



Submission of the Human Rights Foundation of Turkey  
to the UN Committee against Torture for its  
consideration of the 3rd Periodic Report of Turkey

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*Information and recommendations in reply to the list of issues  
transmitted to the State party prior to the submission of its report*

*Human Rights Foundation of Turkey*

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## Introduction

Turkey has submitted its 3rd periodic report to the UN Committee against Torture (CAT) on 30 June 2009 which is almost four years after the deadline of 31 August 2005. For a country that “is committed to preventing and eradicating torture”, that boasts of the “success of [its] ‘zero tolerance [for torture] policy’” and its “progress [which] is now being cited as an example” the excuse that “the reporting burden Turkey has faced [...] delayed the submission of its third periodic report to CAT” seems rather weak. In fact, Turkey’s report shows that its commitment exists on paper, in laws and regulations, but seriously lacks commitment where the actual day to day practice of law enforcement agencies and courtrooms is concerned.

### Issue no. 1

#### I. An overall evaluation of the legal amendments made in 2005

In the year 2005, the Turkish Penal Code (TPC), the Code on Criminal Procedures (CCP) and the Code on the Enforcement of Sentences and Security Measures (CES) were completely changed. These amendments were presented as a ‘legal reform’ by the government and hence lead to serious expectations in both the Turkish public and in international platforms.

Especially the amendments made in the Code on Criminal Procedures would strengthen the right to protection on the one hand, and narrow the authority of law enforcement forces and the judiciary on the other. In the face of these changes, heavy criticism was levelled by those wishing to preserve the status quo and the senior authorities of the law enforcement, claiming that ‘the law enforcement will be disabled in performing its duties and that it would become impossible to combat crime.’ These criticisms had an impact in a very short time and even before the new law was put into effect, the amendments made in the Code on Criminal Procedures were repealed and the improvements eliminated.<sup>1</sup>

Despite the objections of non-governmental organizations working in the field of human rights, no explanation was made to the public. Nor were any discussions held on why such regressive steps were taken. In the answers given by the State Party to your Committee, when explanations are made about

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<sup>1</sup> For example, the article regulating the responsibility to inform people of their rights when they are apprehended by the law enforcement sets forth that “the person apprehended shall be immediately informed of his rights”. Yet, five days before the effective date of the CCP, as a result of the amendment brought with Law no 5353, the article was changed to read “the person shall be informed of his rights once measures are taken to prevent his escape and his inflicting harm on himself or another person”. (CCP art.90/4)

In the same way, an amendment was made in the provision stating that the person is to be immediately referred to the public prosecutor’s office only after which a decision for detention can be taken by the prosecutor; according to the new provision, it is sufficient to inform the prosecutor of the apprehension (CCP art.90/5). Thus, a conclusion was reached that it is unnecessary for the suspect to be brought before and heard by the prosecutor, thereby abandoning an opportunity that would have enabled the detection of torture and ill-treatment and lowered the risk of torture.

In the first version of the law, the legal period of detention was set as twenty four hours; while with Law no 5353, the travel time “necessary to bring the suspect before a judge” was added as a maximum of twelve hours (CCP art.91/1)

the amendments to legislation, there is no mention of why the endeavour to establish a better criminal justice system was abandoned.

## II. Right to an Attorney / the Scope of Legal Aid, its limits and problematic areas

### 1. General

In domestic law, the scope of the right to an attorney is narrow when compared to international standards. However, the main problem is not the legislation but rather the fact that suspects are unable to duly exercise this right due to the illegal and arbitrary practices of the law enforcement officers and judicial bodies.

According to the Code on Criminal Procedures (CCP) and the Regulation on Apprehension, Police Custody and Interrogation, the suspect can avail from the legal aid of an attorney at all stages of the investigation and prosecution.<sup>2</sup> Legal aid is defined as having a lawyer present and his giving legal assistance throughout the deliberation, deposition and interrogation.<sup>3</sup> Furthermore, the confidentiality of interviews and correspondence is essential.<sup>4</sup> Although there are no rules restricting the number of lawyers that can give legal aid to the individual, article 149/2 of the law limits the number to three at the time of deposition during investigation.

Despite these legal arrangements, there are serious shortcomings and obstacles in exercising the right to a lawyer.

For example, there are frequent problems experienced in ensuring the confidentiality of the talks between lawyers and the suspects, in addition to problems regarding the amount of time and facilities provided for these visits. Indeed, in a survey conducted by the Human Rights Foundation of Turkey in 2008, only 12% of lawyers who were asked whether “confidentiality was secured at their meetings with clients” stated that the “confidentiality of the visits” was “always” respected. In response to the survey question on whether sufficient time and facilities are given for the visits, only 8% of lawyers responded “always”.

In incidents where there is torture and ill treatment involved, the suspect’s request to see a lawyer is mostly rejected by the law enforcement. Again in similar situations, lawyer’s access to his client under police custody is virtually prevented or the visits are delayed on various grounds. Such behaviour on the part of the law enforcement is frequently encountered in investigations involving political crimes. Lawyers who object to such arbitrary restrictions and insist on seeing their client, face physical assault and/or are inculpated<sup>5</sup>.

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<sup>2</sup> CCP art. 149/1, YGAİAY art.20/1

<sup>3</sup> CCP art. 149/3, YGAİAY art.20/3

<sup>4</sup> CCP art.154, YGAİAY art.21

<sup>5</sup> The case of Lawyer M.R., which is followed by the Human Rights Foundation of Turkey, is a very striking example in this regard: when M.R. goes to visit his client, he is told that he will not be allowed to see him. When M.R. objects to this practice, which is against the legislation, and insists on the visit, he is battered, insulted, apprehended and detained although his actions do not constitute an offense.

Witnesses to the incident inform two of his colleagues who then go to the police station to see M.R. Upon their arrival, they are told that no one by that name is in custody. By coincidence, they see M.R. waiting in the corridor with his hands cuffed behind him. They are then made to leave the building. When they attempt to enter the building again, they are physically obstructed and insulted.

Another form of violation seen in practice is restriction of the right to “choose” a lawyer. Especially for crimes that fall under the scope of anti-terrorism, the lawyer chosen by the person or his family is prevented from doing his job. Instead, a lawyer is requested from the bar association upon the initiative of the law enforcement officers or the prosecutor. There are also incidents where the person faces pressure and threats to give up seeing his own lawyer.

According to the current law and regulation, lawyers should be able to examine the contents of the case at the investigation stage and be able to receive a copy of the documents they want without having to pay a fee.<sup>6</sup> However, the law and regulation bring an exception to this rule. According to this exception; if the lawyer’s power to examine the file and take copies threatens to endanger the purpose of the investigation, this power can be restricted upon the request of the public prosecutor and the decision of the judge of the criminal court of peace.<sup>7</sup> However, this restriction does not apply in the case of records that comprise the statements of the suspect and the expert witness reports or in the case of records pertaining to other judicial procedures where those named are authorized to be present.<sup>8</sup>

In practice, for crimes that fall under the jurisdiction of Courts with Special Jurisdiction (State Security Courts), decisions for non-disclosure have almost become the rule. In these decisions for non-disclosure, no explanation is made about what the actual situation endangering the outcome of the investigation is. In addition, it is observed that, from time to time, no access is permitted even to documents that the legislation excludes from the scope of the non-disclosure decision. These documents are illegally kept from the lawyers by the law enforcement officers or the prosecutor’s office. It is known that almost all of the objections made to lift decisions for non-disclosure are rejected and the oversight mechanism does not function effectively.

## 2. Restrictions under the Anti-terror Law

Many rights have been restricted with some amendments made in the Anti-terror Law No 5532 made effective in 2006.<sup>9</sup>

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When they finally do enter the building, they are told to talk to M.R. in the corridor in the presence of two law enforcement officers. When they refuse to accept this, M.R. is transferred from the police station to another police unit. The lawyers were able to talk to M.R. only at the second police unit where he was taken.

The officials of the bar association to which M.R. is a member called the police station to confirm whether he is in police custody. They were told that no one was under custody at the police station at the moment including M.R. It was later understood that in addition to M.R., his two clients (whom he tried to visit) were also being kept in the same police unit.

An apprehension record was kept by the law enforcement about M.R. It was claimed in the document that M.R. showed resistance to and insulted a public official to prevent him from doing his job.

According to the records kept by the lawyers of M.R., two senior officials working in the provincial and district police directorate who visited the police station said that “M.R. should not file a complaint or otherwise their colleagues would do file a complaint as well. They stated that mutual dropping of complaints would be better for everyone’s sake”. When the lawyers turned down the proposal to not file a complaint, the interview was put to and end.

As a result, upon the complaint of the superintendent and the police officers, a case was filed against M.R. claiming that he showed resistance towards the public officials to keep them from doing their job and insulted them (Izmir 5th Criminal court of Peace 2008/1649 E). A case was filed by one superintendent and four police officers on grounds that they injured M.R. by excessive use of force (Izmir 6th Criminal Court of First Instance 2008/887 E.)

<sup>6</sup> CCP art.153, YGAİAY art.22/1

<sup>7</sup> CCP art.153/2, YGAİAY art.22/2

<sup>8</sup> CCP art.153/3, YGAİAY art.22/3

<sup>9</sup> Anti-terror Law, No 3713 – dated 12.04.1991

During the criminal investigations conducted in the scope of the Anti-terror Law, the suspect is allowed to receive legal aid from only one lawyer during his detention period. The right of the detained suspect to see his lawyer can be restricted for twenty four hours upon the request of the public prosecutor and the decision of the judge. Only one lawyer can be present when the suspect's deposition is taken.<sup>10</sup>

Since the article does not specify what situations and conditions can cause restrictions on seeing a lawyer, unfounded decisions without concrete reasons are given for such a restriction. Although preventing the suspect from seeing his lawyer is the exception to the rule, it has nearly become "the rule" in practice. In fact, the UN Working Group on Arbitrary Detention mentions in its 2007 report that this arrangement on the restriction to see a lawyer carries a high risk against the right to defence.<sup>11</sup> In the same way, for crimes under the Anti-terror Law, if the examination of the investigation file and the taking of copies threaten to endanger the purpose of the investigation, this right can be restricted upon the request of the public prosecutor and the decision of the judge.<sup>12</sup>

Following the amendments made in the Anti-terror Law, the UN working Group on Arbitrary Detention stated in its press conference on 20.10.2006 that "the felony courts specializing in terror related crimes prevent lawyers from examining the evidence in the investigation files by systematically giving decisions of non-disclosure, sometimes for periods of more than six months."<sup>13</sup>

In the same way, for investigations conducted for crimes under the Anti-terror law, if there are findings or documents showing that the lawyer is acting as an intermediary in the communications of members of terrorist organizations, an official can be present during the suspect's meeting with his lawyer upon the request of the public prosecutor and the decision of the judge. Furthermore, documents given to the lawyer by the suspect or vice versa can be examined by the judge.<sup>14</sup>

This arrangement explicitly violates the rule of confidentiality governing the relations between lawyers and their clients and leads to "arbitrary" restrictions that "are not based on concrete findings and documents" in practice.

In 2007, a regulation was published on the assignment of defence counsels and attorneys in the scope of the CCP<sup>15</sup>. This regulation brings a notification condition in cases where lawyers are assigned upon the request of the suspect. According to the relevant article,<sup>16</sup> suspects shall be notified in writing that "the fee to be paid to the defence counsel will be counted as part of the court fees and will be collected from the suspect if he is to be convicted." This warning notice results in detainees refraining from demanding a lawyer, especially if they do not have sufficient economic means.

<sup>10</sup> Anti-terror Law art.10/b-c

<sup>11</sup> Report of the UN Working Group on Arbitrary Detention, A/HRC/4/40/Add. 5, para.73 (Adopted by the UN General Assembly on 07.02.2007 .)

<sup>12</sup> Anti-terror Law art.10/d

<sup>13</sup> From the press statement made by the Head of the UN Working Group on Arbitrary Detention Leila Zerrougui about the Turkey report on October 30, 2006; <http://www.bianet.org/bianet/kategori/bianet/87066/turkiyede-keyfi-tutukluluk-yaygin>

<sup>14</sup> Anti-terror Law art.10/e

<sup>15</sup> The Regulation on the Procedures and Principles Governing the Assignment and Payment of Defence Lawyers and Counsels According to the Code on Criminal Procedures, OG: 02.03.2007, 26450

<sup>16</sup> Regulation art.5/1-3

The same regulation narrows the bar associations' authority in assigning lawyers and paying their fees. The authority to demand for a lawyer was given to the law enforcement, prosecutor, investigating judge and the court.<sup>17</sup>

Prior to 2007, it was possible for the families of suspects who were apprehended or detained to apply to the bar associations and make a request for a lawyer. This method, which was developed by the bar associations to break the habit of the law enforcement to refrain from demanding an attorney, especially in cases where the crimes of torture/ill treatment were committed, has become non-applicable in the new regulation.

Oversight of the work done by the lawyer and the mandate to decide whether a fee will be paid is counted among the administrative duties of the prosecutor in the Regulation. This situation has resulted in lawyers being subject to an indirect administrative supervision, restricting their ability to act independently.

### 3. The System and Unfavourable Changes in the Assignment of Lawyers

The first version of the CCP, which entered into force in 2005, widened the scope of compulsory defence counsel whereas amendments made with Law no 5560<sup>18</sup> narrowed it down. In the first version of the law, even if the individual did not so demand, he would be appointed a lawyer in crimes "requiring imprisonment for an upper limit of more than five years". In the new version of the law, this practice has been limited to crimes requiring "imprisonment with a lower limit of more than five years".<sup>19</sup>

The CCP adopted in 2005 regulated the right of the victim to ask for an attorney if he could not afford it himself without any prerequisite. With the amendments made in the CCP in 2008 with Law no 5793<sup>20</sup> there are two prerequisites to be met for the victim to demand a lawyer. The victim can only ask for an attorney from the bar association for "the crime of sexual assault" and "crimes requiring imprisonment with a lower limit of more than five years".<sup>21</sup>

### 4. Other Problematic Areas

Law enforcement officers do not provide immediate and detailed information to detainees about their rights. Usually, people are reminded of their rights at the deposition and interrogation stages. In the same way, although records are kept due to legal obligations saying that the person was reminded of his rights (this is in print on the forms) when testifying before the prosecutor or the court, these rights are not explained in detail.

In PARAGRAPH 20 of the State Party's answers, there is mention of a separate record being prepared where people who do not want an attorney express this in writing in their own handwriting and sign the document. This information is not clear. Because in practice, when detainees undersign their

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<sup>17</sup> Regulation art.5/end

<sup>18</sup> Law no 5560 was adopted on 19.12.2006.

<sup>19</sup> CCP art.150/2-3, art.91/6, art.74/2; please see. YGAİAY art.20/4-5-6

<sup>20</sup> Law No 5793 was adopted on 24.07.2008

<sup>21</sup> CCP art.234/a(3),b(5)

depositions, they are also deemed to have signed the statement that is printed on the top of the form saying “demanded a lawyer” or “did not demand a lawyer”. No other document is obtained from the person in his own handwriting. The printed statements on the form regarding the demand for a lawyer are marked by the person taking the deposition and although the suspect makes no statements regarding his demand for an attorney, this is processed as if he has actually made the statement.

In addition to the above-mentioned issues, the attorney fees paid to lawyers appointed as per the CCP are very low. With the regulation amendments made in 2007, the costs incurred during the performance of duties by attorneys have been limited only to travel expenses to a certain degree, and even the expenses incurred for copying files have been removed from the expense items. There are delays in payment of fees that sometimes go up to a year. This situation causes a general reluctance on the part of lawyers to spare sufficient effort and time. If a lawyer sees an incident of torture in a case to which he is appointed, he is reluctant to investigate it since it is a separate and difficult job.

#### 5. Access to lawyers in prisons

The right to a lawyer of inmates in prisons is regulated primarily under the Enforcement Law<sup>22</sup> and the enforcement Regulation<sup>23</sup>.

According to the legislation, convicted persons can see their lawyers during work hours. Remand prisoners, on the other hand, can always see their lawyers<sup>24</sup>. However, there are many incidents where lawyers visiting prisons to see their clients in remand outside work hours are not permitted by the prison staff.

The legislation regulates that inmates are to meet with their lawyers in a separate place assigned for this where his talk with the lawyer cannot be heard.<sup>25</sup>

Despite this, in many prisons, especially in open prisons and district prisons, it is stated that there are no separate rooms for meetings with lawyers. In some prisons, since the physical conditions are insufficient, all meetings are held in the same space. Therefore, people are obliged to meet with their lawyers in an environment where there are other prisoners and lawyers without any privacy.

On the subject of lawyers seeing their clients who are in remand, the Regulation brings a restriction that does not exist in the law.<sup>26</sup> The arrangement stating that remand prisoners can meet with three lawyers at most at the same time at the investigation stage is against the law. Although there is no such restriction brought for convicted prisoners, the article is implemented in their case as well.

Article 59/4 of the Enforcement Law narrows down the principle of privacy in relations between lawyers and their clients who are sentenced or in remand for crimes that fall under the jurisdiction of Specialized Courts with Special Jurisdiction (State Security Courts). According to the said article, upon the request of the Chief Public Prosecutor’s Office, and the decision of the enforcement judge,

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<sup>22</sup> Law No 5275 on the Enforcement of Sentences and Security Measures

<sup>23</sup> By-law on the Management of Prisons and the Enforcement of Sentences and Security Measures (OG: 06.04.2006 – 26131)

<sup>24</sup> Regulation on the Visits Made to Sentenced Prisoners and Prisoners in Remand art. 19/1

<sup>25</sup> Law on the Enforcement of Sentences and Security Measures art.59/2, CİKYCGTİHT art.84/3

<sup>26</sup> HTZEY art. 19/2

under certain conditions an official can be present during the meetings between lawyers and their clients and the documents exchanged between the two can be subject to examination by the enforcement judge. Furthermore, article 84/2-c of the Enforcement By-law has widened the scope of this restriction and warrants oversight of the records kept by the lawyers during the visit.

In the same way, the Enforcement By-law has an article used to violate the principle of privacy. The By-law sets forth that in certain crimes falling under the jurisdiction of Courts with Special Jurisdiction, the files and documents of lawyers can be subject to a “physical search”.<sup>27</sup> The search is to be made by the prison staff. There is no definition of what physical search is. Hence, there are examples where prison staff especially watches the meetings between people who are victims of torture/ill treatment in the prison and their lawyers, and try to read their notes under the name of “physical search”.<sup>28</sup>

Another important restriction that prevents access to a lawyer in prisons is the obligation to submit a power of attorney. Convicted prisoners have the right to see their lawyers for three times at most without a power of attorney.<sup>29</sup> This article is abused in practice from time to time.<sup>30</sup>

On the other hand, the Turkish Civil Code<sup>31</sup>, sets forth that a legal guardian will be appointed to persons sentenced to at least one year imprisonment. Thus, the authority to issues a power of attorney rests with the legal guardian appointed by the court. Due to problems in appointing a legal guardian and the problems in reaching guardians, it is not possible for the convicted prisoner to see his lawyer for a long period of time.

### Recommendations

1. The Anti-terror Law art.10/b-c, CCP art.49/2, Law on the Enforcement of Sentences and Security Measures art.59/1, Regulation on the Visits Made to Sentenced Prisoners and Prisoners in Remand art art.19/2, which delay meeting up with a lawyer or bring restrictions to the number of lawyers, should be amended
2. The restrictions under CCP art.153/2, Regulation on Apprehension, Police Custody and Interrogation art.22/2, Anti-terror Law art.10/d, and article 45 of the Registrar’s Regulation, which restrict lawyers’ power to examine files and get examples should be lifted.

<sup>27</sup> By-law on the Management of Prisons and the Enforcement of Sentences and Security Measures art.84/2-c(2);

<sup>28</sup> In an example from Izmir, the lawyers had talks about taking to the ECHR the case of a remand prisoner subject to torture in the prison. When leaving the prison, the deputy governor of the prison, waiting for them at the door, asked to read the notes of the lawyers taken during the meeting. When the lawyers stated that this practice was against the law, they were reminded of the article on “physical search”. The lawyers stated that reading the notes of the talks was more than a “physical search”. Upon this, the lawyers were subject to physical intervention and a record was kept on grounds that they insulted, threatened a public official and engaged in misconduct. A case was filed against the lawyers for this reason. (Izmir 11th Criminal Court of Peace 2009/692 E)

<sup>29</sup> Law on the Enforcement of Sentences and Security Measures art.59/1

<sup>30</sup> Furthermore, an incident experienced in the Izmir Kırklar No 1 F type prison constitutes a good example for this. The lawyers of H.E. who paid him a visit on a Friday, without a power of attorney due to his status as a remand prisoner, learned from his kin on the next Monday that H.E. had been tortured and shut in an observation room. When they go to the prison, they give the administration the name of the person they wish to see by phone and are told that “he is a sentenced prisoner and has only three rights to a visit by his lawyer “. The lawyers are not permitted in the prison. In order for this attitude of the administration to be changed, the lawyers make an application to the enforcement judge. However, their application is turned down without an examination (Izmir Enforcement Judge’s Office, 22.01.2007, 2007/14 E. 2007/14 K). After a short while, the person is transferred to another prison in another town and is totally prevented from seeing anyone.

<sup>31</sup> Turkish Civil Code art.403, 407



3. Anti-terror Law art .10/e, Regulation on Apprehension, Police Custody and Interrogation art.59/4, By-law on the Management of Prisons and the Enforcement of Sentences and Security Measures art.84/2, which violate-restrict the privacy between the attorney and the client, should be amended;
4. The Regulation regarding the appointment of lawyers under the Code on Criminal Procedures, which brings suspects to a point where they do not ask for a lawyer, gives the chief public prosecutors the opportunity to oversee lawyers, deprives bar associations of their authority to oversee and appoint lawyers, should be revised.
5. The principle of “immediately” informing suspects of their rights should be re-adopted. Arrangements should be made to ensure the taking of separate statements from persons declaring that they do not want a lawyer. This should be a separate document from the deposition.
6. Arrangements narrowing the scope of mandatory defence counsel should be changed. Obstacles that prevent victims from asking for the appointment of a lawyer should be lifted. If victims cannot choose a lawyer, the practice of having the bar association appoint a lawyer can be re-adopted.
7. In addition to all of these legislative changes, measures should be taken to prevent illegal and arbitrary behaviour or decisions by the law enforcement and judges. Especially in judicial and administrative investigations, the protective attitude towards public officials should be abandoned. The complaints filed should be rapidly and impartially evaluated.
8. All places of apprehension should harbour separate and suitable places where meetings can be held with lawyers.

### III. The Right to Inform One’s Kin

In order for the right of the apprehended person to inform his kin or a third person of his choice of his apprehension to bring a safeguard against torture, this right must be used “immediately” in the period of detention, not just any time.<sup>32 33</sup>

The right to inform one’s kin is regulated under the Constitution<sup>34</sup> and the Code on Criminal Procedures. However, since the way in which this right is to be used is regulated under the Regulation on Apprehension, Police Custody and Interrogation, there are no legal safeguards on the issue.<sup>35</sup>

According to the law, the next of kin or a person chosen by the suspect is informed “without delay” when a person is apprehended, taken into police custody, when the period of detention is extended, when he is taken into custody in remand or when the remand period is extended.<sup>36</sup>

<sup>32</sup> the UN Body of Principles for the Protection of Detained or Imprisoned Persons art.16,

<sup>33</sup> The Report of the UN Special Rapporteur on Torture dated December 23, 2003, E/CN.4/2004/56, para.31

<sup>34</sup> Constitution art .19/6, CMK

<sup>35</sup> Regulation on Apprehension, Police Custody and Interrogation art.8

<sup>36</sup> CCP art. 9 5/1, 107/1-2

Although the constitution calls for “immediately” informing next of kin, the law and regulation use the ambiguous term “without delay”. This results in arbitrary delays caused by the law enforcement in exercising this right.<sup>37</sup>

Another problem frequently encountered in practice is that notifications are asked to be made to the lawyer on grounds that he is the next of kin. In this way, two separate rights set forth to protect the separate interests of the suspect are brought down to a single right.

The Anti-terror Law brings an exception to the general rule of informing next of kin. According to the law, if there is a situation that can “endanger the purpose of the investigation”, the notification is made to only one person of kin upon the order of the public prosecutor.<sup>38</sup> Yet in practice, this article almost automatically creates a major obstacle in the effective use of the right in criminal investigations conducted under the Anti-terror Law.<sup>39</sup>

There are no arrangements allowing for the suspect to see or otherwise communicate with his kin after exercising the right to inform them of the apprehension. It would be wise to enable apprehended persons to see their kin for the sake of protection against torture.

#### **Recommendations**

1. Article 10/a of the Anti-terror Law restricting the number of people to be informed of the apprehension should be repealed.
2. Opportunity should be given to apprehended persons to communicate with their kin and see them. Legal safeguards should be brought on the subject.

#### IV. Right to See a Physician, its Scope and Problems

##### 1. General

The importance and principles of the medical assessment and reporting of torture have been the subject of many international conventions and documents. The Istanbul Protocol<sup>40</sup>, the UN Body of Principles for the Protection of Detained or Imprisoned Persons, the UN Standard Minimum Rules for the Treatment of Prisoners, Medical Ethics Principles<sup>41</sup>, Resolutions of the UN Committee Against

<sup>37</sup> In the survey conducted by the Human Rights Foundation of Turkey in 2008, when asked whether their clients were given the right to inform their next of kin 17% responded ‘always’, 45% responded ‘usually’. The percentage of lawyers who stated that this right was ‘never’ or ‘rarely’ given to their clients is 22%. When they were asked whether the right to inform their next of kin was notified to their clients ‘without delay’, the 35% of lawyers responded ‘usually’ or ‘always’. 42% of lawyers responded ‘never’ or ‘rarely’.

<sup>38</sup> Anti-terror Law art.10/a

<sup>39</sup> The data collected by the Human Rights Foundation of Turkey from the survey conducted with lawyers confirm this finding. The survey asked lawyers whether the right to inform kin was restricted to one person in criminal investigations conducted in the scope of the Anti-terror Law. 8\*% of lawyers responded ‘always’ or ‘unusually’ while only 5% of lawyers responded ‘never’ ‘rarely’ and ‘sometimes’.

<sup>40</sup> The Istanbul Protocol (the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)

<sup>41</sup> The UN 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 (Adopted by the UN General Assembly on December 18, 1982 with Resolution no 37/194.)

Torture<sup>42</sup>, Reports prepared by the UN Special Rapporteur on Torture<sup>43</sup>, the Biomedicine Convention<sup>44</sup>, and The Lisbon Declaration on the Rights of Patients<sup>45</sup> are the major ones.

Under the Code on Criminal Procedures, the right of access by suspects to a physician is regulated as a right. Ensuring a medical examination for people who have been apprehended is defined as the duty of the law enforcement and given as their responsibility. As a natural result of this, there is no requirement to inform people of the right to a physician and its scope.

According to article 9 of the Regulation on Apprehension, Police Custody and Interrogation;

A medical examination must be conducted by a physician to determine the health condition of the individual;

- If the apprehended person is to be detained or if he is apprehended by use of force, and
- Before the detainee's place is changed for any reason, the period of detention is extended; he is released or transferred to the judicial bodies.

An important point here is that if force was used by the law enforcement at the time of apprehension, the person must be subject to a medical examination without waiting for the decision of detention. However, contrary to what is said by the State Party in PARAGRAPH 30 of its answers, this rule is not respected in practice. In cases of apprehension by use of force, people are subject to medical examinations not immediately but after they are taken to the police unit.

There are negative outcomes of having apprehended people undergo a medical examination only if they are to be taken into police custody. The apprehended person is taken to the police unit before the health unit and undergoes a medical examination only if the prosecutor gives an order for his detention. This practice prevents determining the person's health condition before being taken to the detention unit. If no order of detention is given, the person is released and undergoes no medical examination at all.

As a rule, if the person has been apprehended by force he should be subject to a medical examination regardless of whether or not he is released without being detained.

While international standards persistently emphasize that the right to a physician must be granted upon the request of the person, the Regulation on Apprehension, Police Custody and Interrogation sets forth a condition for access to a physician other than the regular checks. According to this, the person can only undergo a medical examination by a physician when his health is bad or when there are doubts concerning his health.<sup>46</sup> There is no explicit mention of who is decide on this, which leads to problems in practice and the use of a wide margin of discretion on that part of the law enforcement.

Especially when a person falls ill due to the torture or ill treatment he suffers in the unit he is kept, or if there are doubts about this health, the law enforcement uses its discretion in favour of not sending the person to a physician.

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<sup>42</sup> Uzbekistan, CAT, A/57/44 (2002) 54, para 116 (h)

<sup>43</sup> Report on the Problem of Torture by the Special Rapporteur, E/CCN.4/1999/61/Add.1, para.113(d), Report of the UN human Rights Committee Special Rapporteur dated July 3, 2001 no. A/ 6/156.

<sup>44</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine

<sup>45</sup> World Medical Association Declaration of Lisbon on the Rights of the Patient, Third Principle

<sup>46</sup> Regulation on Apprehension, Police Custody and Interrogation art.9/3

On the other hand, according to domestic law as different from international standards, as a rule, it is not possible for the person to be examined by a physician of his own choice other than the official physician. The right to choose one's physician is regulated such that only those whose health is failing and have a chronic illness can have a physician of their choice present while being examined by the official physician.

Apprehended persons should have the right to receive a second or alternative medical evaluation report from a specialist physician during the period of their apprehension or after.<sup>47</sup>

In domestic law, the duty and authority to prepare forensic examinations/reports is vested in the Forensic Medicine Authority and attached bodies.<sup>48</sup>

According to this law, the Forensic Medicine Authority and the division directorates attached to the authority are obliged to deliver forensic medicine services in their area.

The Forensic Medicine Authority is administratively attached to the Ministry of Justice. They are not autonomous/independent in their establishment, staff appointment and personnel affairs. They work in connection with the Executive body. This causes a serious problem in documenting a crime that was committed in cases of torture and ill treatment.

## 2. Medical evaluation and reporting

The relation between the physician and the apprehended person, and the form of the examination are not specified in the regulation. This loophole is tried to be closed with the Circulars issued by the Ministry of Health. This creates an environment where different practices are born and where they are constantly changed.<sup>49</sup>

## 3. Relationship between the physician and the patient (confidentiality and privacy)

In the Regulation on Apprehension, Police Custody and Interrogation, it is emphasized that the physician and the person examined must be left alone and that the examination must be done in the frame of patient-doctor relations. However, "...the physician may ask for the examination to be conducted in the presence of a law enforcement officer in case of concerns regarding personal security. This request shall be documented and met ..."<sup>50</sup>

Yet, in practice, during forensic examinations, it is known that there are serious problems with respect to the privacy of the doctor-patient relationship.<sup>51 52</sup>

<sup>47</sup> UN Body of Principles for the Protection of Detained or Imprisoned Persons Principle 25; Istanbul Protocol para.122

<sup>48</sup> Forensic Medicine Authority Law art.2

<sup>49</sup> In the above-mentioned survey done by the Human Rights Foundation of Turkey, in answer to the question on "whether physicians fully listen to the complaints of the person during forensic examinations" only 11% of lawyers responded 'usually'. 58% of lawyers responded 'rarely', while 12% responded 'never'. It is thought-provoking that no lawyer gave the response 'always' to this question. On the other hand, the percentage of lawyers stating that physicians 'usually' "examine the person in a detailed way" was limited to 6%. None of the lawyers gave the answer that physicians 'always' "examine the person in a detailed way". The percentage of lawyers with the response 'never' or 'rarely' was 81%.

<sup>50</sup> The Regulation on Apprehension, Police Custody and Interrogation art .9/10; Ministry of Health, 2005, m.3.2.4.(c)

<sup>51</sup> In the same survey, in response to the question on whether "rules of privacy are respected in forensic medical examinations," lawyers who responded 'always' was limited to 3%. Those who gave the response 'Never' was 14%. More importantly, the percentage of lawyers who stated that "the police officers were present during the examination" was 59% (always: 17%, usually 42%). The percentage of lawyers stating that the police officers were never present during the

The example given below is very striking in this regard.

#### 4. Confidentiality of Medical Reports

In the Regulation on Apprehension, Police Custody and Interrogation, different from the international standards, various categories are brought regarding the confidentiality of the medical report.<sup>53</sup>

- A copy of the forensic reports (entry reports) issued as a result of apprehension (reports that should be given immediately if there apprehension by use of force or those issued after the person is taken into custody) shall be submitted to the relevant law enforcement officer.
- Reports issued by physicians in case of extension of the detention period, change of place or release from the detention centre shall not be handed over to the law enforcement officers bringing the person in for an examination but should be promptly sent to the prosecutor's office in a closed and sealed envelope.

In implementation, this is also a problematic area.<sup>54</sup>

#### 5. The scope of the medical report

In Turkey, the forensic reports prepared by physicians is far from meeting the standards and content specified in the Istanbul Protocol.<sup>55</sup> In addition, even when apprehended persons are allowed to see a

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examination is only 5%. These percentages show that the legal arrangement that should only be resorted to in exceptional circumstances has become an almost routine practice.

<sup>52</sup> An incident experienced in the forensic medicine unit in the Izmir Court House on 25.03.2008, is striking in showing the scope of the violation of the confidentiality principle. The complaint filed by the lawyers in this case to the Izmir Chief Public Prosecutor's office is being processed under investigation file number 2008/30885. The record kept by the Izmir Bar Association Lawyer's Rights Centre about the incident is as follows:

RECORD

Att. [...], Att. [...] came to our centre on 25.03.2008 at around 11:15 (Izmir Bar Association Centre for Lawyer's Rights) and made an application with a complaint. On seeing that police officers were present at the medical examination to obtain a physician's report for their client, who was detained by the Anti-terror unit, they had wanted to enter the room, thinking that the client will not be able to comfortably give a statement but they were forced outside by a woman police officer in the room.

As of 11:34, Member of the Izmir Bar Association Board of Directors Att. [...] and a member of the legal staff of the Centre for Lawyer's Rights [...] visited the Medical Unit of the Court House, they determined that there were 3 plain-clothes policemen and 1 police officer in uniform with the doctor. Member of the Board of Directors Att. [...] asked what they were doing there. In answer to his question, he was told that they "helped in preparing the reports". When the doctor was asked whether a lawyer colleague was forced out of the room, the doctor answered "yes, I had the lawyer forced outside, by the police" ... 25.03.2008

Izmir Bar Association BD Member Att. [...] Izmir Bar Association Centre for Lawyer's Rights  
Legal Staff [...]

Att. [...]

<sup>53</sup> the Regulation on Apprehension, Police Custody and Interrogation art.9

<sup>54</sup> In the mentioned survey of the HRFT, when asked "whether the release reports are given to the law enforcement" 98% of lawyers responded 'always' or 'usually'. There were no lawyers who said that the release reports were 'never' given to the law enforcement; and the percentage of those who responded 'rarely' was only 2%.

<sup>55</sup> In the mentioned report of the HRFT, the components of a report according to the Istanbul Protocol and the Turkish legislation on forensic reporting were listed and lawyers were asked to what extent these components were seen in the forensic reports and with what frequency. From the responses given it is understood that;

- The identity of the other people present in the examination room are rarely mentioned in the report,
- The identity of the person who brings in the suspect for an examination is generally not seen in the report
- The reports almost never cover the detailed story of the traumatic process experienced by the person,
- Information on physical complaints is rarely reflected in the reports, only 68% of physical findings are reflected in the reports,

physician, the physical or mental traces/findings that are the most important evidence in proving torture cannot be determined because of insufficient medical examinations and the shortcomings in the reports.

#### 6. Examinations and Reporting Relevant to Prisoners who are Sentenced and in Remand:

The Law on the Enforcement of Sentences and Security Measure states that prisoners have the right to benefit from examination and treatment opportunities for the protection of their physical and mental health and for the diagnosis of their illnesses. As a rule, the urgent or regular examinations of the prisoners are carried out by the institution's physician. However, if examination or treatment is not possible in the infirmary of the institution, persons have to be referred to either public or university hospitals.<sup>56</sup>

However, despite international standards, domestic law and all ethical rules, frequent problems are faced in the examination and treatment of prisoners.

In implementation, the right of prisoners to access medical care can be prevented; during examinations conducted by the physician, people can be subject to treatment that is against human dignity or examinations are not duly conducted.

Delays in answering the requests of prisoners to be referred to hospitals for an examination and treatment are among the frequently experienced problems.

The presence of guards in the examinations in the prison infirmary, are among the most frequently encountered complaints.

Again, it is known that the hand cuffs of prisoners are not taken off when they undergo a medical examination at the hospital. Or there is a gendarmerie officer or guard present in the room.

An agreement signed between ministries and known as the "Trilateral Protocol"<sup>57</sup> is shown as grounds for the violation of the principle of privacy during examinations. Article 61 of the said Agreement sets forth that a gendarmerie is to be present in the room during the examinations to be carried out for the prisoners at hospitals. According to this, a gendarmerie will be present in the examination room during the hospital examinations of those who are sentenced or on remand for crimes under the laws for combating terrorism and organized crime.

In the same way, according to the same article, during the hospital examinations of those outside the scope of these crimes, the gendarmerie shall wait outside the examination room if the room is secure and inside the examination room if the room is not secure.

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- Psychological complaints are almost never covered in the reports and that only 10% of psychological findings are reported,
  - There are serious problems in additional consultations, laboratory and radiological examinations, and the use of body diagrams,
  - In forensic medicine reports, the rule on the concurrence of the trauma recorded in the case history and the findings determined is almost never respected,
  - Photographs and video recordings are never used in the forensic reporting process.

<sup>56</sup>Law on the Enforcement of Sentences and Security Measures, art.71, art.78, art.80

<sup>57</sup> Protocol signed by the Ministry of Justice, Ministry of Interior and the ministry of Health on 06.01.2000

In both cases, the gendarmerie must keep a distance so as not to hear the conversation. But, because of the small size of examination rooms, it is impossible to abide by this rule.

The protocol, which was signed to regulate the principles for the delivery of services by the Ministry of Justice, Ministry of Interior and the Ministry of Health in the area of prisons, is of an administrative nature. Therefore, it cannot be of a nature that violates laws, by-laws, regulations and international conventions or that restricts fundamental rights and freedoms.

The tri-lateral protocol includes many arrangements that restrict rights and freedoms in addition to the article violating the privacy of the doctor-patient relationship. The said article violates the Regulation on Patient Rights<sup>58</sup>, the Istanbul Protocol<sup>59</sup>, and the Biomedicine Convention<sup>60</sup>. It is especially problematic with regard to the reporting of torture in prisons.

Since many people refuse to be examined in these degrading conditions, they are not able to receive health services.

Because of this condition that violates the law and the ethical rules of the medical profession, problems are encountered between physicians and the prison staff. Physicians who ask officials to leave the room during the examination or who ask for the hand cuffs to be taken off are subject to insults or a judicial-administrative investigation is started against them.<sup>61</sup>

Delivery of health services to prisoners outside the prison depends on whether he can be treated in the infirmary. Prisoners are not referred to a hospital upon their wish. This rule is in violation of the right to choose one's physician and causes significant delays. Even if it is found suitable for persons to be referred to hospitals outside the institution, the referrals are in a bottleneck due to the insufficient number of ring vehicles and shortage of staff.

Another question is that of how referrals are to be made to hospitals. Even when there is an urgent and serious health problem, and when a doctor and ambulance are requested from the 112 Emergency Health Services, the referrals of the individuals to hospitals are made using the ring vehicles.<sup>62</sup>

Although there is no restriction in the legislation with regard to the use of university hospitals, there are problems in practice when referrals are made to university hospitals. The major problem is that administrators have a tendency not to make referrals to university hospitals. Another problem is that

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<sup>58</sup> Regulation on Patient Rights art.5, 21, 35

<sup>59</sup> IP para.124

<sup>60</sup> BS art.10

<sup>61</sup> When the gendarmerie entered the examination room during the examination of the prisoner sent to the hospital from the prison, the psychiatrist doctor asked the gendarmerie to leave. Upon resistance by the gendarmerie, a forensic medicine specialist reminded them that their presence in the room was against the law and the ethical principles of the profession. Despite this, the gendarmerie did not leave the room, and the physicians filled out a record form to determine the situation. In view of the rights of the person, the examination was conducted in the presence of the gendarmerie. A second record was kept by the enforcement protection officers (guards) accompanying the gendarmerie and sent to the prosecutor's office. The prosecutor's office asked for permission from the district governorship to conduct an investigation on the physicians for misconduct. Upon the receipt of permission for an investigation, the physicians objected to the decision and the permission was lifted by the court. In yet another case, the same prison officials call for an administrative investigation about one of the afore-mentioned physicians who asks for the hand cuffs of the prisoner to be taken off. The permission granted was lifted with the same court decision. (Izmir Regional Administrative Court, dated 24.02.2010 - 2010/18 E -2010/55 K.)

<sup>62</sup> A convicted prisoner, claimed to have been tortured in prison lost his life in the hospital he was referred to because of a skull fracture and brain haemorrhage. The first intervention was made by the emergency healthcare care physician and notified people that he must be urgently taken to the hospital. However, due to security reasons, the patient was not sent with the ambulance used by the emergency health squad but with the ring vehicle in company of the gendarmerie. The investigation regarding the death is ongoing. (Izmir Chief Public Prosecutor's Office, 2010/34364 Sor.)

all universities do not have a protocol with the Ministry of Justice for the examination and treatment of prisoners. According to the data from the Directorate General for Prisons and Detention Houses<sup>63</sup> only 30 university hospitals throughout Turkey have wards for prisoners and the total number of beds is 56. In addition, the outpatient clinic services are limited as per the protocol.

The value given to healthcare services by the Ministry of Justice is reflected in the official statistics. According to the Ministry of Justice's 2008 annual report<sup>64</sup> the occupied positions for Healthcare Services in the Directorate General for Prisons and Detention Houses in 2007 is 552, while this figure has dropped to 541 in 2008. The vacant positions for 2007 were 1,607, while the vacant positions for 2008 were 1,418. The decrease in the number of health workers in 2008 alongside the decrease in the number of vacant positions shows that the ministry is narrowing down the cadres. Similarly when we evaluate the data for these two years together, it is understood that the healthcare workers in prisons are 1/3rd of the need.

The quantitative data regarding the appointments of healthcare workers confirm this finding. According to the same report, in 2008 the Directorate General for Prisons and Detention Houses appointed a total of 1,166 enforcement protection officials while the total number of physicians appointed to prisons was only 10. Even the number of cooks appointed in the same year was 22, higher than the number of physicians.

Thus, there are problems in prisons regarding access to physicians. Healthcare workers are left to do examinations and give treatment.<sup>65</sup> In the case about Engin Çeber, who lost his life in 2009 as a result of torture, it has been understood that the prison physician did not come to the prison, that the admittance examinations of the prisoners were not carried out and that records were kept as if such examinations were in fact conducted.<sup>66</sup>

One of the most important current issues in Turkey is that sick prisoners are not able to receive sufficient healthcare services because their sentences are not deferred. Many ill people who face vital danger or for whom recovery is not possible continue to be kept in prisons. Article 16 of the Law on the Enforcement of Sentences and Security Measures states that if the enforcement of the sentence creates a vital danger for prisoners in hospital care, these sentences can be deferred, or that the sentence would be continued to be served at the hospital referred to by the institution.

According to the HRFT Documentation Centre, 97 prisoners who require advanced examinations and treatment continue to be kept in prisons in the first 6 months of 2010. Similarly in this process, seven people lost their lives in prison for illnesses. Five died of cancer.<sup>67</sup>

The continuation of sentences for people under these conditions increase the pain and suffering of the person and turns into torture.

<sup>63</sup> [www.cte.adalet.gov.tr/diger/saglik/universite\\_hastaneleri.xls](http://www.cte.adalet.gov.tr/diger/saglik/universite_hastaneleri.xls)

<sup>64</sup> The 2008 data were used since the Ministry of Justice 2009 annual report was not published.

<sup>65</sup> The infirmary registry book in the Honaz Criminal Court of First Instance file no 2010/118 E.

<sup>66</sup> Decisions of the Bakırköy 14th Felony Court dated 01.06.2010 and numbered 2008/337 E. – 2010/104 K.

<sup>67</sup> HRFT Documentation Centre Rights Violations Interim Evaluation Report for the First Six Months of 2010, 09.07.2010, p.7-8.



## **Recommendations**

1. Access to a physician by prisoners (sentenced and on remand) and suspects should be regulated as a right. Its scope and minimum restrictions should be safeguarded by law.
2. Apprehended persons should have access to a physician any time they want without any conditions.
3. Legal arrangements should be made for apprehended persons to be examined by a physician of their own choice and to receive an alternative report.
4. Article 9 of the Regulation on Apprehension Police Custody and Interrogation should be amended to allow for determination of the person's health condition prior to the detention unit.
5. The tri-lateral protocol should be repealed.
6. Article 16 of the Law on the Enforcement of Sentences and Security Measures should be rewritten to ensure unconditional deferment of sentence for prisoners who have a life-threatening situation or an illness that requires advanced examination.
7. The number of health care workers in prisons should be increased. Training should be delivered on the ethical principles regarding the role of the physician in human rights and the prevention of torture. In identifying the content of the training and the delivery, cooperation should be made with NGOs who have knowledge and experience on the field.
8. In order to prevent arbitrary actions and rights violations in practice, measures should be taken to ensure the oversight of the processes of law enforcement officials and the prison workers. The administrative and judicial complaints made on these issues should be investigated thoroughly.
9. Transparency of information on the results of supervisions and controls should be ensured and detailed information should be given to the NGOs working in the field about the procedures carried out.
10. Public officials who do not act independently should be imposed criminal and administrative sanctions including the Public Prosecutors and the Enforcement Judges.
11. The Forensic Medicine Authority should be made independent from the Ministry of Justice and should have a structure that allows for carrying out examinations based on scientific and impartial principles. The authority to issue reports should be taken out of the monopoly of the Forensic Medicine Authority and especially the universities should be supported in terms of forensic examination and treatment.

## **Issues no. 2 and 5**

### *Visits*

It is stated in the governments reply to the questions 2 and 5 that the detention places have been monitored with administrative, judicial, civil, parliamentary and international monitoring bodies both

periodically and ad hoc. Although the reply of the government, presents a utopia both in judicial and practice levels.

First of all this illusion took root from the designation of the violator/perpetrator as protector. These structures are not independent from the hierarchy of the administration and organising structures that can monitor it from outside. Although quite a long time and serious attempts are necessary to change the practice as a natural result of this structure, before all else judicial arrangements should be made for the monitoring visits that are convenient to Paris Principle and OPCAT.

There is not any statistical data on the types of visits that were made in the reply of the government and it is not possible to reach noteworthy information by searching the internet. Information on the visits of prisons was found in the websites of the prisons. For example Committees from North Carolina, Libya and Korea visited Ankara High Security Prison No.2 in 2010 and a committee from Saudi Arabia visited Bozüyük Open Prison. But according to the information on the visits the committees visited social activity areas, infirmaries and workshops and did not make monitoring activities for the prevention of torture and ill-treatment<sup>6869</sup>.

As it will be exemplified below whereas human rights boards and prison monitoring boards that were labelled as “civil” supervision bodies by the government did not meet with serious human rights violations in detention places, CPT documented several violations in its 33 monitoring visits to police stations, prisons and detention places for refugees without informing:<sup>70</sup>

- Excessive use of force during apprehension still goes on.
- The maximum detention period (4 days) for offences defined under Fight with Terrorism Law (FTL) was begun to be practised systematically.
- Authorities don't let the detainees to sleep (Diyarbakır Security Directorate's Fighting with Terrorism Department).
- Due to the presence of the police officers during the medical treatment detainees and physicians could not talk in private, treatment are done in a hurry or never done.
- Persons in refugee detention places do not have enough exercise opportunity in open air.
- The physical conditions of the prisons are worsening. The number of prisoners doubled in three years and it is a matter of concern.
- There is one physician for 1750 prisoners in prison. Only 64 of the 206 the cadres of physicians are occupied.

There are structural/ judicial reasons for the other supervision mechanisms' disability to document these types of violations that were documented by CPT and they should be focused on. Below the supervision mechanism that were mentioned in the governments reply is going to be evaluated and problems will be put forth.

<sup>68</sup> <http://www.haberler.com/suudi-arabistan-heyeti-bozuyuk-acik-cezaevi-ni-haberi/> (last access - 02.09.2010)

<sup>69</sup> <http://www.ankaraf2.gov.tr/> (last access - 02.09.2010)

<sup>70</sup> <http://w9.gazetevatan.com/haberdetay.asp?tarih=13.09.2009&Newsid=259119&Categoryid=1> (last access - 02.09.2010)

The report mentioned in this article could not be found on the CPT website. It is not clear who the media accessed this report.

## *ADMINISTRATIVE SUPERVISION*

### *Civil Prisons*

Administrative supervision is the one that is performed by the members of the bureaucracy of the unit that is responsible from the detention of persons such as, supervisors, hierarchical superiors, prosecutors and etc.

Prosecutors obliged to carry out administrative supervision in prisons in accordance with Article 5 of the Law on The Execution of Sentences and Security Measure<sup>71</sup> (No. 5275) and Article 4/4 of the Rules on the Administration of Prison and Execution of the Security Measures.

Moreover the prosecutors who carry out the supervision duty, in practice also carry out the proceedings on the investigation of the offence when violations were reflected to the judicial mechanism. In other words the authority of judicial investigation and supervision responsibility have to be carried out by the same prosecutor.

But concentration of responsibilities and authorities in one hand complicates such investigations and carrying out an impartial and comprehensive investigation on the violations of rights and perpetrators by the prosecutor who has to investigate his responsibility in the violation becomes objectively impossible.

### *Martial prisons*

Martial discipline courts, the office of discipline officials, discipline prisons and detention places, are supervised by commands in military hierarchy or military superiors and Military justice Supervisors of Ministry of National Defence.<sup>72</sup>

The visits executed by this kind of administrative supervision bodies seldom have an approach that comprehend topics such as human dignity and human rights of the persons that deprived of their liberties. Although these bodies fulfil their responsibilities in terms of interior supervision methods, the problem of complying with the international standards on the detention conditions still exists.

## *JUDICIAL SUPERVISION*

Though the government mentioned judicial supervision in its reply to the Committee this reply should be criticised from two issues;

1. Judicial supervision mechanisms/opportunities that were set forth by the codification system are much more than the ones mentioned in the report. In the report only judicial supervision authority of the enforcement judges was mentioned but in reality prosecutors and penal judges also have similar authorities. Judicial supervision as a mechanism that is performed after the transformation of a violation to a penal investigation and prosecution, at

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<sup>71</sup> Law on The Execution of Sentences and Security Measure (Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Yasa), of 29/12/2004, Article 5.

<sup>72</sup> Law on the Foundation of Discipline Courts, Trial Proceedings, Discipline Offences and Sentences (No. 477), Publication date and number: 26.6.1964/11738, Art. 38.

the same time has a potential of supervision function in terms of the method that is used in penal proceedings for both prosecutors and penal judges.

*a. Judicial supervision authorities/duties of the prosecutors have three forms*

- Immediately launch an investigation and perform the proceedings as soon as they get a torture information; this arrangements requires the prosecutor to go the scene of incident and collect evidences.
- In crime investigation “positioning” proceeding in scene of crime<sup>73</sup>
- By force of their judicial duties, supervision of the units that the detainees would be placed, interrogation rooms if they exist, the well-beings of these persons, the reasons and periods of their detention, all records and proceedings on the detention,<sup>74</sup>

Nonetheless the effectiveness of these authorities of the prosecutors is controversial.

That is to say according to the 2007 report prepared by Diyarbakır Province Human Right Board<sup>75</sup> in previous year 30 detention units were supervised and 29 of them supervised by **prosecutors** and in none of these supervisions “**nothing was found to be criticised**”.

Thus CPT underlined the inefficacy of the monitoring done by the prosecutors in its report published in 2005. The prosecutors usually check only the records and do not visit all parts of the stations.

Moreover the committee ascertained that none of the detainees was interviewed during the investigations that were fulfilled in 7 stations in Gaziantep Province on 12 March 2004.<sup>76</sup>

*b. Judicial supervision authorities/duties of the penal judges*

Penal judges do not have authorities on the supervision of the detention places that is openly defined by law. Nonetheless their authority of “reconnoitre” during the collection of evidences of and trial of torture and ill-treatment acts under article 83 of Criminal Procedure Code allows the penal judges to control the detention places as crime scene in any case.

Moreover the magistrates have the authority to directly supervise the crime scenes during the investigations in accordance with the Article 162 and 163 of Criminal Procedure Code as the prosecutors during investigation.

Thus during the prosecution of torture and ill-treatment allegations there is not any restriction in front of investigating of records, visiting the crime scene and carrying on detections. But in practice penal judges had never visited a detention place to determine the place of violation, the instruments that maybe used, the features of the environment and coherent with the descriptions of the person or not.

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<sup>73</sup> Art. 85 CCP

<sup>74</sup> Art. 92 CCP and the Regulation on Apprehension, Detention and Statement Taking.

<sup>75</sup> Diyarbakır Provincial Human Rights Board, 2007 report, p. 17-20.

<sup>76</sup> CPT/Inf (2005) 18, para. 21. Similar criticism was voiced by Meryem Erdal (2006), *İşkence ve Cezasızlık Dosyası 2005*, (Ankara: HRFT publications), p. 248.

Same detections can be made for the violations in prisons. In one of the cases monitored by HRFT, in the case of a prisoner who killed due to infliction of torture in Adana Military Prison in 2005, the reconnoitre in the prison in which the incident took place can be given as the only example. Bu this reconnoitre was made 5 years after the incident and with the demand of the lawyers. In this process inner configuration of the prison was changed as the positions of the surveillance cameras and camera records could not be attained.<sup>77</sup>

*c. Judicial supervision authorities/duties of the Execution judicature*

As it mentioned in the foundation law of the execution judicature, they were founded to investigate and to conclude the proceedings on the prisoners in prisons or complaints on the activities about them.<sup>78</sup>

Moreover they evaluate the reports of prisons monitoring boards that are arrange on their detections on the prisons in their scope authority and conclude on the issues classified as complaints.

Execution judicatures have the authority to reconnoitre as mention in the Article 83 of Criminal Procedure Code regard to the complaints they received consequently have the authority to visit the places that torture and ill-treatment incidents claimed to be take place. In accordance the Article 6 of the Law of Execution Judicature regulates that execution judges **“can make *ex officio* investigation on the proceedings or activities that caused the complaint before passing their verdict”**.

If the regulations on the gathering evidences by the judge in the crime scene during an offence investigation were taken into account, execution judicatures, in the context of both their authorities in the offence investigations and the intended aim of their foundation law, are the judicial units that are responsible for the supervision of prisons in their scope of authority.

But execution judges seldom visit suck places. As a matter of fact CTP had detected İzmir Execution Judge **had never visited a prison** in his scope of authority and Gaziantep Execution Judge had seldom visited the units in his scope of authority.<sup>79</sup>

Along with this view in practice, although the judicial supervision mechanisms may have a preventive function, they are not the structures that were founded to perform regular visits as it was foreseen in Optional Protocol and their scope of duty was not defined to fulfil this aim.

The execution judicatures that do not use their authority to perform visits **also function as if a notary on the decisions of the authorities of prison**.

The number of the cases that were sent to execution judicatures in 2008 was **12,187**. The **57.2%** of these cases were the applications and complaints of the prisoners and the **42.8%** of them were related with the discipline penalties of prisoners. The **95.56%** of the applications

<sup>77</sup> Adana Heavy Penal Court No. 5, 2007/288 Esas.

<sup>78</sup> Law of Execution Judicature, Art.1

<sup>79</sup> 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, CPT/Inf (2005) 18, para. 97.

and complaints of the prisoners were declined and the **82.37%** of the discipline penalties of prisoners were approved.<sup>80</sup>

With the amendment of the Law of Execution Judicature on 22 July 2010 the regulation that these judicatures would work in the courthouses of the places they had been founded, was annulled.<sup>81</sup> After this amendment, the execution judicatures that works as the approval mechanism of the administrations of prisons, will move into prison campuses and there is a high risk for them to become a completely closed circuit system.

Same amendment brought the rule to make trials “on the complaints on the discipline penalties with hearings”.<sup>82</sup> Despite this positive regulation, the restriction of hearing rule with only the discipline penalties is a serious deficiency. In case of no objection to the imposed penalties, execution judicature would shape his verdict on the documents without hearings and this is a rule that restricts the right to defence. Likewise the process without hearing will be applied to other proceedings than the discipline penalties.

2. The regulation in the 57<sup>th</sup> paragraph of the reply of the government does not provide any protection.

The government claims in this paragraph that the Article 169 of the Criminal Procedure Code makes it compulsory “to record all stages of proceedings during the investigation” and this provision constitutes an effective safeguard against any attempt of misconduct. The regulation of this proceeding as an article of a law certainly will provide safeguard for the proceeding. But it is a routine practice of the law enforcement officers and the guardians who are the suspects of the offences torture or ill-treatment to prepare a “record of incident” which falls short of the reality in favor of them. Even graver than this, is the prosecutors and judges who qualify these records as “absolute evidence” and base their verdicts essentially on them. Even graver than the previous one is these “records of incident” is the reason for the cases that are launched against the victims of torture or ill-treatment on charges of “resisting”.

#### *The supervisions performed by the Provincial and Sub-provincial Human Rights Boards*

The boards were constituted with the Rules on the Foundation, Duty and Work Principles of the Provincial and Sub-provincial Human Rights Boards. As of now there is not any law on the boards.

The government, in the 62<sup>th</sup> paragraph of the reply stated that the structure of the membership of the boards was changed and became a civil society-based structure.

In accordance with the Article 5 of the Rules members who will be elected for the boards are chosen from chambers of trade/industry, other chambers of professions, local press, head of quarters, school-family unions, civil society organizations by the governor of province or district who is also the

<sup>80</sup> These data were obtained by using the most recent numbers in the website of Ministry of Justice.  
[http://www.adlisicil.adalet.gov.tr/istatistik\\_2008/infaz/infaz4.pdf](http://www.adlisicil.adalet.gov.tr/istatistik_2008/infaz/infaz4.pdf),  
[http://www.adlisicil.adalet.gov.tr/istatistik\\_2008/infaz/infaz2.pdf](http://www.adlisicil.adalet.gov.tr/istatistik_2008/infaz/infaz2.pdf) (last visit - 13 September 2010)

<sup>81</sup> Law No.6008, Art.10/B, 25 July 2010, R.G. 27652.

<sup>82</sup> Law No.6008, Art. 5.

chairperson of the board. This is not only restricted with the determination of the persons also the governor of province or district is authorised to determine the organisations regarding to other chamber of professions or trade unions in which the person has been working.

Also there is not any regulation on the criterions for the election of members and this reveals that the election were made with subjective criterions such as the worldview, formation, political standpoint of the chairperson of the board.<sup>83</sup> The “human rights” organisations that participated in the boards are supposed to be working in the field of human rights in the broadest sense but none of them focused on torture and ill-treatment in Turkey. But there are various organisations in Turkey that they gained international prestige with their work on torture and ill-treatment such as Human Rights Association (HRA/IHD), Organisation of Human Rights and Solidarity for Oppressed People (MAZLUMDER) and HRFT. None of these organisations participated in the boards.<sup>84</sup>

In accordance with the Paragraph (f) of the Article 12 of the Rules on Provincial and Sub-provincial Human Rights Boards, the boards can conduct visits to see in place the human rights practices in institutions and organisations. A complaint is not necessary for these visits.

In the Human Rights Presidency’s website, which was relatively functioning until 2008, the links for provincial and sub-provincial human rights boards is not working and nearly none of the links on the based on provinces are working. During the evaluation of the annual reports of provincial boards which have working links nothing can be found on the “periodic” or “ad hoc” visits in the framework of OPCAT. The visits reflected in the reports are more likely to be a guest visit rather than a monitoring one.<sup>85</sup>

Yet the boards’ informed visits were hindered with the amendment of the Rules on the Visits to Prisoners. According to Article 26 the members of the boards “can visit the Prisons and interview with the prisoners by means of getting permission from Chief Public Prosecution Office”

According to the 2007 Report of the Human Rights Presidency boards conducted more than ten thousand visits in that year.

Some of the visits mentioned in the 2007 Report were conducted by Diyarbakır Provincial Human Rights Board. Under the “Diyarbakır Investigation and Monitoring Activity” chapter of the 2007 Activity Report of Diyarbakır Provincial Human Rights Board, 21 visits conducted by the Provincial Board were stated but it is also stated that no visit was conducted by sub-provincial boards.<sup>86</sup> A table was presented on the number of visits informing/without informing in the next pages of the report.<sup>87</sup> According to the table one informed visit was conducted to the gendarmerie headquarters/detention place and two informed visit was conducted to the security headquarters/detention places.

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<sup>83</sup> Rules, Art. 14/f.

<sup>84</sup> Diyarbakır, 2007, *ibid.*

<sup>85</sup> <http://www.haberler.com/suudi-arabistan-heyeti-bozuyuk-acik-cezaevi-ni-haberi/> (last visit – 02.09.2010)

<http://www.ankaraf2.gov.tr/> (last visit – 03.09.2010)

<sup>86</sup> *Diyarbakır Provincial Human Rights Board’s Report*, p. 8.

Other reports of this institution could not be reached anymore. Provincial Human Rights Board page in Diyarbakır Governorate’s website only contains information on personal application.

<sup>87</sup> Table-5/a: Institutions visited, p. 40.

After the table that declares that three visits were conducted to security and gendarmerie headquarters/detention places there is another table showing the dates, persons who had attended to the visits and the detections. According to this table provincial human rights board conducted 66 visits to the detention places.<sup>88</sup>

From the table, 4 visits were conducted to security and gendarmerie detention places in 2 different districts on the same day (on 30 January 2007 Çınar and Silvan Security Directorate and Gendarmerie Headquarters); 3 visits were conducted in 3 different districts on the same day (on 31 January 2007 Çüngüş and Dicle Security Directorate, Eğil Gendarmerie Headquarters); same place was visited on two following days and 3 times in a month (on 1, 2 ve 31 May 2007 Dicle Security Directorate); and 11 visits were conducted to Silvan District Security Directorate in on months.

It is hard to interpret the contradictions in numbers and explanations in the same report. Additionally it is impossible to understand why the same detention place was visited several times and twice on two followings days on the grounds that in all visits it was detected that “detention places comply with the standards, gendarmerie officials were not neglecting their duties, records were kept regularly, the conditions of the physical space is good”. It is understood from the data presented in the report that none of the visits has the quality of investigation in depth because of this the detections were made with limited information.

Istanbul Provincial Human Rights Board and Kadıköy District Human Rights Board decided to conducts visits and realised this decision on 12 May 2008. First a meeting was done on the decided day at 2.00 pm and later Kadıköy District Security Directorate İskele Police Centre was visited. Physical conditions of the centre and detention place were evaluated and they were informed on the ongoing proceedings. Then Social Services and Society for Protection Children’s (SHÇEK) Semiha Şakir Playschool was visited and physical conditions of playschool were evaluated and the director informed them on the necessities of the playschool. Members of the board talked with the children and gave presents.<sup>89</sup>

The members of the provincial and district human rights boards coming together in the afternoon and conducted two visits in such a short time indicates that these visits are not much more than courtesy visits and they do not meet the requirements which will be explained below.

Some positive examples also should be emphasised. However as it is mentioned in the report of Human Rights Watch Organisation, “Turkey: steps for the independent Supervision in Police and Gendarmerie Headquarters”, there is not a standard model that is practiced by all the boards.<sup>90</sup>

In the same report of Human Rights Watch Organisation, “many representatives of the boards” stated that “they needed a guideline on how the visits should perform including details such as the extension, lighting, airing, nutrition and hygiene conditions of the detention places that are admissible” is quoted.

<sup>88</sup> Table-5/c: Report on the monitoring and inspection of police stations, p. 25-29.

<sup>89</sup> <http://www.istanbul.gov.tr/?pid=12346>

<sup>90</sup> Human Rights Watch (2006), *Türkiye: Polis ve Jandarma Karakollarının Bağımsız Denetimine Doğru İlk Adımlar*, (New York: HRW), p. 9-10, <http://hrw.org/backgrounders/eca/turkey0306/turkey0306turk.pdf>; IHB 2007 Report, p.15.



Just as Human Rights Presidency's 2007 Report mentioning that the importance of the issue was not comprehended by the boards sufficiently, states that "the boards had been passive in conducting preventive visits".<sup>91</sup> Visits should be conducted regularly, informing and uninformed by persons specialised in their fields and informed on human rights and visits also suggested in the report.<sup>92</sup>

#### *PARLIAMENTARY SUPERVISION*

TBMM GNAT's Human Rights Investigation Commission<sup>93</sup> was founded "to ensure the compliance of the practices to the developments in human rights field in our country and in the world and to investigate complaints".

The mechanism known as Human Rights Commission of the Assembly conducted several visits in 12 provinces, interviewed with 4,200 people and later prepared visit reports in the presidency of Dr. Sema Pişkinsüt between 1998 and 2000.<sup>94</sup>

The first part of the visits were conducted in 1998 and two years later detention places were revisited to test whether a progress in passing time or not.

Although the founding aim of the commission is more extensive and was not focused on the preventive visits on detention places, the activities of the commission in that period was realised on this ground was very effective.

But unfortunately the commission's activities was interrupted with a case which was launched against the chairperson of the commission on the grounds that he did not inform the Supreme Court of Appeal's Chief Prosecution Office with the names of the victims of the violations that were detected by the commission due to their unwillingness of the victims.<sup>95</sup>

The determination of the commission in accordance with the "consent" and "privacy" principles unfortunately resulted with the demise of the activities. The commission did not have a reporting activity between 2003 and 2007.<sup>96</sup> Although in 2007 the commission recommence its investigation and reporting activities it could not manage to stabilise a systematic visit system as in previous years.

Although official complaints were made on the detected violations and investigations were launched against the suspects in previous period in the 22<sup>nd</sup> and 23<sup>rd</sup> Legislation Years several visits were conducted but there is not any information on what was dome with the detected violations in administrative and judicial levels.<sup>97</sup> The information that proceedings were launched against the perpetrators in the 66<sup>th</sup> paragraph of the governments reply therefore seems abstract.

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<sup>91</sup> İHB 2007 Report p.15 and Human Rights Watch, p. 8.

<sup>92</sup> İHB 2007 Report, p. 16.

<sup>93</sup> Law No. 3686, Date of Admission: 05/12/1990, Date of Publication: 08/12/1990, Publication No. 20719

<sup>94</sup> Sema Pişkinsüt (2001), Filistin Askısından Fezlekeye İşkencenin Kitabı, (Bilgi: İstanbul).

<sup>95</sup> <http://www.aksaArt.coArt.tr/arsiv/aksam/2001/07/26/politika/politika2.html>; <http://www.radikal.coArt.tr/haber.php?haberno=208288>.

<sup>96</sup> <http://www.tbmArt.gov.tr/komisyon/insanhaklari/index.htm>.

<sup>97</sup> <http://www.tbmArt.gov.tr/komisyon/insanhaklari/index.htm>.

Moreover a transformation of mentality was took place regarding previous period and the deputies' uninformed visits to prisons was restricted. As a result of the amendment of the Rules on the Visits to Prisoners in 2007.<sup>98</sup>

-Deputies' uninformed visits to prisons were hindered. The establishment should be informed before visits.

-Authorisation of the ministry is necessary to interview with the prisoners in connection with the "terror" offences.

This regulation will be implemented not only to the interviews of the deputies but also to the visits of related commissions' chairpersons and members of the GNAT to the prisons. Visits and interviews will be conducted in the observation of the public officials also regulated in the same Rules.<sup>99</sup>

### *CIVIL SUPERVISION*

In Turkey there are very few attempts on civil supervision. Due to the authorities perception of the activities of the independent groups as "partial", the authorities does not want to cooperate and as a result of this the proliferation of and the long-termed and systematic conduction of these activities is not possible. The cooperation of the authorities with NGOs in torture and ill-treatment field occurs when a serious and emergency problem take place mostly in detention places and especially in prisons in the form of mediation demand.<sup>100</sup>

One of the few examples of the known visits is related with the experiences of the Torture Prevention Group of the Izmir Bar Association. The experience of the group, which was active between 2001 and 2004 to prevent torture and ill-treatment incidents and to provide judicial help to the survivors, was important in its prevention function. The group followed two different ways for the fulfilment of this prevention function. First immediately interfering the incident by going to the headquarters or places in ongoing torture and ill-treatment allegations and second visits to the places known with problems and interviews with authorities. Uninformed visit conducted to the Gümüşpala Police Headquarters in May 2003 should be mentioned here.<sup>101</sup>

Also there were few visits to prisons conducted by chamber of professions along this example. But there is not any institution outside the mechanism of the State that could conduct an uninformed visit and there are various problems experienced in the informed/authorised visits.

For example Ankara Medical Chamber performed a visit to Sincan Prison Complex with the authorisation of the General directorate of the Ministry of Justice on 19 November 2007 in connection with the health problems of the prisoners.

During this visit with the permission of the General Directorate the administration of the prison **did not allow** them to visit the F1 and L1 Prisons in which **the complaint applications were widespread.**

<sup>98</sup> Rules, Art. 26 and 40.

<sup>99</sup> Amendment para: RG-28/07/2007-26596.

<sup>100</sup> Radikal, "Buca Cezaevi'ndeki isyan sona erdi", 14.10.2004, <http://www.radikal.coArt.tr/haber.php?haberno=131175>; Sabah, "Buca'da 12 saatlik isyan", <http://arsiv.sabah.coArt.tr/2004/10/15/gnd110.html>.

<sup>101</sup> "Avukatlardan Karakola Ziyaret", <http://www.abgp.gov.tr/index.php?p=28922&l=1>; Birgün, "İzmir Barosu'nun Girişimi Kınandı", [http://www.birgun.net/actuel\\_2004\\_index.php?news\\_code=1102706505&year=2004&month=12&day=10](http://www.birgun.net/actuel_2004_index.php?news_code=1102706505&year=2004&month=12&day=10).

The visiting group asked for interviewing with the prisoners in conditions that comply the privacy principle without the monitoring of the administration of the prison and the demand **was declined on the grounds that the ministry did not give order in this matter**".

Consequently the group could only conduct a limited visit to F2 and prison for females.<sup>102</sup>

The visits of the guest-houses for the refugees are seriously problematic both in the codification system and in practice. In accordance with the Article 32 of the Rules on the Refugee Guest-houses, **"no one is allowed to enter the guest-house other than the refugees and officials.** But the applications to make interviews with the refugees will be send to the Ministry and will be act upon the orders. The persons permitted to visit will be recorded".

However there is not any record that the Ministry of Interior Affairs permitted to civil supervision until today. Refugees are having problems even with the visits of their lawyers and UNHCR. The visits of other international organisations, NGOs or human rights defenders were severely restricted. Lawyers, UNHCR representatives and judicial advisors are not permitted to access the refugees in the transit points of the airports.<sup>103</sup>

### Recommendations

1. The supervision mechanisms should have organisation structures that is independent from the administration's hierarchy and is able to monitor it from outside. First of all legal regulations on monitoring visits which comply with the aims mentioned in Paris Principles and OPCAT.
2. The prosecutor who is responsible for the supervision of the detention places should be different from the prosecutor for the investigations of the torture and ill-treatment acts in those places.
3. The supervision of the military prisons should be performed by a unit outside the hierarchy of the Ministry of National Defence.
4. The prosecutors and the executive judges should investigate the violations in detention places immediately, *ex officio* and in place. They should confiscate all the evidences. Investigating in place and confiscating evidences (for example, registration notes) will serve as supervision function at the same time.
5. Executive judges should make a *ex officio*, in place and comprehensive investigations on the complaints that they receive. Seeing the environment of the place that grievance take place both would provide comprehensive investigation of the complaint and would show that the grievance is related with "human beings".
6. Executive judicature should be constituted inside the courthouse due to its judicial character.
7. In executive judicature all trials on discipline affairs should be done with hearings. For the other complaints, proceedings without hearing should be exception not a rule.

<sup>102</sup> [http://www.ato.org.tr/index.php?id=72&option=com\\_content&task=view](http://www.ato.org.tr/index.php?id=72&option=com_content&task=view) .

<sup>103</sup> İstenmeyen Misafirler: Türkiye'de "Yabancı Misafirhaneleri"nde Tutulan Mülteciler, Kasım 2007, Helsinki Yurttaşlar Derneği, [http://www.hyd.org.tr/staticfiles/files/multeci\\_gozetim\\_raporu\\_tr.pdf](http://www.hyd.org.tr/staticfiles/files/multeci_gozetim_raporu_tr.pdf).

8. Province and district human rights boards and prison boards should be restructured in the light of Paris Principles and OPCAT with focusing on organisation, membership, training, independency, visits and reporting issues.
9. The right of deputies to make visits to detention places without informing should be regulated without a restriction.
10. During the interviews with deputies privacy should be provided.
11. Administrative and Penal proceedings should be launched on the violations that were ascertained by the commissions of the GNAT and the public opinion should be informed about the results of the proceedings.
12. The detention places should be opened to the supervision of the NGOs working in the field of human rights.

### Issue no. 3

Right from the start civil society organisations established by the relatives of political prisoners and the public in general reacted negatively to the building of F-type prisons in Turkey.

Although the hunger strikes which were part of this process might have looked as if there were only directed against the transference to the new F-type prisons, the hunger strikers also had other reasonable and human demands<sup>104</sup>. Contrary to what is stated in the 3<sup>rd</sup> periodic report of Turkey the dialogue which was implemented under the mediation efforts of representative of democratic mass organisations and leaders of society was not finalised. This process was stopped with the operation known by the general public as the “Massacre of 19 December”.

On 19 December 2000 a coordinated operation in 20 prisons all over Turkey was carried out. After this operation during which 31 prisoners died and hundreds were injured the transferees to the F-type prisons were carried out and all other demands of the hunger strikers put an end to.

The hunger strikers were taken to hospitals and subjected to force-feeding. Force-feeding was first regulated in the “three party protocol” of January 2000 and then changed into a clear instruction for physicians in a Ministry of Health circular of 19 December 2000. Finally, it was incorporated in the Law on the Execution of Sentences and Security Measures (No. 5275) of 2005<sup>105</sup>.

After the introduction of the F-type prisons protests increased, but the Ministry of Justice saying that the lawyers holding meetings with the prisoners were responsible for this and thus targeting the lawyers.

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<sup>104</sup> These demands were the abolishment of article 16 of the Anti-Terrorism Law which constitutes the legal basis of the F-type prisons; the annulment of the “three party protocol” which provided an obstacle to defence and treatment; regular inspection of prisons by independent delegations composed of members of the bar associations, medical chambers, concerned mass organisations, and relatives; punishment of those responsible for the massacres that occurred between 1995 and 2000 in the prisons of Buca, Ümraniye, Diyarbakır, Ulucanlar, and Burdur; release of prisoners who have fallen ill in prison; and the annulment of anti-democratic laws.

<sup>105</sup> Article 82 of the Law on the Execution of Sentences and Security Measures

The police intervened in protests against the prison operation and the F-type prisons and detained and arrested protesters. The associations established by the relatives of prisoners were raided and by the police and afterwards closed upon courts decisions.

Persuasion to participate in or incitement to hunger strikes were criminalised and those who made statements contrary to the Government's position faced a risk of criminal sanctions<sup>106</sup>.

Despite these repressions and restraints the hunger strikes continued until 2007.

In 2007 there were two activists on the verge of death. As during the tense political atmosphere after the death of journalist Hrant Dink on 17 January 2007, the Government did not want to draw more negative reactions it changed circular No. 45 and reissued it under its new form as circular No. 45/1. As a result the hunger strikers announced that they would interrupt their hunger strike.

As mentioned in the Government's report Circular No. 45/1 extended the period of conversation between inmates from 5 to 10 hours<sup>107</sup>. However, complaints from prisoners indicate that they are not allowed to spend 10 hours per week together with others. According to official statements this it is impossible to fully implement the requirements of this circular because of a lack of space and personnel.

Attention is drawn to the following conclusions regarding the F-type prison practice which has been lasting 10 years.

- Complaints that this form of punishment based on isolation damages the physical and mental integrity and personality of the prisoners continue. When evaluating the prison conditions and practices as a whole, one can see that isolation has the same effects as tortures.

The HRFT which provides treatment and rehabilitation services also to persons who have been in F-type prisons for a certain period of time has also witnessed these effects among its applicants and tries to contribute to their disappearance.

- As inmates of F-type prisons are sometimes confronted with difficulties in explaining the torture and ill-treatment they have been subjected to, the negative effects of isolation on their physical and mental integrity and personality, their problems and demands to the authorities, they resort to hunger strikes as a means of making their voice heard. It can happen that these hunger strikes turn into death fasts or suicide attempts. That these protests are organised by different political groups and even non-political prisoners shows that these protests are becoming wider.
- A group of political prisoners is continuing their protest because of the ongoing problems in prisons, especially against the humiliating practices during searches, by refusing to wear shoes inside and outside the prison. There are detainees who have been refused participation in their

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<sup>106</sup> Article 307 b of the old Turkish Criminal Code, article 298 of the new Turkish Criminal Code

<sup>107</sup> CAT/C/TUR/3, p. 16.

hearings for this reason<sup>108</sup>. This is an important example showing that the prohibiting attitude towards the prison issue continues even among the judiciary.

It is known that torture and ill-treatment continue to be applied routinely and widespread in F-type prisons which almost destroy communication in prisons and where inmates only spend limited time in company with others and that prisoners face difficulties in forwarding their complaints to the competent official authorities.

### **Recommendation**

All methods of punishment based on isolation, in particular F-type prisons, should be abandoned.

### **Issue no. 4**

1. In Turkey's second periodic report, the government informed the Committee that "to further augment the domestic institutional framework regarding human rights protection, the draft law on the creation of the institution of "Public Inspector", which will function as an Ombudsman, has been presented to Parliament and is currently on the agenda of the Justice Commission".<sup>109</sup>
2. However, as noted in Turkey's third periodic report to the CAT<sup>110</sup>, the Ombudsman Law, No. 5548 adopted by the Turkish Parliament had been annulled by the Constitutional Court.
3. Although, the Constitution amendment approved by referendum this September includes an article concerning the establishment of the Ombudsman Office, whether the government will try to pass the same draft from the Parliament is yet to be seen.
4. Meanwhile, another draft with regard to the establishment of the Turkish Human Rights Institution has been sent to the Parliament. The draft is being currently worked on at the Justice Commission.
5. The Government in its third periodic report claims that "due attention is paid to the Paris Principles in the creation of the National Human Rights Institution". Since the report also states that "The Government aims to establish this institution as the domestic monitoring mechanism that will enable Turkey to ratify the Optional Protocol to the Convention against Torture (OPCAT)" this claim should be assessed carefully. As will be discussed in some details below, the process has been totally in conflict with the spirit of Paris Principles.

### **Assessment of the Draft Law on the Turkish Human Rights Institution**

<sup>108</sup> Izmir 10th Heavy Criminal Court, 2007/432 E.

<sup>109</sup> CAT/C/20/Add.8, para. 167.

<sup>110</sup> CAT/C/TUR/3, para. 75.

The Draft Law on the Turkish Human Rights Institution (“Draft”) was submitted to the TGNA on 28 January 2010. However, it should be noted that efforts to establish a national human rights institution has a 6-year history. The work on the current Draft was launched at the latest in September 2008.

In this period of six years no serious field study has been conducted on the alternative national institutions nor been the views of those active in human rights area taken into consideration.

Furthermore, although the Draft is presented as a part and parcel of the Democratic Opening, the short history of the Draft is an indication that it is forged to fulfil the commitments to the EU in this area. It should be considered as sheer contradiction that a process whereby no democratic procedures are in place is introduced as a symbol of democratic initiative. Below some prominent deficiencies of the draft arising from lack of consultation are enumerated:

#### **Legal basis and Principle of Legality**

- The Draft explicitly gives an end to some of the current bureaucracy in human rights and foresees the tacit continuation of the others. However the relations between the new and the old mechanisms are not precisely prescribed under the Draft.
- In case the Draft is adopted, there will technically be a legal basis for the Turkish Human Rights Institution. However due to the fact that the language of the Draft on a number of issues is vague, the clarification will be left to less secure administrative decrees or even worse than that, to the individual decisions of the administration.

#### **Institutional Structure**

The Draft foresees two different structures within the Institution. One of them is the Turkish Human Rights Board (Board) and the other is the Presidency. The duties of the Board are mainly symbolic. On the other hand, the overall structure of the Presidency reminds of an ombudsman where the President of the Institution is dominant.

#### **Pluralism and Independency**

According to the Draft; the President, Vice President and all members will be selected by the Cabinet. The only provision aiming to ensure pluralist structure of the Turkish Human Rights Board is the 4<sup>th</sup> paragraph of Article 3. According to this; “A pluralist representation of relevant civil society, social and professional organisations, think tanks, universities and experts shall be ensured during the selection process.” As a result of these provisions;

- while it was needed to further concretize the Paris Principles in the national legislation, on the contrary they have become even more vague.
- considering that Article 3 of the Draft does not stipulate any conditions to become President and Member of the Board, the Council of Ministers will be able to appoint anyone they prefer as a member of the Board.
- In the absence of any safeguards it would not be realistic to expect the Government to select the names who will criticize it. Persons to be selected as such will avoid criticising the government when it is needed the most.

## **Presidency and Organisation**

The key role of the Presidency becomes more apparent in view of the fact that the fundamental and permanent functions of the Institution shall be provided through experts and assistant experts and that the personnel of the institution will be appointed by the President. The experts shall be empowered to request, examine and take copies of the relevant information and documents from all public institutions and organizations as well as other real and legal persons; to obtain written and verbal information from the interested [parties]; and to pay visits to, inspect and keep minutes of the sites where people deprived of their liberty or persons under protection are being kept, **only if** the President authorizes them.

### **Organisation**

According to Article 6 of the Draft there will be 9 Service Units within the Board (Violation Allegations Investigation Unit, Anti-Torture and Maltreatment Unit, Legal Unit, Training Unit, Foreign Relations and Project Unit, Media and Public Relations Unit, Information and Documentation Unit, Personnel Unit and management Services Unit). However total number of personnel expected to undertake such a comprehensive workload is 60, 45 of whom are experts and assistant experts. In this case, roughly an average of 5 experts and assistant experts can be recruited at each unit. It is not possible to get through this heavy workload with this personnel structure:

- If the Institution is able to build confidence among the society then thousands of applications to merely the violations unit should be expected.
- With such a structure it is impossible to access places in Turkey where people are deprived of their liberties as required by the OPCAT, let alone to carry out in-depth examination.

### **Qualifications of the Staff**

There is no doubt that the staff to be employed at the Institution should have the necessary qualifications to perform the services foreseen.

According to the Draft, in order to become an assistant expert it is sufficient to be a graduate of the faculties which award a degree as a result of a four year education in areas falling under the field of activity of the Institution, which will be specified in the regulation, to be promulgated after the Law enters into force. As for those who will be employed at the Legal Unit, they are required to have completed their internship as an attorney. However, the service units that have been foreseen require staff with expertise in different fields. For instance, it is recommended to have jurists, forensic medicine experts, specialised psychiatrists, psychologists, social service experts and persons experienced on detention places as well as anthropologists during visits to detention places.

### **Immunities and Privileges**

According to the Draft, contrary to international criteria and irrespective of national experiences, it will be possible to carry out criminal prosecutions about board members for offences related to their duty. No restrictions have been foreseen for these prosecutions.

Article 3 paragraph 12 contains another provision that diminishes their safeguards; ‘The President and members as well as the Institution staff shall not disclose to anyone apart from the competent



authorities specified by law the confidential information pertaining **to the public**, personal data and confidential information pertaining to the Institution that they have obtained during the performance of their duties.’ The definition about confidential information pertaining to the public and the Institution has not been given under the Draft. There is no uncontroversial general definition on this under Turkish law either. Given this situation, the Institution staff that comes across such information during their inquiries will not be able to disclose them thinking that they may face legal and penal sanctions in case of declaring such information.

In terms of immunities and privileges, the situation is even graver for experts and assistant experts who will render the fundamental and permanent services of the Institution. These persons will investigate violation of rights, will visit detention houses and will conduct and report thematic investigations. The draft does not introduce any safeguard for the experts and assistant experts who will render all these services.

### **Examining violation allegations**

To be able to examine allegations of violations, just like in other functions the Institution should have the power to summon witnesses and compel their appearance, the power to impose sanctions on those who fail to implement the decisions they have taken for obtaining evidence, the right to access any kind of information and document including those available in public institutions, unlimited right to inspect places restricting the freedom of individuals such as penal execution institutions, detention facilities, police stations, the right to conduct on-site visits and the right to appoint experts. The relevant provision in the Draft is way behind these objectives; “Where the **President** authorizes, the experts shall be empowered to request, examine and take copies of the relevant information and documents from all public institutions and organizations as well as other real and legal persons; to obtain written and verbal information from the interested [parties]; and to pay visits to, inspect and keep minutes of the sites where people deprived of their liberty or persons under protection are being kept.”

It is a problem *per se* that the President’s authorisation is required. Even in cases where they are in urgent need of information, experts will have to wait for the President to finalise the huge pile of cases pending before him.

Experts and assistant experts are empowered to obtain information and conduct visits; however the draft does not make any reference to those who have to impart such information. There is no provision about the action to be taken against those who refuse to provide information and the duration in which they have to provide the information. Thus, the Draft does not regulate how long the experts have to wait for a reply and what their alternatives are in case of failure to obtain the information.

Obtaining results is as important as conducting an effective investigation. The action to be taken by the Institution as a result of the investigation is unclear in the Draft. The Draft only refers to; “notifying the results to the relevant persons, institutions and organizations, and following up those results; taking initiative to launch legal procedures against those found responsible”. However, it is not clear what will be done if such initiatives remain inconclusive.

### **Power to Conduct Visits and the Anti-Torture and Maltreatment Unit**

The Draft refers to regular visits only. However, unannounced visits are at least as effective as regular visits and they have the potential to stop a violation by making immediate intervention possible.

The Draft does not elaborate the frequency and type of visits. In addition, it does not include the safeguards stipulated in the Optional Protocol. The national mechanism should be able to interview in private the people deprived of their liberty, with the assistance of an interpreter if necessary; should have the liberty to identify the places and persons it wants to visit; should have access to all detention facilities and their annexes and units; and should have access to any kind of document. None of these safeguards have been included in the Draft.

### **Conclusion**

In Turkey, international organisations and primarily the EU have underlined in documents their demand for the establishment of mechanisms that will protect and reinforce human rights and will include the civil society. But the result obtained is just the contrary of what has been announced. Nobody knows the reason why this method has been chosen among different national human rights mechanisms.

It had always been stressed that the civil society should be consulted or involved when selecting institutional structures and it should not be based on the unilateral decision of the government. However, as a result, the civil society is being fully excluded from the process and the national Institution is becoming part of the Turkey-EU bargain. If the Institution to be established will be supported and accredited by the EU then the civil society's already diminished domain of struggle might disappear, because in order to exist it will be required to become a part of the newly established mechanisms, i.e. *etatism*.

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### **Issue no. 6**

However, lately on 27 September 2010 the Ministry of Justice refused to give permission to a group of members of the Council of Europe Parliamentary Assembly who wanted to visit Imralı Prison based on article 30 of the same regulation.

Similarly, members of the Provincial Human Rights Board of Diyarbakır which is attached to the Human Rights Presidency of the Prime Ministry was refused permission to visit children who had been detained in Cizre/Şırnak on 15 February 2008 and later arrested and taken to Diyarbakır E-type Prison where they were allegedly tortured. The application was refused on 28 October 2008.

Similarly, the application of the HRA, HRFT and Mazlum-Der to visit Imralı Prison to inspect the prison conditions of Abdullah Öcalan was refused by the Ministry of Justice.

The Turkish Medical Association which had applied to the Ministry of Justice on 16 February 2010 for permission to send a group to Diyarbakır E-type Prison to investigate the prison conditions of children held under the Anti-Terrorism Law was also refused permission.

For information and statistics on government policies it is possible to apply to BIMER the Information Unit of the Prime Ministry. However, because replies are often deficient or negative and the questioners are not directed to other units, submitting written questions in Parliament via individual Members of Parliament is a more reliable option for human rights defenders. Thus, questions are answered but statistical information is often outdated.

#### **Recommendation**

While it is legally possible to visit places of detention, the applications for visits are being rejected. As prisons are currently overcrowded due allegations of torture and ill-treatment have increased. Visits to such places should therefore be facilitated, applications should receive a positive response and permissions should be given quicker.

#### **Issue no. 7**

According to United Nation High Commissioner for Refugees, by the end of May 2010, there were 15.255 people who are in concern of UNCHR in Turkey, 6105 of them are asylum seekers and 9150 of them are refugees. Please find statistic of UNCHR breakdown by nationality and sex as of 31 May 2010 and statistics of last three years below.

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#### *Person of concern to UNCHR Turkey Breakdown by Nationality as of 31 May, 2010*

Nationality	Person
AFG	2897
IRN	4526
IRQ	5403
PAL	158
SOM	1172
SUD	211
UZB	114
Others	774
<b>Total</b>	<b>15255</b>

#### *Person of concern to UNCHR Turkey Breakdown by Sex as of 31 May, 2010*

	0-4	5-11	12-17	18-59	60+	Total
<i>Female total</i>	544	715	694	4145	133	6231
<i>Male total</i>	575	853	876	6529	191	9024
<i>total</i>	1119	1568	1570	10674	324	15255

#### *Refugee/Asylum Seekers Statistics of Last Three Years by UNCHR*

	2010 May	2009 May	2008 December
<i>Asylum seekers</i>	6105	6975	7106
<i>refugees</i>	9150	10879	11103
<i>total</i>	15255	17854	18209

According to the CAT Turkey Third Period Report, the Government of Turkey mentioned that in Turkey, 11.477 asylum applications were registered in 2008; 3.560 of them were registered temporary asylum. Yet according to UNCHR 18.209 people are in concern of UNCHR in 2008; 11.103 of them were registered as refugee.

As it is known, terms used in Refugee Regulation in Turkey do not align with international standard because of geographical limitation on 1951 Refugee Convention. While in international law, asylum seeker is a person who is seeking for asylum in a country but who has not been fully recognized as refugee yet, in Turkey, based on 1994 Refugee Regulation of Turkey, a refugee is foreigner or stateless person of **European origin** that has been recognized as such according to the criteria within Article 1 of the Refugee Convention by the Ministry of Interior, and an asylum seeker is described as foreigner or stateless person of *non-European* origin whose status of asylum seeker has been recognized by a decision of MOI that s/he meets the criteria within Article 1 of the Refugee Convention. This means that based on 1994 Refugees Regulation individual who originate from non-European countries are in refugee status as stipulated in the 1951 Convention are defined as asylum seekers and they are benefiting from “temporary asylum” protection in Turkey.

In the light of given information, it can be claimed that two different sets of data given by UNCHR and Ministry of Interior indicate the same group of people in Turkey; those who originate from non-European countries and whose status falls in the definition of Article 1 of 1951 Convention. This difference illustrates the government of Turkey does not recognize all people granted refugee status by UNCHR as asylum seekers

Furthermore it is known that in Turkey almost all asylum seekers applicants could not be recognized as asylum seekers by Ministry of Interior until their resettlement procedure is started by UNCHR. Although these people get residence permit to stay in Turkey until their departure for resettlement, they are not recognized as asylum seekers (which equals refugee in international law). Therefore the number of those who are granted temporary asylum given by the government in the third periodic report of CAT seems uncertain. It is not clear whether the government indicate those who are granted asylum seeker status or those who has only residence permit as an asylum seekers applicant.<sup>111</sup>

#### **Recommendations**

- Turkey firstly should align their definition of asylum seekers and refugee with the international standards.
- The government of Turkey should share clear and reliable statistics of each category of asylum seekers, asylum seeker applicants and refugees and asylum applicants.

<sup>111</sup> According to statistic given by Ministry of Interior of Turkey to Amnesty International, Turkey in the context of right of information act, as of 01 July, 2009, there are 36 asylum application (those who originated from European country), 25 refugees and 20.276 asylum seekers applicants.

- Also the government of Turkey should not postpone recognizing asylum seekers applicant as asylum seekers until their resettlement procedure began. On the contrary, it should grant asylum seekers status after fair and satisfactory status determination evaluation as soon as possible. This is vital for asylum seekers to reach social services provided for them.
- Based on the report of *Commissioner for Human Rights of the Council of Europe*<sup>112</sup>, Turkish authorities should respect the decision of UNCHR in granting refugee status to non-European refugee.

In the third periodic report of CAT, the government of Turkey mentioned that from 2005 to date; only 19 persons have appealed the decision of expulsion of the MoI. Regarding the number, our concern is that number of person who has appealed the decision of expulsion is small not because there are less people who are deported or people whose application is rejected but Turkey lacks of effective appeal mechanism and no written notification is given to asylum seekers applicants. Rather, in many cases of forcible return, the decisions of Turkish authorities are communicated verbally to asylum seekers and no reasoned decisions are given and no chance is given to asylum seekers to appeal the decision. Therefore in many times it is not clear on what basis Turkish authorities reject the application. Although usually as reason “threat to national security” is shown, this could not hide the reality that such decision are taken arbitrarily and without written notification or opportunity to appeal.<sup>113</sup>

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#### **Recommendation**

- An effective mechanism for asylum seekers applicant to appeal the negative decision should be implemented. This should include written notification consisting of reasons of rejection rather than verbal notification, access to legal advisor and information about the right to appeal.

#### **Issue no. 8**

In the third periodic report of CAT, the government of Turkey claimed that process of removal of rejected asylum seekers are guided by the principle of *non-refoulement*.<sup>114</sup> Yet in the report of Commissionaire for Human Rights of the Council of Europe, it was clearly stated that “in 2008 there was an increase in forcible returns of refugees and asylum seekers to countries where they were at risk of serious human right violations including irregular deportations resulting in the death or injury of

<sup>112</sup> In the report by *Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe*, following his visit to Turkey on 28 June-3 July, it is mentioned that although in the majority cases, temporary asylum is granted for those refugees who are recognized by UNCHR, in growing number of cases in recent years national authorities did not match UNCHR decision.

<sup>113</sup> In the report of Commissioner for Human Rights of the Council of Europe it is claimed that between 2002 and 2007 only 123 asylum seekers lodged in administrative appeal against a negative first instance decision and only 22 lodged judicial appeal with the Administrative Court

<sup>114</sup> Para 87 of CAT/C/TUR/3

asylum seekers”<sup>115</sup> Based on the statement of the Commissionaire it can be claimed that Turkey has continued to ignore the principle of non-refoulment in the cases of removal of rejected and potential asylum seekers. This is clear indicator of violation of 1951 Geneva Convention and Article 3 of CAT.

Also in recent years, there have been many applications to ECHR regarding deportation of asylum seekers from Turkey and their detention. It is known that in many cases, ECHR gave interim measure indicated under Rule 39 of the Rules of Court to stop the deportation. Moreover decision of ECHR against Turkey can be regarded as an indicator of violation of Article 3 and 13 of European Convention on Human Right. These decisions can be evaluated as proof of the existence deportation of asylum seekers that is also violation of non-refoulment.<sup>116</sup>

Furthermore, Turkey does violate the principle of *non-refoulment* in variety ways such as such as directly through forcible return to the country of origin, indirectly through return to an intermediary country, denying access to territory or fair and satisfactory asylum procedure along with the procedure of expulsion.

Although in the context of the *non-refoulment* principle, state are obliged to permit to entry to people seeking international protection to determine through a fair and satisfactory procedure whether they would face serious human rights abuses if returned in Turkey, asylum seekers are denied to access asylum procedure through rejection at the border and being detained for irregular entry to Turkey. Person who may be in need of international protection are denied to access to asylum procedure at land border and after arrival at airports.

Moreover, in Turkey persons who may be in need of international protection are usually detained at the transit zones airport and they are refused to access to asylum procedure as well as access to NGOs, UNCHR and lawyers. Although a circular letter no. 2010/19 ensuring access to asylum procedure in detention place was issued by the government, denying access to asylum procedure continues in practice and there is lack of mechanism to investigate whether this rule is obeyed in detention center or not.

Furthermore access to asylum procedure was denied due to the fact that police officer refused to take application for asylum. It is known from many cases, many persons who may be in need of international protection were refused to submit their application during their detention and sometimes they are forced to sign a document claiming that they had withdrawn their asylum application.

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<sup>115</sup> The report by *Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe*, following his visit to Turkey on 28 June-3 July

<sup>116</sup> Case of Alipour and Hosseinzadgan v. Turkey, Case of Charahili v. Turkey, Case of Dbouba v. Turkey, Case of Keshmiri v. Turkey, Case of M.B and other v. Turkey, Case of Ranjbar and others v. Turkey, Abdolkhani and Karimnia vs Turkey

Additionally, person who may be in need of international protection are also directly forced to return their origin country or another country without giving any written notification stating that their application is rejected. Although they made their application and are waiting for determination for their status by both UNCHR and Turkish authorities, they can be deported without notification. Also in the cases of administrative appeals; the deportation order is only suspended if Administrative Court issues an interim measure. This does not occur frequently. This demonstrates that the risk of being subject to degrading and inhuman treatment in the cases of deportation is not evaluated in advance. Needless to say, it is a potential violation of Article 3 of ECHR.

In fact it can be claimed that in Turkey the principle of *non-refoulement* is violated by not only forcible returns of refugees and asylum seekers to countries where they were at risk of serious human right violations but also by denying access to asylum at borders, refusing to take application during detention period, detained person as result of illegal entry to Turkey and forcing people to return the country without taking their application or without notification of departure in the cases they made application.

#### **Recommendation**

- The government of Turkey should protect refugees recognized by UNCHR and people who face human right violation if they return to their origin countries against refoulement
- To prevent the refusal of asylum application by state official, the state officials who refuse to take the asylum applications or failing to transfer them to relevant authorities should be effectively investigated. Also the government of Turkey should train all relevant state officials in terms of receiving asylum applications. Especially the training of officers at the border should be improved with a view to ensuring that potential asylum seekers are properly informed of their right at the arrival.
- The government should guarantee that those in need of international protection, including rejected asylum seekers is not forcibly returned to place where they are at risk of serious human right violation by establishing effective mechanism to examine their claim.
- The government should guarantee that asylum seekers are not deported unless their claim is rejected on appeal. Also it should reform the appeal procedure in such way that an administrative decision will be completely assessed by the administrative courts and it includes suspensive effects in the cases where there is potential of risk for life and freedom according to ECHR, Article 13.
- The government of Turkey should take measure to ensure that state officer provide those who may be in need of international protection to access asylum procedure in the direction of the circular letter no. 2010/19.

The government of Turkey, in the third periodic report of CAT, claims that Turkey asylum procedure are based on 1994 Regulation on Asylum amended in 2006 in line with EU acquis on asylum and

migration. This also means that Turkey still lacks of domestic law issuing state conduct towards to asylum seekers, refugee and other people who may be in need of international protection on the contrary conduct of state official is governed by different regulations. This clearly weakens the level of protection of refugees and asylum seekers in Turkey. It should be noted that state's attempt to prepare new Asylum Law is valuable but urgency of the situation should not be ignored and the preparation should be ended by taking urgency into consideration.

### **Recommendation**

- Turkey should enact the Asylum Law in cooperation with NGOs, UNCHR and other relevant institution as soon as possible. During the preparation, it should consider recommendation of NGOs and focus on all current deficiency in the asylum procedure of Turkey.

In the third periodic report of CAT, the government states that according to article 6 of the Regulation demands of those who seek residence permit in Turkey or seek asylum in Turkey are assessed in accordance with 1951 Geneva Convention. Yet in practice domestic determination procedure concerning “temporary asylum” has severe deficiencies. Police officers conducting interview and the civil servant of MoI who decide on the status are left without a system enabling them to assess credibility of applicants and risk in cases of return.

Furthermore Turkey has ratified 1951 Convention relating to the Status of Refugee and its protocol. Yet it maintains the geographic limitation pursuant to Article 1 B of the 1951 UN Refugee Convention. Therefore non-European asylum seekers are excluded from protection under the Refugee Convention. Although the draft of new asylum Law seems promising, it clear that there is no intend to remove geographic limitation. Also contradiction in terms of Turkey caused by geographical limitation and its consequence on restriction on asylum procedure for non-European asylum seekers seems not to be solved by new Asylum Law. It is because it lacks of clarification of terms such as refugees from European countries, Refugees from non-European countries and benefactors of secondary protection.

### **Recommendation:**

- The government of Turkey should provide equal protection opportunity to non-European asylum seeker by lifting geographical limit.
- The government of Turkey should establish a reliable and effective system including country of origin information system to assess credibility of applicants and risk in cases of return in the light of 1951 Geneva Convention.
- The new Asylum Law should clarify terms used in asylum procedures by defining all terms such as refugees from European countries, Refugees from non-European countries and benefactors of secondary protection in the new Asylum Law.



The government of Turkey claims that according to Article 7 of the regulation, the Ministry of Interior cooperates with other ministries, governmental bodies and organization and with international organization such as UNCHR, IOM and NGOs. Yet although there is parallel procedure between UNCHR and MOI and UNCHR has been working in Turkey since 1960 there is no still formal host country agreement between UNCHR and Turkey.

Moreover, although the dialogue between Turkish authorities and NGOs seems better than earlier with works of Asylum and Migration Bureau under the MoI, NGOs active in the field of refugee protection are still not invited to meeting organized by the Ministry. Also although intent to take comments of NGOS on draft of new Asylum Law seems promising for better dialogue between MOI and NGOs, this initiative seems not enough and so limited. Furthermore, although the behavior of government officers and Turkish authorities against NGO working in the field of refugee rights are not completely hostile, sometimes they prevent NGOs to realize their activities. For example, one of three billboards<sup>117</sup> prepared by Human Right Foundation of Turkey for World Refugee Day was not allowed to be demonstrated by Van Foreigner Department. Such behaviors can be evaluated as indicator of negative attitude of Turkish authorities to NGOs, which damage the dialogue between NGOs and the government of Turkey.

#### **Recommendations**

- The government should explore further cooperation and collaboration with UNHR by signing the host country agreement.
- It should establish a dialogue with NGOs in drafting and implementation of legislation. (It is urgent for the Asylum Law under preparation).
- The government should give up its restrictive and harmful behavior against NGOs working in the field of refugee rights.

Although in the third periodic report it was stated that Turkey aimed to harmonize its legislation with EU in the field of asylum and migration, and it shows the Turkey Action Plan for Asylum and Migration of 17 January 2005 as proof of the intent, there are not so much gradual steps to realize this intent in practice.

Moreover in the report, the government claimed that in the way of harmonization with EU acquis, it takes necessary measures such as improving administrative capacity, establishment of expert unit to implement legislative changes. In this respect, the government established the Bureau for the “Development of Asylum and Migration Legislation and Strengthening Administrative Capacity”

<sup>117</sup> The billboard is presented in Annex 1

responsible for legislative change, capacity building, etc. Under the mandate of the bureau, a draft of Asylum Law was prepared in 2010 and was shared with relevant NGOs. Despite the fact that long time passed after the draft, there has not been any development regarding the law. Also in the way of harmonization with EU acquis, some circular letters were issued, use of them in practice were not monitored by the relevant authorities.

#### **Recommendations**

- The government should not limit activities for harmonization with EU acquis with change in legislation. Rather it should both monitor whether change in legislation are obeyed by relevant authorities and take necessary measure to improve asylum procedure in practice.

The government of Turkey stated that removals of illegal migrants are carried out with law and regulation and they are detained for public order and safety. In Turkey people who may be in need of international protection are also apprehended and detained because of violation of Passport Law and for public order and safety. Also while Turkish authorities claims that detainee reach asylum procedure and enact the circular letter no. 2010/19, in practice they usually do not use this rights because of lack of legal procedure defining the period between detention and deportation, lack of information, absence of independent monitoring mechanism, denial of access to lawyers, NGOs and UNCHR. Furthermore as stated in Amnesty International Report, according to Asylum Regulation, people who claim after arrest for irregular entry or attempted exit or irregular status in country are subject to accelerated asylum procedure within five days of detention<sup>118</sup>. This means to punish asylum seekers for their illegal entry, which represent the violation of Refugee Convention.<sup>119</sup>

According to the government of Turkey, once illegal immigrants are apprehended their return is facilitated as soon as possible. Yet in the cases of deportation in practice, many foreigners cannot be deported because of absence of readmission agreement with origin country and lack of required resources for deportation. In these cases, foreigners are hold for weeks or months and then released with the order requiring them to leave country. Also the length of detention can range from one week to more than one year. It usually depends on when detainees can afford their own tickets. Moreover since there is no enough resource to carry out the procedure, asylum seekers are detained for months before release without any explanation and status being determined.

#### **Recommendations**

- The government should ensure that asylum seekers are not returned to their country origin or any other country unless their claim has been examined and rejected on appeal.

<sup>118</sup> Implementation Directive, section 13 cited in Stranded

<sup>119</sup> Article 31.1 of Refugee Convention

- The government should comply with the principle that penalty for unauthorized entry or stay-detention- should not imposed on refugees and asylum seekers who present good cause for irregular entry.
- Asylum seekers and refugee should be detained as a last resort in exceptional cases and where non-custodial measures have been proven on individual ground in accordance with ECHR, Article 5 and ICCPR Article 9. Also alternative non-custodial measure should be considered before detention
- The alternatives to detention should be expressed in the Asylum Law which is under preparation.
- The accelerated asylum procedure should not have lower standards of human rights protection than regular procedure and right to legal advice should be provided in accelerated procedure.
- The government of Turkey should adopt human right based view in the detention of aliens who may be in need of international protection.

In the third periodic report of CAT, the government mentioned that efforts to improve physical condition and capacity of removal centers in which irregular migrants are held. Although with Twinning project on Establishing Removal Centers and other project regarding the removal centers, the governments intend to emphasize this important issue, the problem regarding the detention places, removal centers, etc. still continues.

In Turkey, until departure and expulsion, foreigners are held in so called guest houses under the authority of Ministry of Interior. This clearly means that there is no court decision or judicial review for their detention. Also in the guest houses, foreigner cannot challenge the legality and the length of detention. This means that the procedure regarding the detention of foreigner until they are deported is in conflict with the European Court of Human Right's cases.

According to the comprehensive report of Helsinki Citizens Assembly, the detention facilities are usually overcrowded, dirty and without hoe-water. Foods are usually not enough and have lack of necessary nutrition. Medical care was often denied. Usually exercises or outdoor activities were not available. Also communication is severely restricted because of inability to call and minimal access to visitors, NGOs, lawyers and UNCHR. Also in the report it was stated that allegation of torture and ill-treatment including person being beaten on the sole of foot, known as falaka, and being forced to stand naked in front of other detainees.<sup>120</sup>

On the other hand, although these foreigner houses which exists in all major cities of Turkey and administrated by the Tracing and Control Police Section of the Foreigner's Department of each city's Security Directorate are sometimes monitored by local human rights boards, these monitoring could not exactly reach aims because of their lack of independence.

<sup>120</sup> Helsinki Citizen Assembly, Unwelcomed Guests: The Detention of Refugees in Turkey's "Foreigner Guest Houses

### **Recommendations**

- The government should ensure judicial review of reason and length of detention by domestic courts.
- Asylum seekers should be informed, in language they understand, of the reason of their arrest and detention in accordance with Article 5 of ECHR.
- Therefore it is important for Turkey to ratify OPCAT and implemented its provision through establishment of an independent national body to carry out visit to all places of detention places including foreigner' guest houses, airport detention facilities.
- There should be maximum duration for detention provided by law.
- People who are seeking for asylum should be granted to legal counsel, interpreters, doctors, refugee NGOs, UNCHR, etc.in detention.
- Detainees should have access to health care and psychological counseling
- The government should make further effort to provide better living condition in all places of administrative detention. It should improve safeguards against verbal and physical abuse by officers in detention places.

The government stated that Education and training Law no. 222 would automatically allow the children of illegal migrants to attend the school. Yet while access to education is generally granted, asylum seeker children attend to primary education, in many cases they are not able to get graduation certificate since they are registered to school as guest student. Also access to secondary education is far less frequent.

### **Recommendation**

- In this regard, the government should make further effort provide asylum seeker children to get graduation certification and to access secondary education.

### **Issue no. 9**

#### *I. Penal code*

As it is mentioned in the government's reply in its 155<sup>th</sup> and 116<sup>th</sup> paragraph, the definition of torture was extended and it has more extensive framework than the international law in its elements. The Article 94 of Turkish Penal Code (TPC) that defines torture has a very extensive definition. With the amendment of TPC the distinction between torture and ill-treatment was abolished and the acts that could be evaluated under ill-treatment were taken under the definition of torture. Torture adopted as a comprehensive concept that includes every type of ill-treatment.

For the constitution of the offence "giving pain", "insulting" to a person or "disruption of persons power perception and will" due to a behaviour that "doesn't comply with human dignity was seen as

adequate. A specific intention was not sought for the constitution of the offence. Moreover the “severity of pain” was not defined. The judge would determine the degree of the pain and suffering and the immensity of the act and also the sentence from 3 to 15 years.

The definition of the perpetrator in the Article is “public official” though the definition of the public official in the Article 5 of the Code of State Officials is quite extensive and the article arrange that the persons who took part in the crime although they are not public officials will be tried as if they were public officials.

In this context the Article 94 is very positive and has a deterrent effect if it is applied as it should be. Nonetheless there are several problems has been experienced. First of all, in practice the condition of being “systematic” was looked for in the action to constitute torture although it is not mentioned in the article.

#### *The problems concerning being “systematic”*

In the Article 94 for the constitution of an offence elements such as the continuity or being systematic of the action were not foreseen. Nonetheless the offences that “*present continuity in a process*” i.e. *being systematic* for torture was mentioned in the justification of the article. This definition paves the way for the evaluation of several acts that should be qualified as “torture”, as offences lighter than torture. However the fact of “systematic” practice that the prosecutors and courts base their verdict on, was only foreseen in the framework of “crimes against humanity” in TPC and legislator introduced a margin between 3 to 15 years of imprisonment for the courts to decide the sentence between the upper and lower limits according to the immensity of the offence.

The justification of the Article 94 that defines torture and the justification of the Article 86 which defines wounding are similar except the systematic practice that was not sought in Article 86. Moreover the definition of the offences was similarly made in both of the articles text. The similarity of the definitions and the systematic practice that was not sought in Article 86 make the prosecutors and the courts to apply the Article 86 instead of the Article 94 and by this way the perpetrators enjoy impunity.

#### *The problems concerning the perpetrators*

According to the government’s reply in its 155th paragraph, tormenting (the Article 96 of TPC) was included in the offences of torture. But this article arranges the actions that none of the parts is state officials or that states officials are not related with. The only difference between the offences of torture and tormenting both in their texts and justifications is the “qualification of the perpetrator”. The public official is the person that “executes a public service” the actions that are fulfilled in the context of this public service will be included in the offence of torture. According to this definition, the act of torture was defined as an offence of the acts of the persons that have organic or functional links with the state as executing a public service but the act of tormenting is not an offence related with public service. For example a law-enforcement officer’s influential act against his neighbour during his public service

would constitute torture and it would constitute the offence of tormenting if it was actualised outside the public service.

In the justification of the Article 96 which is partially similar with the justification of the Article 94, the essence of the offence of “tormenting” is constituted by the acts of “torture”. Thus the acts that are not attributed to public officials and that are not different from torture, are defined as “tormenting” on the grounds that they were realised by non-officials.

Against this clear distinction in the articles and the justifications of them, in practice the acts of officials have been evaluated in the framework of the Article 96 is a matter of concern. And it is a dangerous instrument in the hands of judiciary that commutes the penal responsibility of the perpetrators of torture and ill-treatment offences.

#### *The problems concerning the qualification of the action*

The cases were launched from articles other than torture by implementing “being systematic” and “the immensity of the act” criteria in several incidents although it is not foreseen in the law. This causes the impunity of the perpetrators of torture.

Acts that have physical outcomes like wounding were evaluated under Article 96 (tormenting) or Article 256 (excessive use of force) or Article 86 (intentionally wounding) on the grounds that the acts are not systematic or don’t have the immensity of torture.

The problems concerning the qualification of the action as an offence can be seen in the evaluation of the 21 cases that were included in the Prevention of Torture Project which was conducted by Human Rights Foundation of Turkey’s between 2007 and 2008. Only six out of the 21 incidents that were monitored and served with judicial help cases were launched against public officials on charges of “torturing”. The qualifications of the offences in the cases including the cases of torture are “tormenting”, “excessive use of force”, “intentionally wounding”, “simple wounding”, “intentionally wounding by misconduct of the authority of public official”, “insulting”, “and ill-treatment to inferiors”, “influential act”.

Due to this fundamentally wrong approach that was also admitted by the government in its reply’s 155<sup>th</sup> and 116<sup>th</sup> paragraph, the cases and investigations **have been launched especially on charges of “excessive use of force” under Article 256 of TPC** which substitutes torture offence. This article, as it is mentioned in the reply of the government has been treated as one of the offences of “torture” and it should be emphasized as an article that have been used in place of torture.

The Article 256 on the use of force foresees the public officials as the perpetrators and these officials have the authority to use force and during the execution of their duties these official exceeded their authority to use force.

Therefore the offences of these public officials that were committed during their duties can be handled in the framework of excessive use of force and torture. Nonetheless the material or physical force of officials, even the force is proportional, cannot be used beyond the duty. Force is an authority that can

be used by officials during their administrative duties and it is not possible to talk about “the authority” to use force as soon as their judicial duties begin.

For example “even in the conditions that “apprehension with use of force” is absolutely necessary, the official with authority to use force, from the instance of apprehension, begin to make judicial duty and his authority to use force is over. Similarly in a position allegedly insulting the public official during an identity check, due to proceedings of an offence the authority to use force is absolutely illegal and illegitimate. Because of this the argument on the proportional or disproportional use of force is not possible on the grounds that the act is inside the framework of the Article 94.

Nonetheless there is an opposite tendency in the practise. According to the data of Ministry of Justice 82.75% of the total 1611 investigations that were launched under Articles 94, 95 and 256 in 2009 were launched under Article 256.<sup>121</sup> The investigations of these offences have differences and constitute a serious problem. The issue was discussed under the reply of the 14<sup>th</sup> question.

Although the government presented the statistics on the years between 2003 and 2008 in **120<sup>th</sup> paragraph**, it is not clear that which parameters were used in these statistics. Ministry of Justice’s Codification General Directorate’s reply to the parliamentary question M. Nuri Yaman, a deputy of Peace and Democracy Party (BDP) on 2 July 2010 presents elaborated data on this subject.<sup>122</sup>

Below every year was not evaluated separately but the data on 2007 that the government mentioned in **120<sup>th</sup> paragraph** of its reply was evaluated with the data that had been presented to the GNAT. The government stated in 120<sup>th</sup> paragraph that there are 850 **ongoing torture cases** in 2007. With the tables it becomes clear that these cases are not only cases on torture offence (the Articles 94 and 95 of TPC) but also cases on “excessive use of force” (the Article 256 of TPC).

According to the table **the number of cases that were launched on torture offences (the Articles 94 and 95 of TPC) are only 256**. 184 of them were passed from the previous year, 56 of them were launched in 2007 and 16 of them were returned from the Supreme Court.

Moreover the government claimed that the number of persons that were convicted in 2007 is 1357 but this information does not reflect the reality. This number is the number of persons that have ongoing cases against them not the convicted ones. According to the table presented to the GNAT, 771 out of the **1357 (57%) defendants were acquitted** and 193 of them **were (%14) convicted**. Besides others verdicts (such as prescription of time) were given against **393 persons (%29)**.

The number of the officials that were convicted on charges of torture (the Articles 94 and 95 of TPC) were 68 in 131 cases. Not all the sentences are imprisonment;

- 21 imprisonment,
- 18 fine,
- 3 both imprisonment and fine,
- 1 imprisonment commuted to fine.

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<sup>121</sup> Response of the Ministry of Justice to the Presidency of the Parliament, 02/07/2010 (no. B.03.0.KGM.0.00.00.05/2010-610.01-188/1644/3384)

<sup>122</sup> Response of the Ministry of Justice to the Presidency of the Parliament, 02/07/2010 (no. B.03.0.KGM.0.00.00.05/2010-610.01-188/1644/3384)

Furthermore 15 of the execution of the sentences were postponed.

The government did not presented data concerning the year 2009 that are quite striking. 67 torture cases (the Articles 94 and 95 of TPC) and 172 excessive use of force cases (Article 256 of TPC) and 239 cases in total were finalised in 2009. In these 239 cases 752 defendants were tried and 397 of them (52.8%) were acquitted and 54 of them (7.2%) were sentenced. Other verdicts (that are not defined) were given against the remaining 301 defendants (40%).

In 2009 **total 11 defendants** were convicted in **67 cases on charges of torture (Articles 94 of TPC)**. In 2009 no cases were launched under Article 95. It is spectacular that only **4 defendants were sentenced to imprisonment and four others' executions of their sentences were postponed**.

As one can understand by evaluating the statistics of the Ministry of Justice if the amount of the sentence drops under a limit other options steps in. In addition to the low amount of the sentences that were adjudicated under the Articles 94, 95 and 256 of TPC, with launching investigations under Articles 96, 256, 86 etc;

- The special significance of the torture offence in the field of human rights and the qualification of the offence is changed,
- Authorisation system steps in to launch investigation (the most important effect of the qualification problem is the nullification of the rule that torture investigations cannot be subjected to authorisation. The qualification of torture offences as other offences makes the investigation subject to authorisation and faces it with administrative obstacles even in the investigation phase. In several torture incidents the investigations were hindered with authorisation mechanism. See the reply to the 14<sup>th</sup> question)
- Remission becomes possible,
- The prescription of time limit becomes shorter,
- Negotiation-postponing and commuting to a fine becomes possible,
- The reflection of the offence to the Law of Discipline changes.

Although the government mentioned in its paragraph 118<sup>th</sup> that a system of recourse from the perpetrators of the compensations that were paid for the offence of torture was initiated but **there is not any example in practice**.<sup>123</sup>

## *II. The Law of Discipline*

In internal codification, the fundamental arrangement on the discipline trials of **the public service officials** were made under the paragraphs 2-4 of the Article 129 of the Constitution. The heading of the Article is as follows “Duties and Responsibilities, and Guarantees During Disciplinary Proceedings”.

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<sup>123</sup> These issue have been discussed under issues no. 17 and 19.



In the light of the general arrangements of the Constitution, seventh section of the Law of State Officials with a heading “discipline”, arranges the general rules of discipline affairs of all the state officials.

The judicial supervision of the sentences that are given in the end of discipline investigations would be conducted basing on the Article 125 of the Constitution that arranges the openness of the judicial proceedings on all activities and procedures of the administration.

### *1. The Law of State Officials*

Article 125 of the Law of State Officials (LSO) arranges which penalty will be given to which behaviour. In the article various behaviours and situations are categorised and for each category five different penalties from lower to higher are foreseen.

A - Warning: notification of the official with a written warning to be more careful in his duty and manners.

B - Denouncement: notification of the official with a written warning on his faults in his duty and manner.

C - Wage cut: the cut of the official’s wage between 1/30 and 1/8.

D - Interdiction to advance in career: Interdiction of the official’s advance in career for 1 to 3 years according to the significance of the act.

E - Banishment from state official: Banishment of the official without a parole.

Although for each penalty category, the act and situation for the penalty was elaborated, in the article **torture or other ill-treatment types was neither defined nor was a sanction foreseen**. The only regulation that can be seen related with the issue was the act of “f) preparing reports or documents that do not comply with reality” which is subject to the penalty of “prevention of progress of stage”.

The absence of such a regulation in the Law of State Officials is a serious deficiency. Although the Article 125 of LSO states that “**norms on discipline offences and penalties in specialised laws are reserved**” these acts was not sanctioned in cases in which a specialised law was not regulated for specific profession groups or in which in specialised law torture and ill-treatment types was not sanctioned.

Thus among the specialised regulations “torture” was only mentioned in the Security Organisation Discipline Rules as an offence of discipline. In other armed forces and law-enforcement codifications there is not a regulation that directly foresees torture as an offence of discipline. Instead of this it is ironical to find a regulation on inflicting torture as an offence of discipline in students discipline rules.

### *2. Members of Security Organisation*

According to the Article 82 of **the Law on Security Organisation** the discipline penalties are as follows:

A) Warning: notification of the official with a written warning to be more careful in his duty.

B) Denouncement: notification of the official with a written warning on his faults in his duty and manner.

C) Wage cut: the cut of the official's wage up to 15 days.

D) *Short termed interdiction to advance in career: Interdiction in the official's career for 4, 6 or 10 months.*

E) *Long termed interdiction to advance in career: Interdiction in the official's career for 12, 16, 20 or 24 months.*

F) Ban from profession: Ban from profession without a remission.

G) *Dismissal from office: Dismissal from office with barring to be appointed to public service again. This penalty is practised by the authorised discipline board defined by and in accordance with the rules of the Law on State Officials No. 657.*

**Security Organisation Discipline Rules** regulates the sanctions related with short termed interdiction, long termed interdiction and banishment from profession and behaviours that cause these sanctions in its Articles 6 to 8.

Acts that could be evaluated in the framework of torture and ill-treatment are as follows;

The Article 5 that regulates “**wage cut**”;

*7 – Humiliating speech or act to the people or work owners;*

The Article 6 that regulates “**short termed interdiction**”;

*2 – Insulting persons who came to or brought to security buildings,*

*3 – Not fulfilling supervision duty;*

The Article 7 that regulates “**long termed interdiction**”;

*1 – Beating person(s) who came to or brought to security buildings;*

The Article 8 that regulates “**dismissal from office**”;

*1 – During the fulfilment of the duty discriminating on bases of language, race, sex, political view, philosophical belief, religion and sect; acting against laicism and having separatist behaviours or having discriminating attitudes and behaviours among the members of the security.*

*6 – (...) raping, carnal abuse, (...)intentionally homicide or attempting to commit this offences, breach of confidence, false witnessing, false oath, fabricating offence, (...)*

*10 – destroying the evidences or knowing and willingly causing its destruction or disguising, helping its disguise or changing evidences,*

*12 – Intentionally false reporting or preparing document, signing or make someone to sign it,*

*27 – Not fulfilling monitoring and observation duty without a reason,*

*39 - “inflicting torture on persons or job owners who came to or brought to in security buildings”.*

According to the records of the Istanbul Governorate, in five years between 2003 and 2008 administrative investigation were launched against **2140 security personnel on charges of** torture and ill-treatment. A discipline penalty was imposed upon only **42** of the 2140 **personnel (2%)**.<sup>124</sup>

29 out of the 42 discipline penalties are given in accordance with the Article 5/7 that regulates “**wage cut**” on charges of “**Humiliating speech or act to the people or work owners**”; 13 out of the 42 discipline penalties are given in accordance with the Article 7/1 that regulates “**long termed interdiction**” on charges of “**Beating person(s) who came to or brought to security buildings**”. **None of the discipline penalties was given in accordance with the Article 8/39 that regulates “inflicting torture in security buildings”.**

### 3. *The Members of the Gendarmerie Organisation*

There is not any specialised regulation on acts of torture and other ill-treatment types that can be used in discipline investigations. Nonetheless the real problem for both gendarmerie and other members of the armed forces, is the various codifications that were regulated on the proceedings on them in accordance with both the various functions such as military, administrative and judicial and in accordance with the army division they belong to.

But this situation does not change the reality that infliction of torture and other ill-treatment types whatever the function or duty was performed or ignoring or inciting such an act or not fulfilling the supervision duty was not regulated as an act that necessitates a discipline investigation.

As a matter of fact no details were given in the reply Ministry of Justice to the parliamentary question of Ayla Akat Ata on the disciplinary proceedings and it is understood from the same reply that disciplinary penalties in connection with torture and other ill-treatment types subordinated to the penal prosecution;<sup>125</sup>

“(…) it is declared with the written reply No. GN.PL.P.5000-226510-08/PL dated on 20/06/2008 of the Gendarmerie General Command that a further discipline investigation is not launch in cases a penal investigation was launched against the members of the Gendarmerie General Command in connection with the acts of torture and ill-treatment; but the personnel who is convicted to a penalty that necessitates the dismissal from the Turkish Armed Forces (TSK) is dismissed from TSK.”

Gendarmerie General Command did not give any information on the number of gendarmerie officers that had disciplinary proceedings between 2006 and 2008 which constitutes a part of the parliamentary question in this reply.

### 4. *The Evaluation of the Statistics of the Ministry of Interior Affairs*<sup>126</sup>

<sup>124</sup> Response of the Governorship of Istanbul of 05/12/2008 (no. 8278), TBMM Engiç Çeber report, p.79

<sup>125</sup> Response of the Ministry of Justice to the Presidency of the Parliament, 02/07/2010 (no. B.03.0.KGM.0.00.00.05/2010-610.01-188/1644/3384)

<sup>126</sup> Letter of the Ministry of the Interior General Directorate of Security to the HRFT, 02/06/2010, (no. B.05.1.EGM.0.71..803 (91250)- 101355)

- The number of public officials against whom a penal investigation was launched under Articles 94, 95 and 256 of TPC in years between 2005 and 2009 is 21,732 and officials with discipline investigations is 3,329. In other words only 15.1% of the officials with penal investigations are subjected to discipline investigations.
- In connection with offences of torture (the Article 94 of TPC) and of aggravated torture (the Article 95 of TPC);
  - In 2009 discipline investigations were launched against 24 personnel on charges of torture but **none of them convicted**. Investigation against one personnel is still going on. The situation in 2008 is not different; **54 investigations and 54 “no need to impose penalty” decision**.
  - Between 2005 and 2007 none of the personnel was convicted moreover the discipline investigations against three personnel were dropped due to prescription of time limit.
- In connection with offences of excessive use of force (the Article 256 of TPC);
  - In the first five months of the 2010 discipline investigations were launched against 12 personnel and “no need to impose penalty” decision were given to 8 out of this 12 personnel. Three investigations are still going on and in one of the discipline investigations denouncement penalty was practiced.
  - Total 534 discipline investigations were launched in 2009 and 22 of them are still going on. In 496 (95%) investigations finalised with “no need to impose penalty” decision. One of discipline investigations was dropped due to prescription of time limit. **The number of the personnel that a discipline penalty was imposed upon was 16 (3%).**
  - Between 2005 and 2008 the numbers and percentages are nearly the same. The only difference is the number of were dropped due to prescription of time limit: 12 in 2005, 2 in 2007 and 6 in 2007.
- Between 2005 and 2009, although penal investigations against 60 law-enforcement officials were launched in connection with 25 suspicious deaths in accordance with the Article 95/4 of TPC but in the same period only one “banishment from profession” decision was imposed on one official due to a discipline investigation.<sup>127</sup>
- **The penalties imposed are quite irrelevant** with the acts of torture, ill-treatment and excessive use of force.<sup>128</sup>

For example in 2007 warning penalty was imposed upon one person in connection with excessive use of force act. But there two conditions for warning penalty: 1 – Keeping his firearm, instruments, uniform dirty, not keeping attention to the cleaning of his work place; 2 – Not shaving

<sup>127</sup> In its response to a question the Presidency of the Parliament of 01/06/2010, (no. 05.1.EGM.0.12..05.05-17782-3798-100462) the Ministry of the Interior General Directorate of Security stated that:

- in 2006/2007 17 law enforcement members received a short or long suspension from duty, three received a penalty of one month wage loss, and 15 were completely suspended from office

- in 2008/2009 23 law enforcement members received a short or long suspension from duty, one received a penalty of one day/month wage loss, and 9 were completely suspended from office

for breaches of articles 81, 82, 94, 95 and 258 TCC. From the responses sent to the HRFT we can see that except one complete suspension from office, none of the penalties is connected to torture but were given for murder.

<sup>128</sup> Response of the Ministry of Justice to the Presidency of the Parliament of 30/07/2008 (no. 1846/1068)

daily without an obligatory reason. In this case the public official who exceed his authority to use of force was sentence on the grounds he did not clean his office or he did not pay attention to his personal hygiene during his act.

- Security Organisation's Discipline Rules regulates discipline penalties in connection with torture (or other ill-treatment types) that are inflicted on the person(s) who "came to or was brought to security buildings" and **does not qualifies actions outside the security buildings as torture.**
- Because of the discipline investigations of the officials are not conducted by independent units, the investigations have a slow pace and some of the investigations were **dropped due to prescription of time limit.** Between 2005 and 2009 discipline investigations on torture and excessive use of force against 24 persons were dropped due to prescription of time limit.
- Together with the fewness of the number of personnel that a discipline penalty imposed upon the **discipline penalties before the first six months of 2006 was subject to remission** with the Law on the Remission of the Discipline Penalties of the Public Officials and other Public Servants (No. 5525) dated 22 June 2006.<sup>129</sup>
- No records was found on the discipline proceedings in accordance with the Article 94/5 which regulates offence of torture against the attendants of the detention places and/or their superiors that did not perform their supervision duty during infliction of torture.

In Okkaly v. Turkey case, two police officers were sentence in accordance with the Article 243 and also they were barred from public duty for 3 months. Nonetheless ECHR detected that the government did not presented any document on the execution of the verdict that the police officers were suspended from office. Even if it is accepted that the verdict was executed and the officers were suspended from office this does not change the reality that there is not any conducted discipline investigation and any discipline penalty was not imposed upon them. The government did not explain upon the applicant's claim on the promotion of the officers.<sup>130</sup>

The prescription of time-limit in discipline offences related with torture, **the classification of the incidents outside the security buildings as "not torture", remission of the penalties are in contradiction with the absolute character of the ban of torture.**

The ratio of the discipline investigations to the penal investigations, the mildness of the penalties that were imposed, statements of the authorities that protects perpetrators shows that the impunity related with the offences of torture still perpetuates itself.

### **Recommendations**

1. The government should guarantee the special significance of the torture offence in the field of human rights. Both in penalty and discipline investigations and prosecutions;
  - i. Authorisation system should be abolished without condition,
  - ii. Regulations should be made

<sup>129</sup> Response of the Ministry of Justice to the Presidency of the Parliament of 19/01/2009 (no. B.03.0.KGM.0.00.00.03/136/198)

<sup>130</sup> Okkaly/Türkiye, para. 39, 70

- a. for the prevention of torture offence to be remission,
- b. and to abolish prescription of time limit for torture offences,
- iii. Regulations that allow the sentences related with torture to become ineffective by negotiating -postponing- and commuting to a fine should be abolished.
2. Ministry of Justice should make through with prosecutors and judges on regulations: Offence of torture regulated under the Article 94 and 95 of TPC and the offence mentioned in Article 256 will be an offence of torture in conditions without “proportionality.”
3. The government should declare that;
  - i. In practice of the Article 94 of TPC being systematic is not seek in the act,
  - ii. The offence of tormenting that is arranged under the Article 96 of TPC is not related with public officials,
  - iii. There is not a severity step in the definition of the offences of torture,
4. The statistics that was presented to Committee by the government and others that presented to the GNAT, other reports and the data that were given to HRFT constitute inextricable information. The data in local units and in the centre should be subjected to a central supervision and should be presented to public opinion.
5. Torture should be placed as discipline penalty whether in the Law of State Officials or other specialised codes. “Dismissing from profession” should be foreseen as a sanction.
6. A discipline investigation should be launched against all the public officials against whom a penal investigation was launched on charges of torturing or other acts of ill-treatment (under Articles 256, 96 and 86 that the government had mentioned). A regulation should be made in specialised codes in this direction.
7. In discipline investigations, penalty proportional to the investigated act should be guaranteed.
8. The victims, in discipline investigations and trials, should have every safeguard on effective investigation and fair trial.

#### **Issue no. 10**

As it is stated in **PARAGRAPH 122** of the government, according to article 13/1-c of the TPC, if an act of torture is committed by a citizen or a non-citizen in a foreign country, Turkish law is applicable and the person is tried in Turkey.

Yet in such a case, it is not possible for a prosecutor to initiate an investigation ex officio or upon a complaint. According to article 13/3 of the TPC, such investigations can only be initiated upon the demand of the **Ministry of Justice**.

Indeed, a petition was filed by the Contemporary Lawyers Association Izmir Branch on April 25, 2006 against the then US Secretary of State Condoleezza Rice who was visiting Turkey at the time

for the NATO summit on grounds of torture and crimes against humanity with a demand for her detention and custody; the petition was denied based on the TPC 13/3.<sup>131</sup>

In the decision made by the Prosecutor it was stated that *“There is no demand on the part of the Ministry of Justice concerning the crimes which are the subject matter of the petition, the condition for an investigation is not met, it is not possible to initiate and conduct an investigation or to pass a decision for a measure and there is therefore no need for an investigation...”*

The TPC (Turkish Penal Code) article 13/3 is therefore in conflict with article 160 of the CCP (Code on Criminal Procedures) and articles 5 and 6 of the Convention that regulate the authority of prosecutors to conduct an investigation.

In **PARAGRAPH 123** the government brings forward article 18 of the TPC, which regulates the prohibition of ‘extradition’ in cases of torture crimes. Although the crime of torture falls under the scope of the prohibition of extradition according to legal arrangements, the practice is highly problematic.

When foreigners who wish to go over to Europe as refugees are caught in Turkey, they face the risk of being extradited even if their right to life is in question or if they face a risk of torture in their countries of origin. Those who claim that they face such a risk must first make a request to the Ministry of Interior and if their request is denied they must file a case at the Administrative Court for a ‘preliminary injunction’ to be issued. Yet, because the procedures for the case take a long time, people frequently tend to apply to the ECHR for a ‘preliminary injunction’ trying to prevent the extradition. Despite this, there are still cases where individuals are extradited regardless of a decision for a ‘preliminary injunction’.<sup>132</sup>

#### **Recommendations**

1. The TPC 13/3, which brings a limitation to the impartiality and independence of prosecutors, must be repealed.
2. Universal jurisdiction must be accepted as an absolute.
3. With respect to crimes that are subject to a prohibition of extradition, the units responsible for extradition should conduct a realistic examination on whether there is a risk to the right to life or a risk of torture, without waiting for a court decision.
4. The preliminary injunction decisions given by both the Administrative Courts and the ECHR must be applied.

<sup>131</sup> The decisions for lack of grounds for legal action by the Ankara Public Prosecutor’s Office on files 2006/1818 and 2006/1044

<sup>132</sup> M.B. and others vs. Turkey, 15 June 2010, no. 36009/08; Alipour and Hosseinzadgan v. Turkey, 13 July 2010, nos. 6909/08, 12792/08 and 28960/08; Ranjbar and others v. Turkey, 13 April 2010, no. 37040/07; Keshmiri v. Turkey, 13 April 2010, no. 36370/08; Tehrani and others v. Turkey 13 April 2010, nos. 32940/08, 41626/08, 43616/08

## Issue no. 11

In the framework of the Human Rights Education in Turkey Programme (1998-2007), numerous education programmes on the prevention of torture and ill-treatment were implemented with the personnel of Ministries of Interior Affairs and Justice especially between 1998 and 2003. However with the end of the term of office of the chairperson of the education committee caused dysfunction in the activities in this context.

### Recommendations

1. Human Rights Education National Committee became dysfunction on the grounds that no one actively employed it. Human rights education should be always kept on the top of the agenda and implemented not nominally but to attain its object.
2. After 2005 with the fall of the human rights education from the agenda, the torture and ill-treatment incidents that had respectively decreased became widespread again. Not only but an important factor in this increase is the education that was not taken into account “seriously”.
3. “Serious education” -the education that yields public officials to settle with themselves- should be implemented and proportional weight should be given to the education of law.
4. A national human rights institute that conforms to its aims should be constituted and an education commission should be founded in the framework of this institute that will plan human rights education for officials all over Turkey, maintain the implementation without disruption with knowledge and honestly and monitor the implementation.

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## Issue no. 12

The government stated in the 124<sup>th</sup> paragraph of its reply that the forensic medicine services were fulfilled by “physicians not specialised in forensic medicine” in the health institutions of Ministry of Health due to the scarcity of personnel. In the health institutions under Ministry of Health 90 State and 17 Training and Survey Hospitals the number of the forensic medicine specialists is stated as 21 it is known that only 9 of them conduct forensic medicine implementations and the remaining 12 specialists were employed as head physician or vice head physician. If the numbers were taken into consideration although the personnel deficiency that stated by the government seems to pose a serious problem but this situation stems from the structure of Institute of Forensic Medicine (ATK). Because; Most of the forensic medicine services in Turkey have been conducted by Institute of Forensic Medicine (ATK) under Ministry of Justice and this resulted with the rare employment of the forensic medicine specialists in the health institutions of Ministry of Health.

Again in the 124<sup>th</sup> paragraph the government declared that the physicians who fulfil the forensic medicine services but not specialised in forensic medicine need training. The training need of the physicians not specialised in forensic medicine is a fact. With the evaluation of the 1641 forensic



reports it is deducted that none of the forensic reports were made with examination and documentation in accordance to the standards and this evaluation revealed the need of training.

Among these reports there are reports of Institute of Forensic Medicine Branch Directorates, Group Presidencies and Board of Specialisation that do not comply with standards. Therefore the forensic medicine specialists should be trained in the context of standards.

But in the government's reply there is not deductions and suggestions on the structure of forensic medicine services and administrative regulations and the given situation was identified with the lack of training of physicians. Nevertheless not only the physicians that conduct forensic medicine services in Turkey need training but also administrative and judicial regulations should be made in the ATKs of Ministry of Justice and in the health institutions of Ministry of Health.

ATKs that give legal expert services in the field of forensic medicine all over the world have different structures and operation mechanisms;

ATK as an expertise institution in Turkey is a unique institute worldwide in its size in the context of work load. The judiciary can apply universities, health institutions and persons as an expert in accordance with the Code of Criminal Proceedings unfortunately ATK is the official legal expertise institution. The courts and the Supreme Court of Appeal consider ATK as the supreme legal expertise institution. This creates a gigantic work load of preparation of and fulfilment of judicial examinations more than in 120,000 cases in every year.

Institute of Forensic Medicine (ATK) was founded with the amendment of the Law No. 2659 dated 14.04.1982 with Law No. 4810 dated 19.02.2003 under Ministry of Justice. The Institute has 17 branches in Istanbul province and 15 group presidencies in 15 provinces and branch directorates in 42 provinces. During the discussions on the amendment of law of ATK in 2003, ATK should have an academic and autonomous structure model was stated but it was not reflected in the amendment. In other countries the training and legal expertise in the field of forensic medicine has been conducted by universities outside the structures of Ministries of Justice and Health. Today in 35 provinces with branch directorates of ATK (*Adana, Afyon, Ankara, Antalya, Aydın, Balıkesir, Bolu, Bursa, Canakkale, Denizli, Diyarbakir, Edirne, Elazığ, Erzurum, Eskisehir, Gaziantep, Hatay, Isparta, Mersin, Istanbul, Izmir, Kocaeli, Konya, Malatya, Manisa, Ordu, Rize, Samsun, Sivas, Trabzon, Sanliurfa, Van, Zonguldak, Kırıkkale, Düzce*) there are also universities with forensic medicine departments and universities became inactive with the foundation of branch directorates.

Forensic medicine services in other countries have been conducted inside the health institutes from the point of their professional and work space but in Turkey ATK has been working under and inside courthouses not in health institutes. This situation causes serious problems in terms of professional and ethics.

The government stated in the 125<sup>th</sup> paragraph of its reply that with the project on "Training Programme on the Istanbul Protocol: Enhancing the Knowledge Level of Non-Forensic Expert Physicians, Judges and Prosecutors" aims at training physicians who are not forensic experts on the Istanbul Protocol with a view to enabling them to properly examine those persons who have possibly

been subjected to torture as well as enabling the prosecutors and judges to improve their skills in prosecuting and assessing cases of torture, and thus increasing the efficiency of processes involved in medical examination concerning torture allegations and assessment processes involved in legal proceedings. But the objectives of the project were not restricted with IP training.

The ATK's project supported by the EU was conducted between November 2007 and December 2009 and the beneficiaries of the project are Ministry of Health, Ministry of Justice and ATK and the project was conducted by the consortium of Turkish Medical Association (TTB) and IRCT. The project was supported by the training team and materials of HRFT.

Despite the project Ministry of Justice objected the lawyers of IP trainers, who have serious experience in human rights working with HRFT to be the trainers of trainers in the training of judges and prosecutors and due to this objection the activities in the project was suspended between October 2008 and January 2009. This issue was overcome by splitting the training of judges and prosecutors from the physicians' and the training judges and prosecutors was planned and applied by Ministry of Justice. The role of the consortium in this training was limited with organisational and administrative assistance.

In the context of the project 163 physicians were trained as IP trainers and 3453 physicians all over Turkey had IP training. 69 judges and prosecutors were trained as IP trainers and 1100 judges and prosecutors all over Turkey had IP training.

A Joint Work Group (JWG) including a representative of Security General Directorate and all the stakeholders was constituted to realise all the activities foreseen (that was mentioned in the objectives of the project). JWG evaluated the given situation as it was foreseen in the project and prepared suggestions in practice and in codification to render the given situation comply with IP and suggestions for the curriculum of the IP training. The evaluation the given situation and the suggestions could only be possible for the medical processes. Because Ministry of Justice did not authorised the JWG to access the case files to detect the proceedings in investigation-prosecution and for the preparation of suggestions that comply with IP.

JWG worked in the following areas to detect the given situation;

- Evaluate the proceedings in practise and given codification,
- Scientific investigation on the evaluation of the forensic reports before and after detention all over Turkey,
- "Frequently Asked Questions" gathered by the administrative, judicial, ethical and scientific issues stated by the physicians in the trainings,
- Survey and workgroups to detect the reasons why the forensic examination report form that had been prepared by Ministry of Health was not used in health institutions and to develop new forms.

The government stated in the 126<sup>th</sup> paragraph that legal proceedings are arranged according to the evidences of torture and ill-treatment detected for the preparation of forensic report that complies with

IP and in 127<sup>th</sup> paragraph the rules for forensic medicine services were re-regulated to comply with the amendments of Turkish Penal Code and Code of Criminal Proceedings in 2005. Although in recent years positive steps were taken in codification and in practice for the prevention of torture but the given situation in the practice that was detected in the context of the IP training project reveals out that new regulations should be made. For example during the trainings it is detected that most of the physician has no idea on the forensic examination report form that had been prepared by Ministry of Health and this form was not used in many of the health institutions.

At the end of these works suggestions were generated to render the given situation comply with IP procedures and principles foreseen in IP;

- New procedure and practise principles for the evaluation of the torture and ill-treatment incidents in accordance with the principles of IP,
- Suggestions for the amendment of the given codification,
- Training strategy generated to guide the future trainings,
- Curriculum suggestions generated for the graduate and postgraduate education in medicine, and law faculties and for police academia,
- More functional general forensic examination report form that complies with IP and a guidebook were generated and all the stakeholders of the JWG approved these decisions.

A mechanism for the monitoring of forensic reports could not be established although it was foreseen in the activities of the project. The stakeholders of the project agreed upon the fundamental principles, its function but could not agree upon the probable legal infrastructure of the mechanism.

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#### **Recommendations**

1. The Institute of Forensic Medicine should be regulated as a scientific and independent body; the duties and responsibilities of this structure which is under Ministry of Justice should be reduced; educative and legal expertise duties should be handed down to the universities as in other countries.
2. Medicine Faculties' Forensic Medicine Departments should be directly inside the practice.
3. Forensic Medicine Directorates should be taken out of the courthouses and integrated to the structure of Ministry of Health.
4. Professional units in health institutions that would arrange forensic reports should be constituted.
5. Forensic medicine specialists should be employed in the inpatient treatment institutions of Ministry of Health; physicians who will be employed in judicial units should have in-service training on the forensic medicine practices and continuous training programmes should be developed.
6. The forensic medicine training in the medicine faculties should be restructured

7. IP training should be provided for all forensic medicine specialists and continuous training programmes should be developed for forensic medicine specialists.
8. Collaboration of all the stakeholders should be maintained for the realisation of the suggestions that all the stakeholders of the JWG in the framework of the IP training agreed upon.
9. Activities should be initiated for the development of the “monitoring mechanism” that was generated after the forensic reporting training and all the stakeholders of the JWG could not agree upon.

**Issue no. 13**

*Table provided on 2 July 2010 in response by the Ministry of Justice*

<i>Year</i>	<i>Enquiry</i>	<i>Suspected</i>	<i>Wronged</i>	<i>Non-suit</i>	<i>Lawsuit</i>	<i>Criminal Suit</i>	<i>Sentence</i>	<i>Exculpation</i>	<i>Suspension</i>
2003	3499	8026	5008	1153 <sup>133</sup>	965 <sup>134</sup>	877 <sup>135</sup>	862	1375	213
2004	3252	7054	5081	1230 (2638)	789 (1824)	931	462	1631	147
2005	2498	6219	4477	1005 (3134)	423 (1052)	1022	459	1870	133
2006	2761	6018	3962	1216 (3174)	236 (531)	658	427	961	112
2007	2948	6735	4719	1438 (3223)	378 (892)	426	193	771	31
2008	2569	6194	4331	1234 (2999)	317 (795)	276	129	543	53
2009	2308	5416	3673	904 (2291)	372 (988)	239	54	397	20
<i>Total</i>	19835	45662	31251	8180 (20033)	3480 (8415)	4429	2586	7548	709

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**Issue no. 14**

In **PARAGRAPHS 117 and 131-134** of the State Party answers, it is said that the public prosecutor’s role in criminal investigations has increased. As a matter of fact, there is no inhibition in domestic law concerning the authority vested in the investigating bodies preventing the effective investigation of the crimes of torture and ill treatment. Considering that the most important reason for the never-ending “impunity” arises at the investigation stage, the reason for failure to conduct effective investigation should not be sought in the legislation but in the attitudes and decisions of the implementers.

**PROBLEMATIC AREAS CONCERNING EX OFFICIO AND PROMPT INVESTIGATIONS**

**PARAGRAPH 130**

<sup>133</sup> 2574 suspects in 1153 files. Suspects will be given in parentheses in tables henceforth.

<sup>134</sup> 2333 defendants in 965 files. The defendant will be given in parentheses in tables henceforth.

<sup>135</sup> With the files that were passed on from previous years.

The duty to undertake an ex officio investigation and “the duty to investigate the facts of the case” stated under the CCP art.160/1, is independent from the testimony of the victim and arises the moment the public prosecutors comes across people who are suspected to have been tortured as a result of the crime that is the subject of the criminal investigation.

The rule to promptly initiate the investigation has a special significance in the case of torture crimes. The act of torture may still be ongoing at the time one becomes aware of the crime. In this case, the initiation of the investigation will put an end to torture and ensure the safety and treatment of the victim. In addition to this preventative function, it is of utmost importance that evidence is immediately collected because public officials who are suspects of the crime of torture and ill treatment also have the opportunity to taint the evidence.

In implementation, concrete cases where the principle of ex officio and prompt investigation are violated can be seen in the following conditions.

- In a criminal investigation, people who are suspected of having been tortured may state, in their depositions at the law enforcement station, that they were tortured at the time of apprehension or later; or that they were subject to unnecessary or disproportionate use of force; and may have ensured that these statement were put down in the records. However, it is frequently the case that despite the written statement brought before the public prosecutor, he may tend to turn a blind eye on it and continue to collect information and evidence concerning the crime for which the suspect is charged.
- The person may reiterate the allegations of torture as already stated in his deposition taken at the law enforcement station. This statement is, at the same time deemed to be a notification of a crime that involves public order to official authorities. In such cases, it is observed that public prosecutors do not wish to put down in the records, statements other than those that have to do with the charges brought against the suspect, and when they are in fact written down, only short statements such as ‘They beat me up’ are written instead of detailed information that could be used in identifying the perpetrators.
- When the individual’s narrative about the torture inflicted on him is recorded, instead of promptly initiating an investigation, there is display of behaviour that is in violation of the CCP art. 160/1 such as asking the suspect whether he has any complaints, or saying that he can file his complaint in writing. Prosecutors do not accept oral statements and seek a written application.
- The individual may make statements regarding allegations of torture to the judge passing the remand order during the investigation conducted against him, or to the court at the time of the proceedings. This statement, at the same time, has the nature of a notification made to official bodies about a crime that involves public order. Yet, even in these cases, the complaints are sometimes written down in the records and sometimes not. Still, under no circumstances is the principle of initiating an ex officio investigation implemented. Judges fail to launch the judicial mechanism in the case of complaints involving torture.

- In addition, there are many situations in practice that enable a public prosecutor to become aware of the crime of torture. The Monitoring Boards for Prisons and Detention Houses have the obligation to prepare a quarterly report at the end of their monitoring activities; and have to submit this report to the relevant Chief Public Prosecutor.<sup>136</sup> Although the allegations of torture in these reports also have to be investigated ex officio, there is no information that this is done.
- In the written and visual media, there is frequent news about disproportionate use of force; or use of force that would violate the prohibition of torture. Such news stories not only give the impression that a crime is being committed but directly show the crime being committed yet they are not the subject of ex officio investigations launched by public prosecutors.

Only 6 cases out of 35, which are currently being followed by the Human Rights Foundation of Turkey, have been initiated ex officio. 4 out of 6 of these cases are about suspicious death caused by torture. In other words, an ex officio investigation was started on only 2 of the cases. In one of them, the father of the victim went directly to the prosecutor to make an application right after the incident,<sup>137</sup> in the other incident, lawyers have called the prosecutor in to the crime scene<sup>138</sup>. As this information shows, investigating authorities are negligent in performing their duty to directly launch an investigation, and remember their duty to perform an ex officio investigation only in cases that have resulted in death.

Prosecutors leave their offices in cases that have resulted in death and take part in at least the autopsy stage of the investigation; while in cases of torture and other forms of ill treatment where deaths do not occur, they do not take part in the investigation procedures.

In one of the cases followed by the HRFT, extremely important results were obtained when the prosecutor visited the crime scene himself after being called in by the lawyers.

*M.B., M.S.G., H.D., M.B., H.E., Y.İ., M.G. and A.K., who were apprehended on claims that they joined a rally on 21.10.2008 in Idil, were detained for two days and stated that they were battered both during their apprehension and in the following processes.*

*The prosecutor, who was given a phone call by the lawyers of the victims, went to the police station and ensured that the victims underwent a medical examination. He then processed the facts together with the police on duty at the station and the police who came as reinforcement from other provinces, and found and recorded that an officer identified in the process threatened the victim who identified him.*

*The victims were taken into custody in remand for the charges pressed against them but were kept in the police station until they were transferred to prison. However, for the first time in Turkey, a prosecutor seized the guns of the police officers identified by the victims and prohibited them from coming near the police station until the victims were transferred to the prison.<sup>139</sup>*

<sup>136</sup> Regulation on the Prison and Detention Houses Monitoring Boards art.9

<sup>137</sup> Honaz Criminal Court of First Instance, Case No 2010/118

<sup>138</sup> Midyat Felony Court, Case No 2010/49

<sup>139</sup> Midyat Felony Court, Case No 2010/49

However, unfortunately, this example is an exception and shows the function prosecutors have when they promptly handle the case in propria persona. Other than that, a serious process has to be adopted to turn the doings of a “handful of good people” into a system.

Failure on the part of prosecutors to perform their duties and promptly launch an investigation results in the loss of evidence and the erasing of video footage. It also leads to results such as the elimination of other crime weapons, changing of the crime scene, loss/intentional loss of evidence such as finger prints etc, changing of the witnesses and failure to protect witnesses against pressure.

## **PROBLEMATIC AREAS CONCERNING INDEPENDENT INVESTIGATIONS**

### **a. The problem regarding permissions to investigate**

Not having to receive permission from any other authority to investigate the claims made against the perpetrator is the pre-requisite for a prosecutor to launch an ex officio investigation. In cases where the permission of another authority must be granted to collect information and evidence that will shed light on the crime, it is not possible to speak of the principle of ex officio investigations or the independence of the investigation.

Investigations about perpetrators of the crime of torture, or about public officials who create the environment for or facilitate the crime, or cover up the event must be directly launched by judicial bodies.

In **PARAGRAPHS 138-142**. Of the State Party answers, it is specified that article 148 of the old Criminal Court Procedures Law, which brought a permission system for prosecutors to start an investigation was repealed in order to ensure an independent investigation. This determination is only partially true, but the permission system has not been totally lifted.

With a paragraph added in 2003 to article 2 of the Law on the Proceedings against Civil Servants and Other Public Officials, it is set forth that the public prosecutor shall directly investigate crimes involving excessive and unauthorized use of force.<sup>140</sup> In the case of these crimes, there is no need to get permission from the administrative unit under which the public official works. However, the law puts forward a **permission system for launching an investigation involving governors, district governors and the highest level law enforcement officers**. In the first version of the law that was accepted, the only exceptions to this rule were the governor and the district governor. But with the amendment made in the Code on Criminal Procedures in 2005, **the highest level law enforcement officers** were also brought in the exception.<sup>141</sup> So, the investigation of **the highest level law enforcement officers** who commit the crime of torture or prevent a person from seeing his lawyer, who fail to obtain proper medical reports, who fail in their duty to inform the next of kin, who do not prevent the crime of torture despite their knowledge of it, who cover up or eliminate the evidence of the crime, requires a permission from the Ministry of Justice...

<sup>140</sup> Art 33 of Law No 4778 dated 02.01.2003

<sup>141</sup> Art 24 of Law No 5353 dated 25.05.2005

In addition to the separation between judicial and administrative duties, the subject matter of “duty”, the mandate of the prosecutors; the complexity of the legal arrangements on the subject; the careless approaches of the implementers and especially of the prosecutors create a much more complex issue in terms of permissions.

Due to the existence and large scope of the permission system, investigations launched based on articles other than CCP 94, 95 and 256, are left to the discretion of the administration.

**b. Prosecutors’ having contradicting authorities**

One of the major problems in investigations is the issue of independent bodies carrying out the investigation. Due to reasons such as contradictions between the authorities and responsibilities of prosecutors, the lack of separation between judicial and administrative law enforcement, the duties of the administrative law enforcement to also act as the judicial law enforcement, it is not possible for investigations on torture and ill treatment to be carried out by independent bodies.

For example; the prosecutor who investigates civil servants’ offenses is also responsible for overseeing the detention units. In the same way, a prosecutor who is responsible for prisons is responsible both for overseeing the prisons and investigating the violations in the prisons. In other words, prosecutors are, all at the same time, the supervisors of the staff they are responsible for overseeing in the administrative hierarchy, the person responsible for the violations occurring in these places and the person who is responsible for investigating these places. All titles are intertwined. This intertwined structure directly relates to the independence of the investigating authorities.

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**c. The law enforcement conducting the investigation is also the suspect**

Another problem is that the law enforcement officers conducting torture investigations are, at the same time, the suspect of the act and/or the witness to it. The police and gendarmerie, who perform the duties of administrative law enforcement are also the bodies responsible for judicial law enforcement. Any time they interfere in an incident concerning their scope of duty, the moment an individual’s liberty is restricted; the law enforcement’s duties cease to be administrative but turn into duties of judicial law enforcement.

Because of this duty of judicial law enforcement, a relevant unit will carry out the judicial procedures concerning a case that they intervene in and are also responsible for investigating any ill treatment that may have occurred during this procedure (because this would have occurred in their field of duty).

Where there is use of force by the police such as in the case of rallies, there are always records of the incident stating that the person/people against whom the force was used showed resistance, that it was necessary to use such force, and that it was used in a proportionate way. These records are then used when the person makes a complaint of torture-ill treatment and also in the case filed against him on grounds of “resisting a public official in the performance of his duties” as evidence against him.

Even more grave is the fact that the prosecutor’s office that conducts the investigation and the court that conducts the prosecution both base all the investigation and prosecution activities on the processes



carried out by the law enforcement who have a primary role in the scenario. Investigations are launched based on records that have no more evidence value than any ordinary record of findings, the statements of the people who signed the records are referred to, and sentences are imposed on people based on such “reliable witness” accounts.

Therefore, the perpetrators, in fact are the ones with the leading role in the main scenario.

**d. The existence of a hierarchical relationship between the perpetrator and the investigative authority**

There are personal, professional or hierarchical relations between the perpetrator of torture and the people or units conducting the investigation. Crimes of torture and/or unauthorized excessive use of force are investigated directly by the organization or unit in which the perpetrator works; hence it is not possible to state that investigations are conducted independently

**PROBLEMATIC AREAS RELATED TO IMPARTIAL INVESTIGATIONS**

Even in a system where the existing laws provide an excellent foundation for an investigation and where the best technical facilities are accessible, the ideological structures and the mentalities of the units in the justice system can render the implementation totally unjust and create an armour of impunity for perpetrators due to lack of impartiality in investigations.

The Report titled “Patterns of Perception and Mentality in the Judiciary” published in 2007 by The Turkish Economic and Social Studies Foundation<sup>142</sup>, draws conclusions from the interviews held with judges and prosecutors, gives place to their content and holds important clues about the problem of impartiality with respect to torture crimes.

The findings in this report show that the perception and approaches of the investigating and judicial authorities constitute a serious obstacle in the in obtaining the truth in torture cases. The subject of the outlook on human rights is a significant criteria that would determine the function of the judiciary in combating torture.

The members of the judiciary, who are asked about their approach to crimes claimed to be committed “by public officials or crimes committed in the name of the state”, focus on the notion of “security” in the relationship between the concept security and justice; this points to the fact that the investigating and prosecuting authorities also have a tendency to legitimize torture and protect the perpetrators.

The discourse that victims of torture pose a threat against the state, public order and public security makes torture legitimate before the public as well as the people and organizations who have the duty to combat torture. When the interest of the individual vs. the state and the individual vs. the society are compared, the opinion that the interest of the state or the public should be primarily protected strengthens and thickens the immunity and impunity armour worn by the perpetrators of torture.

<sup>142</sup> Mithat Sancar, Eylem Ümit; Report on the Patterns of Perception and Mentality in the Judiciary, November 2007  
[http://www.tesev.org.tr/UD\\_OBJS/PDF/DEMP/YargidaAlgiveZihniyetKaliplariRaporu.pdf](http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/YargidaAlgiveZihniyetKaliplariRaporu.pdf)

C.E., who was younger than 18 on the date of the incident was battered by the police in Hakkari in 2008 during the Newroz incidents. The violence inflicted upon her was witnessed on all television channels. She was kept in police custody for three days and in the process, the physical and verbal violence against the other six children staying with her continued. She was released at the end of police custody but then taken into remand and sent to prison. She stated that throughout her stay in the prison, she was subject to physical violence, swearing, insults and threats.<sup>143</sup>

C.E. applied to the Izmir Office of the HRFT and received treatment at the end of which a report was prepared. This report was placed in the investigation file.

Upon the complaint filed about the incident, the investigation conducted on the police officers ended with the dismissal of the case on lack of legal grounds. Yet, in the decision for dismissal on lack of legal grounds it was stated that,<sup>144</sup> “...During the intervention and preventive law enforcement activities on the date of the incident, our province (...) in groups of 300-400 people (...) **using slogans praising the terrorist organization, and praising the leader of the organization, building barricades on the main road, building a bonfire (...)** that C.E. was directly involved in these incidents, was apprehended and taken into custody by the security forces (...) that the investigations on CE and her friends are continuing on grounds of terrorist activities based on the rallies they have taken part in on 22.03.2008 ...”

**“(...) that all these claims cast a shadow on the illegal action and discourse and bear the purpose of propaganda for the terrorist organization, that the incident was provoked, that various visual and audio broadcasting channels are served by unidentified people with a purpose to cause indignation, that they were partially successful in achieving this, that as a result, many security officers are shown as targets and become the target of messages on various media organizations, that the family of the victim is using this incident to use their victimization and that this had turned into a case of gaining interest, and that many investigations are conducted by the Chief Public Prosecutor’s Office on this subject, that the claims about the moment of apprehension of the victim C.E. do not reflect the truth, that the security forces were doing their job in the framework of the laws, that she was apprehended just like all the other people who engaged in actions for the benefit of the terrorist organization, (...) that the incident turned into what was witnessed as a result of the provocation of the media organizations that broadcasted under the directives of the terrorist organization upon the video images that were shot, that some real persons and legal entities also fell for the trap without investigating the truth and so assisted in serving these organizations; that such untruthful news stories and footage was published throughout the country (...), it is understood that (.....)**

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As the background information on the example investigation shows, the perception of prosecutors and judges regarding the state, justice and the roots of punishment, their personal opinion on human rights, social priorities, and the functions of the judiciary are invisible factors that have an impact on impartiality and serve to protect preserve immunity in torture cases.

The lack of impartiality in investigations directly affects their “thoroughness and effectiveness”.

#### **PROBLEMATIC AREAS PERTAINING TO THOROUGH INVESTIGATIONS:**

The patterns of mentality among the members of the judiciary (judges and prosecutors) as also revealed in the above-mentioned report, lead to a sided approach to torture investigations. Other than a few exceptions, this, in turn, results in investigations that are neither ex officio, nor prompt, nor impartial, nor independent nor thorough.

<sup>143</sup> From the case study section of the HRFT Medical Evaluation Report dated 08.05.2008

<sup>144</sup> Hakkari Chief Public Prosecutor’s Office, Decision dated 17.03.2008 with Investigation No 2008/544and Decision No 2008/417

Because of the problems related to impartiality and independence, evidence is mostly collected in a one-sided way. The evidence collected usually aim to prove that the use of force by the law enforcement was ‘proportionate’ and to free the suspects from claims of violation.

Hence, in **PARAGRAPH 14** of the State Party’s answers, the statement “a case is filed if the claim is supported with serious evidence” is a mere illusion.

*Y.S., who is an applicant of the HRFT, was battered by the traffic police in front of his family and his two little children on 31.10.2008. The police claimed that Y.S. had attacked them, insulted them and that they had used “proportionate” force to apprehend Y.S. Y.S. was injured with many bruises on his body and fractures in his ribs as a result of this treatment. Because he was not provided treatment during his detention, there was tearing in his liver and Y.S. had to undergo three surgeries as a result. All of the investigation procedures pertaining to the incident were conducted by the police who were involved in the incident. The police suspects prepared an “incident record” and narrated how the event took place as the suspects to the case. This record is the main document that determines the entire investigation. All police depositions at the investigation stage were taken by the colleagues of the perpetrators working in the same Police Station. In the summary report prepared by the police, only the narrative of the police officers was taken into consideration and the files were referred to the public prosecutor with claims that “Y.S. had resisted, threatened, insulted and sworn at an officer on duty”. The claims made by Y.S. that he was battered by the police were not taken into consideration in any way. The complaint filed by Y.S. to the Chief Public Prosecutor’s Office resulted in the decision “No grounds for prosecution”. The rationale was as follows: “it is understood from the entirety of the investigation documents that sufficient evidence, other than the abstract claims made by the claimant, does not exist to prove the crime”. In addition to the above statements, it was also decided that the applicant’s official complaint “could be an act to save him from a sentence to be passed in the public case filed against him”. Furthermore, the witness testimonies in the file that supported Y.S.’s claims were not taken into consideration in any way. The testimony of his children, who were direct witnesses to the event, was not referred to. No investigation was conducted into Y.S.’s poor health, which started failing at the detention stage, or its reasons and no evaluation was done regarding the existing medical reports. Moreover, a decision for custody in remand was passed for Y.S. despite his very serious health problems and he was sent to prison. After being kept in prison for 34 days, a case was filed against him based on claims that “resisted to prevent a public official from performing his duties”.<sup>145</sup> The Case is followed by the HRFT volunteer lawyers.*

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Contrary to what is indicated in **PARAGRAPH 135-137** of the State Party’s answers, the rule for opening a case if the claims are supported with serious evidence is not a rule that is implemented absolutely in the case of crimes of torture and other forms of ill treatment. The European Court of Human Rights (ECHR) states that if there are any bruises on persons who have been deprived of their liberty and who are under the control of public officials, this should be presumed to be resulting from an act of torture or ill treatment. Unless the opposite of this presumption is proven, in other words,

<sup>145</sup> Decision No 2008/21412 dated 25/02/2009 of the Gaziosmanpaşa Office of the Chief Public for Not to Prosecute. Gaziosmanpaşa 1st Criminal Court of First Instance File No 2008/1603

unless it is proven with “satisfying” and “believable” reasons that the public officials are not responsible for the injury, there should be a presumption of the existence of torture.

*As noted by Amnesty International, in March of 2006, ten people lost their lives during the violent demonstrations in central Diyarbakir and many allegations of torture and ill treatment were made right after the event. An Amnesty delegation that met with the children who were detained during the events, **determined that the allegations of the children were reliable and consistent.** As a result, the only prosecution conducted despite a lapse of more than 21 months (as of the publishing date of the report), was the case filed for damaging the environment during the demonstrations against 463 people. **Not a single investigation was launched about the law enforcement officials.**<sup>146</sup>*

According to the Ministry of Justice data<sup>147</sup>, 263 investigations were filed in 2009 pursuant to the TPC art. 94 and 95. In 50.58% of these, decisions were passed “stating that there is no need for a public case.” In 33.34%, “other decisions” were passed. Only 16.48% of the Investigation files were made subject to cases. The ratio of the cases filed to the total number of investigation files in 2008 is 17.26%.

In 2009, out of the 1329 investigations launched on grounds of excessive use of force, (TPC art. 256) only 24.75% were turned into cases while in 2008, out of 1594 investigation files, only 16.88% were turned into cases.

The Ministry of Justice has three circulars on the subject. In these circulars there is mention of many shortcomings and mistakes in the investigation. These mostly point out that the investigating prosecutor is ‘in negligence’ of duty. Such negligence has also resulted in Turkey’s paying compensation in many cases where a violation was found according to article 13 of the ECHR. Furthermore, contrary to what is indicated in **PARAGRAPHS 114 and 130** of the state party’s answers not a single investigation has been launched against prosecutors due to the shortcomings in investigations on torture and ill treatment. On the contrary, the complaints filed on the subject are dismissed on lack of grounds<sup>148</sup>.

Some problematic areas complied from the decisions of the ECHR and reflected in the circulars of the Ministry of Justice are as follows:<sup>149</sup>

- The investigations are left to be conducted by the law enforcement although the primary authority and duty rests with the prosecutors. This, in turn, results in failure to collect evidence duly and on time,
- The depositions of the victims are not taken, the necessary care and attention is not shown in the collection of evidence, the investigation is finalised without sufficient light being shed on the nature of the crime,

<sup>146</sup> Memorandum of the Government of Turkey, 17 January 2008, Amnesty International; [http://www.amnesty.org.tr/yeni/index.php?option=com\\_content&view=article&id=648:tuerk-huekuemetine-memorandum&catid=69:raporlar](http://www.amnesty.org.tr/yeni/index.php?option=com_content&view=article&id=648:tuerk-huekuemetine-memorandum&catid=69:raporlar)

<sup>147</sup> The letter of the Ministry of Justice Directorate General for Legislation no. B.03.0.KGM.0.00.00.05/2010- 610.01-188/1644/3384 dated 02.07.2010, submitted to the Chair of the Speaker of the Grand National Assembly of Turkey

<sup>148</sup> As an example; decision no. 2009/17869 of the Ministry of Justice Directorate General for Criminal Affairs indicating that there is no need for an investigation

<sup>149</sup> Circulars 2, 4 and 8 dated 01.01.2006 issued by the Ministry of Justice Directorate General for Criminal Affairs

- Procedures such as taking depositions are not conducted with sufficient speed and delayed initiation of investigations undermines the effectiveness of domestic remedies,
- The records signed by individuals who are not informed are used as a basis in legal procedures, the contradictions, inconsistencies and gaps in the documents submitted by the law enforcement are not corrected, photographs of the crime scene are not taken,
- The detention records are not examined, there are shortcomings in the autopsy records and photographs,
- Insufficient medical examination and physician reports are accepted to suffice,
- The investigation documents are not regularly kept, some documents are lost,
- Decisions on lack of jurisdiction or no necessity to prosecute are passed without collecting the necessary evidence, the decisions taken are not notified to the victims and the petition holders,
- Some indictments and decisions not to prosecute are written by the court clerks.

Contrary to what is indicated in **PARAGRAPH 131** of the state party answers, these findings also reveal that the prosecutors **DO NOT CARRY OUT THE PROCEDURES IN PROPRIA PERSONA**. The circulars issued by the ministry state that the investigation for the crimes of torture and ill treatment are conducted not by the prosecutor in person but by the law enforcement officers.

Contrary to what is indicated in **PARAGRAPH 131** of the state party answers, the obligation to carry out an investigation in propria persona for crimes involving torture and ill treatment is not mentioned in the law.

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#### **Recommendations**

1. The number of the investigating prosecutors should be increased.
2. Prosecutors who are on shift outside of work hours should be present in the court house.
3. The telephone numbers of the prosecutors who will be on shift should be informed to the bar associations in the form of monthly lists and should be hung up in a way that everybody can see in places of detention.
4. Prosecutors should immediately intervene in the incident in person.
5. The oral statements made by individuals before the prosecutor, the judge, or the court, the findings in official reports, newspaper stories, briefings or reports of NGOs should be accepted as a notification of a crime and immediate action should be taken.
6. The system for obtaining permission to carry out an investigation, which is in breach of the prosecutors' independence and authority to conduct an ex officio investigation, should be altogether abandoned.
7. The judicial law enforcement system should be structured and put into practice as soon as possible.
8. The investigation should cover not only those who are suspected of directly having committed the crime, but also those who have the responsibility of oversight and other operational responsibilities, including those of the supervisors.

9. Evidence should be collected not only in support of the public officials but also in support of the victim.
10. Crime scene investigations should be conducted. If possible, the crime scene should be closed down until the investigation is finalised.
11. All evidence found at the crime scene should be seized (camera footage, finger prints, detention logs, list of assigned staff, etc.).
12. In case of failure to obtain the camera footage or other evidence, both an administrative and a judicial investigation should be started about those who are responsible.
13. All public officials who are alleged to have been involved in the incidence or who have witnessed it, should be kept separated from each other. They must be prevented from ensuring consistency in their statements and thus generating evidence by seeing each other before their deposition is taken.
14. Individuals who are likely to have witnessed the incident should be identified (if the incident took place in a place other than the detention unit).
15. Medical reports must be obtained immediately and in accordance with the Istanbul Protocol.
16. The records kept and procedures carried out by the law enforcement should not be accepted as absolute evidence. It must not be forgotten that these records are actually kept by one of the parties to the case or even by the possible perpetrator.
17. The law enforcement should not have the authority to prepare a 'summary report' which is similar to an indictment and is taken as the basis of the former. The authority to evaluate the evidence should rest exclusively with the investigating prosecutor.
18. The processes carried out by the law enforcement should be overseen not only to determine whether they were indeed carried out and to expedite the process, but also to check the manner in which they are done.
19. Open files should be compared to the records; there should be no files left that are lost incomplete or inactive.
20. Especially the 'aged' and 'deadlocked' cases should be concluded before the statute of limitations applies.
21. Exchange of written correspondence to obtain information and documents within the court house should not be opted for; such a process should be done immediately and in person.

**Issue no. 15****Statute of Limitations**

One of the most important problems experienced in Turkey on combating torture is that no legal arrangements are made and implementation problems are not addressed to ensure punishment and the

actual enforcement of the punishment. Thus, the statute of limitations and alternative sentencing are still nourishing impunity and continue to be a weak area.

As it is stated in **paragraph 146** of the Government's answer, the statute of limitations for crimes involving torture has not been repealed. The only exception for this is when the "crime involving torture is committed against humanity"<sup>150</sup>. Yet, in order for an act of torture to be considered under this article, it has to be committed systematically based on a pre-conceived plan against a section of the society based on political, philosophical, racial or religious motives.

The Government, stating that there is a statute of limitations in all legal systems, claims in their answer in **Paragraph 149** that repealing the statute of limitations for crimes involving torture would be in violation of the Constitution and the principle of equality. However, as it is indicated above, the statute of limitations is already repealed for crimes committed against humanity set forth under article 77 of the Turkish Penal Code. In the same way, the statute of limitations does not apply in the case of the crime of genocide and the crime of establishing an organization to commit the two crimes mentioned<sup>151</sup>.

The exceptions applicable to these three crimes do not violate the principle of equality before the constitution and the Law; it is thought provoking how the principle of equality is brought forward when the issue is crimes involving torture. The answer of the government is based on a mentality that fails to accept the crime of torture as a sufficiently grave crime against humanity.

In giving examples of the concrete steps that were taken, the Government states in paragraphs 148, 151 and 152 that with the enforcement of the new Code on Criminal Procedures, the period for statute of limitations was extended and that amendments were made in order to ensure the effectiveness of investigations and the fairness of trials. The government has shown as an example, the Circulars issued by the Ministry of Justice ordering for the immediate initiation and conclusion of investigations. Yet, these instruments are not specifically particular to the crime of torture and can be implemented for all crimes.

With the approval of the new Code on Criminal Procedures, an unfavourable arrangement has been made and the only concrete step that has been taken until now with respect to the statute of limitations has been eliminated.

In the old law<sup>152</sup> it was arranged so that torture and ill treatment were regarded as work requiring immediate urgency, that these would be handled without delay and that in cases involving these crimes, the trials would not be interrupted for a period of more than 30 days unless necessary.

The Code on Criminal Procedures No. 5271 does not have this provision. One of the consequences in regarding torture and ill treatment cases as work requiring immediate urgency, as stated in the old law, is that the proceedings would continue even in times of official recesses and judicial holidays. Whereas regarding a crime of torture as 'work requiring immediate urgency' and not allowing for an

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<sup>150</sup> Turkish Penal Code art.77/3

<sup>151</sup> Turkish Penal Code art.76, 78

<sup>152</sup> Provisional article 7 of the obsolete Criminal Procedures Code No. 1412

interruption more than 30 days were factors that expedited the trials, crimes of torture have now been left outside of these safeguards.

The statute of limitations is calculated by taking into consideration the time spent at both the investigation and the trial stages. Therefore, the time it takes to complete the investigation is just as important as the time it takes to complete the proceedings. In domestic law, there are no special arrangements made to expedite the investigation of torture crimes. Although the Circulars issued from time to time by the Ministry of Justice call for the immediate opening and conducting of investigations, these are left to mere wishes and not mechanisms are created to oversee the speed of the investigations of torture cases.

In addition to the speed of investigations concerning torture, the quality and the classification of the crime in the indictment prepared at the end are among the factors that affect the statute of limitations.

We have mentioned the problems resulting from the misclassification of crimes in the explanations we have made under Question 9 concerning the norms under which suspects of torture are tried. The fact that acts of torture are classified by prosecutors as persecution or “infliction of injury due to excessive use of force” or merely as “infliction of injury“, leads to low sentences in charges brought against the perpetrators of torture.

Since the time periods for statute of limitations in our criminal justice system increase based on the upper sentence limit of the crime, the low sentence leads to a shorter period of time for the statute of limitations to apply. Thus, many cases of torture are already subject to a statute of limitations when there are discussions before the court on whether or not the act is an act of torture.

In addition, since torture related crimes are under the jurisdiction of felony courts, if the act is accepted to be an act of torture at the stage of the proceedings, the courts pass a decision of non-jurisdiction and refer the case to felony courts.

If the felony court, which receives the case, does not think that it is within its jurisdiction, the case is referred to the Court of Cassation on grounds that there is a conflict of jurisdiction between courts and the Court of Cassation examination takes time.

Even if the felony court accepts that it has jurisdiction, it has to carry out all the proceedings already completed by the prior court without jurisdiction leading to starting the case from scratch. In both cases, time losses are incurred that can be expressed in years, and this in turn increases the risk of the case being dismissed due to the statute of limitations.

Again, due to lack of effectiveness during investigations and the preparation of indictments without sufficient collection of evidence or altogether failure to collect evidence lead to the collection of evidence at the stage of the proceedings or even the determination of what evidence there is. This situation, which leads to a prolongation of proceedings, is one of the reasons for impunity, which is caused as a result of the statute of limitations.

In Turkey, victims of torture and their attorneys try to secure punishment for the crime of torture despite the preventions of the public officials and the resistance of the judiciary on the one hand and make an effort to race against time on the other.



Likewise, the section titled ‘Recommendations on the Judiciary’ in the report<sup>153</sup> ‘Effective Combat against Torture and Ill Treatment’ prepared by the Human Rights Presidency of the Prime Ministry mentions that the statute of limitations for the crimes of torture and ill treatment bother the public conscience and call for urgent and significant measures to be taken about the issue. The report concretely recommends that the number of judges be increased. However, the recommendation should be to repeal the statute of limitations in line with international standards in legal arrangements pertaining to torture and other crimes involving ill treatment.

### **Reasons Preventing the Enforcement of the Sentence other than the Statute of Limitations**

Another one of the obstacles preventing the enforcement of sentences is that the sentences are converted to other punishments or measures. Deferment of punishments given for crimes involving torture, the suspension of the verdict or the conversion to a fine should not be an option.

As mentioned under the subject of the statute of limitations, the changes made in 2005 have resulted in a backward step.

With the amendments made in 2003 under the activities for EU Harmonization, it was accepted that the sentences given for the crimes of torture and ill treatment under articles 243 and 245 of the old Turkish Penal Code could not be converted to fines or any other measure and that they could not be deferred.<sup>154</sup>

This provision does not exist in the new Turkish Penal Code No. 5237, made effective as of 2005. In **paragraph 153** of the government’s answers, although it is said that if perpetrators of torture are sentenced to more than two years imprisonment, their sentences cannot be deferred or converted to another measure, this still shows that the law is behind what was achieved prior to 2005.

Under article 231, the new Criminal Procedures Code accepts a new system called the ‘suspension of the sentence. According to this system, if a sentence passed under certain conditions is 2 years or less, the announcement of the sentence could be suspended; if the suspect does not intentionally commit another crime in the following five years, the sentence would be repealed and the case would be dismissed. If the conditions mentioned in the article are present, the article can also be applied to suspects of torture.

Similar to the risk of the application of the statute of limitations increasing when prosecutors prepare an indictment by classifying acts of torture as crimes requiring a lower sentence, in the same way, when a suspect is found guilty and convicted, there is a high risk that there will be no imprisonment since the sentence will be lower even when the suspect is convicted.

### **Suspension from Duty**

The Civil Servants Law No 657 governs when and against whom the measure of suspension from duty will apply. However, there are special legal provisions pertaining to the members of the security

<sup>153</sup> “Report on the fight against torture and ill-treatment” 26 November 2008, Ankara [www.ihb.gov.tr/RaporlarIstatistikler.aspx](http://www.ihb.gov.tr/RaporlarIstatistikler.aspx) (in Turkish only)

<sup>154</sup> article 245 old TCC

forces, and military staff who are officers, non-commissioned officers, specialist sergeants and specialist gendarme.<sup>155</sup> There are special arrangements for the members of the security forces under the Law on the Security Organization and the By-Law on the Disciplinary Procedures for the Security Forces. Yet when these provisions are compared to those under the Civil Servants Law, it is observed that they are protective of the law enforcement and also non-functional.

According to the Ministry of Justice statistics, in 2009, 91.1% of the people against whom charges were pressed for torture or ill treatment were either police officers or the gendarmerie. Because of the legal provisions mentioned above, almost all of the public officials against whom charges were pressed for torture were kept outside the provisions of the Civil Servants Law.

Public officials can be suspended from duty if there is a “disciplinary investigation” or “criminal proceedings” against them.<sup>156</sup> Yet, the police, who have the highest rate of committing the crime of torture, can only be suspended from duty if their disciplinary investigation has been finalized and a “decision to depose from civil service” has been rendered.<sup>157</sup>

In either case, it is not mandatory to enforce the measure and it is left to the discretion of the administration. The investigating authorities do not have the authority to take measures requiring suspension from duty.

Late referral to this measure renders the measure meaningless and non-functional. Moreover, the mechanism to suspend a public official from duty as a measure in case of allegations of torture is never resorted to in practice.

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### **Custody Measures**

The custody measure under the Code on Criminal Procedures is an employable mechanism in the place of or in addition to the administrative measures for the well-being of the torture investigations.

Article 100 of the CCP (Code on Criminal Procedures) sets forth that a decision for custody can be passed if “there are reasons for custody”. The reasons for taking a suspect into custody are specified as the suspect “destroying, hiding or changing the evidence” or engaging in behaviour to pressurize the “witness, victim or others” or exhibit behaviour that “leads to the suspicion that he will abscond or go into hiding”.

Article 101 of the CCP sets forth that a decision for custody can be passed even if the suspect does not display behaviour pointing to the above-mentioned reasons for custody. Such crimes that do not require a concrete reason for a decision of custody to be passed are called “catalogue crimes”. When there are cases involving catalogue crimes, the judicial authorities often pass decisions for custody.

In paragraph 4 of article 101, “the crime of torture (TPC art.94-95)” was counted among the catalogue crimes. Hence, even if there is no concrete reason to pass a decision of custody, such a decision can be passed if there is an investigation based on allegations of torture. Considering that there is a high risk

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<sup>155</sup> CCP art.1/3

<sup>156</sup> CCP art.137

<sup>157</sup> Law on the Security Organization Add. article.8

of a perpetrator of torture tainting evidence or influencing victims or witnesses due to his position and authority, it is understandable to not look for a concrete reason to pass a decision of custody.

The authority and position of the perpetrator of torture also applies in the case of the public official who employs excessive use of force. However, the crime for excessive use of force is not covered under article 101 of the TPC<sup>158</sup>. Yet in many cases, according to international law and especially the jurisprudence of the ECHR, such actions can also be considered to be torture. Thus, in each concrete case, a determination must be made on whether there are reasons for a decision of custody and such a decision should be passed when necessary.

It is possible to say that custody, which is an important measure in torture investigations and proceedings, is almost never applied in Turkey.

While judicial bodies pass many decisions of custody for catalogue crimes, they almost never resort to the measure of custody (unless a death has occurred) when the catalogue crime in question is torture.

According to the report of the Human Rights Foundation of Turkey, between 2006 and 2008 in only 3 cases out of 38 involving torture or death caused by public officials only a part of the perpetrators were taken into custody.

Only one of these cases involves death caused by torture, two involve killings with fire arms/bombs.

It is striking that there was a death in the single case<sup>159</sup> where the perpetrator was taken into custody for the crime of torture; this shows us that the judicial bodies rarely resort to custody as a measure and then only when grave consequences have risen.

### **Dismissal from public office as a measure**

Public officials who are convicted of the crimes of torture and ill treatment must be dismissed from public office.

The sanction of dismissal from public office has been regulated under domestic law as a disciplinary sanction in crimes involving torture. There is no administrative sanction that results in dismissal from public office in the case of excessive use of force which is regarded as ill treatment. This issue has been separately tackled in the answers we have given to Question 9.

In criminal procedure, it is set forth that those who have been convicted of committing an intentional crime cannot engage in public office until the sentence is enforced.<sup>160</sup> This prohibition, which only results in withdrawal from public office for a certain period of time does not correspond to the “dismissal from office” the Committee recommends.

In **Paragraph 154** of the government answers it is stated that public officials who commit a “crime of torture (TPC art.94)” are temporarily or permanently dismissed from civil service. There is no mention of ill treatment.

The statistics provided by the Ministry of Interior upon the application made by the Human Rights Foundation of Turkey, reveal that public officials continue their duties in cases where there are

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<sup>158</sup> TPC art.256

<sup>159</sup> Adana 5th Felony Court, 2007/288 E.

<sup>160</sup> TCK m.53/1-a, 2

charges of ill treatment. Between 14.02.2005 and 01.06.2010, 20 people were found guilty of ill treatment. Of these, 11 public officials were fined, 8 were sentenced to imprisonment while only 1 was dismissed from public office. It is not understood by the answers whether this sanction is permanent or temporary.

#### **Recommendations**

1. Legal arrangements should be made to repeal the statute of limitations for crimes involving torture.
2. Arrangements should be made to ensure that prosecutors provide regular written information to the ministry and the victim regarding the investigation they are carrying out.
3. Amendments should be made in article 53 of the Turkish Penal Code to prohibit the deferment of imprisonment or the conversion of the sentence to a fine in cases of torture regardless of the amount of the sentence; and the same exception should be brought for article 231 of the TPC on the suspension of the announcement of the sentence.
4. Provisions should be laid down in laws to classify torture cases as ones requiring urgency, to prohibit an interruption of the proceedings for more than 30 days, to ensure the continuation of proceedings in judicial recesses and to give priority to torture cases in appeals.
5. For the measure to suspend from duty;
  - a. The condition to initiate a disciplinary investigation and give a punishment of dismissal from office should be lifted.
  - b. The authority to decide on imposing the measure should be taken from the disciplinary supervisors and given directly to the prosecutor.
6. The sanction of dismissal from public office should not be at the discretion of the administration but should be arranged as a permanent measure/sanction under criminal law.

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#### **Issue no. 16**

The committee is asking what kind of procedure is in place for the records of people in custody to be accessed by their lawyers and families. However, in answer to this question the government has given irrelevant information such as informing of the individual of his legal rights, notifying the family of his custody and the right to an attorney.

The reason behind such an answer by the government is that in Turkey there is no legal arrangement or procedure to enable the oversight of detention records by the families and lawyers of the detainee.

In **PARAGRAPH 160** of the government answers, it is stated that detainees are informed of their right to a physician. As we mentioned in answer to Question 1, the right to a physician is not regulated as a legal right in domestic law. Therefore, information cannot be given to the detainee saying that they have the right to a physician.

In the Regulation on Apprehension, Police Custody and Interrogation, it is stated that an entry must be made in the ‘Detention Centre Book for Detainees’ once the individual is brought to the detention centre and the body search is completed.<sup>161</sup>

In domestic law, there is mention of the ‘examination of investigation’ files. The books kept at the detention centre are not considered in this scope. There is no special arrangement that allows for the examination of these records or allows for copies to be taken of records.

The individual under police custody can only see the police detention centre book when he signs it confirming that his family was informed, that he wants a lawyer and that his lawyer has visited him.<sup>162</sup>

Other than this, no other access is made possible to the detention centre book. There is also no arrangement allowing for families and relatives to examine these records. As it is stated in **PARAGRAPH 162** of the government answers, the families of the detainee can only receive information from the law enforcement forces about the precautions taken and the condition of the detainee, they cannot make an examination themselves.

Records are kept of the procedures of apprehension<sup>163</sup> and interrogation, which are the first stages of deprivation and the time of apprehension is shown in these records.<sup>164</sup> However in practice, it is observed that the law enforcement fails to show the necessary care in keeping records that are mandatory by law and that many pieces of information is left out in the relevant records.

Even more grave is the fact that there are often serious contradictions in the information written in the detention centre book concerning the time or reason for apprehension. The contradictory information in the records casts doubt on the accuracy of the records and shows that some of the public officials keeping these records show misconduct or negligence at the least.

Since these documents are also documents used in investigation, they are brought before the prosecutor, yet no examination is carried out to determine why there are such contradictions or which public official kept false records.

In the records kept for investigations conducted in the scope of the Anti-Terror Law, only the registration numbers of the law enforcement officers are written down instead of their full names.<sup>165</sup>

Because of this arrangement, there are problems in identifying perpetrators especially during investigations on torture and ill treatment.

In **PARAGRAPHS 156 AND 157**, although it is stated that the police custody procedures are conducted under the oversight of prosecutors and that if there are shortcomings or wrongdoings, immediate legal action is taken, this information does not reflect the reality. The authority to oversee the detention units and prisons is counted among the administrative duties of the chief public prosecutor. In practice, chief public prosecutors exercise this authority through one or two prosecutors, which they delegate.

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<sup>161</sup> Regulation art.11/1, 12

<sup>162</sup> Art 12. Reg. on App. Custody and Inter.

<sup>163</sup> CCP art.97

<sup>164</sup> CCP art.147, Reg. on App. Custody and Inter. art.23

<sup>165</sup> TMY m. 10/ç

With a limited number of prosecutors, it is physically impossible to effectively oversee and examine the accuracy of records belonging to dozens of detention centres, which are under the responsibility of the Chief Public Prosecutor's Office.

The oversight mentioned in the answers of the government have no significance other than in making a formal determination on whether records are kept and creating the appearance that the requirements of the law are met.

The camera images in the detention units are very important evidence in proving torture. Yet in practice, it is almost impossible to get access to video recording in investigations and prosecutions opened for torture/ill treatment.

Since the investigating authorities themselves do not examine the records immediately on site, in most cases evidence cannot be obtained. The Prosecutor's Office asks the supervisor of the police unit or the prison governor whether there are records and if there are records, copies are requested. The answers given to such letters of request by administrative authorities are usually;

- There are no records because the cameras are broken,
- That the cameras are used only for monitoring, that there is no recording,
- That the old recording are erased and overwritten in the system because of time passing.

It is observed that the video recordings of not only the places of detention but also of other official organizations are not sent to the investigating authorities for similar reasons.<sup>166</sup>

It is known that the camera recordings from official buildings in turkey can be erased or altered. In the case known by the public as the Council of State Attack, where one judge was killed and four judges were injured inside the Council of State Building, the court was informed that the cameras were broken; but the expert examination showed that the records were erased. The fact that images video recording cannot be secured even in the buildings of the judiciary raises concerns.

It is also known that in some detention units, there are still no systems that make recordings.

And because the recordings in some building cannot be copied, it is not possible for them to be kept in a file.<sup>167</sup>

The main reason for these hitches is that there is no legal arrangement on how video recordings are to be kept in detention units and how long they are to be kept. Each public organization has its own legislation governing the internal functioning as well as arrangements on the video recordings. Yet it is not possible to get access to these.

In an investigation started upon a suspect being killed in a detention centre with a bullet from a police gun, information was given that the cameras were used to monitor the detention centre yet no recordings were made. The lawyer representing the family of the deceased asked the Directorate General of Security for the legal arrangements governing this subject and was told that there were

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<sup>166</sup> Because of allegations of beatings in the hospital corridor and consulting room at the Idil Public Hospital the CCTV recordings were requested. However, as the CCTV was out of order there were not any recordings. (Midyat Heavy Criminal Court, 2010/49 E.)

<sup>167</sup> Honaz Criminal Court of First Instance 2010/118 E.

provisions in two regulations and one directive on ensuring the security of police buildings. The lawyer, who could not get access to the said legislation, asked the DG for Security for a copy of the said regulations and the directive. His application was denied on grounds that the legislation could not be sent to him because the regulations were “restricted” and the “directive” was confidential.<sup>168</sup>

It is also an important problem that the judicial bodies fail to carry out more in-depth research upon receiving answers that there are no recordings and do not initiate judicial proceedings against public officials who are responsible for the video recordings.

### **Recommendations**

1. Legal arrangements should be made to establish the right to examine all detention records including the books and documents in detention centres by suspects, their lawyers and families.
2. Article 10/ç of the Anti-Terror law should be changed to allow for the identification of the public officials who carry out the detention procedures.
3. Investigations should be allowed to be started immediately about public officials without the requirement of complaint in cases where they prepare contradicting documents in the detention procedures.
4. Legal arrangements should be made on how camera recordings are to be kept, how long and according to what principles they will be kept and by whom they will be overseen.
5. Ex officio investigations should be initiated immediately about public officials who are responsible in cases of failure to get video recordings, erasing of the recordings or the alteration of the recordings. Answers obtained from the administrative agencies should not suffice; the accuracy of the answers should be directly checked.

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### **Issues no. 17 and 19**

#### **REHABILITATION**

Although the State party expresses in its answer to questions 17 and 19 that various arrangements are made for victims of crime, these arrangements involve victims of crime in a general sense and fall short of specific arrangements made for the victims of torture and other forms of ill-treatment.

As it is stated on the web site of the “Protection Board”, which carries out activities for victims and which is one of the units of the Probation and Help Centre established under the Ministry of Justice, the activities of the Board focus on ensuring employment for victims. There is no information on the kinds of activities carried out for treatment and rehabilitation.<sup>169</sup>

<sup>168</sup> Letter from the DG for Security, dated 13.01.2010 and numbered B.05.EGM.0.36.31

<sup>169</sup> “A significant part of the activities of the Protection Board consist of vocational training projects. In this scope, cooperation is carried out with primarily the Turkish Public Employment organization and various other organizations, agencies and NGOs for the rehabilitation, social integration and other needs of victims of crime and offenders who are released from prisons and projects are prepared for ensuring employment and acquiring a vocation.”

<http://www.cte-dsm.adalet.gov.tr/menusayfalari/korumakurulu/korumakurulu.htm>

On the same web site, although statistical information can be found on probation and protection boards, it is not understood according to what systematic approach the number of files are determined. The figures given in monthly intervals as of October 2009 first show an increase and lead one to believe that each month links to the following month; then, as of May-August 2010, the figures drop and then rise again. As of November 2009, monthly information about victims can also be found on the web site. These figures are not stable in some months and continue to show a rise. As of November 2009, there are 559 applications and 437 acceptances while as of August 2010; there are 802 applications and 495 acceptances. In other words, in a period of 9 months there have been 243 applications and 58 acceptances. In the same period, the number of files subject to procedures for probation is 73,241. The ratio of the Protection Board files to the probation files subject under procedure is 0.08dir. As the figures show, the probation centre, which was designed for offenders is widely functioning while the system designed for victims is not yet so.

In addition, as it is stated in articles 111 and 104 of the Law on Probation and Help Centres and Protection Boards, the Protection Board must make an evaluation and pass decision about the support to be given to victims.<sup>170</sup> When we look at the given figures, the rate of acceptance of applications by the Protection Board is 61.7. This shows that many applications are rejected. Furthermore, the nature of the support given to the 437 victims, whose applications were accepted, is not specified.<sup>171</sup>

Due to failure on the part of the State to develop an effective system, victims try to solve their problems either using the general health system or through their own means (those who are aware of the problems that arise as a result of the treatment they incurred and those who have the opportunity to apply to a health institution). A significant part of the victims do not have the opportunity to receive any treatment.

For those who do have access to a health institute, there is no chance of receiving the necessary sufficient treatment. Victims tend to refrain from talking in health institutions, about the torture and

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<sup>170</sup> The Law on Probation and Help Centres and Protection Boards.

**Article 12** - (1) The duties of the division director during investigation are as follows:

c) To give counselling and guidance and help in solving the psycho-social and economic problems faced by people who are victims of crime.

**Activities for victims of crime**

**Article 111** – (1) Protection Boards help in the solution of the social, economic and psychological problems of victims of crime.

(2) The applications made to the Protection Boards by victims of crime are subject to the provisions of article 104 of this Regulation.

(3) If so decided by the Protection Boards, particular psycho-social intervention activities are carried out with victims of crime.

(4) Projects focusing on victims of crime are prepared in accordance with paragraph three of article 110 of this Regulation.

(5) The most suitable help is given by the Protection Board independent of the demand of the victim.

**Procedures to be followed during the acceptance of the applications made to the Protection Boards**

**Article 104** – (1) the following shall be taken into consideration in accepting the applications made to the protection Boards.

3) The final court decision or letter written by the relevant authority at the investigation or prosecution stage for the victims of crime,

5) Documents are asked showing the economic situation of the person based on the demand made; if applicable, the registration number to the Turkish Employment Organization and a document showing his education and professional status; other documents deemed necessary by the division directorate

<sup>171</sup> <http://www.cte-dsm.adalet.gov.tr/>



ill-treatment they faced because of concerns of being stigmatized, and the target of negative approaches and for fear of having to face state authorities all over again.

Neither the curriculum of the medical faculties, nor the training programs after graduation cover diagnosis, treatment and rehabilitation of psychological and physical problems caused by torture and ill-treatment.

A perspective has been provided to physicians on diagnosis and treatment thanks to the Council of Forensic Medicine's EU-supported "Project for Training on the Istanbul Protocol: Building the knowledge of physicians, judges and prosecutors who are not forensic medical experts" held between November 2007 and December 2009 and implemented by a consortium consisting of the Turkish Medical Association and the IRCT with the beneficiaries as the Ministry of Health, Ministry of Justice and the Council of Forensic Medicine. Yet no foundation is laid for rehabilitation services to be delivered to the victims of torture and other forms of ill-treatment. The training focused only on diagnosis, treatment and reporting during the judicial proceedings.

Hence, an obstacle preventing victims from receiving the necessary treatment is the limited knowledge and experience of physicians working at university and public hospitals on how to approach a victim of torture and on the treatment and rehabilitation of problems related with torture.

The Human Rights Foundation of Turkey and the Foundation for Society and Legal Studies<sup>172</sup>, provide comprehensive treatment and rehabilitation services to victims of torture with their limited resources. However, only a small part of the victims of torture who know about them apply to these organizations. A large majority of victims have no information about the existence of these organizations.

No information is given and people are not referred to these organizations, which have expertise in treatment and rehabilitation of torture and ill-treatment victims. In fact sometimes, victims state that they are given warnings, face threats and pressure on not to apply to these organizations.

Therefore, the rehabilitation services delivered by the Human Rights Foundation of Turkey and the Foundation for Society and Legal Studies cannot substitute an integrated service to be provided by the state.

## **INDEMNIFICATION**

As stated above, the state does not have any effective activities on rehabilitation. In the same way, the subject of remedy is not evaluated in an integrated way and is perceived to be limited to financial indemnification. Lack of an effective activity for rehabilitation is the natural result of such a limited approach.

Yet, the payment of a ***financial indemnification*** to victims for the treatment they have been subject to is an altogether problematic area.

In domestic law, the only legal remedy victims of torture and ill-treatment can seek other than a criminal investigation is indemnification. Two ways have been envisaged to this end:

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<sup>172</sup> Foundation for Society and Legal Studies, <http://www.tohav.org>.

- Demands of indemnification from individuals based on their personal responsibilities
- Demands of indemnification from the administration due to fault in delivery of service

The party subject to damage *can directly file a civil law suit against the perpetrator in cases where his identity is known* or *can file a lawsuit against the administration (state whether or not the perpetrator is known)*. It is not mandatory for the victim to resort to either one of these remedies.

Both types of legal action are based on the principle of indemnification against financial and moral damage.

1. Cases filed against individuals: In indemnification cases filed to determine the responsibilities of individuals, although not so required, a direct relation is established between the outcome of the criminal proceedings and the determination of the responsibilities of individuals. Therefore, the court that evaluates the claims for indemnification links the claim to the criminal investigation and passes a decision based on the outcome of the criminal case. Considering that many investigations do not become cases and there are many acquittals in the cases filed, the success rate of the indemnification cases filed against individuals is very low; unfortunately indemnification cases fall short of being an effective legal remedy.
2. Cases filed against the administration: This is a relatively functioning legal remedy. Yet, because of the problem areas mentioned below, it is not possible to say that this is satisfying from the point of view of victims or deterrent in the case of the perpetrators.<sup>173</sup>

#### *Periods in which to File Cases*

According to article 13 of Law no 2577 on the Administrative Court Procedures, the period of filing a case with claims of indemnification is within one year as of the date of knowledge of the administrative offense, and in any case, within a period of 5 years following the administrative offense; and 60 days in cases where the application made to the relevant administration is rejected or unanswered within 60 days.

It is not possible to obtain any statistical data regarding the number of indemnification cases filed at administrative and civil courts by victims of torture and ill-treatment, yet it is not difficult to guess that the figures are very low.

It is frequently the case that the periods for filing a case are missed; because victims of torture and ill-treatment first wait for the outcome of the investigation and the criminal proceedings if a criminal case has been filed, thinking that these will affect the outcome of the indemnity case. However, due to the length of the criminal investigations and especially torture investigations in our country, the one-year administrative case application period is exhausted at this stage. In this case, a decision to dismiss the case on lack of legal grounds is passed and the indemnity cases are rejected on grounds of overdue applications.

#### *Statute of Limitations in Indemnity Cases*

<sup>173</sup> (Abdülmenaf) Kaya/Turkey, Application no: 158/1996/777/978; Decision of February 19, 1998, para. 104, 105, 108

On the other hand, the main problem is that there is a statute of limitations for indemnity cases just as in the case of criminal proceedings involving torture and ill-treatment.

#### *Fees/ legal aid in indemnity cases*

According to both civil and administrative procedures, the applicants must pay a court fee in ratio to the amount of the indemnity they seek. However, the high amounts of indemnity demanded in cases involving torture and other forms of ill-treatment lead to high court fees, which cause the victims or their families to refrain from filing cases.

According to article 469 of the Civil Procedures Code, the Legal aid system does not bring procedural safeguards to sufficiently protect the parties against arbitrary practices since the party making the demand for legal aid has no right to object to the decision of the court.<sup>174</sup>

- The demand for legal aid is examined only once and by way of examining the documents submitted by the parties,
- There is no opportunity for the parties to be heard and they have no chance of voicing their objections,
- Refusal to grant legal aid deprives the parties totally from having their case heard by a court,
- This transaction which is done at the beginning of the proceedings, brings a restriction to the right to apply to court,
- The State party fails to meet its obligations under article 6, paragraph 1 of the Convention on duly arranging for the right to application to court

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#### *Recourse to public officials in cases where the state party has to pay an indemnity*

Although the system of recourse has been in the Turkish system for a very long time, it has only recently begun to be discussed or more correctly applied in terms of human rights violations.

The relevant arrangements in domestic law are under articles 40/3 and 129/5 of the Constitution and article 13/1 of the Law on Civil Servants<sup>175</sup>.

According to article 13/1 of the Civil Servants Law, there is a right of recourse against the public official causing the damage for the collection of indemnity imposed as a result of administrative cases as well as the indemnity imposed by the ECHR.<sup>176</sup> Therefore, according to article 129/5 of the constitution, the indemnity imposed on the administration by the ECHR is paid through **recourse to public officials** in cases where they are at fault in the performance of their duties.

In addition, according to the decisions given by national courts, **there is no information that such recourse has been made to any public official for the payment of indemnity.**

The **recourse against public officials** has never been applied for the decisions passed by the ECHR as of 2009.

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<sup>174</sup> Minister/ Turkey, Application No: 50939/99, Decision dated June, 12, 2007

<sup>175</sup> Law No 4748 for the Amendment of Various Laws under article 13 of the Civil Servants Law (R.G. 9.4.2002) art.3.

<sup>176</sup> As stated above Decision of the 10<sup>th</sup> Chamber of the Council of State

This implementation issue was taken up in the correspondence carried out by the Human Rights Foundation of Turkey and the Ministries of Justice, Interior and National Defence and questions were asked regarding the collection of indemnity payments with recourse to officials in cases of torture and ill-treatment. According to the answer given by the Legal Advisor's Office of the Ministry of Interior;<sup>177</sup>

“Since no classification is made according to the organization and responsibility of the individuals subject to these cases, it has not been technically possible to provide statistical information on the cases where recourse was made against the staff of the Ministry of Interior as of 26.03.2002 in cases involving such indemnity as stated in your letter.”

Thus being the situation, the subject was raised with the Directorate General for Security and the General Command of the Gendarmerie.

The letter received from the General command of the Gendarmerie stated that *there are no staff members who have been subject to recourse* as a result of applications filed at the ECHR. The Directorate General for Security stated that the names of **2 staff members** were given to the Ministry of Finance for recourse to be applied with regard to ECHR decisions.”

According to the answer sent by the Chief Legal Advisory and Directorate General for Proceedings, the Ministry “upon examination of the records, it was found that *three transactions* for recourse were made against public officials found to be at fault by their organizations.”<sup>178</sup>

The Chief Legal Advisory stated that one of these staff members was from the Ministry of Interior<sup>179</sup> and the other was from the Ministry of Justice<sup>180</sup>, that the ministries gave orders for recourse cases to be filed against them; and though a recourse case was filed against the third staff member from the Ministry of Interior<sup>181</sup> the case was *rejected* by the first instance court<sup>182</sup> and the decision was approved by the Court of Cassation<sup>183</sup>. The grounds for rejection in the decision were unfortunately not found.

Therefore, the procedure of recourse, which can be enforced as a highly effective tool for preventing torture unfortunately was not (could not be) used at the time the above-mentioned correspondence took place.

Thus, in addition to the perpetrators of torture and ill-treatment whose responsibility cannot be determined according to criminal law or who are not punished, the public officials who do have liability in the process are free from individual liability under civil liability law. There are additional problematic areas.

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<sup>177</sup> Answer of the Ministry of Interior Legal Advisory no B.05.0.HUK.0.00.00.02-647.03.02/3925 and dated 10.03.2009

<sup>178</sup> Answer of the Ministry of Finance Chief Legal Advisory and Directorate General for Proceedings dated 05.02.2009 no B.07.0.BHM.0/00.4180-216

<sup>179</sup> Binali Huylu/Turkey, application no 52955/99

<sup>180</sup> Zeynep Özcan/Turkey, application no 45906/99

<sup>181</sup> Şevket İşçi/Turkey, application no 31849/96

<sup>182</sup> Malazgirt first Instance court, 2002/247 E., 2006/18 K

<sup>183</sup> Court of Cassation 4<sup>th</sup> Civil Chamber, 2006/1920 E., 2007/11313 K.

*The procedure for determining the individual fault of the public official against whom recourse will be made*

The answer sent by the Ministry of Finance Chief Legal Advisory and Directorate General for Proceedings also included information about how the staff member subject to recourse is to be identified;<sup>184</sup>

“Our Ministry requests information from the administration involved in the application on whether the public official has personal liability, If there is such liability, the full names and identity information and the notification addresses of the responsible staff are asked to be sent alongside their legal opinion, If the relevant administration gives information, document and names as well as a legal opinion that the public officials do, in fact, have legal liability...”

As it can be understood from this explanation, an independent administrative staff member is not assigned in determining individual liabilities, on the contrary, the organization under which the staff member claimed to be at fault works is asked to do an investigation. It is evident that such an investigation cannot be independent and impartial and that the organization will protect its own staff. Hence this is not an effective procedure.

*Recourse for indemnities paid as a result of ECHR decisions*

In the above answer sent by the Ministry of Finance, it is stated that since a determination is not made with regard to the fault of the public official in cases where the ECHR passes a decision of violation or friendly settlement, the issue of recourse is resolved by filing a case of claims. In the same answer, it is stated that a total of 3 cases were filed until February of 2009 and that none of these were bore an outcome.<sup>185</sup>

The issue of recourse in ECHR Decisions has other handicaps.

In most cases, the issue that leads to an application at the ECHR against the State is one where the requirements of an effective investigation are not met under domestic law or failure to establish a sentence against the perpetrators due to the end of the statute of limitations caused by failure to perform an effective investigation.

Although the Ministry of Interior have stated that the ECHR does not make a determination of personal fault, and the essence of these decisions is to unveil the responsibilities of the state, the ECHR decisions are of a nature that reveals the facts, the violations and the identity of the public officials who have caused the violation.

These can be concretely determined in many cases such as a prosecutor not conducting an effective investigation, a judge prolonging the proceedings, or a physician who does not issue a proper report or one who violates ethical rules. It is possible for the administration to create a separate mechanism

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<sup>184</sup> Ministry of Finance Directorate General for Legal Affairs response of 05/02/2009, no. B.07.0.BHM.0/00.4180-216

<sup>185</sup> Ministry of Finance Directorate General for Legal Affairs response of 05/02/2009, no. B.07.0.BHM.0/00.4180-216

independent of criminal investigations to determine the fault of its own staff, just as the in disciplinary investigations.

Furthermore, ECHR Decisions are reason for “retrial of the suspect in his interest” as per article 311/1-f of the CCP. However this provision does not suggest retrial **against the interest** of the perpetrators of torture or those who have criminal liability even if they are not perpetrators. Hence, even if the responsible people are determined from the ECHR decisions, it is not possible to press charges or take legal action against them.

### **Recommendations**

- It is not enough for the remedy to victims to be limited to “financial” remedies; the state should create both the legal and implementation conditions for other forms of remedy.
- Rehabilitation does not only mean providing the necessary help for the individual to gain physical and psychological health, it should also comprise the compensation of all his social losses.
- The effects of torture are seen not only in the individual but also in his family, close ones and undermine the integrity of the society as a whole and therefore rise as a public health issue. For this reason, rehabilitation activities should target not just the individual but his entire family, kin and the entire society.
- The legal remedies the State provides for indemnity should be effective and conclusive.
- The indemnity cases to be filed against torture and other forms of ill treatment should be exempt from all types of fees and costs.
- The statute of limitations should be repealed for indemnity cases filed by victims of torture and ill treatment.
- With regard to the determination of the staff member against whom recourse will be made for indemnities paid by the Treasury;
  - The legislation should be amended to provide a sufficient and effective method.
  - A separate mechanism safeguarding independence and impartiality should be created to determine the liabilities of public officials.
  - In determining the fault of public officials for the recourse procedure, those who fail to meet the responsibility of oversight and notification, those who are responsible for ‘planning and execution’, those who do not give ‘permission’ for an investigation, those who fail to conduct an effective investigation and fair trial, those who violate the ethical rules of the medical profession should be taken into consideration alongside those with ‘primary fault’.
- Even if there is a friendly settlement, in order to determine criminal liability and liability for indemnification in decisions reached by the ECHR,
  - If an investigation has not been started in domestic law, prosecutors should have the liability to immediately start and ex officio investigation;

- If an investigation has been started but closed due to lack of legal grounds; the decision of the ECHR should be accepted as new evidence and a public case should be filed against the individual subject of the dismissed case;<sup>186</sup>
- If a case has been filed against a public official and he has been acquitted, a paragraph should be added to article 314 of the CCP regulating “the reasons for a retrial against the suspect or the sentenced”, thus allowing for decisions of the ECHR to be accepted as grounds for retrial against the suspect.
- In this framework, the ministry of Foreign Affairs, Directorate General for the Council of Europe and Human Rights should be the unit responsible for starting the notification and other necessary procedures before prosecutors and courts.

### Issue no. 18

#### Para 91 (a)

Please see issues no. 2 and 14.

#### Para 91 (b)

A number of political prisoners who were tortured and sentenced in courts martial after the 12 September 1980 coup d'état when democracy was non-existent and detention periods of up to 90 days were normal, are still in prison. Furthermore, some files are still open as the cases have not been finalised.

After the courts martial the state security courts continued to decided cases based on statements and evidence obtained through torture. Additionally, a state of emergency rule was established in many provinces for years, thus martial law continued *de facto*. Many decisions of the state security courts whether they concerned the provinces under state of emergency rule or other parts of the country were subject of complaints in the European human rights system and lead to many decisions finding a violation of the European Convention on Human Rights.

Although article 311 CCP provides for the retrial of cases which were subject to decisions of the European Court of Human Rights (ECtHR) many cases which were decided by the state security courts have not been retried yet<sup>187</sup>.

Even though it is a necessity to grant an amnesty for those tried as terrorism offenders, until today among the activities of the Government there are not any preparations such as the abrogation of penalties.

### Recommendation

<sup>186</sup> Article 170/2 CCP

<sup>187</sup> E.g.; Güneş v. Türkiye, application no. 28490/95, 19 June 2003; Göçmen v. Türkiye, application no. 72000/01, 17 October 2006; Söylemez v. Türkiye, application no. 46661/99, 21 September 2006.

1. All trials of the state security courts together with their legal results should be abrogated. To achieve this, the Government should grant a general political amnesty.
2. In addition, a process of facing the past should be started and all those responsible for the practices under the state of emergency rule including torturers should be held accountable in the name of justice and social conscience.

**Para 91 (c)**

**Kızıltepe**

The case of the death of Ahmet Kaymaz and his 12-year-old son Uğur Kaymaz in a police operation ended with an acquittal on 19 April 2007. However, it cannot be said that fair trial standards were respected.

- For “security reason” the trial was held at the Eskişehir Heavy Criminal Court instead of Mardin Heavy Criminal Court.
- During the hearing on 19 April 2007 the written request accompanied by pictures of the lawyers of the complainants to conduct an on-site investigation and to hear the deputy security director of Mardin and the director of the special operations department in Mardin as witnesses in order to ensure a fair trial.
- The court decided, instead of accepting the claim to punish “the planned murder of father and son”, to acquit the accused because the event “happened within the limits of lawful self-defence”<sup>188</sup>.
- After the decision of acquittal the lawyers of the complainants filed a complaint against the judges with the Presidency of the Review Committee of the Ministry of Justice and the High Council of Judges and Prosecutors<sup>189</sup>.

Additionally, pressure was put on those who wanted to raise public awareness on the trial<sup>190</sup>.

- The first hearing was held on 24 October 2005.
  - o Some of the lawyers and those who wanted to attend the trial and came to the town by bus were refused to enter the town on the order of the Governorship.
  - o Those who were refused entrance were attacked by a group of civilians. Because some of them had wanted to walk as a group to the court house 11 people were detained<sup>191</sup>.
- Charges were brought against lawyer Tahir Elçi for “trying to influence the judiciary” because he had made a statement on having been prevented from attending the hearing and that he did not expect the trial to comply with fair trial standards. The trial ended with an acquittal.
- During the hearing on 27 September 2006 a group of six people, including a lawyer, a deputy party chairperson and a provincial party chairperson were detained after an argument with members of the security forces.

<sup>188</sup> <http://www.milliyet.com.tr/2007/04/19/guncel/axgun03.html>.

<sup>189</sup> <http://www.radikal.com.tr/haber.php?haberno=219177>.

<sup>190</sup> <http://arsiv.ntvmsnbc.com/news/438939.asp>.

<sup>191</sup> Information obtained from the lawyer of the case Tahir Elçi.



- The mayor of Sur/Diyarbakır was charged for having commissioned a statute commemorating Uğur Kaymaz. The prosecution had asked for a three-year prison sentence and while the lower court acquitted the mayor, the Court of Cassation quashed the verdict on 16 September 2010 and convicted the mayor for “having caused a prejudice of 2,292 TL to the municipality by commissioning a statute commemorating 12-year-old Uğur Kaymaz and the number of bullets in his body who was killed on 21 November 2004 by security forces in front of his house”<sup>192</sup>.

### **Şemdinli**

Three individuals were accused of “attempting to overthrow the State’s unity and indivisibility, murder and attempted murder, and conspiring to commit a crime” and charged by the Van 3<sup>rd</sup> Heavy Criminal Court. The trial has passed various stages but is still ongoing. However, when looking at the trial process as a whole, one can see that fair trial standards have not been complied with.

- Since the beginning of the investigation protective statements for the accused have been made by including the then Commander of the Army General Yaşar Büyükanıt.
- That prosecutor Ferhat Sarıkaya included allegations concerning the then Commander of the Army General Yaşar Büyükanıt in the indictment was criticised by the general staff. Two inspectors of the Ministry of Justice alleged that Sarıkaya “had included matters in the indictment which should not be included according to the CCP”. Immediately afterwards, on 20 April 2006 the High Council of Judges and Prosecutors expelled Sarıkaya from his office “for having damaged the reputation and honour of the profession and the credit and authority of the civil service”.
- The trial of the Şemdinli case started on 5 May 2006 with political pressure and discussions about the minutes. Despite the insistence of the intervening parties the court refused to read the part of the indictment concerning the allegations against the then Commander of the Army General Yaşar Büyükanıt and other generals<sup>193</sup>.
- The accused were sentenced by the Van 3<sup>rd</sup> Heavy Criminal Court to a total of 39 years, five months and 10 days imprisonment.
- The judgment was appealed and the 9<sup>th</sup> Criminal Chamber of the Court of Cassation quashed the decision on the grounds of an incomplete investigation, determined that the action of the accused had been “covered by their anti-terrorism duties” and decided that the case should be heard by a military court.
- The Van 3<sup>rd</sup> Heavy Criminal Court did not relinquish jurisdiction in favour of the military court.
- Instead it decided to carry out the on-site investigation which the Court of Cassation had pointed out as lacking. However, the security forces responsible for assuring the security on-site stated that they “would not be able to assure the security of the court”, thus preventing the on-site investigation.

<sup>192</sup> <http://www.firatnews.tv/index.php?rupel=nuce&nuceID=33099> (last access on 24/09/2010)

<sup>193</sup> <http://www.radikal.com.tr/haber.php?haberno=186384> (last access on 24/09/2010)

- The judges who refused to relinquish jurisdiction in favour of the military court were subject to inspections by the High Council of Judges and Prosecutors and were appointed to courts in other provinces. The newly chosen judges of the chamber relinquished jurisdiction in favour of the Military Court of the Van Gendarmerie Public Security Corps Commandership.
- The lawyers of the intervening parties objected that the military court was not competent to hear the case but this objection was overruled. Consequently, the lawyers announced that they would not participate in the hearings anymore unless the case was heard in a civil court.
- The military court released the three accused during the first hearing on 14 December 2007<sup>194</sup>.
- On 22 January 2010 the military court decided that no evidence could be found proving that the accused had “attempted to overthrow the State’s unity and indivisibility” despite the fact that the indictment had conclusively established the actions and reducing the charges to “murder and attempted murder, and aiding and abetting of these crimes” and relinquished jurisdiction in favour the Hakkari Heavy Criminal Court<sup>195</sup>.
- The trial is ongoing.

#### **Para 91 (d)**

On the issue of OPCAT please see issue no. 30.

Despite the speech of Prime Minister Recep Tayip Erdoğan on 8 October 2004 in front of the Council of Europe Parliamentary Assembly promising that Turkey would become soon a State Party to the Rome Statute establishing the International Criminal Court (ICC), this promise has not yet been fulfilled.

Furthermore, Omar Al Bashir, Sudanese President against whom the ICC has issued an arrest warrant was invited to participate in a conference of the Organisation of the Islamic Conference on 09 November 2009 in Istanbul. Despite huge public pressure Al Bashir came to Turkey to participate in the conference and no arrest warrant was issued against him in order to arrest and hand him over to the ICC.

#### **Issue no. 20**

In its response to issue No. 20 the Government stated that evidence obtained under torture would not be invoked as evidence in the proceedings against the torture victim. The response also states how this principle is laid down in the constitutions, laws and regulations.

First it should be mentioned that the scope of application of the prohibition contained in article 38 of the Constitution is wider than the scope of application in article 148 Code of Criminal Procedure (CCP). While article 38/6 of the Constitution states that “findings obtained through illegal methods

<sup>194</sup> <http://www.radikal.com.tr/haber.php?haberno=241641> (last access on 24/09/2010)

<sup>195</sup> <http://www.cnnturk.com/2010/turkiye/01/22/semidinli.davasinda.gorevsizlik.karari/560533.0/index.html> (last access on 24/09/2010)

shall not be considered evidence”, article 148/3 CCP states that “statements obtained through prohibited methods shall not be used as evidence notwithstanding that they were given with the person’s consent”. The term “statements” used by the law is narrower than the term “finding” used by the Constitution.

According to the legislation any kind of actions that would harm the will of the person during the interrogation are prohibited. As a rule statements obtained through torture or by other means harming the will of the person deprived of his liberty cannot be used as evidence<sup>196</sup>.

However, the rule that “evidence” obtained through torture cannot be invoked in proceedings is wider. It does not only cover the suspect’s statements, but all evidence, whether based on a statement or not, obtained by harming the individual’s will cannot be invoked as evidence in proceedings.

For example, on site investigations and searches carrying out upon a statement obtained through torture should also not be used as evidence in proceedings. As these issues are not clearly regulated in national law, in practice the inadmissibility as evidence in proceedings is often limited to the statements of the accused.

Furthermore, in order to be inadmissible it has to be proven that the statement was obtained through prohibited methods.

When the accused alleges that a statement was obtained by torture, the court investigates whether there is an investigation or trial concerning this issue. If the court finds that no charges were brought or a decision of non-prosecution taken or if the trial has not resulted in a conviction, the court will use the statement.

These difficulties encountered during the investigation and trial of torture allegations<sup>197</sup> result in the impossibility to prove the torture allegations and the acceptance as evidence of statement obtained by the law enforcement agencies even if obtained through torture.

Moreover, the legislation does not clarify how to proceed with statements obtained through prohibited methods and other evidence based on these statements. A trial is, by definition, a process of convincing the court. For this reason, even if it does not have the quality of evidence, all statements and evidence obtained through torture should be removed from the file. This is the only way to ensure that the judge will not be influenced in his decision by this evidence.

However, there is no such rule in domestic legislation which ensures that prohibited evidence is removed from the file. Consequently, statements and evidence which should not be used during the trial continue to influence the judge and other parties to the trial (prosecutor, victim/complainant, expert or witness) and to be used directly or indirectly during the trial.

## Recommendation

<sup>196</sup> Article 38 of the Turkish Constitution, article 148 CCP, article 24 Regulation on Apprehension, Detention and Statement Taking

<sup>197</sup> Concerning problems related to the investigation of torture allegations, please see our response to issue no. 14. Furthermore, we have touched upon issues concerning prescription and the delay of the disclosure of the sentence which prevent the termination of a trial in our reply to issue no. 15.

1. Article 148 CCP and article 24 of the Regulation on Apprehension, Detention and Statement Taking (RADST) which limit evidence to “statements obtained through prohibited methods” should be changed to “statements or evidence obtained through prohibited methods”. Additionally, the meaning of “shall not be used” should be clarified, so that such evidence is not only not used in the decision but prohibited during every stage of the trial.
2. In order to ensure implementation in practice it should be regulated by law that statements and evidence obtained through prohibited methods are removed from the file.

## **Issue no. 22**

In Turkey, the Juvenile Justice System has not been completely established. In this context, Turkey lacks of regulation compatible with the Convention on the Right of the Children. Also there are juvenile courts in only metropolis in Turkey. In Turkey, the principle of high benefiting of children in the Convention on the Right of Children was not arranged in regulations related to children. By Constitutional Amendment accepted with the referendum on September 12, the principle of benefiting of child under the Article 41 was only arranged in the context of relationship with mother and father. This can be regarded as insufficiency of the article in respect of the principle. Moreover, the number of penal institution for children is not enough in Turkey. Also many of children are held in different rooms but at same prison with adults.

In Turkey, investigation of children was made together with adult’s investigation until the enactment of the law no. 6008 on July 25, 2010. This situation resulted in various violations. This law limits the detention of children with specific charges. Before the law, approximately 4000 children were on trial with adults by Special High Criminal Court between 2006 and 2010. These children were charged of “being member of illegal armed organization”, “making propaganda on behalf of the armed organization”, “holding illegal demonstration” and “resisting a police officer”. The Law no. 6008 provides children to be released only for one time but it does not prevent children from being fined because of being membership of illegal organization and organization propaganda. With this law, alternative measures different from imprisonment will be taken for children who commit this crime for only one time. Yet if the child commits the crime a second time, s/he would be sentenced to prison sentence. Needless to say, majority of these children committed this crime more than one time.

### **Recommendations**

- 1- There should be Juvenile Court in each of 81 cities in Turkey.
- 2- There should be different and separated penal institutions for children in Turkey.
- 3- Criminal Justice System should be established based on the Convention of the Rights of Children.

## Issue no. 24

Turkey has not applied the UN Declaration on the Protection of Human Rights. Those who want to use right of congregate and demonstrate are charged of violation of Law of Demonstration and Congregate (Law no 2911). Also judicial harassment on human right defenders still continues in Turkey.

Some of human right defenders who were taken into custody in last one year are as follows;

- Yüksel Mutlu (IHD Discipline Committee)-released
- Filiz Kalaycı (member of IHD Executive Committee)-released
- Muharrem Erbey (Vice President of IHD)-into custody
- Vetha Aydın (President of IHD Siirt Branch)
- Roza Aydede ve Aslan Özdemir (executives of IHD Diyarbakır Branch)
- Abdülkadir Çoğata (executive of IHD Mardin Branch)
- Genççağ Karafazlı (president of IHD Rize representative)-released

Furthermore, in Turkey, Human Right Boards is under the authority of governor in provinces and under district-governorship in sub-provinces. Therefore these boards mandated by governors and district governor who are chief of public officers violating usually human rights cannot function well.

As a result of these, Human Right Association (IHD) does not take part in these boards.

Additionally, Vice-President responsible for human rights is at the same time President of High Commission of Anti-Terror since 2007. Also Vice-President has not got in dialogue with Human Right Organization yet. It can be claimed that government has security-based human right policy.

In Turkey, there is not any national Human Right Institutions compatible with the UN Paris Principles. Draft law on that issue has not been ratified by Parliament because it is not sufficient yet.

Moreover Turkey has not any Law regarding the establishment of an institution for promoting equality and fighting against discrimination.

Optional Protocol to the Convention against Torture (OPCAT) has not been ratified in Turkey. Also a national preventing mechanism has not been established yet.

### Recommendations

- 1- Turkey should obey the UN Declaration on the Protection of Human Rights.
- 2- Turkey should establish a National Human Right Institution.
- 3- An institution for promoting equality and fighting against discrimination should be established
- 4- OPCAT should be ratified and human right defender should take part in national preventing mechanism to be established.

## Issue no. 25

In the context of charges under the Article 100 of Law of Criminal Procedure, people can be arrested easily based on the assumption of presence of reason of arrest. For example, one who is charged of being member of illegal organization can be detained without time-limit. On the other side, Law of Criminal Procedure makes an exception for many laws. (Catalogue crimes). It cause emergence of bilateral arrest regime. Moreover, there is no time limitation of arrest for crimes under the responsibility of Special High Criminal Courts which are follow-up of former State Security Court.

According to the Law of Criminal Procedure, in the context of crimes under the responsibility of Special High Criminal Court detention period is defined as two days for one person and four days for more than one person. In the Anti-Terror Law no. 3713 access to lawyer are also prohibited in the first 24 hours of detention period. Yet this can result in ill-treatment and torture against suspected in the first 24 hour of detention.

Moreover, the law of Criminal Procedure states that alternative measure should be applied rather than detention. Yet in the practice detention is usually applied because of Article 100 in which reason of arrest can be assumed in case of catalogue crimes.

Furthermore, human right defenders cannot monitor detention centers in Turkey.

#### **Recommendations**

- 1- Regardless of type of crimes, there should be upper limit of detention period, and public case should be opened as soon as possible.
- 2- Detention should be used in exceptional cases and supervised liberty should be preferred than detention.
- 3- Limitation in the Anti-Terror Law should be lifted and in each and every condition lawyer should be enabled to meet with suspected.
- 4- Detention period should be equal for each type of crime.
- 5- The state should enable human right defender to monitor detention place.

#### **Issue no. 26**

First of all, an individual *de facto* deprived of his liberty can file a complaint under article 109 Turkish Criminal Code (TCC) for deprivation of liberty. The penalty foreseen for this crime is one to five years imprisonment. However, in Turkey *de facto* deprivations of liberty usually take the form of abduction and neither the offenders nor the vehicles nor the place where the person is taken to can be identified. For this reason, it is next to impossible to take any successful legal action in case of a *de facto* deprivation of liberty.

In case of *de jure* deprivation of liberty, as mentioned in the 3rd periodic report of Turkey, article 108 CCP provides that a suspect has the right to appeal against his arrest<sup>198</sup>. Additionally, the suspect also has the right to appeal against the detention and detention procedure<sup>199</sup>. However, while an appeal against the arrest is sometimes successful, there is no information on successful appeals against the detention and detention procedure.

An individual deprived *de jure* of his liberty has a right to damages if the deprivation of liberty is determined to have been illegal<sup>200</sup>. However, there are two main problems:

- The list of cases in which damages can be awarded is not comprehensive. For example, if, after the change of the TCC in 2005, the more lenient rule is applied to an individual's case, the individual has no right to damages if as a result of the more lenient rule he stayed in prison too long.
- This right is not very effective as the damages awardable are very low.

As mentioned in the 3rd periodic report of Turkey persons deprived of their liberty and/or tortured can apply to different judicial and non-judicial mechanisms<sup>201</sup>. The report also contains a list of these mechanisms. However, the main problem with regard to these mechanisms is that they do not function effectively. Even the large number of mechanisms shows that there is a problem. A legal system where the judicial means are not effective, individuals have no other chance but to search for other means. The judicial means have been evaluated under issues no. 9 and 14, the supervisory mechanisms have been evaluated under issues no. 2 and 5 and the questions of compensation and rehabilitation has been evaluated under issues no. 17 and 19. As explained in these sections, the “attitude of the State” rules over these mechanisms and, in particular when it comes to the security forces, the general attitude is to acquit those responsible. Thus, the problem is not the lack of appropriate legislation or mechanisms but, quite the contrary, the mentality of those within these mechanisms.

#### **Recommendation**

Please see issues no. 2, 5, 9, 14, 17 and 19.

#### **Issue no. 27**

The scope of the “Return to Village Programme”: Project covers 14 provinces but it should include the whole country. Moreover as it can be understood from the name of the programme settlement units other than villages were excluded from the programme. At it is mentioned in the paragraph 249 of the government's reply, 151,469 people had been benefitted from the programme until the end of October 2008. But according to the findings of the “Survey on Migration and Displaced Population” was

<sup>198</sup> CAT/C/TUR/3, para. 286

<sup>199</sup> Article 91 (4) CCP

<sup>200</sup> Article 141 CCP

<sup>201</sup> CAT/C/TUR/3, para. 289

conducted by Hacettepe University of Population Studies (HIPS) in the coordination of the States Planning Organisation between July 2004-June 2006 at least 950,000 and at most 1,200,000 people had to migrate between 1984 and 1999<sup>202</sup>. Only one out of the six people who had been displaced could benefit from the programme. According to the reports of NGOs the programme was not progressing in a transparent way as it should be. Another controversial point is the voluntary basis of return as it is mentioned in the paragraph 292<sup>203</sup> of the reply. The families who had objected to be settled to other places other than their former residence could not benefit from the programme.

The decline and the fall of the agricultural infrastructure, the clashes that has been gathering speed recently, the temporary village guards who took hold of the local economy and the animosity between the families who had been displaced and the guards and the landmines that had been laid are the most important obstacles facing with the return. The recommencement of the clashes agitates the insecurity environment and forces the people that had benefit from the programme to migrate again. As long as all of the obstacles sustain their existence it is impossible to successfully practice of programme.

Law on the Compensation of Losses Resulting from Terrorist Acts and the Measures Taken against Terrorism (No. 5233) that came into effect on 27 July 2004 is far from having the potential to fulfil the aims in its justification. The law does not cover the losses that took place between 1984 and 1987; damages from pain and suffering was not foreseen (this hinders the detection of the perpetrators and the responsibility of the State); the reparation amount for material damages to human life and body was fixed; reparation in kind was given priority; persons who was convicted from the offences that had been regulated under the Law on Fighting with Terrorism were excluded from the scope of the law whether their material damages were resulted from their acts or not; the victims have a heavy proof burden (to provide documents that had never existed such as incident detection record, title deed, etc.) and temporary village guards were allegedly privileged. The reparation amounts that have been paid until today, was so low that the victims feel insulted. As it can be seen from the table below the highest average reparation was 16,472 TL (8,310.53 €) which was paid in Van Province. It is clear that it is impossible for someone re-establish his family's life with this amount of money.

Law on the Compensation of Losses Resulting from Terrorist Acts and the Measures Taken against Terrorism (No. 5233)					
<i>Province</i>	<i>Number of Applications</i>	<i>Number of Accepted application</i>	<i>Amount of Reparation</i>	<i>Average Reparation</i>	<i>Date of news</i>
<i>Tunceli</i>	17.393	13.351	8.000.000 TL	599 TL	20.02.2010
<i>Van</i> <sup>204</sup>	33.795	12.323	202.995.518 TL	16.472 TL	18.08.2010
<i>Batman</i>	18.200	8.000	107.000.000 TL	13.375 TL	19.07.2010

## Issue no. 29

<sup>202</sup> Dilek Kuban, "Raporun Söylemedikleri", Radikal 2, 31 December 2006.

<sup>203</sup> "The project aims at settling the families wishing to return on a voluntary basis to their former places of residence or to other places suitable for settlement." (See, para. 292)

<sup>204</sup> Number of people who signed deed of settlement 3,000; number of people who launched cases in administrative courts 1,800.



During the UPR process Ministry of Foreign Affairs made a call to NGOs for their opinions and suggestions in written but did not mention how it will use these reports. The Ministry also invited the NGOs to a meeting on UPR process. Some of the NGOs presented their opinions and suggestions to the related body including Human Rights Foundation of Turkey. But the participation to the meeting between the NGOs and the Ministry was lower than the expectations of the organisers. During the process the Ministry did not organise another meeting or call for additional information and did not perform a feedback.

This situation is not only limited with UPR process. In 2008 Secretariat General for EU Relations made a call to the NGO to present their opinions and suggestions in written form on the draft of the Third National Programme but none of the suggestions was reflected in the final form of the Programme<sup>205</sup>. In 2009 NGOs called to present their suggestions on the national human rights institutions but the Ministry of Interior ignored the presented suggestions<sup>206</sup>. In other words whenever the State didn't ignore NGOs, it imposed hierarchical relations on them.

#### **Recommendations**

1. A protocol that would regulate the relations between the State and NGOs should be constituted with the contributions of both parts.
2. The state should inform the NGOs in order to constitute mutual relations.

#### **Issue no. 31**

The OPCAT is an effective tool in for the prevention of torture and ill-treatment. Its importance stems from the fact that, in contrast to the UN Convention against Torture, the European Convention for the Prevention of Torture and other human rights conventions, it concentrates on the prevention of the violation before it happens. The preventive effect of the OPCAT rests on the ability to visit without prior notice any kind of official or unofficial detention place.

Turkey has signed the OPCAT on 14 September 2005; that is when the AKP was already in Government. It is noteworthy that although the Government claims to have “zero tolerance for torture” policy and holds a majority in Parliament which would allow the ratification of the OPCAT, it has not yet done so.

Between 2006 and 2008 the HRFT implemented a comprehensive campaign for the ratification of the OPCAT. Within the framework of this campaign letters were sent to members of parliament, submission of parliamentary questions was ensured, and meetings with the then Minister of Foreign

<sup>205</sup> <http://tihv.org.tr/index.php?HRFTaEs-Opinions-and-Suggestions-on-the-Constitutationalisation-of-a-National-Human-Rights-Institution>.

<sup>206</sup> <http://tihv.org.tr/index.php?The-HRFTaEs-Opinions-and-Suggestions-on-the-Draft-Law-of-the-Human-Rights-Council-of-Turkey>.

Affairs and Government member responsible for human rights issues Abdullah Gül and other members of the Government were held. Yet, while in the autumn of 2009 a draft law for the ratification of the OPCAT was submitted to the Parliament, the HRFT and other NGOs were neither informed nor consulted. Today, the draft law is still waiting in the Parliament. We are afraid that even if the OPCAT was ratified as soon as possible, its full implementation would be delayed. In fact, the justification draft law of the law explicitly states that the OPCAT allows the postponing of the establishment of the national preventive mechanism for up to three years. So far, there are no preparations under way for the mechanisms required under the OPCAT. That the Government seems to intend to establish the national preventive mechanism within the planned National Human Rights Institution is also subject to critique.

#### **Recommendations**

1. The OPCAT should be ratified immediately and the plan to delay the establishment of the national preventive mechanism by three years should be given up.
2. The national preventive mechanism to be established should be transparent, independent and effective and in compliance with the Paris Principles and should be established by taking into account the views of NGOs.

#### **Issue no. 32**

As “terrorism” has no universally accepted definition, the result especially in Turkey is the application of a very large, ambiguous and vague definition. This makes it easier to limit the exercise of rights such as the freedoms of expression, association, and assembly.

While there had been a relative improvement in terms of human rights in Turkey between 2000 and 2004, this trend reversed in 2005. The issue of security and human rights was resolved in favour of security concerns and anti-terrorism approaches. The negative developments, a result of this trend, can be summarised as follows:

##### **a. Legal changes:**

- Article 220 (6) of the TCC includes the following example of this mind-set: without actually being a member of a terrorist organisation it punishes those who commit a crime in the name of a terrorist organisation as if they were members of this terrorist organisation. This article provides the grounds for thousands of detentions and arrest in Turkey including children.

- The State Security Courts, criticised in the Conclusion and Recommendations on the 2<sup>nd</sup> Periodic report of Turkey, were replaced in 2005 with the Special Heavy Criminal Courts. However, these courts cause similar human rights violations, such as the right to fair trial, as the State Security Courts.

- The changes of the Anti-Terrorism Law of 2006 cause, as described in various parts of this report, violations of rights such as the right to life, freedom of expression or the prohibition of torture.
- The changes of the Law on the Powers and Duties of the Police of 2007 cause, as described in various parts of this report, violations of the rights of individuals, associations, foundations, trade unions or similar organisations.
- Regulations based on these laws are equally problematic.

b. Practices

These legal changes have had negatives effects on daily life as described in the reports of the HRFT and other human rights organisations.

c. Another example of this process:

When looking at the website of Deputy Minister Cemil Çiçek the member of government currently responsible for human rights one can see that the areas of responsibility are ranked as follows. Mentioned among the first is “Presidency of the Anti-Terrorism High Council”, mentioned as the last responsibility is “Coordination of issues concerning human rights with institutions concerned with human rights”. Deputy Minister Responsible for Human Rights Cemil Çiçek has, since he assumed responsibility for this issue in 2007, not once held a meeting with human rights institutions in order to share his views on this issue. It should be mentioned that in Turkey during the 1990s there was a minister responsible only of human rights issues.

Furthermore, during a reception he replied to the HRFT President expressing his concern about the little value attached to human rights that “security is now more important”. It is a very telling example of the attitudes of the Government.

**Recommendation**

- The TCC, CCP, Anti-Terrorism Law, Law on the Powers and Duties of the Police and other need to be reviewed and changed taking into account the requirements of international human rights law.