HRFT
HUMAN RIGHTS FOUNDATION
OF TURKEY

NATIONAL PREVENTIVE MECHANISM

Evaluation Report

Human Rights Foundation of Turkey Publications 108

Ankara, July, 2015

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Introduction

Human Rights Foundation of Turkey (HRFT) has previously published "Common mind on the Prevention of Torture"[1] and "National Preventive Mechanisms, Is Turkish Human Rights Institution is the Proper One?"[2] within the framework of action for the ratification of 'United Nations (UN) Optional Protocol to the Convention against Torture' and in its aftermath, and emphasised the importance of establishment of national preventive mechanisms in these studies. HRFT has also published a report assessing the country's progress towards the establishment of national preventive mechanisms during the year 2013 and the first half of 2014 against international standards.[3] The study at hand has been prepared for the purposes of periodic review and monitoring of the implementation of the Optional Protocol during the one-year period between July 2014 and July 2015.

This report is based on the principles of the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which we take as the reference document. The OPCAT was adopted by the UN General Assembly on 18 December 2002 and it entered into force on 22 June 2006. As of 21 July 2015, there are 79 state parties to the OPCAT and an additional 18 states are signatories.[4] Turkey ratified OPCAT on 27 September 2011. Article 1 of the OPCAT sets the objective of the Protocol as "to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."

According to the Protocol, each State Party is obliged to maintain, designate or establish national preventive mechanisms (NPMs), which should comply with the minimum requirements as outlined in the OPCAT, to fulfil their commitment to preventing torture. Accordingly, State Parties should clearly specify the mandate and powers of the NPMs in a constitutional or legislative text and allow NPMs unrestricted access to all places of detention to conduct announced/ unannounced visits without interference by State authorities by guaranteeing functional and institutional independence of NPMs and providing adequate financial and human resources for their effective functioning.[5]

1 ALTIPARMAK, Kerem; ÜÇPINAR,Hülya: "İşkenceyi Önlemede Ortak Akıl, TİHV Yayınları, Ankara, May 2008, http://80.251.40.59/politics.ankara.edu.tr/altipar/Yayinlar/Iskenceyi%20Onlemede%20Ortak%20Akil.pdf

2 ÜÇPINAR, Hülya: TİHV Yayınları, Ankara, September 2012

3 These reports are available at http://tihv.org.tr/ulusal-onleme-mekanizmasini-kuramamak-2/; http://tihv.org.tr/94-ulusal-onleme-mekanizmasi-degerlendirme-raporu/ (TR) http://tihv.org.tr/95-national-preventive-mechanism-evaluation-report/ (EN), http://tihv.org.tr/ulusal-onleme-mekanizmasi-degerlendirme-raporu-2-yariyil/

4 http://www.apt.ch/en/opcat-database/

5 The Subcommittee on Prevention of Torture (SPT) adopted the Guidelines on National Preventive Mechanisms (CAT/OP/12/5) at its 12th Session that took place from 15 to 19 November 2010, and outlined these basic principles. The SPT Guidelines is available at http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx

Article 17 of the OPCAT requires States Parties to establish their NPM(s) no later than one year after ratification or accession. In line with this obligation, Turkey had to establish or designate an NMP until 27 October 2012. However, the mechanism was not designated until 28 January 2014, when a Cabinet Decree, designating Human Rights Institution of Turkey (HRIT) as the national preventive mechanism, was promulgated in the Official Gazette.[6]

Thus, HRIT was designated as the national prevention mechanism despite the provisions of Paris Principles and the OPCAT and barrage of concerns and criticism from relevant NGOs, international society and from public institutions themselves, which pointed out to the fact that the HRIT did not have the institutional or functional capacity to perform this task. Based on the general consensus on lack of independence and capacity, and considering the fact that the HRIT has been established as a human rights body, it became evident that institutional framework and activities of the HRIT should be revised to assume a preventive mandate.

I. Visits of the Human Rights Institution of Turkey

Activities of the HRIT, which have been reported under the category of "visits" by the HRIT, are the main focus of this evaluation report, which can be qualified as "monitoring of the monitoring mechanism based on visits." This report seeks to determine if the monitoring framework was properly established and monitoring programme was produced, and to make an assessment of the framework of the preparatory work before visits, how the visits were conducted and the mechanisms established to ensure follow-up of findings.[7]

1. Inquiry Report on Incidents at Sincan Prison

The HRIT has adopted the "Inquiry Report on Incidents that Took Place at Sincan Prison on 01.01.2014" on 10 July 2014 and published the report on its website.[8] According to the report, the HRIT initiated an ex officio inspection, with consideration of media reports and reports by the Human Rights Association Ankara Branch Prison Commission. The HRIT set a committee of two people to visit Sincan Prison and interviewed two children and the prison administration. Then another committee of three had made inspection at Şakran and Maltepe Prisons.

6 Cabinet Decree numbered 2013/5711, http://www.resmigazete.gov.tr/eskiler/2014/01/20140128-4.htm

7 Basic criteria for monitoring visits are explained in detail at "Alıkonulma Yerlerinin İzlenmesi", Diyarbakır Bar Association, March 2006 and "Uygulamacılar için Alıkonulma Yerlerinin İzlenmesi El Kitabı", HRFT Publications 82, July 2012.

8 http://www.tihk.gov.tr/www/files/Sincan_raporu.pdf

The report indicates that Ministry of Justice did not send all the information and documents requested; thus some information was missing.

The report provides a detailed account of the ill-treatment that the children were subject to and the medical examination procedures, and describes the systematic problems in the prison with reference to international legal standards and to the principle of the best interest of the child, in particular. The report concludes that the cruel treatment against the children had amounted to torture, in violation of the prohibition of torture under Article 3 of the European Convention on Human Rights. The report indicates that recommendations as to the personnel and management of the prisons and claims of ill-treatment would be conveyed to relevant Ministries and public authorities.

The report gives an overview of the findings of the Human Rights Association and Ankara Bar Association, but these organisations were not included in the inquiry and decision-making process of the HRIT. Going through the document we see that there is no information about the circumstances of the interviews conducted with the children. Likewise, the follow-up mechanism is not identified.

2. Report on Gezi Park Events

The HRIT announced on 30 October 2014 that it published the Report on Gezi Park Events on its website.[9] Accordingly, the report was prepared when "claims of human rights violations due to interventions by security forces and other persons acting in official capacity during the widespread protests/ demonstrations throughout Turkey" came on the agenda. The HRIT took the decision to carry out an inquiry and investigation on 10 June 2013. The report points out that there were two limitations associated with the inquiry: First, "it was actually impossible to cover all of the demonstrations and assemblies and to investigate all of the claims of human rights violations that took place during the Gezi Park Events." The second limitation has been indicated as follows: "The claims of human rights violations were categorised and sample cases of human rights violations were investigated." The report does not explain how these limitations were addressed with objective discretion, nor the criteria for sample selection procedures. In addition, the report admits that "the institution's technical and human resources capacity was not sufficient" and that "collecting all of the evidence for incidents was beyond the capacity and the mandate of the HRIT."

The report provides a legal overview of the right to freedom of expression, right to freedom of assembly and demonstration, right to life, and prohibition of torture and ill-treatment, and continues with sections which, according to the report, were

9 http://www.tihk.gov.tr/tr/duyuru-ve-haberler/haberler/gezi-parki-olaylari-raporu-yayinlandi/82

specific to the Gezi Park events. However, it should be noted that selected cases were not relevant to Gezi Park protests and were not representative. In addition, qualifiers such as "alleged" or "claimed" were used relating to incidents, despite the fact that violations took place right in front of public eye. It has been observed that the report tends to consider violations as independent criminal cases, regardless of the extent of the protests and the historical context. As such, the report does not include any mention of the use of extraordinary force by security forces, which operate under a central chain of command hierarchy, and the extraordinary use of authority and power by the government, which bears the political responsibility.

In terms of the right to freedom of expression, and the right to access to information, in particular, the report concludes that participants of the Gezi Park protests had been "misled," but it does not mention the media blackout limiting access to information on violations by the security forces. In a similar way, it is impossible to reason with the HRIT when it expresses hope that "the public authorities should enhance their reliability in the eye of public," while commenting on the bans on social media in relation to the right to freedom of expression, despite the fact that these bans had already been ruled illegal and unconstitutional by the Constitutional Court. The same approach is also inherent in the account for attacks and violence against journalists. The report avoids pointing out to perpetrators, and describes the attacks in general terms without reference to security forces to reflect the misconceptualization and non-holistic approach pursued throughout the report.

The section on the right to assembly simply repeats the information by the Ministry of Interior Affairs in a misleading way, and refers to the Gezi Park protests as "events where most of the demonstrators had resorted to violence", which is unacceptable. Categorising the "Standing man" protest as the only legitimate form of action is another example of the report's preference to refrain from adopting a holistic view of the protests. The report describes the Law No. 2911 as "fully embracing the security mentality," yet it goes on to make claims under various categories based on this law, in clear breach with the international standards. Subcategories such as "prior notification requirement" and "locations for meetings and demonstrations" do not provide a basis for discussing the legality of dispersal (withforce) of entire demonstrations. Indeed, the HRIT refrains from adopting a holistic view of the use of force by security officers, which was discussed under the heading "limits of intervention" in the report. The report reads that "interventions to some of the assemblies and demonstrations could not be justified and it is impossible to claim that the use of force was proportionate in these interventions," to implicate that other interventions were justifiable and the security forces did not use excessive force.

In terms of violations of the right to life, it should be underlined that the HRIT, publishing the inquiry report in the capacity of the national preventive mechanism, fails to provide any information as to the circumstances of injuries and deaths during the protests. In this section the HRIT simply lists the national and international regulations, and refers to the civilian injuries and deaths due to excessive use of force by the security forces

as “claims,” although these cases have been well-documented with evidentiary video recordings and medical evaluation reports.

In the section on torture and ill-treatment, the HRIT provides its opinion concerning torture in Turkey. It is quite remarkable that the HRIT, which noted that its report would not attempt to cover all of the incidents during Gezi Park protests, now suggests a general perspective on torture and ill-treatment. Then, the HRIT observes that “Turkey’s efforts in the fight against torture, especially the “zero tolerance policy,” ratification of international conventions, acceptance of jurisdiction of international monitoring mechanisms, being a State Party to OPCAT and finally designation of the HRIT as the national preventive mechanism in January 2014 are regarded as positive developments,” and it concludes that there has been a decrease in claims of ill-treatment at prisons and detention places. Hence, it becomes inexplicable how the HRIT, which lacks the institutional or functional capacity to perform the tasks of a national preventive mechanism as we have explained above and as became evident with this report, could celebrate these developments as ‘positive’ against the background of widespread use of torture and ill-treatment during the Gezi Park protests.

Without making any comments, the report notes that there were claims of ill-treatment through the widespread and abusive use of tear gas and other chemical irritants, and there was one known case of abusive use of pressurised water. The report also notes that there were complaints regarding use of plastic and rubber bullets, but concludes that it was impossible to know if these types of bullets were used during the demonstrations as they were not listed in the inventory of the Ministry of Interior. The report limits itself to quote the figures provided by the Ministry of Interior under the section titled “Various interventions.” Thus, the report refrains from making any comment or observation on the use of torture despite the publicly witnessed fact that thousands of people have been subjected to human rights abuses during Gezi Park protests.

As is the case with other inquiry reports of the HRIT, the section “Conclusion and Recommendations” does not identify any follow-up mechanism. In a similar way, recommendations lack a coherent definition and a holistic perspective of systemic problems, which is the more general problematic aspect of the report itself.

3. İstanbul Deportation Centre Report

The HRIT and members of NGOS visited İstanbul Kumkapı Deportation Centre, according to the news story published on the HRIT website on 2 May 2014. The website did not provide any information about the scope or the purpose of the visit. Then, the report of the visit was published on the

website on 26 November 2014[10] According to the report, the HRIT took the decision to conduct an inquiry visit when they "received information that people confined in İstanbul Deportation Centre were not allowed to open air and living conditions were poor." The report does not explain if the visit was unannounced or not.

According to the report, the delegation was briefed by the centre's administration on living conditions and services provided at the centre, and interviewed persons confined in the centre. Interviews were conducted without the presence of authorities, yet the report does not provide any information on why the delegation had preferred to interview persons staying there for 1 or 2 months despite the fact that they found out that some people were kept at the centre for more than one year. The report does not give the number of interviewees, nor explain how the delegation selected the interviewees or the selected group was representative of all the people confined in the deportation centre.

The report provides a list of physical limits of the facilities based on observation, and of violations of basic human rights based on interviews. The report identifies the human rights standards and the ECtHR case law relevant to the inquiry, and reminds us that the HRIT was designated as the national prevention mechanism. The report suggests that the inquiry had been conducted by the HRIT in its capacity as the national preventive mechanism, and that basic principles of the OPCAT were taken into consideration for the purposes of the inquiry. This claim is far from convincing as the report itself is a concrete example of how the HRIT failed to duly perform those functions in this inquiry.

As such, the report simply points out to the gaps in the regulation, despite the fact that confining people in these detention centres for indefinite periods of time is a clear breach of international human rights law. The report sets out recommendations but without analysing the root causes of the problem or without a holistic perspective for solution. For example, the HRIT had established that the people confined in the centre experienced problems concerning the right to health, as they were not allowed to open air, the facilities were overcrowded, and access to hygiene, food and health services were problematic. In a similar way, fundamental rights of the confined people were breached (for example, right to notification, translator/ interpreter service, legal aid) according to the report, yet recommendations on this issue are very limited. These examples clearly demonstrate that the HRIT fails to address the problems with a holistic approach and in an independent way. As is the case with the general approach of the inquiry which fails conceptualise the problem, the recommendations section fails to suggest a solution as it almost implies that those grave human rights violations would simply diminish when physical conditions of the facilities are improved. In this report, too, the HRIT does not identify any follow-up or monitoring mechanism.

10 http://www.tihk.gov.tr/tr/duyuru-ve-haberler/haberler/istanbul-geri-gonderme-merkezi-raporu-yayinlandi/83

4. The Report into the Death of Lütfullah Tacik and on Van Deportation Centre

The report was published on HRIT's website on 5 January 2015. According to the report, "HRIT decided to visit Van Deportation Centre to probe the claims of that Lütfullah Tacik, a 17-year old Afghan refugee, was beaten to death in police custody at Van Security Directorate."[11] It is understood that the general purpose of the visit was to receive information as to the claims and make an assessment of the problems. According to the HRIT, the legal basis of the visit was the Law on HRIT and the decree which designated the HRIT as the national preventive mechanism. Having a legal basis does not necessarily mean performing a NPM function properly. As could be derived from the discussion below, functional independence and an explicit methodology for use of authority and for inquiry/ reporting into human rights violations are basic prerequisites for an effective NPM mission, which the HRIT is lacking.

The report lists the names of persons and public authorities/ organisations that the HRIT mission met during the visit, but it does not explain if the visit was unannounced. Yet, the HRIT mission found it "meaningful" that the witnesses had left the Cntre of Children and Youth building prior to the visit, which, according to us, might indicate that the visit was an announced one.

The report summarises the interviews and the investigation file, but does not provide details of the circumstances of interviews. After reviewing the interviews, the report gives a broad coverage to international human rights law and ECtHR case law. Then follows a section on the conditions of the Deportation Centre, which were "favourable" according to the report. However, it should be noted that the HRIT mission assessed the conditions of the Centre against other deportation centres in Turkey, which are not as favourable. The report gives a breakdown of the refugees kept at the centre by using the categories defined by the State, such by demographic characteristics and by status such as 'economic migrant' / 'political migrant'. As mentioned above, the report provides an assessment of the physical conditions of the Centre as a detention centre; however, it does not make any comments or observations on protection measures, administrative hierarchy nor how the refugees are treated.

The alleged death of 17-year old Lütfullah Tacik in custody was the main objective of the inquiry, according to the report. However, the report does not make any comments regarding the murder in custody (para. 174-180) nor addresses this incident as the main objective of the inquiry. This problem was also underlined by one of the HRIT Board members, who expressed a dissenting opinion for the report. Recommendations listed

11 http://www.tihk.gov.tr/www/files/van_ggm_raporu.pdf

in the report are of general nature and the report does not identify any follow-up or monitoring mechanism.

5. Report on Allegations of Sexual Abuse and Ill-treatment at Antalya L Type Closed Prison

The report of the HRIT's visit to Antalya L Type Closed Prison, which was published on HRIT's website on 27 February 2015, was prepared following the decision taken by the HRIT upon the news stories about the sexual assault against an inmate by another inmate, and upon the Human Rights Association's appeal to the HRIT concerning the same incident.[12] The report does not explain if the visit was unannounced.

According to the report, the HRIT delegation met the parties and the prison administration, but it does not provide details of the circumstances of interviews. It is understood that the delegation was briefed by the prison director and a representative of the Ministry of Justice on the general conditions at the prison. The prosecutor of the prison also provided some information, which was apparently crosschecked by the HRIT delegation who reported several contradictions.

It is understood that the HRIT delegation interviewed the inmate who had been subjected to sexual abuse and the suspect of the assault, but the report does not provide information on the circumstances of the interviews. In connection with the claims of sexual assault in prison, the delegation met randomly selected inmates, and the method and circumstances of the interviews were explained in the report. However, as the inmates were selected randomly, it is understood that the delegation could not reach out to the witnesses of the sexual assault.

In sum, the report mentions that the visit had been conducted upon an original application, yet it fails to give an account of violations in the prison. The report simply points out to the gaps in regulations and confines itself with precatory recommendations such as a shift in the attitudes of the prison administration. The report does not define any follow-up mechanism.

6. The Report of the Visit to the Prisoners Ward of Ankara Numune Training and Research Hospital

The report of the visit, which was conducted upon an individual application filed to the HRIT, was published on HRIT's website on 13 May 2015.[13] According to the report,

12 http://www.tihk.gov.tr/www/files/54f0a1ca09080.pdf

13 http://www.tihk.gov.tr/www/files/55758a79a4d5c.pdf

the objective of the visit was to receive information as to the claims and make an assessment of the problems, and the legal basis of the visit was the Law on HRIT and the decree which designated the HRIT as the national preventive mechanism. Having a legal basis does not necessarily mean performing a NPM function properly. As we have explained above, the HRIT lacks the legal basis to conduct an effective NPM mission, which also applies to this visit. Instead of making a decision on the claims in the individual application, the HRIT preferred to conduct a visit and thus failed to use its authority to prevent violations. Here, too, the report does not explain if the visit was unannounced.

The report explains circumstances of interviews with the hospital staff and inmates kept at prisoners ward, yet it does not summarise interview notes. The report outlines the legal framework concerning the prisoners' right to access to health, and then make an assessment of external facilities, detention centre, the prisoners ward and rooms in the ward, and of staff and health services. The report concludes with recommendations, yet fails to define any follow-up mechanism.

II. Other Activities

According to the information available at the website, the HRIT has organised a number of workshops and international conferences. Yet there is no information on how these events were decided, planned and organised or on the profiles of the participants and actions taken and /or planned as a result and outcome of these events.

For the first time since its establishment, the HRIT provided statistical data on human rights violations on 16 February 2015, covering the year 2014, at its web site.[14] The data published in this report were segregated into three categories based on type of claims of violations, public authorities receiving complaints, and provinces. Other than this the raw statistical data on violations, the report does not provide any information on the claims of violations, except for noting in the introduction that "investigations into these claims are continuing."

III. Working Document on the Draft Bill Amending the Law on Human Rights Institution of Turkey

The HRIT was established with the Law No 6332 of 21 June 2012. Civil society organizations have shared their concerns with the public several times prior to and after the enactment of the HRIT Law, asserting that the HRIT, which should promote and safeguard human rights, was in fact far from meeting the minimum requirements of a national human rights body in terms of its designated powers, duties and structural conditions.[15]

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14 http://www.tihk.gov.tr/www/files/54e204712baf5.pdf

15 Please see the Joint Press Release by Helsinki Citizen Assembly, Human Rights Association, Human Rights and Solidarity with the Oppressed Association, Human Rights Foundation of Turkey, Amnesty International, 18 April 2012, at http://www.tihv.org.tr/turkiye-insan-haklari-kurumu-kurulmasina-dair-

The HRIT itself has started working on a draft bill to amend its founding law, and sent the "Working Document on the Draft Bill Amending the Law on Human Rights Institution of Turkey" to several human rights NGOS, including the HRFT, with a letter dated 20 January 2014 and numbered 16949670/550-76. Upon this, the HRFT prepared a detailed evaluation of the HRIT, which is included in the previous Evaluation Report.[16] The HRIT prepared another draft bill in 2015 and shared this document with human rights NGOS on 16 March 2015.

The draft bill draft prepared by the HRIT notes that Institution has been designated as the national preventive mechanism with the cabinet decree. Then, it cites two reasoning, as in the draft of 2014. The first one is as follows: *"Given that the national preventive mechanism is a highly extensive duty" and "also taking into consideration the other duties of the Institution, it is highly difficult for the Institution to effectively perform the function of national preventive mechanism with its current organization and number of staff. Hence, it is imperative that the Institution's organisational structure is restructured by reinforcing its central organisation, establishing its provincial organisation, increasing the staff number and recruiting experts at the provinces."* The general reasoning, which indicates the number of places of deprivation of liberty as 5000, considers the function of the national preventive mechanism as merely a numeric one and fails to comprehend why an independent visit mechanism is a necessary condition for the prevention of torture. As for the second reasoning, the draft bill states that the organization of the Institution as a directorate general *"would diminish its effectiveness at national scale, and would have a negative impact on its prestige at international level --and in connection with that, on the prestige of our country."* and suggests that *"an organization at the level of an undersecretariat would be appropriate."*

The general reasoning largely concentrates on the functions of the national preventive mechanism. However, unlike the general reasoning, the text of the law is unfortunately far from defining the relevant functions of the national preventive mechanism. As such, even the relevant articles of the draft law, which apparently aim at defining the functions of the NPM (Article 1, Article 5 and Article 7), do not show any relevance with the Paris Principles and the principles of the OPCAT. Above all, we should emphasise that the national preventive mechanism should be able to perform preventive functions, conduct enquiries, visits and inspections at any place where there are people deprived of their liberty. The mission and powers of national

kanun-tasarisi-derhal-geri-cekilmelidir/; and Assessment Note on 14 February 2014 by the Society of Forensic Medicine Specialist, Progressive Lawyer Association, Agenda for Children Association, Helsinki Citizen Assembly, Human Rights Research Association, Human Rights Association, Human Rights and Solidarity with the Oppressed Association, Human Rights in Mental Health Association, Foundation for Society and Legal Studies, Human Rights Foundation of Turkey, Turkish Medical Association, and Amnesty International, at http://www.amnesty.org.tr/uploads/Docs/degerlendirme-notu890.pdf

16 The Turkish and English versions of the HRFT's Evaluation Report are available at http://tihv.org.tr/94-ulusal-onleme-mekanizmasi-degerlendirme-raporu/ (TR) and http://tihv.org.tr/95-national-preventive-mechanism-evaluation-report/ (EN)

preventive mechanisms should be elaborated explicitly and specifically in national legislation as a constitutional or legislative text. The general definitions of detention sites should be made in line with the protocol and should be reflected in those texts. The national preventive mechanisms should complement the existing protection systems against torture and maltreatment. They should not replace the governmental and non-governmental monitoring, control an inspection institutions or should not repeat their practices. The main objectives of NPMs are to prepare draft legislation or provide comments in relation to existing or proposed legislation, as well as to make recommendations on the basis of the information collected and observations made and make suggestions for implementation of recommendations with a perspective that aims at improving the situation of people deprived of their liberties by engaging in dialogue with the competent authorities. In order for a national preventive mechanism to be compatible with the Optional Protocol and with the Paris Principles pursuant to article 18/last of the Optional Protocol, the states which are party to the protocol must establish [this mechanism] as one that is functional so as to pay un-notified visits to places of deprivation of liberty, and independent in terms of structure and personnel regime; sufficient in terms of finances and human resources; and the powers and security of access to places of deprivation of liberty thereof should be specified in the constitution or legislation in the domestic law.[17] To put it in a nutshell, according to the Optional Protocol assuming the function of the NPM does not merely depend on the designation of an institution, but on the existence of a legislation that specifies its mission, powers, structure, functional independence and the transfer of adequate financial and human resources for their effective functioning.

The relevant legislation should ensure that the elections and appointments of NPM members are conducted in line with the published criteria foreseeing the necessary expertise and experience, and in an open, transparent and pluralistic manner that provides for the participation of a wide range of stakeholders including the civil society. It should also ensure that an egalitarian approach is followed in terms of the gender of members, the sufficient representation of minorities, ethnic and specific local groups are taken into consideration, any justification concerning the term of duty and removal from office of the members are explicitly stated and the immunities and privileges required for the members to perform their functions independently are ensured. It is unacceptable that an extremely limited regulation that is far from ensuring fundamental standards has been proposed with respect to the members, organization and job descriptions of the Institution whereas a detailed study has been conducted with respect to the financial rights of the other people therein.

The draft bill foresees amendments to the structure of the Institution without taking into consideration the unique structure of the national preventive mechanism, and represents a text that is not compatible with the function of the national preventive mechanism and is moreover contrary to the aforementioned instruments. Moreover,

17 UN Subcommittee on Prevention of Torture (SPT) Guiding Principle, para 24-29.

although it had been stated as a priority by all relevant national and international organisations that HRIT's independence should be safeguarded and its capacity should be enhanced, the draft bill does not intend to solve these problems. On the contrary, it has a highly alarming approach whereby it aims to turn into "ordinary civil servants" the civic institutions, human rights organisations and academics under articles 7, 8 and 9, which are declared to be particularly related to the national preventive mechanism.

The draft Bill notes that several amendments to the organisation of the Institution have been proposed with the aim of guaranteeing "*functional autonomy"* in organisation. The transfer to the Institution of provincial and district human rights councils --which have been existing for years in the absence of any legislative basis-- and transformation into departments of the structures that had been defined as units in the institution's establishment law, indicate that new hierarchical organisational principles are determined. As stipulated in Article 5 of the Paris Principles, the guarantees concerning the organisation of the Institution are important in terms of ensuring an infrastructure that enables the institution to carry out its activities smoothly, having sufficient financial resources, its own personnel and facilities. Apparently a reorganisation in negligence of these fundamental principles, similar to organisation of an ordinary public institution by amending the names and employing other cumbersome structures under the Institution, will not make any sense. As such, formations such as "local human rights councils" which are equipped with important duties such as objections have been mentioned in the Bill without defining them.

The Draft proposes amendments to memberships to the Board following "*criticisms by civil society*". Pursuant to Paris Principles Article 2, the tenure of the members of the Board the composition and mandate of which should be explicitly defined in the constitution or laws, the circumstances under which such tenure would be terminated, and the provisions concerning re-election should not be sufficient [per se] to ensure its independence. [Moreover] In the process of candidacy for membership and --based on the criteria-- the election thereof, neither the government nor any other authority should be engaged in filtering of candidacies, and that all candidates should be delivered before the mechanism that will carry out the election. Otherwise the institutions representing the government and the Board will be able to appoint the persons of their preference as a member of the board. A procedure of appointment that will result with the President and members working in affiliation to the government is definitely in violation of the spirit of Paris Principles which foresees "impartiality and independence." [18]

In the draft bill, the influence of the Cabinet continues with regard to the election of the board members. From this standpoint, no provisions have been included to guarantee the independence of the members. Not only it is unclear whether the Board will employ a filtering on the candidate lists before sending them to the authorities

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18 Kirsten Roberts, Bruce Adamson- Chapter 23 Peer- Review Mission: Human Rights Institutions. 17-21, January 2011, Ankara, Turkey; CAT/C/40/2, para. 28 (c) and (d)

to will make the selections, but also the criteria to be used by the Cabinet, too, are not set out. The provision, which foresees the trial of board members in cases where investigation authorization is granted by the Prime Ministry, openly prefers distancing itself from a being a provision that should take independence and immunity as the basis. When it is a matter of reporting state actors that conduct a violation, it is indispensable that responsibility is felt towards the authority which will authorize the investigation. However, with respect to the personnel and other experts of diverse responsibilities at the institution, there are no protective provisions.

There are no provisions ensuring gender balance and representation of ethnical/ religious/cultural minorities in relation to the membership profiles of the Board. Again while the qualifications to be sought from the new members concerning the protection and promotion of human rights are of importance in view of functional independence, it is seen that the past provisions are preserved in this respect. As a result, from the stand point of the scope of Paris Principles, a regulation with a guarantee of independence is not foreseen; and the proposed articles, too, lack such a guarantee within themselves.

It is easy to understand why the draft bill of the HRIT gives place to highly detailed provisions concerning the financial rights of the personnel. Financial independence pursuant to the Paris Principles (Article 5) is significant; however, having its own personnel is neither sufficient nor meaningful for the NHRI to independently and effectively operate. In that respect, we prefer to refrain from commenting on financial provisions such as monthly fees, rights, compensations and other payments, personnel seniority and severance rules, which the Institution seems to have meticulously focused on while elaborating the relevant provisions. Due to poor information made public about the duties undertaken by the Institution since its establishment, it is not possible for us to provide a realistic assessment of the provisions on the personnel regime defined in the draft Bill in details. However as mentioned both in the Paris principles and relevant recommendations and in the abovementioned Nils Muiznieks' report, it is unacceptable in view of the principle of independence that the personnel of the Institution are subjected to the same general personnel and recruitment legislation applicable to other civil servants. Similarly the Bill defines in Article 14, the relation of the "Provincial Human Rights expert" cadre with the total staff cadre however the definition of the position is not provided in any articles in the Bill nor a cadre has been allocated even in the additional indicators. Therefore introduction of quantitative limitations on non-existing cadres is a confession of how organisational and functional independence would not be ensured, when the absence of any provisions in the Bill concerning the independence of its staff is considered.

Draft bill defines an additional task of the Institution in Article 1 as follows: "*To conduct regular visits to sites where people deprived of their liberty or persons under protection are detained, within the scope of international agreements Turkey is a party to*." The Law currently in effect also assigns the same task to the Unit to Prevent Torture and

Ill-treatment. In the reasoning of the article it has been noted that the definition has been incorporated due to the fact that the Institution will also undertake the task of national prevention mechanism in addition to other tasks. Supplementary to our above-mentioned explanations that a mechanism lacking a legal basis would be incompatible with the OPCAT principles, we would like to note that making a reference to an international agreement would not be sufficient in itself to be called an effective national prevention mechanism.

The Bill transforms the structures organised as units in the current Law, into departments. The Bill does not involve any explanation as to how the structural and functional independence of the position defined as “head of department” would be ensured and in article 5, department of prevention of torture and ill-treatment has been equipped with the power of paying informed and uninformed visits. However how the principles of independence would be implemented in view of fulfilling this function has not been defined. Moreover the current Institution has been often criticised for its institutional and capacity deficits in the reasoning of the Bill. Yet contrary to this diagnosis, it introduces ambitious limitations dismissing pluralism and independence, such as setting the standards for the visit report of the head of department, preparing the training materials of the training department and setting standards for training.

Article 7 which is the one and only article in the bill said to be concerning the national prevention mechanism, refers to the functions of national prevention mechanism, and in the reasoning it is noted that this function would be fulfilled at local level by “Bureaus”, “Provincial Human Rights Consultation Boards” and “Independent Human Rights Rapporteurs”, duties and powers to be laid down by a Regulation.

The organisational features of the “Bureau”, modus operandi according to which it will undertake powers and duties, members or professional staff positions it will involve, have not been defined by any means. Moreover, it has been noted that “managerial positions will not be allocated.” The functions to be undertaken by this null and void bureau, independent from HRIT and internally independent, are uncertain. By the same token, the body introduced as provincial human rights consultation board, foresees a basis ensuring that Provincial HR Boards, operating in the absence of any legal basis, convene less often. Apparently this consultative body, with the Governor at its centre, lacks any functional or structural autonomy in view of preventing torture. Similarly the bill defines a category of independent human rights rapporteurs, who will be selected, when need be, by the Institution among “those interested”, and that’s the only criteria defined for the selection of these rapporteurs. The Bill also defines a “specialisation” through an unclear process of certification of the Institution, which defines itself as insufficient in terms of capacity. Apparently, these rapporteurs, though defined as independent, who are appointed upon approval of the Institution or selection of the Board, are expected to serve according to the standards defined by the Institution and who do not even have been assigned any special tasks, do not correspond to the OPCAT and the Paris Principles nor the SPT (Sub-Committee on Prevention of Torture) recommendations.

Though it has been noted that, the amendment has been proposed in view of *"functional autonomy"* as is known, as stipulated in Article 20 of the OPCAT, in order to enable the national preventive mechanisms to fulfil their mandate, they should be empowered to access to all information concerning the number of persons deprived of their liberty in places of detention, as well as the number of places and their location, to access to all information concerning the treatment of those persons as well as their conditions of detention; should be granted the liberty to choose the places they want to visit and the persons they want to interview, and the opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary. Therefore, despite the absence of any such provisions in the draft bill, it is unacceptable to argue that the proposal included in the reasoning is compatible with functional independence.

As we have mentioned earlier, in order to ensure the presence of a national prevention mechanism, compatible with the Protocol and Paris Principles, a mechanism having functional and organisational independence in terms of its powers, with predefined and secured terms of reference and professional requirements of its members, as well as details such as appointment, tenure and inviolabilities, having its own budget and personnel. Therefore, the proposed amendments cannot be accepted as defining the national prevention mechanism, although they intend to do so.

Unfortunately, we have to conclude that the Draft Bill does not provide a perspective for effective prevention of torture when it assumes that this task would be performed by an expert recruited at the headquarters (to be appointed by the Chair of the HRIT Board), working in cooperation with "Bureaus" (7 of them to be established at most, but the Draft Bill fails to guarantee their institutional capacity and their personnel has not been defined by Law), and with the Provincial Human Rights Consultation Board in another province (which has no structural difference with the existing Provincial Human Rights Boards, and which would convene once a year in order to exchange information and views), and with "Human Rights Independent Rapporteur" (who shall be certified by the current HRIT based on currently unknown certification procedures; the reporting procedures of whom are defined by the HRIT; and who would be able to request and collect information and documentation if authorised to do so by the President or Second President or Head of Department).

Keeping all these criticisms, the HRFT has participated in the "HRIT Law Revision Workshop," organised by the HRIT on 17 March 2015.[19] The participants of the workshop, including the representatives of human rights NGOs and public authorities, decided that a new draft should be prepared, following the criticisms levelled against the proposed draft bill during the workshop. As such, another meeting took place on 15 May 2015 and similar meetings will continue in this new process.

19 http://www.tihk.gov.tr/tr/duyuru-ve-haberler/haberler/kanun-revizyonu-calistayi-/92

CONCLUSION

This study has been carried out for monitoring Turkey's steps towards establishing a national prevention mechanism, which Turkey has undertaken by ratifying the OPCAT. In line with the requirements of OPCAT, Turkey was obliged to establish or designate an NMP until 27 October 2012. Yet, this step was taken in 2014, when the HRIT was designated as the NPM with a Cabinet Decree as of 2014. As presented throughout this study, the way the HRIT was designated as the NMP leaves no room for a discussion of assignment of the HRIT with NPM tasks. Indeed, when the reporting activities of the HRIT, which provides no means for an analysis of these activities, and the HRIT's efforts towards drafting a Bill, which would presumably define the functions of the NPM, are considered together, it is impossible to claim that the HRIT has acted in the capacity of the NPM up to the date. As also stated during the UN's second term universal periodic review on Turkey held on 27-29 January 2015 in Geneva, HRIT's founding law is far from meeting the Paris Principles and there is a need for a legislative amendment to guarantee the NPM's structural and financial independence to fully conform to the Paris Principles.[20] As this report clearly demonstrates, its founding law does not provide the HRIT with the means to carry out the tasks of a national human rights body, and yet there is still a long way to take for the HRIT to act in the capacity of a national preventive mechanism.

Vesting the state, which is the main source of human rights violations, with the responsibility of preventing human rights violations and promoting the human rights is indeed contradictory. One should accept that attempting to overcome this contradiction with an independent human rights institution would have some limitations of its own, yet attempting to make one to act in this capacity without even ensuring fundamental standards is a clear sign of lack of political will. In this regard, we point out to the "Principles relating to the status of national institutions for the promotion and protection of human rights" (Paris Principles) accepted by the UN General Assembly (20 December 1993, 48/134) as the basic reference document, which defines the national human rights institutions as "key national actors" with several tasks, including monitoring violations, providing recommendations to address human rights cases and promoting human rights thorough public education programmes, and describes the structural and functional qualifications of these actors.

The HRIT's inquiry reports discussed above clearly demonstrate that the HRIT cannot perform effectively without functional, institutional and financial independence. In a similar way, the HRIT has been designated as the national preventive mechanism but without the necessary legal, structural and financial guarantees; thus, it is not possible to lay weight on its activities, which, according to the HRIT, have been carried out in

20 United Nation Human Rights Council universal Periodic Review 2nd Cycle in 2015: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/210/44/PDF/G1421044.pdf?OpenElement, para 4 and 5; The UN Committee Report on the Protection of the Rights of All Migrant Workers and Members of Their Families, CMW/C/TUR/QPR/1, para. 4

the capacity of the NPM. It is not possible to assume that HRIT's activities limited to visits would contribute to the prevention of torture, especially when it is considered that the HRIT has failed to establish an effective individual application mechanism as a national human rights institution.

We suggest that the HRIT should bring an objection against undertaking the task of national preventive mechanism itself, at the first hand. Thereby, we hope that the HRIT guarantees its functional and institutional independence and carry out effective activities. As HRFT, we will continue to monitor the implementation of the Optional Protocol until an independent, effective and realistic national prevention mechanism is established.

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