cases regarding torture.<sup>37</sup> The fourth harmonization package also saw the amendment of the *Prosecution of Civil Servants and Public Employees Act*, lifting administrative permission barriers to the prosecution of public officials in torture cases.<sup>38</sup> Secret/incommunicado detention was also abolished so that all detainees would have the right to see a lawyer from the moment of detention.

Reform of the Turkish Penal Code in June 2003 also increased prison sentences for health officials who falsified medical reports from six months to two years, with a fine of up to 4 billion Turkish Liras, with those using the falsified reports to be subject to the same punishment.

The seventh harmonisation package, adopted on 30 July 2003, aimed at enhanced accountability by making the investigation and prosecution of torture a judicial priority, introducing measures aimed at ensuring the speedy investigation and, if appropriate, prosecution of alleged offences of torture or ill-treatment ensuring that unless absolutely necessary hearings were not to be delayed by more than 30 days.

However it is submitted here that the progress achieved by these reforms and the political rhetoric of the 'zero tolerance' policy on torture are subsequently circumvented either by further reform (such as the 2006 anti-terror legislation), or through exploitation of technicalities subverting their effectiveness.

The European Commission has since expressed concern '*that certain past positive amendments have not been maintained in the context of the Code on Criminal Procedures; most notably, an article limiting the postponement of trials in torture*

36 [www.abig.org.tr](http://www.abig.org.tr)

37 However Amnesty has expressed concern that cases can still be dropped under the extended statute of limitations of 15 years, and similar concern has been expressed in the case of Ceren Salmanoğlu and Deniz Polattaş by the UN Special Rapporteur on the question of torture, that 'a new trial would likely exceed the statute of limitations'. United Nations Economic and Social Council, Civil and Political Rights, Including the Question of Torture and Detention, Report of the Special Rapporteur, Manfred Nowak, 21 March 2006

38 Article 28

*cases does not appear in it and it is not clear whether a regulation<sup>39</sup> stipulating that sentences for crimes of torture/ill-treatment cannot be converted into a fine or suspended sentence is maintained in the context of the new legislation.<sup>40</sup>*

Significant inroads have also been made into the achievements of reforms granting the right of immediate access to a lawyer by the anti-terror legislation of 2006<sup>41</sup>.

State Security Courts were technically abolished in June 2004 as a measure designed to address the fairness of trials before them<sup>42</sup>, although while *“It is said that the [State Security Courts] were abolished...actually they were not. Only their names [and] the signs at the entrance changed and they became heavy penal courts equipped with special powers.”*<sup>43</sup> The new special Heavy Penal Courts continue to try cases that had started before them when they were State Security Courts.

### *Current Domestic Legal Framework*

The New Criminal Procedure Code (law 5271) and Criminal Code (5237) as adopted in 2005 incorporate legislative amendments of the early 2000's regulating the offences of torture, torment and ill-treatment. Torture in Turkey is now defined, more in line with international law, under Articles 94, 95 and 96 of the new Turkish Penal Code (no. 5237). Article 94 provides for the offence of 'torture', article 95 for 'torture aggravated by consequences' and article 96 for 'torment' or 'suffering'.

39 Introduced by Act No. 4778 of the fourth harmonisation package (referred to above), amending articles 243 and 254 of the Penal Code so that judges were denied the ability to suspend sentences for those convicted of torture, or the right to reduce prison sentences to fines

40 EC progress report 2005. Similarly, the CPT has questioned surviving effectiveness of the same provision; concerned that under the new Code, while it appears that a prison sentence for such an offence cannot be replaced by a fine, as this possibility only exists for sentences of up to one year (which is below the minimum sentence set for the offences of torture or ill-treatment), *'it would appear that by virtue of Article 51 of the Code, a prison sentence for the offence of ill-treatment could be suspended if it is set at the minimum level of two years.'*

41 See below, section on regressive reform of anti-terror legislation

42 This has been referred to the European Committee of Ministers as a general measure taken to address the violation in the case of *Hulki Güneş* (28490/95), judgment of 19/06/2003 concerning the lack of independence and impartiality of the Diyarbakir State Security Court on account of the presence of a military judge (violation of Article 6§1,ECHR) and the unfairness of the proceedings before that court: the applicant was sentenced to death (subsequently commuted to life imprisonment) mainly on the basis of statements made by gendarmes who had never appeared before the court, and the applicant's confessions had been obtained when he was being questioned in the absence of a lawyer and in the circumstances which led the European Court to find a violation under Article 3 (and violation of Article 6§§1 and 3d). The case also concerns the ill-treatment inflicted on the applicant while in police custody in 1992 which the European Court found to be inhuman and degrading (violation of Article 3).

43 Köksal Bayraktar, Professor of Law, Galatasaray University, taken from Amnesty International Report\_EUR 44/013/2006 6 September 2006 <http://web.amnesty.org/library/Index/ENGEUR440132006?open&of=ENG-TUR>

Article 94 stipulates the sentence for torture to be between three and twelve years, or between eight and fifteen years if perpetrated against a lawyer or other civil servant targeted because of their profession<sup>44</sup>, or against a person of diminished capacity<sup>45</sup>; rising to between ten and fifteen years if aggravated by sexual abuse. The sentences provided for by Article 94 are doubled under Article 95 if torture results in consequences, including; permanent psychological or serious bodily harm or miscarriage in the case of pregnancy. A life sentence for torture resulting in death is also provided for.<sup>46</sup>

For offences of torment or suffering under article 96 causing a person to suffer both physically and psychologically and/or be degraded, a sentence of between two and five years is provided for, or between three and eight years if aimed at certain categories of persons of diminished capacity or relatives of the defendant. In case the offence of torment as defined in Article 96 being committed by public officials, the act is considered within the scope of the offence of torture as defined in Article 94. Article 96 therefore, applies to offences of torment committed by individuals other than public officials.<sup>47</sup>

The conversion of sentences to a fine or suspended sentence is not possible under the provisions of Articles 94 to 96.<sup>48</sup>

Law No. 4963 of 7 August 2003 by the seventh harmonisation provided for the investigation and prosecution of cases of torture and ill-treatment to be treated with particular speed, as priority cases. Hearings of cases relating to these offences cannot be adjourned for more than 30 days, unless there are compelling reasons, and these hearings will also be held during judicial recess.

The CPT has stated that it considers ‘the penalties provided in the new Criminal Code for the offences of torture or ill-treatment [to be] of a level which can be considered as dissuasive, and include a minimum sentence of imprisonment’, and has praised the legislative framework for being amongst the most comprehensive in Europe<sup>49</sup>.

The Committee of Ministers of the Council of Europe, while addressing the impact of the reforms in light of certain systemic problems contributing to violations by

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44 Article 94(2)(b)

45 A child or someone unable to defend themselves bodily or mentally, or against a pregnant women; article 94(2)(a)

46 Article 95(1),(2),(3) and (4)

47 Response of Turkish government to CPT following visit 7 to 14 December 2005

48 Ibid. although the CPT and the European Commission have questioned this

49 See Commission's 2005 progress report

the security forces,<sup>50</sup> acknowledged the improvement of procedural safeguards for those in police custody, welcoming in particular the right of all persons to see a lawyer of their own choosing from the outset of the custody period, the right to free legal assistance, the right of the suspect's representative to have access to the investigation file and the right to a medical examination without the presence of members of security forces.

The Committee also acknowledged; the enhanced accountability for the security forces in the new Criminal Code as a result of the introduction of minimum prison sentences for crimes of ill-treatment and torture, which may no longer be converted into fines or suspended; the fact that the administrative authorisation required for criminal investigations in cases of alleged ill-treatment and torture by the security forces was abolished on 10 January 2003 by an amendment to Law No. 4483; the provisions of the new Code of Criminal Procedure enabling the involvement of victims or complainants in the criminal investigation and subsequent proceedings, in particular the right of victims to have access to the investigation file; the fact that Turkish law provides an automatic right of judicial review in cases where public prosecutors issue a decision not to prosecute cases of alleged abuse by members of security forces; the efforts made to improve the efficiency of criminal investigations and proceedings through the training of judges and prosecutors; in particular the positive results obtained in the framework of "Council of Europe/European Commission Joint Initiative" which aimed to develop new, practice-based, training capacities among judges, prosecutors and lawyers on the Convention and the application of the Court's case-law.

However, despite most of the legal and administrative *framework* in the fight against torture having been put into place, (something the Commission has been quick to draw attention to)<sup>51</sup>, the *implementation* of many of these measures has yet to be completed effectively, the 'zero-tolerance' policy against torture of the Turkish government has yet to be realised, and torturers continue to enjoy relative impunity in Turkey.<sup>52</sup>

### *Recent Reforms*

In September 2005 Turkey signed, although has yet to ratify, the Optional Protocol to the UN Convention against Torture (OPCAT), which will allow for regular visits to detention centres by an independent expert body.

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50 Res DH(2005)43

51 See chapter III EU Accession

52 See below, section on Impunity

In June 2006, the General Assembly of the Turkish Parliament passed a law to limit the authority of military courts to try civilians in peacetime. It further granted civilians tried by military courts the right to appeal decisions to the European Court of Human Rights if it is determined by the ECtHR that the decision contravened the human rights convention. Limiting the authority of military courts to try civilians will encourage accountability, especially considering the special status of military courts, which has encouraged an atmosphere of impunity for military officials involved in torture or ill-treatment cases.

*Regressive Reform (2006 anti-terror legislation)*

The introduction of amendments to the *Law to Fight Terrorism*, through new anti-terror legislation (TMY) in 2006 suggests a positive regression in efforts to combat torture. Those amendments, adopted in June 2006 as a response to the escalation of 'terrorism', extend the list of what constitutes a terrorist offence for which suspects are treated to an 'alternative' regime<sup>53</sup> and maintain a wide definition of terrorism. They reduce vital procedural and custodial safeguards for suspects of terrorist offences; Access to a lawyer may be denied for a period of 24 hours<sup>54</sup>; Personal safety is endangered with the republic prosecutor being authorized to order for a suspect *not to be allowed to contact relatives or receive the assistance of an attorney as of the moment of detention*; effectively re-introducing possible incommunicado detention and raising concern that 'disappearances under detention incidents could be revived'. Under certain circumstances security officers may attend meetings between suspects and their lawyer<sup>55</sup>, eroding the principle of the right to confidential meetings between lawyer and client as outlined in the UN Basic Principles on the Role of Lawyers<sup>56</sup>. As regards the defence rights, officials and former officials of the security services are granted differentiated treatment<sup>57</sup>, prejudicing the principle of equality of arms. Statements made under torture are effectively rendered admissible in court, the possibility for the examination of security officials responsible for

53 See Working Group on Arbitrary Detention visit to Turkey 20 October 2006 [http://www.ohchr.org/english/press/docs/WGADpress\\_en.doc](http://www.ohchr.org/english/press/docs/WGADpress_en.doc)

54 Article 9 (amending Article 10 of Law 3713) restricts the immediate right to legal counsel for those detained on suspicion of committing terrorism offences. Paragraph (b) of the article specifies that, at a prosecutor's request and on the decision of a judge, a detainee's right to legal counsel from the first moments of detention may be delayed by 24 hours.

55 At the request of the prosecutor and on decision of a judge, an official can be present during meetings between a person suspected of having committed a terrorist offence and their lawyer, and a judge can examine documents passed between them.

56 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

57 Legal counsel for persons suspected of terrorist offences is limited to just one lawyer (as opposed to three for crimes which do not fall under anti-terrorism legislation), while Article 15 of the Law to Fight Terrorism provides that members of the security forces suspected of criminal offences in the course of counter-terrorism operations are entitled to benefit from three defence lawyers whose fees are paid by the security directorate under which they are employed

taking statements and preparing incident reports at trial is eliminated and the use of secret investigative agents, whose identities will not be revealed and who cannot be examined at trial is made permissible<sup>58</sup>.

The erosion of, and negation of, safeguards is a definite step backward in the fight against torture and ill-treatment and cannot be considered consistent with a declared 'zero tolerance policy' with regard to the perpetration of torture.

The law also introduces further protective measures for members of the security forces involved in counter-terrorism operations suspected of criminal offences. The most striking of these provides<sup>59</sup> that members of the security forces can be tried while released on bail, regardless of the nature of the crime for which they stand trial or the sentence they would face if convicted. This provision allowing for the prosecution of members of the security forces to continue while they remain on bail conflicts with the duty of the authorities under international law to protect witnesses from intimidation or harassment by defendants.

The EUTCC (EU Turkish Civil Commission) has recorded its opinion that; 'The adverse effect [of] this piece of legislation... on Turkey's reform process and its stated goal of democratization *cannot be overstated*. It targets fundamental rights and freedoms that had previously been bolstered by the [earlier] amendments and *sets the democratization process back several years*.'<sup>60</sup>

The law has been described as '*surrender[ing] personal rights and freedoms to the conscience of the security forces...eliminate[ing] basic human rights*;<sup>61</sup> with the Turkish Human Rights Foundation saying that this signals not only Turkey's 'shift...from its previous EU projections *but also...a turn to a 'tolerance policy towards torture*'.<sup>62</sup>

### *Continuing Abuses*

While significant progress *has* been made in the human rights field, formal legislative change by the Turkish government has not been sufficient to tackle the ongoing practice of torture in prisons and detention centres. Reform has been uneven, and torture cases still persist. In Interim Resolution DH(2002)98, the Committee of Ministers notably stressed that efficient prevention of renewed abuses requires, *in*

58 Torture in Turkey - The Current Status of Torture and Ill-treatment - KHRP August 2006

59 By the revision to Article 15 of Law 3713

60 Quoted in Desmond Fernandes *A Step Backwards – the Effects of the new Anti-Terror Law on Fundamental Rights and Freedoms*, the EUTCC at the same time attributed the introduction of the new draconian measures to the 'example of a number of western European States [including the UK].'

61 Ibid.

62 Referenced in Desmond Fernandes



*addition to the adoption of new texts*, a change of attitude and working methods by members of the security forces and effective domestic remedies ensuring adequate compensation for victims effective criminal prosecution of the officials responsible.

Although the number of human rights violations reported has decreased in recent years, the Diyarbakır branch of the İHD *has* continued to receive complaints of violations. The number of human rights violations reached its peak in 2003 with 1,849 reported cases of torture and ill treatment, according to the İHD. After a steady decrease in recent years, there were 1040 reported cases of torture in 2004 and 825 cases in 2005. The number of torture complaints in the first five months of 2006 was 113.

The CPT reported that, despite an overall impression of a reduction in occurrences of severe ill-treatment, the delegation *did* receive, in each of the three Provinces visited during their 2005 visit, continuing allegations of recent physical ill-treatment during police/gendarmerie custody, and in a few cases of a serious nature. Medical evidence consistent with some of the above-mentioned allegations was found in the end-of-custody medical reports and/or in medical reports drawn up on entry into prison, and in several cases, medical members of the delegation observed themselves injuries consistent with allegations made. The CPT also referred to allegations heard regarding ill-treatment of a psychological nature, such as threats of physical ill-treatment or to take into custody other members of the detained person's family.<sup>63</sup>

In addition to ill-treatment in police detention, cases of torture and ill-treatment in 'remand' or 'prison' custody continue to surface, as do reports of torture *outside* detention facilities. Police officers and plainclothes security forces have been known to carry out torture in the streets of the city centres, in the basements of apartments or shops, or in the desert areas outside the cities where people are forcibly transferred in police cars<sup>64</sup>. CPT references to '*complaints...heard of physical ill-treatment at the time of apprehension and/or in the context of public demonstrations; [and the] continuing problem of the disproportionate use of force on such occasions*'<sup>65</sup> corroborate continuing reports of police beatings. The European Union has

63 CPT report following visit 7 to 14 December 2005

64 İHD, Press Conference, 2<sup>nd</sup> December 2003, Ankara, see also EU Commission's progress reports

65 CPT report following visit 7 to 14 December 2005

also expressed shock and concern at the disproportionate force used by Turkish police.<sup>66</sup>

The CPT has also expressed concern over a number of reports of persons being apprehended and ill-treated in an isolated place<sup>67</sup> and doctors examining detainees continue to suffer harassment and intimidation by the security forces.

While there has been a marked reduction in certain forms of torture, such as electric shocks and hanging by the arms<sup>68</sup>, KHRP is concerned that other forms of torture have persisted and arguably increased, including severe beatings, stripping naked and hosing with water.

There is a crucial need for governors and prosecutors to visit all police stations and Gendarmeries regularly, and for the Interior Ministry to arrange for access by independent monitors, including Turkish Bar Associations. Once the Optional Protocol to the UNCAT is ratified an independent and international body of experts will be afforded access.

#### *Incommunicado Detention*

The UN Special Rapporteur on Torture has stated quite categorically that incommunicado detention should be abolished:

Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal and persons held incommunicado should be released without delay. Legal provisions should ensure that detainees should be given access to legal counsel within 24 hours of detention.<sup>69</sup>

66 “The EU, which has told Turkey it must continue with political reforms, said: ‘On the eve of a visit by the EU during which the rights of women will be an important issue, we are concerned to see such disproportionate force used... We were shocked by images of the police beating women and young people demonstrating in Istanbul,’ the three EU representatives said in a joint statement. ‘We condemn all violence, as demonstrations must be peaceful.’... About 300 people gathered for the unauthorised demonstration on Sunday, chanting anti-government slogans and demanding equal rights for women. After about 100 refused to follow police orders to disperse, officers armed with tear gas and truncheons charged on the crowd, say reports. Police were seen beating and kicking the men and women trying to flee”; BBC News on 7 March 2005

67 The CPT reported that: ‘more than one person interviewed by the delegation alleged that they had been taken by law enforcement officials to a forest area and threatened (e.g. a gun pointed to the head); reflecting an increase in instances of ill-treatment outside of law enforcement establishments

68 The CPT has noted that interlocutors, such as public prosecutors, State doctors entrusted with the medical examination of persons in police/gendarmerie custody, and representatives of Bar Associations and local branches of the Human Rights Association, all give the impression that torture is now exceptional and that there had been a very significant decrease in recent years in the number of cases of other forms of physical ill-treatment of persons in custody

69 Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1995/434, 12 January 1995.

An effective system of procedural safeguards can deter violations and prevent the occurrence of future crimes. A clear right to challenge the legality of detention before an independent judicial body (through a *habeas corpus* or an *amparo* remedy), is likely to deter arbitrary detention and the mistreatment of the person detained, as it will be clear to officials that any offensive treatment will be promptly reported to an impartial judge.

International law has also established other *custodial* safeguards to protect persons who are taken into custody; including the right of access to lawyers, physicians and family members or diplomatic and consular representatives in the case of foreign nationals. International humanitarian law has also detailed rules on the treatment of persons in custody.

The Judicial control of detention is provided for in both the Turkish Constitution and the Criminal Procedure Code. Article 128 of the Criminal Procedure Code (CCP) ensures that a detained person be brought before a judge within 24 hours (with possibility of this being extended to four days for collective offences, ‘for reasons of difficulty encountered in the collection of evidence or a high number of perpetrators or other similar reasons’), although in the case of those held under anti-terror legislation this period is 48 hours with the possibility in exceptional circumstances of being extended to four days. (The UN Working Group however found the registers kept by the anti-terror police departments showed that four days of police custody appears to be in some anti-terror police headquarters the rule and not the exception.<sup>70</sup>) Article 149 and Article 107 (having been amended by Article 6 of law 4744) respectively make the right to legal counsel and the right of notification of a relative immediate, theoretically eliminating incommunicado detention. The new Code widens the scope of compulsory legal representation by providing that representation by legal counsel is to be mandatory for all offences, extending it to all persons detained, including those suspected of an offence punishable by a maximum sentence of at least five years imprisonment, so that *all* criminal suspects have, *as from the outset of custody*, the right of access to a lawyer.<sup>71</sup>

However due to the introduction of the new 2006 anti-terror law, the right of immediate access to a lawyer is eroded and can be legally withheld for the first 24 hours for those held under such legislations.

Article 147 of the CCP states that every detainee must be informed of his or her right to legal counsel. According to the Bar Associations, there has been a 100%

70 Statement by the chairperson of the working group on arbitrary detention, at the conclusion of the working group’s visit to Turkey, Ankara, 20 October 2006 [http://www.ohchr.org/english/press/docs/WGADpress\\_en.doc](http://www.ohchr.org/english/press/docs/WGADpress_en.doc)

71 CPT report following visit 7 to 14 December 2005

increase in the appointment of defence lawyers since the new CCP came into effect. This is corroborated by the CPT finding that ‘there had been a significant increase in the number of persons enjoying access to a lawyer whilst in police custody, including in cases where the assistance of a lawyer was not obligatory. In fact, most criminal suspects had received the visit of a lawyer during their period of custody (contrary to the situation observed during earlier visits, when access to a lawyer was the exception, not the rule).’

However, the CPT was also quick to note continuing allegations to the effect that law enforcement officials on occasion *delay* access to a lawyer as well as of absence of feedback to the detainee (whether notification had indeed been made or when). Persons detained are informally questioned without the presence of a lawyer, prior to the taking of a formal statement in the lawyer’s presence. This is despite the introduction in the new criminal procedure code of 2005 of a provision to the effect that statements made to the security forces (police or gendarmerie) may not be used as evidence in court proceedings unless they are signed in the presence of a lawyer or confirmed in front of a judge; a reform that, *if implemented*, could mark significant progress in the campaign to end torture and other ill-treatment. However, Article 148 is not retroactive, so defendants in ongoing trials or even trials yet to commence may still be convicted on the basis of statements extracted under torture or other ill-treatment before 1 June 2005 when the presence of a lawyer was not required:

Statements to the security forces that have been signed in the absence of a lawyer cannot count as evidence unless they are repeated in front of a judge (Article 148).

Regional variation has also been recorded in the request for lawyers in detention from 70% in Diyarbakır to 5% in Ağrı<sup>72</sup>, and the EU Commission has also noted that the notification of a relative of the detained person and the right to access a lawyer are not uniformly applied.

It is submitted that though *theoretically* eliminated by the above mentioned reforms detainees *are* still subjected to ‘incommunicado detention’ through the circumvention of the legislative safeguards, for example exploitation of the possibility of detainees ‘waiving’ the right to a lawyer, something regularly alleged by officials. Officials still falsify custody reports in order to evade new restrictions on the length of detention, or simply re-arrest detainees. In some cases detainees have been officially registered as being in detention after several days of “unofficial” (unrecorded) detention and in a great number of cases, detainees have not been granted access to legal counsel

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72 Turkey Progress Report 2005.

even if they asked for it, denying them the right to legal counsel during interrogation by police officers and the prosecutor's questioning.<sup>73</sup>

The European Court of Human Rights (ECtHR) has repeatedly found Turkey responsible for violations of human rights in connection with disappearances following arrest. Disappearances, by definition, contribute to the persistence of incommunicado detention in which detainees are denied access to a lawyer. Unacknowledged detention is a complete negation of the guarantees contained in Article 5 of the ECHR, which provides for the liberty and security of the individual. Further, this has been seen as a violation of Article 3 of the ECHR, as the concerns of family members for the disappearance of relatives and friends constitutes inhuman treatment on the part of security forces.

Those held under anti-terror legislation are most at risk of being subject to arbitrary or incommunicado detention conducive to ill-treatment. The UN Working Group has referred to what effectively amounts to 'two criminal justice systems in Turkey, one for common offences and the other for terrorism related crimes'<sup>74</sup>; the distinction informing the difference between being held for 24 or 48 hours prior to being brought before a judge, having access to parts of the evidence in the case file denied for up to six months as well as the denials of other safeguards referred to above.

The U.N. Committee against Torture, the U.N. Special Rapporteur on Torture and the European Committee for the Prevention of Torture have stated that the most important step towards curbing torture is to ensure that all detainees have access to legal counsel from the moment they are detained.

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73 Ekin Saygili and Garip Cagdas, members of the Socialist Platform of the Oppressed (ESP) were detained on 7 July 2006 in the Karal district of Istanbul. According to ESP, Saygili and Çagdas were tortured and prevented from contacting their lawyers following allegations that they had participated in an armed attack on a military vehicle on 15th October. They were reportedly beaten by Gendarmerie in Adana Kürkçüler E-type Prison. Their lawyer Vedat Özkan announced that 'the eyes, foot and wrist of Hanifi Kaçar were swollen. His neck was injured and there were bruises on his body. There were bruises and traces of beating on the face and body of Çelebi. There were wounds on the face and neck of Alban. They were also forced to drudgery, kept standing, beaten by the guards, and forcibly shaved. Their basic needs were not met; they were also not allowed to receive visits during the period of both detention and arrest' *Özgür Gündem*, TİHV's recent human rights reports in brief, July 2006.

74 Statement by the chairperson of the working group on arbitrary detention, at the conclusion of the working group's visit to Turkey, Ankara, 20 October 2006 [http://www.ohchr.org/english/press/docs/WGADpress\\_en.doc](http://www.ohchr.org/english/press/docs/WGADpress_en.doc)

### *Reduction in Length of Detention*

The length of police detention is crucial in contributing to the persistence of torture in Turkey, as torture mainly occurs in police and Gendarmerie detention before the detainees are presented to a prosecutor or a judge. Article 5 (3) of the European Convention on Human Rights contains the right to be brought promptly before a judge. In the case of *Aksoy v Turkey*, the Court ruled that even with respect to Article 15 of the ECHR which allows derogations from the Convention during times of emergency, a 14 day detention was not justified, and left the applicant vulnerable to torture.

The average length of a trial went down from 406 days in 2002 to 210 days in 2004 for a criminal trial and from 241 to 177 days in the same period for a civil trial. A large backlog of cases saw 1,056,754 criminal cases and 671,915 civil cases carried over from 2004 to 2005.

Article 19 of the Constitution of Turkey enshrines the right to be judged within a reasonable time. While article 128 of the Criminal Procedure Code states that a person who has been arrested shall be brought before a judge within 24 hours subject to a possible extension of up to four days, that period is 48 hours for those held under anti-terror legislation and can be extended to four days in exceptional circumstances.

In terms of *remand* detention pending trial, the new Criminal Procedure Code, as originally drafted, had proposed that the maximum length of custody in pre-trial detention and during trial should be two years for the most serious offences, without any provision for extension. This limit was set specifically to meet the requirements of European law and to address rulings against Turkey by the European Court of Human Rights. However, as adopted the Code allowed detention before and during trial for up to five years (Article 102(2)), and doubled this time limit for people tried in the special Heavy Penal Courts (Article 252(2)). Though an improvement on a situation which saw a complete lack of restriction on pre-trial detention periods or on length of proceedings for those facing prison sentences of over seven years, this was an inadequate reform which failed to address the concerns of the European Court in its rulings. However, the implementation of even this flawed version of the original plan to impose a statutory limitation on pre-trial custody and length of proceedings would have resulted in the immediate release of several detainees already on trial for over 10 years, but parliament subsequently delayed the provision's implementation until 1 April 2008, effectively giving the courts 13 years in some cases to complete long-running trials.

The UN Working Group has commented on the situation of the numerous persons accused of terrorism who have spent seven, eight, ten, in some cases thirteen years in detention without being found guilty, their trials registering a perfunctory

hearing every month or two. The length of detention in such cases is justified by the prosecutor on the pretence that evidence was still being gathered and analysed and that the problem is compounded by the frequent changes in the judges sitting on the trials.<sup>75</sup> As referred to above, in order to be able to maintain these persons in detention for several years more without a judgment, the legislator has decided that the maximum remand detention for persons accused of terrorist crimes shall be ten years, and that even this limitation on the duration of remand detention shall enter into force only in April 2008.

The Turkish government, in its response to CPT inquires on the absence in the new Code of Criminal Procedure of provisions of the previous Code aimed at ensuring the speedy investigation and prosecution of alleged offences of torture or ill-treatment, referred to *‘effective investigation measures and arrangements [introduced] in order to ensure the completion of trials in the possible shortest period as prescribed by the additional Article 7 of the previous Code. The new Code prescribes the completion of a trial in one hearing.*

‘...the duration of the judiciary holiday has been re-arranged. In accordance with paragraph 1 of Article 331 of the Code of Criminal Procedure, offices and courts with criminal duties shall be on judiciary holiday from August 1 to September 5 every year. The new regulation has seemingly eliminated the time conflict between the hearing schedule and the judiciary holiday.’<sup>76</sup>

#### *Use of Statements Elicited Under Torture*

Article 15 of the UN Convention Against Torture obliges the states parties to *“ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”*

The amendments to the Turkish Criminal Procedure Code in 1992 saw torture and ill-treatment declared “prohibited interrogation methods”<sup>77</sup> and further amendments introduced in the new Criminal Procedure Code of 2005 provide that

75 Statement by the chairperson of the working group on arbitrary detention, at the conclusion of the working group’s visit to Turkey, Ankara, 20 October 2006 [http://www.ohchr.org/english/press/docs/WGADpress\\_en.doc](http://www.ohchr.org/english/press/docs/WGADpress_en.doc)

76 Government response following visit 7 to 14 December 2005

77 *“The statements of the defendant and the testifying person must reflect his own free will. Physical or emotional interventions such as ill-treatment, forceful administration of medicine, tiring or deception to hinder such a reflection, or the use of physical force or devices which distort the will are prohibited. No illegal advantage can be promised. Even if there is consent, testimonies extracted by use of the above-mentioned prohibited methods cannot be considered as evidence,”* incorporated as Article 148 of the 2005 Criminal Procedure Code)

statements made to the security forces (police or gendarmerie) may not be used as evidence in court proceedings unless they are signed in the presence of a lawyer or confirmed in front of a judge<sup>78</sup>. If implemented strictly this could have a substantial impact on the use of torture and other ill-treatment to extract confessions. However, it is not retroactive, so defendants in ongoing trials or even trials yet to commence may still be convicted on the basis of statements extracted under torture or other ill-treatment before 1 June 2005.

The ban has Constitutional status by amendment of Article 38.

However victims of torture often allege that at the end of their interrogation in custody they were made to sign a statement in which they “confessed” their own guilt or blamed others for the offence. Detainees are frequently remanded to prison on the basis of statements declared by them to have been extracted under torture. Such testimony is frequently read out in court and placed in the court file. In most of these cases Prosecutors and Courts do not investigate the related torture allegations; dismissing arguments raised to the effect that such statements should not be used as evidence, by the simplistic and straightforwardly erroneous response of some judges that there is ‘no legal provision for the removal of documents constituting evidence from court files’.

The Court of Cassation *has* made exemplary rulings in some cases which demonstrate recognition of the ban on “torture evidence”, however instances of these being registered by lower courts are rare. The Court of Cassation, in 2003, quashed the conviction of two minors for supporting a terrorist organization on the basis that the sole evidence in the case consisted of statements made in detention which the defendants alleged in court had been extracted from them under torture. The Court of Cassation stated in this case: “*A decision to acquit must be given since beyond the statements in custody which the defendants later rejected sufficient, clear and believable evidence for conviction had not been presented*”.<sup>79</sup>

There are also instances of the Court of Cassation quashing convictions because the trial court did not wait for the outcome of separate trials of alleged torturers. However in practice trials based on a confession allegedly coerced under torture often proceed, and even conclude, before the court had examined the merits of the torture allegations.

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78 “*Statements to the security forces that have been signed in the absence of a lawyer cannot count as evidence unless they are repeated in front of a judge*” (Article 148).

79 Court of Cassation 9th Chamber (9. Ceza Dairesi) esas no. 2003/1046; and quoted by Ersin Bal, “Gözaltı ifadesi tek başına delil değil”, Akşam newspaper, 9 April 2005



### *Blindfolding*

In May 2002, the Turkish government adopted an important anti-torture regulation forbidding blindfolding of detainees in police custody. Regrettably, however, despite this regulation, and a circular sent around in April 2004 which further called for the end of questionable interrogation methods including blindfolding, prolonged standing, sleep deprivation and threats (methods preferred to harsher forms of torture such as electric shocks, burns and rape because they leave no visible traces behind), police and Gendarmerie in Turkey continue to blindfold detainees<sup>80</sup>.

### *The Role of Doctors*

Medical evidence (both physical and psychological) is probably the most important type of evidence that can be obtained and will usually add strong support to witness testimony.

Reforms introduced in the second harmonisation package stated that detainees have the right to be alone with a doctor during a medical examination. Via amendments in January 2004, the *Regulation on Apprehension, Detention and Statement Taking* saw the provision for medical examinations of detainees to take place in the absence of security officials (notwithstanding a special request for their presence from the examining physician). The possibility for the detained person himself to request the presence of law enforcement officials during the examination was removed from Article 10, reducing the possibility for pressure to be exerted on the detainee to 'make' such a request. Regulations therefore require doctor-patient privacy during examinations, with exceptions in cases where the doctor requests police presence for security reasons. This has consistently been repeated in subsequent Ministry of Health circulars<sup>81</sup>.

80 Erkan Inan was detained on 12 January, 2005 in Ercis, Van on charges of "being member of an illegal organization". It was reported that he was kept in detention for 3 days during which time he was blindfolded and subjected to ill-treatment and torture. Examined by a doctor in the presence of security officials, Inan did not report his experience out of fear. Students Özgür Karakaya and Sercan Gürenin were reportedly beaten by police while putting up posters for the Youth Federation on 17 February in the Bağcılar district of Istanbul. The students alleged that after asking for their IDs and handcuffing them, police officers blindfolded them, kicked and insulted them. Gürenin claimed to be beaten many times before he was taken to the hospital. TIHV, 31 January 2006.

81 A circular on "points to be borne in mind in providing forensic medical services and drawing up forensic reports" was issued by the Ministry of Health on 10 October 2003, addressed to the 81 Provincial Governors' Offices stipulating that the medical examinations "must be conducted out of the hearing and sight of members of the law enforcement agencies. The person to be examined must be received in a room in which only health personnel are present..." Instructions which have since been repeated in Ministry of the Interior circulars of 15 and 20 April 2004 insisting upon the importance of providing suitable, secure rooms for the medical examination of persons in police/gendarmerie custody and highlighting the importance of complying with the requirement that the doctor and the person examined remain alone.

However, despite these provisions, the CPT has reported that the confidentiality of examinations is *'still far from being guaranteed. Most detained persons claimed that they had been examined in the presence of law enforcement officials, and such a practice was openly acknowledged by medical staff at Van State Hospital.*

*'Detained persons were still being medically examined with their clothes on and that, in most cases, the medical findings were limited to "No signs of physical ill-treatment/injuries"'*<sup>82</sup>

The confidentiality of the medical examinations of persons in police/gendarmerie custody also involves steps to ensure the confidential transmission to the relevant authorities of the medical reports drawn up after such examinations. This is to ensure that law enforcement officials are not given the opportunity of reading the report and, if they were not satisfied with it, taking the detained person elsewhere for another medical examination. The Supreme Administrative Court has recently annulled the provision of Article 10 of the *Regulations on Apprehension, Custody and Taking of Statements* according to which a copy of the medical report should be given to the law enforcement unit which detained the person concerned. However, concern remains over the implementation of this and over the confidential transmission of the medical report to *other* relevant authorities (e.g. the prosecutor).

The Forensic Medicine Institution (FMI) has been set up to examine persons who claim they have been mistreated in police custody. In response to much criticism, its law was amended in 2003 to allow for strengthened administrative capacity and budgetary provisions to recruit extra staff, in order to accelerate judicial procedures. Thousands of doctors were trained in western Turkey in accordance with the FMI's Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment and the Istanbul Protocol starting in 2004. This training was undertaken in response to criticism that there was a severe lack of experts trained in detecting torture and ill treatment. However, the 2005 EU report stated that conditions in several forensic examination rooms are still deficient. Although the FMI has undertaken to move examinations from places of detention to hospitals and health clinics, there is still a need for a strict procedure on medical examination to be set out, and specified places for examinations need to be arranged in order to achieve uniform standards of examination. Further, despite training, there are still too few specialised doctors to examine detainees who claim they have been tortured and the numbers vary widely across the country, with most qualified specialists located in Istanbul and other major cities.<sup>83</sup>

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82 CPT report following visit 7 to 14 December 2005

83 EU Turkey Progress Report 2005

State-employed doctors administer all medical exams for detainees. The Forensic Medical Institute, a body institutionally bound to the Ministry of Justice, enjoys a near monopoly on producing medical reports admissible in court, only in very few cases are medical reports by independent experts recognized. Medical examinations usually occur once during detention and a second time before indictment or release, but the examinations generally are exceedingly brief and informal, often lasting less than a minute. Doctors are often brought reports to sign, without having examined the detainees and former detainees assert that some medical examinations occurred too long after an incident of torture to reveal any definitive evidence of torture. Lawyers contend that medical reports--their only basis for filing a claim of torture--are not placed regularly in prisoners' files.

The Turkish Medical Doctor's Association has played a leading role in the development, under UN auspices, of the December 2000 "*Istanbul Protocol*," an alternative medical report process that instructs doctors how to identify and treat victims of torture. The *Istanbul Protocol* is a United Nations endorsed document that promotes the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment. However, in October 2003, Turkish security forces opened a criminal investigation of those taking part in a training programme in the *Istanbul Protocol* for the prevention of torture held in Izmir in June 2003. The participants in the training programme were physicians issuing forensic reports<sup>84</sup>. The trainers and participants are currently charged with being involved in "propaganda for an illegal organisation". Dr. Jens Modvig, Secretary-General of the IRCT, stated that:

Being investigated by security forces simply because you are participating in a training seminar creates a threatening atmosphere. I can think of only one reason for such a conduct, and that is to prevent torture from being medically documented through hindering the implementation of scientific, effective and internationally accepted methods for the prevention of torture. From an international perspective, you can only mistrust that the Turkish Government is sincere in its efforts to improve the human rights situation in the country. The IRCT strongly urges the Turkish Government to open an investigation into the practise of the Izmir Governorship. Further we urge the Government to, through a public statement, fully recognise that training in effective investigation and documentation of torture is not only legal but also necessary for the prevention of torture in Turkey and for the further protection and promotion of human rights at a national level.<sup>85</sup>

84 'Harassment of Human Rights Specialists and Health Professionals', International Rehabilitation Council for Torture Victims, Media release, 2nd October 2003.

85 Ibid

The Government has also taken action against doctors attempting to report torture.<sup>86</sup>

It is in rare cases that doctors are charged when they fail to record signs of torture in medical reports. Such recording is essential to stop torture from happening and to assist in prosecution for torture cases. Compliance of doctors with the security forces has often been based on intimidation, and if this is unsuccessful the perpetrators merely seek a more favourable report from a more compliant doctor.<sup>87</sup>

In light of these reports it is regrettable that the ECtHR has not paid more attention to allegations calling into question the integrity of medical reports failing to corroborate allegations of ill-treatment.<sup>88</sup>

Documented incidents are recent enough to raise doubts over the efficacy of torture eradication efforts in Turkey. There is an ongoing pattern of intimidation and harassment of professionals involved in the process of torture eradication<sup>89</sup>, which casts doubt on just how rapidly the political reform rhetoric can become a reality.

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86 In a trial that started on 11 July 2005 at Adana Penal Court of First Instance No 11, lawyer Mustafa Çinkiliç and physician Mehmet Antmen, both TIHV Adana representatives, were charged with hiding evidence and forgery of official documents. Çinkiliç testified at the hearing that the accusation that they attempted to cover up torture were ludicrous, especially given the activities and purpose of TIHV. The defendants maintain that the allegations amount to punishment for previous certifications of torture claims. *TIHV human rights reports in brief*, 12 July 2005

87 A case was launched in January 2005 against seven police office officers on the allegation of torturing several university students, detained in May 2002 in connection with the killing of Yasemin Durgun in Istanbul. The police officers were indicted on charges of torture and three physicians from Haseki State Hospital were charged with supplying a false report. *TIHV Human Rights reports in brief*, 2005

88 See chapter V on the jurisprudence of the ECtHR, specifically discussion of case of *Gökçe and Demirel v. Turkey* 51839/99 22 June 2006, and KHRP assisted case of *Karaoğlan v Turkey* 60161/00 (dec.) 10 May 2005

89 On 21 July 2005, Abdulkadir Akgül, Ergin Demir, Cigerhun Erisen, Zübeyit Keserci and Muzaffer Keserci were detained in the Ercis district of Van. The alleged that they were tortured by security officials in detention. Their lawyer, Cemal Demir, stated that his clients were taken to Ercis State Hospital, where physicians refused to certify their injuries. Eventually Abdulkadir Akgül was given a report certifying traces of beatings, however, the others were not certified because the traces of beatings had disappeared during the long wait. Demir suggested that the examination physicians were under pressure because police officers and soldiers were present during the examination. The continuing ineptitude of medical staff in the fight against torture is further revealed by the case of Selma Kil. Selma Kil, who was detained by police on 1 December 2005, alleged that he was beaten by police in detention with wooden sticks. Security officials took Kil to Taksim First Aid Hospital, where the ill-treatment continued. The physicians present did not intervene or file a report about the incident. Riza Tanis, aged 15, was hit by an armoured vehicle on 25 June 2005 during a demonstration in Istanbul and detained by police afterwards. Tanis was reportedly beaten by officers at the Kanarya police station, even though his arm and ribs were broken. When he was eventually taken to the state hospital, the examining physician refused to file a report on the incident, claiming that he was not authorised to do so. Tanis was subsequently taken to Halkali Children's Branch without treatment. *TIHV human rights reports in brief*, 2005

The law stipulates heavy jail sentences and fines for medical personnel who falsify reports to hide torture, those who knowingly use such reports, and those who coerce doctors into making them. In practice there are few such prosecutions however. The Medical Association has the authority to levy fines and suspend doctor licences for up to 6 months for doctors who falsify reports. However, Association officials say they were unable to enforce these sanctions because most doctors worked at least partly for the state, which protected the sanctioned doctors.

As regards the precise modalities of medical examinations, significant variations exist in the practice followed in the different health care facilities visited (and even between different doctors in the same facility). Some doctors systematically requested the person being examined to undress; others do so only if the person voiced complaints about his treatment. Some doctors record any allegations made by the person examined; others only record allegations where physical injuries are observed. Further, a variety of different forms are used for the recording of doctor's findings.

The *Istanbul Protocol*<sup>90</sup> contains detailed guidelines on obtaining physical and psychological medical evidence. Medical evidence is rarely *conclusive* (proof with certainty that torture occurred), because many forms of torture leave very few traces, and even fewer leave long-term physical signs and it is often difficult to prove beyond question that injuries or marks resulted from torture and not from other causes. What medical evidence can do is demonstrate that the recorded injuries are *consistent with* (could have been caused by) the torture described.

To this end the Istanbul Protocol details a protocol of best practice for conducting medical examinations, the collection of medical reports and the collation of data.

The examination must follow established standards of medical practice. In particular, examinations shall be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials. The medical expert should promptly prepare an accurate written report. This report should include at least the following:

(a) The name of the subject and the name and affiliation of those present at the examination; the exact time and date, location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g. detention centre, clinic, house); and the circumstances of the subject at the time of the examination (e.g. nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the

90 Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UNGA Res A/RES/55/89 of 4 December 2000,

prisoner, threatening statements to the examiner) and any other relevant factors;

(b) A detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, the time when torture or ill-treatment is alleged to have occurred and all complaints of physical

and psychological symptoms;

(c) A record of all physical and psychological findings on clinical examination, including appropriate diagnostic tests and, where possible, colour photographs of all injuries;

(d) An interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and further examination should be given;

(e) The report should clearly identify those carrying out the examination and should be signed.

The report should be confidential and communicated to the subject or a nominated representative. The views of the subject and his or her representative about the examination process should be solicited and recorded in the report.

In 2004 the CPT expressed specific concern over the situation in Gaziantep where most of the medical examinations of persons in police/gendarmerie custody were carried out in the presence of law enforcement officials, and where the examination performed was, in most cases, apparently very superficial; *many persons alleging that it had consisted of nothing more than the doctor asking whether they had any "marks"*. A few persons stated that they had told the doctor that they had been ill-treated, but that this had not led the doctor to physically examine them. The CPT reporting that this state of affairs appeared to be the result not only of the wishes of law enforcement officials but also of the attitude of the doctors, who clearly were not committed to this particular task assigned to them.<sup>91</sup>

TIHV chairman Yavuz Önen reported that "medical personnel preparing reports are not sufficiently trained or equipped to determine the physical and mental marks of torture."<sup>92</sup>

In light of the regional variation the CPT has consistently recommended the designation of one specific medical facility in a given city as having the primary responsibility for the carrying out of such examinations. Centralising in one facility

91 CPT report following visit 16 to 29 March 2004, CPT/Inf (2005) 18

92 Onen Speaks Out: "Why Torture is Systematic", BIA News Centre, 28 June 2006

the examinations of persons in police/gendarmerie custody would obviously counter the phenomenon of “health-care unit shopping”; further, by virtue of its status as the specifically designated facility for such examinations, the institution concerned would be better placed to ensure strict observance of their confidentiality. There would also be other advantages; in particular, the provision of appropriate training to the doctors responsible for this particular task, and the application of uniform working methods and standards, would be facilitated.

### *Lawyers*

The right to access to a lawyer is a safeguard against torture, acting as a deterrent to security officials who might otherwise engage in ill-treatment of detainees.<sup>93</sup> The new provisions in the Code of Criminal Procedure and the *Regulation of Apprehension, Detention and Statement Taking* require that all detainees have free access to a lawyer. However, reports suggest that detainees are still being intimidated by police and security officials, discouraging them from requesting legal counsel.<sup>94</sup>

In accordance with Turkish law, judges may require the presence of security officials at meetings between a lawyer and client, or the recording of such meetings. Lawyers are immediately suspended and prevented from contacting their clients once any criminal investigation pursued against them. Furthermore, anti-terror legislation limits a suspect to the legal assistance of just one lawyer. These provisions unduly frustrate the work of the defence team, raising questions regarding their compatibility with the right to fair trial.<sup>95</sup> Lawyers are also prevented from seeing their clients in some cases when security officials falsely inform them that their clients do not want to see them and can *legitimately* be denied access to their clients under anti-terror legislation for the first 24 hours of detention.

Lawyers are frequently harassed for proceeding with torture cases. Lawyers visiting F-Type prisons to examine detention conditions suffer invasive searches of their bodies, particularly in the case of women. There have been reported cases of female lawyers being required to remove their underwear for examination.<sup>96</sup> The HRA reported that 47 cases were launched by prosecutors against HRA branches from August 2004 to August 2005.

In March 2005, the EU-financed Torture Prevention Group (TPG) was abolished by the Izmir Bar Association’s new management. The group, established in 2001, provided legal support to individuals who complained of ill-treatment and torture,

93 Turkish Daily News – 29 July 2006

94 EU Turkey Progress Report 2005

95 Human Rights Defenders in Turkey, KHRP, 2006

96 Human Rights Defenders in Turkey, KHRP, 2006

monitored all stages of legal proceedings and intervened when necessary. A general assembly was requested by over 1000 lawyers to discuss the decision, but this request was rejected by the board. When he announced the closure of the TPG in December 2004, Izmir Bar Association president Nevzat Erdemir cited one of the reasons for the closure was the European Commission's intent to divide Turkey and damage its national interest.<sup>97</sup> There were reports that the Izmir Bar Association had seized files and computers from the offices of the Torture Prevention Group which contained, inter alia, confidential testimony, and records related to hundreds of applications from victims of torture. It was a concern at the time that the applicants named would, as a result of the seizure, face harassment, detention, torture and ill-treatment.

The Human Rights Foundation of Turkey (TIHV) announced in July 2006 that starting August 1, the Turkish Bar Association would suspend free legal services for indigent clients. The move was reportedly in response to the Ministry of Justice's failure to pay approximately 17,000 lawyers for providing the compulsory service, which was introduced in 1992 to protect people from torture.

The Bar Association decided to resume obligatory counsel duties after a meeting on 10 August with Prime Minister Recep Tayyip Erdogan in which he issued instructions to overcome problems, instructing Finance Minister Unakıtan to prepare a payment plan for the advanced payment of lawyers and requesting the creation of a special commission that would work in coordination with the bar associations.<sup>98</sup>

Lawyers involved in human rights activities often face harassment in the form of professional or legal sanctions for carrying out such work. Often, professional codes of conduct are invoked to punish human rights lawyers, particularly those who "seek to defend the human rights of clients deemed hostile to the state, such as pro-Kurdish political activists."<sup>99</sup> Lawyers for Abdullah Öcalan, eight of whom were suspended temporarily on 17 June 2005, have faced continuous hostility from Turkish officials. It seems that Turkish authorities have inferred the involvement in terrorism of the defenders of those prosecuted under counter-terrorism laws, failing "to properly appreciate the independent functions of the legal profession."<sup>100</sup>

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97 KurdMedia.com, 22 March 2005

98 BIA News Centre – 14 August 2006

99 Harassment of Human Rights Defenders in Turkey, KHRP 2006

100 Ibid.



Following the demonstrations and clashes of March and April 2006, hundreds of people were detained. Lawyers were prevented from having access to detainees, in blatant violation of Turkish and International law.<sup>101</sup>

#### *Human rights boards and committees*

The structure of governmental human rights boards and committees was improved during 2003, with the passing of a critical piece of legislation regarding the establishment and duties of provincial and sub-provincial Human Rights Boards (HRBs) in an attempt to instigate efficient examination and investigation mechanisms for human rights violations. The law enacted on 23<sup>rd</sup> November 2003 replaced non-civilian HRB members with civilian members. Provincial HRB's are made up of the mayor or deputy mayor, the provincial head or a selected representative of the political parties represented, university rectors or a lecturer, a lawyer or a public official who is a law school graduate, as well as representatives from the Bar Association, Turkish Medical Association, the chamber of industry or commerce, the provincial general assembly, and other professional organizations. The HRB's mandate is to evaluate issues brought to their attention by the local authorities, examine and investigate obstacles to the protection of human rights, and look at the social, political and administrative causes behind these violations in order to recommend solutions. However, due to limited resources, unclear roles and mandates, the efficacy of such institutions as the Reform Monitoring Group, the Human Rights Presidency, the Parliamentary Human Rights Investigation Committee and provincial Human Rights Boards (created to process human rights complaints, address specific cases and provide training on human rights to law enforcement officials, lawyers and other public officials) remains low.

Between October 2004 and March 2005, HRBs received 565 complaints of human rights abuses despite considerably higher number of abuses reported in total, bringing into question the efficacy and visibility of the Boards. The Boards vary in effectiveness, and their independence has been questioned by some Turkish human rights NGOs, notably the Human Rights Association, which has refused to participate in HRBs.

The Reform Monitoring Group was given the task of ensuring that allegations of human rights violations were investigated. A Human Rights Violations Investigation and Assessment Centre was established within the Gendarmerie Command. Human Rights awareness was raised among civil servants and the judiciary, with a training programme on ECtHR case law for the judiciary beginning in May 2003.

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101 TIHV Human Rights Reports in Brief, April 2006

### *Human Rights Defenders*

Although Turkish law has been amended to allow for human rights monitoring, in practice human rights defenders have continued to experience harassment from Turkish authorities, as evidenced by the numerous cases against human rights defenders and organizations. Over and above the more common incidences of detention, prosecution, intimidation, harassment and formal closure orders, members of the HRA reported even more serious harassment in April 2005 in the form of death threats.<sup>102</sup> Restrictive laws have continued to hamper the operation of many human rights organizations, particularly in the southeast. In general, however, human rights activism in Turkey has been improved by the scrutiny of the EU accession process and increased funding and support for local NGOs from international sources.

Among the main human rights NGOs in Turkey are the Human Rights Association (İHD), Human Rights Foundation of Turkey (TIHV), Association for Human Rights and Solidarity with the Oppressed (Mazlum-Der) and the Human Rights Institute of Turkey (TIHAK). The activities of these organizations include monitoring, reporting, lobbying the government, participating the drafting of legislation, providing legal assistance, organizing demonstrations, promoting and protecting minority rights and advocating for political secularism.

The Law on Associations, reformed in 2004, increased freedom of association, easing restrictions on human rights NGOs. However, some articles that remain are a source of concern. Article 30 restricts the operations of NGOs which have “prohibited objectives” and article 56 limits associations with contravene “law and morality”. While article 56 has not yet been used to prevent the registration of human rights NGOs, the vague wording is concerning because it could be interpreted so as to limit the activities of human rights organizations. Article 92 of the Turkish civil code, which subjects Turkish NGOs to licensing by the Committee of Ministers, has been used to target NGOs. Diyarbakır İHD has been targeted by this provision, for receiving foreign NGOs, media, political and student delegations.<sup>103</sup> The discretionary powers granted to administrative and police authorities in the Law regarding Meetings and Demonstrations have allowed human rights defenders to be targeted. Article 23, regulating the criminalization of meetings and demonstrations

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102 Allegedly from The Turkish Revenge Brigades, a paramilitary organisation thought to be supported by some Gendarmerie forces and organised crime. see EU Turkey Progress Report 2005. The chair of İHD Bingöl, Ridvan Kızgın, was sentenced to prison for two and a half years in December 2005 in relation to a report that was released in 2003 about the human rights violations perpetrated by the Gendarmerie. *İHD Report, “Human Rights Defenders in Turkey”, 2006*

103 İHD Report, “Human Rights Defenders in Turkey”, 2006

which are “in contravention of the law”, has been used to charge NGOs and their members for participating in or monitoring demonstrations.<sup>104</sup>

Article 301 of the Turkish Penal Code limits freedom of expression by criminalising expression which ‘denigrates’ Turkishness, the Republic or the Grand National Assembly. Although freedom of conscience is professed to be protected, many human rights defenders have been prosecuted under this provision. The former chair of the Human Rights Advisory Council, Ibrahim Kaboğlu, and a former member of the council, Baskin Oran, who drafted a report on the status of minorities, were prosecuted under Article 301. The İHD faced hundreds of charges in 2005 related to their press releases and human rights reports.

In response to growing concern and scrutiny, human rights councils were created by the government in all provinces and sub-provinces to give NGOs, professional organizations and the government the ability to consult on human rights issues. While the council investigated complaints and selectively referred them to the public prosecutor, many of the councils were disorganized and ineffective. Many NGOs refused to participate in the councils, citing a lack of authority and independence.<sup>105</sup>

Turkey’s Human Rights Presidency (HRP) was established to “monitor the implementation of legislation relating to human rights, coordinate with NGOs, and educate public officials”<sup>106</sup>, however it was also connected with the Prime Ministry and did not maintain a separate budget and had limited resources. Several other government human rights bodies were created or maintained in the past years, including the High Human Rights Board, which makes appointments to human rights posts, the Human Rights Consultation Board (HRCB) and the Human Rights Investigative Board (HRIB).<sup>107</sup>

In March 2005 six NGOs, including TIHAK and HRFT, announced their withdrawal from the HRCB, which was supposed to serve as a consultation forum between NGOs and the government, because of government interference with the body.<sup>108</sup>

### *Judicial Reform and Modernisation*

Judicial reform has taken place in Turkey in order to bring Turkey in line with the European Commission and Council of Europe’s standards, although many concerns remain about the independence and integrity of the judiciary. Extensive training

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104 Ibid.

105 USDOS Country Report, Turkey 2005

106 Ibid.

107 Ibid.

108 Ibid.

has been provided for judges and prosecutors by the Ministry of Justice and the Judicial Academy on many areas including the Code of Criminal Procedure, the Penal code, new legal reforms and human rights law. The Justice Academy has been training all prospective judges and prosecutors since 2004 and has started to take over the training of current judges and prosecutors from the Ministry of Justice. Judges are regularly evaluated for their integrity, efficiency and quality by inspectors from the Ministry of justice.

The European Commission reported that in 2006 620 new judges were recruited. Training activities continued to ensure implementation of the reforms carried out in the last three years. The budget of the Ministry of Justice was increased and the programme of building Courts of First Instance continued and the establishment of Regional Courts of Appeal is proceeding.

However, the Commission also expressed concern that a number of issues remain to be addressed; among them, continuing inconsistency in the judiciary approach to the interpretation of legislation and reports that the judiciary does not always act in an impartial and objective manner, and is often influenced by the executive. Appointment, promotion and discipline of all judges and prosecutors are determined by the High Council of Judges and Prosecutors, which is chaired by the Ministry of Justice, does not have its own secretariat or budget and is located inside the Ministry of Justice.

In an effort to modernise the judiciary a number of study visits were organised in 2005 for managers of the Justice Academy. The managers were taken to France, the Netherlands and Greece in order to demonstrate the training systems for judges and prosecutors around Europe. In another set of study visits in May and November, Justice Academy managers and students had the opportunity to meet with officials from the main European institutions in Europe. Further changes were made the curriculum of the Justice Academy, resulting in an ambitious and diversified training programme. A series of seminars were organised to allow for continuous modernisation of the Justice Academy curriculum. Four Turkish judges from the Ministry of Justice's General Directorate of European Union were sent to do one-year of studies in the UK on courses relevant to their respective work at the Ministry.<sup>109</sup>

The Committee of Ministers has also praised 'the efforts made to improve the efficiency of criminal investigations and proceedings through the training of judges and prosecutors; in particular the positive results obtained in the framework of "Council of Europe/European Commission Joint Initiative" which aimed to develop

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109 Judicial Modernisation and Penal Reform in Turkey, Council of Europe Report

new, practice-based, training capacities among judges, prosecutors and lawyers on the Convention and the application of the Court's case-law.<sup>110</sup>

### *Delays in Court Proceedings*

The judicial system in Turkey faces a large backlog of cases. The 2005 EU Progress Report stated that there were 1,070,133 criminal and 671,915 civil cases pending in the Turkish courts. The average duration of a judicial proceeding lasts 210 days in criminal courts<sup>111</sup>. In torture cases, the proceedings are often excessively long, with many unresolved as they exceed the statute of limitations.

Judges and Public Prosecutors face a large backlog of cases, resulting in an insufficient allowance of time for hearings and often inadequate analysis of case files. Nonetheless, trials remain overly lengthy and generally suffer from delays which reduce victim's chances for redress.

In 2004, Parliament answered a call for the establishment of a system of intermediate courts of appeal in order to increase both the speed and efficiency of the judiciary, as well as ensuring the right to a fair trial. The regional appeals courts, which will relieve some of the heavy caseload of the high court of appeals, are set to start hearing cases in 2007.<sup>112</sup>

Recent domestic cases<sup>113</sup>, as well as cases before the ECtHR<sup>114</sup> show problems in the length of proceedings.

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110 Res DH(2005)43

111 '2005 Regular Report on Turkey's Progress Towards Accession', EU, November 2005.

112 USDOS Country Report, Turkey 2005

113 The trial of 16 youths tortured by police officers in 1995 perhaps best illustrates the prolonged nature of trials for torture in Turkey. In October 2002, the Manisa Penal Court convicted 10 police officers of torture and sentenced them to prison terms ranging from 60 to 130 months. What has become known as the case of the 'Manisa Children', was a high-profile case involving the torture of 16 youths while in police detention in 1996, eight of whom were under the age of 18. The youths were detained for putting up left-wing political posters, and subjected to beatings, and electric shocks, rape, and being sprayed with pressurised water. Following a huge public outcry and pressure from human rights groups, the police officers were put on trial in Turkey. After the initial appeal of 1995, the trial did not continue until November 2000, after five years and three appeals. However, the first two trials acquitted the police officers, while the second and third trials ended after the Prosecutor ordered a new trial. Some lawyers for the defendants withdrew from the trial, and other defendants did not appear in court at all. Meanwhile, the youths were kept in prison for five years as they had been forced to confess to belonging to left-wing groups while under torture. The trial took seven years to complete, almost exceeding the statute of limitations and none of the police officers were yet in prison by the end of October 2003. With the final appeal exhausted, the Court of Appeal approved sentences for the police officers ranging from five to eleven years in April 2005.

In Iskenderun in the South of Turkey, family members of two girls arrested and tortured by police in March 1999 had opened a case in April 2000 against four police officers accused of raping and torturing the girls. The girls, Ceren Salmanoğlu and Deniz Polattaş, were arrested for being suspected

In response to these, the Turkish government has referred to 'effective investigation measures and arrangements [introduced in the Code of Criminal Procedure (no. 5271)] to ensure the completion of trials in the possible shortest period as prescribed

members of the PKK, and were given long prison sentences based on confessions given under torture. Salmanoğlu was released in 2004 due to changes in the Turkish penal code, but Polattaş remains in prison. While in police detention in Iskenderun Police Headquarters, they were subjected to rape and torture using police truncheons by police officers, one of whom was the Chief of the Anti-Terror Branch. The trial took more than four years and was postponed over forty times, during which one of the four charged police officers was promoted to the position of Chief in another police department. (Dicle News Agency, 26th October 2003) In addition, the families of the girls complained that the trial was biased as all four policemen had their lawyer fees paid by the State, which likely unfairly influenced the outcome of the trial, as well as the content of the medical report from the Forensic Medical Institute, for which they waited 28 months. The officers were acquitted and the case dismissed on 22 April 2005 on the basis of insufficient evidence. The Institute's report found that a psychiatric report submitted by the victims did corroborate the torture claims, however, the General Board of the FMI, which the report was referred back to by the court, found that the independent expert psychiatric report was not valid evidence. Several of the Board members lacked the necessary qualifications to make such a judgement. (United Nations Economic and Social Council, Civil and Political Rights, Including the Question of Torture and Detention, Report of the Special Rapporteur, Manfred Nowak, 21 March 2006) Reportedly, one of the members of the Board has been disciplined in the past for attempting to cover up torture allegations. (Amnesty International Press Release, 22 April 2005) The verdict has been appealed, but a new trial would 'likely exceed the statute of limitations.' (United Nations Economic and Social Council, Civil and Political Rights, Including the Question of Torture and Detention, Report of the Special Rapporteur, Manfred Nowak, 21 March 2006) The case of Mehmet Aytunç Altay is one of the most long-running and disturbing examples from Turkey of protracted trials. Detained in Istanbul on 2 February 1993 on suspicion of being a leading member of an armed oppositionist organization and of having ordered acts such as robbery and bombings he was interrogated for over two weeks at the Anti-Terrorism Department of the Istanbul Police Headquarters, he was given a medical examination on 15 February which documented injuries to the head, and was brought before a judge and placed in pre-trial detention on 16 February 1993. On 4 March 1993, the public prosecutor at the Istanbul State Security Court formally charged Mehmet Aytunç Altay. He was sentenced to death, commuted to life imprisonment, on 26 May 1994. On 2 June 1995 the Court of Cassation upheld that judgment. Mehmet Aytunç Altay and his lawyer appealed to the European Court of Human Rights. On 11 May 1993 Mehmet Aytunç Altay lodged an official complaint, alleging torture by the police officers who had been on duty during his time in police custody. The Governor instructed the chief of Istanbul Police to investigate the complaint of torture, but in a letter of 21 June 1993, the chief of Istanbul Police requested the Istanbul Governor to discontinue the investigation into the torture allegations on the grounds that there was insufficient incriminating evidence. The Governor granted that request, but Mehmet Aytunç Altay was not informed of the decision to drop the investigation, contrary to international legal requirements. On 22 May 2001, the ECtHR found violations of Articles 3, 5(3), 6(1), ordering Turkey to pay compensation of 110,000 French Francs. Mehmet Aytunç Altay's lawyers applied for a retrial in Turkey under legislation bought in during the third harmonisation package reforms and, on orders of the Court of Cassation, Istanbul State Security Court had to hear the case again. In a striking example of the technical circumvention of the effectiveness of the reforms the State Security Court held that the conditions of Article 327(a) of the old Criminal Procedure Code had not been fulfilled (retrial only if damage cannot be compensated with money). On 21 February 2005 the 9th Chamber of the Court of Cassation quashed the special Heavy Penal Court's verdict stating that the lower court had to open the trial again and decide on confirmation or cancellation of the original verdict. Thus the case of Mehmet Aytunç Altay was submitted to a second retrial attempt. Again on 29 September 2005, Istanbul Heavy Penal Court No. 10 ruled against a retrial with the same arguments and citing the same legislation as in the previous decision. As of 21 July 2006, the case was pending at the Court of Cassation, while Mehmet Aytunç Altay remains in Edirne F-Type Prison.

114 see *Esen* (49048/99) Judgment of 8 August 2006 and *Öktem v. Turkey* (74306/01)

by the additional Article 7 of the previous Code. The new Code prescribes the completion of a trial in one hearing.

...[also] the duration of the judiciary holiday has been re-arranged. In accordance with paragraph 1 of Article 331 of the Code of Criminal Procedure, offices and courts with criminal duties shall be on judiciary holiday from August 1 to September 5 every year. The new regulation has seemingly eliminated the time conflict between the hearing schedule and the judiciary holiday.

### *Prison Reform*

There were 58,670 persons in prisons and detention as of May 2005 and changes to the Turkish penal code had resulted in the release of 14,431 prisoners.<sup>115</sup>

Increased support for the prison system has resulted in training for prison staff, the improvement of prison management and the monitoring of prisons. Prison staff training has been modified based on European standards. Trainers participated in study visits to Germany, Italy and Austria in September 2005 to gain an understanding of different approaches to training issues. A prison management manual was drafted in 2005 in an attempt to normalize standards at prisons across Turkey. The manual dealt with such issues as human rights, healthcare, safety and security, vocational training, rehabilitation, women and young people in prison and the rights and obligations of inmates.<sup>116</sup> However, conditions in Turkish prisons remain poor, plagued by overcrowding, underfunding and insufficient training.

Until late 2000, prisons were run on the ward system and most prisoners lived in 50-100 person wards. Ward inmates often indoctrinated and punished fellow prisoners, resulting in gang and terrorist group domination of entire wards. Between December 2000 and January 2001, the Ministry of Justice moved hundreds of prisoners to small-cell "F-type" prisons, which left many of the prisoners in strict isolation. Prison authorities controlled prisoners' access to water, food, electricity, and toilets. There were allegations that prisoners were badly beaten during the transfer and denied medical assistance for severe injuries.

F-type prisons are high security establishments intended primarily for persons held under the Law to Fight Terrorism or under Law No. 4422 (organised crime) with certain categories of prisoners placed in single cells, including; newly-arrived prisoners undergoing an observation period; prisoners subject to a disciplinary sanction; prisoners segregated for reasons related to maintaining good order within

115 EU Progress Report, Turkey 2005

116 COE Report 2005, Judicial Modernisation and Penal Reform in Turkey

the establishment; and prisoners who have requested to be held apart from others. The CPT<sup>117</sup> has expressed particular concern over the situation of prisoners sentenced to “aggravated life imprisonment” and held in single cells by virtue of Article 25 of the recently-adopted *Law on Execution of Sentences and Security Measures* (LESSM). The sentence of “aggravated life imprisonment” is applied to prisoners in respect of whom a death sentence has been commuted to life imprisonment, and is also foreseen in the Penal Code for a certain number of crimes. Article 25 of the LESSM sets out the main conditions of execution of such a sentence, the very first being that the prisoner is to be held in an “individual room”.

The application of an isolation-type regime is a step that can have very harmful consequences for the person concerned, potentially leading to inhuman and degrading treatment, and should be based on an individual risk assessment, not the automatic result of the type of sentence imposed.<sup>117</sup>

In protest, 816 prisoners in F-type prisons started a hunger strike in October 2000. A total of 128 prisoners have died from death fasts since October 2000. According to the Solidarity Association of Prisoners’ Families (TAYAD), seven people in Turkey are currently taking part in death fasts to protest prison conditions.<sup>118</sup> A further 500 people are now permanently disabled as a result of hunger striking.

Prisoner protests against F-type prisons and isolation led to ‘prison operations’ in 20 prisons on 19<sup>th</sup> December 2000 which left 28 prisoners were left dead after.<sup>119</sup> After the operations, many prisoners and convicts, including those who were not carrying out a hunger strike or a death fast, were forcibly transferred to F-type prisons.

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117 Committee of Ministers Recommendation Rec (2003) 23 on the management of life sentence and other long-term prisoners.

118 [www.bianet.org](http://www.bianet.org), ‘İHD Calls For End to F-Type Prisons’, 6 June 2006.

119 [www.bianet.org](http://www.bianet.org), ‘180 ‘Death Strikers’ Pardoned by President’, 19 June, 2006.



Recently the public prosecutor launched an investigation into allegations of the torture of 10 prisoners in İzmir Kırıklar F-type Prison.<sup>120</sup>

The Government now permits prison visits by representatives of some international organizations, such as the CPT, and the U.N. Special Rapporteur on Torture. The CPT carried out visits to Turkey in March 2004 and December 2005. The main objective of the 2004 visit was to examine whether recent legal reforms in conditions of detention were being implemented in practice, such as replacing large-scale dorm-style quarters with smaller living units and the situation of juveniles in prison with adults<sup>121</sup>. Requests by the CPT to visit prisons are routinely granted, although domestic NGO's do not have access to prisons. The 2005 visit focused on the treatment of persons in the custody of law enforcement agencies and developments in F-type prisons.<sup>122</sup>

In order to improve prison conditions, Enforcement Judges and Monitoring Boards were set up to ensure the living conditions, health, food, education and rehabilitation of prisoners are in line with international standards and Turkish law. As of November 2005, 131 Monitoring Boards had been established, carrying out

120 In two reports prepared by "Prison Monitoring Committee", (formed by İzmir Medical Chamber, TIHV, İHD and Contemporary Lawyers' Association) it was announced that 31 prisoners had recorded complaints of torture.

It was alleged in the reports that officials take the prisoners to a sponge covered room to beat and insult them with the tacit or worse acceptance of the 1st and 2nd directors of the prison reportedly join the torture. The location and inside of the torture room was defined in detail in the reports. Provincial Human Rights Council went to the prison and interviewed with the prisoners after the reports announced to public. Contemporary Lawyers' Association asked the "room covered with sponge" to Ministry of Justice.

The Ministry stated that it is the "Observation Room" founded according to the Article 49 of the Law on Execution of the Sentences (Law No 5275), providing as follows: "In the case of profound danger threatening the order of the institution and security of people preventive measures that are not openly defined in the law can be taken in order to ensure the security and order. Application of the measures does not obstruct the disciplinary measures."

Testimonies of one of the prisoners reported: "They took me out of the cell on 21 December 2005. They tied my hands and feet at back. They laid me on the ground. Afterwards they brought M. and S. They tied M. in the same way. "Sudden Intervention Squad" tied us in the command of the 2nd Director K and hit my eyebrow when they attacked on me in the room No A-6. We were waited in a tied way from 08.00 to 08.00 on the next day"; "They stuck tape onto the handcuffs after making me kneel down. They tied my feet with my handcuffed hands upon the order of the 1st Director Z.U. I stayed in the 'sponge room' for one day. We used our teeth to open other prisoners' zippers when they needed to go to toilet." *TIHV human rights reports*

121 On 24 October 2005, Serdar Arı died in İzmir Kırıklar F-type prison of 'breathing smoke and soot'. Prison officials claimed that Arı had set himself on fire in protest, although his lawyer reported that there were no burn marks on his body. No charges were laid in the incident. *TIHV Human Rights Reports in Brief*, 26 October, 2005

Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 29 March 2004.

122 16 December 2005 News Flash, European Anti-Torture Committee visits Turkey

routine inspections and produce quarterly reports for the Ministry of Justice and other relevant bodies on prison conditions and disciplinary measures. The Boards consist of lawyers, doctors, pharmacists, psychologists, and other professionals. During the period January to July 2005, the Boards submitted 1247 suggestions for improvements, of which 532 were acted upon. Although the Boards visited 419 prisons between October 2004 and May 2005, they still do not contain a significant proportion of representation from civil society and their reports are confidential. In addition, 141 enforcement judges were appointed in the last quarter of 2004. To date, they had received 830 applications regarding various issues such as enforcement of sentences, disciplinary punishments, and prison conditions. Of these, 83 were admitted. However, the impact of these monitoring boards and enforcement judges needs monitoring in itself, and civil society representatives have reservations regarding their composition. Decisions of enforcement judges are not always followed up, and complaints are not always made confidentially. Therefore not all complaints are dealt with.

In response to the reservations held by civil society groups regarding the failings of these official boards, a self-constituted Izmir Independent Prison Monitoring Group, composed of civil society groups has since 2003 repeatedly applied for access to prisons and remand detentions centres in Izmir to conduct independent monitoring. However government responses have consistently cited the lack of any legal provision to accommodate such a request.

With the exception of high-profile political prisoners or those with gang connections, underfunding and poor administration of penal facilities remain. Most prisons lack adequate medical care for routine treatment or even medical emergencies. Inmates' families often had to supplement the poor quality food. Human rights observers estimate that at any given time, at least one-quarter of those in prison are awaiting trial or the outcome of their trial. Despite the existence of separate juvenile facilities, juveniles and adults are often held together. Pre-trial detainees are not usually held separately from convicted prisoners and people convicted of non-violent crimes can frequently be found in high security prisons. Although the food quality improved, there was a scarcity of potable water at some facilities. Furthermore, there was reportedly a shortage of doctors at some facilities and on some occasions, prisoners have alleged that they were denied medical treatment for serious injuries sustained in prison.<sup>123</sup>

In January 2002, the Minister of Justice rejected a compromise formula from four Turkish bar associations, known as 'three doors, three locks', which aimed to reduce isolation in F-Type prisons by allowing the locks of three cells to be opened so that groups of nine inmates, three from each cell, could meet in the corridors outside. In

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123 USDOS Country Report, Turkey 2005

October 2002, the Ministry of Justice lifted all conditions attached to participation in communal social activities, although isolation (some self-imposed) continues in these prisons. Access to telephones for ten-minute phone calls every week, have been arranged, and the right to open visits in F-Type prisons have improved considerably. In May 2003, the Government amended the Anti-Terror Law to allow limited interaction among political prisoners and passed legislation creating special prison judges responsible for examining the complaints of prisoners regarding their conditions and treatment.

The İHD has called for an end to F-type prisons and for independent boards representing civil society organisations to be allowed to regularly monitor all prisons and places of detention. Inmates in F-type prisons face a variety of harsh conditions like isolation and mistreatment, the inability of medical treatment, limited communication rights and access to news, and the monitoring of lawyer meetings by prison officials<sup>124</sup>.

### *Hunger Strikes*

In October 2000, 816 prisoners, mostly affiliated with far-left terrorist groups, went on hunger strikes to protest against F-type prisons. The Government entered the prisons in December 2000, after the fast had reached its 60th day, by which time 31 inmates had died. Weapons and other illegal materials were found in the cells during the operation. The cause of many of the deaths - including those who allegedly set themselves on fire on the order of their organization - is unclear. Many hunger-striking prisoners were released from jail for temporary medical reasons. By the end of May 2006, 128 hunger strikers had died and 500 have been permanently disabled as a result of the striking. Turkish President Ahmet Necdet Sezer has granted amnesty to 180 hunger strikers due to the onset of Wernicke-Korsakoff Syndrome, a form of brain damage that results from the severe malnourishment brought on by hunger strikes.<sup>125</sup>

Twenty-three prisoners in Mardin E-type prison started a hunger strike in August 2005 to protest the conditions of Abdullah Öcalan's detention and military operations in Southeast Turkey and were sanctioned by prison authorities to lose visitor privileges and the use of common areas for one month.

A group of protestors, named the Cengiz Soydaş Death Strike Team after the first F-type prison hunger strike protester to lose his life, started a hunger strike to death on 1 May, 2006.

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124 BIA News Centre, 06 June 2006

125 BIA News Centre, 19 June 2006

The Penal Code was reformed in February 2003 with the aim of increasing security in prisons and preventing hunger strikes. Article 307/a stipulates prison sentences of between two and five years for persons bringing weapons into prisons. Article 307/b states that those preventing detainees from meeting lawyers or friends can be sentenced to one to three years. It is also an offence to prevent detainees from being fed, and those who do so are liable for a sentence between two and four years.

In addition, the Prisoners' Family Association (TAYAD) started a campaign of 30-day hunger strikes across Europe in June 2006 to raise awareness for the prison conditions, and ongoing protests in Turkey, and lawyer, Behiç Aşçı started a death fast on 5 April 2006 to end isolation and torture in prison. As a lawyer, Aşçı has seen his clients in prison and detention face the gravest of abuses, including beatings, isolation, burning, rape, and humiliation, resulting in a wide range of psychological illnesses like anxiety and depression.

An act of legislation known as the "Repentance Law" states that any prisoner convicted of being a member of an illegal organisation, save those involved in the leadership of the organisations, may be pardoned or have their sentences reduced if in return they become informers for the State. They have popularly become known as 'confessors', as they are required to give information about certain 'rebels' before they can be pardoned. However, prisoners who do not want to benefit from the law are sometimes forced to do so. It has been reported that prisoners who do not wish to benefit from the Repentance Law have been isolated and neglected, not being allowed to go to the toilet, being forced to drink water from the taps in toilets and given food only once a day<sup>126</sup>.

### *Impunity*

The concept of impunity, that those that perpetrate human rights abuses are not held to account or are somehow held to be 'above the law' is incompatible with victims' right to a remedy and reparation and the duty on the state to investigate 'effectively' and 'thoroughly' allegations of torture.<sup>127</sup>

Prosecutions serve a preventive function in so far as they work to combat a culture of impunity and act as a deterrent, but they are an essential means of restoring the dignity of those who have suffered as a form of redress constituting or contributing to satisfaction for the victim or assurances and guarantees of non-repetition.

126 Özgür Gündem, 7<sup>th</sup> November 2003.

127 This observation is taken from the *Redress Trust, Implementing Victims Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, March 2006 at pg 22; see Art. 12 and 13 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 entry into force 26 June 1987, ratified by Turkey 2 Aug 1988

Government officials admit that torture occurs but deny that it is systematic. An accurate assessment of the numbers of complaints and the rate of prosecution and conviction is difficult as different sources record different figures. It has been noted that official figures provided by Turkish government agencies are inconsistent as between the General Security Directorate, the General Directorate of Judicial Records and Statistics of the Ministry of Justice, and have been queried by the CPT<sup>128</sup> with figures recorded by the Council of Europe Memorandum between 15 and 30% lower than those recorded by the Ministry of Justice. Exact figures are hard to establish. The Minister of Interior reported that in the first quarter of 2005, 1 239 law enforcement officials had been charged with either “mistreatment” or “torture” of detainees and only 447 prosecutions were pursued. Of the 1 831 cases concluded in 2004, 99 led to imprisonment, 85 to fines and 1 631 to acquittals. Only 531 cases launched during previous years were finalized, with courts convicting 232 officers and acquitting 1,005.

Police officers facing torture or mistreatment charges frequently remain on duty while the trials are ongoing. Convicted police officers often receive administrative punishments, such as short suspensions, for torture or mistreatment. While reforms have addressed the problem of absentee defendants, torture and ill-treatment cases continue to exceed the statute of limitations.

The investigation, prosecution, and punishment of members of the security forces for torture or other mistreatment is rare, and accused officers usually remain on duty pending a decision, which could take years. Light sentences are often transformed into fines or not enforced. The US State Department reported that in the first six months of 2005, 232 out of 531 cases against police officers and security officials had resulted in convictions. Of those convicted, 30 were sentenced to prison terms, 32 were fined, seven were given jail terms and fines, and 163 were subject to administrative punishments such as fines, suspensions or salary cuts.<sup>129</sup>

Alternative figures recorded in the Memorandum of the Council of Europe demonstrate the extremely low conviction rate for those cases that make it to trial. In 2005 prosecutions under articles 94 and 95 of the new penal code resulting in convictions numbered 105 only 28 of which resulted in jail sentences for the convicted, with 362 acquittals and 511 resulting in postponement of trial, exceeding the statute of limitations, or returning negative decisions on jurisdiction.

On any assessment the number of prosecutions resulting in conviction is extremely low, and even lower is the number of those facing prison sentences.

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128 See CPT report on it March 2004 visit, remarking ‘...the CPT wonders whether the statistics provided are accurate...’

129 USDOS Country Report, Turkey 2005

There are a range of reasons for low successful prosecution rates. These include procedural flaws such as ineffective investigations, overly short deadlines for bringing criminal proceedings against alleged perpetrators and barriers which impede prosecutions altogether, such as amnesty laws or provisions to the effect that courts could not convict under the law if the defendant did not attend at least one trial session, resulting in some police defendants not attending trial sessions to avoid convictions. Prosecutors accused the court of not making an effort to locate the absentee defendants, even when they were salaried police officers who received checks at their home address<sup>130</sup>. Police and Gendarmerie continue to carry out arbitrary arrests and detentions and prolonged detention and lengthy trials combined with inappropriate limitation statutes continue to hamper improvements in human rights standards.<sup>131</sup>

The scarcity of convictions and the light sentences imposed on police and Gendarmerie for killings and torture, and a generalized climate of fear have fostered the received climate of impunity, as have prosecutors' reluctance, in contravention of international standards, to investigate the conduct of members of the security forces. Under article 15 of Law 3713 members of the security forces can be tried while released on bail, regardless of the nature of the crime for which they stand trial or the sentence they would face if convicted. This is clearly conducive to the intimidation or harassment of witnesses and perpetuation of the climate of impunity. In these trials the defendants are not seriously interrogated and the torture victims are asked to prove their allegations. In cases where the allegations are verified, cases are often struck out due to lapse of time and in the limited numbers of cases that do result in conviction, sentences are given at minimum level, are reduced or postponed.

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130 USDOS Country Report, Turkey 2005

131 The Turkish Human Rights Association, in a report on the culture of impunity, has flagged up perceived causes and opportunities for its perpetuation, notably; immunities granted to security officials preventing their prosecution for acts of torture in which they are complicit; statutes of limitations combined with lengthy protracted trials, and the suspension of sentence for those convicted of ill-treatment. something the ECtHR has found sufficient to constitute a violation of Article 3 and 13 see *Okkaly v. Turkey* (52067/99) and *Öktem v. Turkey*

In a number of cases the ECtHR has referred to the *de facto* impunity afforded to perpetrators of torture and ill-treatment; finding it sufficient to constitute a violation of Article 3<sup>132</sup> and other *domestic* cases clearly show the effective impunity afforded to officials.<sup>133</sup>

### *The Role of Prosecutors*

Public Prosecutors in Turkey have frequently failed to take adequate steps to ensure that those responsible for torture are investigated and punished. Prosecutors who are supposed to directly act by launching investigations are not seriously taking torture allegations into consideration. Prosecutors are guilty of a plethora of abuses including orchestrating delays in statement-taking, obstructing forensic examinations of victims, failure to interview witnesses, failure to look for evidence of torture abuses, failure to enquire into official complaints, failure to inspect custody ledgers and detention centres, and taking decisions not to prosecute police officers involved in allegations of torture without questioning them beforehand. A KHRP fact-finding mission reported in August 2003 that ‘there remains an absolute dependency on the good faith of public prosecutors, who enjoy a position of power

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132 See chapter V

133 On September 25th 2002, an Istanbul court convicted 5 police officers and sentenced each to 14 months’ imprisonment for torturing 9 detainees in 1996, including journalists from the leftist newspaper “Atilim.” Two other officers were acquitted in the case. Three of the convicted officers, Bayram Kartal, Sedat Selim Ay, and Yusuf Öz, were also convicted in December in a separate trial involving the torture of 15 detainees in 1997, most of whom were also associated with “Atilim.” However, their sentences were suspended.

On 19 December 2006 Çorum Heavy Penal Court concluded the case against 11 gendarmerie intelligence officials and a physician for the torture of Melek Serin who was detained in Çorum in 2003 on the allegation of “aiding the DHKP-C” and “misconduct of duty”. The court decided on the acquittal of officers Selahattin Köse, Bayram İlkbahar, Ali Tellioglu, Bülent Demir, Mithat Yiğit, Osman Badak, Ömer Yaman, Metin Çiftçi, Kutlu Gög, Nurullah Kartal, Nihat Tekin and physician Naci Önal.

The court also decided to register an official complaint against Captain Hamza Gökdemir, Commander of Çorum Gendarmerie Headquarter who testified against the defendants. Hamza Gökdemir had reported :

*“Melek Serin was interrogated by the intelligence officers upon the order of Provincial Gendarmerie Commander İrfan Şahin although she should have been interrogated by us . Someone used a fake signature instead of mine while sending her to medical examination. I sent a staff member while she was being interrogated in order to prevent ill treatment. But he was not taken inside. He said that Melek Serin was shouting in the interrogation room. I went to Şahin’s room next day. When I asked why they ill-treated her he got angry with me...There were wounds on her neck and arms that were due to hitting. When Melek Serin told that she was tortured and had lumbago the physician said that she should be taken to hospital and X-rayed. When Şahin said that the traces were not newly happened the physician arranged the report in that way. I did not give testimony before due to the threats.”*

Defendant Selahattin Köse had testified during the investigation phase that: *“The staff who interrogated her [Melek Serin] have technical knowledge on interrogation...They do not have authority to conduct judicial investigation. So I just read the testimony and signed it.”*

greatly superior to that of defence lawyers and an alarming ideological proximity to the judges on the State Security Courts<sup>134</sup>.

It has been suggested that Prosecutors in Turkey are entirely complicit in the practice of Torture and that the failures of prosecutors to investigate complaints of torture is one of the main contributions the continuing atmosphere of impunity in Turkey.<sup>135</sup> Numerous cases have been recorded with concern in which allegations of confessions/statements having been extracted under duress have not been investigated.<sup>136</sup> Detainees alleging that their claims of abuse during interrogation are ignored and victims of torture and ill-treatment are denied from having corroborating witnesses heard.

The Ministry of Justice circulated memos in October 2003 instructing prosecutors to carry out investigations into torture themselves and give priority to such cases. However, a large proportion of torture and ill-treatment complaints continue to be disregarded by prosecutors after a brief examination which is often limited to the medical reports of the complainant, falling well below what is required of an investigation to be considered 'effective and thorough' under international law.

The Turkish government must ensure the swift and effective investigation of those accused of torture, with Prosecutors acting promptly to allegations of torture even in the absence of express complaints. Without such action, there can be no hope for improvement in the widespread practice of torture at the level of implementation. The UN Special Rapporteur on Torture in March 2006 had already expressed concern that '*with regard to allegations of torture and ill-treatment of terrorism suspects, he did not find convincing evidence that an independent, impartial, accessible and effective investigation mechanism is in place.*'<sup>137</sup>

### *Threshold of Investigation*

The UN Convention against Torture requires the *effective* investigation of torture allegations even in the absence of any express complaint. Established and accepted best-practice for the *prompt and impartial* investigation and prosecution of those

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134 'In the Wake of the Lifting of State of Emergency Rule: Report of a Fact-Finding Mission to Southeast Turkey', August 2003, KHRP, p.19.

135 AI Report August 2005

136 See cases of the *Sirnak 16*, of *Metin Kaplan*, of *Turgay Ulu*, and of *Mehmet Aytunç Altay* recorded in *Justice Delayed and Denied*: The persistence of protracted and unfair trials for those charged under anti-terrorism legislation AI Index: EUR 44/013/20066 September 2006

137 Preliminary note by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin visit to Turkey (16 to 23 February 2006) E/CN.4/2006/98/Add.2 24 March 2006



involved in torture is set out in both the *Istanbul Protocol*<sup>138</sup> and the *Basic Principles and Guidelines on the victims right to a remedy and reparation for gross violations of human rights and serious violations of humanitarian law*.<sup>139</sup>

The Istanbul Protocol establishes that States are obliged to publish the results of investigations and are also obliged to ensure that the alleged offender or offenders are subject to criminal proceedings if an investigation establishes that an act of torture appears to have been committed. Administrative punishments are not enough. The *UN Declaration of Basic Principles for Victims of Crime and Abuse of Power* calls for judicial and administrative processes to be responsive to the needs of victims - for example, by keeping them informed and allowing their views and concerns to be considered at appropriate stages of the proceedings<sup>140</sup>.

Recent moves aimed at ending the culture of impunity include the amendments eliminating/extending the five-year Statute of Limitations on cases regarding torture, those in seventh harmonisation package, adopted on 30 July 2003, aimed at enhanced accountability by making the investigation and prosecution of torture a judicial priority, and a circular issued by the Minister of Justice on 1 January 2006 requested that due diligence be paid in order to ensure that investigations into allegations of torture and other forms of ill-treatment are carried out directly by public prosecutors - in no case being entrusted to the police or gendarmerie - in an effective and adequate manner, having in mind the Constitution of Turkey, relevant legislative norms, international treaties to which Turkey is a Party, and the case law of the European Court of Human Rights.<sup>141</sup> This aims to perpetuate the official line on the zero policy against torture. However continuing reports of cases in which officials *are* granted de facto impunity impeach any perceived progress in this area. While suggestions that the situation is improving need substantial support, suppositions to the effect that impunity remains need none. The official line of the zero tolerance policy for torture is betrayed by a culture of impunity that survives the official policy. This contradiction is also an indication of the fact that torture is not individual and discontinuous but is a systemic incident.

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138 The Istanbul Protocol provides that: "States are required under international law to investigate reported incidents of torture promptly and impartially. Where evidence warrants it, a State in whose territory a person alleged to have committed or participated in torture is present, must either extradite the alleged perpetrator to another State that has competent jurisdiction or submit the case to its own competent authorities for the purpose of prosecution under national or local criminal laws."

139 Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law 16 December 2005 General Assembly at its 60th session, through Resolution 147 (A/Res/60/147)

140 The European Court of Human Rights and the Inter-American Court of Human Rights have equally found a duty of States to inform the complainants about the outcome of investigations and, the Inter-American Court, to publish the results of an investigation. Both the Committee against Torture and the Human Rights Committee have called on State Parties to publish information relating to the number and nature of complaints, investigations undertaken, and steps taken following such investigations, including punishment of the perpetrators. Flaws in the investigative procedures may lead to deficiencies in the prosecution of alleged perpetrators.

141 CPT report



### III. Accession to the EU

#### *The Debate over Accession*

In December 2004, the EU agreed to open accession talks with Turkey in 2005. This followed a report and recommendation from the Commission that Turkey was ready to enter into negotiations.

Turkey's eventual accession to the EU is formally understood to be conditional upon the fulfilment of the Copenhagen Criteria, under which prospective new members must have achieved a "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities"<sup>142</sup>.

This was made clear by the Luxembourg European Council in December 1997, confirming that Turkey's eligibility for accession would be judged on the 'basis of the same criteria' as other applicant states. The centrality of the Copenhagen Criteria was again confirmed in 2002 at the Copenhagen European Council of December 2002 where it was stated that "...if the European Council in December 2004, on the basis of a report and a recommendation from the Commission, *decides that Turkey fulfils the Copenhagen political criteria*, the European Union will open accession negotiations with Turkey without delay"<sup>143</sup>.

However the original formulation of the opening of negotiations following the fulfilment of the Criteria was seemingly abandoned with the Council moving ahead with accession negotiations on the back of a report and recommendation by the Commission which *presumed the future* fulfilment of the Copenhagen Criteria, rather than a declarative finding of already existing and stable 'institutions guaranteeing...human rights'. That report stating:

Turkey is undertaking strong efforts to ensure proper implementation of these reforms. *Despite this, legislation and implementation measures need to be further consolidated and broadened.* This applies specifically to the zero tolerance policy in the fight against torture and ill-treatment.

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142 Copenhagen European Council December 2002

143 Ibid.

However:

...the Commission considers that Turkey sufficiently fulfils the political criteria and recommends that accession negotiations be opened. *The irreversibility of the reform process, its implementation in particular with regard to fundamental freedoms, will need to be confirmed over a longer period of time.*<sup>144</sup>

The Commission's recommendation, then, contemplated the *future* implementation, effectiveness and stability of the Turkish reforms, in the Commission's words it's future 'irreversibility'. Given the requirement of the *stability* of these criteria as a *precondition* for negotiations and the Commission's recognition that 'the irreversibility of the reform process' was *yet* to be addressed, the Council's decision of 17 December 2004 to open accession negotiations suggests a departure from the previously accepted principle that Turkey's eligibility for accession would be judged on the 'basis of the same criteria' as other applicant states.

The KHRP has previously submitted that the Commission's recommendation, leading to the Council's decision 'that Turkey had "sufficiently" fulfilled the Copenhagen Criteria...misrepresented Turkey's progress', given that at the time of the recommendation there were 'enormous outstanding problems with Turkey's record on human and minority rights'<sup>145</sup>.

The progress report by the European Commission of 11 November 2006, while using overly diplomatic language to do so, recognises the continuing shortfalls in Turkey's reform program that were evident at the time of the 2004 recommendation.

Despite its Islamic roots, the EU has encouraged Turkey to preserve its secular tradition and be brought into the 'democratic orbit' by joining the EU. While KHRP supports a friendly approach to Turkey, the EU should not compromise on issues of principle, by easing the pressure on Turkey's political leaders to improve the country's human rights record. KHRP is concerned that Turkey may be able to exploit its position in the current geo-political climate of prevailing regional security concerns, as a strategic bridge between Europe and the wider Muslim world to such an extent that the EU decide to let Turkey join, without Turkey first fully implementing its human rights reforms<sup>146</sup>.

144 Recommendation of the European Commission on Turkey's progress towards accession - 2004

145 KHRP report, *Turkey's Accession to the EU: Democracy, Human Rights and the Kurds*, (KHRP, London, 2006)

146 Kurdish Media - "Let us not forget Leyla Zana and her co-defendants", 19th December 2003, Dr David Morgan.

Traditionally, Europe's citizens have readily accepted new members as it grew from the original six countries to the 25 that will form the EU in 2004. Once a purely West European community, the Union has pushed out its frontiers in all directions, from the north of Finland to Cyprus and Malta, from Ireland to the Baltic States.

However, Turkey is different. The countries that have joined the EU in recent years adhere to a traditional concept of Europe. Yet Turkey's territory lies in Asia, not Europe; its culture is Islamic, not Christian, and its population will be the second largest in the EU. Turkey also borders Iran, Iraq and Syria, which will place the EU on the fringes of Islamic radicalism and terrorism, a collection of fragile states, a field of competition for arms including nuclear arms, and a region where the United States is strategically involved and where Israel will continue to provide a rallying point for anti-Western sentiments. With Turkey as a member, the EU will thereby become a part of the troubled Middle East<sup>147</sup>. It would take only one country to bloc Turkey's accession. Any country that holds a referendum on Turkey's potential EU membership will undoubtedly decrease its chances of joining. It may well be that Europe is not yet ready for Turkey.

However, despite these risks, the prospect of EU membership is by far the most powerful force for reform in Turkey, and a modern and democratic Turkey is of crucial interest to Europe, both domestically and regionally. The EUTCC views the accession process as the best method by which to actually gain respect for human rights and the rule of law on the ground.<sup>148</sup> EU enlargement policy is based, among other things, on the notion that all European citizens will benefit from having neighbours with stable democracies and prosperous market economies. However the accession's potential *strategic* significance for the West in the current geo-political climate is at present the overriding policy consideration.

Strategic foreign policy is now unashamedly proclaimed as the number one policy consideration of the US and is evidently a major consideration of Britain. Securing and stabilizing Turkey's position as a secular, moderate and progressive majority Muslim state and an ally in the War on Terror seemingly outweighs an objective approach to the strict application of human rights criteria and the use of accession as a potential incentive for human rights reform for the potential benefit for the Kurds and Turkey's wider population, the accession being arguably more important to the West than to Turkey. The strategic significance of the accession has not been missed by Turkey, playing to fears that anti European/Western nationalist sentiments could be fuelled by what could be viewed as anti-Turkish European moves on Cyprus.

147 *The Korea Herald*, "EU's battle for Turkey", Christopher Bertram, 15<sup>th</sup> December 2003.

148 KHRP Report, Turkey's Accession to the EU: Democracy, Human Rights and the Kurds, July 2006

Recent statements from Sweden's Foreign Minister Carl Bildt to the effect that: "at the end of the day we're dealing not with certain chapters but with big issues such as the strategic significance of this part of Europe...We should keep that particular perspective..."<sup>149</sup>, lend weight to the suggestion that extraneous geo-political factors are outweighing the objective consideration of conditional criteria.

### *Turkey's Future*

After the sanctioning of accession negotiations, the European Commission set out to construct a rigorous negotiation framework, setting out the guiding principles and procedures for talks with Turkey. Olli Rehn, European Commissioner responsible for EU Enlargement, stated in June 2005 at the presentation of the framework:

It is in Europe's interest to have a stable, democratic, prosperous Turkey that adopts and implements all EU values, policies and standards. The opening of the accession negotiations is a recognition of the reforms already achieved in Turkey. It gives this country a chance to demonstrate, through a fair and rigorous negotiation process, whether it is able to meet fully all the criteria required to join the EU. But we all know that it will be a long and difficult journey and we have to take into account the concerns of citizens.<sup>150</sup>

The EU legislation and standards were broken down into 35 chapters for negotiation, including the two chapters most relevant to the prevention of torture; Judiciary and Fundamental Rights and Justice, Freedom and Security.

Improvements in human rights including the tightening of the legal regulation of torture *have* been introduced/enacted as part of a noteworthy series of reforms<sup>151</sup>. These have formed the central focus of the European Commission's progress reports on Turkey. However focus on Turkey's progressive *legislative* reform agenda fails to take into consideration the *implementation, effectiveness* and '*irreversibility*' of those reforms. Apparent 'implementation gaps'<sup>152</sup> in Turkey's reform program suggest that the Commission's approach continues to be a somewhat superficial assessment of Turkey's achievements, focusing on legislative and administrative reforms enacted by the current administration and putting forward little *de facto* analysis of the impact of those reforms. This approach however might be ending

149 Quoted in Turkish Daily News 6/12/06  
<http://www.turkishdailynews.com.tr/article.php?enewsid=61038>

150 Commission presents a rigorous draft framework for accession negotiations with Turkey, Brussels, 29 June 2005

151 See *inter alia* the assessment of the Working Group on Arbitrary Detention visit to Turkey

152 KHRP publication Implementation gaps in Turkey's reform

with the most recent report reflecting a waning of patience on the part of the Commission<sup>153</sup>. While acknowledging ‘a comprehensive legislative framework’ including ‘a comprehensive set of safeguards against torture and ill-treatment’ and praising the continued ‘downward trend in the number of cases of torture and ill-treatment...the reforms in detention procedures and detention periods’ and ‘the regulation...concerning the system for the medical examination of persons in police or gendarmerie custody’, the 2006 report nonetheless draws attention to the fact that ‘*implementing the legislative reforms undertaken in previous years remains a challenge*’ and that ‘cases of torture and ill-treatment are still being reported, in particular outside detention centers.’

Recent amendments to Turkish Anti-terror legislation also go further than suggesting a mere slowing-down of the reform process, reflecting instead a positive regression in achieving the standards required by the Copenhagen Criteria. Those amendments, adopted in June 2006 as a response to the escalation of terrorism, extend the list of what constitutes a terrorist offence and maintain a wide definition of terrorism. They reduce the procedural safeguards for suspects of terrorist offences. Access to a lawyer may be denied for a period of 24 hours<sup>154</sup>, and under certain circumstances security officers may attend meetings between suspects and their lawyer, eroding the principle of confidentiality as outlined in the UN Basic Principles on the Role of Lawyers. As regards the defence rights, officials and former officials are granted differentiated treatment, prejudicing the principle of equality of arms. Statements made under torture are effectively rendered admissible in court, the possibility for the examination of security officials responsible for taking statements and preparing incident reports at trial is eliminated and the use of secret investigative agents, whose identities will not be revealed and who cannot be examined at trial is made permissible<sup>155</sup>. One of the most striking of the provisions<sup>156</sup> allows for the prosecution of members of the security forces to continue while they remain on bail while released on bail, regardless of the nature of the crime for which they stand trial or the sentence they would face if convicted, conflicting with the duty of the authorities under international law to protect witnesses from intimidation or harassment by defendants. These developments suggest a regression (rather than progression) not just in the prevention of torture in Turkey but in the entire democratic reform.

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153 The report having been read as ‘a clear signal to the Turkish government’ - KHRP response to the European Commission’s 2006 Progress Report on Turkey’s Accession bid November 2006

154 Article 9 (amending Article 10 of Law 3713) restricts the immediate right to legal counsel for those detained on suspicion of committing terrorism offences. Paragraph (b) of the article specifies that, at a prosecutor’s request and on the decision of a judge, a detainee’s right to legal counsel from the first moments of detention may be delayed by 24 hours.

155 Torture in Turkey - The Current Status of Torture and Ill-treatment - KHRP August 2006

156 By the revision to Article 15 of Law 3713

The EU Turkish Civil Commission has recorded its opinion that; ‘The adverse effect [of] this piece of legislation... on Turkey’s reform process and its stated goal of democratization *cannot be overstated*. It targets fundamental rights and freedoms that had previously been bolstered by the [earlier] amendments and *sets the democratization process back several years*.’<sup>157</sup>

The law undoes vital safeguards for the prevention of torture and introducing conditions conducive to torture is inconsistent with Turkey’s obligations to ensure the absolute status of the prohibition and it’s rhetoric of ‘zero-tolerance’.

Given that torture is defined by the international community as one of the most severe violations of human rights and subject to an absolute prohibition under international law and under the EU’s own Charter of Fundamental Rights, the introduction of the 2006 anti-terror law *and* continuing references to numerous cases of ill-treatment and torture in and outside of detention centres<sup>158</sup> can not be considered consistent with the ‘stability of institutions guaranteeing...human rights’ as required under the Copenhagen Criteria.

At the onset of negotiations, the EU reserved the right to suspend accession negotiations in the event of “in the case of a serious and persistent breach by Turkey of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law”<sup>159</sup>. Following its latest progress report, failures on the part of Turkey to implement its obligations under the Ankara Protocol, and warnings from European Union diplomats that a slowdown in the Turkish reform process, the large number of freedom of speech cases and the closure of Turkish ports and airports to EU-member Greek Cyprus would undermine Ankara’s EU accession aspirations, the Commission *did* recommend and the Council agreed to, the suspension of talks in eight of the 35 Chapters<sup>160</sup> pending the re-opening of its ports and airports to traffic from EU member Greek Cyprus. Those Chapters primarily relate to trade, negotiations should continue in the areas of Fundamental Rights protection and Justice, Freedom and Security.

However the current domestic political climate militates against Ankara regaining reform momentum anytime soon. Nationalist sentiment antagonistic to EU accession has been fuelled by a perception that the EU has been one-sided on

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157 Desmond Fernandes “A Step Backwards: The Effects of the new Anti-Terror law on Fundamental Rights and Freedoms”

158 See commission progress report of 2006, and CPT reports following 2005 visit

159 Commission presents a rigorous draft framework for accession negotiations with Turkey, Brussels, 29 June 2005

160 Commission recommendation on the continuation of Turkey’s accession negotiations 29/11/06 - <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1652&format=HTML&aged=0&language=EN&guiLanguage=en>



the Cyprus issue, by rhetoric of an 'Anti-Turkey axis emerging in EU' following German-French demands for an ultimatum to be set that would see a review of Turkey's accession follow the suspension of the talks in the eight Chapters should Turkey continue to close its ports and airports to EU member state Greek Cyprus as well as recent European moves on the Armenian issue, in particular a recent law passed by the lower house of the French parliament making it a crime to deny that the mass killings of Armenians by the Ottoman Turks constitutes genocide. Turkey's parliamentary elections have seen political parties emphasize their nationalist credentials and distance themselves from the currently unpopular accession negotiations.

Despite the criticism from Brussels, as well as the nationalist mood in Turkey, there are indications that both sides are working to reach a compromise before the EU summit in December. Turkish Prime Minister Recep Tayyip Erdoğan recently expressed a willingness to amend article 301, a controversial law limiting free speech, while there are also efforts to work out an interim deal on the Cyprus issue.

In addition to curbing torture, there must be an end to prosecutions of government critics, a plan to enable the return of villagers driven from their homes during the conflict between Turkish security forces and the Kurdish Workers' Party (PKK) in the 1990s, an end to small-group isolation in Turkey's prisons, and safeguards to protect asylum-seekers and refugees in Turkey.

Turkey deserves the credit it has received for recent progress, but that credit must inspire further determination, not, as in the past, complacency.

The EU accession process has been an important catalyst in Turkey's human rights progress. Achievements include the abolition of the death penalty, easing of restrictions on broadcasting and education in minority languages (among them Kurdish, spoken by Turkey's large Kurdish minority), shortened police detention periods, and lifting of the state of emergency in the formerly troubled Southeast. The judiciary still does not act in an independent or consistent manner, which fosters an ongoing culture of impunity with regard to cases of torture. There is little evidence of the prosecution of officials suspected of torture. Further efforts are also required in the areas of freedom of expression, women's rights, religious freedoms, trade union rights and cultural rights.

To be effective, reforms need to be implemented in practice by both executive and judicial bodies at different levels throughout the country, its 'irreversibility' needs to be secured. The EU report for 2002 stated that the 'fight against torture and ill-treatment, civilian control of the military...and compliance with the decisions of the European Court of Human Rights' were the most important issues needing to be

addressed<sup>161</sup>. The rhetoric of the self-proclaimed 'zero-policy' on torture needs to be made concrete and effective.

KHRP welcomes the reduction in certain forms of torture, such as electric shocks and hanging by the arms, but is concerned over the persistence of other forms of torture, including severe beating. Hundreds of people have continued to report ill-treatment because official and independent monitoring of detention facilities are not sufficiently tight. Turkey's future ratification of the Optional Protocol to the United Nations Convention Against Torture, allow an independent international monitoring body access to detention centres and medical facilities through out Turkey, is eagerly anticipated. Governors and prosecutors must regularly visit all police stations and gendarmeries in their area, and the Interior Ministry must permit access by independent monitors such as bar associations

KHRP regards the process of Turkey's EU accession as critical to the future well-being of the Kurds in the Southeast, and for securing fundamental rights more generally in Turkey, however concerns remain over the measure of 'latitude' being afforded to Turkey in the interests of the wider geo-political strategic concerns driving the negotiations. While acknowledging the considerable progress Turkey has made, KHRP urges the EU to take all necessary steps to ensure all reforms are fully implemented.

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161 EU 'Regular Report on Turkey's Progress Towards Accession', October 2002.

## IV. Sexual Violence against Female Detainees and the Abuse of Children in Detention

KHRP is gravely concerned about reports of violence against women at the hands of both private individuals and state officials.

### *Background to Gender Discrimination*

The illiteracy rate for women in Turkey is nearly twenty percent illiterate while in the Southeast this figure is considerably higher, and female employment is under 30 per cent. In addition, women are poorly represented in the political sector, holding only four per cent of parliamentary seats up until the July 2007 parliamentary elections (24 in the 550-seat parliament in 2005)<sup>162</sup> and only 1 female minister in the 23-member cabinet. Prevailing discrimination exists in the labour market. Participation by women in the workforce is among the lowest in OECD countries.<sup>163</sup>

In May 2004, Turkey passed amendments to the Constitution, which provide for equality of women and men (Act No. 5170). Article 10 states:

All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.

Men and women have equal rights and the State is responsible to implement these rights...

The New Civil Code (No. 4721) ratified on 22 November 2001 defines the family as a partnership based on equality between men and women. The husband is no longer the head of the family; spouses govern the family union as equal partners with equal decision-making powers. Spouses have equal rights over the family residence. Spouses have equal rights over property acquired in the course of the marriage. The concept of 'illegitimate' children has been abolished; mothers now have custody

162 Stop Violence against Women (stopvaw) stated in their country page updated on 3 May 2005, *citing*: Lisa Pavan-Wolfe, *Address at Combating Discrimination in the European Union and in Turkey: Legislation, Implementation, Equality Bodies*, Ankara (11-12 Oct. 2004).

163 EC report 2005

of children born out of wedlock.<sup>164</sup> Article 159 (stating that women needed their husbands' consent to work outside the home) and Article 438 of the Criminal Code (providing for a reduction in the punishment for rapists under certain conditions) have both been abolished<sup>165</sup>.

Throughout 2005–06 a UNICEF/Ministry of Education campaign continued aiming to increase girls' attendance at school. As a result of the campaign, enrolment and attendance are reported to have dramatically increased among primary age girls<sup>166</sup>

Legal status has been given to a Directorate on the Status of Women, attached to the Prime Ministry and responsible for promoting equal rights and raising awareness of discrimination against women which will work to strengthen the position of women in Turkish society. On 24 December 2004 legislation came into force which obligates municipalities with a population of more than 50,000 inhabitants to establish shelters for women.

These recent changes in both the Civil Code and in the Penal Code, aiming at further equality between women and men in an effort to eliminate the use of violence against women represent significant steps forward, so that women now enjoy the same rights as men; however, societal and official discrimination remain widespread, and as a result women continue to find themselves adversely effected in being targets for violence and in the subsequent failure to investigate incidents only serving to contribute to the climate of impunity that fosters the continuing oppression and ostracism of women. The reforms to the Turkish Civil and Penal Codes, promoting gender equality, are welcomed by KHRP, yet it is evident that reforms in the legal domain alone are not sufficient to prevent gender discrimination and violations of women's rights, or reverse indoctrinated social roles. Women's lives continue to be shaped by a multiplicity of traditional practices which violate existing laws, including early and forced marriages, polygamous marriages, "honour" crimes, virginity testing and restrictions on women's freedom of movement.

### *Violence against women*

The Directorate General for the Status of Women reported that 147,784 women were victims of domestic violence from 2001 to 2004. These incidents included 4,957 cases of rape and 3,616 cases of attempted rape. However women's rights advocates believe many cases are underreported.<sup>167</sup>

164 The Women for Women's Human Rights (WWHR) website (undated) accessed on 26 September 2006

165 Norwegian Country of Origin Information Centre 'Report of fact-finding mission to Turkey (7-17 October 2004)'

166 UK Foreign and Commonwealth Office (FCO) Human Rights Annual Report 2006, released in October 2006

167 USD 2005

Istanbul Bar Association Women's Rights Enforcement Center (KHUM) records for 2005 show that 2,827 women applied to the Bar Association's women's rights center; 10 percent concerning violations of Law 4320<sup>168</sup>; the Law on the Protection of the Family, which includes judicial powers to forbid violent men from coming near their family homes.

Violence against women is compounded by a reluctance in bringing complaints and a tolerance of domestic violence forced upon women due their lack of economic independence and their reliance on their husband, or fear of having their children taken away if they complain.

Thus even though Turkey's Family Law number 4320 can protect women from violence on paper, victims of violence themselves generally avoid complaint<sup>169</sup> for three reasons: Patriarchal relations, economic weakness and lack of education.

### *Female Detainees*

Discrimination against women and the sexual assault of women in detention are linked. When individuals representing the State abuse female detainees, this not only fails to uphold women's rights, but it may contribute to perpetuating a culture of violence against all women.

As a result of this history of gender discrimination, women in Turkey are particularly at risk of being subjected to sexual torture at the hands of state officials. Cases continue to surface and KHRP continues to receive reports of the sexual assault of detainees in police custody in Turkey. Women detained are frequently stripped naked by male police officers during periods of questioning in police custody or in prison. Forms of torture inflicted upon women include electro-shocks to the genitals, standing for long periods of time, being forced to strip and stand naked in front of male guards, forced virginity tests, beatings targeting the genitals and breasts, use of high-pressure water hoses, and sexual abuse including rape and threats of rape. Moreover, threats of rape are often compounded by police taunts that rape will deprive women of their virginity and their "honour" and women can be subjected to sexual violence in the presence of her husband or family member, apparently as a means of forcing her husband or family member to "confess", or as a way of demeaning her family and her community.

Particular allowances should be made for rights and needs of special categories of detainees including women and juveniles. The UN Convention on the Elimination

168 BIA News Center in September 2006, 'Women Seek Help Most for Domestic Violence'

169 Ankara Bar Association Women's Rights Council President Attorney Munise Dayi referenced in *Domestic Violence Silences Women's Complaints* BIA News Center 15/06/2006

of all Forms of Discrimination Against Women (CEDAW) includes obligations on States parties to remove discriminatory legislation and practice. The narrow definition of ‘rape’, ‘virginity testing’, ‘honour killings’, and assessment of medical evidence regarding sexual violence all arguably engage such obligations. Turkey ratified the Optional Protocol to CEDAW in August 2002, allowing complaints from individuals to be made to the Committee. The last report submitted by Turkey to the Committee was in 1997.

There have been numerous reports, including a KHRP fact-finding mission to Turkey in September 2002<sup>170</sup>, of the use of systematic sexual violence by State agents. Not just Kurdish women, but all political opponents of the State are at risk of sexual violence and torture. Opponents of the State are subjected to rape and sexual assault as a means of placing psychological pressure on women in order to force them to stop political activity. İHD reported that it was dealing with 30 complaints a month regarding sexual violence involving state agents in rural areas<sup>171</sup>. Women rarely speak about their abuse, due to ostracism, discrimination, and concepts of ‘honour’ in Turkish society<sup>172</sup>.

Reports also suggest that the majority of women who report sexual violence by state security forces are Kurdish, or express political opinions that are unacceptable to the military or the government. Other reasons for detention range from getting male family members to ‘confess’ to punishing political members of their family.

A recent study carried out by the *Judicial Assistance Project for Sexual Harassment and Rape Under Detention* into the subjection of women to kidnapping and violence by the security forces has shown that of at least 234 women seeking legal support in Turkey between 1997 and 2006, at least 70 women were raped in detention while 166 others were sexually harassed. Prevailing discriminatory attitudes contribute to the problems in securing judicial support. Harassment and rape were acknowledged to be specifically employed as deterrent methods in east and southeast Turkey with the kidnapping of women concentrated in the cities of Tatvan and Mardin.

The police topped the list of those committing the offences with responsibility for 184 incidents while 55 cases against the gendarme and soldiers were recorded and 13 recorded against the Paramilitary Village Guards. An ethnicity detail of the

170 ‘The Continuing Use of Sexual Violence Against Women in Turkey as a Method of Political and Cultural Repression’, KHRP Trial Observation, January 2003.

171 ‘The Continuing Use of Sexual Violence Against Women in Turkey as a Method of Political and Cultural Repression’, KHRP Trial Observation, January 2003.

172 From a report by Associated Press, ‘Activists Denounce Sex Abuse in Turkey’, Ankara, 26th February 2003.

report showed that 187 of the complainants were Kurdish women. 38 victims were reportedly aged 10 to 18 while 198 of the victims were aged between 18 and 67.<sup>173</sup>

In 2005 the case against four police officers for torturing two young girls, Fatma Deniz Polattaş and Nazime Ceren Samanoğlu, in Iskenderun in 1999 was concluded. While the related case against the officers saw them remain in their duties and receive promotions, Polattas and Samanoğlu were convicted on the basis of confessions reportedly extracted under torture. The two girls were released in December 2004 due to an amendment to the law while in April, İskenderun Aggravated Penal Court acquitted the police officers on the basis of insufficient evidence since the Forensic Institute reported that the girls objected to virginity test which might have obtained evidence of their rape.

Derya Orman, Gülselin Orman and Seyhan Geylani Sondas were arrested by the police in Istanbul in April because one of them did not have an identity card with her. They stated that the police requested them ‘sexual favors’ in the station in order to release them. They reported that they were stripped naked, sexually harassed and forced to sexual intercourse by the officers on duty, including a policewoman. HRA officials reported that the applicants were mistreated by the prosecutor when they went to his office to file complaints against the police officers.<sup>174</sup>

Many cases continue to go unreported, with reasons varying from psychological distress and shame experienced by the survivor to fear of retribution at the hands of the state. Other women do not disclose sexual assaults in the belief – accurate in the vast majority of cases – that reporting sexual assault by state security forces would not result in the perpetrators being punished. Furthermore, the difficulties of obtaining medical evidence and redress persist.

In Turkey a woman’s sexuality is a reflection of the family honour, so if a woman is not chaste then she may be viewed as a burden on the family, not accepted, subjected to forced marriage, or even killed. Women who have been sexually assaulted risk death, further violence, forced marriage or ostracism by their families or communities as a result of their experiences. In Turkey, the concept of “honour” is used as an excuse for inaction and as a means of silencing survivors of sexual violence. Secrecy and non-intervention keep sexual violence “private” whilst the state continues to perpetrate and tolerate sexual violence against women by failing to act to protect their rights

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173 BIA News Center 02/11/2006 [Ayca ÖRER](#)

174 The International Helsinki Federation (IHF) for Human Rights 2006 Turkey report

*'Honour'*

Women who live in communities that uphold notions of “honour”, find it very difficult to speak out against sexual violence. They may be shamed or may be looked upon as guilty for simply disclosing sexual assaults, as blame for an assault is typically attached to the women.

The community’s attachment to the value of the ‘honour’ of its women has become a method by which state agents can control opposition – and torturing and degrading women a means of attacking not only the woman, but her community also. Where threats of rape are compounded by police taunts that rape will deprive women of their virginity and their “honour” and women can be subjected to sexual violence in the presence of her husband or family member, apparently as a means of forcing her husband or family member to “confess”, or as a way of demeaning her family and her community.

The Parliamentary Assembly of the Council of Europe has passed a resolution urging States to take the necessary measures against so-called ‘honour crimes’<sup>175</sup>.

*'Honour' Killings*

Every few weeks in this Kurdish area of southeast Anatolia, which is poor, rural and deeply influenced by conservative Islam, a young woman tries to take her life. Turkey has tightened the punishments for ‘honour crimes’. But rather than such deaths being stopped, lives are being ended by a different means. Parents are trying to spare their sons from the harsh punishments associated with killing their sisters by pressing the daughters to take their own lives instead.<sup>176</sup>

Honour killings – the killing by immediate family members of women suspected of being unchaste – remain a distinct problem. The killing of women and girls occurs when a woman allegedly steps outside her socially prescribed role, and is usually committed by a male member of the family. Punishment is typically minimal as Turkish law enforcement authorities generally condone this practice and the Turkish Penal Code contains provisions which continue to discriminate against women and provide loopholes for the perpetrators of ‘honour crimes’<sup>177</sup>. During 2005 Dicle University in Diyarbakır conducted a survey on honour killings. The university polled 430 persons in the southeast; 78 percent of those surveyed were men. The survey revealed that 37.4 percent of the respondents believed honour killings were

175 Resolution 1327 (2003) of 4<sup>th</sup> April 2003.

176 *International Herald Tribune* article dated 12 July 2006

177 OMCT Press Release, “OMCT expresses concern at violence against women in Turkey at 30th session of Committee Against Torture”, Geneva, 1 May 2003



justified if a wife committed adultery, and 21.6 percent believed infidelity justified punishments such as cutting off a wife's ear or nose.<sup>178</sup>

While accurate statistics are difficult to ascertain due to women's suicides not always being properly investigated, especially in the Southeast and girls not being registered at birth, women's advocacy groups report dozens of such killings every year. Most NGOs estimate the number of unreported or undetected cases to be significantly higher than the official numbers which are distorted by honour killings often hushed up or women being forced into committing suicide by their family so that honour killings and suicides are inextricably bound up.

The İHD (Human Rights Association) 2005 Balance Sheet on Human Rights Violations in Turkey reported a total of 68 deaths (39 women; 29 men) and 29 cases of people being injured (15 women; 14 men). (Honour related attacks)

The International Helsinki Federation (IHF) for Human Rights June 2006 Turkey reported that; "Thirty-nine women and 29 men fell victim to 'honor killings', and 116 women and at least 45 children were killed as a result of domestic violence."

Although no region is immune, honour killings appear to be more frequent in the Black-Sea Region and in Kurdish inhabited areas in the Southeast, where tribal customs play an important role in everyday life. From the sunni-dominated areas of central-Anatolia (such as Konya) however, fewer cases are reported. 'Honour crimes' are particularly prevalent in Southeastern regions of Turkey but they have also been reported in Istanbul and Izmir.

The new penal code, which came into force in June 2005, *has* made progress in addressing this issue; removing the sentence reductions for murders motivated by 'honour', thus treating 'honour killings' as seriously as any murder. Turkish Prime Minister Erdogan issued a directive on 17 July 2006 aimed at reducing honour killings and domestic violence and calling for 'new and urgent' action. The directive includes setting up a free helpline for victims of domestic violence and a number of educational and awareness-raising initiatives about 'honour crimes'. This builds on the work of a parliamentary commission set up in November 2005 to investigate the incidence and causes of honour killings in Turkey which produced a number of recommendations.<sup>179</sup>

The campaign 'Stop domestic violence' has entered a second phase, after being launched in October 2004 by the daily *Hürriyet*, in cooperation with the Foundation

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178 Ibid.

179 UK Foreign and Commonwealth Office (FCO) Human Rights Annual Report 2006, released in October 2006

of Contemporary Education and the Istanbul Governor's Office. Most daily newspapers and TV channels extended their support to a campaign targeting the education of girls. The legal framework is overall satisfactory, but implementation remains a challenge.<sup>180</sup>

Life sentences were given in October 2005 by two different courts to relatives of women who had been victims of 'honour killings'.<sup>181</sup>

### *Rape*

Rape is a crime of violence, domination and coercion, which affects women disproportionately, causing severe physical or mental suffering. In a landmark case at the European Court of Human Rights (ECtHR) in January 1997, Turkey was found in breach of Articles 3 and 13 of the European Convention of Human Rights in the case of *Aydin v Turkey*<sup>182</sup>. In this case it was found that rape was a form of torture, as 'the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape amounted to torture in breach of Article 3 of the Convention.' The Commission stated that 'the nature of the act of rape, which strikes at the heart of the victim's physical and moral integrity must be characterised as particularly cruel and involving acute physical and psychological suffering...and must be regarded as torture.' Furthermore, whether or not the victim was able to identify the perpetrator was deemed irrelevant.

The applicant was 17-year old girl of Kurdish origin who was detained, tortured and raped by security officers in June 1993. The Government had disputed the applicant's claim, claiming that there was no record of her detention on the custody register. The Court ruled that blindfolding, beating, being paraded naked, and exposed to high pressure water hoses, all amounted to torture.

A formal complaint is still necessary in order to investigate instances of rape, and no amendments have been made to the penal code to make it easier for a victim to prove sexual torture. Under article 102 Sexual Offences, rape is defined as an act of sexual assault '*committed by means of inserting an organ or other object into the body*', for which 'the perpetrator shall be imprisoned for a term of from seven to twelve years. If the act is committed by a spouse, legal investigation and prosecution shall be initiated provided that the victim lodges a complaint.' While this clearly refers to rape, the omission of the word 'rape' is regrettable as it fails to recognise the gravity of the offence, the stigma attached and the classification of the offence as a form of torture.

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180 European Commission 2006 report

181 See USSD 2005

182 See KHRP's report, '*Aksoy v Turkey, Aydin v Turkey*', December 1997.

Aggravated rape, under article 102(3) committed against person of diminished capacity; children or other persons ‘physically or mentally incapable of defending themselves’ incurs a sentence rise of up to half as long again. Provision is also made for the aggravated rape or other sexual assault perpetrated ‘*by breach of duty and/or abuse of official status*’, contemplating the abuse of detainees by security officials; recognising the aggravated nature of a sexual assault on a victim in a situation of powerlessness.

### *Virginity Testing*

In January 1999 the Minister of Justice published a decree prohibiting subjecting women in custody to virginity tests without their express consent. The decree stipulates that such tests may only be used to confirm suspicions of sexual assault, sexual acts committed on minors and prostitution. Only a judge can order such an examination without the women’s consent and then only if it is the sole means of gathering evidence that an offence has been committed. The new [Penal] Code foresees a prison sentence for those ordering and conducting such tests in the absence of a court order. Under Article 287, anyone who without the permission of the authorised judge or prosecutor refers a person for genital examination or performs such an examination shall be sentenced to a term of imprisonment of from three months to one year; although, the provision is defined under section 2. Offences against the Judiciary of the Chapter on Offences against the Nation and State and Final Provisions, rather than under Offences against the Person. Virginity testing is prohibited unless formally authorised by a judge or a prosecutor.

However, the Council of Europe Commissioner for Human Rights has since expressed continuing concern over the situation of women in police custody and the virginity testing of female detainees<sup>183</sup> and KHRP is concerned that women in custody are still being subjected to forced “virginity tests”. Amnesty International visits to prisons in Diyarbakır , Muş, Mardin, Batman and Midyat and interviews with over 100 female prisoners and representatives of the Diyarbakır Bar Women’s Commission established that nearly all of the women had been subjected to “virginity testing”, and nearly all had experienced some form of sexual abuse, either verbal or physical, whilst in police custody<sup>184</sup>.

The Turkish NGO Women for Women’s Human Rights has expressed concern over ‘inadequate’ provision in the new penal code with regard to virginity testing;

the actual term ‘virginity testing’ is not employed in the Penal Code. Instead, Article 287 entitled ‘Genital Examination’ has been included in the new law. The article stipulates that anyone who performs or takes a

183 Report published December 2003

184 AI: 26/02/2003, EUR 44/011/2003 “End Sexual Violence Against Women in Custody: Summary”

person for a genital examination without the proper authorization from a judge or a prosecutor can be sentenced to between three months to one year of imprisonment. Women's groups are protesting this article as it fails to explicitly name and ban the practice, and also because the article does not require the woman's consent for genital examination, thereby leaving room for forced examination and human rights violations.<sup>185</sup>

Merely the threat of a test can be sufficient to cause psychological consequences for the victim of sexual assault. To refuse can be perceived as an admission of "stained honour" and may put the survivor at increased risk of sexual assault. When a woman has been raped, a refusal also carries the risk of being unable to provide evidence that sexual assault has taken place. Forced "virginity testing" cannot be condoned under any circumstances.

CEDAW reported in 2005 that it was concerned that women victims of violence are unaware of their rights and the protection mechanism available to them under the law and that support services for women victims of violence, including shelters, are inadequate in number. Under the recently enacted Law on Municipalities, the responsibility for establishing shelter has been delegated to municipalities without adequate mechanism to monitor its implementation and ensure financing and there does not seem to be any long-term implementation.<sup>186</sup>

The need for shelters is urgent as they provide vital support to women ill-treated and/or abused. According to one study in which 33 per cent of women reported being beaten by their husbands, and 26 per cent reported being beaten by their father before marriage, 91 per cent of women stated that in the difficult times that they encountered ill treatment, they wanted to be able to find shelter from a social foundation.

Despite the legal changes introduced with the enactment of the Law on Municipalities, adopted by Parliament in July 2004, the European Commission 2006 progress report recorded that: "There is still a need to further increase the provision of shelters for women subjected to domestic violence. While legislation provides that municipalities with populations greater than 50,000 were required to establish shelters for women, figures from official sources recording the existence of only 17 shelters for women established under the Social Services and Child Protection Institution (SHÇEK) growing to 30 if those established by other institutions are included, suggest that implementation remains a problem.

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185 As noted in the document "Turkish Civil and Penal code reforms from a gender perspective: the success of two nationwide campaigns", February 2005 by available at [http://www.wwhr.org/id\\_917](http://www.wwhr.org/id_917)

186 Amnesty 11 March 2005 'Implementation of reforms'

Furthermore the legislation that there is contemplates one shelter for every 50,000 people, although according to a recent European Union report there should be one shelter per 10,000 head of population.<sup>187</sup> Turkey, with a population of 70 million people should therefore have approximately 7,000 shelters. Against this, Turkey's 17-30 shelters are clearly inadequate.

Women organisations in Turkey include:

Women's Support and Solidarity Centre in Antalya,

The Purple Roof Foundation in Istanbul,

The Women's Centre (Ka-Mer) in Diyarbakir,

The Women's Solidarity Foundations (KADAV) in Ankara and İzmit.

Women are not immune from the clashes between militant groups and the Turkish Government. After civil unrest in April, Turkish Prime Minister Erdogan suggested that not even women and children would be immune from Turkey's need to win control against terrorists, so this presumably would mean that women and non-combatants could be held arbitrarily by Turkish security forces under the guise of fighting terror. Following his remarks, Turkish security forces conducted mass arrests. Given their precarious state, women in Kurdish regions of Turkey need extra protection from the Government.

Prime Minister Erdogan's comments seem to justify allowing women to become collateral damage in Turkey's battle against militants. According to OSCE guidelines, unrelated parties must not be involved in any detention and if there are not charges pending or no reason for imprisonment, then the inmate must be released. Turkey cannot use its conflict with Kurdish militants to inordinately punish Kurdish women whom Turkey declares are committing an offence, whether by its statutes forbidding the disruption of unity, insulting Turkishness, or Turkey's anti-terrorism law - which has been used to stifle criticism and imprison dissidents in Kurdish regions - since this would amount to double discrimination.

On 7 March 2005 it was reported that; "The European Union has expressed shock and concern at the 'disproportionate force' used by Turkish police during a protest in Istanbul. Police used truncheons and tear gas to break up Sunday's demonstration ahead of International Women's Day. The EU, which has told Turkey it must continue with political reforms, said: 'On the eve of a visit by the EU during which the rights of women will be an important issue, we are concerned to see such disproportionate force used.' 'We were shocked by images of the police beating women and young people demonstrating in Istanbul,' the three EU representatives said in a joint statement. 'We condemn all violence, as demonstrations must be peaceful?... About 300 people gathered for the unauthorised demonstration on

Sunday, chanting anti-government slogans and demanding equal rights for women. After about 100 refused to follow police orders to disperse, officers armed with tear gas and truncheons charged on the crowd, say reports. Police were seen beating and kicking the men and women trying to flee”.<sup>188</sup>

### *Reporting Sexual Violence*

Women who speak out against sexual violence by agents of the state are at risk of further abuse by state agents. As a result of speaking out against such violence, women in Turkey have been subjected to legal action, threats or actual imprisonment. Women who organized and spoke at a conference on “Sexual Violence in Custody” in Istanbul in June 2000 were charged with having insulted the security forces with their denunciation of rape in custody.

Concepts of ‘honour’, and a history of discrimination against women in Turkey, make reporting sexual torture extremely difficult. When agents of the state are the perpetrators, their actions simply reinforce a culture of violence and discrimination. Rape and sexual torture are carried out in the knowledge that they are unlikely to be reported by many of the victims. Many women often do not disclose sexual assault because they believe that reporting it will not result in the perpetrators being punished.

Women surviving sexual violence often have their experiences compounded by being ostracized. Other women have been forced to flee their homes, with or without their families. Those women who do speak out against sexual violence by agents of the state are at risk of further abuse. Women who have spoken out have been subjected to legal action, threats and imprisonment. Lawyers, like Eren Keskin, representing women who have been sexually assaulted in custody have been subjected to official and media persecution<sup>189</sup>. This makes it even more difficult for survivors of sexual violence to obtain justice, and contributes to the silence surrounding sexual crimes. Eren Keskin has had 100 charges laid against her on account of her work, and her indictment illustrates the current problems faced by human rights lawyers in Turkey.

### *Medical Evidence*

In Turkey, medical examinations are needed to provide evidence of sexual torture. However, they do not always take place in situations conducive to either safety or disclosure. Individuals often refuse to undergo an examination in the presence of security forces so the individual is not able to obtain medical evidence to document their torture claims without violation of the right to privacy. Doctors in Turkey

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188 BBC News on 7 March 2005

189 ‘Turkey: Sexual Violence of Women in Detention’, 26th February 2003, [www.hrea.org](http://www.hrea.org)

are employed by the state, and run the risk of being transferred from their duties or overlooked for promotion if they write reports that document signs of torture.

Perpetrators of sexual torture often remain unpunished due to delays in obtaining medical reports, refusals to request them by the relevant courts or prosecutors, the refusal to accept medical reports from independent sources, and the refusal to make medical reports available to plaintiffs or their lawyers. Victims of sexual violence are therefore often denied their right to redress and reparation, particularly when perpetrators of sexual violence have been State actors.

KHRP calls on the government of Turkey to continue an immediate and impartial investigation into all allegations of sexual violence and torture against women. Turkey is a State Party to international instruments that prohibit and punish torture and violence against women, including the Convention against Torture and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The failure to investigate the incident only serves to contribute to the climate of impunity that fosters the use of rape as a weapon of oppression of female detainees.

KHRP recommends that Turkey alter its practices with regard to sexual violence of women in detention. It must improve access to medical attention and reliable medical evidence for victims of sexual torture; increase both the resources and the resolve to investigate and prosecute the perpetrators of those responsible for sexual violence; amend the Turkish Penal Code to define 'virginity testing' expressly under Offences against the Individual, rather than as an offence categorised under Offences against the Judiciary and amend Turkish Penal Code article 102 to define 'rape' expressly by name.

### *The Abuse of Children in Detention*

The state of emergency and exceptional state security measures, have paved the

way for abuses of power, arbitrary arrests and detention of children in Turkey.<sup>190</sup> Children as young as 11 years of age accused of crimes under the jurisdiction of the State Security Courts were treated as adults while in detention, leaving them vulnerable to severe forms of torture and ill-treatment<sup>191</sup>. Although the law *now* provides for special safeguards for children in police custody, so that Juvenile offenders are now held by specialised police forces supported by psychologists and social workers, and prosecuted by specialised prosecutors before special courts for

190 Recent cases such as that of F.A. (17) and E.A.(18), who were arrested for the alleged raping of the girl Z.K. (14) in Aziz Nesin Foundation in Çatalca town of Istanbul, suggest that the torture/ill-treatment of juveniles in detention continues.

F.A and E.A were detained on 8 January and remained in custody on 10 January. E.A. was sent to Metris Prison while F.A. was sent to Bayrampaşa Prison for being younger than 18 years. Upon a report by the Forensic Institute certifying that the girl was not raped the juveniles were released on the night of 12 January.

E.A. was reportedly continuously beaten, denigrated and frightened while in Metris Prison where he was forced to sleep on the ground and traces of kicks on his legs and swelling to his head were reported. F.A. was subjected to phalanga and beaten by plastic pipes after being stripped naked, threatened with rape and with being sent to the “ward of rapists”.

FA stated:

*“Torture started immediately after we entered the prison. A guard asked my crime at the entrance. I did not respond him. He hit my legs and hands with long plastic pipes after he learned my crime from another guard. Afterwards he laid me on the ground and hit my soles with a stick. I was walking on my heels due to the pain. He got angry with me for not walking normally and hit my back with the plastic pipe. After a while they took me to the quarantine room. We were six persons in the two square meter room. We got out there next morning. Another guardian hit my nape, kicked and said: “you the perverted grandchildren of Nesin”. They cut our hair after putting us in order. ‘Master of the ward’ in A-1 ward beat me after he learned the accusation against me. Around 24.00 the guard came and said that I could go. I did not have money because they took my 100 YTL. Someone gave me 10 YTK. When I left the prison in the dark it was raining. I went home by tram.”*

E.A. reported the following:

*“It was my birthday on 8 January (Monday) when I was put in custody. I was sent to Metris Prison on Wednesday. The soldiers started to beat me immediately after they read the accusation against me in the file. Four soldiers were kicking and slapping me. The guards beat me too after learning my alleged crime. Afterwards they too me to the quarantine room... There were around 80 persons in the quarantine room. I said that I was accused with “theft” when they asked. I was put in the rape ward on Friday. The guard who beat me before beat me again in this ward again. Another guard threatened me to put me in the murder ward. They threatened me indirectly to rape and death.”*

*The juveniles were given reports at Bakirköy Dr. Sadi Konuk Training and Research Hospital certifying the traces of torture and ill-treatment on their bodies*

191 USDOS 2002 Human Rights Report, 31st March 2003. “Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment”



minors, police officers and prosecutors frequently evade or ignore these provisions. The law stipulates that the state prosecutor or a designated assistant should carry out interrogations of minors and that minors must be provided with lawyers; however, in practice, police and prosecutors often denied minors access to lawyers and failed to inform parents.

Research carried out by the University of Hacettepe<sup>192</sup>, involving 40 children between the ages of 14 and 17, into the children's prison at Ankara recorded the abuse of children subject to hosing, sexual abuse and electrocution, with rough beatings and cold water used during interrogation, and threats of violence and torture for revealing the ill-treatment to forensic medical doctors during exams. The research reported the belief among the children that there was collusion between the security/prison officials and the doctors.

### *Conditions of juvenile detention*

Children aged between 11 and 18 years are staying in the same cell, which has led to violence and sexual harassment among the children. There are also allegations that the prison management encourages children to form gangs, providing children with sharp objects, so that many children who are freed from the prison have cut marks on their bodies. The prison management also made it very difficult for lawyers to see the victims, following the Committee's report.

The CPT has made clear its serious misgivings concerning the policy of having juveniles who are remanded in custody placed in prisons for adults, compounded by a combination of mediocre material conditions and an impoverished regime, with minimal equipment in units in a poor state of repair or hygiene.

The CPT has also expressed concern that establishments consistently fail to provide the juveniles in their custody with a programme of activities adapted to the needs of the age group and that prison staff called upon to deal with these inmates had not received any special training. Almost all juveniles in detention spend practically all of their time in their units, unsupervised, and with little to do other than watch TV and play games.

Management staff stress the lack of material and human resources necessary to improve the situation.

The CPT has repeatedly emphasised that it would be preferable for all juvenile prisoners, whether on remand or sentenced, to be held in detention centres specifically designed for persons of this age, offering regimes tailored to their needs

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192 'The Children's legal system in the eyes of children inmates'

and staffed by persons trained in dealing with the young. In their responses, the Turkish authorities have referred to plans to bring into service more remand prisons for juveniles (in addition to the two which already exist and the three Reformatories for sentenced juveniles in Ankara, Elaziğ and Izmir).

The essential components of an appropriate custodial environment for juveniles are: accommodation in small units; a proper assessment system to ensure suitable allocation to units; a multi-disciplinary team (preferably of mixed gender) selected and specially trained for work with juveniles; a full programme of education for those below school leaving age, with emphasis on literacy and numeracy skills, as well as further education and vocational training for older juveniles; a daily programme of sport and other recreational activities; association and social activities; facilities to allow juveniles to maintain close contact with their families, with due attention paid to the situation of female juveniles in detention.

In 2006 the United Nations Expert on Violence Against Women concluded its mission to Turkey and the Committee on the Rights of the Child concluded its findings on Turkey's state party report.

## V. ECtHR Article 3 Cases

Turkey topped the European Court of Human Rights' annual table of violations in 2005, with 270 judgments recording at least one violation, and again in 2006 with 320 final judgments finding that Turkey had violated at least one article of the ECHR. With 2280 applications lodged in 2006 regarding Turkey. Most of these referred to cases lodged prior to 1999 and the beginning of the reform process. Of the 2100 new applications made from 1 September 2005 until 31 August 2006 regarding Turkey, more than two thirds refer to the right to a fair trial (Article 6) and protection of property rights (Article 1 of Protocol No 1). The right to life (Article 2) and the *prohibition of torture* (Article 3) are referred to in 78 and 142 cases respectively.<sup>193</sup> With 9016 cases pending before the Court as at 1 January 2007 (10% of the total) and 1097 final judgments recorded from November 1998 and 20141 applications lodged in the same period.

The European Court of Human Rights has found Turkey in breach of Article 3 of the ECHR in several high profile cases in previous years, including the first case in which the ECtHR delivered a finding of torture against a European State, *Aksoy v. Turkey*. Cases submitted by KHRP have been instrumental in modifying the definition of torture under Article 3 of the ECHR, such as the landmark cases of *Aksoy v Turkey*, *Aydın v Turkey*, and *Taş v Turkey*, all developing the definition of treatment constituting a violation of Article 3.

In the last year, 2280 new applications have been made to the Court, highlighting the urgent need for more effective implementation of reforms concerning human rights. The failure to provide an effective domestic remedy has been the most prevalent complaint made to the Court in recent years, exposing the widespread failure of the Turkish authorities to secure the most fundamental human rights. While many may view the Court's adverse rulings as a sign that Turkey is being held to account for failing to prevent the practice of torture, the truth is far more alarming. Although the Court has ordered Turkey to compensate victims and implement further reforms, examples from the previous chapters show that abuses have continued.

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193 2006 EU progress report on the Turkey's Accession

With the reforms having been enacted in the early 2000's, and the process for consideration of applications before the Court taking some years, and with most of the cases before the Court having been lodged before 1999, it will be a while before the Court's jurisprudence reflects the effectiveness of those reforms; the *Committee of Ministers* has however had engagement with some of the reforms in terms of general measures taken by Turkey to remedy specific violations the subject of individual complaints and the systemic problems contributing thereto.

Two themes are overridingly prevalent in the Court's jurisprudence: Firstly the Article 3 cases see the Court consistently reiterating that where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the veracity of the victim's allegations, particularly if those allegations are backed up by medical reports. Failing this, a clear issue arises under Article 3 of the Convention<sup>194</sup>. Secondly, the failure to investigate allegations of torture and ill-treatment can itself constitute a violation of Article 3 and/or 13. Both see the Court developing the procedural obligations involved in article 3.

In *Dilek Yılmaz v. Turkey*<sup>195</sup>, the applicant was arrested on 7 October 1995, on suspicion of belonging to an illegal organisation, and taken into police custody. On 12 October 1995, when she was released from police custody, the applicant was examined by a doctor who noted a 3 cm area of bruising on the inside of her left elbow. The Court observed that where a person is injured in police custody while entirely in the charge of police officers, any injury occurring during that period gave rise to strong factual presumptions. In the absence of any plausible explanation by the Turkish Government, the Court considered that Turkey bore responsibility for the applicant's injury. Accordingly, it held that while in police custody Ms Yılmaz had suffered inhuman and degrading treatment which had constituted a breach of Article 3.

The Court decided to examine the applicant's complaint about the lack of an effective remedy from the standpoint of Article 13, rather than under the procedural aspects of Article 3. Following the applicant's complaint, an investigation had been opened in the course of which statements were taken from the applicant and the police officers concerned, but not from the doctor who had examined her or from the inspector whose name she had given. That investigation, not explaining the origin of the applicant's injury or identifying those responsible, had ended with a

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194 *Çolak and Filizer v. Turkey*, 32578/96 and 32579/96; *Selmouni v. France* [GC], 25803/94; and *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2278, § 61

195 58030/00 judgment of 31 October 2006

discontinuation order. Accordingly the Court found a violation of Article 13. In *Göçmen v. Turkey*<sup>196</sup>, the Court found the Respondent State in violation of Article 3. The applicant had repeatedly informed the authorities that he had been subjected to treatment contrary to Article 3 in connection with the proceedings against him, submitting a medical certificate in support of his allegations that had not been taken into consideration even though, under Turkish, and international, law a prosecutor informed of such accusations should take immediate action. Again, pointing to the contempt with which allegations of torture and ill-treatment are treated. The lack of any investigation was sufficient for the Court to conclude that the applicant had not had an effective remedy within the meaning of Article 13. It therefore held that there had been a violation of Article 13.

The Court has placed stringent obligations on member States to investigate allegations of torture and inhuman or degrading treatment. Article 13 taken in conjunction with Article 3 gives rise to an obligation on member states to carry out a *thorough* and *effective* investigation capable of leading to the identification and punishment of those responsible, and where appropriate the payment of compensation. In *Esen*<sup>197</sup> the Court pointed out that a *prompt* response by the authorities in cases involving allegations of ill-treatment could generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. In that case, the Court observed that the police officers had been able to act with complete impunity in spite of the concrete evidence against them established by the court of first instance. In these circumstances, the Court took the view that the Turkish authorities could not be considered to have acted promptly to ensure that the police officers implicated did not enjoy virtual impunity and consequently found a violation of Article 3.

Similarly in *Okkalı v. Turkey*<sup>198</sup> the Court found that the impugned criminal proceedings had failed to provide appropriate redress for an infringement of the principle enshrined in Article 3 in respect of an investigation in which the prosecutor had indicted the officers for the offence (defined by Article 243 of the Criminal Code) of ‘obtaining by a public official of a confession under torture’, but for which the Assize Court had acknowledged that the applicant had been beaten by police officers but decided to reclassify the offence as ‘assault and ill-treatment’, handing down the minimum sentence, which it mitigated on account of the defendants’ good conduct during the trial, then commuted the prison sentence to a fine and ordered a stay of execution.

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196 72000/01 judgment of 17 October 2006

197 49048/99 judgment of 8 August 2006

198 52067/99 judgement of 17 October 2006

An identical judgment that was ensuing, following a referral back to the Assize Court by the Court of Cassation, was subsequently upheld by the Court of Cassation on 24 March 1999. The applicant's action for damages against the Ministry of the Interior was dismissed for being time-barred.

The Court considered that the criminal-law system as applied in the applicant's case, had proved to be far from rigorous and had had no dissuasive effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant, and accordingly found that the impugned proceedings, in view of their outcome, had failed to provide appropriate redress for an infringement of the principle enshrined in Article 3. Here the Court attaches significant importance to the *procedural* aspects of Article 3, finding a violation by reference to the operation of the avenues for redress. This signals a willingness of the Court to define Article 3 broadly to encompass what might otherwise come under Article 13.

Again in *Öktem v. Turkey*<sup>199</sup> the Court found that the virtual impunity afforded to the perpetrators of acts of torture against the applicant, by virtue of the proceedings having lasted more than eight years and consequentially having run beyond the limitation period, was sufficient to show that the remedy had not satisfied the criterion of 'effectiveness' for the purposes of Article 13.

Following the initial acquittal by the Istanbul Assize Court on 14 November 2001 of four police officers in criminal proceedings, the Court of Cassation quashed the judgment and remitted the case to the Assize Court for fresh consideration. On 9 February 2004 the Assize Court found all the police officers guilty of torture within the meaning of Article 243 of the Criminal Code in respect of Mr Öktem with a view to extracting a confession from him, and sentenced them to ten months' imprisonment, in addition prohibiting them from holding posts in the civil service for ten months. It nevertheless suspended their sentences.

The applicants again appealed to the Court of Cassation. However, on 17 March 2005 the Court of Cassation, while acknowledging that the offence of torture had been made out, discontinued the proceedings as the limitation period had expired.

#### *Burden of Proof and over reliance on Medical Reports*

While the recognition, and condemnation of the impunity afforded to the perpetrators of torture in *Öktem* is positive, what is regrettable is the unwillingness on the part of the ECtHR to consider the finding of a violation of *any article* (even article 13 or the procedural aspects to article 3) *vis* the treatment of Mrs. Öktem *in the absence of corroborating medical evidence*, when the substantiated

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199 74306/01 judgment of 19 October 2006

ill-treatment of her husband in parallel and analogous detention, taken with the allegations of Mrs. Öktem, might have supported such an inference. The Court however dismissed the complaint with regards to the treatment of Mrs. Öktem for insufficient evidence. Even the finding of a violation of Article 13 was formulated *vis* the treatment afforded to Mr. Öktem for which there was corroborating medical evidence in support of the allegations.

In the absence of corroborating medical evidence the Court might have relied on either the procedural elements to Article 3 or Article 13 to find a violation with regard to the applicant's complaints. However in Öktem the dismissal of the complaints as inadmissible in respect of Mrs Öktem's several medical reports having found no evidence of torture or ill-treatment on her body, suggests an unwillingness to contemplate violations of even the procedural elements to Article 3 or of Article 13 in the absence of medical evidence.

This unwillingness to find a violation in the absence of corroborating medical evidence is regrettable if the Court is to react to new methods of ill-treatment, such as sleep and food deprivation, hosing, and other forms of psychological torment.

The Court has consistently reiterated that, in assessing evidence in a claim of a violation of Article 3 of the Convention, the applicable standard of proof is "beyond reasonable doubt"<sup>200</sup> and that such proof may '*follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact*'<sup>201</sup>. However in the absence of having pre-determined the existence of a sustained 'practice or pattern' of ill-treatment, the only 'unrebutted presumptions of fact' the Court seems willing to entertain are those raised by corroborating medical evidence.

Medical documentation *is* probably the single most effective source of evidence for recording torture. However it is *rarely* conclusive, (proof with certainty that torture occurred), because of the many forms of torture leaving very few traces, and even fewer leaving long-term physical signs. It is also often difficult to prove beyond question that injuries or marks resulted from torture and not from other causes. While not conclusive what medical evidence can do is to provide a valuable record to demonstrate that the injuries found are *consistent with* (could have been caused by) the torture described.

200 See *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII. *Keser and Others* 33238/96 & 32965/96 Judgment of 2 February 2006

201 See *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 161

In *Gökçe*<sup>202</sup> the applicants complained of having been subject to Palestinian hanging, blindfolding and deprivation of food. Despite allegations to the effect that *medical personnel had been put under pressure by the State authorities at the relevant time*, and that the applicant *had* actually complained of a pain in his shoulder before the doctor yet had not been taken to a hospital for a more detailed examination, the Court concluded that the absence of corroborating medical evidence was determinative.

Although in the instant case the timing and lack of detail in the applicant's allegations (*taken together* with the lack of corroborating medical evidence) cast doubt on their reliability, the *consistent* and *sustained* unwillingness on the part of the Court to pursue allegations *even in light of the stringent procedural obligations incumbent on states under Article 3 or by Article 13* reflects a regrettable pattern. This is even more so in the case of allegations made regarding the integrity of the medical reports themselves.

While the Court has explicitly stated that it 'recognises the difficulty for detained people to obtain evidence of ill-treatment during police custody', its consistent practice, bordering on blanket dismissal of uncorroborated claims, betrays its expressed sympathy.

Similarly in *Yüksektepe v. Turkey*<sup>203</sup>, relying on *Tanrikulu and Others v. Turkey* (dec.)<sup>204</sup>, the Court considered the complaints with regard to Article 3 inadmissible for lack of corroborating medical reports, reiterating that 'allegations of ill-treatment must be supported by appropriate evidence'.

In the KHRP assisted case of *Karaoglan v Turkey*<sup>205</sup> the Court again found 'the lack of corroborating evidence' sufficient to dismiss the applicant's complaint with regard to Article 3, finding a medical report submitted corroborating the applicant's story inconclusive for being submitted two years after the alleged ill-treatment, dismissing a *prima facie* reasonable explanation as to the lack of *earlier* corroborating medical reports submitted in support of the allegations.

The applicant claimed that during his arrest he had been dragged by force and subjected to beatings and that while in custody he was subjected to electric shocks and to "Palestinian hanging", forced to drink urine, hosed with pressurised water and burned with cigarettes. Through the proceedings the applicant constantly

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202 *Gökçe and Demirel v. Turkey* 51839/99 22 June 2006

203 No. 62227/00, 24 October 2006

204 No. 45907/99, 22 October 2002

205 No. 60161/00 (dec.) 10 May 2005



denied the allegations made against him contending that the statement he made to the police on 21 March 1998 taken under duress was signed without reading it.

On 15 December 1998 the Izmir State Security Court convicted the applicant and sentenced him to twelve years and six months' imprisonment. This decision was later upheld by the Court of Cassation. The State Security Court, in its decision, took into account two medical reports taken at the time of the events which stated that the applicant bore no signs of the alleged ill-treatment (which it found sufficient not to initiate an investigation into the allegations); findings the ECtHR would later rely on.

During release pending trial, the applicant contended that he was treated at the Diyarbakır Hospital by Dr K.S. and a nurse Ms A.B., however, in response to a request by the Registry of the ECHR, for the applicant to provide the Court with the medical reports mentioned in the judgment of the State Security Court and the medical reports pertaining to the treatment the applicant had received from Dr. K.S, the applicant informed the ECtHR that Dr. K.S. and Ms A.B. would not submit their medical report or any statements for fear of persecution. The applicant *did* submit undated eye-witness testimony by Damiano Giovanni, a free-lance journalist, in support of his allegations of ill-treatment.

Medical reports prepared *on 19 May 2000*, albeit two years after the events, by a Dr Jean Paul Martens in Belgium, *did* find somatic injuries and symptoms consistent with the alleged treatment including:

- a) cervical vertebral column, shoulder girdle and right arm: pain syndrome and functional problems which are consistent with elongation injuries of the plexus cervicalis and brachialis. Particular cervical reaction. Compatible with the patient's story: suspension by the arms behind the back and the like.
- b) capsulitis glenohumeral at the right side with slight capsule retraction and arguments for chronic subacromial bursitis.
- c) tendonitis extensor carpi radialis at the right side, tenoperiosteal.
- d) scar near the right scrotum, round, white. According to what I have been told there was a serious swelling after torture in the form of pinching.
- e) sharply limited, round, pale skin atrophy near right foot. As a consequence of having lost conscience the patient does not know the injury type. There was scab formation in the acute phase. Compatible with scar left by a burn, possible electrically caused.
- f) the patient also stated having been tortured with electricity near the penis. No detectable injuries.
- g) sporadically short macroscopic haematuria. Did not occur during examinations. The patient states having urinated blood in the course of 14 days after ill-treatment. Further medical examination is required.

The Court found this report inconclusive for having been drawn up two years after the applicant was released from police custody; finding that while relevant, the report ‘cannot be regarded as affording strong support for the applicant’s allegations.’ The Court further found the lack of *prompt and conclusive* medical reports corroborating the applicant’s story, taken along with the two year delay in the only corroborating medical report, sufficient to dismiss the claim as ‘*manifestly ill-founded*’.

It is submitted here that while the delay and the existence of contradictory medical evidence might point to inconsistency, and to the *unsubstantiated* nature of the claim, it does *not* support a finding of the complaint as ‘manifestly ill-founded’. Rather the medical evidence documented in the report of May 2000 taken with what is *prima facie* a reasonable explanation as to the non-production of the reports from Diyarbakır hospital should *at the least* call into question the integrity of the original reports relied on by the State Security Court.

The Court further alluded to the fact that the applicant only claimed to have been ‘under duress’ before the prosecutor and the courts, finding that a mere allegation of duress in itself, without any description as to what form that duress had taken, is not sufficient to be interpreted as an allegation of ill-treatment.’ This given in support of the Court’s determination that ‘[t]herefore, the national authorities had no evidence to start an investigation into the applicant’s allegations’.

It is suggested that the ECtHR’s approach to the burden of proof is not entirely inline with that of CaT. While the applicant’s complaints were not detailed, they never the less clearly allege the extraction of statements, being used in court, under duress. In light of the obligations under CaT to investigate allegations, even in the absence of an express or detailed complaint, to investigate *where cause for concern is brought to their attention*, and for *the state* to assume the burden, where allegations regarding the extraction of statements under duress, of proving that such statements were not procured as alleged, the allegations might have triggered an investigation.

Thus while the report drawn up in 2000 *might* support a direct finding *vis* the treatment of the applicant, the failure to investigate the allegations of statements extracted under duress, might support a finding in relation to the procedural aspects of Article 3, or Article 13.

Instead the Court decided that Article 13 applies only where an individual has met the requisite standard of having made an “arguable claim” to be the victim of a violation of a Convention right.

*(Non-) recognition of a practice or pattern of ill-treatment*

This over reliance on medical evidence as the sole source for presumptive

findings reflects a further unwillingness on the part of the Court to entertain presumptions that might otherwise be drawn from the recognition of an existing ‘*practice or pattern*’ of torture or ill-treatment.’ The Court has been unwilling to recognise the existence of such a pattern. Most notably, this surfaces in the Court’s jurisprudence in the context of disappearances, where *Çiçek* remains authority for the evidentiary requirements needed to establish a violation in the ECtHR, and where the comparable jurisprudence of the IACtHR is instructive to the lower burden of proof required for a finding of an individual violation following a finding of a sustained practice. In *Velásquez Rodríguez*, the IACtHR concluded a pattern or practice of forced disappearance existed in Honduras “supported or tolerated” by the government, from evidence such as testimony from victims of arbitrary detentions during the relevant period, interviews with family members whose relatives were disappeared, and general country reports produced by independent, non-governmental organizations.

After concluding the existence of such a pattern or practice, the IACHR stated that if the applicant could link the disappearance of a particular individual to that practice, then the “disappearance of [a] particular individual [could] be proved through *circumstantial or indirect evidence or by logical inference*.” The value of the IACHR’s holding is significant because it lowers the burden of proof for an individual to establish that a forced disappearance occurred.

Similarly the recognition of a sustained pattern or practice of *torture* steers analysis of the requisite standard of proof for the finding of subsequent violations, so that an applicant can establish the victim suffered torture based on “circumstantial or indirect evidence or even by logical inference.”

The ECHR’s employment of proof beyond a reasonable doubt arising solely on medical evidence to establish a claim of torture, other than being regrettable for its effective non-recognition of the many forms of torture leaving very few traces, and even fewer leaving long-term physical signs, raises other concerns in light of the objectives of international human rights law. The evolution of methods of torture less easily detected poses obvious problems for the over reliance by the ECtHR on medical documentation; further, as the IACHR emphasized in *Velásquez Rodríguez*, “international protection of human rights should not be confused with criminal justice.” An international human rights proceeding is civil rather than criminal in nature; the objective being not “to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for reparation of damages resulting from the acts of the States responsible.”

A determination as to the existence of systemic practice of torture or to the prevalence of ill-treatment in Turkey and recognition of the widespread and systematic use of new methods of ill-treatment such as blindfolding, hosing and sleep deprivation, so

as to enable further inferences to be drawn would be an important step in lowering the threshold of evidentiary proof required for the finding of violations both in the absence of medical evidence *as well as* in the context of disappearances. Such a determination would also *not* represent such a drastic leap in light of both the Committee of Ministers and the Parliamentary Assembly having *already recognised* (under Interim Resolution ResDH(2005)43, below)<sup>206</sup> the ‘systemic nature of violations carried out by the security forces’. In light of this, the determination/recognition or not as to the systematic/systemic nature of torture in Turkey is central.

The Court’s jurisprudence also sees a notable recurrence of violations of applicant’s rights to liberty and security in terms of the procedural and custodial safeguards leading to a consequential violation of the prohibition of torture. In *Yilmaz* (above) the Court stated that a *strict* application, right from the beginning of a deprivation of liberty, of fundamental safeguards – such as the right to request an examination by a doctor of one’s choice in addition to any examination required by the police authorities, and access to a lawyer and family member, backed up by the prompt intervention of a judge – could lead to the detection and prevention of ill-treatment which might be inflicted on prisoners, for whom the authorities were responsible.

#### *Turkey’s Execution of ECtHR Judgments*

Despite internal reforms and Court judgements against Turkey, implementation remains the key to true progress in Turkey’s human rights standards. The issue of Turkey’s compliance with the Court’s judgments in various fields has in the past called for the Parliamentary Assembly’s special attention<sup>207</sup>. The EU Parliament stated in May 2003 that Turkey’s ‘amendments still leave scope for repressive actions by the police and ... little has changed on the ground.’<sup>208</sup> In October of the same year, the Committee of Ministers of the COE adopted an Interim Resolution regarding lack of compliance by Turkey with the judgements of the ECtHR<sup>209</sup>, also finding that not all necessary measures had been taken with respect to judgements made regarding abuses by security forces. The 2006 European Commission progress report acknowledges that the implementation of Turkey’s reforms remains a challenge, stating that while ‘reforms undertaken by Turkey in 2004 and 2005 *have* had positive consequences on the execution of judgments of the ECtHR... Turkish

206 See the Rapporteur’s consideration of the measures taken to address the structural problems raised by the cases concerning the security forces the subject of ResDH(2005)43, below - next pg

207 See Resolutions 1297 (2002) and 1381 (2004), Recommendation 1576 (2002)

208 European Parliament Resolution, P5\_TA-PROV(2003)0218-15.5.2003-11-05

209 This was made regarding the case of *Loizidou v Turkey*, Application No. 15318/89, a Cypriot woman who lost land and property as a result of the actions of Turkish security forces. In June 2003, Turkey promised to pay EUR 1.12 million in compensation as stipulated by the Court, although it was not until December 2003 that any payment was made.

cases still represent 14.4% of the cases pending before the Committee of Ministers for execution control.’

Recently Turkey’s record of compliance with the judgments of the ECtHR has again drawn the attention of the Assembly.<sup>210</sup> Following decisions taken at the Council of Europe by the Committee of Ministers to the effect that the *Assembly* should address the issue of execution of the Court’s judgments, the Assembly’s Committee on Legal Affairs and Human Rights has adopted a more proactive approach and given priority to the examination of major structural problems concerning cases in which unacceptable delays of implementation have arisen in five member states, including Turkey. Special *in situ* visits were thus paid by the Rapporteur to these states in order to address the problem of non-compliance.

The main problems of compliance, warranting the Rapporteur’s special attention with respect to Turkey were:

- 1/3 The reopening of domestic proceedings in the case of *Hulki Güneş* (28490/95), judgment of 19/06/2003, in which the applicant continues to serve his prison sentence on the basis of the conviction imposed with serious violations of the right to a fair trial, culminating in Interim Resolution ResDH(2005)113;<sup>211</sup>

In terms of individual measures pushed by the Committee, the *reopening of proceedings requested since 2003* was paramount. The case is similar to *Sadak, Zana, Dicle* and *Doğan*<sup>212</sup> in which proceedings *had* been reopened following the coming into force of Law No. 4793 of 23 January 2003 (specifically providing for the reopening of cases the subject of ECtHR findings of violations). However, those provisions do not enable the criminal proceedings to be reopened in the present case as the relevant legislation rules out retrial in cases pending before the European Court on 4 February 2003.<sup>213</sup>

210 The Parliamentary Assembly Doc. 11020 18 September 2006

211 The case concerns the lack of independence and impartiality of the Diyarbakır State Security Court on account of the presence of a military judge (violation of Article 6§1,ECHR) and the unfairness of the proceedings before that court: the applicant was sentenced to death (subsequently commuted to life imprisonment) mainly on the basis of statements made by gendarmes who had never appeared before the court, and the applicant’s confessions had been obtained when he was being questioned in the absence of a lawyer and in the circumstances which led the European Court to find a violation under Article 3 (and violation of Article 6§§1 and 3d). The case also concerns the ill-treatment inflicted on the applicant while in police custody in 1992 which the European Court found to be inhuman and degrading (violation of Article 3).

212 (Final Resolution ResDH(2004)86)

213 This was a measure designed to preclude retrial in the case of Ocalan, but captures other cases before the ECtHR the same year.

As no progress in the implementation of the judgment had been achieved, at the 948th meeting (November 2005), the Committee adopted Interim Resolution ResDH(2005)113 calling on the Turkish authorities to redress the violations found in respect of the applicant without further delay through the reopening of the impugned criminal proceedings or other appropriate ad hoc measures.

Meanwhile, Hulki Güneş remains in prison.

The abolition of the state security courts in 2004 following constitutional amendments was referred to the Committee of Ministers in terms of general measures taken to address violations concerning the independence and impartiality of the court, however the new special Heavy Penal Courts continue to try cases that had started before them when they were State Security Courts and the continuation of human rights violations that persisted under them as State Security Courts betrays their technical abolition. Accordingly it has been suggested that while “*It is said that the [State Security Courts] were abolished...actually they were not. Only their names [and] the signs at the entrance changed and they became heavy penal courts equipped with special powers.*”<sup>214</sup> The persistence of violations under the newly constituted courts impeaches their remedial value as an effective general measure, particularly given the introduction of the anti terror legislation of 2006.

The general measures the state referred to with regard to the *ill-treatment inflicted on the applicant*, concern those under way in cases concerning action of the Turkish security forces pending before the Committee (see below).

- 2/3 Further progress to be made in implementation of the *Cyprus v. Turkey* judgment of 10/05/01 following the Committee of Ministers’ recent Interim Resolution ResDH(2005)44, notably to ensure effective investigations into the fate of Greek Cypriot missing persons, this being central to resolving the Cyprus issue, Interim Resolution ResDH(2005)44;
- 3/3 Strict implementation of the new legal framework aiming at the respect of the ECHR by the security forces in line with the recent Interim Resolution ResDH(2005)43;

Turkey’s implementation of judgments *relating to abuses by security forces* and/or the lack of effective investigation into such abuses has warranted the specific

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214 Köksal Bayraktar, Professor of Law, Galatasaray University, taken from Amnesty International Report\_EUR 44/013/2006 6 September 2006 <http://web.amnesty.org/library/Index/ENGEUR440132006?open&of=ENG-TUR>

attention of Interim Resolution ResDH(2005)43; The cases the subject of this resolution concern violations of Articles 2, 3, 5, 6, 8 of the Convention and of Article 1 of Protocol No. 1, notably in respect of unjustified destruction of property, disappearances, infliction of torture and ill-treatment during police custody and killings committed by members of the security forces.

All these cases highlight the general problem of the lack of effective domestic remedies capable of redressing violations of the Convention (violations of Article 13), and all the violations found can be attributed to a number of structural problems, these being: the general attitudes and practices of the security forces, their education and training system, the legal framework of their activities<sup>215</sup> and, most importantly, serious shortcomings in establishing at the domestic level administrative, civil and criminal liability for abuses.

Following calls to the Turkish authorities to rapidly adopt comprehensive measures remedying these shortcomings in order to comply with the Court's judgments, and following a series of the reforms adopted since 2002, the Committee adopted a new Interim Resolution<sup>216</sup> assessing the progress in the implementation of these judgments. The Committee welcomed numerous recent measures adopted by the authorities in response to the Court's judgments and the Committee's two previous Interim Resolutions of 1999 and 2002. The Committee welcomed in particular the authorities' "zero tolerance" policy against torture and ill-treatment, as evidenced in particular by the introduction of additional procedural safeguards and of deterrent minimum prison sentences for torture. The Committee also welcomed the recent constitutional reform reinforcing the status of the Convention and of the Court's judgments in Turkish law. At the same time, the Committee stressed the need for strict implementation of new legislation. It is notable that the Committee's consideration of Turkey's efforts to address the aforementioned structural problems, including the wide powers of the security services came before the introduction on the anti-terror legislation of 2006; not having a chance to comment on its impact. The Committee's assessment of this is, however, eagerly anticipated with the law having been described elsewhere as; '*surrender[ing] personal rights and freedoms to the conscience of the security forces...eliminate[ing] basic human rights.*'<sup>217</sup>

The case of *Doğan v. Turkey*<sup>218</sup>, and the ensuing enactment of the new Compensation Law is cited by the assembly as a *positive example* of the progress in the execution of judgments of, and increased respect for the ECtHR and the Committee of Ministers. The Parliamentary Assembly in resolution 1516 (2006) welcomed in particular what it called; '*the decisive progress achieved in:*

215 Now including the controversial 2006 anti-terror legislation

216 ResDH(2005)43 07/06/2005

217 Quoted in Desmond Fernandes above, see note 7

218 8803/02, judgment of 10/11/2004

9.3. *Doğan v. Turkey*, a judgment... raising an important systemic problem: in response, Turkey adopted and implemented a new Compensation Law, thus providing to all internally displaced persons an effective domestic remedy to obtain compensation for property destroyed (without prejudice to their right to return).’

There are approximately 1500 similar cases from South-East of Turkey concerning the denial to the applicants of access to their property in South-East Turkey since 1994 on security grounds registered before the European Court. This figure constitutes 25% of the total applications filed in respect of Turkey.

In terms of the General measures taken to remedy the specific violation in *Doğan* and resolve the structural problems: firstly the *Law on Compensation*<sup>219</sup> and *relevant Regulations* provide alternative possibilities to obtain, directly from the administration, compensation for pecuniary damages caused to natural or legal persons as a result of terrorist activities and operations carried out in combating terrorism during the period 1987 to 2005 with a possibility of judicial review of decisions taken in this respect. Secondly the Turkish authorities submitted an outline of a *Research Project* by the Institute of Population Studies at the University of Hacettepe in Ankara to determine certain points which will assist the Turkish Government to improve the situation of IDPs in Turkey.

The decision of the European Court in the case of *İçyer v. Turkey*<sup>220</sup> in which the Court concluded that the Turkish government had (following and in response to the Court’s decision in *Doğan and others*) taken several measures, including enacting the Compensation Law, and may therefore be deemed to *have introduced an effective remedy* which could have been pursued by the applicant in the current case, is cited as endorsement of those measures. Accordingly, the Court rejected the applicant’s complaints on the ground of non-exhaustion of domestic remedies.

However the KHRP does not agree with this assessment of the Law on Compensation as providing adequate redress to constitute a measure sufficient to discharge the obligation on the state to address the specific structural problems raised by ECtHR judgments. The KHRP has recorded its concern over flaws in the legislation following a fact finding mission to South East Turkey; while the law provides for compensation based on an assessment by compensation commissions, the KHRP considers the constitution of these commissions ‘invites conflict of interest and

219 Law on Compensation of the Losses Resulting from Terrorism and from the Measures Taken against Terrorism (Law No. 5233 adopted on 17/07/2004, amended by Law No 5442 of 28/12/2005)

220 18888/02



threatens to undermine their impartiality and independence.<sup>221</sup> The KHRP further identified the possibility for exclusion from compensation if the applicant had been previously convicted under anti-terror legislation. Those ‘voluntarily’ evacuated are also excluded, and unduly strict evidential formalities preclude open access, placing an undue burden of proof on the applicant which is often impossible to meet. Figures recorded in the fact finding mission report show that of 27,011 applications to commissions before 3 May 2006, 15,112 were rejected, 4,980 for being ‘outside of the scope of the law’ and 1213 for lack of information and documents.<sup>222</sup> In light of these figures, the conclusion that the law constitutes an effective remedy sufficient to discharge the obligations on the state to address the systemic problem is questionable. The lack of compensation for distress and suffering, a failure to provide legal aid for applicants and undue delays in the process and the arbitrary calculation of awards under the scheme all contribute to the failure to meet international standards of redress, failing to provide a remedy for actual violations which have occurred, which is a requirement under Article 13.<sup>223</sup>

The ECtHR has requested the payment of compensation in a number of cases regarding torture. In August 2002, the ECtHR required the country to pay Abdulkaki Akbay \$37,000 (50 billion Turkish Liras) in compensation for torture whilst in detention in 1995. Akbay also received a written statement from the Government expressing regret for the mistreatment of detainees<sup>224</sup>. In *Berkтай v Turkey*<sup>225</sup>, the applicants, who are father and son from Diyarbakır were arrested on suspicion of involvement in terrorist activities. Hüseyin Berkтай, was told his son had jumped from the balcony four floors up and was forced to go to sign a document incriminating his son. Devrim Berkтай was in a coma for 26 days.

The applicant complained of violations of articles 2,3,5,15 and former article 25 (now 34) of the Convention. The Court upheld that there was a violation of article 3 as regards Devrim Berkтай, but there was no violation of article 3 as regards his father. The Court upheld that there had also been a violation of article 13 as all the versions of the incident from the police officers had discrepancies and the criminal court had failed to carry out an investigation. It was also found that there had been a violation of article 5 as there was no ‘reasonable suspicion’ of Devrim Berkтай having committed any offence which therefore warranted the deprivation of his liberty. The Court found that there had been no violation of article 25 however.

221 KHRP publication *The Status of Internally Displaced Kurds in Turkey, Fact Finding Mission Report 2006*

222 Ibid.

223 For a detailed analysis of the Law on Compensation and its Machinery for redress, see KHRP report; *The Status of Internally Displaced Kurds in Turkey*

224 USDOS “Country Reports on Human Rights Practices 2001”, 4th March 2002

225 Application No. 22493/93

The Court awarded the sum of £55,00 to Devrim Berktaş for physical and moral damage, and £2,500 to Hüseyin Berktaş for moral damage.

Article 46 of the ECHR binds all member States to abide by ECtHR judgements in cases involving them as a State. The Committee of Ministers controls the payment of compensation, and the adoption of measures to improve the human rights situation, such as changes to legislation, administrative reforms, or human rights training. However the Committee of Ministers lacks the power to enforce sanctions, and so Turkey has failed to implement remedies in a large number of cases. The Committee has made various Interim Resolutions with regard to Turkey's failure to comply with its obligations, yet despite these little has changed.

The case of *Aksoy v Turkey* has become a prominent example of Turkey's failure to implement change. Initially seen as a legal landmark as the first Kurdish case to be submitted to the Court, and the first ECtHR judgement to find torture anywhere in Europe, it has since become an illustration of Turkey's contempt for judgements of the ECtHR regarding the use of torture.

Following the judgement of the ECtHR on 18<sup>th</sup> December 1996, Turkey was found in violation of Articles 3, 5(3), and 13 of the ECHR, and the Turkish government was subsequently praised for introducing various measures aimed at tackling the problem of torture in Turkey. The Court interpreted Article 13 as an obligation to investigate claims of torture promptly and effectively.

In December 1997, a report by KHRP stated that 'Despite these efforts, the Committee observed that the practice of torture and other forms of severe ill-treatment of persons in police custody remained widespread.'<sup>226</sup> Today, little has changed.

Zeki Aksoy was shot dead in April 1994, after receiving death threats for submitting his application to the Commission complaining of torture while in detention in 1992. His father then took his case to the ECtHR. The Court found that Turkish security forces were responsible for the torture of Zeki Aksoy while he was in detention in 1992. He had been subjected to 'Palestinian hangings', beatings at regular intervals over four days, electric shocks and being hosed with pressurised water. As a result he had lost the use of both his arms. The Court awarded the applicant with the sum of £20,710 in compensation, which the Turkish government paid in full to the applicant's father. Despite heated debate within Turkey, the government complied with the Court's judgement, and implemented the Law of 7<sup>th</sup> March 1997, which reduced detention periods and improved access to a lawyer for detainees.

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226 KHRP, *Aksoy v Turkey, Aydin v Turkey*, Volume I, December 1997.

However, since the judgement, the name Aksoy is now identifiable with the persistence of the use of torture in Turkey. Despite his son's landmark victory at the ECtHR, Şerif Aksoy has endured every imaginable kind of torture in recent years. A mission by KHRP in July 2003<sup>227</sup> interviewed Şerif Aksoy, and found that he has been detained and tortured approximately twenty-seven times in the last decade. Even in 1998, the year of the ECtHR judgement, he was tortured so severely that he was left unconscious in the countryside. In 2000, he was castrated while in police custody, and in 2001 he was detained for fifteen days and tortured severely every evening. In 2003, he continues to face prosecutions and is tortured in detention. At the age of 73, he now suffers from a lung condition as a result of a decade of torture and ill-treatment. Political and judicial reforms have had little meaning for Şerif Aksoy, as he continues to face persecution and threat of torture on a daily basis.

Legal amendments have clearly had a minimal impact in some areas, as they have not been accompanied by a change in attitudes at the level of implementation. There remains a strong need for human rights education and training to complement legal reforms. Gendarmerie and Police need to be trained in the collection of evidence, and drafting of witness statements in order to combat the problem of failure to provide domestic remedies. In Interim Resolution DH(2002)98, the Committee notably stressed that efficient prevention of renewed abuses requires, *in addition to the adoption of new texts*, a change of attitude and working methods by members of the security forces and effective domestic remedies ensuring adequate compensation for victims effective criminal prosecution of the officials responsible.

### *Friendly Settlements*

One of the most crucial problems to emerge from the judgements of the ECtHR arose after the conclusion of the *Akman v Turkey* case<sup>228</sup>. The case involved the unlawful killing of Murat Akman by Turkish security forces in January 1997, and ended in a strikeout under Article 37(1)(c) of the ECHR, following a unilateral declaration admitting violation of Article 2 of the ECHR and the promise of measures to ensure the right to life in future. This indicated a noticeable change in the approach of the ECtHR. Article 37(1)(c) of the ECHR provides:

The Court may at any stage of the proceedings decide to strike out an application out of its list of cases where the circumstances leads to the conclusion that

(a) the applicant does not intend to pursue his application; or

227 'Turkey's Non-Implementation of European Court Judgements: The Trials of Fikret Başkaya', September 2003, KHRP.

228 ECtHR Application No. 37453/92

- (b) the matter has been resolved
- (c) for any other reason established by the Court

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires

Turkey agreed to pay £85,000 to Akman<sup>229</sup> and in a written statement, agreed that Turkey was in violation of Article 2 through excessive use of force resulting in death.

KHRP is deeply concerned that this strikeout has set a dangerous precedent for future applicants, and is a most unjust method of reducing the Court's heavy caseload. Many applicants see compensation as a form of 'blood money', and believe it robs them of their right to be heard in Court. Monetary compensation simply avoids the much more difficult task of forcing Turkey to make real reforms on the ground. The ECtHR has imposed a settlement upon the applicant that does little to address the actual details of the killing, and therefore avoids making any serious pledges of reform of torture practices for the future.

In 2005 6 cases concerning Turkey were dealt with through friendly settlement and 3 were struck out, avoiding a finding on the merits in these cases. In the case of *Tahsin Acar v Turkey*<sup>230</sup>, the Court decided to strike out the case after the Turkish government agreed to pay £70,000 in compensation to the victim. Judge Loucaides' dissenting opinion stated that:

I fear that the solution adopted may encourage a practice by States – especially those facing serious or numerous applications – of 'buying off' complaints for violations of human rights through the payment of ex gratia compensation, without admitting any responsibility... This practice will inevitably undermine the effectiveness of the judicial system of condemning publicly violations of human rights through legally binding judgements and, as a consequence, it will reduce substantially the required pressure on those Governments that are violating human rights

Nothing in the history of the Article suggested that it could be used in such cases, and it was originally intended to be used very restrictively. It was intended as a general clause to cover other possibilities where it was no longer justified to continue a petition, such as the death of an applicant with no heirs to continue the application. It was never intended to be used in cases where the applicant complained of a fundamental allegation of human rights abuse. A unilateral declaration with no

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229 Faysal Akman, father of Murat Akman.

230 No. 26307/95 6th May 2003 judgement.

effective remedy forces the applicant to accept a settlement that fails to address the fact that the State has not fulfilled its duty under the ECHR. An admission of liability by a State cannot be seen as justification for a strikeout.

In *Yaman v Turkey*<sup>231</sup>, the applicant complained that his son had died in hospital in August 1996 as a result of torture committed by civil servants during his detention. The applicant complained under Article 2 and 3 of the ECHR, yet the Court decided to strike out the case according to Article 38 (1) (b) in a friendly settlement. On 21<sup>st</sup> February 2003, Turkey agreed to pay EUR 60,000 in compensation to the applicant and assured the Court that new legal and administrative measures would be adopted to reduce the number of deaths and cases of ill-treatment of detainees.

The ECtHR has recently thrown out a number of cases that it declares have ended in a friendly settlement under Article 38 (1) (b). In *Boztürk v. Turkey*<sup>232</sup> the applicant, a Turkish national held in Aydin Prison complained, of ill-treatment at the hands of the prison warders during the inspection of the wing in which they were being held and of the inadequacy of the ensuing investigation by the Turkish authorities and lack of an effective remedy, relying on *inter alia* Articles 3 and 13.

The case was struck out following a friendly settlement in which EUR 17,000 was to be paid to the applicant in respect of damage and EUR 3,000 for costs and expenses. The Turkish Government making the following statement:

the Turkish Government consider that the supervision by the Committee of Ministers of the execution of Court judgments concerning Turkey in this and similar cases is an appropriate mechanism for ensuring that improvements will continue to be made in the context of protecting human rights. To this end, necessary cooperation in this process will continue to take place.

Similarly in *Karakoç v. Turkey*<sup>233</sup> the applicant, relying on *inter alia* Articles 3 and 13, complained of treatment at the hands of security forces in October 1994 during the forced evacuation of the village of Kozluca where he lived with his family. The case was struck out following a friendly settlement in which EUR 48,000 was to be paid for any non-pecuniary and pecuniary damage, costs and expenses. The Turkish Government made the following declaration:

The Government regret the occurrence...of individual cases of destruction of home, property and possessions resulting from the acts of agents of the State in south-east Turkey...and of failure by the authorities to carry out effective investigations into the circumstances surrounding such events...

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231 No. 32446/96

232 No. 35851/97

233 No. 28294/95

It is accepted that such acts and failures constitute a violation of Articles 8 and 13 of the Convention and Article 1 of Protocol No. 1 and, given the circumstances of the destruction and the emotional suffering entailed, of Article 3 of the Convention.

The Government undertake to...adopt all necessary measures to ensure that the individual rights guaranteed by the aforementioned Articles... are respected in the future...necessary provisions for the restoration of his house will be supplied in accordance with the 'Return to Village and Rehabilitation Project'...new legal and administrative measures have been adopted which have resulted in a reduction in the occurrence of destruction of property in circumstances similar to those of the instant application and in more effective investigations being carried out...

Again in *Binbay v. Turkey*<sup>234</sup> the Court was satisfied that the subject of the complaints relying on *inter alia* Article 3 and 13 were effectively dealt with and the case was struck out following a friendly settlement in which EUR 45,000 was to be paid for any non-pecuniary and pecuniary damage, costs and expenses. The Turkish Government again, repeating the formulation of previous declarations stated:

the Government regrets the occurrence of individual cases of assaults against individuals, including at the time of and during their detention, as well as threats to their person and property, and the failure of the authorities to carry out effective investigations into allegations of this nature, as in the case of the applicant, Mr Yavuz Binbay, notwithstanding existing Turkish legislation and the resolve of the Government to prevent such failures.

It is accepted that [such] acts, and the authorities' failure to investigate these matters,,constitute a violation of Articles 3, 5 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention. The Government undertakes to issue appropriate instructions and adopt all necessary measures to ensure that the rights guaranteed by these Articles...are respected in the future. It is noted in this connection that new legal and administrative measures have been adopted which have resulted in a reduction in the occurrence of assaults in circumstances similar to those set out in the instant application as well as more effective investigations.

While most of the cases of torture at the ECtHR occurred in the 1990's, resolutions adopted by the Committee of Ministers in the supervision of the implementation of Court judgements continue to reveal a distinct lack of progress on the part of the Turkish government to implement reform of torture practices. Interim Resolution

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234 No. 24922/94

DH(99)434 of June 1999 stated that:

more than two years after the first judgements of the European Court of Human Rights denouncing the serious violations of the human rights issues here, the information provided to the Committee of Ministers does not indicate any significant improvement of the situation...<sup>235</sup>

In 2005, the Committee was still concerned over the 'continuing existence of new complaints of alleged torture and ill-treatment'<sup>236</sup> in Turkey. It is clear that reforms to reduce the practice of torture have failed to comply with international human rights standards.

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235 KHRP Legal Review 4, November 2003, p. 167.

236 Interim Resolution ResDH(2005)43, 2005.





## VI. Reporting Torture

Governments whose agents commit human rights abuses prefer to keep such practices out of the public eye, in order to escape condemnation. Reporting allegations of torture and ill-treatment to relevant international mechanisms raises awareness of the real situation in a country and is therefore crucial in helping to prevent the practice of torture. Lack of awareness of international human rights norms is one of the principal reasons for the ongoing practice of torture and ill-treatment in Turkey today. By raising awareness, particularly among security forces and police and within domestic law enforcement agencies, action is more likely to be taken. In addition, the more information the international community receives, the more likely it is to act to condemn Turkey and increase pressure for reform.

Consistent and regular information is more important than a few isolated reports, as it provides evidence of patterns of torture and ill-treatment and will raise more concern with the international community. It shows that the problem is a serious one and makes it more difficult for a state to argue that it is unaware of such practices.

Drawing attention to a situation is not just about seeking condemnation however, it is about seeking long-term constructive improvements in order to contribute to the elimination of torture. This requires changes in both the legislative framework and official attitudes to torture. Recommendations from international bodies usually include the introduction of legal and practical safeguards to give greater protection to detainees. For example, recommendations could include the introduction of regular medical examinations, reducing the period for which a detainee may be held without access to a lawyer, or measures to eliminate impunity. However, it is crucial to ensure that such recommendations are actually implemented so that such recommendations are just the beginning of the dialogue and not accepted as a fait accompli.

### *Combating Impunity*

The concept of impunity, that those that perpetrate human rights abuses are not held to account or are somehow held to be 'above the law' is incompatible with both the victims' right to a remedy and reparation *and* the obligation on states both to take effective measures to ensure the prevention of violations and to

investigate thoroughly (and to prosecute where appropriate) where violations are alleged to have occurred. However, in some cases, perpetrators can be promoted on the basis of their ability to obtain results in investigations through the use of torture<sup>237</sup>. Reporting torture can help to cast light on the individuals who carry out such practices to ensure that they are aware that such behaviour has serious consequences.

Ideally a prosecution should be initiated within the domestic legal system first.

Many states have an obligation under a number of conventions, such as the UN Convention against Torture, to ensure that the perpetrators of torture are held responsible for their actions and brought to justice. If a state does not prosecute those individuals which it knows to have been involved in the practice of torture, or does not allow another state to do so, it is in contravention of international law.

This obligation to investigate and prosecute *promptly and impartially* acts of torture is universally accepted; expressed in the UN Convention Against Torture and both the *Istanbul Protocol* and the *basic principles and guidelines on the victim's right to a remedy and reparations for gross violations of international human rights law and serious breaches of international humanitarian law (Principles and Guidelines)*; articulating the accepted principle *aut dedere aut judicare*.<sup>238</sup>

### *Remedies*

An effectively functioning domestic system for providing redress is “one of the best safeguards against impunity.” Articles 12 and 13 of the Convention require states to ensure that any individual who alleges torture has the right to lodge a complaint to competent authorities, who are then obliged to examine complaints of torture promptly and impartially. However should the domestic legal system fail, there are many international treaty bodies able to pronounce whether or not torture has taken place and can make an authoritative declaration that the state has breached its obligations under international law. Such mechanisms can request an effective investigation into an allegation of torture and the perpetrator be prosecuted. This ensures that perpetrators are not able to practice torture without repercussions.

The requirement under international law that perpetrators of international crimes be brought to justice exists independently of the rights or wishes of victims: and is a well-

237 “The Torture Reporting Handbook”, Camille Giffard, Human Rights Centre, University of Essex, February 2000.

238 “Where evidence warrants it, a State in whose territory a person alleged to have committed or participated in torture is present, must either extradite the alleged perpetrator to another State that has competent jurisdiction or submit the case to its own competent authorities for the purpose of prosecution under national or local criminal laws.”

established obligation of States. However, holding perpetrators legally accountable for their actions *is* also of great relevance for reparation and is a fundamental way of providing some measure of redress for victims and their families.

Reparations can be awarded in a number of forms to repair the damage caused to an individual. These include monetary compensation calculated on the basis of actual monetary loss, moral damages, or by opening a school or a hospital for example in a community which has been subjected to such violations. The Basic Principles and Guidelines on the victim's right to a remedy and reparation for gross violations of human rights and serious violations of humanitarian law (*Principles and Guidelines*) emphasise that victims are entitled to “adequate, effective and prompt reparation” which should be “proportional to the gravity of the violations and the harm suffered.” The *Principles and Guidelines* refer to: restitution; compensation; rehabilitation; satisfaction; and guarantees of non-repetition for full and effective reparation to be made; account must always be taken of the individual circumstances of each case: not every violation will necessarily and automatically require each of these aspects of reparation, but they should always be considered and, if appropriate, applied in proportion to the gravity of the violation suffered. In this way the state can contribute financially to the rehabilitation of the victim.

### *Defining Torture*

Anyone can be a victim of torture, man or woman, young or old. The determining factor may be membership of a particular political or religious, or ethnic group or minority, although no one is immune. Determining whether certain actions amount to torture can be complex. Sometimes this depends on cultural factors, sex, age, or religious beliefs. For example, in some countries beatings may not be considered torture but normal practice. However, if unlawful at an international level it must still be reported.

The facts must constitute torture in the legal sense and cannot be based simply on an individual's opinion. The basis for the definition of torture is contained in the UN Convention Against Torture (1984). Article 1 (1) states that:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising from, inherent in or incidental to lawful sanctions<sup>239</sup>

239 United Nations Convention Against Torture, 1984, Article 1 (1).

Article 16, requires States parties to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article”.

Torture is an emotive word, and one which should not be used lightly. It is important both in establishing state responsibility, *and* for establishing the applicability of universal jurisdiction under the UNCAT, to reserve the term for the most objectively serious forms of ill-treatment. It is distinguished from other forms of ill-treatment by the **severity of suffering**, the **purpose** for which inflicted, the **context** *and* the **intent** of the perpetrator, although the weight attached to each of these factors seems to vary between forums. As early as 1969 the European Commission in the Greek case<sup>240</sup> categorised torture as ‘inhuman treatment *for a purpose*...generally an *aggravated* form of inhuman treatment’. The 1975 UN Declaration against Torture<sup>241</sup> states torture to be ‘...inflicted...*for such purposes* as...constituting an *aggravated* and deliberate form of cruel, inhuman or degrading treatment’.

The Convention against Torture<sup>242</sup> defines the aggravating element to be ‘the infliction of severe pain or suffering *for such purposes as...*’ distinguishing it from ‘other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in art. 1’

An interpretation of the listed purposes (obtaining information or a confession, punishment or intimidation, or discrimination of any kind ‘...*when inflicted or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...*’) can be read to ‘presuppose a situation of powerlessness of the victim, which usually means deprivation of personal liberty<sup>243</sup>, something that finds expression in the 1998 Rome Statute definition of torture:

‘...intentional infliction of severe pain or suffering...upon a person in the custody or under the control of the accused...’<sup>244</sup>

Certain essential elements of torture must be established, including,

- **WHAT?** Severe physical or mental pain or suffering has been deliberately inflicted or that intentional exposure to significant mental

240 Greek case 1969 Y.B. Eur Conv. On HR 461 (Eur. Comm’n on HR)

241 Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, GA resolution 3452 Annex 9 December 1975

242 United Nations Convention Against Torture 1984

243 Manfred Nowak *What Practices Constitute Torture? US and UN Standards* Human Rights Quarterly 28 (2006) 809-841

244 Rome Statute of the International Criminal Court adopted 1998 17 July UN Doc A/CONF.183/9

or physical pain or suffering has occurred. Torture may encompass many forms of suffering, including psychological torture, as these may have the most long-lasting effects on a victim.

- **WHO?** The State authorities either inflicted this suffering themselves or else knew about it and ought to have prevented it. For an act of oppression to constitute torture, it must be carried out by a state official. This includes the police, Gendarmerie, and the military in the case of Turkey, or prison officers, any government official, and health professionals (usually by omission or falsifying medical reports, or failure to give appropriate treatment).
- **WHY?** Suffering was inflicted for a specific purpose such as gaining information, punishment, or intimidation

However, a non-State actor can still be held to account for acts of torture by the State itself, and should a State fail to take effective measures to prevent torture or prosecute perpetrators, the State can be held responsible. In this way, international human rights law ensures that private individuals are also held to account.

The relevant monitoring bodies must decide whether torture has occurred in line with the above guidelines, and they face the difficult task of developing consistent interpretations of the definition of torture. The following has become a standard list of kinds of treatment that amount to torture:

- ‘Falaka’
- Palestinian Hanging
- Severe Beatings
- Electric Shocks
- Rape
- Mock executions
- Being buried alive
- Mock amputations

Other forms of treatment remain unclear as to whether they amount to torture, such as solitary confinement, poor prison conditions, and treatment inflicted on a child that would not constitute torture if inflicted on an adult.

### *Ill-Treatment*

For ill-treatment to occur, the degree of suffering must be less severe, and it does not have to be inflicted for a specific purpose, or with the degree of intent required for ‘torture’. It is instructive that in determining what constitutes treatment falling within the ambit of Article 3, inhuman and degrading treatment is treated by the ECtHR as a relative term considered in all the circumstances of each case. Relevant

factors include *the duration of the treatment, its physical/mental effect and in some cases the sex, health and age of the victim*. For example, in the case of *Aydin v Turkey*<sup>245</sup>, the Court ruled that her treatment amounted to torture particularly due to the fact that she was 17 years old at the time of her detention. The Court has also held that cumulative effects should also be taken in account<sup>246</sup> so that certain forms of ill-treatment which do not constitute torture on their own may do so in combination.

#### *When is torture likely to occur?*

The greatest risk of torture and other forms of ill-treatment to individuals is in the first phase of arrest and detention, before they have access to a lawyer or court. Torture does not have to be confined to the place of detention, and can occur in the victim's own home or during transportation.

Incommunicado detention is usually the period of most risk for detainees as there is no outside monitoring of the conditions of detention and interrogation. The conditions of detention may themselves amount to inhuman or degrading treatment. Torture may also occur during abductions, or so-called 'disappearances' in which a victim is held by or with the acquiescence of the authorities, but without their acknowledgement. Such forms of abduction are often used as a means of instilling fear or intimidation in the community, and can be seen as forms of torture in themselves.

#### *Reporting Allegations at the International Level*

Under international law, individuals must have exhausted domestic remedies before international procedures can commence. Domestic remedies are usually more immediate as international procedures can take a very long time to complete. Should domestic remedies fail, there is a wide range of mechanisms available at the international level in connection with allegations of torture. Some consider matters relating only to torture, others examine general human rights abuses which include torture. All UN non-treaty mechanisms are available to almost every country in the world, and other treaty mechanisms apply only to those States which have agreed to be bound by the treaty.

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245 Application No. 23178/94

246 *Ülke v. Turkey* (39437/98) Judgment of 24 January 2006 in which the Court considered that, taken as a whole and regard being had to its gravity and repetitive nature, the treatment inflicted on the applicant had caused him severe pain and suffering which went beyond the normal element of humiliation inherent in any criminal sentence or detention, constituting degrading treatment within the meaning of Article 3 of the Convention.

International Reporting Mechanisms can receive and gather information from States and third parties on human rights situations and can make recommendations for improvement. They can also make fact-finding missions.

International Complaint Procedures can address individual grievances, and create publicity for individual cases. Their recommendations can result in legally-binding decisions, and award reparations. The *effectiveness* of international awards varies across the different bodies; often contingent on the mechanisms for follow-up employed by each.<sup>247</sup>

### *Europe*

In Europe, a number of organisations exist to deal with allegations of torture:

- *Organisation for Security and Co-Operation in Europe (OSCE)*
- *Council of Europe (COE)*  
Within this body there is the:
  - *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*

The European Convention for the Prevention of Torture came into force in 1989, and by 1999 all 40 member States of the Council of Europe had ratified it. It is seen as a preventive mechanism to accompany the judicial mechanism of the ECtHR. The Convention provides non-judicial preventive machinery to protect detainees. It is based on a system of visits by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The Secretariat of the CPT forms part of the Council of Europe's Directorate General of Human Rights. The Convention established the CPT which has unique functions; the most intrusive of any of the mechanisms available. It carries out visits to places of detention to examine the treatment of detainees, and prepares a report of its findings, which is confidential but may be made public with the consent of the state. The CPT may carry out interviews with detainees in private, can travel throughout the country without restriction, can communicate freely with anyone it believes can supply information, and its visits can take place at any time. Once the state has accepted obligations under the Convention, the Committee's activities should not depend on the consent of the State Party. The CPT has full right of access to a state's territory, the right to travel without restriction, full information on where detainees are being held, and other information necessary for the CPT to carry out its work.

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247 See the Enforcement of International Awards Redress Publication may 2006

The CPT has developed a set of criteria for the treatment of detainees over the past ten years. Three of these safeguards are:

- The right of a detainee to inform a third party of his or her arrest
- The right to have immediate access to a lawyer
- The right of access to a physician, of his or her own choice if so desired

The Committee is composed of as many independent and impartial members as there are states parties to the Convention, and may be assisted by ad hoc experts.

- *European Court of Human Rights (ECtHR)*

The ECtHR can hear cases from individuals, NGO's, and groups of individuals claiming to be victims of human rights violations. The right of individual applications is now mandatory and all victims have access to the Court. In the case of Turkey, the State has agreed to be bound by the Convention, and any victim of an abuse of the ECHR can bring a direct claim to the ECtHR, as the Convention provides for an individual complaint mechanism. Once the Court has delivered its judgment in a particular case, the judgment is then transmitted to the Committee of Ministers, which supervises the execution/enforcement of the Court's decision. The Committee oversees the implementation of measures taken with a view to addressing both the individual violation and the systemic problems contributing to such violations (individual and general measures). The Committee adopts resolutions in particular cases/on particular issues of concern. For example; Res DH (2005) 43 assessing the measures taken to address the problems raised by 74 ECtHR judgments concerning the actions of Turkey's security forces.

- *European Union (EU)*

The EU provides for individual complaints mechanisms for States parties

### *International*

If a State is in breach of a human rights obligation embodied in international customary law, the victim has the right to claim international responsibility against the State directly under international law. However, there is no mechanism to bring such claims and the victim must rely on *treaty* mechanisms instead.

Under the United Nations, there are various *treaty* mechanisms which are all run from the Office of the High Commissioner for Human Rights (OHCHR) in Geneva. These mechanisms are available to all member states of the United Nations, but



the use of the treaty body mechanisms is strictly associated with ratification of the relevant treaty by the respective State. The main function of treaty bodies is to review States reports which are submitted periodically by State parties.

➤ *Treaty Bodies*

*Treaty bodies* are created by a legally binding agreement, such as a convention, charter, or covenant. The bodies supervise the way in which the agreement is implemented by states parties, for example the UNCAT sets out a number of obligations which states parties must respect. Monitoring activities of these bodies are based on the examination of state party reports submitted by states on a regular basis, and in the case of the UNCAT (CaT) and ICCPR (HRC) the consideration of complaints brought by individuals alleging violations of rights under the respective treaty. CAT also provides for an inquiry procedure, which includes undertaking investigations or sending missions to state parties in connection with concerns about systematic or grave violations of treaty rights.

For the relevant treaty body to have competence/jurisdiction to receive individual complaints or to otherwise undertake investigation the state in question must first be a party to that treaty. In terms of these communications, such complaints must relate to rights protected by the respective treaty, concerning a violation of rights taking place *after* the entry into force of the treaty in a particular state (*ratione materiae* and *ratione temporis*), and victims must be subject to the jurisdiction of the alleged violating state party at the relevant time. The relevant Committee will only consider complaints from individuals involving the actions of a State Party which has both ratified the relevant treaty and either i) in the case of the ICCPR ratified the Optional Protocol recognising the right of individual petition, or in the case of the CAT made the relevant declaration under Article 22, conferring competence on the relevant committees. Victims must exhaust all *effective* domestic remedies before bringing a complaint. The treaty bodies examine the communication; considering the admissibility and the merits of the communication in closed session. The body then issues its views, opinion or decision to the parties and may engage in follow-up to monitor measures taken in response.

- *Committee against Torture (CAT)*

This treaty body supervises the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* to ensure that states respect their obligations to prevent and punish torture. Established under Article 17 of the Convention, the Committee consists of ten experts. The Committee has been charged with analysing the effectiveness of the Convention's obligations in strengthening the protection against torture and other inhuman treatment and monitoring their implementation.

Article 22 of the Convention provides for the Committee to receive complaints alleging violation of the rights protected by the convention. However for the Committee to consider such communications the state party must have recognised the competence of the committee to do so, making the relevant declaration. Special circumstances of urgency requiring immediate action fall under Rule 108 (1) of the Committee's rules of procedure. This is the basis for the complainant to seek interim measures to prevent irreparable harm while the communication is being considered, for example in deportation case under Article 3 CaT. Article 20 provides that the Committee may initiate an investigation if it considers there to be 'well-founded indications that torture is being systematically practised in the territory of a State Party'. Ever since the Committee's first meeting in April 1988, it has conducted its activities mostly discretely.

However, a state may choose not to confer competence to the Committee if at the time of ratification of the Convention, it declares that it does not recognise it. Turkey ratified the CAT on 2<sup>nd</sup> August 1988, and has recognised CAT's competence to receive individual complaints under Article 22.

Turkey has also signed, although is yet to ratify, the optional protocol to the CAT allowing for visits by independent international experts to state parties.

- *Human Rights Committee*

Supervises the implementation of the International Covenant on Civil and Political Rights (ICCPR). Article 40 provides for the obligation on states parties to submit reports every five years on measures adopted to implement, or which otherwise effect, the rights in the Covenant. Articles 6 – 27 encompass individual rights that may be invoked before the Committee as set out in the First Optional Protocol. For the Committee to enjoy competence to receive individual complaints from any state party, that state must have also ratified the first optional protocol.

Turkey signed the ICCPR on 15 August 2000, ratifying it 23 September 2003, but did *not* ratify the first Optional Protocol conferring competence on the Committee to receive individual communications.

- *Non-Treaty Bodies*

*Non-treaty* bodies are not set up to supervise a particular treaty, but may be a political body of state representatives or set up by a resolution, and has the power to examine states which are members of the relevant inter-governmental body. For example, the UN Commission on Human Rights created the Special Rapporteur on

Torture by resolution<sup>248</sup>, to draw attention to allegations of torture regarding any UN member state.

- *Human Rights Council*

Established by General Assembly resolution 60/251 of March 2006. On June 19 2006 the UN Human Rights Council replaced the Commission on Human Rights. The new Council, introduced to address the over politicisation of the Commission, is a standing body of 47 members represented by geographical region, elected by an absolute majority of the Assembly. The Council meets regularly throughout the year, to address the world's worst human rights problems by a peer review mechanism. The Council inherits from the Commission the following relevant extra-conventional mechanisms:

*a. Special Rapporteurs, including:*

- *Special Rapporteur on Torture of the Human Rights Council*

This is a *non-treaty* UN Charter-based body designed to examine international practice relating to torture in any State, regardless of any treaty the State may be bound by. It was created by resolution to address situations which are deemed to be of sufficient concern, through the collection and examination of reliable information from governments, specialised agencies, intergovernmental agencies and NGOs. The Special Rapporteur on Torture was founded in 1985 to engage governments in dialogue, requesting their comments on cases/issues that are raised and carry out fact-finding missions. However, he cannot visit a country without permission from the Government in question. The reports may address specific issues or developments that influence or are conducive to torture in the world or general observations about the problem of torture in specific countries offering general conclusions and recommendations<sup>249</sup>, but no conclusions on individual torture allegations; the Rapporteur has no power to rule on individual complaints, enforce recommendations, or award reparations and can only *offer* recommendations to States. The Special Rapporteur reports annually and publicly to the Council and to the UN General Assembly.

*b. Relevant Country Mandates (although none currently exist with respect to Turkey)*

*c. Other Thematic Mandates;*

*UN Working Groups and Independent Experts, including:*

- *Working Group on Arbitrary Detention*

248 Established by Commission resolution 1985/33; renewed repeatedly

249 NB: Deaths as a result of torture are dealt with by the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Execution.

The activities of the country and thematic mechanisms are based on information received from various sources containing allegations of violations, all receive general information about specific abuses, pertaining to systemic or systematic patterns of violations, and most also accept individual communications relating to individual or localised violations, although the avenues for redress or relief are limited by way of these bodies not being established under treaty. The findings and recommendations of these mechanisms are therefore not legally binding or enforceable.

➤ *1503 Procedure of the Council and the Sub-Commission on the Promotion and Protection of Human Rights*

This Procedure takes its name from resolution 1503 of the Economic and Social Council of 27 May 1970. It is the oldest human rights complaint mechanism in the United Nations, and examines complaints of gross violations of human rights in order to identify patterns of violations. It acts as a monitoring mechanism, examining consistent patterns of gross, reliably attested violations of human rights occurring in any country. The mechanism primarily examines *patterns* of violations rather than individual violations, announcing the names of states under consideration, and those which have been dropped from consideration.. All initial steps in the process are confidential until a situation is referred to the Economic and Social Council. Any individual or group, either the victim of a violation or having reliable knowledge of such violations, can submit a complaint to the Procedure, although it cannot obtain remedies for individuals, or receive feedback concerning allegations. The procedure for the handling of complaints sees the consideration of the complaint by the Working Group on Communications and the Working Group on Situations to decide whether the situation referred to reveals a consistent pattern of gross and reliably attested violations. The complaint is then either forwarded to the Human Rights Council which then might make specific recommendations, or is kept before the Working Group for further consideration. Consideration before the Human Rights Council takes place in closed session with the government concerned invited to address the Council. The Council then decides to either; keep the situation under review; discontinue the matter; take it up under a public procedure; or make recommendations to the Economic and Social Council.

*Reporting Allegations at the National Level*

Every state has different domestic remedies. A person who has been subjected to ill-treatment can complain to the public prosecutor, or local police in most countries however, and likely remedies include sentencing the perpetrator to a fine, probation or imprisonment. However, this relies on the public prosecutor's decision as to whether the prosecution is appropriate.

Articles 12 and 13 of the Convention require states to ensure that any individual who alleges torture has the right to lodge a complaint to competent authorities, who are obliged to examine complaints of torture promptly and impartially. States must also investigate wherever there are reasonable grounds to believe torture has been committed, even if there has been no complaint. The right to complain about torture requires states to guarantee the following elements both in law and practice:

Individuals alleging to have been tortured, or, their relatives, must have the right to bring a complaint. States must provide for this by adopting laws and administrative measures to set up complaints procedures. Procedures may either relate to a wide range of complaints, which include torture, or alternatively they may be special to torture cases;

States should designate appropriate authorities which are competent to receive complaints, such as the judiciary, police oversight bodies and national human rights institutions;

States must provide effective access to the complaints authority, including the right to be informed about available remedies and procedures; the right to have access to lawyers, physicians and family members and, in the case of foreign nationals, diplomatic and consular representatives; the right to have access to external bodies; the right to compel competent authorities to carry out an investigation and the right of effective access to the investigatory procedure;

There must be no delays in the complaint process as allegations about torture must be investigated 'promptly'. As a guide, Rule 36 (1) of the UN Standard Minimum Rules for the Treatment of Prisoners provides that prisoners must have the opportunity each week day to make requests or complaints to the director of the institution or the officer authorized to represent the prisoner.

The corollary to the right to complain sees this right engaging the duty on the state to investigate once a complaint is made, the opening of an investigation is required even in the absence of a complaint.

### *Judges & Prosecutors*

The basic role of judges is to uphold national law and to preside impartially over the administration of justice. They must ensure that court proceedings are managed in a way that is fair and seen to be fair. The accused must receive a fair trial, ensuring their rights are respected at all times, only using evidence that has been properly obtained without using coercive means. If a detainee alleges that he or she has been

ill-treated, it is incumbent upon the judge to record the allegation in writing and immediately order a forensic examination.

Prosecutors can play a significantly different role, but also have a responsibility to ensure all the evidence gathered in the course of a criminal investigation has been properly obtained, and any evidence obtained through recourse to unlawful methods should be rejected. Any evidence obtained through the use of torture can only be used as evidence against the perpetrators of these abuses.

Prosecutors have a responsibility to ensure that they do not participate in interrogations in which coercive methods are used to extract confessions. The prosecutor should ensure all information is given freely, and explore for signs of physical or mental distress and take all allegations of torture seriously.

Military personnel may also be prosecuted by internal military discipline, yet in a country like Turkey where the military exercises considerable power, it is unlikely that an investigation will be carried out.

### *The Law of Responsibility*

The doctrine of 'international responsibility' is applicable to any subject with legal personality in international law. Any subject of international law may be held responsible for an act or omission that violates international law.

'International Responsibility' has undergone a significant evolution pertaining to the prohibition of torture, in terms of the rules protecting individuals from official abuses. Traditionally, a state-centric approach has protected individuals only regarding certain conduct by states other than their own, but after World War Two this approach has been transformed with an increasing concern with individuals who are involved in atrocities. Human beings now have intrinsic rights under international law, not only by extension of the rights of their States, but by an extensive body of law designed to protect individuals from abuses of all governments including their own. The responsibility for violations constituting serious or gross violations involves both the individual criminal responsibility of perpetrators as well as the rights of victims to reparation. .

### *State Conduct*

Every act attributable to the State invokes State responsibility if the act breaches in international obligation. The conduct of any State organ is considered to be an act of that State, whether the organs exercise legislative, executive, judicial or any other functions. States are responsible for the *ultra vires* acts of officials, committed within their apparent or general scope of authority. Even if a person is arbitrarily

detained or tortured by a police officer not under official duty, but seeming to act in the role of police officer, that torture may still be attributed to a wrongful act of the State, engages the responsibility of the state and requires reparation to be afforded to redress the wrong.

The right to remedy is considered non-derogable. A State *must* provide reparation when it breaches an international human rights obligation.

In order to effectively implement the obligations arising under CAT, domestic legislation must deal with, and if needs be, must be changed to provide for, preventive measures, the investigation of suspected perpetrators and compensation.

### *Right to Reparation*

Under international law, ‘reparation must as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would have existed if that act had not been committed’<sup>250</sup>. There is a right to, (and a corresponding duty on states to afford) an effective remedy and adequate forms of reparation for *any* breach of human rights or international humanitarian law. Different types of violations give rise to different legal consequences. For example, a breach of the right to freedom of expression by the unjustified censoring of a newspaper or using the flags of neutral States in an armed conflict are violations of international human rights/humanitarian law but do not necessarily constitute crimes. In these cases, there is not necessarily an obligation to prosecute perpetrators - administrative remedies might be sufficient – and statutes of limitation might be applicable to control the timeframe to bring claims.

The legal consequences, however, arising from *gross and serious violations* of international human rights and humanitarian law (which constitute crimes under international law, and of which Torture is an example) are very specific: the right to a judicial remedy, universal jurisdiction, the non-applicability of statutes of limitations, and so on. These are the standards codified in the *Principles and*

250 See Permanent Court of Arbitration, Chorzow Factory Case (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits 1986 ICJ Report, 14, 114 (June 27); Corfu Channel Case; (UK v. Albania); Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184 ; Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif, C.I.J., Recueil, 1950, p. 228. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: “Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001” (ILC draft Articles on State Responsibility))

*Guidelines*<sup>251</sup>; covering the legal consequences arising from violations that constitute crimes under international law (e.g. *Torture*). Again however account must always be taken of the individual circumstances of each case: not every gross/serious violation will necessarily and automatically require each of these aspects of reparation, but they should always be considered and, if appropriate, applied in proportion to the gravity of the violation suffered.

As provided for under the (*Principles and Guidelines*), victims have a right under international law to “adequate, effective and prompt reparation...proportional to the gravity of the violations and the harm suffered.” Reflecting that account must always be taken of the individual circumstances of each case and that not every gross/serious violation will necessarily and automatically require each of these aspects of reparation, but they should always be considered and, if appropriate, applied in proportion to the gravity of the violation.

The *Principles and Guidelines* refer to: restitution; compensation; rehabilitation; satisfaction; and guarantees of non-repetition for full and effective reparation to be made.

- *Restitution*, in so far as it envisages the ‘return’ of the victim to where he/she was prior to the occurrence of the wrongful act, is especially important where the obligation breached is of a continuing character: thus in a case of unlawful detention or disappearance, for example, the authorities must end the situation by producing the victim.
- *Compensation* awards include material losses (loss of earnings, pension, medical and legal expenses) and non-material or moral suffering and is central in light of the purposes of human rights law; being not “to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for reparation of damages resulting from the acts of the States responsible”.
- *Rehabilitation* refers to the provision of the necessary material, medical, psychological and social assistance and support. States parties to the Convention against Torture are specifically encouraged to support rehabilitation centres that may exist in their territory to ensure that torture victims get the means for as full rehabilitation as is possible.

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251 Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law 16 December 2005 General Assembly at its 60th session, through Resolution 147 (A/Res/60/147)



- *Satisfaction* covers a wide and varied range of non-monetary measures that may contribute to the broader and longer-term restorative aims of reparation. A central component is the role of public acknowledgment of the violation (comprising effective investigation and prosecution, or declaration as to the acknowledged wrongfulness of the act).
- *Guarantees of non-repetition*, envisaging the growth of a culture of and respect for fundamental rights *as part of reparation for the individual victim and address the systemic problems at issue*, also serve a preventive function in so far as they comprise measures;
  - a. *Ensuring effective civilian control of military and security forces;*
  - b. *Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;*
  - c. *Strengthening the independence of the judiciary;*
  - d. *Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;*
  - e. *Promoting the observance of codes of conduct and ethical norms...international standards;*
  - f. *Reviewing and reforming laws contributing to or allowing...violations*



## VII. Applicable International Law Standards and Human Rights Norms

### *International Prohibition*

The principle enshrined in Article 5 of the Universal Declaration of Human Rights (1948)<sup>252</sup> stating that ‘No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment’ is found in a number of international and regional human rights treaties, such as the International Covenant on Civil and Political Rights (1966)<sup>253</sup>, the European Convention on Human Rights (1950)<sup>254</sup>, the American Convention on Human Rights (1969)<sup>255</sup>, and the African Charter on Human and People’s Rights (1981)<sup>256</sup>. A number of treaties have been drawn up specifically to combat torture, including the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984)<sup>257</sup>, the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (1987)<sup>258</sup> and the Inter-American Convention to Prevent and Punish Torture (1985)<sup>259</sup>. Expression is also found in international criminal law, under the Rome Statute of the International Criminal Court (1998)<sup>260</sup> and under international humanitarian law under the Geneva Conventions (1949)<sup>261</sup>. Furthermore the principle is regarded as one of *customary* international law

252 GA res.217 A (III), 10 December 1948

253 GA res.2200A (XXI), 16 December 1966

254 European Treaty series no.5

255 OAS Treaty series no.36

256 OAU Doc.CAB/LEG/67/3 rev.5,21 I.L.M. 58(1982)

257 GA res.39/46, Annex, 10 December 1984

258 European Treaty series no.126

259 OAS Treaty series no.67

260 UN Doc.A/CONF.183/9

261 See Geneva Convention III, art.13,17,87,129,130; Geneva IV, art.27,30,32,146,147; also common article 3, prohibiting ‘...mutilation, cruel treatment and torture;...outrages upon personal dignity, in particular humiliating and degrading treatment’; and ar.75 protocol I (1977), prohibiting ‘...torture of all kinds, whether physical or mental...[and] outrages upon personal dignity, in particular humiliating and degrading treatment’

carrying special *jus cogens* status as a peremptory norm of international law<sup>262</sup>. This means the prohibition of torture is binding on all states even if they have not ratified a particular treaty. Rules of *jus cogens* cannot be derogated from, or otherwise contradicted by other rules of international or domestic law. There are no circumstances in which states can set aside or restrict the obligation to prohibit torture, even in times of war or other emergencies. Excessive periods of incommunicado detention, denying detainees prompt access to a court or lawyer, put individuals at risk of torture or ill-treatment and may be seen as inconsistent with the absolute nature of the prohibition. This prohibition operates irrespective of circumstances, such as the status of the victim, be he or she a criminal suspect or not.

The Special Rapporteur on Torture, Sir Nigel Rodley, has stated that:

The prohibition of torture or other ill-treatment could hardly be formulated in more absolute terms...no possible loophole is left; there can be no excuse, no attenuating circumstances.<sup>263</sup>

When a State breaches its obligations under international law, its responsibility is engaged. This responsibility attracts responsibility to investigate the facts, even in the absence of a specific complaint from the alleged victim, to bring justice to those responsible, and to afford reparation to the victim. Individuals responsible for torture must be investigated under criminal jurisdiction on a universal basis.

Torture is considered to be a crime against humanity when the acts are perpetrated as part of a widespread or systematic attack against a civilian population, whether or not they are committed in the course of an armed conflict.

Turkey is a state party to most of the important instruments for the prohibition of torture including the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), the Convention

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262 See expression of the International Criminal Tribunal for the former Yugoslavia in *Furundzija* stating torture: ‘...has evolved into a peremptory norm or *jus cogens*, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules...Clearly the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.’ Prosecutor v. *Furundzija*, Case no IT095017/1-T; 10 December 1998 38 International Legal Materials 317 paras 153-4; also ECtHR in *Al-Adsani v. UK*, (2002) 34 EHRR 273 paras 59-61; House of Lords in *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No. 3), [1999] WLR 827 and *A and Others v. SSHD* [2005] 3 WLR 1249 at para 33.

263 N. Rodley, ‘The Treatment of Prisoners Under International Law’, p.58.

on the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the European Convention on Human Rights and the European Convention for the Prevention of Torture (see below).

Turkish domestic law sees the international prohibition incorporated by Article 17 of the Constitution providing that no one shall be subjected to torture or ill-treatment, and by Article 90 providing that “International agreements duly put into effect carry the force of law.”

#### *Basic Principles on Conditions of Detention and Rights of Detainee*

Everyone has the right to liberty and security of person, including the right to be free from arbitrary arrest and detention<sup>264</sup>. When the state deprives a person of liberty, it assumes a duty of care to maintain that person’s safety and safeguard his or her welfare.

The CPT has stressed that during the immediate period following arrest or detention, the risk of torture is at its greatest. International standards, including notification of detention, the right to access a lawyer, and right of access to a doctor must therefore apply *from the moment someone is detained*<sup>265</sup>.

#### *Notifying People of Their Rights*

Everyone deprived of liberty has the right to be notified of the reason for his or her arrest and detention. Article 9 (2) of the ICCPR states that ‘anyone who is arrested shall be informed, at the time of arrest, of the reasons for arrest and shall be informed promptly of any charges against him.’ This is repeated under Article 5 (2) ECHR, providing that ‘Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.’

#### *Incommunicado Detention*

The UN Special Rapporteur on Torture has stated quite categorically that incommunicado detention should be abolished: “*Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal and persons held incommunicado should be released without delay. Legal provisions should ensure that detainees should be given access to legal counsel within 24 hours of detention.*”<sup>266</sup>

264 Article 9 (1), ICCPR, & Article 5 ECHR.

265 CPT/Inf/E (2002), 1, ‘Extract from the 12th General Report’, p.12-13.

266 Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1995/434, 12 January 1995.

Combating incommunicado detention requires the effectiveness of custodial and procedural safeguards, including; judicial control of detention, access to legal assistance, the notification of detention, and procedural mechanisms such as *habeus corpus*.

The *Human Rights Committee* has declared the practice of incommunicado detention conducive to torture and may violated Article 7 or 10 of the ICCPR. The Committee has stated that all detainees should be held in officially recognised places of detention, and for their names and places of detention to be kept in registers which are accessible for all concerned. In the judgement of the ECtHR in *Çalciki v Turkey*<sup>267</sup> the Court stated that incommunicado detention was a ‘complete negation’ of the guarantees in the ECHR of the right to liberty and security of person.

The *CPT* recommends a custody record for all detainees, accessible to the detainee’s lawyers. The *UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment* states that the authorities must keep updated records of all detainees for access by the Court authorities, family or lawyers<sup>268</sup> and the *Standard Minimum Rules for the Treatment of Prisoners* provide for the registration of each prisoner’s identity, the reasons for his commitment and the authority therefore and the day and hour of his admission and release<sup>269</sup> ‘in every place where persons are imprisoned’.

Places of detention are also to be visited by qualified persons from an authority distinct from the authority in charge of the place of detention, and a detained person shall have the right to communicate freely with persons who visit the places of detention<sup>270</sup>.

The *UN Special Rapporteur on Torture* recommends that interrogation should not take place in secret locations, and no evidence obtained in a secret location should be used as evidence in court<sup>271</sup>.

### *Notification of Detention*

Obligations under CAT require states to provide safeguards against the abuse of torture of those in custody, *including securing the right to inform family members*

267 *Çalciki v Turkey*, ECtHR judgement 8<sup>th</sup> July 1999.

268 Principle 12.

269 Rule 7

270 Principle 29.

271 Report of the UN Special Rapporteur on Torture, July 2001, UN Doc.A/56/156.

or third persons immediately about their detention, and, in case of foreign nationals, their consular representatives.<sup>272</sup>

Principle 16 of *The UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment* provides for the notification of the detained person's family, or 'other appropriate person of his choice', of his arrest, detention and the place of detention. It goes on to read that such notification 'shall be made without delay' subject only to the possibility for delay 'where exceptional needs of the investigation require.'

In addition the Standard Minimum Rules for the Treatment of Prisoners provide under rule 44 (3) that 'every prisoner shall have the right to inform at once his family of his imprisonment or his transfer to another institution.'

#### *Access to a Lawyer*

The right to legal counsel is central to protecting the detained individual's rights at the pre-trial stage. International standards provide for prompt (under the *Basic Principles on the Role of Lawyers*, within 48 hours from the moment of arrest or detention) access to legal counsel for all persons arrested or detained, with or without criminal charges. Furthermore the *Basic Principles on the Role of Lawyers* state that it is the responsibility of the state to ensure that lawyers are able to 'perform all of their professional functions without intimidation, hindrance, harassment or improper interference'<sup>273</sup>.

Article 14 of the ICCPR and article 6 ECHR recognise the right of detainees to have access to legal advice. The promptness of such access is crucial in preventing torture. Lawyers must be able to communicate with detainees in complete confidentiality. Denial of access to legal advice may violate the right to a fair trial and is a basic safeguard against abuse. In the judgement against Turkey in *Aksoy v Turkey*, the ECtHR stated that absence of such safeguards would leave the detainee 'completely at the mercy of those detaining him.'<sup>274</sup>

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272 Belgium, UN Doc. CAT/C/CR/30/6, para.7(g); Latvia, UN Doc. CAT/C/CR/31/3, para.7 (c); Russian Federation, UN Doc. CAT/C/CR/28/4, para.8 (b) and Principle 16 of the *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, and the ICJ judgments in the *LaGrand Case (Germany v United States of America)*, and *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*. An instance of failure to provide for the right to inform a third party of arrest is Latvia, UN Doc. CAT/C/CR/31/3, para.6 (g).

273 Principle 16.

274 *Aksoy v Turkey*, ECtHR, Judgement 18<sup>th</sup> December 1996.

*Access to a Doctor*

The HRC has stated that the protection of detainees requires prompt access to a doctor. The UN Body of Principles of All Persons under any Form of Detention or Imprisonment states that ‘a proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary’<sup>275</sup>.

In addition, the UN Special Rapporteur on Torture has recommended that ‘*at the time of arrest, a person should undergo a medical inspection, and medical inspections should be repeated regularly and should be compulsory upon transfer to another place of detention*’<sup>276</sup>

Medical documentation is probably the single most effective source of evidence for recording torture. Although rarely conclusive, (proof with certainty that torture occurred), because of the many forms of torture leaving very few traces, and even fewer leave long-term physical signs and it often being difficult to prove beyond question that injuries or marks resulted from torture and not from other causes, the documentation of medical evidence provides a valuable record to demonstrate that the recorded injuries are *consistent with* (could have been caused by) the torture described.

In addition to access to a doctor following arrest, prisoners against whom means of force have been used should have the right to be immediately examined by a doctor. A record should be kept of every instance of the use of force against prisoners. The CPT stresses that a prisoner has the right to be immediately examined if force has been used against him or her.

*Medical Documentation of Torture*

*The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* establish and set out a protocol of best practice for medical and legal experts for the documentation and recording of evidence of torture and ill-treatment, aiming at; Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families; Identification of measures needed to prevent recurrence; Facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.

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275 Principle 24.

276 Report of the Special Rapporteur on Torture, UN Doc.A/56/156, July 2001.



States have an obligation to document acts of torture and to investigate with a view to prosecuting those responsible. However, they often fail to independently and consistently do so. Particular challenges faced in documenting torture include;

- The collecting of evidence - torture usually occurs behind closed doors, with few witnesses. Survivors may not be in a position to obtain a medical exam until after the visible scars have healed. Nonetheless, it can be important to register a complaint with the appropriate body despite these constraints - sometimes, there will be many others who allege the same treatment – lending strong support to the individual and the case; occasionally, where specialised doctors are available, they will be able to demonstrate signs of torture in the absence of outwardly visible injuries.
- The security and safety of victims and those civil society organizations undertaking documentation. There will be extreme security risks in some countries - at times, documentation may not be feasible, or, this activity will need to be undertaken amidst heightened security conditions;
- The process of seeking statements or other evidence from victims may in itself be a traumatic experience for them. It is normal for those who have suffered severe trauma to experience an array of psychological problems - these can be treated. Survivors should be encouraged to seek professional assistance;

Effective investigation and documentation of alleged torture can generate reliable evidence that torture has taken place and is instrumental in bringing perpetrators to justice and in ensuring torture survivors' access to justice and right to reparations.

To this end the Protocol enables medical and legal experts to:

- *Gather relevant, accurate and reliable evidence of alleged torture;*
- *Reach conclusions on the consistency between the allegations and the medical findings;*
- *Produce high-quality medical reports for judicial/administrative bodies;*
- *Obtain relevant, accurate and reliable statements from torture victims and witnesses so as to enable the use of such statements in legal proceedings against perpetrators;*
- *Recover and preserve evidence related to the alleged torture;*
- *Determine how, when and where the alleged torture occurred*

*The Torture Reporting Handbook* also serves as a reference guide for those wishing to know how to take action in response to allegations of torture or ill-treatment. It explains ; the documentation of evidence ; the process of reporting and submitting

complaints to international bodies and mechanisms including how to choose between the various mechanisms according to particular objectives; and how to present information in a way which makes it most likely that you will obtain a response.

### *Limits on Interrogation*

Article 11 of the CAT requires states to keep under review interrogation rules, instructions, and methods of custody and treatment of detainees. No one should be compelled to testify against himself or to confess to guilt, see article Article 14 (3) (g) of ICCPR: “Everyone has a right not to be compelled to testify against himself or to confess guilt”, as it is unacceptable to treat an accused person in a manner contrary to article 7 of the CCPR to extract a confession.

A detainee should be informed of the identity of all those present at the interview. There should be clear rules regarding the permissible length of the interview, places where interviews may take place, and a record should be kept of the time interviews start and end and of requests made during interviews.

Statements or confessions made under torture are unreliable and their use in proceedings only encourages interrogation techniques that result in torture. Accordingly any statement or confession which is established to have been made as a result of torture must not be allowed in evidence in any proceedings under any circumstances.

Article 15 of the Convention provides that “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

Cat provides for the obligations on states to both investigate allegations of torture and ill-treatment promptly and effectively *and* to assume the burden of proof when a credible allegation is raised that a confession or a statement was made under torture,<sup>277</sup>

In addition the prohibition must apply to both criminal and non-court proceedings

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<sup>277</sup> 164 CAT, K.K. v. Switzerland (2003). and P.E. v. France, (2001) para 6.3, see Visit to Brazil, Report of the Special Rapporteur on Torture, para.101 et seq. See also *Bouabdallah LTAIEF v. Tunisia*, UN Doc. CAT/C/31/D/189/2001, para.5.12 and *Singara v. Sri Lanka*, in which the Human Rights Committee found, para.7.4. “...that by placing the burden of proof that his confession was made under duress on the author, the State party [Sri Lanka] violated article 14, paragraphs 2, and 3 (g), read together with article 2, paragraph 3, and 7

such as administrative and extradition or removal hearings.<sup>278</sup> Statements must not be allowed in evidence even if the torture was committed by a third party unconnected to the proceedings in a third country.<sup>279</sup>

The *UN Guidelines on the Role of Prosecutors*<sup>280</sup> states that ‘when prosecutors come into possession of evidence against suspects they now or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment...they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice’<sup>281</sup>.

*The UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*<sup>282</sup> state that ‘non-compliance with these principles [referring to the use of torture for the extraction of statements or confession] in obtaining evidence shall be taken into account in determining the admissibility of such evidence’.

The UN Special Rapporteur on Torture has stated that ‘*all interrogation sessions should be recorded and preferably video-recorded, and the identity of all persons present should be included in the records*’<sup>283</sup>

#### *Individuals’ right to make a complaint and states’ duty to investigate*

The UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment and the Convention against Torture both state that all detainees have the right to complain about their treatment to which the authorities must reply promptly<sup>284</sup>. Articles 12 and 13 of the Convention require states to ensure that any individual who alleges torture has the right to lodge a complaint to competent authorities, who are obliged to examine them promptly and impartially. The complaint need not be formal. The victim only needs to bring the allegation of torture to the attention of a competent authority for the latter to be obliged to treat the allegation as a complaint that must be investigated. The *Principles and Guidelines* also provide that:

278 CAT, P.E. v. France (2001), para 6.3.

279 United Kingdom of Great Britain and Northern Ireland, UN Doc. CAT/C/CR/33/3, para.4 (i).

280 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

281 Guideline 16.

282 A/RES/43/173, 9 December 1988

283 Report of the Special Rapporteur on Torture, UN Doc A/56/156 July 2001.

284 Principle 33.

...States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish him or her. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

The Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (Impunity Principles)<sup>285</sup> also oblige “States [to] undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.”

### *Women in Detention*

Particular allowances should be made for rights and needs of special categories of detainees including women and juveniles. The UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) includes obligations on States parties to remove discriminatory legislation and practice. The narrow definition of ‘rape’, ‘virginity testing’, ‘honour killings’, and assessment of medical evidence regarding sexual violence all arguably engage such obligations. Turkey ratified the Optional Protocol to CEDAW in August 2002, allowing complaints from individuals to be made to the Committee. The last report submitted by Turkey to the Committee was in 1997, even though States parties are required to provide regular reports on progress and measures taken to implement the Convention.

The HRC has expressed concern at the practice of allowing male prison officers access to women’s detention centres. Female members of staff should supervise women in custody and facilities for pre-natal and post-natal care treatment must be provided.

The Convention on the Rights of the Child applies to children up to the age of 18, and article 37 emphasises that the detention of children should be a measure of last resort and used for the shortest period of time possible. Children also should have right of access to a lawyer and doctor, and jurisdictions should recognise the inherent vulnerability of juveniles so that additional precautions are taken.

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285 E/CN.4/2005/102/Add.1

*Use of officially recognised places of detention*

Provision should be made for detainees to be held in places officially recognized as places of detention, as well as the names of the persons responsible for their detention, to be kept in registers accessible to those concerned, including relatives and friends<sup>286</sup>. There should also be a complete custody record for each detainee, which should record all aspects of custody and action taken. The UN Body of Principles of All Persons under any Form of Detention or Imprisonment states that all officials must keep up-to-date registers of all detainees, which must be available to courts, the detainee, and his or her family<sup>287</sup>. In addition to this, the principles state that places of detention shall be visited regularly by qualified and experienced persons appointed by a competent authority distinct from the authority directly in charge of the administration of the place of detention. A detained person should also have the right to communicate freely and in full confidentiality with persons visiting the places of detention<sup>288</sup>.

The UN Special Rapporteur on Torture has recommended that ‘Interrogation should take place only at official centres and the maintenance of secret places of detention should be abolished under law...Any evidence obtained from a detainee in an unofficial place of detention and not confirmed by the detainee during interrogation at official locations should not be admitted as evidence in court’<sup>289</sup>.

*Humane Conditions*

The *CPT Standards*<sup>290</sup> outline a comprehensive regime for the appropriate treatment and conditions for prisoners.

The HRC has stated that the following conditions must be applied to all detainees:

- There is a duty to treat detainees with respect for their inherent dignity as a basic standard.
- States are obliged to provide all detainees and prisoners with services that will satisfy their essential needs.
- Everyone detained or imprisoned must be provided with adequate food and recreational facilities
- Prolonged solitary confinement also may amount to a violation of the prohibition against torture in Article 7 of the ICCPR and should be

286 Opinion of the HRC, General Comment 20, Article 7, 44th Session, 1992, UN DOC HRI/GEN/1/Rev.1 at 30 (1994)

287 Principle 12.

288 Principle 29.

289 Report of the Special Rapporteur on Torture, UN Doc A/56/156 July 2001.

290 CPT/Inf/E (2002) 1, Rev. 2006

abolished

- All places of detention are free from any equipment liable to be used for inflicting torture or ill-treatment
- States must abolish the use of electro-shock stun belts and restraint chairs
- Everyone detained has a right to complain about their treatment to which the authorities must reply promptly
- Force may only be used on people in custody when it is strictly necessary for the maintenance of security and order within the institution

The *Standard Minimum Rules for the Treatment of Prisoners* also state that corporal punishment and all cruel or inhuman punishments shall be completely prohibited as punishments<sup>291</sup>, and the *Basic Principles for the Treatment of Prisoners* state that solitary confinement as a punishment should be abolished.<sup>292</sup>

*The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*<sup>293</sup>

The United Nations has long sought to protect all people from torture or cruel, inhuman or degrading treatment. Its conventions, declarations, and resolutions state that there can be no exception to the prohibition of torture. United Nations human rights bodies and mechanisms have established certain obligations to ensure protection against torture. These include:

- Legislative, administrative and judicial measures to prevent acts of torture;
- Not extraditing a person to a country where there are grounds for believing that he or she would be tortured;
- Criminalizing acts of torture;
- Making torture an extraditable offence;
- Limiting the use of incommunicado detention;
- Education and training regarding the prohibition of torture;
- Ensuring that statements made as a result of torture are not used as evidence;
- Ensuring that the authorities undertake prompt investigations into allegations of torture;
- Ensuring that victims have the right to redress and compensation;
- Criminal proceedings of the alleged offender.

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291 Rule 31.

292 Principle 7.

293 1984; entry into force 26 June 1987, ratified by Turkey 2 Aug 1988, recognising the competence of the Committee under Article 22.

CAT imposes obligations on States to; criminalise Acts of Torture, with the relevant definition and appropriate penalties, barring superior orders as a defence; ensure appropriate status for the law prohibiting torture; take effective measures to prohibit torture, comprising: custodial safeguards, appropriate and effective training of officials and the review of interrogation methods, the independent and effective monitoring of places of detention; respect the principle of *non-refoulement*; prohibit the use in court of statements extracted under torture and ill-treatment; provide a channel for complaints and to investigate appropriately; respect the principle of *non-refoulement*; prohibit the use in court of statements extracted under torture and ill-treatment; provide a channel for complaints and to investigate appropriately; remove bars to prosecution, including amnesties and statutes of limitations, and ensure the irrelevance of official capacity; provide appropriate procedural remedies and reparation; pay due regard to acts of torture committed in third countries, including providing for universal jurisdiction and extradition and make available civil remedies.

States must undertake to train law enforcement and medical personnel, and any other persons who may be involved in the custody, interrogation, or treatment of detained individuals, about the prohibition of torture and ill-treatment<sup>294</sup>. States must actively investigate acts of torture and ill-treatment even if there has not been a formal complaint about it, when there is ‘reasonable ground to believe that an act of torture has been committed’<sup>295</sup>. Individuals have a right to complain about acts of torture and ill-treatment, to have their complaints investigated and to be offered protection against intimidation<sup>296</sup>.

The right to reparation for human rights violations is also explicitly recognised in a range of international and regional human rights instruments, such as the Basic Principles and Guidelines on the victim’s right to a remedy and reparation. The Guidelines contemplate; *Restitution Compensation, Rehabilitation, Satisfaction and Guarantees of non-repetition*.

There is also a growing acceptance of the importance of safeguarding people from similar treatment carried out by private groups, or individuals against persons under their effective control.<sup>297</sup>

### *The European Convention on Human Rights, 1950*

Turkey is a party to the European Convention on Human Rights, Article 3 of

294 Article 10, UN Convention Against Torture.

295 Article 12, Ibid.

296 Article 13, Ibid.

297 See Redress publication, *Not Only the State: Torture by Non-State Actors* May 2006, available at <http://www.redress.org/publications/Non%20State%20Actors%209%20June%20Final.pdf>

which states that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. While Article 15 of the Convention allows signatory countries to derogate from some articles of the convention “...in times of war or other public emergency threatening the life of the nation”, Article 3 is considered “non-derogable”. In other words, the right not to be subjected to torture must apply fully at all times and cannot be suspended even in a state of emergency.

Excessive periods of incommunicado detention, denying detainees prompt access to a court or lawyer, putting individuals at risk of torture or ill-treatment and may be seen as inconsistent with the absolute nature of the prohibition.<sup>298</sup>

In 1990, Turkey clearly derogated from certain articles in the European Convention within the region under State of Emergency, with regard to the right to liberty and security, the right to a fair trial, the right to freedom of expression and freedom of association. In 1992, Turkey limited this derogation to Article 5, concerning the right to liberty and security, Article 5 (3) providing for the right to be brought promptly before a judge. The ECtHR having ruled that detaining a person for four days and six hours constitutes a failure to allow prompt presentation to a judge, derogation from Article 5 enables states to detain persons in excess of this without violating the Convention or breaching its obligations under international law. On 29th January 2002, Turkey informed the Council of Europe that it was cancelling its derogation from Article 5 of the Convention, reducing the length of pre-trial detention in the Region under State of Emergency. The State of Emergency has since been lifted.

Article 41 provides for the provision of redress and compensation by the Court for victims of torture and other ill-treatment. ‘If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.’ Just satisfaction may include compensation for both pecuniary and non-pecuniary loss and legal costs and expenses, at the discretion of the Court.

*The International Covenant on Civil and Political Rights*, 1966 entry into force 23 March 1976, ratified by Turkey 23 September 2003. However, Turkey has not signed the Optional Protocol to the ICCPR, conferring competence on the Human Rights Committee to receive communications from individuals.

Article 7 *provides that*; ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected

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298 Redress Guide for the National Implementation of CAT pg 42



without his free consent to medical or scientific experimentation.

Article 9 states that; *'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention...Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge...Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'*

Article 10 provides that; *'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'*

Article 14 goes on to state that; *'In the determination of any criminal charge against him, everyone shall be entitled...; (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (g) Not to be compelled to testify against himself or to confess guilt.'*

Article 7 is considered non-derogable by Article 4, although the other articles referred to here may be restricted in a state of emergency.

### *Other Safeguards*

In addition to human rights law and the laws of armed conflict, a considerable range of other rules and standards have been developed to safeguard the right of all people to protection against torture. They are not legally binding, but represent agreed principles which should be adhered to by all states. They include:

- *Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)*<sup>299</sup>
- *Basic Principles for the Treatment of Prisoners*<sup>300</sup>
- *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*<sup>301</sup>
- *Code of Conduct for Law Enforcement Officials*<sup>302</sup>
- *United Nations Rules for the Protection of Juveniles Deprived of the Liberty*<sup>303</sup>

299 GA res.3452 (XXX) of 9 December 1975 annex, U.N. Doc. A/10034 (1975)

300 GA res.45/111, annex, U.N. Doc. A/45/49 (1990)

301 GA res.43/173, annex, U.N. Doc. A/43/49 (1988)

302 GA res.34/169, annex, U.N. Doc. A/34/46 (1979)

303 GA res.45/113, annex, U.N. Doc. A/45/49 (1990)

- *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>304</sup>

These include:

- A duty to provide compassionate care, and the duty to respond to those in medical need;
- To give precedence to a patient's wishes rather than the view of any person in authority concerning what is best for that individual;
- Duty of confidentiality as a fundamental principle;
- A dual obligation to promote the person's best interests and to ensure that justice is done and violations of human rights prevented.

- *Declaration on the Protection of All Persons from Enforced Disappearance (1992)*<sup>305</sup>
- *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)*<sup>306</sup> (1999)

These include:

- clarification of the facts and acknowledgement of individual and State responsibility for victims;
- identification of measures needed to prevent reoccurrence;
- prosecution or disciplinary sanctions for those responsible, and fair compensation and rehabilitation;

- *Guidelines on the Role of Prosecutors and Basic Principles on the Role of Lawyers*<sup>307</sup>
- *Standard Minimum Rules for the Treatment of Prisoners*<sup>308</sup>

This includes rules relating to the maintenance of a register of prisoners, provision of food, medical services, contact with the outside world, and complaints by prisoners. This is not a legal instrument, and can give only recommendations.

304 GA res.37/194, annex, U.N. Doc. A/37/51 (1982)

305 GA res.47/133, annex, U.N. Doc. A/47/49 (1992)

306 GA res.55/89, annex, U.N. Doc. A/55/89 (2000)  
<http://www.ohchr.org/english/about/publications/docs/8rev1.pdf>

307 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990)

308 Adopted at the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res.663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res.2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977)

- *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)*<sup>309</sup>
- *The Basic Principles and Guidelines on the Victim's Right to a Remedy and Reparations for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005)*<sup>310</sup>

This sets out international and accepted standards on victims' rights of access to justice and to appropriate reparation; providing a protocol for the prevention, investigation, prosecution and punishment of torture, measures for ensuring the equal access to justice through effective remedies, and documents appropriate forms of reparation for the harm suffered, including; *Restitution; Compensation; Rehabilitation; Satisfaction; and Guarantees of non-repetition.*

- *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (2005)*<sup>311</sup>

These deal with the obligation on states to prosecute under the rubric of the victim's "right to justice", stressing that it is a general principle that States must take "appropriate measures... particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."

- *United Nations Voluntary Fund for Victims of Torture*<sup>312</sup>

This was established in 1981 by the General Assembly, with the aim of providing aid to 'individuals whose human rights have been severely violated as a result of torture and to relatives of such victims'. The Fund supports those bodies that work to provide relief, in particular medical and psychological relief, to those who have suffered from torture and ill-treatment at the hands of governments.

309 GA res.40/34, annex, U.N. Doc. A/40/53 (1985)

310 GA res.60/147, annex, U.N. Doc. A/60/147

311 UN Doc. E/CN.4/2005/102/Add. 1 Feb. 8, 2005

312 GA res.36/151and.49/176, U.N. Doc. A/49/49 (1994)



## VIII. Recommendations

KHRP welcomes certain aspects of constitutional and legislative reform, but urges the Turkish authorities to follow up on, consolidate and implement the reforms. In line with the expressed concern of both; the European Commission that ‘*implementing the legislative reforms undertaken in previous years remains a challenge*’; and the Committee of Ministers that ‘the efficient prevention of renewed abuses requires, *in addition to the adoption of new texts*, a change of attitude and working methods by members of the security forces and effective domestic remedies ensuring adequate compensation for victims and effective criminal prosecution of the officials responsible’, special attention must be given to implementing these reforms and combating the received culture of impunity and those *systemic* problems the subject of the Committee and the Parliamentary Assembly’s renewed attention in interim resolution (2005)43.

*The KHRP urges the Turkish Government to;*

- End the practice of torture, and the impunity of those responsible;
- Ensure the highest Turkish authorities demonstrate their total opposition to torture. They should condemn torture unreservedly whenever it occurs. They should make clear to all members of the police, military and other security forces that torture will never be tolerated;
- Revise the parallel criminal justice systems in operation for those held under anti-terror legislation; reversing the erosion of certain custodial and judicial safeguards for those detained under anti-terror legislation and ensuring *all* detainees have immediate access to legal counsel;
- Shorten periods of police detention and remand detention; ensuring that the extension of detention before being brought before a judge provided for under Article 128 of the CPC and in circumstances ‘for reasons of difficulty encountered in the collection of evidence, or the high number of perpetrators or other similar reason’ is used sparingly and exceptionally and not as a rule;
- Ensure that detention registers are well-kept, inline with the provisions of

the *UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment* and the *Standard Minimum Rules for the Treatment of Prisoners*, taking the form of a bound volume with numbered pages to avoid being tampered with. Delays in notification, and in the recording of detention in registers, must be addressed. Scrupulous record-keeping of all detentions is important, not only to establish responsibility for any violations committed during custody but, more urgently, in order to prevent “disappearances”. Relatives and lawyers should be able to find out immediately where a detainee is held and under which authority;

- Ensure that those safeguards envisaged in legislation are put into practice; the Turkish government should establish systems for rigorous monitoring of police stations and gendarmeries, including by independent councils consisting of members of the public. Police officers and gendarmes must be sharply disciplined and/or prosecuted whenever they deny detainees access to legal counsel; induce detainees to sign away their right to see a lawyer; fail to inform detainees of their rights; interfere with medical examinations; fail to inform relatives when people are detained; fail to register detainees on arrival; or fail to take detained children directly to the prosecutor as regulations require. Turkey should ratify the Optional Protocol to the UN CAT allowing for access by the independent and international monitoring committee;
- Have due regard to the recommendations of the Committee of Ministers and Parliamentary Assembly with regard to the actions of the Security Forces<sup>313</sup> and to take resolute action through training and human rights awareness. Carry out inspections of detention centres and prisons without prior notice, and punish those responsible for torture and ill-treatment;
- Ratify the first Optional Protocol to the ICCPR conferring competence on the Human Rights Committee to receive individual communications;
- Not to use the activities of certain military and political groups as an excuse for their own inaction and complicity in various human rights violations against its own people;
- Implement procedures found in the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Detainees should have immediate access to independent, impartial and competent medical experts. Independent medical or psychiatric reports should be admissible to any investigation.

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313 Particularly Res DH(2005)43

Medical examinations should be conducted in accordance with the regime provided for/envisaged by the Istanbul Protocol; in particular with due regard paid to the procedures for the effective documentation of medical evidence. The examination must be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials. The medical expert should promptly prepare an accurate written report, including *at least* the following:

- The name of the subject and the name and affiliation of those present at the examination; the exact time and date, location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g. detention centre, clinic, house); and the circumstances of the subject at the time of the examination (e.g. nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner, threatening statements to the examiner) and any other relevant factors;
- A detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, the time when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms;
- A record of all physical and psychological findings on clinical examination, including appropriate diagnostic tests and, where possible, colour photographs of all injuries;
- An interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and further examination should be given;
- The report should clearly identify those carrying out the examination and should be signed.

The report should be confidential and communicated to the subject or a nominated representative and should be delivered directly to the Public Prosecutor rather than via a police officer. The views of the subject and his or her representative about the examination process should be solicited and recorded in the report. In the case of rape and other forms of sexual abuse, the examining health personnel should be of the same sex as the victim unless otherwise requested by the victim. Medical examinations should be carried out in places specifically designed for the purpose, ideally with a central designated medical facility in a given city having the

primary responsibility for the carrying out of such examinations, inline with CPT recommendations.

- Revise provisions of the new Turkish anti-terror law (TMY) allowing for<sup>314</sup> the trial of members of the security forces to continue while the defendants remain released on bail, regardless of the nature of the crime for which they stand trial or the sentence they would face if convicted. And to consider the enhanced opportunity for the intimidation or harassment of witnesses afforded by such provisions in light of the obligations under international law *to protect witnesses, those conducting the investigation and their families from intimidation and/or harassment or threats of violence*;
- Ensure that complaints and reports of torture or ill-treatment, "disappearance" and extrajudicial execution are promptly, impartially and effectively investigated; Turkey should revise its procedures for the receiving of complaints, the investigation of allegations of ill-treatment and the channels for redress. Even in the absence of an express complaint, an investigation should be undertaken whenever there is reasonable ground to believe that torture or ill-treatment might have occurred. The investigators should be competent, impartial and independent of the suspected perpetrators and the agency they serve. They should have access to, or be empowered to commission investigations by impartial and independent medical or other experts. Victims should be kept informed of the progress of the investigation;
- Prosecute those responsible for human rights violations, including those who order it, bringing them to justice in accordance with international standards of fairness. Police officers or gendarmes under investigation or trial for ill-treatment, torture, "disappearance" or extrajudicial executions should be suspended from active duty pending the completion of investigations and if convicted they should be dismissed from the force. Prosecutions should be conducted with the requisite level of promptness and effectiveness. Barriers to prosecution, impunity and its contributing factors addressed;
- Inline with Article 15 of the UN Convention against Torture, "ensure that any statement which is established to have been made as a result of torture should not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." A body should be established to review previous convictions based on evidence alleged to have been extracted under torture and, where appropriate, to

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314 By the revision to Article 15 of Law 3713



arrange for prompt retrial or release. The courts must follow the exemplary rulings of the Court of Cassation with regard to the in-admissibility of statements extracted under torture. The state must assume the burden, where allegations regarding the extraction of statements under duress, of proving that such statements were not procured as alleged;

- End the practice of blindfolding to promote accountability by police and to end torture. Blindfolding is a form of ill treatment in itself, and makes the reliable identification of officers responsible for abuses more difficult. In accordance with the recommendation made to the Turkish government by the UN Special Rapporteur on torture in 1999, the authorities should seriously consider the introduction of video recording of interrogations, as a means of protecting both detainees held incommunicado and law enforcement officers who may be falsely accused of acts of torture or ill-treatment;
- Recognise that forcibly subjecting female detainees to "virginity tests" is a form of gender-based violence constituting torture or cruel, inhuman or degrading treatment. Mechanisms to ensure that such practices will not be tolerated should be put in place;
- Improve access to medical attention and reliable medical evidence for victims of sexual torture;
- Amend the Turkish Penal Code to define 'virginity testing' expressly under Offences against the Individual, rather than as an offence categorised under Offences against the Judiciary;
- Amend Turkish Penal Code article 102 to define 'rape' expressly by name;
- End isolation regimes in prisons: Small-group isolation and solitary confinement in 'F-Type' and other prisons should end immediately and prisoners should be allowed to spend at least eight hours of the day taking part in communal activities outside their living units, as called for by the CPT;
- Ensure that it meets its obligations under Article 14 of the UN Convention against Torture, regarding the rights of victims of torture and their dependants to fair and adequate redress from the state; and to have due regard to the standards set out in the Basic Principles and Guidelines on the victim's right to a remedy and reparation for gross violations of international human rights law and serious violations of international humanitarian law. This should include appropriate medical and psychological care, financial

compensation and rehabilitation. Remedies must be of a requisite degree of effectiveness;

- Address *all* aspects of the fairness of trials conducted before Heavy Penal; seeing through the abolition of State Security Courts (SSC), including length of remand detention and trial of those held for offences under their jurisdiction, the role of lawyers, equality of arms (defence), access to case file and admissibility of evidence;

*KHRP urges the European Union to;*

- Ensure all reforms are fully implemented by the Turkish government before concluding accession talks;
- Evaluate Turkey's accession to the EU on the basis of tangible improvements to its human rights record, rather than just theoretical reform. If the EU does not ensure that changes in theory are matched by changes in practice, it risks exacerbating Turkey's human rights violations as well as compromising its own credibility and integrity;
- Avoid assessments based on external political pressure, and to consider whether Turkey's reforms are sufficiently implemented to qualify for a definite date for the start of accession talks. Should the EU offer rewards for reform that is not fully implemented and adhered to, it will set a precedent which jeopardizes the need for genuine human rights reform in Turkey;

*KHRP urges the Council of Europe,  
Specifically the European Court of Human Rights to;*

- Ensure that over reliance is not placed on medical evidence as the sole source of acceptable evidence; recognising the evolution of new methods of ill-treatment, such as sleep and food deprivation, hosing, and other forms of psychological torment, less conducive to forensic detection, and the obvious problems this poses for the over reliance on medical documentation;
- Afford appropriate status to consistent reports attesting to the existence of a sustained pattern of ill-treatment and to the determination of the Court's own Committee of Ministers as to the systemic problems pervading the security forces and to other forms of evidence that might lend weight to complaints *in the absence of corroborating, conclusive or prompt medical*

*evidence*. This even more so in the case of allegations made regarding the integrity of the medical reports themselves;

- Implement the Court's own formulation that the applicable standard of proof of "beyond reasonable doubt" may 'follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact'<sup>315</sup>; the Court having also stated that it; 'recognises the difficulty for detained people to obtain evidence of ill-treatment during police custody';

*And the Committee of Ministers to;*

- Pursue the issue of Turkey's compliance with the judgments of the ECtHR and to continue remain seized of the issue of violations by Turkey's security forces.

*KHRP urges the UN Human Rights Council to;*

- Actively condemn Turkey's human rights violations as long as they continue to happen;
- Encourage Turkey's full compliance e Turkey's refusal to respond to repeated requests of UN human rights mechanisms to visit the country and to challenge Turkey where this is not forthcoming;
- Adopt a strong resolution on the human rights situation in Turkey;
- Demand that the Turkish government invite visits by Special Rapporteurs on Torture;

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315 See *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 161



## IX Conclusion

Despite claims to the contrary, torture is still systemic in Turkey. While official reports by the CPT attest to a *general* decrease in the levels of traditional forms of torture and ill-treatment, there *are* signs that torture persists and that there has been a shift from more obvious forms of torture to those which leave little physical trace on the victim. More importantly, legal *regression* in custodial safeguards has re-opened the way for increased exposure to situations conducive to torture and other forms of ill-treatment. KHRP continues to receive reports on a daily basis from Southeast Turkey of instances of torture of detainees, malpractice of doctors examining victims, and unfair and lengthy trials of those responsible. Deaths due to extra-judicial killings, deaths in prison, deaths in custody, extra-judicial attacks, and suspicious deaths while in detention continue and the position of human rights defenders and lawyers acting on behalf of torture victims remains a concern. Factors contributing to the continuing practice of torture are still in place, and have arguably *increased* with the latest anti terror law. While the state of emergency has technically been lifted in the remaining provinces in the Southeast, its mentality prevails as cases involving disappearances and incommunicado detention continue, perpetuating an atmosphere conducive to the practice of torture.

Fact-Finding Missions and Trial Observations carried out by KHRP have demonstrated a concerted effort on the part of security forces in the Southeast to deliberately obstruct the reform process. The Committee of Ministers and Parliamentary Assembly have both drawn attention to the systemic nature of factors contributing to violations by the security services, pointing out that 'efficient prevention of renewed abuses requires, in addition to the adoption of new texts, *a change of attitude and working methods by members of the security forces* and effective domestic remedies ensuring adequate compensation for victims effective criminal prosecution of the officials responsible'<sup>316</sup>.

Although the EU accession process has undoubtedly had an effect in terms of security for certain fundamental rights, its impact is yet to pervade all sectors of society and the slowing down of accession talks, not expected to pick up anytime soon, is of increasing concern for the future of the reform agenda.

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316 Interim Resolution DH(2002)98

The adverse effect [of the 2006 anti-terror legislation] on Turkey's reform process and its stated goal of democratization, [reversing earlier reform efforts and setting the democratisation process back several years], cannot be overstated<sup>317</sup>

The reforms of the 2000's were intended to enlarge the domain of citizens' rights *vis-à-vis* the previous security-oriented state structures, however subsequent draconian laws, unfair court procedures, and widespread impunity have perpetuated the disproportionate influence of the executive and the military. The legal process continues to protect those responsible for torture, which has compromised the integrity of the rule of law.

While Turkey has made considerable progress towards reforming its legal framework and deserves praise for its efforts, the road to implementing effective reform is long and Turkey still has a long way to go. Certain reforms set out in 2003 were designed to ensure that allegations of torture are promptly investigated and prosecuted, forming part of Turkey's package of reforms to improve human rights violations. The 6<sup>th</sup> and 7<sup>th</sup> Harmonization packages formed in mid-2003 were certainly positive developments, yet despite almost four years having passed, these packages remain to be fully implemented; some of those achievements having been positively undone by subsequent reform

KHRP welcomes Turkey's reforms as a crucial step towards improving its human rights record, yet at the same time is concerned that the reforms are not being implemented on the ground. The long-awaited reduction in detention periods has proved insufficient to combat what has become an ingrained system of abuse. The anti-terror laws have seen the effective re-emergence of incommunicado detention rape while in police custody still continues, disappearances are common, and beatings in detention centres are rife.

The shift from flagrant to more subtle forms of violation, leaving few traces or long-term physical signs, and the increase in incidences of ill-treatment outside official detention centers, betrays progress reflected by the figures.

The issue of impunity remains a crucial obstacle to human rights progress and continues to hinder reform at a basic level. Systemic factors contributing to the persistence of torture and impunity for perpetrators are unfortunately still in place, and have arguably increased with anti-terror legislation effectively '*surrender[ing] personal rights and freedoms to the conscience of the security forces.*'<sup>318</sup>

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317 EUTCC referenced in Desmond Fernandes 'A Step Backwards – the Effects of the new Anti-Terror Law on Fundamental Rights and Freedoms' note.7

318 Quoted in Desmond Fernandes above note 7

The failure within the legal process to protect detainees from ill treatment is compounded by an unwillingness and inability to prosecute those responsible for it, articulated in the UN Special Rapporteur on Torture's expressed concern *in March 2006* that 'with regard to allegations of torture and ill-treatment of terrorism suspects, he did not find convincing evidence that an independent, impartial, accessible and effective investigation mechanism is in place.'

The progress of the EU accession process will be crucial for securing fundamental rights in Turkey. Turkey's human rights record *is* attracting international attention, however concern remains over the measure of 'latitude' being afforded to Turkey in the interests of the wider geo-political strategic concerns driving negotiations. Genuine reform needs more than formal legal change, but requires a discernible effort on the part of those in authority to enforce the new laws, and ensure that they are carried out in practice. Again the determination of the Committee of Ministers that the efficient prevention of abuses requires '*in addition to the adoption of new texts*, a change of attitude and working methods by members of the security forces and effective domestic remedies ensuring adequate compensation for victims effective criminal prosecution of the officials responsible'<sup>319</sup> is instructive .

The application and implementation of reforms will require the positive abandonment of old attitudes and requires those systemic issues the subject of both the Committee of Ministers' and the Parliamentary Assembly's renewed attention<sup>320</sup> to be properly addressed. Those in power must commit to genuine reform and discard old modes of thinking so as to furnish reform with the institutional will to enforce it. For the reforms to be properly applied, Turkish society as a whole will be required to make a great effort to change.

For the last fifteen years, the KHRP has brought these allegations to the attention of the EU, OSCE and the COE and asked the member states to give them their most urgent attention. Unfortunately, the KHRP is today repeating the same call. KHRP is concerned that the EU should not set a date for accession until such reforms are implemented effectively. It is vital that the EU does not compromise on issues of principle in order to satisfy external strategic demands for Turkey's accession.

The international community must continue to remind the Turkish government of its human rights obligations as regards torture and calls upon the international community to use the human dimension mechanisms at its disposal to assist Turkey in addressing these serious human rights issues regarding the torture of Kurdish detainees and impunity of those responsible.

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319 Interim Resolution DH(2002)98

320 Resolution ResDH(2005)44 of the Committee of Ministers, and Parliamentary Assembly Doc. 11020 18 September 2006





## Appendix I

### **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

**Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1)**

The States Parties to this Convention,

*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Recognizing* that those rights derive from the inherent dignity of the human person,

*Considering* the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

*Having* regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

*Having* regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

*Desiring* to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

## **PART I**

### **Article 1**

1. For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

### **Article 2**

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

### **Article 3**

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

### **Article 4**

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

### Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
  - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
  - (b) When the alleged offender is a national of that State;
  - (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

### Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

### Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

#### **Article 8**

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

#### **Article 9**

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

#### **Article 10**

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or

imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

#### **Article 11**

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

#### **Article 12**

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

#### **Article 13**

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

#### **Article 14**

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

#### **Article 15**

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

#### **Article 16**

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when

such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

## **PART II**

### **Article 17**

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.
3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term

of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.
7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

### **Article 18**

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:
  - (a) Six members shall constitute a quorum;
  - (b) Decisions of the Committee shall be made by a majority vote of the members present.
3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.
4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

### **Article 19**

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned.
1. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.
3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State
4. Party may respond with any observations it chooses to the Committee.
5. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph I of this article.

#### **Article 20**

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs I to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

#### **Article 21**

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive



and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure;

- (a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
- (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
- (c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;
- (d) The Committee shall hold closed meetings when examining communications under this article;
- (e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;
- (f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
- (g) The States Parties concerned, referred to in subparagraph (b),

shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

- (h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:
  - (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
  - (j) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

- 2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

### **Article 22**

- 1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.
- 2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.
- 3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee

written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned. 5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:
  - (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;
  - (b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.
5. The Committee shall hold closed meetings when examining communications under this article.
6. The Committee shall forward its views to the State Party concerned and to the individual.
7. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General.
8. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

### **Article 23**

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph I (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

### **Article 24**

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

### **PART III**

#### **Article 25**

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### **Article 26**

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary General of the United Nations.

#### **Article 27**

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

#### **Article 28**

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph I of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

#### **Article 29**

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering an d voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph I of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have

- accepted it in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

### **Article 30**

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by paragraph I of this article with respect to any State Party having made such a reservation.
3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

### **Article 31**

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

### **Article 32**

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

- (a) Signatures, ratifications and accessions under articles 25 and 26;

- (b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;
- (c) Denunciations under article 31.

**Article 33**

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

## Appendix II

### **Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

**Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199**

**Entered into force on 22 June 2006**

#### PREAMBLE

The States Parties to the present Protocol,

*Reaffirming* that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights,

*Convinced* that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

*Recalling* that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

*Recognizing* that States have the primary responsibility for implementing those articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all and that international implementing bodies complement and strengthen national measures,

*Recalling* that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures,

*Recalling* also that the World Conference on Human Rights firmly declared

that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional protocol to the Convention, intended to establish a preventive system of regular visits to places of detention,

*Convinced* that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention,

Have agreed as follows:

## **PART I**

### **General principles**

#### **Article 1**

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

#### **Article 2**

1. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter referred to as the Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.
2. The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.
3. Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.
4. The Subcommittee on Prevention and the States Parties shall cooperate in the implementation of the present Protocol.

#### **Article 3**

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).



#### **Article 4**

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.
2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

### **PART II**

#### **Subcommittee on Prevention**

#### **Article 5**

1. The Subcommittee on Prevention shall consist of ten members. After the fiftieth ratification of or accession to the present Protocol, the number of the members of the Subcommittee on Prevention shall increase to twenty-five.
2. The members of the Subcommittee on Prevention shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.
3. In the composition of the Subcommittee on Prevention due consideration shall be given to equitable geographic distribution and to the representation of different forms of civilization and legal systems of the States Parties.
4. In this composition consideration shall also be given to balanced gender representation on the basis of the principles of equality and non-discrimination.
5. No two members of the Subcommittee on Prevention may be nationals of the same State.
6. The members of the Subcommittee on Prevention shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee on Prevention efficiently.

#### **Article 6**

1. Each State Party may nominate, in accordance with paragraph 2 of the present article, up to two candidates possessing the qualifications and

meeting the requirements set out in article 5, and in doing so shall provide detailed information on the qualifications of the nominees.

2.
  - (a) The nominees shall have the nationality of a State Party to the present Protocol;
  - (b) At least one of the two candidates shall have the nationality of the nominating State Party;
  - (c) No more than two nationals of a State Party shall be nominated;
  - (d) Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.
3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list, in alphabetical order, of all persons thus nominated, indicating the States Parties that have nominated them.

#### Article 7

1. The members of the Subcommittee on Prevention shall be elected in the following manner:
  - (a) Primary consideration shall be given to the fulfilment of the requirements and criteria of article 5 of the present Protocol;
  - (b) The initial election shall be held no later than six months after the entry into force of the present Protocol;
  - (c) The States Parties shall elect the members of the Subcommittee on Prevention by secret ballot;
  - (d) Elections of the members of the Subcommittee on Prevention shall be held at biennial meetings of the States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee on Prevention shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.
2. If during the election process two nationals of a State Party have become eligible to serve as members of the Subcommittee on Prevention, the candidate receiving the higher number of votes shall serve as the member of the Subcommittee on Prevention. Where nationals have received the same number of votes, the following procedure applies:
  - (a) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee on Prevention;
  - (b) Where both candidates have been nominated by the State Party

- of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall become the member;
- (c) Where neither candidate has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which candidate shall be the member.

#### **Article 8**

If a member of the Subcommittee on Prevention dies or resigns, or for any cause can no longer perform his or her duties, the State Party that nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

#### **Article 9**

The members of the Subcommittee on Prevention shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half the members elected at the first election shall expire at the end of two years; immediately after the first election the names of those members shall be chosen by lot by the Chairman of the meeting referred to in article 7, paragraph 1 ( d).

#### **Article 10**

1. The Subcommittee on Prevention shall elect its officers for a term of two years. They may be re-elected.
2. The Subcommittee on Prevention shall establish its own rules of procedure. These rules shall provide, inter alia, that:
  - (a) Half the members plus one shall constitute a quorum;
  - (b) Decisions of the Subcommittee on Prevention shall be made by a majority vote of the members present;
  - (c) The Subcommittee on Prevention shall meet in camera.
3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee on Prevention. After its initial meeting, the Subcommittee on Prevention shall meet at such times as shall be provided by its rules of procedure. The Subcommittee on Prevention and the Committee against Torture shall hold their sessions simultaneously at least once a year.

**PART III**  
**Mandate of the Subcommittee on Prevention**

**Article 11**

1. The Subcommittee on Prevention shall:
  - (a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
  - (b) In regard to the national preventive mechanisms:
    - i. Advise and assist States Parties, when necessary, in their establishment;
    - ii. Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;
    - iii. Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
    - iv. Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;
  - (c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.

**Article 12**

1. In order to enable the Subcommittee on Prevention to comply with its mandate as laid down in article 11, the States Parties undertake:
  - (a) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in article 4 of the present Protocol;
  - (b) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman

- or degrading treatment or punishment;
- (c) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;
- (d) To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

### **Article 13**

1. The Subcommittee on Prevention shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfil its mandate as established in article 11.
2. After consultations, the Subcommittee on Prevention shall notify the States Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.
3. The visits shall be conducted by at least two members of the Subcommittee on Prevention. These members may be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention. In preparing the roster, the States Parties concerned shall propose no more than five national experts. The State Party concerned may oppose the inclusion of a specific expert in the visit, whereupon the Subcommittee on Prevention shall propose another expert.
4. If the Subcommittee on Prevention considers it appropriate, it may propose a short follow-up visit after a regular visit.

### **Article 14**

1. In order to enable the Subcommittee on Prevention to fulfil its mandate, the States Parties to the present Protocol undertake to grant it:
  - (a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
  - (b) Unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention;
  - (c) Subject to paragraph 2 below, unrestricted access to all places of detention and their installations and facilities;
  - (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information;

- (e) The liberty to choose the places it wants to visit and the persons it wants to interview.
2. Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

#### **Article 15**

No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

#### **Article 16**

1. The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism.
2. The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.
3. The Subcommittee on Prevention shall present a public annual report on its activities to the Committee against Torture.
4. If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the recommendations of the Subcommittee on Prevention, the Committee against Torture may, at the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee on Prevention.

### **PART IV**

#### **National preventive mechanisms**

#### **Article 17**

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may

be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

### **Article 18**

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.
2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.
3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.
4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

### **Article 19**

The national preventive mechanisms shall be granted at a minimum the power:

- (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
- (c) To submit proposals and observations concerning existing or draft legislation.

### **Article 20**

- (a) In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:
  - (a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
  - (b) Access to all information referring to the treatment of those persons as well as their conditions of detention;
  - (c) Access to all places of detention and their installations and facilities;
  - (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator

if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;

- (e) The liberty to choose the places they want to visit and the persons they want to interview;
- (f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

#### **Article 21**

- 1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.
- 2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

#### **Article 22**

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

#### **Article 23**

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

### **PART V Declaration**

#### **Article 24**

- 1. Upon ratification, States Parties may make a declaration postponing the implementation of their obligations under either part III or part IV of the present Protocol.
- 2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two years.

### **PART VI Financial provisions**

#### **Article 25**

- 2. The expenditure incurred by the Subcommittee on Prevention in the



implementation of the present Protocol shall be borne by the United Nations.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee on Prevention under the present Protocol.

#### **Article 26**

2. A Special Fund shall be set up in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms.
3. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

### **PART VII** **Final provisions**

#### **Article 27**

1. The present Protocol is open for signature by any State that has signed the Convention.
2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

#### **Article 28**

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, the present Protocol shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

### **Article 29**

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

### **Article 30**

No reservations shall be made to the present Protocol.

### **Article 31**

The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.

### **Article 32**

The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

### **Article 33**

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation that may occur prior to the date on which the denunciation becomes effective, or to the actions that the Subcommittee on Prevention has decided or may decide to take with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter already under consideration by the Subcommittee on Prevention prior to the date on which the denunciation becomes effective.
3. Following the date on which the denunciation of the State Party becomes effective, the Subcommittee on Prevention shall not commence consideration of any new matter regarding that State.

### **Article 34**

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to

the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment that they have accepted.

#### **Article 35**

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

#### **Article 36**

When visiting a State Party, the members of the Subcommittee on Prevention shall, without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

- (a) Respect the laws and regulations of the visited State;
- (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

#### **Article 37**

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.



## Appendix III

### **Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

#### **Annex to GA res.55/89 of 4 December 2000. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

1. The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter “torture or other ill-treatment”) include the following:
  - (a) Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families;
  - (b) Identification of measures needed to prevent recurrence;
  - (c) Facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.
  
2. States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards and the findings shall be made public.

3. (a) The investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry.<sup>321</sup> The persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-treatment to appear and testify. The same shall apply to any witness. To this end, the investigative authority shall be entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence.
  - (b) Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.
4. Alleged victims of torture or ill-treatment and their legal representatives shall be informed of, and have access to, any hearing, as well as to all information relevant to the investigation, and shall be entitled to present other evidence.
5. (a) In cases in which the established investigative procedures are inadequate because of insufficient expertise or suspected bias, or because of the apparent existence of a pattern of abuse or for other substantial reasons, States shall ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.
  - (b) A written report, made within a reasonable time, shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. Upon completion, the report shall be made public. It shall also describe in detail specific events that were found to have occurred and

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<sup>321</sup> Under certain circumstances, professional ethics may require information to be kept confidential. These requirements should be respected.

the evidence upon which such findings were based and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The State shall, within a reasonable period of time, reply to the report of the investigation and, as appropriate, indicate steps to be taken in response.

6. (a) Medical experts involved in the investigation of torture or ill-treatment shall behave at all times in conformity with the highest ethical standards and, in particular, shall obtain informed consent before any examination is undertaken. The examination must conform to established standards of medical practice. In particular, examinations shall be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials.
- (b) The medical expert shall promptly prepare an accurate written report, which shall include at least the following:
  - (i) Circumstances of the interview: name of the subject and name and affiliation of those present at the examination; exact time and date; location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g., detention centre, clinic or house); circumstances of the subject at the time of the examination (e.g., nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner or threatening statements to the examiner); and any other relevant factors;
  - (ii) History: detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, times when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms;
  - (iii) Physical and psychological examination: record of all physical and psychological findings on clinical examination, including appropriate diagnostic tests and, where possible, colour photographs of all injuries;
  - (iv) Opinion: interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and/or further examination shall be given;
  - (v) Authorship: the report shall clearly identify those carrying out the examination and shall be signed.

(c) The report shall be confidential and communicated to the subject or his or her nominated representative. The views of the subject and his or her representative about the examination process shall be solicited and recorded in the report. It shall also be provided in writing, where appropriate, to the authority responsible for investigating the allegation of torture or ill-treatment. It is the responsibility of the State to ensure that it is delivered securely to these persons. The report shall not be made available to any other person, except with the consent of the subject or on the authorization of a court empowered to enforce such a transfer.



## Appendix IV

**Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 April 2005)**

### Preamble

*Recalling* the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular the Universal Declaration of Human Rights at article 8, the International Covenant on Civil and Political Rights at article 2, the International Convention on the Elimination of All Forms of Racial Discrimination at article 6, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at article 14, the Convention on the Rights of the Child at article 39, and of international humanitarian law as found in article 3 of the Hague Convention of 18 October 1907 concerning the Laws and Customs of War and Land (Convention No. IV of 1907), article 91 of Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), and articles 68 and 75 of the Rome Statute of the International Criminal Court,

*Recalling* the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular the African Charter on Human and Peoples' Rights at article 7, the American Convention on Human Rights at article 25, and the European Convention for the Protection of Human Rights and Fundamental Freedoms at article 13,

*Recalling* the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment

of Offenders, and resolution 40/34 of 29 November 1985 by which the General Assembly adopted the text recommended by the Congress,

*Reaffirming* the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

*Noting* that the Rome Statute of the International Criminal Court requires the establishment of “principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation” and requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court “to protect the safety, physical and psychological well being, dignity and privacy of victims” and to permit the participation of victims at all “stages of the proceedings determined to be appropriate by the Court”,

*Affirming* that the Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,

*Emphasizing* that the Principles and Guidelines do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms,

*Recalling* that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

*Noting* further that contemporary forms of victimization, while essentially

directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively,

*Recognizing* that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law,

*Convinced* that, in adopting a victim oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines.

## **I. OBLIGATION TO RESPECT, ENSURE RESPECT FOR AND IMPLEMENT INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW**

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:
  - (a) Treaties to which a State is a party;
  - (b) Customary international law;
  - (c) The domestic law of each State.
  
2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:
  - (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
  - (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
  - (c) Making available adequate, effective, prompt, and appropriate remedies, including reparation, as defined below; and
  - (d) Ensuring that their domestic law provides at least the same level of protection for victims as required by their international obligations.

## II. SCOPE OF THE OBLIGATION

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:
  - a. Take appropriate legislative and administrative and other appropriate measures to prevent violations;
  - b. Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
  - c. Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
  - d. Provide effective remedies to victims, including reparation, as described below.

## III. GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.
5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

#### IV. STATUTES OF LIMITATIONS

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.
7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

#### V. VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

8. For purposes of this document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

#### VI. TREATMENT OF VICTIMS

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

## VII. VICTIMS' RIGHT TO REMEDIES

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:
  - (a) Equal and effective access to justice;
  - (b) Adequate, effective and prompt reparation for harm suffered; and
  - (c) Access to relevant information concerning violations and reparation mechanisms.

## VIII. ACCESS TO JUSTICE

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:
  - (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
  - (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
  - (c) Provide proper assistance to victims seeking access to justice;
  - (d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.
13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.
14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

## IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.
16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations.
17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.
18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non repetition.
19. Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
  - (a) Physical or mental harm;
  - (b) Lost opportunities, including employment, education and social benefits;
  - (c) Material damages and loss of earnings, including loss of earning potential;
  - (d) Moral damage;
  - (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
  
21. Rehabilitation should include medical and psychological care as well as legal and social services.
  
22. Satisfaction should include, where applicable, any or all of the following:
  - (a) Effective measures aimed at the cessation of continuing violations;
  - (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
  - (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
  - (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
  - (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
  - (f) Judicial and administrative sanctions against persons liable for the violations;
  - (g) Commemorations and tributes to the victims;
  - (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.



23. Guarantees of non repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:
- (a) Ensuring effective civilian control of military and security forces;
  - (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
  - (c) Strengthening the independence of the judiciary;
  - (d) Protecting persons in the legal, medical and health care professions, the media and other related professions, and human rights defenders;
  - (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
  - (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
  - (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
  - (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

#### **X. ACCESS TO RELEVANT INFORMATION CONCERNING VIOLATIONS AND REPARATION MECHANISMS**

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

#### **XI. NON DISCRIMINATION**

25. The application and interpretation of these Principles and Guidelines must be consistent with international human rights law and international

humanitarian law and be without any discrimination of any kind or ground, without exception.

## **XII. NON DEROGATION**

26. Nothing in these Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Principles and Guidelines are without prejudice to special rules of international law.

## **XIII. RIGHTS OF OTHERS**

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.



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