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METHODS TO PREVENT AND TO COMBAT TORTURE

Statement by Theo van Boven (Warsaw, 22 September 2005)

1. Torture and the human rights agenda

It is for good reasons that the prevention and suppression of torture figures prominently on the international human rights agenda, in particular on the agendas of organizations and institutions such as the United Nations, the OSCE, the Council of Europe and other organs of civil society that make energetic efforts to promote and protect human rights. It is questionable, however, whether the same applies to all agendas in a world of violence and degradation. There, priorities are often of a different nature and issues relating to torture are relegated to the backroom of darkness and secrecy.

It is a common understanding and a widely shared opinion that all human rights are universal, indivisible, interdependent and interrelated. All human rights are meant to serve human life and human dignity. It cannot be contested, however, that the prohibition of torture and methods to prevent and combat the practice of torture carry a very specific normative and imperative weight in the commitment to uphold human dignity and to defend the physical and moral integrity of the human person. Therefore, authoritative international adjudicators, such as the International Criminal Tribunal for the Former Yugoslavia and the European Court of Human Rights, have ruled that the prohibition of torture is an peremptory norm of international law (*ius cogens*), thus belonging to the highest ranking norms in the international hierarchy of laws and values. Against the same background numerous international instruments of human rights and humanitarian law affirm and re-affirm that the prohibition of torture is a non-derogable right and does not allow any exceptions and limitations. It must be repeated time and again that this absolute prohibition applies everywhere, under all circumstances, and with respect to all human beings, no one excluded.

What I just said about the absolute nature of the prohibition of torture might come across as stating the obvious, as teaching the A, B and C of the human rights agenda, as repeating what has been said dozens of times before. However, in these days when we are challenged by serious terrorist threats, when ethnic and religious conflicts and violence are abound, when sexual abuses reach widespread and systematic proportions, we have to be mindful that all these agonizing issues have serious implications as regards the prohibition of torture and demand that the absolute nature of this prohibition be fully respected.

2. Difficulties and obstacles

Why is it that the struggle against torture continues to encounter so many obstacles and setbacks? Why is it that torture and other forms of cruel,. inhuman or degrading treatment, though widely condemned as an international crime, persist in many parts of the world, including in the OSCE region, as an endemic phenomenon and as a plague to humanity? Means and methods to prevent and suppress torture are only effective if we squarely face the obstacles and difficulties that bedevil any anti-torture strategy. One major obstacle is a policy or attitude of denial on the part of authorities, hiding the facts and suppressing all information. In several of my earlier functions in the United Nations I have come across instances of persistent denial and refusal to acknowledge and to accept responsibility. The first and decisive step on the way to correct, to cure and to prevent is acknowledgement of the problem, followed by a firm commitment publicly expressed by the highest authorities that torture cannot be tolerated and has to be eradicated in all its forms and at all levels. Such an unequivocal public stand and commitment carries with it a series of implications and measures which are prescribed in legally binding international instruments, in the jurisprudence of international adjudicators and in recommendations of such anti-torture mechanisms as the United Nations Committee against Torture, the European Committee for the Prevention of Torture and the UN Special Rapporteur on Torture.

A basic requirement is the duty to investigate promptly and effectively whenever allegations or reports of torture or ill-treatment are brought to light. Too often national authorities, ranging from law enforcement agencies to the judiciary, are not only reluctant but unwilling to initiate and carry out investigations into acts or omissions that may implicate the same authorities. A culture and attitude of inaction and impunity prevails and occasionally, if any action is taken at all, such action is incidental or symbolic and perpetrators are exonerated or pardoned. There is no doubt that a publicly announced and implemented policy of prompt and effective investigations of complaints and reports of torture or ill-treatment, carried out by competent and impartial investigators who are independent of suspected perpetrators and the agency they serve, proves to be one of the strongest means to combat and prevent torture.

As I said earlier, the prohibition of torture or ill-treatment is absolute and unexceptional. This implies that no one under any circumstances may be subject to torture or ill-treatment. Everyone, whoever he or she is and, as the European Court of Human Rights stated "irrespective of the victim's conduct", has the right to be free from torture or ill-treatment. A difficulty encountered by monitors and investigators is - and I speak from experience – that in taking up cases of torture victims these monitors and investigators are criticized for supposedly making common cause with suspected criminals or terrorists. Such criticism must be rejected. The principle must be defended that the absolute prohibition of torture applies to everyone. But upholding this principle implies by no means any support of the aims, objectives and actions of suspected criminals or terrorists.

3. Criminal justice

In earlier human dimension meetings, as well as in the present meeting, a whole range of measures and methods are reviewed to prevent and suppress torture in the criminal justice context. Against the background of experience with political and legal systems in a number of countries in the OSCE region, I will briefly concentrate on three issues which are vital in the stand against torture. I will refer to the dubious practice of incommunicado

detention, to the crucial importance of an independent and active judiciary and to the principle of *non-refoulement* as a corollary of the absolute ban on torture.

Anti-torture monitors have on many occasions expressed the view that in the period immediately following deprivation of liberty the risk of intimidation and physical ill-treatment is the greatest. It is indeed crucial that in this period of police custody effective safeguards against torture and ill-treatment be ensured, in particular the right of access to a lawyer including the right to consult the lawyer in private; the right to be examined by a forensic doctor; and the right to have relatives informed of the arrest and the place of detention. It is a matter of profound concern that in many political and legal systems, also in the OSCE region, incommunicado detention, stretching over a period of one or more weeks, is increasingly resorted to. The United Nations Commission on Human Rights has repeatedly labeled prolonged incommunicado detention as a condition that facilitates the perpetration of torture and in itself can constitute a form of cruel, inhuman or degrading treatment or even torture. It is my considered opinion that the incommunicado regime be abrogated.

The vital role of the judiciary and more in particular the independence of the judiciary as one of the basic conditions for upholding the rule of law is also a topic of another session at this human dimension implementation meeting. Let us not forget that an independent, capable and professional judiciary is crucial for combating torture. It is well-known that in countries where the judiciary functions as a custodian of the rule of law, executive measures and police practices tending to undermine the prohibition of torture are corrected in view of dynamic judicial investigation and action. On the other hand, it is a matter of knowledge and experience that systematic torture practices usually occur in countries, also in the OSCE region, where there is lack of independence of the judiciary as well as rampant corruption in the judiciary and law enforcement agencies. In a number of these countries, the judiciary is overshadowed by excessive powers procurators are exercising in the overall criminal proceedings, making judicial initiative and judicial control sheer illusion. What is needed is human rights training and education for the

whole legal profession and the law enforcement agencies and, above all, reform of the criminal justice system so as to make it conform to international human rights standards.

Another issue of growing concern in the OSCE region, and beyond, is the erosion of the non-refoulement principle as enshrined in article 3 of the UN Convention against Torture and in the jurisprudence relating to the European Convention on Human Rights. No one shall be expelled, returned (refoulé) or extradited to another State where there are substantial grounds for believing that such person would be in danger of being subjected to torture. This prohibition of refoulement is intrinsically linked with the absolute prohibition of torture. It applies to everyone, irrespective of a person's conduct, including terror suspects. It forbids expulsion, repatriation, extradition to countries where torture is endemic or where a person runs serious risks of persecution and torture because of his/her racial, ethnic identity, nationality, sexual orientation, religious or political affiliation. States, including OSCE participating states, are now resorting to the dubious practice of circumventing the non-refoulement principle by means of requesting diplomatic assurances from receiving states, without proper specification of such assurances and without arranging for close and independent control and monitoring so as to guarantee that assurances are complied with. Experience has proven that diplomatic assurances often serve as a loophole rather than a guarantee. We must insist on strict respect for the non-refoulement principle.

4. International dimensions

International standards, procedures and mechanisms operating in New York, Geneva, Strasbourg, Vienna or Warsaw are based on the notion and the implications of the accountability of States. The implementation of human rights, and more in particular the prevention and suppression of torture and ill-treatment, is a joint and common responsibility but also an obligation and commitment of each individual State. What counts at the end of the day is national implementation and national action, more than what is discussed in New York, Geneva, Strasbourg, Vienna or Warsaw.

Nevertheless, it cannot be overlooked that international standards, procedures and mechanisms may well have a positive effect on national implementation. International dimensions serve as encouragement, impetus, sometimes as warning, also as hope and support for human rights defenders and as a relief for victims who are entitled to redress and reparation. We are aiming at an open interaction between national and international instruments, procedures and mechanisms, for the sake of the promotion and protection of human rights in general and as a vital component of strategies to prevent and suppress torture. For this reason and in order to strengthen the basis of joint action and to open up avenues as well as means and methods of accountability and transparency in the struggle against torture, it is crucial that participating States, if they have not done so:

- ratify or accede to the UN Convention against Torture;
- accept the competence of the Committee against Torture to receive and consider petitions under article 22 of the UN Convention;
- ratify or accede to the Optional Protocol to the UN Convention against Torture relating to the monitoring of places of deprivation of liberty;
- ratify or accede to the Rome Statute of the International Criminal Court;
- comply with decisions, views and interim measures of the Committee against Torture and other treaty bodies such as the Human Rights Committee;
- work closely with the European Committee for the Prevention of Torture (CPT) and implement its recommendations;
- issue a standing invitation to UN Special Rapporteurs and Working Groups, in particular the Special Rapporteur on Torture, for fact-finding and monitoring purposes;
- cooperate with the UN Special Rapporteur on Torture in responding promptly and constructively to allegation letters, urgent appeals and in following-up general recommendations as well as specific recommendations based on country visits.

5. Democratic and public space

Last but not least, the struggle against torture can only be successful and bring about results in a climate of openness and frankness. Freedom of opinion and expression, freedom of the press and other media are absolutely essential to unravel policies and practices that cannot stand the light of the day. At the end of a fact-finding visit to a European country I felt bound to conclude as UN Special Rapporteur on Torture that there must be democratic and public space to raise and discuss fundamental human rights issues such as those falling within the mandate of the Special Rapporteur. Denial and silence jeopardize the values inherent in human dignity and human security. Vigilant and vocal human rights organizations and human rights defenders deserve everywhere praise and protection.