"Improving the Effectiveness of Investigation of Allegations of Ill-treatment and Combatting Impunity in Turkey"

ASSESSMENT REPORT AND RECOMMENDATIONS ON ADJUSTEMENT OF LEGISLATION AND PRACTICE IN ORDER TO IMPROVE THE EFFECTIVENESS OF INVESTIGATION OF ILL-TREATMENT

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Introduction

The absolute prohibition of torture and inhuman or degrading treatment or punishment[1] clearly comprises the need to combat impunity. Contemporary concerns surrounding this issue have been based on many findings and indications of failures by states to effectively investigate ill-treatment and properly punish and otherwise hold to account the perpetrators.

The European Court of Human Rights (ECtHR) continues to make a considerable number of adverse judgments in this area, despite its clear elaboration of the relevant standards over many years. Thus, by the beginning of 2019, in addition to 2404 substantive breaches of Article 3 of the European Convention on Human Rights ("ECHR")[2], there were 837 findings of a violation in respect of the procedural aspect of the same Article concerning the requirement to effectively investigate allegations and other signs of ill-treatment.[3] The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("**CPT**") addresses the issue accordingly, particularly in its 14th and 23rd General Reports and in many of its visit reports. The standards concerned have been summarised in the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.[4]

Although the number of adverse judgments delivered by the ECtHR concerning the procedural limb of Article 3 against Turkey is considerably high (215 by the beginning of 2019), the majority of these cases and the facts concerned date back to the early 2000s and the preceding period. The same applies to the findings of the CPT and other international institutions and mechanisms. Since then, Turkey has addressed many of the shortcomings and adopted a series of general measures on its own initiative or in line with their recommendations. At the same time, the Constitutional Court, the Court of Cassation, Council of State, the Ministry of Justice and other domestic stakeholders, as well as the ECtHR, CPT, Council of Europe's Commissioner for Human Rights, relevant UN bodies, other international organisations and monitoring mechanisms, continue to identify some shortcomings and further improvements needed in this area. In recent years, within the framework of the dialogue and cooperation under these frameworks, as well as beyond it, Turkish authorities have endeavoured to adopt a more targeted and systemic approach to addressing the ill-treatment and related issues. This began with a series of formal statements, including on the highest political level, of zero tolerance towards torture. It also involved lifting the statute of limitation for it, along with other legislative moves. These developments involve some institutional changes, capacity building, and other steps concerning the effectiveness of the compliance with the relevant procedural obligations. It is indicative that

[1] Hereinafter collectively referred to as "ill-treatment".

[2] Article 3 ECHR prohibits torture and inhuman and degrading treatment.

[3] Violations by Article and by State. https://www.echr.coe.int/Documents/Stats_violation_1959_2018_ENG.pdf

[4] Adopted by the Committee of Ministers of the Council of Europe on 30 March 2011 at the 1110th meeting of the Ministers' Deputies.

the MoJ, in particular its Department of Human Rights, has created and maintains a dedicated website entitled 'The Turkish Legislation and Practice as regards Torture and Ill-treatment" outlining the measures in issue.[5]

Against this background, the Council of Europe and Turkey have implemented the Project "Improving the Effectiveness of Investigation of Allegations of Ill-treatment and Combatting Impunity in Turkey" (hereinafter - the Project). The Report has been prepared under this Project accordingly. It provides analysis and suggests relevant advice and particular recommendations for future action for enhancing the compliance of the Turkish legal framework (legislation and practice) concerning the effectiveness of the investigation of deliberate ill-treatment immediately attributable to the state, its officials and other agents.[6]

The Report has been drafted by the CoE international consultant Erik Svanidze[7] with the contribution of the national expert, Prof. Dr İlhan Üzülmez[8] and processed by the Working Group comprising the representatives of the key stakeholders. It has reflected the deliberations and conclusions of four targeted Round Table discussions, with the participation of key domestic actors engaged in fulfilling the procedural obligations under Article 3 of the ECHR, as well as two meetings with representatives of NGOs, civil societies and the Union of Turkish Bar Associations respectively. Their participants provided opinions on the most challenging legislative and practical issues and possible solutions, as well as on primary and secondary legislation, some statistical and qualitative data, reports developed by governmental institutions and other stakeholders, and on domestic jurisprudence of the Constitutional Court and the Court of Cassation.

The Report has benefited from the intensive co-operation extended by the Ministry of Justice, other national authorities, the Project Team in Ankara and Strasbourg, and discussions held by the international consultant with the relevant representatives of the division of the CoE Department for the Execution of judgements of the ECtHR.

[5] See http://www.humanrights.justice.gov.tr/announcement/2017/december/the-turkish-legislation.html

[6] The effectiveness of investigation of deliberate ill-treatment by private individuals and procedural obligations under other limbs of Article 3 of ECHR are addressed by other activities of the Project.

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The report's chapters are preceded by sections that recapitulate the key international standards on the issues under consideration.[9] They are followed by an analysis of relevant legislative and regulatory provisions, judicial practice, as well as an outline of the key deliberations and proposals generated in the course of the events held under the Project.

- The key points and important findings are underlined in the text.
- Recommendations for improving the effectiveness of investigation of ill-treatment and the level of compliance with the relevant procedural obligations under Article 3 of the ECHR are developed and formulated (in bold) on the basis of relevant arguments and deliberations, and are summarised at the end of the Chapters accordingly.

[9] The views expressed in this report are not those of the Council of Europe, but of its author. See also E. Svanidze, Effective investigation of ill-treatment. Guidelines on European standards, 2nd edition, Council of Europe, Strasbourg, 2013. E. Svanidze, Combating ill-treatment and impunity. 11 key questions and answers. 2nd edition, Council of Europe, Strasbourg, 2017.

Abbreviations

CAT	United Nations Committee against Torture
CCTV	Close Circuit Television (system)
CoEHRC	Human Rights Commissioner of the Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CCP	Criminal Procedure Code (Turkey)
ECHR	European Convention for the Protection on Human Rights and Fundamental Freedoms ("European Convention on Human Rights")
ECtHR	European Court of Human Rights
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
Istanbul Protocol	Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
MoI	Ministry of Interior
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
TCC	Criminal Code (Turkey)
UN	United Nations
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

1. Substantial Legislation Concerning Ill-Treatment

• Outline of the relevant international standards

1. The absolute prohibition of torture and inhuman or degrading treatment or punishment should be supported by an appropriate domestic legislative framework.[10] This corner-stone measure is one of the requirements comprising the obligation to prevent and combat ill-treatment spelled out in Articles 2 and 16 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

This requirement is furthered by the obligation of making the offence of torture punishable under criminal law in accordance with the definition of torture set in Article 1 of the UNCAT. The principle that torture should entail measures of criminal responsibility and punishment has been consequently endorsed by the ECtHR and CPT.[11] As to inhuman and degrading treatment and punishment, the states are expected to explicitly criminalize and apply respective sanctions for serious physical or psychological abuses and other forms of deliberate ill-treatment by law-enforcement and other government agents or those immediately attributable to them.[12]

Less serious violations of the prohibition should entail disciplinary, administrative or civil responsibility. No occurrence of ill-treatment should go unpunished.[13]

2. International human rights standards highlight the importance of an explicit criminalization and classification of criminal acts and other contraventions, which sets a responsibility for ill-treatment. They are essential for alerting everyone, including perpetrators, victims, and the public to the particular seriousness of ill-treatment and the need for appropriate punishment of it. This requirement aims at strengthening the deterrent effect of the prohibition itself, enhancing the ability of responsible officials to track the specific violations and enabling the public to monitor and, when required, challenge their acts or omissions.[14]

3. There have been comparatively recent developments in the ECtHR case law that have reinforced and advanced the requirements in issue. It has emphasized that the obligation to

[10] General Comment N2, CAT/C/GC/2, para.1.

[11] See *Bati and Others* v. *Turkey*, ECtHR judgment of 3 June 2004, applications nos. 33097/96 and 57834/00, paras 145-146; *Mikheev* v. *Russia*, ECtHR Judgment of 26 January 2006, application no. 77617/01, paras. 120 and 135; 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 27.

[12] 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 27; General Comment N2, CAT/C/GC/2, para. 10.

[13] See *Zelilof* v. *Greece*, ECtHR judgment of 24 May 2004, application no. 17060/03, para. 58; *Menesheva* v. *Russia*, ECtHR Judgment of 9 March 2006, application no. 59261/00, para. 68; 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 27.

[14] See General Comment N2, CAT/C/GC/2, para. 11; *Bekos and Koutropoulos* v. *Greece*, ECtHR judgment of 13 December 2005, application no. 15250/02, para. 54; CPT's Report on the visit to Albania carried out from 13 to 18 July 2003, CPT/Inf (2006) 22, para. 38.

combat impunity is an indispensable prerequisite of its prevention. An appropriate punishment in terms of both the adequacy of the sanction imposed and the specific classification of the wrongdoing as ill-treatment is indispensable in this regard. The ECtHR has spelled out that the existence of a relevant substantial criminal law framework and its appropriate application constitute part of the obligation to prevent ill-treatment. [15]

4. Thus, findings of serious ill-treatment should be classified in accordance with the specifically enacted legislation and lead to appropriate criminal, administrative, and disciplinary penalties provided by law, and which are proportionate to the gravity of the ill-treatment involved.

Moreover, amnesties, pardons, other measures of clemency or impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators, including full exemption from criminal or other responsibility due to favourable provisions of legislation on disclosure or repentance, frustrate the aims of effective investigation and combating impunity and should be avoided.[16]

• Formal prohibition and criminalization of ill-treatment in Turkey. Preventive effects.

5. The Turkish legislation provides for a formal prohibition of torture and other forms of ill-treatment. It is envisaged on different levels starting with the Constitution. Its Article 17 (paragraph 3) states:

> "No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity."[17]

Although its wording does not fully match the international formulations, including Article 5 of Universal Declaration of Human Rights, and the first sentence of Article 7 of the International Covenant on Civil and Political Rights, and Article 3 of the ECHR, it sufficiently features the elements of the prohibition. Therefore, the constitutional provision in issue could be considered as adequate.

6. Moreover, the Constitutional Court of the Republic of Turkey has, in a number of judgments, including in the cases of Tahir Canan[18], as well as Cezmi Demir and others,[19] specified that the

[15] Valeriu and Nicolae Rosca v. *Moldova*, judgment of 20 October 2009, paras. 71-75.
[16] General Comment N2, CAT/C/GC/2, para.5; *Enukidze and Girgvliani* v. *Georgia*, Judgment of 26 April 2011, application no. 25091/07, para. 274.
[17] The English translations of the provision under consideration differ with regard to the terms used. This Report operates with the text available on the web-site of the Constitutional Court of the Republic of Turkey. https://www.anayasa.gov.tr/en/legislation/turkish-constiution/
[18] The Constitutional Court, Tahir Canan, no 2012/969, dated 18.09.2013 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2012/969?BasvuruAdi=tahir+canan. The report operates with the

relevant acts prohibited in the Constitution correspond to Article 3 of ECHR. The latter judgment is one of its leading authorities regarding Article 17 of the Constitution and elaborates on the interrelation of the terms and the relevant elements of the prohibition of ill-treatment. In particular, it states:

> "Ill-treatment is graded and described in different concepts by the Constitution and the ECtHR considering the effect thereof on the person. Therefore, it is seen that there are some differences of intensity between the statements present in paragraph three of article 17 of the Constitution. In order to identify whether a certain treatment can be considered as "torture" or not, it is necessary to observe the difference between the concepts of "torment"[20] and "incompatible with human dignity" and torture as mentioned in the said paragraph. It is understood that this difference was introduced by the Constitution specifically in order to draw attention to the special situation in deliberate inhuman treatment which causes very grave and cruel pain and to do a sort of grading and that the said statements have a broader and different meaning than the elements of the crimes of "torture", "torment" and "insult" which are regulated by the Turkish Penal Code numbered 5237."[21]

While recapping the ECtHR case law concerning the severity of suffering and other indicators, the judgment under consideration highlights the specific purposes pertinent to the internationally recognized definition of torture (Article 1 of UNCAT).

In terms of the remaining components of the prohibition, the Constitutional Court follows the hierarchical construction according to which inhuman and degrading elements differ both in terms of the nature of suffering and its gravity. Accordingly, it suggests:

> "Inhuman treatment which does not extend to the level of "torture" but is premeditated, applied for hours within a long period of time and caused physical injury or intensive material or spiritual suffering can be defined as "torment". . ."[22]

> "It is possible to define lighter treatment that arouses feelings of fear, humiliation, grief and degradation in the aggrieved in a way to possibly humiliate and embarrass him or has a degrading

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English translation available on https://www.anayasa.gov.tr/en/leading-judgments/individual-application/cezmi-demir-and-others-application-nr-2013293-date-of-decision-1772014/

The report operates with the English translation available on https://www.anayasa.gov.tr/en/leading-judgments/individual-application/cezmi-demir-and-others-application-nr-2013293-date-of-decision-1772014/

[19] The Constitutional Court, Cezmi Demir and Others, no 2013/293, dated 17.07.2014, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2013/293?BasvuruAdi=cezmi+demir. The report operates with the English translation available on https://www.anayasa.gov.tr/en/leading-judgments/individual-application/cezmi-demir-and-others-application-nr-2013293-date-of-decision-1772014/

[20] The English translation of the judgment differs from the text of the Constitution available on the Constitutional Court of the Republic of Turkey. The term 'torment' used in the former is to be read as referring to the term 'mal-treatment' (as corresponding to ill-treatment) used in the latter.

[21] Supra note 18. Para. 84.

[22] Supra note 20. Para. 88.

quality which draws the aggrieved to act contrary to his own will and conscience as treatment or punishment that is "incompatible with human dignity . . ."[23]

It is to be noted that the Constitutional Court elaborates on this correlation for the purposes of its own jurisdiction. It has specified that '[w]hen a court case is being tried at courts of instance in relation to the claims of ill-treatment, the responsibility of penal law needs to be kept separate from the responsibility of the Constitution and of the international law.'[24] Nevertheless, its interpretation of the Turkish legal terminology is of importance for interpreting the corresponding articles and corpus delicti of current Criminal Code of the Republic of Turkey (TCC).

7. The TCC includes articles that specifically criminalize torture. In particular, Paragraph 1 of Article 94 introduces criminal responsibility for an act towards a person that is incompatible with human dignity, and which causes that person physical or mental suffering or affects the person's capacity to perceive or his ability to act in his own will or insults the person that is attributable to a public official (state agent) and accomplice(s). This crime is punishable by a considerable range of imprisonment, in particular for a term of three to twelve years.[25]

Paragraphs 2-5 of Article 94 of the TCC and Article 95 provide for the circumstances that require increasing of and aggravating the punishment, excluding its reduction in case of committing it by omission, as well as applicability of statute of limitations to these crimes. This provision has been introduced by the amendment from April 2013 and is in line with the expanding best practices. The exclusion of the applicability of the statute of limitation and the increased range of sanctions up to the aggravated life imprisonment could be considered as appropriate in terms of the (comparative) gravity of the crime of torture under the TCC.

8. According to the CAT's most recent concluding observations, it is considered as a deficiency that the outlined wording omits to specify the purpose(s) of the act in question, including intimidation, coercion or obtaining information or a confession from a person other than the person who was tortured.[26] At the same time, the Turkish stakeholders consider that by leaving the purposes out, Article 94 covers those specified in the UNCAT, as well as all other purposes and makes it more comprehensive in this regard. Although, subparagraph 2 of Article 1 of the UN Convention states that "this article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application", the purposes listed in the internationally recognised definition of torture are important for its differentiation from other forms of ill-treatment, and appropriate sanctioning, accordingly. Therefore, it could be **recommended that Article 94 of the TCC is amended so that it specifies the purposes**

[23] Supra note 20. Para. 89.
[24] Supra note 18. Para. 96.
[25] The Report is based (with some linguistic adjustments) on the English translation of the CC available on: http://legislationline.org/documents/action/popup/id/6872/previ
[26] Concluding observations on the fourth periodic reports of Turkey, CAT/C/TUR/CO/4, 2 June 2016, para.17.

included in the internationally recognised definition of torture. As discussed, the Constitutional Court of the Republic of Turkey has also highlighted the importance of the purpose(s) as an integral part of the international definition of torture.[27]

9. As far as the element of the gravity of suffering inherent in torture is concerned, it is to be noted that the Turkish judicial practice is being developed in line with the international, including the ECtHR, understanding, according to which all the characteristics contributing to the physical and mental consequences of the treatment concerned and their adverse effects are to be taken into account in their totality. Besides the Constitutional Court that rightly assesses the purpose, duration, physical and mental impact and other factors (as it was done in the Cezmi Demir judgment[28]), there are judgments of the courts that underpin this approach by using the term 'systematic'. In particular, the Court of Cassation, Criminal Chamber 8, in its judgment N2017/3721 has specified:

> "It is sufficient for ill-treatment to be committed on different days; in other words, for acts constituting torture to continue for a certain period without necessarily being committed on consecutive days. Wilful injury lasts a couple of minutes, threat with signs or words lasts one minute or less, sexual abuse lasts one or a couple of minutes (such as nipping and patting). In case of continuity of these acts; like going back and forth and slapping someone in the face, kicking at someone, swearing at someone every ten minutes, making someone stand on one foot, keep someone waiting with his/her face looking at the wall and hands up or on single foot with the face attached to the wall, frequently asking questions at night in order to prevent someone from falling asleep, getting angry and shouting, hitting, interrogating, constantly making someone listen to loud music, laying bare on concrete in cold, giving electricity, preventing someone from drinking water in a hot atmosphere, spraying water on someone bare or with clothes and watching so, preventing someone from relieving his/her toilet needs, and similar acts, and in case of these acts being **systematically** committed within a certain period without a momentary ill-treatment, crime of torture should be discussed."[29]

At the same time, the Round Tables and other events held under the Project, suggest that there is no sufficient and uniform comprehension by judges and prosecutors of these and other related specifics of the international and domestic legislative frameworks, including of the outlined advanced practice, that require targeted and continuous capacity building interventions for the members of judiciary and other legal professionals.[30]

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[27] See the preceding paragraph of this report.

[28] Supra note, 18. Para. 105.

[29] Court of Cassation, 8th Criminal Chamber, Merits No 2016/5680 on Reversal, Judgment No. 2017/3721, Letter of Notification No : 8 - 2014/380247- (Turkish: Yargıtay 8. Dairesi, Esas No. 2016/5680 Bozma Üzerine, Karar No. 2017/3721, Tebliğname No. : 8 - 2014/380247)

[30] These considerations have been addressed by the ToT and other training activities held under the Project.

10. The key remaining deficiency of the substantial (criminal law) legislation concerning the prohibition of ill-treatment is constituted by the lack of clarity in addressing (deliberate) inhuman or degrading treatment or punishment. The *corpus delicti* construed under Articles 94 and 95, and the entire TCC do not suggest a coherent framework that would specifically differentiate between torture and deliberate inhuman or degrading treatment and punishment. It was suggested that the former Turkish Criminal Code (Law N765) included "torture or cruel or inhuman or offensive treatment" in Article 243 and "maltreatment" in Article 245. In practice, however, no method had been developed that would suggest the difference between torture and other forms of ill-treatment. Reportedly, this and related considerations had affected the approach chosen under the current CC.

At the same time, there is an increasing trend that can be found in a number of comparatively recent judgments (predominantly of the Court of Cassation) suggesting that the word 'torture' used in the title and body of Articles 94 and 95 is to be read as comprising inhuman or degrading treatment as well. To put it differently, the term 'torture' is seen as corresponding to its more general meaning, extending over inhuman and degrading elements of the prohibition.

This view is reinforced by the wide range of punishment(s) set out in the articles concerned. The lower and upper limits of the sanctions are meant for guiding the judiciary in applying sanctions for inhuman or degrading treatment and torture respectively.

For example, in its judgment No. 2012/38227of 13.12.2012[31] that concerned extended, overnight questioning of the victims, who were detained for up to a week, as well as confined in premises for six more days, which involved 'keeping them up standing and not letting them sleep in order to weaken their willpower and force them to confess to the alleged offense', the 8th Criminal Chamber of the Court of Cassation has classified it under paras. 1-4 of Article 94 of the TCC and sentenced the defendant to 2 years and 6 months of imprisonment.

However, since the article in question and its relevant interpretation is not applied often, judicial authorities are not sufficiently aware of the situation.

Besides the instances from the judicial practice,[32] deliberations and conclusions of the round-tables and other events held under the Project, as well as the comments suggested by its national expert, have confirmed that serious (deliberate) ill-treatment as a recourse to physical force which has not been made strictly necessary by victim's own conduct or other forms of deliberate inhuman or degrading treatment in practice is still often seen and classified as an excess of power accompanied by acts of violence or infliction of relevant bodily injuries and so on. In particular, depending on the context or specifics of relevant acts, deliberate ill-treatment falling short of torture is classified and processed as intentional injury (Articles 86-87), threat (Article 106), deprivation of liberty (Article 109) and insult (Article 125), as well as exceeding the limits of

[31] Merit 2012/29994.

[32] See Constitutional Court judgement of Hamdiye ASLAN (Application No: 2013/2015), paras. 98- 126. HAMDIYE ASLAN APPLICATION (Application No: 2013/2015), dated 4/11/2015, O.G. date and issue: 22/12/2015-29570.

authorization for use of force (Article 256) or some other articles of the TCC. As discussed, this correlation has been addressed by the Constitutional Court of the Republic of Turkey.[33]

The outlined simplified and confusing terminology used in the articles under consideration has a limited potential for addressing instances and elements of ill-treatment that do not cause injuries or specific, immediately identifiable consequences, such as subjection to intense noise, deprivation of food, sleep[34] and many other methods comprising deliberate mental or physical suffering that goes beyond the minimum level of severity embraced by Article 3 of the ECHR. Furthermore, this approach creates considerable shortcomings in terms of filtering applicability of the statute of limitations, clemency or alleviating measures to crimes embracing other forms of ill-treatment (apart from torture).[35] Furthermore, this approach makes it difficult to streamline the reporting regulations (with regard to ill-treatment).[36] Under the international standards it is not sufficient that serious ill-treatment falling short of torture is punishable and perpetrators are held responsible under any of criminal law provisions. As outlined above, the international standards and considerations of general prevention and other requirements suggest that they are to be specifically (consistently) criminalized under distinct *corpus delicti*.[37] It is to be noted that the Committee of Ministers of the CoE within the framework of supervision of execution of the ECtHR judgments has recently specified the need to adhere to the standard set by the Constitutional Court of Turkey (that in its turn echoes the ECtHR case-law) regarding the characterisation of facts concerning crimes of torture and ill-treatment.[38] As suggested by the ongoing dialogue between the CoE Committee of Ministers and Turkish authorities, the proper characterization of relevant crimes (under Articles 94, 95 of the TCC) would exclude a possibility for suspending or postponement (deferment) of pronouncement of a decision.

Thus, it is advised to consider **amending the Criminal Code so that it explicitly covers and specifically criminalizes (spells out) the whole scope of serious forms of ill-treatment, i.e. deliberate inhuman or degrading treatment or punishment immediately attributable to the state (officials and representatives). While the first option is to be regarded as the most effective and straightforward, alternatively, the deficiency in issue could be remedied by developing a steady judicial practice.**

It would be necessary to supplement the legislative measures and/or advancement of the judicial practice by means of **capacity building of prosecutors and judges and other appropriate methodological or instructive inputs as to the scope of the prohibition of ill-treatment, differentiation between torture and inhuman and degrading treatment and punishment, so**

[33] See para. 6 of this Report above.

[34] *Ireland v UK*, *Ireland* v. *the United Kingdom*, Judgment of 18 January 1978, application no. 5310/71, p.p. 165-168.

35 See para. 15 below.

[36] See para 39 below.

[37] See paras.2-3 of this Report above.

[38] See CM/Notes/1243/H46-23.

that relevant crimes are classified under articles specifically providing for the criminal responsibility for deliberate ill-treatment.

11. In doing so, it could be appropriate to consider the options suggested by the most recent best practices of other jurisdictions. The formats for meeting the outlined international standards[39] as to the specific criminalization of serious ill-treatment, i.e. deliberate inhuman or degrading treatment immediately attributable to the state (its officials/agents) differ. In those jurisdictions that have amended their legislation in this regard, they range from incorporating them in one article with torture to specifying relevant *corpus delicti* in separate articles. The latter option is comparatively rare and involves nuanced formulation of relevant elements of the crime in issue. At the same time, the former option presupposes their differentiation in practice in line with the ECtHR case law and international human rights law in general. However, in principle, both approaches do address the standards and the choice depends on the preferred legislative techniques and practicalities of the application of the provisions.

The existing modalities can be illustrated by the following examples:

Croatia

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 104

A public official or other person who at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity inflicts on another severe pain or suffering, whether physical or mental, for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, shall be punished by imprisonment from one to ten years.

Czech Republic

Section 149 Torture and other Cruel and Inhumane Treatment

(1) Whoever causes bodily or mental suffering by means of torture or some other inhuman or cruel treatment to another person in connection to exercise of powers of a public authority, a local authority, a court, or another public authority, shall be sentenced to imprisonment for from six months to five years.

(2) An offender shall be sentenced to imprisonment for two to eight years, if he/she

a) commits an act referred to in Sub-section (1) as a public official,

b) commits such act against a witness, an expert or an interpreter because of performance of their duty,

[39] See paras. 2, 5, and 6 above.

c) commits such an act on another person for their true or presupposed race, belonging to an ethnical group, nationality, political beliefs, religion or because of his/her true or presupposed lack of religious faith. commits such act with at least two other persons, or

d) commits such an act repeatedly.

(3) An offender shall be sentenced to imprisonment for five to twelve years, if he/she:

a) commits the act referred to in Sub-section (1) against a pregnant woman,

b) commits such an act against a child under fifteen years of age,

c) commits such act in an especially cruel or agonising manner, or d) causes grievous bodily harm by such an act.

(4) An offender shall be sentenced to imprisonment for eight to eighteen years if he/she causes death by the act referred to in Sub-section (1).

(5) Preparation is criminal.

Hungary

Mistreatment in Official Proceedings Section 301

(1) Any public official who physically abuses another person during his official proceedings is guilty of a felony punishable by imprisonment between one to five years.

(2) The penalty shall be imprisonment between two to eight years if the criminal offense defined in Subsection (1) is committed in a gang.

(3) Any person who engages in preparations for mistreatment in official proceedings is guilty of a misdemeanour punishable by imprisonment not exceeding one year.

(4) The penalty may be reduced without limitation if the perpetrator unveils the circumstances of the criminal offense defined in Subsection (1) to the authorities before the indictment is filed.

Mistreatment in the Proceedings of Persons Entrusted with Public Functions Section 302

(1) Any person entrusted with public functions who physically abuses another person in the process of carrying out his public function is guilty of a felony punishable by imprisonment between one to five years. 104

(2) The penalty shall be imprisonment between two to eight years if the criminal offense defined in Subsection (1) is committed in a gang.

(3) Any person who engages in preparations for mistreatment in the proceedings of persons entrusted with public functions is guilty of a misdemeanour punishable by imprisonment not exceeding one year.

(4) The penalty may be reduced without limitation if the perpetrator unveils the circumstances of the criminal offense defined in Subsection (2) to the authorities before the indictment is filed.

Third Degree Section 303

(1) Any public official who attempts by force or threat of force, or by other similar means, to coerce another person into giving information or making a statement, or to withhold information, is guilty of a felony punishable by imprisonment between one to five years.

(2) The penalty shall be imprisonment between two to eight years if the criminal offense defined in Subsection (1) is committed in a gang.

(3) Any person who engages in preparations for the interrogation of a person for the coercion of information by force is guilty of misdemeanour punishable by imprisonment not exceeding two years.

(4) The penalty may be reduced without limitation if the perpetrator unveils the circumstances of the criminal offense defined in Subsection (2) to the authorities before the indictment is filed.

Spain

Article 175

The authority or public officer, who abusing his office and outside the cases considered in the preceding Article, attacks the moral integrity of a person, shall be punished with a sentence of imprisonment of two to four years if the attack is serious and of six months to two years imprisonment if it is not.

Georgia[40]

Article 144[3] – Degrading or inhuman treatment

1. Degrading or coercing a person, or exposing a person to inhuman, degrading and humiliating conditions as a result of which he/she suffers severe physical and psychological pains,
-
shall be punished by restriction of liberty for up to three years or by imprisonment for a term of two to five years.

2. The same act committed:

a) by an official or a person holding equivalent position;

[40] Georgia has opted for spelling out a separate article on threats of torture.
Article 144[2] - Threat of torture "The threat of the creation of the conditions, or of the application of the treatment or punishment specified in Article 144 of this Law, which is carried out for the same purpose, - shall be punished by a fine or restriction of liberty for up to two years".

b) by abusing the official position;

c) repeatedly;

d) against two or more persons;

e) by more than one person;

f) by violating the equality of persons, or due to their race, colour, language, sex, religion, belief, political or other views, national, ethnic, social belonging, origin, place of residence, material status or title;

g) knowingly by the offender against a pregnant woman, a minor, a person detained or otherwise deprived of freedom, a helpless person or a person dependent on the offender materially or otherwise;

h) by contract;

i) for the purpose of taking a hostage,

- shall be punished by imprisonment for a term of four to six years, with or without deprivation of the right to hold an official position or to carry out a particular activity for up to five years.

Note: The period of limitation provided for by Article 71 of this Code shall not apply to the acts prescribe d under Articles 144[1] -144[3] of the same Code.

12. There are recent examples of applying inadequate sanctions to those found guilty of torture and other deliberate ill-treatment that concern judgments dating back to 2013.[41] Taking into account that there were certain concerns voiced in this regard during the events held under the Project, it would be desirable **to supplement the legislative or practice-related measures by further awareness raising activities of judges and prosecutors specifically addressing this issue**.

13. There have not been recent amnesties or information of using pardons that would concern individuals convicted for ill-treatment.

14. As to regular legal grounds of alleviating criminal responsibility or reduction of punishment envisaged by the TCC, they are inapplicable to the crime of torture (Articles 94, 95 of the TCC). In particular, Article 62 "extenuating circumstances" of the TCC is a general provision and does not envisage any reason that requires remission in any case. It is an arrangement allowing a judge to remit at the rate of 1/6 of the concrete penalty determined within the framework of Article 61 of TCC by considering the perpetrator's condition in the present case. Because of the lower limit of the imprisonment foreseen for the crime of torture, it does not allow application of the measures of postponement of filing a criminal case (Article 171 of TCC) and deferment of the

[41] Judgement of Hamdiye ASLAN (Application No: 2013/2015), para. 126. HAMDIYE ASLAN APPLICATION (Application No: 2013/2015), dated 4/11/2015, O.G. date and issue: 22/12/2015-29570 It is to be mentioned that the judgment concerned torture committed in early 2000s.

announcement of the judgement delivered as a result of the criminal procedure (Article 231 of TCC).

15. At the same time, these measures are applicable to other forms of ill-treatment that do not constitute torture, e.g. deliberate injury, insult, or threat. It is possible to consider application of such measures (conversion into an alternate sanction, stay of the execution of the imprisonment, deferment of the announcement of the judgement, etc.) as an alternative to imprisonment. As discussed, the Project activities and findings, including the specific points made at the Round Tables by the representatives of the key stakeholders, have suggested a need to take relevant legislative and other steps that would address this issue accordingly. It is indicative in this regard that the Round Table that specifically reviewed the substantial legislation suggested that there is no provision that would prevent a prosecution under Article 256 of the TCC, or other *corpus delicti* used for classification in law of deliberate inhuman or degrading treatment, from being dropped due to the statute of limitation. The same considerations were found to be pertinent for the deferment of pronouncing a sentence and other legal grounds for alleviating responsibility or punishment. The majority of the representatives of the stakeholders suggested to proceed in this regard by means of targeted exclusion of such possibilities to specific (ill-treatment-related) circumstances. For example, it was suggested that while injuries that resulted from the physical intervention of public officials are processed on the basis of Articles 86 and 87 of the TCC (as well as other corpus delicti used for classification in law of deliberate ill-treatment other than torture[42]) and deferral of announcement of a judgement is awarded on the basis of the lower limit, it could be appropriate to exclude the latter for acts of public officials, in spite of the wide range of punishment provided for by these articles. Nevertheless, this solution would not be comprehensive and it omits other considerations that are more appropriately addressed **by the proposed introduction of relevant specific** *corpus delicti* **for deliberate ill-treatment falling short of torture immediately attributable to the state (officials or its other representatives) as demonstrated by the practice of other jurisdictions.[43] This could be combined with appropriate restrictions as to the applicability of legal grounds of alleviating criminal responsibility or reduction of punishment.**

16. It is to be noted that the prohibition of ill-treatment is specifically provided for by the Criminal Procedural Code of Turkey. Article 148 prohibits its use against the suspect or accused, who shall not be subjected to physical or mental interventions such as maltreatment, torture, administration of drugs, exhaustion, deception, use of force or threat or use of certain tools in a manner preventing his submissions from being based on his own free will. The statements taken by means of prohibited procedures (including torture and ill-treatment), shall not be used as evidence even if they were given with consent, and statements taken by law-enforcement officers in the absence of a lawyer shall not be taken as a basis for judgment, unless they are confirmed

[42] See above para. 10 of this Report.
[43] *Ibid.*

by the suspect or accused before a judge or court. 206/2(a) of the CCP further specifies that if evidence has been unlawfully obtained, it will be denied. Moreover, according to para. (2) of Article 217 of the CCP, the charged crime may be proven by using all kinds of legally obtained evidence. It echoes the Constitutional provision introduced in its Article 38 in October 3, 2001 by Act No. 4709 specifying that findings obtained through illegal methods shall not be considered evidence. These legal safeguards are in line with the standards established under the case-law of the ECtHR, particularly in relation to Article 6 of the ECHR.

17. There have been numerous declarations at the highest political level that there will be "zero tolerance" towards torture and other forms of ill-treatment in Turkey. [44] At the same time, **it would be necessary to ensure that this kind of unequivocal formal statements further underpin the legislation adopted to prevent and punish acts of ill-treatment.**

18. The most recent round of supervision of the execution of the ECtHR judgment in Bati and others group v. Turkey was concerned with the substantial disciplinary framework, which is seen as considerably unchanged. [45] As reported during the Round Tables held under the Project, the Council of State made a change in its jurisprudence and by stating that the term for filing a case or applying to authorities is one year following the date on which the act has been identified and in any event five years, it now makes a broad interpretation of the beginning of these terms. It has been observed that for situations where the administrative law-related dimension of the act is identified following the finalization of related criminal procedures, the jurisprudence has evolved in a manner that the period of one-year statute of limitations should start from that moment. It has been recommended, however, that this should not be left to precedents and it is to be made clear through legal amendments. It would be necessary **to regulate the disciplinary (administrative) framework with regard to its synchronization with the criminal procedure, tackling its findings, including by means of adjustment of statutes of limitations.** Moreover, the parallel or supplementary character of disciplinary responsibility for ill-treatment is to be specifically extended and linked to **a failure to ensure safeguards and other acts or omissions of this kind and classified as ill-treatment-related disciplinary infringements and handled accordingly.**

[44] Republic of Turkey, Ministry of Justice, Department of Human Rights, The Turkish Legislation And Practice as Regards Torture and Ill-Treatment, 29 December 2017, available at https://web.archive.org/web/20171229053127/http://www.humanrights.justice.gov.tr/announcement/2017/december/the-turkish-legislation.html

[45] The institutional novelties of handling relevant procedures are addressed below. See relevant chapter of this Report below.

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CONCLUSION

In order to ensure the enhancement of the formal prohibition and criminalization of ill-treatment, preventive effects of the legislation and practice, the following is recommended:

- **Amend Article 94 of the TCC so that it specifies the purposes included in the internationally recognised definition of torture;**
- **Amend the Criminal Code so that it explicitly covers and specifically criminalizes (spells out) the whole scope of serious forms of ill-treatment, i.e. introduce specific *corpus delicti* for deliberate inhuman or degrading treatment or punishment immediately attributable to officials or other state representatives; while this option is to be regarded as the most effective and straightforward, alternatively, the deficiency in issue could be remedied by developing a steady judicial practice.**
- **Extend or introduce appropriate restrictions as to the applicability of legal grounds alleviating criminal responsibility or reduction of punishment for relevant crimes (deliberate inhuman or degrading treatment or punishment immediately attributable to officials or other state representatives);**
- **Supplement the legislative measures and advancement of the judicial practice by raising the awareness of prosecutors and judges and other appropriate methodological or instructive inputs, including with regard to:**
  - **The scope of the prohibition of ill-treatment, including under the case-law of the Constitutional Court of the Republic of Turkey and ECtHR as to the differentiation between torture (inherent purposes) and inhuman and degrading treatment and punishment, so that relevant crimes are classified under articles specifically providing for the criminal responsibility for deliberate ill-treatment;**
  - **The adequacy of sanctioning, sentencing policies of those found guilty of torture and other deliberate ill-treatment.**
- **Ensure that unequivocal formal statements of zero tolerance further underpin the legislation adopted to prevent and punish acts of ill-treatment.**
- **Advance the disciplinary (administrative) legislation so as to:**

- **Reinforce parallel or supplementary (to the criminal) disciplinary responsibility for ill-treatment-related disciplinary infringements, including a failure to ensure safeguards and other acts or omissions of this kind, and ensure that they are classified and handled accordingly;**
- **Regulate the disciplinary (administrative) framework with regard to its synchronization with the criminal procedure, tackling its findings, including by means of adjustment of statutes of limitations.**

2. Safeguards against Ill-Treatment and Torture

2.1. Legal Safeguards against Ill-treatment and Torture

- **Outline of the relevant international standards**

19. The prohibition of torture, inhuman or degrading treatment or punishment expands above and beyond a delineation of their characteristics. There is an important set of safeguards that should prevent ill treatment in general,[46] as well as to serve as effective avenues for triggering investigations and assembling potential evidence of ill-treatment.

The key role is attributed in this regard to the fundamental legal safeguards that include the following rights to:

- Notify the detention to a relative or other third party of the detainee's choice;[47]
- Have access to a lawyer, which should include a scheme of effective legal aid for persons who are not in a position to pay for it, the right to talk to the lawyer in private and benefit from his presence at interrogations;[48]
- Have access to a doctor, which in addition to any medical examination carried out by a doctor called by the police authorities should embrace the right to be examined by a doctor of the detainee's own choice and forensic doctors; all medical examinations should be conducted out of the hearing and - unless the doctor expressly requests otherwise in a given case - out of the sight of police or other non-medical staff; their results should be properly recorded and available to the detainee and lawyer;[49]
- Be explicitly informed about the rights concerned in a language understood by the detainee and provided with a form setting them straightforwardly out; detainees should be asked to sign a statement attesting that they have been informed of their rights.[50]

[46] 6th General Report on the CPT's activities, CPT/Inf (96) 21, para. 15. See also 2nd General Report on the CPT's activities, CPT/Inf (92) 3, para. 36.

[47] For foreign citizens it includes a notification of consulates.

[48] It should applicable to persons required to stay with the police regardless of their status. 12th General Report on the CPT's activities, CPT/Inf (2002) 15, para. 41. See also 21st General Report of the CPT CPT/Inf(2011)28-part1.

[49]See *Mammadov (Jalaloglu)* v. *Azerbaijan*, ECtHR judgment of 11 January 2007, application no. 34445/04, para. 74. *Mehmet Eren* v. *Turkey*, ECtHR judgment of 6 April 2004, application no. 21689/93, para. 355. See also the CPT's Report on the visit to Albania carried out from 23 May to 3 June 2005, CPT/Inf (2006) 24, para. 49; CPT's Report on the visit to Georgia carried out from 6 to 18 May 2001, CPT/Inf (2002) 14, para. 30; para. 123 of the Istanbul Protocol.

[50] See 12th General Report on the CPT's activities, CPT/Inf (2002) 15, para. 44.

These rights should apply as from the outset of deprivation of liberty.[51] Even short delays in providing access to a lawyer or doctor or unjustified and prolonged postponement of notification of custody can fall short of the requirements.[52]

In order to protect the legitimate interests of the police investigation it may exceptionally be necessary to delay for a certain period (a number of hours) a detained person's access to a lawyer of his choice or to apply analogous exceptions to the right to have the fact of detention notified to a third party. Such exceptions should be clearly defined and subject to strict limitations and accompanied by further appropriate guarantees (e.g. any delay is to be recorded in writing with the reasons, therefore, and to require the approval of a senior police officer unconnected with the case, judge or a prosecutor). For the same reasons, it may be necessary that the examination of a person in custody by a doctor of his own choice is carried out in the presence of the doctor appointed by the competent authority.[53]

- **Turkish legal framework providing the safeguards**

20. The international monitoring mechanisms have confirmed and commended earlier legal and actual developments in Turkey that addressed the recommendations and adverse findings concerning the safeguards against ill-treatment.[54] They ranged from constitutional amendments (e.g. notification of custody has been specifically provided for in its Article 19 since 2001) to detailed regulations supported by organizational measures that have introduced even higher domestic standards (e.g. the right of detainees of access to a doctor has been supplemented by medical screening on their release).

21. At the same time, the CPT and other international monitoring mechanisms[55], as well as concerns voiced by some representatives of the Bar associations and civil society engaged in the discussions in the course of the events held under the Project, have been warning about the delays and other exceptional restrictions on applicability of the safeguards against ill-treatment. Some of them, in particular in terms of confidentiality of access to a lawyer, reportedly have remained as part of practices introduced during the state of emergency period.

- **Notification of custody**

22. As discussed, the safeguard in issue is envisaged by Article 19 of the Constitution that specifically operates with the word 'immediately'. Although the scope of the persons to be

[51] See 12th General Report on the CPT's activities, CPT/Inf (2002) 15, para. 41CPT's Report on the visit to France carried out from 14 to 26 May 2000, CPT/Inf (2001) 10, para. 35.
[52]See *Mammadov (Jalaloglu)* v. *Azerbaijan*, ECtHR judgment of 11 January 2007, application no. 34445/04, para. 74; *Yüksel* v. *Turkey*, ECtHR judgment of 20 July 2004, application no. 40154/98, para. 27.
[53]See *Mammadov (Jalaloglu)* v. *Azerbaijan*, ECtHR judgment of 11 January 2007, application no. 34445/04, para. 74; *Yüksel* v. *Turkey*, ECtHR judgment of 20 July 2004, application no. 40154/98, para. 27.
[54] See CPT's Report on the visit to Turkey carried out from 9 to 21 June 2013, CPT/Inf (2015) 6, para. 23.
[55] *Ibid.*

notified is outlined as 'the relatives', the supporting framework extends it to trusted persons. In particular, Article 95.1 of the CCP advances it and specifies that custody shall be notified to one of the relatives, or an individual designated by the person who is arrested or taken into custody, by the order of the public prosecutor, without delay. It is welcomed that the limitation incorporated in the anti-terrorist context (Article 10 of the relevant Law) providing for a limitation of notification of one relative only has been lifted.

23. At the same time, CPT findings from a 2013 visit, and information as to the adverse effects of the emergency measures on fundamental safeguards against torture and ill-treatment, suggest that that the exercise of the right of notification of custody is sometimes unofficially delayed for several hours or, on occasion, even more.[56] This **would require**:

- **further continuous capacity building (training) efforts of law-enforcement, custodial staff, and prosecutors, as to the notification of custody requirements;**
- **ensuring systemic (targeted) attention of domestic monitoring and disciplinary, where applicable, mechanisms to violations of the safeguard in issue.**

- **Access to a lawyer**

24. The right of access to a lawyer is regulated in the CCP (Articles 149, 150 and 154) and further normative acts, in particular Sections 20 and 21 of the Regulation on Arrest, Custody and Statement-Taking. These Articles provide detained persons with the right to communicate and meet a lawyer in private and to have a lawyer present during questioning by law enforcement officials. It is formally guaranteed from the outset of custody. Indigent persons are entitled to free legal aid by a lawyer appointed ex officio (through the Bar Association). Further, juveniles can only be questioned by law enforcement officials in the presence of a lawyer and statements can only be taken by a public prosecutor. In addition, the appointment of a lawyer is obligatory in cases where a detained person is suspected of having committed a criminal offence punishable by a maximum of at least five years' imprisonment. Statements taken by law enforcement officials in the absence of a lawyer cannot constitute the basis for a judgment unless they are confirmed by the suspect or accused before the court.

25. The Turkish authorities have undertaken a number of measures to secure the safeguard in issue. There are efforts undertaken to provide lawyers and their detained clients with adequate facilities to meet in private.

26. However, according to Article 154/2 of the CCP of Turkey, persons who are suspected of having committed offences, which are defined in the fourth, fifth, sixth and seventh parts of the fourth chapter of the second volume of the TCC or fall within the scope of Anti-Terror Law, and

[56] CPT's Report on the visit to Turkey carried out from 9 to 21 June 2013, CPT/Inf (2015) 6, para. 23.

the offences of production and trade of narcotics or psychotropic substances, may be denied access to a lawyer during the initial 24 hours of custody by the decision of a judge after the request of a public prosecutor. However, no statement shall be taken within this time period.

These provisions have been addressed in a number of the CPT visit reports, where it indicated some misgivings in this regard. In its 2013 visit report, it has stressed that while the norm prohibits taking formal statements, in practice sometimes there is an unofficial questioning of suspects (without taking of a formal statement) during which a ban on lawyers' visits has been imposed on them and it does not mean that the risk of intimidation and ill-treatment no longer exists. The majority of the allegations of ill-treatment received during this visit from persons suspected of terrorism-related offences related to the moment of apprehension or the period immediately thereafter.[57] The safeguard, which, as discussed, constitutes the core of the CPT standards detailed in its 12th and 21st General Reports on the CPT Activities,[58] is to be differentiated from the related guarantee under the right to a fair trial.[59] Thus, the legal framework is not sufficiently clear in terms of specifying that both formal (taking a statement) and informal questioning, whilst still obtaining information from the detainees, are subject to this exception.

27. There have been further legislative developments that incorporated some of the limitations introduced under the state of emergency into the legislation, which require careful application and further enhancement in line with CPT and fair trial standards. The amendments to Article 59 of Law 5275 on Execution of Punishments and Security Measures,[60] including by virtue of its paragraph 11 extended over the detainees and remand prisoners, provide for certain restrictions

[57] See CPT's Report on the visit to Turkey carried out from 9 to 21 June 2013, CPT/Inf (2015) 6, para. 27.

[58] Supra note 50. It is to be noted that the 21st General Report provides in this regard:

"22. The CPT fully recognises that it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the investigation should be organised. It is perfectly feasible to make satisfactory arrangements in advance for this type of situation, in consultation with the local Bar Association or Law Society.

23. . . Once it has been accepted that exceptionally the lawyer in question may not be a lawyer chosen by the detained person but instead a replacement lawyer chosen following a procedure agreed upon in advance, the CPT fails to see any need for derogations to the confidentiality of meetings between the lawyer and the person concerned."

[59] When combined with the privilege against self-incrimination and implied coercion/ill-treatment, the ECtHR is following the same pattern and suggests that an 'early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination'. In case-specific circumstances it is ready to find violations of Article 6 of the ECHR. *Pavlenko* v. *Russia*, Judgment of 1 April 2010, application no. 42371/02, para. 101. See also *Simeonovi* v. *Bulgaria*, [GC] judgement of 12 May 2017, application no. 21980/04, paras. 112-143.

[60] Amended by Article 6 of the Decree Law no. 676 of 3/10/2016; adopted by Article 6 of the Law no. 7070 of 1/2/2018-7070/6.

between lawyer and detainee falling under the Law on Fight against Terror of 3713[61]. In particular, conversation could be subject of recording (audio or video) for the period of three months upon the request of the Public Prosecutor and the decision of the judge of execution if there is allegation that some information or encoded message in relation to terrorist organization are delivered during meetings between lawyer and detainee. An officer could be present in order to observe the conversation between the sentenced person and the lawyer. Copies of documents given by the sentenced person to the lawyer vice versa may be made, and files and records taken regarding their conversations could be seized, whilst the day and time could be limited. Those restrictions should be reasoned in writing and communicated to parties before the meeting. The maximum period of limitation/prohibition of communication with a lawyer is six months upon the request of the Office of Chief Public Prosecutor by the judge of execution. The decision of the prohibition shall be immediately notified to the detained/sentenced person and to the relevant bar association in order to assign a new lawyer.

It is to be noted that in the discussions with the representatives of the Bar associations within the framework of the Project, they indicated that in their experience they have seen excessive application of these restrictions, at least in some specific prison establishments.

28. In view of the outlined particularities of the safeguard in issue, relevant CPT standards and its importance for securing effective investigation of ill-treatment (procedural limb of Article 3 of the ECHR), as well as in order to ensure compatibility of the nuanced conditions for limitations as to access to a lawyer with the guarantee concerned, **it would be feasible to:**

- **Provide the stakeholders concerned with further methodological, regulatory framework addressing the limitations on access to a lawyer in the details that would prevent their excessive application;**

- **Carry out training and other capacity building activities, in particular in terms of specifying that the exceptional restriction of an access to a lawyer comprises a ban on both formal (taking a statement) and informal questioning, obtaining information under Article 154/2 of the CCP, as well as other CPT standards and related guarantees, specifically developed under the ECtHR case law in terms of confidentiality of access to a lawyer.**

- **Secure systemic (targeted) attention of domestic monitoring and disciplinary, where applicable, mechanisms to violations of the safeguard in issue.**

- **Access to a doctor**

[61] This Law dated from 12/4/1991 and these restrictions concern crimes defined in the Fourth, Fifth, Sixth and Seventh Chapters of the Fourth Part of the Second Book and in Article 220 of the Turkish Penal Code.

29. Turkey has introduced a more comprehensive scheme of medical screening in comparison to the minimum international standards. According to Article 99 of the Law no. 5271 and Article 9 of the Regulation on Arrest, Custody and Statement-Taking, it comprises mandatory medical examinations of persons detained by law enforcement agencies at the outset and end of police custody, and at the time of any extension of a custody period or transfer. The latter, as well as the instructions of the ministry of internal affairs, specify that "it is essential for the doctor and the person being examined to be left alone and that the examination is carried out within the framework of a doctor-patient relationship". Moreover, it is required that "two copies shall be sent to the relevant public prosecutor's office via the fastest way by the relevant issuing health institution, in a closed and sealed envelope. Detainees whose health conditions deteriorate due to any reason and those whose health condition raises doubts shall be immediately examined by a physician and, if necessary, treated. It shall be ensured that those with chronic illnesses are examined and treated by an official physician, under the supervision of their own physicians, if they so desire. Medical examinations, checks and treatments shall be conducted by a forensic medical institution or official health institution. Moreover, it specifies that in case of a doctor coming across torture as stipulated in Article 94 of the Turkish Criminal Code No. 5237, aggravated torture on account of its consequences as stipulated in Article 95, or any kind of evidence that crimes of torment have been committed as stipulated in Article 96 during examination, s/he shall immediately inform the Public Prosecutor. In this circumstance, action shall be taken in accordance with articles 7 and 8 of the Regulation on Physical Examination, Genetic Examinations and Physical Identification in Criminal Procedures.

However, it is to be noted that due to the above-mentioned inconsistency of the classification of ill-treatment other than torture,[62] these instructions do not comprehensively cover allegations of inhuman or degrading treatment or punishment. The deliberations and conclusions of the Round Tables and other events held under the Project repeatedly suggested the need to develop and clarify the reporting obligations of medical professionals in this regard.

30. In addition to the concerns regarding the limitation of access to a doctor of one's own choosing and 'chronic illnesses', and in spite of the detailed regulations, repeated CPT recommendations and a series of earlier ECtHR judgments,[63] there are deficiencies as to their meticulous implementation in practice. A number of judgments of the Constitutional court have identified inadequacies in the practice of medical screening. Thus, in Cihan Koçak Judgment (App. No. 2014/12302, 21/9/2017) it was found that the inmate, who was subjected to ill-

[62] See paras. 10-11 above.
[63] *Salmanoğlu and Polattaş* v. *Turkey*, ECtHR judgment of 11 March 2009, application N 15828/03, paras. 76-98, with further references.

treatment, including by means of prolonged handcuffing, was medically examined after a delay of 17 days.[64]

The discussions in the Working Group organized under the project, as well as the conclusions reached at the Round Tables, highlighted that the same findings are being made by the appeal and other courts of general jurisdiction. They concern: low quality of medical records, delays of medical examination(s)/screening, a shortage of properly equipped rooms for initial medical examinations, occasional presence of non-medical staff and a lack of training of the stakeholders. Furthermore, there is a lack of sufficiently clear regulations and effective practical arrangements that secure immediate and automatic engagement of forensic doctors with regard to allegations, visible injuries and other indications of ill-treatment.

In the most recent public report on its visit to Turkey, the CPT stressed that law enforcement officials continued to be present during examinations in most cases (with the person concerned having no opportunity to speak with the doctor in private). Actual physical examination of a detained person was often performed by doctors in a perfunctory manner. Not all hospital doctors concerned were aware of the aforementioned legal requirement. In several police establishments visited, the delegation was informed that such medical reports were usually given by doctors in a closed and sealed envelope to the escorting police officer and the envelope was then forwarded to the competent prosecutor by the police. On several occasions, escorting police officers even received such reports openly.[65]

31. In the discussions within the Working Group tasked with processing this report and Round Tables held under this Project, the Turkish counterparts demonstrated considerable resistance with regard to accepting the standard on the access to a doctor of the detainee's own choosing. This required a detailed explanation of the nature of the CPT standards in this regard,[66] including in terms of carrying it out at the detained person's own expense and arrangements.

32. The outlined shortcomings would merit **further enhancement of:**

- **The legislative framework in terms of facilitating timely access to a medical professional, including of the detainee's own choosing, as well as forensic doctors;**

(*Cihan Koçak*, B. No: 2014/12302, 21/9/2017, §. Para.80/ .

[65] CPT's Report on the visit to Turkey carried out from 9 to 21 June 2013, CPT/Inf (2015) 6, para. 27.

[66] Including the following para. from 12th General Report on the CPT's activities, CPT/Inf (2002) 15:

"40. As from the outset of its activities, the CPT has advocated a trinity of rights for persons detained by the police: the rights of access to a lawyer and to a doctor and the right to have the fact of one's detention notified to a relative or another third party of one's choice. In many States, steps have been taken to introduce or reinforce these rights, in the light of the CPT's recommendations. More specifically, the right of access to a lawyer during police custody is now widely recognised in countries visited by the CPT; in those few countries where the right does not yet exist, plans are afoot to introduce it."

- **Necessary infrastructure and conditions for confidential and otherwise appropriate medical screening;**

- **Continued (including joint) training of medical professionals and law enforcement staff on the consistent application of the safeguard, in particular, in terms of accurate and appropriate documentation and reporting of indications of all forms of ill-treatment;**

- **Written instructions for medical professionals to follow the Istanbul Protocol and confidentiality of the medical reports. Similar instructions should be made for law-enforcement officers;**

- **Systemic (targeted) monitoring at national level regarding violations of the safeguard in issue[67]and effective disciplinary mechanisms.**

- **Informing detainees of their rights**

33. The legal framework regarding informing detainees of their rights is set up by the-Regulation on Arrest, Custody and Questioning and Suspects Rights Form (SRF), as reproduced in its Annex A, although this lacks information about access to a doctor.

In view of the aforementioned considerations, it is recommended **that steps should be taken to ensure that a form enumerating the rights of persons deprived of their liberty by the police includes information on the right of access to a doctor.**

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CONCLUSION

To ensure further enhancement of the applicability of the safeguards it would be necessary to:

- **Undertake further capacity building (training) of law-enforcement, custodial staff, as well as prosecutors, as to the notification of custody; access to a lawyer and medical screening requirements;**
- **Systemic (targeted) monitoring at national level regarding violations of the safeguard in issue and effective disciplinary mechanisms**
- **With regard to access to a lawyer, these efforts should be supplemented by:**

[67] See the recommendation(s) suggested in para. 18 of this Report, as well as relevant ones recapitulated in the conclusions to its preceding section.

- **Providing the stakeholders concerned with detailed methodological, regulatory framework addressing the limitations to it so that their excessive application is prevented;**
- **A focus on the exceptional restriction of access to a lawyer that comprises a ban on both formal (taking a statement) and so called 'informal questioning', obtaining information under Article 154/2 of the CCP, as well as the CPT standards and related guarantees, specifically developed under the ECtHR case law in terms of its confidentiality;**

➢ **With regard to access to a doctor, these efforts should be supplemented by the enhancement of:**

- **The legislative framework in terms facilitating timely access to a medical professional, including one of the detainees' own choosing, as well as forensic doctors;**
- **The necessary infrastructure and conditions for confidential and otherwise appropriate medical screening;**
- **The consistent application of the safeguards, in particular, in terms of accurate and appropriate documentation and the reporting of indications of all forms of ill-treatment;**
- **The form enumerating the rights of persons deprived of their liberty by the police (and other law-enforcement agencies) so that it includes relevant information on the right of access to a doctor.**

2.2. Other safeguards against Ill-treatment and torture

- **Outline of the relevant international standards**

34. In addition to the legal safeguards, international standards envisage a set of further measures that prevent ill-treatment by deterring it and facilitating its investigation. The range of these measures includes the following elements:

- Keeping comprehensive and accurate records that provide information on all aspects of custody and action taken regarding inmates (specifying when they were deprived of liberty; the reasons for this; when they were informed of their rights; signs of injury,

mental illness, etc.).[68] The absence of custody registers, or their deficiencies, diminishes the prospects of investigation and can lead to its inadequacy;[69]

- Prosecutors and judges involved in the early stages of criminal or other procedures leading to the deprivation of liberty are obliged to take action in response to allegations of ill-treatment of detainees brought before them. Even in the absence of an express complaint, they must react to other indicia (e.g. visible injuries; a person's general appearance or demeanour) that ill-treatment may have occurred;[70]

- Public officials (police officers, prison directors, etc.) are formally required to notify the relevant authorities immediately whenever they become aware of any information indicative of ill-treatment;[71]

- Adequate and confidential screening on admission to prisons followed by a systematic recording of allegations and injuries of newly arrived prisoners, if any, and the transmission of information to the relevant authorities, when appropriate;[72]

- Legally ensured and practically available opportunities for communicating allegations of ill-treatment; sending without delay uncensored written correspondence to the competent authorities and designated bodies, as well as the secure and confidential access of detainees to superior officers and governmental institutions, judicial or prosecutorial authorities, and specialized complaints bodies, and inspection and monitoring mechanisms on domestic and international levels.[73]

- **Legal framework and practice in Turkish context**

Record-keeping

[68] 2nd General Report on the CPT's activities, CPT/Inf (92) 3, para. 41.

[69] See *Khadisov and Tsechoyev* v. *Russia*, ECtHR judgment of 5 February 2009, application no. 21519/02, para. 148; *Menesheva* v. *Russia*, ECtHR Judgment of 9 March 2006, application no. 59261/00, para. 87.

[70] See 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 28; *Krastanov* v. *Bulgaria*, ECtHR judgment of 30 September 2004, application no. 50222/99, para. 99.

[71] See 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 27; *Ahmet Özkan and Others* v. *Turkey*, ECtHR judgment of 6 April 2004, application no. 21689/93, para. 359.

[72] 23rd General Report of the CPT's activities, CPT/Inf(2013)29-part, para, 23. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), para. 73.

[73] See *Niedbala* v. *Poland*, ECtHR judgment of 4 July 2000, application no. 27915/95, para. 81; 27th General Report on the CPT's activities, CPT/Inf(2018)4-part; Opinion of the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, concerning independent and effective determination of complaints against the police, ommDH(2009)4, para. 46.

35. The advancement of record-keeping, including within the framework of general measures for execution of ECtHR judgements, concerns Article 96 of the CCP; Article 26 of the Regulation on Apprehension, Police Custody and Interrogation and Circular (No.3) issued by the Minister of Justice on 01 January 2006 regarding monitoring of custody records and detention premises by public prosecutors.[74] The relevant set of regulations has been updated by replacing the latter by a new Circular No 148 on 21.10.2011.

36. Moreover, the system of custody records maintained at police and other law-enforcement premises, and custody centres in Turkey, is being largely supplemented by CCTV and other video recording systems.

However, there are no regulations on the use of alternative (additional) means of record-keeping for the purposes of reinforcement of the safeguard in issue. The discussions at the round-tables and other events held under the Project suggested that due to the technical capacities of the equipment, the actual period of storage of footage is limited to a number of days and does not exceed 15 days. At the same time, apart from the privacy and other confidentiality considerations, there are no developed international standards on the use of video recording for these purposes (except for maintaining comprehensive and accurate preferably both paper and electronic records).

The CPT has welcomed this practice and suggested that use of CCTV in the common areas of police, prison or courthouse detention facilities and in police interview rooms may act as a safeguard which helps to reduce incidences of ill-treatment (as well as to confirm or refute allegations). Nevertheless, various issues need to be taken into consideration in the context of a CCTV usage policy, including whether a recording is available, whether such recordings are automatically kept for a period, such as 28 days, and whether it is sufficient to be used as evidence if need be.[75]

Moreover, the ECtHR has attached significant importance to the regulations and the use and availability of video footage in the context of the treatment of persons deprived of their liberty.[76] This issue was specifically underlined in the conclusions reached after deliberations during the set of Round Tables held in the course of the preparation of the report as one of the points that is to be addressed for the purpose of improving the effectiveness of the prevention and investigation of ill-treatment. The discussions touched upon and supported the best practices of using video and audio recorders, including pectoral portable individual devices provided to individual officers as part of their regular equipment in many jurisdictions.

[74] Interim Resolution ResDH (2005), http://hudoc.exec.coe.int/eng?i=001-69846

[75] CPT's (supplementary) Report on the 2010 visit to Italy. CPT/Inf (2013) 30 [Part 2], para. 22.

[76] See *Merabishvili* v. *Georgia*, ECtHR [GC] judgment of 28 November 2017, application no. 72508/13, paras. 320-353.

Thus, it would be necessary to **introduce regulations on the use and storage of CCTV and other video recording systems covering law-enforcement facilities. This should be supplemented by the gradual advancement of the equipment and their extension over interventions and actions, including by means of using portable devices, as well as the enhancement of relevant record keeping standards, including the requirement of their availability to the person (lawyer) concerned.**

37. In line with the same considerations, the discussions at the series of Round Tables and their conclusions suggest that the existing simplified practice of often superficial reporting of the use of force by law enforcement officers is insufficient and questionable in terms of the effectiveness and impartiality of eventual investigations as to the proportionality of the force used. This has been found particularly relevant regarding incident reports drafted in the context of crowd control operations or the use of used in the course of demonstrations. They do not include detailed data about the starting point and duration of the incident, the reason for intervention, the type of intervention, those involved, and those affected. In particular, no regular reports are produced specifying the groups formed by the law enforcement officers intervening in social incidents, places of duty and distribution of tasks and ammunition. These deficiencies are the main factors preventing public prosecutors from initiating ex officio investigations and conducting effective investigations.

Moreover, it has been considered that law enforcement and judicial staff have a low level of knowledge and awareness about legal arrangements in terms of the use of the right to assembly and demonstrations, the conditions of interventions in meetings and marches, and the proportionality of the interventions by law enforcement officers.

Against this background, it could be feasible **to develop and introduce separate (distinct from procedural documents) detailed templates and processing schemes for reporting the use of physical force and special means, including in the context of arrest and crowd control operations.**

The role of judges and prosecutors with regard to early indications and allegations of ill-treatment

37. The principle of ex-officio prosecution maintained by the Turkish system of criminal procedure is corroborated by the obligation to report crimes (Articles 158 and 160 of the CCP) and criminal responsibility for a failure to do so, including by public officials and medical personnel (Articles 279-280 of the TCC). The former details this obligation for public authorities and courts. It specifies the obligation of public authorities to immediately report to the relevant Public Prosecutor's Office indications of a crime in connection with the performing a public duty. Thus, the legal framework requires that prosecutors (if not in their immediate jurisdiction), judges

and other public officials must process indications of deliberate ill-treatment as a notification of a crime and report it to a Public Prosecutor's Office accordingly.

38. Turkish judges and prosecutors used to be criticised for overlooking allegations or signs of ill-treatment displayed by detainees brought before them in the general course of the administration of justice.[77] There were judgments of the Constitutional Court that addressed shortcomings in this regard, including the finding of a violation of the procedural obligation inherent in the prohibition of treatment incompatible with human dignity, which is enshrined in Article 17 § 3 of the Constitution, in the individual application lodged by Süleyman Göksel Yerdut (Application No: 2014/788, Date of Judgment: November 16, 2017).[78]

At the same time, discussions at the Round Tables and other events held under the Project, including observations made by representatives of the Union of Turkish Bar Associations, suggested that statements concerning ill-treatment (if) made during court hearings are certainly appended to the minutes of the court hearing. However, the courts would not always report them to prosecutors on their own initiative.

Thus, **there is a need to continue to raise awareness of judges, prosecutors and other officials in respect of their obligation to react to allegations of ill-treatment and to properly report this to the competent prosecutors.**

General obligation to report ill-treatment

39. As outlined, Turkish legislation recognises a general obligation to inform the competent authorities of crimes, in particular those relating to the execution of public duties. In addition, the TCC has established criminal responsibility for the failure to do so in Articles 278-280.[79] Moreover, if a police or other law-enforcement officer, or the public official who has a superior position, witnesses ill-treatment of individuals and fails to act, Articles 94 and 95 of the CC providing for the crime of torture are considered to be applicable.[80] These legal provisions provide sufficient grounds for holding the police, or other law-enforcement officers and public officials, who become aware of or witness ill-treatment of individuals and fail to report it, responsible.

[77] *Aksoy* v. *Turkey*, Judgment of 18 December 1996, application no. 21987/93, para. 56. For a discussion of the judicial authorities' obligations where there is clear written evidence of serious ill-treatment, see *Ahmet Özkan and Others* v. *Turkey*, Judgment of 6 April 2004, application no. 21689/93, para. 359.

[78] The Constitutional Court, Suleyman Goksel Yerdut, no 2014/788, 16.11.2017, para. 43.,44,52 64 and 67 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/788?BasvuruNoYil=2014&BasvuruNoSayi=788

[79] See the preceding section of the report above.

[80] See, The Court of Cassation General Assembly of Criminal Chambers' Decision, Date of Judgment: 28/02/2017, Registry No: 2014/8-269, Decision No: 2017/108.

Nevertheless, discussions at the round-tables and other events held under the Project indicated that in order to reinforce the effect of the legislation in issue it would be necessary to support it with information campaigns and by capacity building in order to overcome the informal adverse culture (solidarity reflex) maintained by some members of law-enforcement agencies. An effective control mechanism should be developed in regards to allegations of torture and ill-treatment being notified to the prosecutor's office.

The legal provisions concerning the obligation to report ill-treatment and sanctions for a failure to do so should be addressed (specifically spelled out/dealt with) by relevant training modules, information campaigns and activities for police and other law-enforcement agencies, as well as prosecutors, so that any of breaches of the obligation concerned do not go unpunished.

Role of the prison service

40. The relevant considerations concerning the state of affairs of access to a doctor at the initial stages of detention in Turkey[81] apply to the medical screening and handling any indications of ill-treatment by the prison administrations.

41. The dialogue between the CPT and Turkish authorities from the most recent public visit report and the Government response that addresses these issues[82] suggest that the state of affairs in prison establishments differ. In spite of regulations and an extended documenting format (a chart) that are appropriately followed in some prisons, there were still shortcomings in several others in terms of the timeliness of examination and reporting, as well as the accuracy of the records.

- It is recommended that **prison staff and medical professionals involved in medical screening in prison establishments are provided with continued (including joint) training on the consistent application of the safeguard. Moreover, Systemic (targeted) monitoring at national level regarding violations of the safeguard in issue and effective disciplinary mechanisms.**

Communication of allegations and complaints

42. Turkish legislation and practice provide inmates with other opportunities for direct contact with the competent authorities or communicating with them in writing. In particular, according to Article 68(4) of the Law on the Execution of Sentences and Security Measures, correspondence sent by prisoners to official authorities should not be censored. At the same time, CPT findings

[81] See relevant section of the report above.
[82] See CPT's Report on the visit to Turkey carried out from 9 to 21 June 2013, CPT/Inf (2015) 6, para. 100; Response of the Turkish Government to the visit report of the CPT, CPT/Inf (2015) 7, p.p. 30-31.

suggest that these requirements were not always met and that prisoners had to submit correspondence in an open manner.[83] Moreover, it is unclear whether this status extends to incoming correspondence from the official bodies. Securing direct access and the confidentiality of regular complaints avenues are essential for making them effective, including in terms of removing the fears of reprisals and other negative consequences. All principles have been consolidated by the CPT in the standard-setting part of its most recent Report of its activities.[84]

The provisions on inmates' uncensored correspondence with official bodies should be clearly extended to incoming mail. In addition, staff of detention facilities should be constantly reminded of this rule and the eventual disciplinary actions for breaching it.

There is no comparable legal framework that would regulate the matter with regard to police establishments. The CPT has recently underlined the importance of relevant avenues of communication for all categories of persons deprived of their liberty, regardless of the place and situation concerned, including police.[85] According to the national law, it is only the written correspondence between a lawyer and detained person that is not subject to control. [86]

Thus, in order to secure this safeguard in line with CPT standards, it is advisable to provide for legal basis for uncensored communication between detained persons in any closed institutions (police station, prisons and other establishments) with their legal representatives..

43. There have been considerable positive developments in the process of the establishment and launching of the Law-Enforcement Monitoring Commission under Law No. 6713 that are in line with the international, in particular CPT standards, complaints mechanisms. This Commission is to act as a disciplinary and complaints body within the Ministry of the Interior, in particular its affiliated institutions: Turkish National Police, the General Command of Gendarmerie and the Coast Guard Command. It will be chaired by the President of the Human Rights Institution (Ombudsperson) and comprised of the representatives of the Ministry of the Interior and external members from the Ministry of Justice, and bar associations. It will be supported by dedicated staff who will act autonomously.[87] There are on-going preparations for its actual launch in cooperation with international partners.

[83] CPT's Report on the visit to Turkey carried out from 9 to 21 June 2013, CPT/Inf (2015) 6, para. 120.
[84] 27th General Report on the CPT's activities, CPT/Inf(2018)4-part, paras. 84-87.
[85] 27th General Report on the CPT's activities, CPT/Inf(2018)4-part, para. 68.
[86] Under Article 154 of the CPC, the detained persons have the right to contact and meet a lawyer in an environment where other individuals are unable to hear their conversation and the written correspondence by these individuals to their lawyers are not subject to control.
[87] See also the Commission-related comments in the subsequent Chapter of the Report.

Up to now, relevant complaints with regard to Gendarmerie can be lodged and processed by its Human Rights Violations Examination and Evaluation Centre. According to the data available, they have resulted in imposing disciplinary sanctions to 17 officers since 2003.

The discussions with the representatives of the civil society organisations and bar associations suggested that **it would be advisable to consider introducing a similar mechanism (a monitoring commission) concerning other security and intelligence bodies performing similar functions to the police.**

44. The Law-Enforcement Monitoring Commission would introduce a comprehensive complaints data base which will correspond to the CPT's requirements in this regard. [88]

In this context, it must be highlighted that the regulatory framework provides for the introduction of a Centralized Record System. The detailed provisions of the Law and further drafts discussed in the course of the Round Tables held under the Project, are to be welcome. In particular those envisaged by Article 7 that specify:

> "...Any and all notifications and complaints filed with the Commission and/or other administrative agencies regarding law enforcement officials shall be recorded by providing a number from the centralized record system, and the persons making the notification or complaint shall be notified of this number. A number shall be provided from the centralized record system for actions and situations determined ex officio by administrative agencies and that require proceedings to be conducted."

- **Monitoring and inspections**

45. In addition to the opportunity to have direct written communication with the competent authorities, persons deprived of their liberty in penitentiary institutions in Turkey can benefit from immediate interaction with superior officials or representatives from inspecting and monitoring bodies and institutions.[89]

The most recent public report on the CPT's visit as well as the response of the Turkish Government and official statements of the Ministry of Justice, suggest that persons deprived of their liberty in the penitentiary establishments are covered by an inspection and monitoring system. The internal (hierarchical) inspections performed by inspectors of the Ministry of Justice

[88] 27th General Report on the CPT's activities, CPT/Inf(2018)4-part, para. 91.

[89] Although both international and domestic inspection and monitoring schemes (e.g. the CPT, national preventive mechanisms provided for by the OPCAT) are supposed to deal with allegations and other accounts of ill-treatment, they are used by respective bodies for the purposes of addressing systemic issues and general prevention of ill-treatment. Accordingly, the current report focuses on the domestic visiting arrangements empowered to process particular allegations with the view of initiation of particular procedures or investigation.

and supervisors of the Directorate General of Prisons and Detention Houses are supplemented by external monitoring arrangements, with prosecutors playing a major role.[90] Prison monitoring boards, Provincial and District Boards for Human Rights are entitled to visit detention facilities. However, some reports indicate the discontinuation or limitation of their operation in recent times. In addition, execution judges are entitled to carry out visits to the prison establishment. However, visits could be more effective (more frequent and improved format of visits). Moreover, the Ombudsman Institution, the National Human Rights and Equality Institution of Turkey, acting also as the national preventive mechanism, can visit prisons.[91] At the same time, their capacity, available human and financial resources, as well coordinating function would require significant reinforcement. The Grand National Assembly of Turkey Human Rights Inquiry Commission or commissions of investigation may also conduct examinations, inquiries, and inspections of the places of deprivation of liberty.

In addition, the penitentiary establishments can be visited under ad hoc visiting schemes by the authorized instituions, including by representatives of the Bar associations. The discussions with their representatives held under the Project suggested, however, that quite often they are not granted permission or have to wait for a long period of time.

46. With respect to the police and other law-enforcement subdivisions and detention facilities, public representatives and prosecutors are the only potentially meaningful systemic actors in this regard. According to Article 26 of the Regulation on Arrest, Custody and Questioning, the chief public prosecutor or other public prosecutors assigned by him inspect the custody and questioning facilities, detention conditions and the records related to the custody.

There is a need to **advance the visiting formats and efficiency of the monitoring system to the prison establishments, including by the execution judges. Finally, more effective monitoring mechanisms covering the police and other law-enforcement agencies should be put in place. It should be entitled to allocate complaints of ill-treatment in line with the principles and best practices of reconciling the interests of the individual concerned, including taking into account confidentiality considerations and the general obligation to report crimes (deliberate ill-treatment).**

Taking into account the role attached to the prosecution service as a key external supervisory agency, it would be advisable to **enhance this function of prosecutors, including by introducing the efficiency of addressing indications of ill-treatment as one of the performance indicators, to ensure their capacity building in this regard.**

[90] CPT's Report on the visit to Turkey carried out from 9 to 21 June 2013, CPT/Inf (2015) 6, para. 122.

[91] According to the Article 22.4 of the Law on the Procedures and Principles regarding the Implementation of the Ombudsman No. 28601 dated 28/03/2013

There is a need for **further support of the national preventive mechanism, namely to provide it with appropriate human and financial resources, as well as to reinforce capacity building of its staff. This would increase the effectiveness of addressing ill-treatment and related complaints in line with confidentiality and sensitivity considerations. Finally, it would be necessary to enhance coordination among the existing monitoring bodies and schemes.**

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CONCLUSION

The system of organisational safeguards against ill-treatment could be reinforced with regard to:

- **Record-keeping and reporting** by means of

- **Introduction of regulations on the use and timeframes of the storage of CCTV and other video footage, recording systems covering facilities, supplemented by the improvement of the equipment and their extension over law-enforcement interventions (actions), including by means of portable devices;**
- **Enhancement of relevant record keeping standards, including the requirement of their availability to the person (lawyer) concerned;**
- **Introduction of separate (distinct from procedural documents) and detailed templates and processing scheme) for reporting the use of physical force and special means, including in the context of arrest and crowd control operations.**

- **General obligation to report ill-treatment** by means of**:**

- **Developing and carrying out training modules, information campaigns and activities for judges, prosecutors and other officials concerning the obligation to promptly report any allegation of ill-treatment. It concerns also sanctions for a failure to do so by the police, other law-enforcement agencies and prosecutors, so that any of breaches of the obligation concerned do not go unpunished.**

- **Role of the prison service** by means of:

- **Continued (including joint) training of medical professionals and law enforcement staff on the consistent application of the safeguard.**

- **Communication of allegations and complaints** by means of:

- **Extension of the provisions on inmates' privileged (uncensored) correspondence with the designated state and international institutions and bodies over the incoming mail;**
- **Appropriate reminders to the staff concerning strict adherence to the safeguard concerned;**
- **Setting up a clear and accessible legal basis that would ensure that the persons deprived of their liberty in police and other law-enforcement establishments could communicate with the legal representatives and institutions in writing and without their correspondence being censored so that it is reconciled with the confidentiality of investigations and related considerations;**
- **Speeding up the actual launch of operation of the Law-Enforcement Monitoring Commission, including the appointment of its external members;**
- **Introducing similar arrangements concerning other security and intelligence organisations carrying out law-enforcement and similar functions.**

➢ **Systemic (targeted) monitoring at national level regarding violations of the safeguard in issue and effective disciplinary mechanisms by means of:.**

- **Advancing the visiting formats and efficiency of the monitoring system to the prison establishments, including by the execution judges;**
- **Introducing an effective public monitoring mechanism covering the police and other law-enforcement agencies in general, which would allocate complaints of ill-treatment allegations, while reconciling the interests of the individual concerned, taking into account confidentiality considerations;**
- **Training activities to improve capacities of the prosecutors to investigate promptly ill –treatment allegations of detainees received through monitoring bodies;**
- **Further steps for ensuring that the NPM-based monitoring scheme receives appropriate administrative and financial, as well as capacity building, support; increase its intensity and effectiveness, including in terms of the allocation of complaints and indications of ill-treatment, while reconciling the interests of the individual concerned, taking into account confidentiality considerations and general obligation to report crimes (deliberate ill-treatment),**
- **Facilitation of coordination between the existing monitoring bodies and schemes.**

3. Effectiveness of Investigation of ill-treatment

3.1. The system of investigations of ill-treatment and its effectiveness

- **Outline of the relevant international standards**

47. Investigations of ill-treatment should establish the facts of the case and obtain evidence concerning the allegations or other indications. This process should lead to court proceedings, where applicable, and if the perpetrator is found guilty for the crime, he or she should be adequately punished.[92]

As a rule, criminal investigations and other procedures start upon relevant indications that there are grounds or an otherwise substantiated need for their initiation. The international requirements envisage that the obligation to initiate an investigation arises whenever the competent authorities receive an allegation that serious ill-treatment might have occurred. An investigation should be undertaken even in the absence of an express complaint of the alleged victim.[93]

Due to the complexity of the circumstances and matters to be examined in ill-treatment-related contexts, there is often a need to conduct criminal and disciplinary proceedings in parallel.[94] They should be incorporated in a coherent system, ensuring an appropriate interaction between them. An adequate assessment of its efficiency requires an introduction of a uniform nationwide system for the compilation of statistical information on complaints, disciplinary actions, criminal proceedings and punishments imposed.[95]

Allegations of ill-treatment in cases of extracting confessions or assembling other evidence are to be examined in conjunction with the right to fair trial under Article 6 of the ECHR.[96] Thus, they should be equally determined from the angle of the admissibility of evidence tainted by them.

48. The overall principle of the effectiveness of investigations of ill-treatment is a composite standard of requirements they have to comply with in order to be considered adequate. The circumstances of incidents vary and it would be impossible to set up a universal list of

[92] 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 31.
[93] See 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 27; Istanbul Protocol, para. 100; *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others* v. *Georgia*, ECtHR judgment of 3 May 2007, application no. 71156/01, para. 97; *Bati and Others* v. *Turkey*, ECtHR judgment of 3 June 2004, applications nos. 33097/96 and 57834/00, para. 100.
[94] See *Ali and Ayşe Duran* v. *Turkey*, ECtHR Judgment of 8 April 2008, application no. 42942/02, para. 70.
[95] See the CPT's Report on the visit to Bulgaria from 17 to 26 April 2002, CPT/Inf (2004) 21, para. 24.
[96] See *Harutyunyan* v. *Armenia*, ECtHR Judgment of 28 June 2007, application no. *36549/03*, paras. 63, 66.

investigative and procedural measures applicable to all cases of ill-treatment. Accordingly, human rights law has incorporated a general condition of making genuine efforts in this regard.[97]

An investigation into ill-treatment must establish the facts of the case and, if the allegations or other indications of ill-treatment prove to be true, identify and punish those responsible by means of eventual proceedings. In order to be adequate and effective, an investigation of ill-treatment has to meet a set of particular criteria. For these reasons it should be:

- **Independent:** officials responsible for the investigation and the substantial decision, should be neither from the same police subdivisions or otherwise closely linked (professionally and individually interrelated, subordinated) to those implicated in the events[98] nor accountable for prosecuting the complainant;[99]
- **Thorough**: i.e. include 'all reasonable steps' and genuine efforts in order to reach the outlined objectives. The duty to investigate is seen as an obligation of means and not result.[100] The standard inventory of evidence to be assembled must contain detailed and exhaustive testimonies of victims; including their medical, preferably forensic, examination. It should also include appropriate questioning and adducing appropriate witness statements, possibly including statements of other detainees, custodial staff, and members of the public, law enforcement officers and other officials. It is obligatory to examine the scene of the crime for material evidence, including implements used in ill-treatment; the examination of custody records, decisions, case files and other documentation related to the incident. Finally, lines of investigation should be pursued on grounds of reasonable suspicion and not disregard evidence in support of an account of ill-treatment or uncritically accepting evidence, particularly police testimonies, against such account; [101]
- **Prompt:** in terms of securing necessary evidence, including those that might be lost or become weaker, as well as the timely accomplishment of procedures needed for taking a final decision or the punishment of those implicated;[102]

[97] See *Barabanshchikov* v. *Russia*, ECtHR Judgment of 8 January 2009, application no. 36220/02, para. 54.

[98] See *Rehbock* v. *Slovenia*, ECtHR Judgment of 28 November 2000, application no. 29462/95, para. 74; *Mikheev* v. *Russia*, ECtHR Judgment of 26 January 2006, application no. 77617/01, para. 115.

[99] See *Barabanshchikov* v. *Russia*, ECtHR Judgment of 8 January 2009, application no. 36220/02, para. 48; *Toteva* v. *Bulgaria*, ECtHR Judgment of 19 May 2004, application no. 42027/98, para. 63; CPT's Report on the visit to Albania carried out from 23 May to 3 June 2005, CPT/Inf (2006) 24, para. 50.

[100] *Ibid*.

[101] See *Khadisov and Tsechoyev* v. *Russia*, ECtHR judgment of 5 February 2009, application no. 21519/02, para. 114; *Bati and Others* v. *Turkey*, ECtHR judgment of 3 June 2004, applications nos. 33097/96 and 57834/00, para. 134; *Barabanshchikov* v. *Russia*, ECtHR Judgment of 8 January 2009, application no. 36220/02, para. 54; Istanbul Protocol, paras. 88-106; the CoEHRC's Opinion, para. 69; 14th General Report on the CPT's activities, CPT/Inf (2004) 28 para. 33. Particular investigations on ill-treatment might require some additional or specific investigative actions and procedures.

[102] See *Mikheev* v. *Russia*, ECtHR's Judgment of 26 January 2006, application no. 77617/01, para. 109; *Yaman* v. *Turkey*, ECtHR Judgment of 2 November 2004, application no. 32446/96, paras. 57, 59.

- Furnished with **full competence** with no formal legal or practical obstacles impeding the procedure, as well as the suspension from duty of persons under investigation, and the application of protective measures to ensure that alleged victims and other persons contributing to the procedures are not intimidated or otherwise dissuaded from participating in them;[103]
- **Subject to scrutiny** by the victim and his or her lawyer, who should be consistently informed of the progress of the investigation and the principal decisions taken. They are entitled to request investigating actions, and to challenge any omissions or conclusions by means of an appropriate judicial review.[104]

Whenever ill-treatment is proven, it should be followed by a suitable penalty. It should be based on a classification in law displaying its relation to ill-treatment and proportionate to its gravity, as well as taking in to consideration measures corresponding to criminal, disciplinary or other types of culpability.[105]

- **Forms of investigations of ill-treatment**

49. There are two types of procedures concerning investigations of ill-treatment in Turkey: criminal and disciplinary procedures.

- **Disciplinary procedures**

50. The disciplinary legal framework for the Ministry of Interior affiliated law-enforcement agencies is being significantly advanced by the ongoing preparations for the implementation of the Law-Enforcement Monitoring Commission.[106] The relevant Law and further draft bylaws entitle inspectors to act under the authorization of the President of the Commission and approval of the hierarchy of the Ministry of Interior. No agency or authority may provide

[103] *Hugh Jordan* v. *the UK* , Judgment of 4 May 2001, application no. 24746/94, paras.125-135; CPT's Report on the visit to Albania carried out from 13 to 18 July 2003, CPT/Inf (2006) 22, para. 44; 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 34; Yaman v. Turkey, Judgment of 2 November 2004, application no. 32446/96, para. 55. See also Bekos and Koutropoulos v. Greece, Judgment of 13 December 2005, application no. 15250/02, para. 54; Chitayev and Chitayev v. Russia, Judgment of 18 January 2007, application no. 59334/00, para. 164.

[104] See *Ognyanova and Choban* v. *Bulgaria*, ECtHR Judgment of 23 February 2006, application no. 46317/99, para. 115; *Chitayev and Chitayev* v. *Russia*, ECtHR Judgment of 18 January 2007, application no. 59334/00, para. 165; *Hugh Jordan* v. *the UK*, ECtHR Judgment of 4 May 2001, application no. 24746/94, para.132; *Khadisov and Tsechoyev* v. *Russia*, ECtHR judgment of 5 February 2009, application no. 21519/02, para. 122; *Gharibashvili* v. *Georgia*, ECtHR Judgment of 29 July 2008, application no. 11830/03, para. 74; *Slimani* v. *France*, ECtHR Judgment of 24 July 2004, application no. 57671/00; *Ramishvili and Kokhreidze* v. *Georgia*, ECtHR Judgment of 27 January 2009, application no. 1704/06, para. 80.

[105] See 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 44; *Okkali* v. *Turkey*, ECtHR Judgment of 16 October 2006, application no. 52067/99, para. 71; *Valeriu and Nicolae Rosca* v. *Moldova*, ECtHR Judgment of 20 October 2009, application no. *41704/02*, paras. 71-75.

[106] See para 44 of this Report above.

recommendations or suggestions to the inspectors or assert pressure to specify or alter a conclusion taken in the execution of the duties.

51. The Law No. 6713 (Article 8) stipulates the jurisdiction and cooperation between different components of the inspection system. It specifies that civilian inspectors conduct the preliminary investigations and/or disciplinary investigations regarding homicide, intentional injury, torture, excessive use of force and organized crimes allegedly committed by law enforcement officials. Inspectors from affiliated institutions may be assigned to serve together with civilian inspectors who conduct preliminary investigations and/or disciplinary investigations, depending on the nature of the incident.

The law requires that preliminary investigations and/or disciplinary investigations handled by the offices of provincial or district governors should be assigned, to the extent possible, to officials in the class of civilian administration authority services.

Preliminary investigations and/or disciplinary investigations initiated by other administrative authorities shall be transferred to the assigned civilian inspectors. At the same time, the special provisions regarding public prosecutors being able to directly conduct investigations are reserved.

Whenever public prosecutors initiate investigations of offences that emerge from the duties of police officials, they shall respectively notify the Ministry, provincial governor's office or district governor's office, within no later than seven business days. Officials conducting investigations within ministries or offices of provincial or district governors shall take all measures necessary to maintain the confidentiality of the investigation.

However, there are few shortcomings related to omission to criminalize deliberate inhuman, degrading treatment or punishment immediately attributable to the state (officials and representatives).[107] These issues were specifically discussed during the Round Tables and other events held under the Project.

In that regard, it is advisable **that the regulations drafted in the course of the launching of the Law-Enforcement Monitoring Commission ensure that investigations are immediately initiated by competent prosecutors.**

Moreover, the **members of the Commission and its support structures would benefit from targeted capacity building on standards concerning effective investigation of ill-treatment and other serious human right violations.**

- **Criminal investigations and grounds for their initiation**

[107] See para. 10 of this Report above.

52. As discussed, criminal procedure in Turkey is based on the principle of *ex-officio* prosecution. The formulation suggested in Part 1 of Article 160 of the CCP corresponds to the outlined standard as to the grounds of initiation of investigations (criminal procedures). In particular, it requires that as soon as the public prosecutor is informed of a fact that creates an impression that a crime has been committed[108], either through a report of a crime or any other way, he shall immediately investigate the factual truth in order to make a decision on whether to file public charges or not.

These provisions are further detailed with regard to the police activities in the relevant law, in particular Additional Article 6 'Judicial duties and authorities'[109]. It provides for the leading and exclusive role of the prosecution in handling the investigative actions beyond securing the crime scene and evidence, which is appropriate for ensuring the compatibility with the standards under consideration. In particular, the police shall carry out duties in relation to the investigation in line with the Code of Criminal Procedure and other legislation. The law enforcement officer shall put into writing the verbal information and complaints that s/he receives and the information concerning the crime that s/he gets hold of during his/her duty. The police, upon encountering a crime after obtaining information or via a complaint, a notice, or alone by him/herself, shall immediately employ the measures to ensure that the health, physical integrity or property of individuals and of the public remains unharmed and the evidence of the crime is not lost or tampered with.

The police, upon receiving information that a crime has been or is being committed, shall secure the scene of the incident, the identification of evidence ensuring that it is not lost or tampered. It addition, police shall inform the public prosecutor about the crime committed, measures applied, persons who are apprehended and transfer all relevant information on the case.

With the aim to identify the evidence of the crime, the police shall carry out the required examinations and technical research on the scene of the incident, identify the evidence, place them under protection and dispatch them to the relevant places for examination upon the order of the Public prosecutor.

The provisions concerning searches and seizures in the Code of Criminal Procedure shall apply for any actions of obtaining evidence for the crime carried out in residences, places of work and non-public closed areas which are outside of the scene of the incident.,

[108] Emphasis added.

[109] Added by Article 7 of the Law no. 3233 of 16/6/1985; amended by Article 5 of the Law no. 5681 of 2/6/2007.

53. According to the statistical data available in 2017 there were 58 cases registered under paragraph 1 of Article 94 (Torture) of the CC and 23 crimes under its related parts. In addition, around 144 cases under paragraph 1 and 2 a od Article 94 were settled before courts in Turkey[110]

In 2016 there were less crimes registered under Article 94 of the CC, paragraph 1 (42 case). There were only 15 convictions under the impugned Article and 47 acquittals.

There were no crimes registered or cases settled under Article 95 of the CC in 2016 and in 2017.

At the same time, in 2017 there were 185 crimes registered under paragraph 1 of Article 256 of the TCC (Exceeding the limits of authorization for use of force) and 157 cases of this category settled by courts with only 10 convictions, 86 acquittals, 24 deferements and 40 other verdicts. In 2016, there were 215 crimes registered under same article and 286 cases of this category settled by courts with only 3 convictions, 188 acquittals, 28 deferements and 67 other verdicts.

The format of the preparation of this report did not involve examination of the specific criminal cases handled by courts of general jurisdiction. However, it is proposed that **judgments rendered within recent years are examined with the view to identifying the causes of the outlined trends suggested by the statistical data.[111]**

54. In the judgment of Süleyman Göksel Yerdut (App. No. 2014/788, 16/11/2017) Constitutional Court found a violation of the procedural aspect of the prohibition of ill-treatment due to lack of investigation when the applicant had appeared with a broken arm, carrying a cast during a court hearing. The action was taken 18 months after the applicant's complaint has been lodged.

The most recent public report on the CPT's visit to Turkey also illustrates the shortcomings in the adherence of this principle. In particular, it concerns the discontinuation of procedures with regards to allegations of a juvenile, who had arrived at a prison on 6 May 2013 with visible injuries that he allegedly sustained from "beatings" by police officers at the moment of apprehension. Although the medical report was communicated by the prison management to the Office of the Chief Prosecutor of Diyarbakır and, when questioned, the juvenile confirmed the allegations, a decision of non-prosecution was taken with barely any further investigative steps being taken due to his statement that he did not wish to lodge a formal complaint against the police officers involved in his apprehension. The prosecutor had not been able to question the police officers because it was impossible to identify the police solely on the basis of their identification numbers.[112]

[110] Parts 2 a, 3 and 4 respectively. This article is reviewed in para. 10 of this Report above.
[111] Prior to 2016 the format of statistics did not provide data single out with regard to Articles 94 and 95 of the CC.
[112] CPT's Report on the visit to Turkey carried out from 9 to 21 June 2013, CPT/Inf (2015) 6, para. 15.

In order to ensure that criminal investigations (procedures) are timely and appropriately initiated, it is necessary to address this issue by **placing emphasis on it in further specific instructions and relevant capacity building schemes for prosecutors.**

- **Independence and impartiality of investigations**

55. The general rule established by paragraph 2 of Article 160 of the CCP is that prosecutors are expected to collect and secure evidence through the judicial security forces (law-enforcement agencies), who are under his/her command. According to the amendment introduced in 2016 by Article 1 (1), the public prosecutor shall personally and primarily conduct investigations regarding allegations of homicide, intentional injury, torture, situations exceeding the limits of authorization for use of force, and the criminal offences falling under organized crimes by law enforcement officials. Cases filed against law enforcement officials due to these criminal offences shall be considered as urgent matters.[113]

56. This has been addressed in the most recent MoJ Circular.[114] It requires that an incident indicating ill-treatment attributable to law-enforcement agencies and other human rights violations are handled immediately by prosecutors. In particular, it specifies that it is necessary: 1) To prevent human rights violations arising from the investigations conducted, by making sure that public prosecutors, who hold the main power and responsibility in the conduct of investigations, carry out the investigations expeditiously, efficiently, fairly, thoroughly, in accordance with human rights, and in line with the principles specified in international conventions, ECtHR judgments, the Constitution, laws, regulations and circulars, and collect the evidence promptly, thoroughly and in accordance with the law, with a view to protecting fundamental rights and freedoms, especially the right to a fair trial and other universal rights, preventing the victimisation of persons and institutions, ensuring the continuity of public trust in the judiciary, preventing the issuance of decisions finding violation and preventing any harm to the prestige of our country at international level; 2) To make sure that investigations concerning human rights violations and allegations of torture and ill treatment are conducted effectively and adequately by the chief public prosecutor himself/herself, or a public prosecutor to be assigned by him/her, *but not by the law enforcement officers*[115]; 3) To closely follow and apply the international conventions to which Turkey is a party, the ECtHR judgments, and other relevant legal documents; 4) To take measures for increasing the awareness of the prevention of human rights violations, and acts of torture and ill treatment.

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[113] Addendum to CPC Article 256 by Law N6713, the Law on Establishment of the Enforcement Monitoring Commission: 3/5/2016-art.6713/10.

[114] Circular No. 158 of 20 February 2018.

[115] Emphasis added.

57. It is evident from the discussions during the Round Table meetings carried out within the framework of the preparation of this report[116] as well as from the Constitutional Court case law that there is a problem of lack of independence concerning the prosecution decision based on minutes prepared by law-enforcement officers involved in the case.

58. The lack of independence has served as one of grounds for establishing breaches of effective investigation requirements in recent ECtHR judgments. IN the case of *Nasrettin Aslan and Zeki Aslan* v. *Turkey*the ECtHR found that the prosecutor had issued non-prosecution decision based on the materials provided by the police inquiries, without questioning the implicated police officers in person and interviewing only one of the complainants. .[117]

Moreover, the Round Tables and other events held under the Project suggested that it is still not uncommon for prosecutors to refer to notifications and materials indicating deliberate ill-treatment, in particular not evidently amounting to torture, for processing preliminary (administrative) inquiries to the police or other corresponding law-enforcement agencies.[118]

59. The discussions and certain overall data concerning the workload of the prosecutors, who process around 250,000 criminal cases (some 800 files per prosecutor on average) per year, raised during the WG meeting, suggest that they are not in a position to effectively investigate the human rights-related cases. This affects the thoroughness and promptness of the ability to meet thestandards. In view of that, the prosecutors have to engage with the police and the law-enforcement structure, who often protract the execution of relevant procedural activities and requests. Moreover, the deliberations and conclusions of the Round Tables suggest that the specialization arrangements of the prosecutors' offices, in terms of handling procedures against public officials, are not covering rural and remote provinces and territories. It is proposed that in order to ensure the effective investigation of the category of cases in issue (including ill-treatment), there is a need to **consider further corresponding institutional solutions, such as expanding the specialization in issue, or conferring this function to the provincial prosecutor's offices, creating judicial police or a special (autonomous) Bureau/system for prosecuting public officials or follow best practices from other jurisdictions.[119]**

[116] See above the introduction to the current report.
[117] ECtHR judgment of 30 June 2016, application N 17850/11, paras. 52-58.
[118] See para. 54 of this Report above.
[119] In jurisdictions where the prosecution authority has responsibility for criminal investigations, the conduct of the preliminary investigation and the carrying out of investigative tasks by police officers is also seen as problematic. Although a prosecutor may have responsibility for the investigation and directing police officers, the fact that police officers carry out the investigation is a cause for concern. Problems arise as a result of the close working relationship between prosecutors and police when working on standard criminal cases and the risk of collusion when investigating allegations of human rights abuse. In Norway for example, an independent and separate unit within the prosecution authority with sole responsibility for investigating criminal allegations and prosecuting police officers

60. The need to comply with with the independence criterion has prompted the adjustment of the Turkish legal framework, providing for the administrative authorisation of prosecutions, as it definitely has detrimental effects in terms of the timeliness of carrying out necessary (initial) investigative activities and meeting the required standard. Moreover, the authorisation procedure is highly questionable as far as negative outcomes (refusals) are concerned, due to the lack of opportunities and meaningful investigations being carried out, and their inadequacy in terms of the requirements concerning their adversarial and public character.[120] Following the ECtHR findings and in the process of the execution of ECtHR judgments under the *Bati and others* group of cases, the legislative and regulatory amendments excluded the authorizationrequirement for prosecuting crimes of torture, aggravated torture and causing intentional bodily harm.[121] However, the Committee of Ministers of the CoE requested the authorities to remove any ambiguity regarding the requirement of administrative authorisation for the prosecution of members of security forces of all ranks on account of all crimes which fall within the scope of Articles 2 and 3 of the Convention.

61. As to the authorisation of the prosecution of members of security forces for other crimes, it is expected that the measures aimed at the appropriate classification in law of deliberate ill-treatment incidents, proper design of the procedures, and institutional arrangements of the Law-Enforcement Monitoring Commission, should address the issue and remaining shortcomings accordingly.[122] With regard to the high-ranking officials of security forces in the most recent round of submissions, the authorities suggested once more that their prosecutions fall under Article 161 of the CCP and not under the Law on Trial of Civil Servants and other Public Officials (Law No. 4483), i.e. the authorisation is to be issued by the Council of Judges and Prosecutors. Moreover, the conclusions of the set of Round Tables held in the course of preparation of the report specified that some uncertainties and differences in practice in the process of requesting an authorisation for investigation partially also remain because the Law no. 353 is currently in force despite the termination of the military prosecution services. While the compatibility of this framework with the ECtHR case-law is to be assessed by an inter-institutional working group created by the authorities, it is to be highlighted that **the practice of**

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was created for the purpose of addressing this problem. In Moldova, by way of contrast, an independent unit within the prosecution service was created to investigate allegations of serious human rights abuse. In Slovenia a specialist unit of the Public Prosecutor's Office has responsibility for investigating criminal allegations against police officers and an external oversight mechanism is in operation. A similar model is recently being adopted in North Macedonia, with specialized unit within the Prosecutor's Office and also responsibility of the Ombudsperson, jointly with an external oversight mechanism. An external oversight mechanism in the form of a newly created independent body, including representatives of civil society, will have powers to review investigations conducted by the specialist prosecutor and serve as an appellate authority.

[120] *Gharibashvili v. Georgia*, ECtHR Judgment of 29 July 2008, application no. 11830/03, para. 74.

[121] 1265 meeting (September 2016) - H46-27 Batı and others group v. Turkey (Application No. 33097/96), http://hudoc.exec.coe.int/ENG?i=CM/Del/Dec(2015)1243/H46-23

[122] See paras. 54 and 59 of this Report above.

completing an intermediary procedure and obtaining an additional decision (authorisation) for initiating the prosecution for torture and other deliberate ill-treatment attributable to law-enforcement and other officials is to be fully excluded.

- **Thoroughness of investigations**

62. The measures undertaken by the relevant authorities in Turkey, including the Ministry of Justice, Prosecution and Judiciary, discussed throughout this report suggest that they are equally aware of the international standards on thoroughness of investigations of ill-treatment, and loss of life incidents, as well as serious human rights violations in general. However, in addition to the constraints related to the overall workload of prosecutors,[123] the domestic practice, including the judgments of the Constitutional Court, and the most recent judgments of the ECtHR, indicate that the lack of thoroughness remains one of the most frequent shortcomings of domestic procedures. The deficiencies comprise the failure or unjustified refusal to:

- Take into account expert reports coherent with the alleged victim's arguments concerning the incident and provide a reasonable explanation as to how the injury in question was caused to the person while under police control/custody[124]

- Sufficiently clarify the circumstances under which the law enforcement officers intervened in the course of crowd control operation, whether they intentionally or recklessly exceeded the limits while using force;[125]

- Obtain an expert report where an assessment as to the time and reason of the fracture to the applicant's arm;[126]

- Hear witnesses to the incident, carry out a reconstruction of the facts; view the CCTV recordings of the scene, as well as not to accept the submissions of implicated officers at face value. [127]

As to the supervision of the execution of ECtHR judgments, the thoroughness-related considerations followed under its enhanced structure in *Bati and others* concern the lack of justification of or the mere refusal to hear witnesses that the parties requested in accordance with the applicable legislation, and ordering additional medical reports when necessary, or requesting additional medical reports. It is worth noting that the Committee of Ministers of the CoE was informed about the developments in the judicial practice, in particular the Court of Cassation

[123] See para. 60 above.
[124] Constitutional Court Judgment in Sinan IŞIK Judgment, app. No: 2013/2482
[125] Constitutional Court Judgment in Özlem KIR Judgment, app. no. 2014/5097
[126] Süleyman Göksel Yerdut app. No. 2014/788, 16/11/2017
[127] ECtHR *Nasrettin Aslan and Zeki Aslan* v. *Turkey* of 30 June 2016, application N 17850/11, paras. 52-58.

judgments that addressed the inconsistencies between medical reports and the need to take a statement from a witness that could potentially affect the outcome of the proceedings. They also referred to the need to seek a report from the Forensic Medical Institute in order to determine the cause of the bruises, coupled with taking further statements from the witness in order to clarify the inconsistencies.

It is to be noted that there have been significant legislative developments related to the forensic expertise, including the adoption of the Law on Experts No 6754, published in the Official Gazette dated 24 November 2016. It was recently followed by the Regulation on Experts[128] published in the Official Gazette dated 3 August 2017. The Regulation provides a framework for increasing the quality of expert reports and covers the following areas: (i) the absolute prohibition of experts in purely legal issues; (ii) points that should be included in the expert's report; and (iii) the introduction of key performance indicators for experts and their effective supervision[129].

63. The deliberation and findings of the Round Tables and other events held under the Project suggest that other practical shortcomings in terms of examining the evidence concerning the incidents at stake often involve failures to obtain recordings from security cameras, , and to request these visual recordings from the law enforcement officials.[130] Moreover, the person allegedly subjected to ill treatment should be heard directly by the public prosecutor and not the law enforcement officers. It should be ensured that procedures such as identification or site visits are done accordingly. It has also been suggested that if a person that has been called to answer the questions required for revealing the material fact is resistant to give a statement, then it is to be taken pursuant to Article 236 of the CCP, which provides for the involvement of an expert in psychology and other special arrangements for their questioning.

[128] Regulation on Experts, O.G. dated 3.8.2017, issue: 30143.

[129] An arrangement on supervision and performance review of the experts is adopted with Article 14 of the Law on Experts. According to the provision concerned, experts are audited by the regional board ex officio or upon application, in terms of whether their attitudes and behaviours on duty or the reports prepared by them are in accordance with the legislation. Where a judge or public prosecutor satisfies himself/herself that attitudes and behaviours on duty of the expert assigned by him/her or a report prepared by the expert assigned by him/her is not in accordance with the legislation, reports this issue to the regional board. The regional board shall not audit the expert's report in terms of special or technical knowledge. No application shall be lodged to the regional board with regard to the special or technical knowledge content of the expert's report, such applications shall be rejected without examination. The provisions of Regularion on Experts set out the details of the audit and review. With Article 72 of the Regulation the points required to be included in the record of the audits and performance reviews of the experts to be carried out by the regional board and the results thereof. The record in question shall include: a) Date of delivery of the file to the expert b) Deadline of the report c) Date of submission of the report ç) Duration in which the file stays with the expert d) Expressing opinion on legal matters, e) preparation the report in person, f) Compliance with the writing technique, g) Taking the report as the basis for the judgement, ğ) compliance with the ethical principles, h) Additional report due to failure of the expert, ı) New expert's report, i) Drawing up a report out of the main field of expertise and subspecialty, j) Avoiding of acting as an expert, k) Unexcused failure in delivery of the report within the given period of time, l) Results of the audit and performance review, m) Remarks.

[130] See also the measures suggested under para. 36 of the Report above.

Accordingly, **relevant guidelines should be advanced (issued) so as to fully comply with the standards concerning the thorough, consistent and objective manner of investigations. This should include a relevant assessment of the initial allegations, other indications of ill-treatment and gathered evidence, in particular in the context of crowd control operations and the use of force.**

These measures should be supported by the appropriate training of the professionals performing relevant investigations.

Moreover, forensic doctors, other medical professionals, prosecutors and judges should be provided with further training on:

- International standards of medical documentation of ill-treatment and the Istanbul Protocol, in particular;

- Relevant domestic legal framework including the Law on Experts and ensued regulatory framework.

- **Promptness of investigations**

64. The discussions within the Working Group,, Round Tables and other events held under the Project indicate that the prosecutors' workload-related factors are to be considered as the main impediments for failure to promptly investigate certain cases as envisaged by the Ministry of Justice Circular dated 20 February 2015.

65. In addition to the overall length of procedures, some specific and crucial investigative activities are delayed and not carried out on time. The most recent relevant judgment of the Constitutional Court (Cihan Koçak, 21/9/2017, app. No. 2014/12302) concerned an unjustified delay in carrying out a medical examination, which took place 17 days after the incident. In a case concerning the loss of life, (Recep Kolbasar Judgment, app. No. 2014/5042, 26/12/2017) the Constitutional Court highlighted that although other investigation processes were concluded in a short period (five months after the incident), the statements of the suspects were taken one and a half years after the incident, and the investigation lasted around five years.

In addition to other measures suggested with respect to the matter, in particular lifting the authorisation requirement for all categories of officials, as well as institutional reinforcement of the system of prosecution/investigation of human rights violations,[131] it would be advisable **to address the promptness considerations through a system of further capacity building**

[131] See paras.57-62 above.

activities for prosecutors and members of judiciary. It has been suggested, in particular, to combine that with more general policy measures envisaged by the Judicial Reform Strategy.[132]

- **Sufficiency of competence**

66. The outlined legislation, including the CCP, provide, in principle, the prosecution and courts with sufficient powers to fully investigate the allegations, incidents indicative of ill-treatment, and to identify, where appropriate, those implicated and hold them responsible. However, the authorisation stage (even within its remaining scope and body concerned as discussed in this Report)[133] could be also considered as a formal legal impediment from the angle of the requirement in issue. The need for authorisation can block further proceedings and restricts the competences of prosecutors.

67. As to the practical shortcomings, it is to be noted that in response to the CPT recommendation concerning allegations and reports that police officer, who intervened in demonstrations and apprehended demonstrators did not wear any identification numbers or had concealed the identification number displayed on their helmets, the Ministry of the Interior issued Circular (No. 2013/33) on 22 July 2013, instructing plain clothes police officers to wear police vests.[134]

Prosecutors are to be reminded of the need to use the identification signs and potential evidence, including CCTV or video footage, to ascertain the identity of the officers concerned in similar or other contexts, where their identity is concealed or unclear.

68. , The supervision framework of execution of *Bati and others group* deals inter alia with ensuring that members of security forces are suspended from their duties while proceedings against them for crimes that fall within the scope of Articles 2 and 3 of the ECHR are underway. Despite the number of administrative procedures initiated against law-enforcement officers due to ill-treatment allegations resulting in their suspension of duties, the Committee of Ministers has so far not discontinued the enhanced supervision of this matter.

In accordance with Article 137 of Civil Servants Law No 657, dismissal is a preliminary injunction adopted for civil servants where it is considered harmful if they remain at their position in cases as required by the civil servant services. The dismissal may also be issued at any phase of the investigation. Law enforcement officials who are the subject of criminal proceedings against them, in line with the above-mentioned provision, may also be dismissed from their work, i.e. temporarily removed from their post. If it is decided that they will not be

[132] http://www.sgb.adalet.gov.tr/ekler/pdf/YRS_ENG.pdf

[133] See para. 61 above.

[134] See CPT's Report on the visit to Turkey carried out from 9 to 21 June 2013, CPT/Inf (2015) 6, para. 21. However, see also para. 15 of the same report that provides an example of the failure to identify the police officers accordingly.

dismissed, , these persons may be appointed to another post. However, it is not done geographically, but within the same department. Therefore, it is not possible for individuals to be appointed to other cities. Yet, in standard appointment processes, it might be possible to appoint civil servants, whose time for (re)appointment has come, to other cities within the framework of standard appointment procedures.

The Round Tables and other events held under the Project specifically highlighted the need for a more active use of temporary suspension from duties in order to prevent illicit pressure being placed on alleged victims of ill-treatment or witnesses and other participants of the procedures.

Thus, it would be appropriate to remind **prosecutors and relevant law-enforcement agencies of the need to use the temporary suspension from duties measure, as well as applying witness protection and other relevant measures to alleged victims or other participants of procedures, where appropriate.**

- **Public scrutiny**

69. ECtHR judgments and supervision of their execution (in *Bati and others group*) suggest that the legal standing of victims (including alleged ones) does not raise any major concern in terms of their formal involvement in the criminal procedures. In particular, Article 234 (with some further itemisation in Article 239) of the CCP provides for the relevant rights and legal standing not only of the victim, but also of the claimant (complainant). They include: to file a motion for evidence to be collected; to demand from the public prosecutor copies of documents; to demand the appointment of a lawyer on her/his behalf by the Bar Association; to ask her/his representative to review the documents of investigation and items that have been seized and taken under protection, to utilize her/his right of opposition against the decision of the public prosecutor to not prosecute as laid down in the Code; to be notified about the court hearings, to intervene in the public claim; to demand copies from the records and documents via his/hers representative; to demand the witnesses to be summoned, and some other entitlements.

The main shortcomings identified in this regard are concerned with the authorisation stage and the consideration of motions and requests of victims to question witnesses and to propose other additional evidence to be adduced.[135]

The Constitutional Court's judgement[136] indicates that there may be occasional violations of the standards due to the failure of timely notification of the procedural developments of damaged parties. Moreover, the Round Tables held under the Project have suggested that it would be appropriate to enhance the reasoning of the decisions, with explanations of the procedural context and steps under the investigation ill-treatment cases. The public scrutiny arrangements should

[135] See paras. 61-62 above.
[136] Hadra AKGÜL and Others judgment (App. No: 2014/867) rendered in 2016

ensure that the alleged victims or their representatives are informed without delay, and in detail, about the progress of the determination or investigation of the accounts of ill-treatment and all the substantial adequately reasoned decisions taken in relation to it.

70. The CCP has recently been amended by Article 145 of the Decree Law no. 694 of 15/8/2017 adopted by Article 140 of the Law no. 7078 of 1/2/2018 and included para.6 of Article 158, providing that a decision of non-investigation shall be notified to the complainant, where available, and an objection may be made against the decision in accordance with Article 173. If the objection is accepted, the Chief Public Prosecutor's Office shall start the investigation process. The procedures in line with this paragraph hereby and the decisions shall be recorded, but can only be seen by the public prosecutor, judge or the court.

The analysis and discussions of the existing format of judicial appeals for challenging non-prosecution decisions suggest that they do not involve public hearings and the adversarial format of the procedures.[137] Therefore, it would **be necessary to ensure (including by means of legislative amendments) the adversarial and public proceedings, as well as to extend the 15 days deadline for challenging the decision taken by the prosecutors.**

71. According to the current disciplinary regulations, information on their progress is only provided to the person against whom a disciplinary investigation is conducted. There is no legal arrangement in the regulation as to its provision to the complainant or victim. Furthermore, during the Round Tables held under the Project, it has been observed that there is no uniformity regarding the notification of the results of the disciplinary investigation to the complainant and victim. While there is no such information as to the notification being made in the Taylan case, it transpires that in the Akman case it was made accordingly.[138]

It is important therefore to note that the Law N6713 on the establishment of the Law Enforcement Monitoring Commission obliges the authorities to regularly update the alleged victims (complainants) (every two months) about the developments of their case, including disciplinary proceedings.

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CONCLUSION

The effectiveness of investigations and court procedures concerning ill-treatment could be enhanced with regard to:

[137] Gharibashvili v. Georgia, ECtHR Judgment of 29 July 2008, application no. 11830/03, para. 74.
[138] Taylan v. Turkey, ECtHR, 03 July 2012, Application No. 32051/09, para. 30; Akman v. Turkey, ECtHR, 13 October 2009, Application No. 33245/05, para. 27.

- **Disciplinary procedures** by means of:

Targeted capacity building (training) the members of the Commission and its support structures on standards concerning effective investigation of ill-treatment and other serious human right violations.

- **Criminal investigations and grounds for their initiation,** by means of:

- **The examination of the judgments delivered within recent years with the view of identifying the causes of the outlined trends suggested by the statistical data;**
- **Targeted capacity building activities for prosecutors in particular concerning timely and appropriate initiation of criminal investigations in cases of alleged ill-treatment by law enforcement officers.**

- **Independence and impartiality of investigations,** by means of:

- **Considering further corresponding institutional solutions, such as expanding the specialization in issue, or conferring this function to the provincial prosecutor's offices;**
- **Creating a judicial police to support prosecutors or a special (autonomous) Bureau/system for prosecuting public officials or following best practices from other jurisdictions;**
- **Excluding any authorisation and related practice of completing an intermediary procedure and obtaining an additional decision for initiating and carrying out prosecution for torture and other deliberate ill-treatment.**

- **Thoroughness of investigations,** by means of:

- **Issuing relevant guidelines as to full compliance with the standards concerning the thorough, consistent and objective manner of investigations. They should concern, inter alia, an appropriate assessment of the initial allegations and gathered evidence, in particular in the context of crowd control operations and the use of force;**
- **Supporting them by providing appropriate training for the professionals performing this category of investigations;**
- **Training forensic doctors, other medical professionals, prosecutors and judges on the international standards of medical documentation of ill-treatment and the Istanbul Protocol as well as the relevant domestic legal framework including the Law on Experts and the regulatory framework.**

- **Promptness of investigations,** by means of:

- **Further capacity building activities for prosecutors and members of judiciary;**
- **Combining them with more general policy measures envisaged by the 2019 Judicial Reform Strategy on enhancing the timing parameters of prosecution and overall judicial procedures.**

- **Sufficiency of competence**, by means of reminding:

- **Prosecutors of the need to use the identification signs and potential evidence, including CCTV or video footage, for ascertaining the identity of the officers concerned in similar or other contexts, where their identity is concealed or unclear;**
- **Prosecutors and relevant law-enforcement agencies of the need to apply witness protection and other relevant measures to alleged victims or other participants of procedures, where appropriate.**

- **Public scrutiny,** by means of ensuring that:

- **Alleged victims or their representatives are informed without delay, and in detail, about the progress of the investigation and all the substantial adequately reasoned decisions taken in relation to it;**
- **Adversarial and public character of the procedures (including by means of legislative amendments), as well as extension of the 15 day deadline for challenging the decisions taken by the prosecutors.**

In terms of the general conclusion, it could be stated that the Republic of Turkey and its competent authorities continue to adopt legislative, institutional, and other measures aimed at improving the effectiveness of the investigation of ill-treatment and compliance with the procedural standards under Article 3 of the ECHR. Following the recommendations generated in the course of the Project and suggested in this report would, in many respects, assist the Turkish authorities to enhance the system of combatting torture and other forms of ill-treatment in applying in practice zero-tolerance policy.