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The prohibition of torture is absolute and must be enforced at all times and in all circumstances

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Torture and cruel, inhuman or degrading treatment or punishment are prohibited under international law. The prohibition is absolute and no exceptions are allowed, ever. Torture was made unthinkable after the ban had been enshrined in the United Nations human rights treaties and the humanitarian Geneva Conventions.

Article 3 of the European Convention on Human Rights outlaws torture and other forms of ill-treatment, one of the most fundamental values of democratic society, as the Strasbourg Court has stressed. It is the sole Article of the Convention that does not leave states any space for derogations, be it for public order or in the interest of society, or even for counter-terrorism actions. Under Article 3, the identity of the victim is irrelevant: It does not matter if the victim is a notorious criminal or a terrorist.

In a recent judgment in the case of *Gäfgen v. Germany*, where the security forces threatened the applicant, suspected of a child's abduction, with being subjected to intolerable pain in order to make him confess the whereabouts of the child in issue, the European Court of Human Rights once again stressed the following: *"The prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk.* ***No derogation is allowed even in the event of a public emergency threatening the life of the nation****. Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult".*[1]

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However, despite this clear and absolute ban in international and national laws, detainees or foreign nationals subject to forced returns are exposed or subjected to torture and other forms of ill-treatment in many European states. A solid underpinning of this legal requirement is now needed more than ever.

Governments must make clear that nothing but zero tolerance towards such practices is acceptable.

Each government should put in place an effective system for preventing all forms of ill-treatment. Police and security staff must be instructed and systematically trained in lawful methods of

[1] Judgment of 1 June 2010, para. 107.

interrogations. Capacity for disciplined, lawful behaviour must be a key factor when recruiting law enforcement personnel; unsuitable officers have to be removed.

Action aimed at preventing and eliminating ill-treatment should be guided by the human rights norm that any person arrested must have prompt access to a lawyer and impartial medical examination upon arrival and release. As the Strasbourg Court has held in a number of judgments against Turkey in which it found a violation of Article 3 of the Convention, the medical examination of persons in police custody, the right of access to a lawyer and the right to inform a third party of the detention constitute the most essential safeguards against ill-treatment.[2]

It should be noted that ill-treatment of persons deprived of their liberty is not confined to police custody or to prisons. Governments should therefore put in place an effective system of continued and independent monitoring of all places where people are held involuntarily, such as psychiatric hospitals and detention centres for refugees and immigrants.

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Asylum seekers are a particular group that should not be forgotten in this context. Historically, states have pledged to protect the rights of their nationals at home or abroad and of citizens of other states who enter the country lawfully. Where refugees flee persecution in their countries, international law requires receiving states to provide the protection denied at home.

Under the UN Refugee Convention, refugees are persons with a well-founded fear of persecution in the country of origin from which they flee and seek protection. Whether an action or threat amounts to persecution depends on the circumstances of each case. Serious personal risk or subjection to torture or other forms of ill-treatment are certainly circumstances that undeniably corroborate claims of persecution. These claims should always be examined meticulously by the authorities of the receiving country.

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Taking into account the significance of the prohibition of ill-treatment, the international community has developed a number of international mechanisms for the prevention of ill-treatment and complaint mechanisms both universally and regionally. Notably, the UN Committee against Torture, based on the 1984 Convention against Torture, examines state reports and individual and interstate complaints concerning ill-treatment.

The 2002 Optional Protocol to the UN Convention against Torture (OPCAT), which has introduced a practical and complementary element to the preventive framework of the UNCAT, is significant for a number of reasons. Firstly, it emphasises the importance of the concept of *prevention*. Furthermore, by bringing about the establishment of both a United Nations and a national preventive mechanism, the OPCAT combines international and domestic efforts for the prevention of torture. Moreover, the system established by the OPCAT is based on a process of cooperation and dialogue in order to assist states parties in the struggle against torture.

One should not lose sight, however, of the fact that prevention was made a priority by the Council of Europe already in 1987 by the Convention for the Prevention of Torture and its Committee, the CPT. The CPT, composed of independent experts from Europe, has the authority to visit places of detention of any kind without specifying to the state parties the exact dates of the visit, has unrestricted access to all places of detention and complete freedom of movement within them. CPT aims to improve the protection of persons deprived of their liberty and to prevent incidents of torture from taking place. It does not receive individual complaints of ill-treatment. CPT's contribution has

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[2] See e.g. *Salmanoglu and Polattas v. Turkey,* judgment of 17 March 2009.

been invaluable. To date it has carried out approximately 300 visits in European states and published around 250 reports.

Coming back to the National Preventive Mechanisms (NPMs), promoted by the OPCAT, they are a valuable addition to earlier mechanisms for the prevention of ill-treatment. Like other human rights mechanisms, they provide a window into spaces or practices which are not normally seen by the public. Unlike international monitoring mechanisms, they are based in the countries concerned and can have more frequent/regular access to places of deprivation of liberty, as well as the possibility to react very rapidly – within hours, given modern-day communication technologies - if there is a particularly urgent situation.

Regrettably, currently 30 of the 57 states parties to OPCAT have *not* as yet notified designation of an NPM.[3] The forms used for NPMs vary. Whatever model is chosen, it is important that the mechanism is fully independent, appropriately resourced and authorised to undertake visits without forewarning, with access to all places of detention, without exception. It should be staffed and funded in a manner that guarantees its impartiality and independence.[4]

There is one possible side-effect, which the setting-up of an NPM should certainly *not* have – to bar expert, non-governmental organisations from access to places of detention. Non-governmental organisations continue to be essential actors in the work against ill-treatment in places of detention – even where national preventive mechanisms exist.

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Along with a preventive mechanism, governments should also ensure that the judiciary reacts promptly and decisively on any reported case. Without an effective investigation of allegations of torture, the prohibition of ill-treatment would be rendered theoretical and illusory, thus allowing state authorities and their agents to act with impunity.

In this context, one should underline the importance of the existence of effective police complaint mechanisms. Such national mechanisms are of fundamental importance for the operation of a democratic and accountable police service. It enhances public trust and confidence in the police and ensures that there is no impunity for ill-treatment.

An effective police complaints system should adhere to the major principles that the European Court of Human Rights has developed. These principles are:

- **Independence**: there should not be institutional or hierarchical connections between the investigators and the officer complained against, and there should be practical independence;
- **Adequacy**: the investigation should be capable of gathering evidence to determine whether the police behaviour complained of was unlawful and to identify and punish those responsible;

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[3] See table of National Preventive Mechanisms of the Office of the United Nations High Commissioner for Human Rights, OPCAT sub-committee on Prevention of Torture at: http://www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm, accessed 25 October 2010.

[4] NB: In Turkey, on 28 January 2010 the government presented a draft Law providing for the establishment of the "National Human Rights Institution" to the Parliament. According to the draft Law, the Institution has the authority to conduct periodical visits to places of detention, and not visits without forewarning. On 17 February 2010 prominent human rights organisations, i.e. Human Rights Foundation, Human Rights Association, Helsinki Citizens' Assembly, Turkish branch of the Amnesty International and Mazlum-Der made a joint declaration in which they criticized, inter alia, the absence of the Institution's authority to visit detention places without prior warning and without limit. The non-governmental organisations in question also criticised the fact that the Institution would not have financial and operative independence. The draft Law in question is currently before the relevant Commission at the Parliament.

- **Promptness**: the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law;
- **Public scrutiny**: procedures and decision-making should be open and transparent in order to ensure accountability; and
- **Victim involvement**: the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests.

In a large number of cases against Turkey,[5] the Strasbourg Court has found violations of Article 3 of the Convention on account of the lack of an effective investigation in disrespect of these principles.

The European Court of Human Rights has further made it clear that when an investigation into allegations of ill-treatment has led to the initiation of criminal proceedings concerning ill-treatment by members of security forces, courts should pay close attention to such cases. Indeed prosecutors and courts have a particular role to play in this field. Cases brought against members of security forces on grounds of torture and other forms of ill-treatment should not be time-barred and the granting of an amnesty or pardon should not be permissible in principle. Furthermore, a state agent charged with ill-treatment must be suspended from duty during the investigation and trial, and should be dismissed if convicted.[6]

Reparation, including in the form of compensation, for victims of ill-treatment is a further requirement. Article 14 of the UN CAT obliges state parties to ensure in their legal systems that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. The European Court of Human Rights has affirmed in its numerous relevant judgments that the notion of an effective remedy under Article 13 of the Convention entails payment of compensation to victims of ill-treatment.[7]

It is only by adhering to these basic rules that the public can maintain or establish confidence in the rule of law in a democratic society.

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In numerous cases brought against Turkey, the Strasbourg Court found that Article 3 was violated since the criminal cases against Turkey had been time-barred or the sentences imposed on the suspects who were members of security forces had not been executed. The current legislation which allows for termination of cases involving serious acts of ill-treatment as time-barred and the practice of national courts to decide to suspend the execution of prison sentences raise serious concerns. Both the law and the practice in question render the criminal law system insufficiently dissuasive to effectively prevent ill-treatment.

A further major issue in Turkey is the use of excessive force by security forces. There are, of course, situations when the use of force by the police can be justified, for instance, to control a riot or to apprehend a suspect. However, this potential should be strictly regulated. One requirement is lawfulness – it is particularly important that the relevant *legal framework is clear*. As the Strasbourg Court has stated, *"[the] legal and administrative framework [must] define the limited circumstances in which law enforcement officials may use force and firearms. […]Police officers [are not] to be left in vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase against a person perceived to be dangerous".*[8]

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[5] According to official statistics found on the Court's web site, between 1959 and 2009, in 74 judgments against Turkey the Court found that the investigation into the allegations of ill-treatment had been ineffective.
[6] See e.g. *Okkali v. Turkey*, judgment of 17 October 2006.
[7] See e.g. *Aydin v. Turkey*, judgment of 25 September 1997.
[8] *Brecknell v. the United Kingdom, McCartney v. the United Kingdom, McGrath v. the United Kingdom, O'Dowd v. the United Kingdom, Reavey v. the United Kingdom,* judgments of 27 November 2007.

Another requirement is that of *proportionality*. The use of force is justified only in a situation of absolute necessity and should even then be practised with the maximum restraint.

There have been a number of cases in Turkey, some of which were also brought to the European Court of Human Rights, where the police have used force to disperse demonstrations and to effect arrests on the ground that the demonstrations had been 'unauthorised'. In most of the situations reviewed by the Strasbourg Court, security forces were able to take preventive measures prior to demonstrations and actually secured the areas where the demonstrations would be held. In some cases, they used force without any prior warnings. In others, force was employed as the demonstrators did not comply with the warnings. In a number of its judgments the Court has found that the demonstrators had not presented any danger to public order, and that they had not resisted or engaged in acts of violence. In these cases the interventions by security forces, which caused bodily injuries, were found to be disproportionate and in violation of Article 3 of the Convention.[9]

Obviously, the principles applicable to investigations conducted into allegations of ill-treatment in places of detention must also be observed in cases where individuals allege that the use of force by members of security forces was unnecessary and/or disproportionate.

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Last but not least, policies and acts of state authorities should be open to a public debate. Public trust in the public authorities requires free discussion in the media. As the Strasbourg Court reiterated in a recent judgment, 'in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public have the right to be informed'.[10]

Transparent public debates on major human rights issues, such as freedom from torture and other forms of ill-treatment, should actually be part of the *systematic work for human rights* that all states are encouraged to establish. In the context of such systematic work, the general public, along with NGOs and national human rights structures, should be informed and contribute to the relevant laws and policies.

States should take human rights more seriously and realise that without proper, systematic work in this area the existing, serious inadequacies and huge gaps between standards and practice cannot be remedied.[11]

In this regard, NGOs, like the Human Rights Foundation, and national human rights structures, have a pivotal role to play.

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[9] See e.g. *Bicici v. Turkey*, judgment of 27 May 2010, *Balcik and Others*, judgment of 29 November 2007.
[10] *Voskuil v. the Netherlands*, judgment of 22 November 2007.
[11] See Commissioner's Recommendation *on systematic work for implementing human rights at the national level*, CommDH(2009)3, www.commissioner.coe.int.