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INTRODUCTION

Human Rights Foundation of Turkey 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] on the ratification process of 'United Nations (UN) Optional Protocol to the Convention Against Torture' and its aftermath regarding the implementation of national preventive mechanisms.

This study represents the stage Turkey has reached regarding the periodic monitoring and implementation of the Optional Protocol during the year 2013 and the first half of 2014. Unfortunately, the mechanisms were not built until the designated date 27 October 2012, but were promulgated in the Official Gazette on January the 28th 2014 through Cabinet Decree, identifying Human Rights Institution of Turkey as the national preventive mechanism.

The purpose of this study is to highlight the necessity of an independent mechanism on the effective implementation of the Optional Protocol. The decree of the Cabinet further created the need to provide an evaluation of the structure and activities of the Human Rights Institution of Turkey, as well as the implementation of the Optional Protocol during the year 2013-2014.

The violations of the right to life, prohibition of torture and freedom of speech throughout the year 2013 and the beginning of 2014 displays the necessity of an institutionalisation through genuine subjects and structures on the area of human rights, which is increasingly perceived as a "wish box of request and complaint".

The first part of this study focuses on the state of national preventive mechanisms in Turkey; while the second part evaluates the involvement of Human Rights Institution of Turkey with the preventive mechanisms.

FIRST PART

1. Why an Optional Protocol?

The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), was signed on 10th December 1984 by the UN General Assembly and entered into force on 26th June, 1988. Turkey adopted the Convention on 29th April, 1988. The States Parties to this Convention are obliged to prevent acts of torture, ensure that it is an offence under criminal law, make these offences punishable, and provide redress and rehabilitation to the victim of an act of torture. These obligations

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: 'Ulusal Önleme Mekanizmaları "Türkiye İnsan Hakları Kurumu' Türkiye için Uygun Bir Model mi?, TİHV Yayınları, Ankara, September 2012

indicate an understanding that prioritizes the prevention of torture, rather than focusing on the consequences of a possible infringement.

The Convention against Torture is not only among the fundamental human rights conventions, but is also based on the principle *aut dedere, aut judicare* (extradite or prosecute), and thus has a hybrid structure. The convention gives the States Parties the authority to take measures regarding the individuals held accountable for the act of torture, irrespective of the nationality of the victim of the perpetrator, or where the act has taken place. In accordance with the article 20, if the Committee receives reliable information that torture is being systematically practised in the territory of a State Party, it holds the right to make confidential inquiries, which may include a visit to its territory in agreement with the State Party concerned[3]. In this sense, although The Convention Against Torture provides an international monitoring mechanism, the restrictions on authorization in the international domain -primarily regarding preventive visits- indicate a need for other entities[4].

In addition to these dynamics, the torture practices across the world further create the obligation to have preventive mechanisms based on visits: "Torture identifies the moment when public authorities or private individuals and professionals who quietly assist them, use these technologies on restrained individuals for state purposes (intimidation, false confessions, and information). It necessarily involves the use or abuse of 'public trust'." [5]

Public safety is closely related with a country's systematic approach towards torture. Permanence of torture in a country indicates the presence of at least one of three prerequisites: A national security model where the democratic institutions that are expected to give an account of the national security administration are repressed; A model of a judicial system that gives a high priority to confession; A civic disciplinary model where the police maintains order though tacit consent.

The national security model is implemented as a part of a pro-active strategy in a state of emergency during a war with the enemy. The individuals that are subject to torture are chosen due to their alleged political activities. The model of judicial system privileges the statements of the judges and prosecutors, declares all that are arrested guilty and aims to obtain written confessions. Similarly, the civic disciplinary model allows torture through citizen and quasi-citizen distinction, humiliation methods and relies primarily on the police for the safety of citizens[6]. These models are not only present in oppressive regimes that are subject to international monitoring, but also in democracies. There is no government that practices torture "one time only" or "in

3 EVANS, Malcolm D.; HAENNI-DALE; Claudine: Preventing Torture? The Development of The Optional Protocol to the UN Convention Against Torture, Human Rights Law Review (2004) 4 (1), s.21

4 For the discussion within regard to UN, see: İşkenceyi Önleme Kılavuzu, TİHV Yayınları, 2007, s.51-89

5 REJALI, Darius: Torture and Democracy, Princeton University Press, 2007,s.559

6 REJALI, age., s. 46-63

certain circumstances". Torture, if seen as a legitimate method by a government, will not only be used against political opposition but all factions of society in the form of oppressive and violent measures[7].

These characteristics of governments that practice torture lead to the recognition of further models that influence the state and the societies' intertwined understanding of torture. The Security Model is based on the supposition that the information gathered from the detained individual may prevent terrorism and thus assert that if the detained individual does not talk it may risk the lives of hundreds. This model establishes a ground for the discussions on redefining torture as "practices that causes severe physical pain" or the creation of new detention centres. The Stability Model perceives torture as a method to discipline the society or repress the existing political opposition. The Legitimacy Model, states that the use of torture by certain individuals in certain particular situations is legitimate and causes the society to gradually accept these identities[8].

These models of the practices of torture are essentially an effort to explain the government practices intended to combat two strategies of global monitoring. One is 'exposing torture to public censure through careful documentation', while the other is 'holding state agents responsible for torture conducted during their watch'. However, the first strategy has encouraged torturers to invest in less visible, hence harder to document, techniques. Similarly, the second strategy has encouraged governments to find allies for their techniques of enforcement from the public, through allegations such as terrorism or illegal immigration[9]. There is no doubt that the monitoring practices remain crucial and the consequences mentioned above cannot be judged in terms of a strict cause and effect relationship. Nevertheless, in a frame of global human rights, the insufficiency of mere monitoring indicates the necessity of an international entity that has a preventive character based on visits. Thus, the debates on national and international mechanisms based on visits to territory and their inclusion to the protocol within UN are considered groundbreaking.

UN Optional Protocol to the Convention against Torture (Protocol) has been adopted by the General Assembly on 18 December 2002 and entered into force on 22 June 2006. As of July 2014, 73 States are parties to the protocol, Turkey has become one on September the 27th, 2011.

The 1st Article 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*".

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7 AI Report Amnesty International, 'Torture and Ill-Treatment: The Arguments', Amnesty International, 2006, http://web.amnesty.org/pages/stoptorture-arguments-eng

8 BLAKELEY, Ruth: Why Torture?, Review of International Studies, C. 33, S. 3 (Jul., 2007) s.377-390

9 REJALI, age., s.43

The Protocol proposes the formation of a subcommittee that consists of 10 people and holds the right to make unannounced visits to detention centres. The committee formed under the name "Subcommittee on Prevention of Torture" (SPT) in 2006, started working in 2007 and by July 2014 it has carried out SPT visits to 20 countries and advisory visits to 5 State Parties[10].

States parties to the Protocol are entitled to implement National Preventive Mechanisms (NPM) that guarantee functional and institutional independence as well as the independence of their personnel. NPMs have to be provided necessary financial and human resources and an unrestricted access to places of detention that are secured by a constitutional or legislative text[11]. Due to the article 17 of the convention, each state party agrees to establish a national preventive mechanism in accordance with the objectives of the protocol, at the latest one year after entry into force.

2. The Independence of the National Preventive Mechanisms

The efficiency of a preventive approach requires an emphasis on the independency of the national preventive mechanisms, as highlighted in Paris Principles and SPT reports. These provisions are a part of the minimum standards of the Optional Protocol and thus must be enforced by all States Parties. These principles can be grouped as legal independence, financial independence and independence against intervention.

In order to ensure the independency of the NPMs, its mandate, powers, terms of office, funding and lines of accountability must be recognised on a legal level. If not, the NPM's will be liable to intervention depending on the changes within the executive government, which will harm its independency. Therefore, it can be said that "the only authority with the ability to alter the existence, mandate or powers of the NPM should be the legislature itself"[12].

The NPMs must likewise have financial autonomy, and must not be subject to any financial control of the executive government, even in the case where the NPM is established within an an existing institution. On such ideal conditions, this law enables NPMs to have the right to draft its own budget[13].

In order for NPMs to fully perform their mandate of carrying out preventive visits, their functional independence must be secured. This principle which encompasses all places of detention, underlines the obligation of a legal mandate for the NPMs that constitute a part of international human rights institutions[14].

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10 Published reports on visits and the information related with visits, see:: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/CountryVisits.aspx

11 CAT/0P/12/5, see the guideline: www2.ohchr.org/english/bodies/cat/.../SPT_Guidelines_NPM_en.doc

12 Association for the Prevention of Torture: Guide to the Establishment and Designation of NPMs, APT Yayınları,2006, s. 39.

13 Guide to the Establishment and Designation of NPMs, s. 46

14 THOMPSON, Mark: APT-Preventing Torture: An Operational Guide for National Human Rights Institutions (video)." Association for the Prevention of Torture. http://www.apt.ch/en/resources/preventing-torture-an-operational-guide-for-national-human-rights-institutions/

The independency of the NPMs is likewise essential for the protection of the individuals who work for or provide information for the NPM's, and for the prevention of any possible threats these individuals might face.

The aspects of independency may be summed up as follows:

Legal Autonomy	✓ The power and mandates of a national institution must be clearly set forth in a constitutional or legislative text[15]. ✓ The terms of the members of the mechanism regarding their re-election, period of office or conditions that will cause their office to end; must be compatible with the autonomy of the NPMs[16]. ✓ The composition and the sphere of competence of the national institution must be set forth in a constitutional or legislative text[17].
Financial Autonomy	✓ The NPM must exercise financial and operational autonomy while carrying out the functions identified in the Protocol[18] ✓ NPMs must have sufficient infrastructure, adequate financial resources, personnel and facilities[19].
Functional Autonomy	✓ In order to fulfil their duty, NPMs must be granted access to all information concerning the number of places of detention and their location, the number of persons deprived of their liberty, their treatment and conditions of detention[20]. ✓ NPMs must have the liberty to choose the places they want to visit and the persons they want to interview, to conduct private interviews with these people without witnesses, either personally or with a translator if deemed necessary[21]. ✓ NPMs must have the right to have contacts with the Subcommittee on Prevention, to send information and to meet with it[22].
Independence against Intervention	✓ No authority or official shall permit any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way[23]. ✓ No authority or official shall tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention[24].

Table 1: Paris Principles and Independence in the Optional Protocol

15 Paris Principles art. 2

16 Guideline art. 9

17 Paris Principles, art. 2

18 Guideline art.. 12.

19 Paris Principles art. 5

20 Protocol art. 20/ a, b

21 Protocol art. 20/d, e

22 Protocol art. 20/f

23 Protocol art. 21

24 Guideline art. 14

The principle of independency above indicates the minimum standards that have to be met in order to prevent torture. The system of preventive visits and the advise given by the NPMs to the Government can not to prove effective without securing the stated level of autonomy.

It is reported that the most common challenge faced by the NPMs currently in operation is the failure to establish financial autonomy. The NPMs established within an already existing institution in particular, are not allocated additional, independent resources which causes the activities of the larger institution to take precedence over the NPM's, a dependence on the approval of the institution in the decision-making process and negligence of the NPM in certain cases[25].

For instance the Macedonian NPM under the Macedonian Ombudsman have stated that they were obliged to cover the expenses of transportation, fuel and technical facilities through fundraisers, despite being funded by the Ombudsman throughout the year 2012; Due to these difficulties and the entailment of the protocol, they were given an independent budget in 2013[26].

The reports and advice submitted to the Government further reveals the level of autonomy of the NPMs. Publishing reports are particularly essential for the efficiency of the NPMs and play a central role in informing the public. Hence, legal assurance of the confidentiality of the individual's data whilst publishing reports is central for ensuring autonomy[27].

The independence of the members of an NPM from the executive government is necessary to ensure the objectivity of the reports and advice; and the well-functioning of the visits[28]. In many countries, members are delegated through 2/3 of the parliamentary votes. As in the case of Slovenia, where the NPM is a part of the Ombudsman, the terms regarding their delegation and dismissal may be secured by a legal guarantee. Similarly, the Ombudsman can be discharged with 2/3 of the votes in the general assembly in case of a prison sentence or failure to perform his/her duty. The members who fulfil their duties can only be discharged through the parliamentary votes in case of misconduct[29].

In countries such as Slovenia and Spain, the obligation for the Government to answer the reports and advice presented by the NPMs is secured by law. In other countries

25 The European NPM Newsletter: No. 21/22,2011, s.1-48. http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/npm_newsletter/npm_newsletter_no21-23.pdf

26 Correspondence with Macedonian NPM delegate Anica Tomshic Stojkovska, 5 November 2013.

27 Meeting with Femke Hofstee – Van Der Meulen, The Hague, 28 November 2013

28 Guide to the Establishment and Designation of NPMs, page 41

29 Correspondence with Slovenia NPM delegate Ivan Šelih ile, 7 November 2013

such as Germany[30], Paraguay[31] and Serbia[32], there is a limitation on the length of the time of response.

3. Establishing National Preventive Mechanisms

Due to the guiding principles[33] set out in the First Annual Report[34] (14 May 2008, CAT/C/40/2) and Fourth Annual Report (3 February 2011) of the Subcommittee on Prevention of Torture, the establishment of the national preventive mechanism must be a public, transparent, co-operative process. The role of the Subcommittee in assisting the States Parties in establishing and operating the NPMs is identified in the Protocol.

In brief, a state assumes two responsibilities by becoming a party to the Protocol: Firstly, the states parties must enable the right to visit the places of detention. Secondly, the states parties must establish an NPM, which is a representation of the Subcommittee against Torture at the national level, in compliance with the principles and objectives of the NPM.

The state parties to the protocol and the official national preventive mechanisms designated in these countries by July 2014 are given below[35]

Africa

States Parties	Ratification Date	NPM
Benin	September 20, 2006	Under Consideration
Burkina Faso	July 7, 2010	Under Consideration
Burundi	September 18, 2013	
Gabon	September 22, 2010	Under Consideration
Congo	September 23, 2010	Under Consideration
Liberia	September 22, 2004	Under Consideration
Mali	May 12, 2005	National Human Rights Commission
Mauritius	June 21, 2005	National Human Rights Commission
Mozambique Nigeria	July 1, 2014 June 27, 2009	National Committee against Torture
Senegal	October 18, 2006	National Observer of Places of Deprivation of Liberty
Togo	July 20, 2010	National Human Rights Commission

30 Correspondence with Germany NPMdelegateJan Schneider, 26 November 2013

31 Correspondence with Paraguay NPM chair Stella Cacace, 4 November 2013

32 Correspondence with Serbia NPM delegate Jelena Samardzić, 29 November 2013

33 www2.ohchr.org/english/bodies/cat/opcat/docs/CAT-C-46-2.doc

34 www2.ohchr.org/english/bodies/cat/opcat/docs/CAT.C.40.2.pdf

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

America

States Parties	Ratification Date	NPM
Argentina	November 15, 2004	-National Committee for the Prevention of Torture -Federal Council of Local Preventive Mechanisms -Local preventive mechanisms in each of the 24 provinces
Bolivia	May 23, 2006	Service for the Prevention of Torture
Brazil	January 12, 2007	National System to Prevent and Combat Torture at the federal level
Ecuador	July 20, 2010	Ombudpserson's Office
Guatemala	June 9, 2008	National Office to Prevent Torture and Other Cruel, Inhuman or Degrading Treatment
Honduras	May 23, 2006	National Committee for the Prevention Against Torture
Costa Rica	December 1, 2005	Ombudsperson's Office
Mexico	April 11, 2005	National Human Rights Commission
Nicaragua	February 25, 2009	Ombudsperson's Office
Panama	June 2, 2011	
Paraguay	December 2, 2005	National Preventive Mechanism Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment
Peru	September 14, 2006	Ombudsperson's Office
Chile	December 12, 2008	National Human Rights Institute
Uruguay	December 8, 2005	National Human Rights Institute

Asia-Pacific

States Parties	Ratification Date	NPM
Philippines	April 17, 2012	Under Consideration
Cambodia	March 30, 2007	Inter-governmental committee
Maldives	February 15, 2006	National Human Rights Commission
Nauru	January 24, 2013	Under Consideration
New Zealand	March 14, 2007	5 different bodies coordinated by the Human Rights Commission

Europe & Central Asia

States Parties	Ratification Date	NPM
Germany	December 4, 2008	National Agency for the Prevention of Torture,
Albania	October 1, 2003	Parliamentary Ombudsman
Austria	December 4, 2012	Austrian Ombudsman Board
Azerbaijan	January 28, 2009	Commissioner for Human Rights
Bosnia and Herzegovina	October 24, 2008	Under Consideration
Bulgaria	June 1, 2011	Ombudsperson's Office
Czech Republic	June 10, 2006	Ombudsperson's Office
Denmark	June 25, 2004	Danish Parliamentary Ombudsman, in collaboration with DIGNITY (NGO) and the Danish Institute for Human Rights (National Human Rights Institution)
Armenia	September 14, 2006	Human Rights Defender's Office
Estonia	December 18, 2006	Office of the Chancellor of Justice
France	November 11, 2008	General Inspector of Places of Deprivation of Liberty
Georgia	August 9, 2005	Ombudsperson's Office
Croatia	September 14, 2006	Ombudsperson's Office
Netherlands	September 28, 2010	5 bodies are designated as the NPM: the Inspectorate of Security and Justice, which also acts as coordinating body; the Health Care Inspectorate; the Inspectorate for Youth Care; the Supervisory Commission on Repatriation; and the Council for the Administration of Criminal Justice and Protection of Juveniles.
United Kingdom of Great Britain and Northern Ireland	December 10, 2003	20 bodies were designated as part of the UK NPM
Spain	April 4, 2006	Ombudsperson's Office
Sweden	September 14, 2005	Parliamentary Ombudsman and the Chancellor of Justice
Switzerland	September 24, 2009	National Commission for the Prevention of Torture
Italy	April 3, 2013	National and Local Authorities for the rights of persons deprived of liberty
Montenegro	March 6, 2009	Protector on Human Rights and Freedom
Kazakhstan	October 22, 2008	Ombudperson's Office

Cyprus	April 29, 2009	Office of the Commissioner for Administration
Kyrgyzstan	December 29, 2008	Centre for Monitoring and Analysis, together with the Coordination Council for the Prevention of Torture
Liechtenstein	November 3, 2006	Corrections Commission
Lithuania	January 20, 2014	Ombudperson's Office
Luxembourg	May 19, 2010	Ombudperson's Office
Hungary	January 12, 2012	Commissioner for Fundamental Rights (effective as of 2015)
Macedonia	February 13, 2009	Ombudperson's Office
Malta	September 24, 2003	Board of Visitors for Detained Persons and Board of Visitors for the Prisons
Moldova	July 24, 2006	Moldovan Centre for Human Rights in combination with the Consultative Council
Norway	June 27, 2013	Parliamentary Ombudsman
Poland	September 14, 2005	Human Rights Defender's Office
Portugal	January 15, 2013	Ombudsperson's Office
Romania	July 2, 2009	Romania has five years to establish its NPM
Serbia	September 26, 2006	Protector of Citizens
Slovenia	January 23, 2007	Human Rights Ombudsperson's Office in collaboration with NGOs
Turkey Ukraine Greece	September 27, 2011 September 19, 2006 February 11, 2014	National Human Rights Institution Parliamentary Commissioner for Human Rights Ombudperson's Office

Middle East & North Africa		
States Parties	**Ratification Date**	**NPM**
Lebanon	December 22, 2008	Under Consideration
Mauritania	October 3, 2012	Under Consideration
Tunisia	June 29, 2011	National Authority for the Prevention of Torture

Table 2: Countries that ratified the Optional Protocol

States parties can choose to establish the national preventive mechanism as a new structure within a much larger structure, or designate an existing structure as an NPM. The protocol allows flexibility on this decision; however, the designated mechanism must be compatible with the "Principles relating to the status of national institutions for the promotion and protection of human rights" [36] (Paris Principles) accepted by the

36 http://ihm.politics.ankara.edu.tr/konferans/images/paris_ilkeleri.pdf

UN International Human Rights Committee in the General Assembly (3 March 1992 1992/54 and 20 December 1993, 48/134) due to the 18th article of the Protocol.

4. Turkey and National Preventive Mechanisms

In Turkey, establishing a national preventive mechanism has been brought to the Government agenda in 2009. During the session on the 'Democratic Initiative Process' in the General Assembly on 13th of November, 2009, the Secretary of Internal Affairs at time, Beşir Atalay have mentioned the ongoing effort of the government on institutionalisation in the area of human rights. He announced the formation of an independent "Commission Against Discrimination", a civil National Human Rights Institute, a National Preventive Mechanism and an independent police complaint mechanism, following the ratification of the Optional Protocol to the Convention against Torture[37].

In the 2012 Progress Report of Turkey issued by the European Commission on the 10th of

October, 2012, it was clearly expressed that *"Independent monitoring bodies have not yet been set up in line with the Optional Protocol to the Convention Against Torture and a National Preventive Mechanism (NPM) in line with the requirements of the Optional Protocol has not yet been established*[38]*.*

On 23rd of February 2012 the MP of the Republican People's Party (CHP) Ayşe Danışoğlu raised a parliamentary question regarding "the attempts on establishing a national preventive mechanism and "the preparatory work carried out with the non governmental organizations". The answer given with the signature of the Minister of Foreign Affairs on the 2nd of November 2012, Ahmet Davutoğlu, announced that "the works continued", however no further detail was given on the sort of work in progress. Similarly, he stated that they have participated in the meeting held by HRFT, Association for the Prevention of Torture and Ankara University on "The National Preventive Mechanism that must be established in line with The Optional Protocol to the Convention against Torture (OPCAT)[39]"

The following conclusions were made in these meetings held on the 3rd of November 2011 and 8th of October 2012, with the participation of multiple NGOs, Ministries, public institutions and the president of SPT Malcolm Evans:

- As expressed by the representatives of the ministries concerned, no concrete step has been taken regarding the establishment of an NPM
- Furthermore, there is no information on a unit designated to initiate the establishment of an NPM

37 13.11.2009 dated Radikal Gazetesi; http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=964199&CategoryID=78

38 http://www.abgs.gov.tr/files/strateji/2012_ilerleme_raporu.pdf, s. 18-19

39 http://www2.tbmm.gov.tr/d24/7/7-4250sgc.pdf

- Although occasional references were made at the cabinet level to entities such as the Human Rights Institution of Turkey, no substantial work was actualised
- As expressed during the meeting (8 October 2012) by the MP of the Justice and Development Party (AKP) and president of the Sub-committee on the Human Rights Inquiry Committee in the Grand National Assembly of Turkey, Hamza Dağ: the law text has not been prepared taking National Preventive Mechanism into consideration

Despite these evaluations and the law text of Human Rights Institution of Turkey, during the press release on 15th of June 2013 on the 28th meeting of the Reform Monitoring Group, the EU Secretary Egemen Bağış announced *"Efforts to designate the Human Rights Institution of Turkey as the initiator of a national preventive mechanism within bounds of OPCAT are in progress"* [40]. Later, in the Progress Report of the EU Commission (16 October 2013) it was stated that "*The national preventive mechanisms has not yet been established"* however, that *"Turkey intends to establish a National Preventive Mechanism within the National Human Rights Institution"* [41].

On the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, (16 March 2013) Christof Heyns has recommended: *"The National Preventive Mechanism should be set up in line with Turkey's obligations under the Optional Protocol to the Convention against Torture"* [42]**.**

On 26th of November 2013, the report of the Commissioner for Human Rights of the Council of Europe Nils Muiznieks on his visit to Turkey from 1 to 5 July 2013 was issued[43]. Muiznieks stated that "*Turkey has not yet designated an NPM despite the Protocol*"; and reminded the concerns of the Turkish authorities on the grounds that "*it does not meet the requisite criteria for independence and that it would not have the operational capacity to fulfil this task"*, re-emphasizing the need to designate an NPM. Furthermore, the commissioner urges the NPM to *"review of its statute in order to ensure compliance with the Paris Principles".*

Although Turkey has agreed to establish an NPM by ratifying the Protocol on 27th of September 2011 according to the article 17, it has not fulfilled its duty by the designated date of the 27th October, 2012. The permanent representatives of Turkey came together with SPT on the 21st meeting in 11- 15 November, 2013[44].

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40 http://www.ab.gov.tr/index.php?p=49011&l=1

41 http://www.ua.gov.tr/docs/default-source/kurumsal/2013-t%C3%BCrkiye-ilerleme-raporu-nbsp-(ingilizce).pdf?sfvrsn=0

42 Translation of the reports, see: http://ihop.org.tr/dosya/ceviri/ChristofHeyns_TurkiyeZiyaretiRaporu_Tr.pdf

43 Translation of the report see: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2395762&SecMode=1&DocId=2079702&Usage=2

44 SPT, Seventh Annual Report, CAT/C/52/2, 20 March 2014: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f52%2f2&Lang=en

The third gathering on the enforcement of a national preventive mechanism in accordance with the optional protocol was organized by the collaborative planning of Ankara University, Association on Prevention of Torture and HRFT. The meeting took place in January 2014 with the contribution of relevant NGOs, public bodies and international structures, as well as the president of SPT Malcolm Evans, and the former member of the European Committee for the Prevention of Torture and the current president of National Preventive Mechanism of Switzerland Jean Pierre Restellini.

As in other meetings it was stated that the Human Rights Institution of Turkey is unable to function as a national preventive mechanism, and furthermore the institution may *"collapse".* The representatives of the institution and the participants of the meeting has reached a full consensus on the impossibility of the fulfilment of this function by the institution.

Nonetheless, the Deputy Prime Minister and the minister in charge of Human Rights who participated in the evaluation section of the meeting, has announced: *"The Cabinet Decree on establishing the Human Rights Institution of Turkey to function as a national preventive mechanism has been presented to the Prime Minister to be signed".*

5. Designating a National Preventive Mechanism through Cabinet Decree?

On January the 28th, 2014 the cabinet decree (2013/5711, 9 December 2013) was promulgated in the Official Gazette[45]. The decree identified Human Rights Institution of Turkey as a national preventive mechanism for the mandate outlined in the Optional Protocol.

Prior to opening into discussion whether this designation is compatible with the international law, the MP of CHP has submitted a parliamentary question on 14th November 2012, on establishing a national preventive mechanism as a part of the Democratic Initiative Process continuing since 2009. She enquired "which concrete steps were taken towards establishing a national preventive mechanism", "which administrative units were authorised for these tasks" and "their programme in order to involve public participation". The answer given by the Minister of Foreign Affairs on 17 March 2013 stated that "Becoming party to the Optional Protocol in 2011 within the frame of 'zero tolerance against torture' policy must be taken as a commitment to the preventive policies in itself" and added that the Human Rights Institution of Turkey is designated as an NPM through Cabinet Decree[46].

Many studies have shown that the 'zero tolerance against torture' has no qualitative and quantitative correspondence, as the process of establishing an NPM equally reveals. The use of violence by an authoritarian regime that restricted fundamental rights and freedoms through certain regulations and practices since 2005, had become persistent by 2013 with the symbolic events of the "Gezi Park Protests" and

45 http://www.resmigazete.gov.tr/eskiler/2014/01/20140128-4.htm;

46 http://www2.tbmm.gov.tr/d24/7/7-33216sgc.pdf

process following “17 December Operations”. By designating Human Rights Institution of Turkey, which is far from fulfilling the role of a mechanism that prevents torture both structurally and functionally, it once again displayed that the policy had no reel correspondence.

As expressed above, an NPM must function in lines with the Paris Principles according to the Optional Protocol article 18. The Optional Protocol stipulates the transparency of the decision and the process of establishing a national preventive mechanism, and the necessity to involve all the relevant structures such as the non-governmental organisations, political parties etc.

The mechanism built in the light of Paris Principles must be based on a legal or constitutional ground; institutional, spatial, financial independence as well as the independence of the members must be guaranteed; members must be granted certain privileges in order to safely carry out their works and to ensure their personal security; there must be specialists from multiple disciplines among the members; gender-balance and representation of ethnical minority must be regarded; and it must have the authority to carry out unannounced visits and documentation in all detention centres.

An NPM can execute its preventive function, carry out investigatory visits and monitoring in every place where people are deprived of their liberty. The mandates and duties of national preventive mechanisms must be clearly and specifically indicated in the national statute in the form of a constitutional or legislative text. The general definition of the detention centres must be identified in these texts according to the Protocol. The national preventive mechanisms must complete their protection systems against torture and ill-treatment. It must not replace other governmental or non-governmental institutions in charge of monitoring, control and inspection, or repeat their practise. The main objective of these mechanisms are to draft legislations, evaluate existing draft legislations, form advice based on the information gathered, communicate with the governing jurisdiction and present advice from the standpoint of improving the situation of the people deprived of their liberty.

Presently, the process designating the national preventive mechanism was executed by the Cabinet Decree which is accepted as a regulatory body, and is not under a statutory provision. By taking the task of the legislative power, the executive power has caused a functional encroachment. Once again, according to the Guiding Principles of SPT, the process of establishing a national preventive mechanism must be public, transparent and co-operative. The Decree has not allowed any civil participation, against the principles of the international agreements; moreover, the Human Rights Institution of Turkey was designated for this mechanism, in spite of the will on the contrary.

The delegation of the duties and mandates of the NPM to an institution through Cabinet Decree does not have any legal foundation and thus is unacceptable. In addition, according to the Protocol the adoption of NPM functions is not only

dependent on a designation of an institution; but also on the existence of a regulation that covers the definition of the duties, mandates, structure, functional independency, adequate resources and transfer of funds in terms of budget and personnel as well a legal regulation ensuring of the safety of the members.

Due to the 17, 18/2, 21th article of the Protocol, Paris Principles article 2 and 5 and the guiding principles of SPT article 12 and 14, even if the national preventive mechanism is designated according to the minimum standard conditions stated above (provided its legal), the autonomy of the NPM from the institution involved must be secured by a legal provision.

These explanations clearly display that the duties and mandates of an NPM which was not designated by law will not have a legitimate basis.

SECOND PART

1. Draft Law Regarding the Amendment of the Law on Human Rights Institution of Turkey

The concerns about the qualities, power and mission of National Human Rights Institutions constituted with the aims of developing and protecting human rights under the Human Rights Institution of Turkey, which had been established with law numbered 6332, dated June 21st 2012 have been previously shared[47].

Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Christof Heyns, stated in his report dated March 16th 2013 that the concerns with regards to "the independence, procedure of election of members and limited inclusion of the comments provided by the civil society may compromise the independence of the institution in future," and invited "the Government of Turkey to consider to review the newly adopted law" in order to ensure the institution's "effective functioning and full discharge of its investigative powers." [48]

In addition, following his visit to Turkey from 1 to 5 July 2013, Nils Muiznieks, Council of Europe Commissioner for Human Rights, released on November 26th 2013, his report which included criticisms of the Turkish Human Rights Institution. The Comissioner emphasized "the lack of guarantees for the independence and impartiality of the members of the Human Rights Board; the fact that the personnel of the THRI would be subject to ordinary legislation on personnel and recruitment of civil servants, without the necessary additional guarantees for independence; and the extensive powers of the President and the Vice-President of the Human Rights Board (elected by the Board members directly), as opposed to a more collegial approach favoured by civil society.

47 18 May 2009 dated Joint Press Release: http://www.tihv.org.tr/turkiye-insan-haklari-kurumu-kurulmasina-dair-kanun-tasarisi-derhal-geri-cekilmelidir/

48 Translation of the report, see: http://ihop.org.tr/dosya/ceviri/ChristofHeyns_TurkiyeZiyaretiRaporu_Tr.pdf

The Commissioner notes that the President of the Human Rights Board does not only preside over the Board, but is also the head of the administration of the Institution, and has full control over budgetary and personnel matters." The report also included the following comments: "It has not been clarified how the THRI is intending to address human rights NGOs' concern about participation, inclusion and transparency. The

Commissioner also notes that, as of September 2013, the Institution does not yet have a website."[49] As of July 2014, the THRI has got a website.

UN Human Rights Committee, in its Concluding Observations dated November 13th 2012, made the following statement: "The State party should amend the 2012 law for the establishment of the national human rights institution, guaranteeing the organic and financial independence of the National Human Rights Institution in full compliance with the Paris Principles."[50]

All statements referred reveal that the Turkish Human Rights Institution cannot act structurally and functionally, as the National Human Rights Institute that is expected to develop and protect human rights in coherence with Paris Principles.

Given the national and international evaluations about the establishment objectives of the Institution, it is not a realistic approach trying to configure it as a national prevention mechanism, a mission that is not included in the Institution's law of establishment, without making amendments for the purpose of functioning as the National Human Rights Institute in accordance with its objective of establishment adopted as a requirement of universal norms.

On March 23rd 2012, the concerns about the incompatibility of the structure of the Turkish Human Rights Institution with Paris Principles and the impossibility of undertaking the function of a national prevention mechanism have been shared with public[51].

Despite the regulations of Paris Principles and Optional Protocol, and the above-mentioned consideration of relevant NGOs, international society and representatives of the society, the Turkish Human Rights Institution is specified as the national prevention mechanism with the Council of Minister decree numbered 2013/5711 and dated December 9th 2013, which entered into force uon publication at Official Gazette on January 28th 2014. In addition, Turkey's Permanent Represemtative to the UN in Geneva attempted, on February 4th 2014, to notify that the National Human Rights Institute has been set as the national prevention mechanism[52].

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49 Translation of the report, see: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2395762&SecMode=1&DocId=2079702&Usage=2

50 Human Rights Committee, 13 November 2012, Final ;Observation Report: www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-TUR-CO-1.doc

51 23 March 2012 dated Joint Press Release: http://www.ihop.org.tr/index.php?option=com_content&view=article&id=562:tuerkiye-nsan-haklar-kurumu-kanunu-tasars-uezerine-ortak-basn-acklamas&catid=36:ulusal-nsan-haklar-kurumu&Itemid=46

52 http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/Turkey4Feb2014.pdf

At that stage, "Draft Law for the Amendment to the Law on Turkish Human Rights Institution" came to the agenda[53]. THRI shared the Draft Law with the Human Rights Foundation of Turkey on January 20th 2014 in order to get views and proposals.

Two justifications were brought as to why the Institution would be assigned as the national prevention mechanism by a decree of Council of Ministers as formulated by the Draft Law in question. The first one was as follows: "Taking into consideration the existing organisational structure and personnel number of the Institution, it is clear that the legislation does not consider the Institution as the national prevention mechanism. National prevention mechanism is an extensive mission amd considering that the Institution has other missions, it would be quite difficult for the Institution to inspect around ten thousand detention places with its esisting structure and number of personnel. Therefore, it is important to re-design the organisational structure of the Institution, to increase the number of personnel and to employ experts in provinces."

Secondly, structuring the Institution at general directorate level "would lessen efficiency of the Institution at national level and negatively affect the Institution's and thereby the country's prestige at international level; therefore structuring at undersecretariat level would be appropriate."

The general reasoning mostly focuses on the function of national preventive mechanism. But contrary to the general reasoning of the draft law, the wording of the articles is away from being in relation with the function of national preventive mechanism; even where it is claimed to be so, there is no connection with Paris Principles and the Protocol principles. In two articles of the draft law (Articles 2 and 7) there is reference to international conventions only and in the reasoning of these articles, which legally cannot be included in the text of the articles, these conventions are said to be the Protocol. As is known, including the conventions only as a reference point is not meaningful in terms of legislation technique. Moreover, the history of not being able to institutionalise human rights in Turkey also reveals that this is not realistic functionally. Despite this experience, it is not acceptable that the Institution proposes very limited level of regulation, separate from basic principles, on the one hand, and undertaking a detailed study about financial employee rights of people to be employed at the Institution.

As is clear and explained above, if the mission of national prevention mechanism will be undertaken by another human rights institution, a constitutional and legal ground should be formed for the mechanism apart from the constitutional and legal ground of the institution[54]. In that sense, it is not acceptable that assignment and authorisation for national preventive mechanism has been issued by a decree of Council of Ministers and that THRI has made it a base for its justification as an unobjectionable fact.

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53 http://www.tihk.gov.tr/tr/mevzuat/mevzuat-calismalari

54 See SPT Guideline www2.ohchr.org/english/bodies/cat/.../SPT_Guidelines_NPM_en.doc; and 2013 International Coordination Committee Observation Report (2013): http://nhri.ohchr.org/EN/AboutUs/Documents/ICC%20SCA%20General%20Observations.pdf

In order for a national preventive mechanism to be in compliance with Paris Principles, as required by the Optional Protocol and Article 18/last article of the Protocol, state parties to the Protocol has to establish a mechanism that will have the ability to make uninformed visits to detention places. Therefore, the mechanism should be independent in terms of function, structure and personnel regime; adequately equipped in terms of finance and human resources; and its access to detention places should be guaranteed constitutionally or legally in domestic law[55]. For attainment of independence in terms of function, structure and personnel regime, the national preventive mechanism should be structured as a separate body having a separate constitutional or legal basement, having its own personnel and budget, and having defined functions[56]. However, the Draft Law brings proposals for amendment of organisational structure and number of personnel of THRI. Without taking the original configuration of the national preventive mechanism as the basis, proposing changes at the structure of the Institution is discordant with the aim of the national preventive mechanism and besides a regulation contrary to the aforementioned regulations is expressed.

Article 1 of the Protocol defines the objective of the Protocol as "establishing a system of regular visits by independent international and national bodies to places where, people deprived of their freedom are held, in order to prevent torture and other cruel, inhuman and degrading treatment or punishment." The Protocol's objective of preventing torture is not only described as valuable, but also ground-breaking; that is relevant to universal acceptance of national and international mechanisms that represent two equivalent standpoints basing on visits, and formulating them under a protocol [57]. As a consequence, for a national preventive mechanism to function effectively, the body, designed to work with the Sub-Committee to Prevent Torture, should be independent functionally, structurally and regarding personnel regime; should be adequately equipped im terms of finance and human resources; its authorities and access to detention places should be constitutionally or legally guaranteed in domestic law. Apart from that, organizing at general directorate or undersrcretariat level as a matter of "prestige" carries no essential value.

The Draft Law includes ruling about membership (Articles 3-6), organisation (Art.2 and Art. 7), certain fields pf responsibility/authority (Art.1 and Articles 8-9) and financial employee rights of the personnel (Articles 10-17).

Article 2 of the Draft Law defines one duty of the Institution as "to make regular visits to places where, people deprived of their freedom or taken under protection, are taken to, in the framework of international treaties Turkey is a party of," among other duties. The law in force assigns the same duty to the Unit for Fighting against Torture and Cruel Treatment. The reasoning of the Article states that this definition of duty

55 Guideline, para. 24-29

56 Guideline, para., 32

57 EVANS, Malcolm D.; HAENNI-DALE; Claudine: Preventing Torture? The Development of The Optional Protocol to the UN Convention Against Torture, Human Rights Law Review (2004) 4 (1), s.20

is brought owing to the fact that the Institution will undertake the task of being a national preventive mechanism, among other tasks. In addition to above-mentioned explanations about why a mechanism without legal basis would not comply with Protocol principles, we would like to mention that making reference to international conventions will not be enough for establishment of an effective national preventive mechanism.

Additionally, Article 7, the only other article of the draft law that is said to be related with national preventive mechanism, makes reference to the function of national preventive mechanism and in the reasoning of the article it is argued that this function shall be carried out by "Agencies" and "provincial human rights councils," whose tasks and authorities will be arranged by regulations. Also, these bodies will undertake the function of national preventive mechanism, in addition to other functions parallel to duties of the Institution.

As aforementioned, in order to establish a national preventive mechanism in harmony with the Protocol and Paris Principles, the mechanism should be structurally and functionally independent in view of its powers; the mandate descriptions, professional qualifications, and rules governing the appointment, tenure and immunity of its members should be iientified and guaranteed; and it should have its own budget and personnel. Therefore, the proposed changes, although appear to be devoted to national preventive mechanism, cannot be accepted as pertaining to a national preventive mechanism.

This regulation is said to have been proposed with the objective of "functional autonomy" but functional autonomy, as clearly ensured under Article 20 of the Protocol, refers to a national preventive mechanism's ability to access the relevant information about the number of detainees and places they are kept, where those people are held and about conditions of care and detention; it also indicates the freedom of national preventive mechanism to choose places to visit and people to meet, and its authority to meet these people in private, witness-free, directly and by means of an interpreter, when necessary. Therefore, it is not reasonable to argue that the proposal brought by the preamble is related with functional independence as long as there is no regulation to this end at the Draft Law.

Especially in view of the year 2013, when human rights violations were widespread and intense, and the results of Gezi protests in terms of the trauma millions faced, it becomes unreasonable that the draft law of the NHRI essentially contains ruling that appear to be exclusive for some people about the personnel's financial and personal rights and retirement. While financial independence is important in accordance with Paris Principles (Article 5), having its own personnel is not enough and even not meaningful for a National Human Rights Institute to actively carry out its activities with independence. In this regard, we cannot express an opinion about the evaluations made concerning numbers/indicators and scale of monthly allowances, rights, compensation and financial rulings. Because the public opinion is poorly informed about the task of

the Institution since its establishment, we are not in a position to meet the need of realistic analysis about the regulations in the draft law regarding personnel regime. Nevertheless, as mentioned by Paris Principles and relevant proposals, and stated in the above-mentioned report of Nils Muiznieks, it is not a tolerable fact in terms of independence that the Institution's personnel shall be subject to ordinary legislation on personnel and recruitment of civil servants.

The draft law proposes regulation on Institution's membership as a consequence of "civil society critiques." As a requirement of Article 2 of Paris Principles, formation and tasks of the Institution members should be defined on constitutional or legal level; regulations as to tenure, conditions of ending membership, and re-election to membership should meet the condition of independence. In the process of accepting candidates and election of members, government or any other authority should not resort to filtering regarding candidates and all candidates should come before the mechanism that will do the election. Otherwise, institutions representing the government can easily appoint someone of their will as council member. A method of appointment that would result in working of the Chairperson and the members attached to the government would definitely be contrary to the Paris Principles' soul of "neutrality and independence[58]." Accreditation Sub-Committee specially emphasizes the folloeing points: transparency of the process; a comprehensive consultation process in the course of election and appointment of candidates; wide announcement of open positions; increasing number of potential candidates from diverse social groups; those members, who would work on their on behalf, not on behalf of their organisations, should be elected[59].

In this respect, no criteria was projected to guarantee members' independence. It is not clear whether the Institution will filter the candidate list before submitting it to the authorities to make the elections. Additionally, the election criteria that the Council of Ministers will use is also not clear. There is no regulation concerning gender balance or representation of ethnic/religious/cultural minorities in the member profile of the Institution. Acknowledging the importance of the qualities that members of the Institution should have regarding protection and advancement of human rights from the point of functional independence, similar arrangements still exist also on this issue.

Regarding the immunity and impunity of its members the safeguards include "not being subject to pre-search, detention, body search or search of their houses and investigation, but there is again no regulation to the effect that the members shall not be prosecuted in connection with their duties.

Conclusively, we consider that no regulation to guarantee independence is set forth regarding the scope of Paris Principles and the proposed articles lack such guarantees in their content.

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58 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) ve (d)

59 Accreditation Subcommittee General Observation, art. 2.2

In the draft law, some regulations about the organisation of the Institution are said to be proposed for the sake of "functional autonomy." The transfer of provincial and district jıman rights councils, which have been existing for years without a legal basis, displays that new organisation principles; these councils were established as "units" but the draft law foresees to turn them into "head of department." As ensured by Article 5 of Paris Principles, the importance of guarantees about the organisation of the Institution lies with having a proper sub-structure to continue its activities, adequate financial resources, personnel and facilities of its own. Without caring for these fundamental principles, it is unreasonable to change names of certain organisations.

2. Activities of Turkish Human Rights Institution

THRI announced that it would start acting with appointment of members of Human Rights Council on September 22nd 2012. THRI, as stated in their website, held 23 ordinary meetings in 2013, the first one on January 24th 2013 and the last one on December 23rd 2013. But there was no information as to the agenda, content and results of the meetings. It is understood that two ordinary meetings were held in 2014 as of July but it is not possible to access information about the agenda and results of the meetings[60]. The principles of participation, comprehensiveness and transparency will be monitored by way of informing the punlic opinion about the activities of the human rights institutions. The Institution is expected prepare annual activity report for ensurement of public accountability. But this has not been done yet.

"The Regulation About Methods and Principles Concerning the Investigation of Applicants' Claims of Human Rights Violations" has entered into force on May 17th 2014 upon promulgation at the Official Gazette[61]. With this regulation THRI, which does not legally have any prevention for getting applications, has determined the methods and principles.

The web site of the Institution points to workshops held with representatives of public sphere and civil bodies at several dates. A workshop was organised on December 12th 2013 as "10 December World Human Rights Day Activity" and the THRI Chairperson made the following evaluation in a press statement about the workshop: "There was a general opinion that the human rights regime has a multi-actor structure, that there is shortage of dialogue both among institutions and between publ,c institutions and civil society organisations, that new ideas and new regulations are desirable for developing human rights culture among society and also that collection and sharing of data by public institutions would be helpful, and on the need of tackling new subjects and problems that may arise in time; the role that the newly established THRI might play in that field was stressed. [62]" Workshop with the topic "Women's Human Rights"

60 http://www.tihk.gov.tr/tr/duyuru-ve-haberler/haberler

61 http://www.resmigazete.gov.tr/eskiler/2014/05/20140517-5.htm

62 http://www.tihk.gov.tr/tr/duyuru-ve-haberler/haberler/turkiye-insan-haklari-kurumu-10-December-dunya-insan-haklari-gunu-etkinligi-duzenledi/55

took place on March 6th 2014. The THRI made a general evaluation publicized by a press statement: "Women rights cannot be considered seperate from human rights in general; THRI, being a bridge between NGOs and decision makers, shall increase the level of working in the field of women rights with utmost cooperation and solidarity. [63]" It is observable that a workshop had been held on May 22nd 2014 on the subject of "Right to Organising Meetings and Demonstrations and its Relevance to Order of Democratic Society." The following statement was made about the workshop by one member of the Institution: "By bringing up the issue of right to organising meetings and demonstrations and keeping the issue on the agenda, the Turkish Human Rights Institution has revealed its sensitivity on the subject[64]." It was declared that a workshop was held with the UN High Commissioner on Human Rights on June 25th and 26th 2014. According to the declaration "international experience on the issues of Paris principles, accreditation process and national preventive mechanism was shared." A general assessment included the requirement to "adopt universal human rights standards and cooperate with international and regional shareholders. [65]"

Paris Principles gives importance to relations between human rights oranisations and civil society; the principles focus on civil society's existence in membership or councils, or playing an active role in undertakings or regarding consultancy so that pluralism and participation can be achieved. Although the THRI has taken steps to bring representatives of the public and civil sphere together in the frame of the above-mentioned workshops, assesssments made about the workshops are not intended to make sense of problems, determination, solution or follow-up of problems. The announcements about the workshops mostly aim to response to the concerns of the civil society about the institutional strutcture of the THRI; they are far from sharing the contents of the meetings with the public and are inadequate to put forward the outcomes of the workshops.

We would also like to highlight the information provided on the THRI's website about mutual relations with representatives of civil society. It is understood that 13 mutual visits took place in 2013 but it is difficult to realise what these visits represent interms of protection and advancement of human rights and what they mean for human rights organisations[66]. The website also makes reference to visits by international authorities,

63 http://www.tihk.gov.tr/tr/duyuru-ve-haberler/haberler/turkiye-insan-haklari-kurumu-tarafindan-duzenlenen-kadinin-insan-haklari-konulu-calistay/63

64 http://www.tihk.gov.tr/tr/duyuru-ve-haberler/haberler/turkiye-insan-haklari-kurumu-tarafindan-duzenlenen-toplanti-ve-gosteri-yuruyusu-duzenleme-hakki-ve-demokratik-toplum-duzeni-kavramiyla-iliskisi-konulu-calistay/66

65 http://www.tihk.gov.tr/tr/duyuru-ve-haberler/haberler/tihk-bm-insan-haklari-yuksek-komiserligi-ortak-calistayi/70

66 http://www.tihk.gov.tr/tr/duyuru-ve-haberler

but there is no statement about criticisms about the structure of the Institution[67]. The establishment law brought only one regulation to the THRI about making regular consultation meetings and the Institution held its first such meeting on June 19th 2014. However, we again understand that no reflection was made apart from the assessment that "these meetings are of great importance[68]."

Evaluating the existing laws and regulations, monitoring the practice and making visits are the prior tasks assigned to national human rights organisations. In this sphere, the THRI made three visits and two on-site examination about violations in 2013 and until July 2014, and reported two of the visits and on-site examinations.

Activities	2013	2014 (as of July)
Regular meetings	23	2
Workshop	1	3
Consultatlion Meeting	×	1
Mutual Visits with NGOs	13	-
Visit/Detention Place/Violation	1	4
Reporting	1	2

Table 3: With regards to on-site observation
× : hasn't conducted any activities
- : hasn't conducted any activities yet.

The website of the Institution makes public that a meeting was realized to İstanbul Kumkapı Returning Back Center with the participation of relevant civil society members on May 2nd 2014. The configuration or objective of the meeting was not indicated in the website. It is declared that findings and suggestions shall "be shared with public later on. [69]." Similarly, it was publicized that "examination was made at Metris No.1 T Type Closed Prison concerning the claim that Ali Uçkun had commited suicide in prison on July 17th 2014; Council members received information, document and also shootings related with the incident. The fimal report shall be promulgated after the Forensic Medicine report about the incident is released. [70]"

The THRI publicisized on its website the Şanlıurfa/Siverek Report on December 26th 2013[71]. The report was initiated with the Human Rights Association Şanlıurfa Branch's

67 The visits conducted by EC Human Rights Commisioner and EU Turkey Delegation was represented on web-site. But it can't be understood via web site whether THRI has any plan due to the requirements of these visits, or not.

68 http://www.tihk.gov.tr/tr/duyuru-ve-haberler/haberler/ilk-istisare-toplantisi-yapildi/69

69 http://www.tihk.gov.tr/tr/duyuru-ve-haberler/haberler/istanbul-kumkapi-geri-gonderme-merkezi-ziyareti/65

70 http://www.tihk.gov.tr/tr/duyuru-ve-haberler/haberler/metris-cezaevinde-inceleme-/72

71 http://www.tihk.gov.tr/www/files/53ae73e5234fd.pdf

application to the THRI. Five Council members of the THRI and forensic medicine expert Prof Ümit Biçer, non-member of the THRI, made on-site examination concerning the mass grave claims. The petition expresses the demand of urgent arrival of the council to the region because effective investigation was not undertaken.

It was declared that the THRI council met with the prosecutor running the invstigaiton and Branch Chairpersons of the HRA and Mazlum-Der, and relatives of the diasappeared persons. It was also noted that they could not meet the head official of the district because s/he was out of Ankara. We also understand that examination was made in the field the mass grave was supposed to be and expertise report was asked from Prof. Dr. Ümit Biçer, and his opinion was reflected in the report and its appendix. Siverek Chief Public Prosecutor's decision that there was no place for legal proceedings was also communicated to the THRI and THRI noted that they had rejected the decision on demands of "a thorough investigation of the issue; the finding of the bone analysis should not be considered as adequate; the borders of area of investigation should be well-defined, the area should be opened up in accordance with the Minnesota Protocol, samples from different sections should be examined and is there are traces of trauma DNA profiles of those bones should be obtained." The report also makes the following advises: "scientific and international standards concerning investigations about mass graves should be observed; public administrative units should be formed outside the judicial system and the Minnesota Protocol should be respected neatly; relevant public institutions should form a commission to set standards."

The report does not include what kind of preparations were made before the inspection and it was not made clear whether the inspection required any compulsory administrative application or not.

We can say this is also a result of lack of functional independence concerning "access to necessary information-document," taking into account that the prosecutor office did not prepare the file the day the inspection was made; that the head official was out of the city, that the date of inspection was November 8th 2013 and 11 days later the decision saying there was no place for investigation was taken. Although we cannot understand whether a copy of the file was obtained or not for the file is with the Forensic Medicine, we expect that the document of the investigation should be included in the report in consideration of the objective of the inspection. Therefore, we see that an inspection, whose main purpose is expressed as "ecamining whether an effecrive innestigation had been carried out in the case of a violation of right to life," is deprived of most fundamental documents about the subject; furthermore, this matter was not reported as an obstacle for realizing the task. The report mentions that the report of the Forensic medicine was acquired, but does not state how.

Under which conditions the committee, whose independence had to be ensured especially while on duty, held the meeting about the violation, were not specified. Similarly, the report also does not include conditions of the examination completed at the excavation site. Another remarkable point about the meetings was that the

meting with the prosecutor is reported as "stated" while the one with the applicants and relatives of the disappeared is reported as "claimed."

The statements of relatives of the disappeared persons and witnesses, who bring claims of violation of effective investigation can be explained by THRI's lack of legal authority to listen to people due to its Establishment Law, contrary to Paris Principles.

Authorization of public administrations is a prominent proposal, but the monitoring process, independent from the proposal's quality, is not specified. We would like to mention that non-existence of civil society participation at any decision making mechanism, contrary to Paris Principles, leads to focusing of the proposals on public administrations.

The THRI announced on its website ist report on "Examination Report About Detainees' and Convicts' Access to Health Services[72]." The report indicated that a working group had been established with the participation of public institutions and civil society upon the meeting demand from the side of Turkish Union of Physicians about the problems of detainees and convicts regarding access to health services, and six meetings had been held thereafter. HRFT's representatives also attended these meetings. The report contains evaluations and proposals about the visit to İstanbul/Metris R Type Prison on February 19th 2014. Representatives of NGOs and members and experts from the Institution organized a visit to the Prison due to intensity of complaints and detection of the state of extremely sick detainees and convicts. As HRFT we have argued also in the meetings that what was done at Metris R Type Prison could be called an on-site observation, and it could not be considered as visit-based monitoring in the frame of a structured programme for detention places. The report starts with mentioning local and international legal standards and comprises presentation of working group meetings. The report concludes with impressions gathered furing the visit to Metris R-Type Prison and proposals about the legislation and management of health services.

Firstly, the report does not include any information about whether or not the visit was made informedly and whether an administrative application was initiated or not. It is understood that the meeting with the prison authorities was in the form of a presentation prepared for the Committee, which indicates that the real aim of the visit, obtaining information about complaints, could not be achieved. No evaluation was made in the report about the principal measures of visits to different sections of the prison and conditions of meeting imprisoned patients were not described. The proposals cited in the summary of working group meetings do not entirely correspond to the proposals of the Institution; pluralism and participation are not integrated to the decision-making mechanism. It is also not clear what kind of a monitoring system will be used regarding the proposals brought in the Report, and how the Report will be transmitted to the relevant Ministries.

The THRI shared with public the report it has approved on July 10th 2014, "the

72 http://www.tihk.gov.tr/www/files/tihk_rapor_metris.pdf

Examination Report About the Incidents that Took Place in Sincan Prison on January 1st 2014.[73]" The report indicated that the THRI had commenced ab ex officio inspection, with consideration of news bulletins that appeared at certain media institutions and the reports by the HRA Ankara Branch Prison Commission. The THRI had set a committee of two peo. ple to visit Sincan Prison and had met with two children and the prison administration. Then another committee of three had made inspection at Şakran and Maltepe Prisons.

The Institution's report indicates that some information and documents demanded from the Ministry of Justice was lacking.

We understand from the report's detailed description of the treatment children had been subject to, methods of medical examination and the systematic problems in prisons that international legal standards and particularly the principle of preeminent profit of tchildren were observed. It is worth mentioning that the report indicated that the actions against the children had violated the ban on torture regulated under Article 3 of the European Convention on Human Rights. The report indicated that relevant Ministries and public institutions had been informed about the recommendations as to the personnel and management of the prisons and claims of ill-treatment.

The Report includes evaluations of the Human Rights Association and Ankara Bar Association, but these organisations have not been included in the examination and decision-making process of the Institution. Going through the document we see that there is no information about the conditions of the meetings with children. Likewise, the follow-up mechanism is not identified.

We have summarized above the information that one can gather only by surveying the website of the THRI about its activities and their content. You can find below a brief review regarding the tasks assigned to the Institution as a requirement of its Establishment Law.

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

Responsibilities in accordance with the Law numbered 6332	2013		2014	
Folow-up-state of national human rights and relations with international bodies (Art.4, 7+Art. 11)	Domestic	International compliance	Domestic	International compliance
	×	×	-	-
Annual Human Rights Report (Art. 7)		×		-
Annual Report of Activities (Art. 10)		×		-
Special Reports (Art. 7+Art. 11)		✓		-
Visits to Detention Places (Art. 7+Art.11)		×		✓
Reports of Visits (Art. 11)		×		
Assessment of Other Institutions' Reports about the Visits (Art. 11)		×		-
Running campaign/programmes (Art. 7)		×		-
Investiation, research and assessment of claims of Violation (Art. 11+Art. 13)	Application	Ex officio	Application	Ex officio
	✓	×	✓	✓
Informing Other Institutions and Organisationd about claims of violation (Art. 11+ Art. 13)		×		-
Taking initiative for commencing legal proceedings against those found responsible of violation (Art. 11+ Art. 13)		×		-
Presenting opinion about legislation and draft law (Art. 11)		×		-
Monitoring judiciary decisions (Art. 11)		×		-
Training (Art. 11)		×		-
Forming a human rights data base (Art. 11)		×		-

Table 4: With regards to the Law no 6332
× : hasn't conducted any activities
- : hasn't conducted any activities yet.
✓ : the activity has been conducted

As can be seen, with its existing structure, the THRI cannot actively fulfill the function of a NHR Institute, whose objective is to protect and develop human rights. However, we have seen as we were considering some of its activities that the problem is about the lack of legal safeguards for its functional independence and its non-compliance with Paris Principles, beyond the matter of inadequacy in terms of finance and human resource. As the institution itself lacks principles of participation, pluralism and transparency, also the inspection and reporting activities lack such principles.

Given the existing structure of the THRI, it is not reasonable to demand the function of a national preventive mechanism. As it is not legally defined, THRI's taking over the function of a national preventive mechanism would not mean anything with the consideration of the principle of independent organisation in line with the Optional Protocol.

CONCLUSION

This study has been carried out for monitoring Turkey's function of establishing a national prevention mechanism that Turkey has undertaken by approval of the Optional Protocol. It was Turkey's obligation to have set up the mechanism by October 27th 2012; the fact that a by-law has been passed as of 2014 assigning THRI as the preventive mechanism prevents any discussion, as presented throughout this study, as how this mechanism has been realised. On the contrary, we have tried to explain why specifying the THRI as the national preventive mechanism is not acceptable in consideration of international standards and objective of the mechanism, in particular. Furthermore, as we could not identify any performance on behalf of the national preventive mechanism as of July 2014, the date this study has been undertaken, it was not possible to make an evaluation of its activities.

While the THRI lacks structural independence as a National Human Rights Institute and does not perform any action regarding its mission we can say that there is still a long way to take for institutionalisation of human rights for the sake of its prevention and advancement.

It is a fact that many diverse institutions and organisations have been established in the field of human rights within central administrative organisations and at local level in the adjustment process to EU legal acquis and today they have unfortunately turned into "complaint and wishes box." Although the THRI has recently started working as a new institution, the negative impact of the tradition it has taken over definitely constitutes a measurement point regarding the functioning of the Institution. Additionally, while the Paris Principles do not even represent an unattainable ideal even in terms of minimum standards, we are face to face with a field of law and implementation that is far behind it.

The historical circumstances that brought about the target of prevention of torture and in this period when Turkey fastly renounces democratic principles negatively effecting human rights and freedoms, prevention of torture stands as an important

target before Turkey. This target is different from a state act thereby which another issue in the checklist of membership to the EU is accomplished.

In a geographic area, where each day one feels more under threat with regards to violation of right to life, right not to be tortured, right to free expression, THRI has to be effective and active in connection with its establishment objectives. One of the conditions is to be able to object to political power's practices without hesitating to stand for independence. We propose that the THRI starts with raising objection against undertaking the task of national preventive mechanism and we hope that the THRI undertakes new activities as an institution with structural and functional independence that we can make evaluation about.

As HRFT, we will continue our evaluations in the scope of application of the Optional Protocol until an independent, effective and realistic national prevention mechanism is established.