PC.SHDM.IO/4/14
11 April 2014

ENGLISH only

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SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

OSCE, Supplementary Human Dimension Meeting

Opening Session

10 April 2014

Vienna, Austria

Good morning, Ladies and Gentlemen,

Introduction

It is my pleasure to be here today and I would like to thank the Organization for Security and Co-operation in Europe (OSCE), its 57 member states, and Ambassador Thomas Greminger and Ambassador Janez Lenarcic for inviting me to return in my capacity as the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for a second time after my participation in the 2012 meeting of the Human Dimension Committee of the OSCE Permanent Council. OSCE has played a pivotal role in seeking to eradicate torture and other cruel, inhuman, and degrading treatment in member states, which are all State parties to the Convention against Torture (CAT). The representation of member states, civil society, and intergovernmental organizations here today is symbolic of widespread importance of this important issue.

I applaud OSCE's continued dedication to the prevention of torture and willingness to assess and expand on the progress made since the 2003 Supplementary Human Dimension Meeting on the Prevention of Torture. Great strides have been made in national legislation, the condemnation of torture, and the ratification of the Optional Protocol to the Convention against Torture.

Role of Collaboration

My mandate has on numerous occasions acknowledged the multifaceted dimensions of torture and ill-treatment and emphasized the importance of approaching the prevention of torture from a multidisciplinary and global perspective. The ongoing support of the international community is crucial in the implementation of norms and legal frameworks which universally prohibit and endeavor to prevent torture and ill-treatment.

My mandate is one of the key mechanisms established by the United Nations to eradicate torture. International cooperation plays an important role in promoting and protecting human rights, and progress in promoting and protecting all human rights depends primarily on efforts made at the regional, national and local levels. Global human rights problems can be addressed effectively only by concerted and well-coordinated cooperation among the whole array of actors involved in the realization of human rights, including Governments, international and regional intergovernmental organizations, parliamentarians, legal professionals, academics, non-governmental organizations, other civil society representatives and rights holders themselves. Only through the benefit of cooperation can a real contribution to the elimination of torture and ill-treatment be achieved.

Governments ultimately are responsible for the implementation of human rights obligations, and therefore are the primary partners in the battle to end torture and mistreatment. Apart from intergovernmental organizations like OSCE, my mandate relies upon civil society and regional organizations, which are the experts closest to the issues and often best situated to address them with greater speed and on a more systematic basis. Indeed, anti-torture instruments and mechanisms adopted and established by regional organizations are often much more significant, timely and responsive. An example is the creation and establishment of National Preventative Mechanisms within states as recommended by OSCE, such as the progressive steps taken by Kazakhstan to adopt NPM legislation and establish periodic visits by the National Ombudsman and representatives of civil society to places of detention and special care homes[1]. Another is the recent commitment of Tajikistan to establish a National Preventive Mechanism in the very near future.

All States have an international legal obligation to take effective legislative, administrative, judicial and other measures to prevent torture. In this respect, my mandate has called upon States promptly to ratify the Convention against Torture and its Optional Protocol and to establish, through legislative action on the basis of an inclusive and transparent process, independent and professional national preventive mechanisms, in full compliance with the Paris Principles. In this context, I commend the 37 OSCE member States that have already ratified the Optional Protocol. Such national preventive mechanisms should be granted unrestricted access to

[1] http://www.osce.org/astana/108523

all places of detention and the opportunity to have private interviews with detainees. Moreover, States should provide national preventive mechanisms with the necessary financial and human resources to enable them regularly to inspect all places of detention, to examine the treatment of detainees and to prevent acts of torture or ill-treatment in detention. Frequent and unannounced visits, including timely and unlimited internal monitoring by independent mechanisms in all places of deprivation of liberty, are crucial for the prevention of torture.

Prevention of Torture

The prohibition against torture and other cruel, inhuman or degrading treatment or punishment enjoys the enhanced status of a *jus cogens* or peremptory norm of general international law and requires States not merely to refrain from authorizing or conniving at torture or other ill-treatment but also to suppress, prevent and discourage such practices. States have not only the obligation to "respect", but to "ensure respect" for, the absolute prohibition against torture.

The existing international legal framework provides a broad range of norms and standards with an ultimate aim to prevent acts of torture and ill-treatment. In addition to the preventive obligations explicitly enlisted in the Convention against Torture, such as the prohibition of *refoulement* (Article 3), the prohibition of invoking evidence extracted by torture in any proceedings (Article 15), the obligation to provide education and training to law enforcement and other personnel (article 10), to systematically review interrogation methods and conditions of detention (Article 11), to investigate *ex officio* possible acts of torture (Article 12) and to the obligations relating to the criminal prosecution of perpetrators of torture (Article 4 to 9), the umbrella clause in Articles 2(1) and 16 (1) require States parties also to take other effective measures aimed at preventing torture and other ill-treatment. This means that the obligation to take effective preventive measures transcends the items enumerated specifically in the Convention. Article 2, paragraph 1, provides authority to build upon subsequent articles referring to specific measures known to prevent acts of torture and other ill-treatment and to expand the scope of measures required for such prevention. Thus, States must take effective

preventive measures, including by good-faith interpretation of the existing provisions, to eradicate torture and ill-treatment.[2]

The absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment extends to all acts of state officials and in some cases even to non-state actors. It also extends to all places where persons are deprived of their liberty within and outside the criminal justice system. In this sense, I have advocated in my report to the General Assembly of October 2013 (A/68/295) that the revised Standard Minimum Rules for the treatment of Prisoners (SMRs) shall apply to all places of detention, including immigration centres, medical and mental health institutions and in my report to the Human Rights Council in March 2013 (A/HRC/22/53) I have elaborated on the prohibition of torture and other ill-treatment in health care settings.

Universal jurisdiction

Although articles 2, paragraph 1, and 16, paragraph 1, of the Convention and article 2 of the Covenant on Civil and Political Rights (ICCPR) contain a jurisdictional limitation, it is clear that the obligation to take measures to prevent acts of torture or other ill-treatment includes actions that the State takes in its own jurisdiction to prevent torture or other ill-treatment in another jurisdictions. As I have explored in my recent report to the Human Rights Council of March 2014, the prohibition of torture and other ill-treatment requires States to abstain from acting within their territory and spheres of control in a manner that exposes individuals outside of their territory and control to a real risk of such acts. The fact that torture or other ill-treatment would occur outside the territory of the State in question and not under the direct control of its agents does not relieve the State from responsibility for its own actions that effectively contribute to torture.

Specific preventive measures

Torture still occurs because national legal frameworks are deficient and do not properly codify torture as a crime with appropriate sanctions. Torture persists because national criminal systems lack the essential procedural safeguards to prevent its occurrence, to effectively investigate allegations and to bring perpetrators to justice. Torture remains entrenched in many

[2] Committee against Torture, general comment No.2, para. 25.

States because of a climate of tolerance of excessive use of force by law enforcement officials or as a practice allowed in particular to counter terrorism or other threats to national security.

If States took their obligations under the Convention and the Optional Protocol seriously and abided by their legally binding obligations, torture could be eradicated in today's world. The appalling conditions of detention in most countries could be effectively addressed by implementing the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Standard Minimum Rules for the Treatment of Prisoners (SMRs), which are currently under review. Customary international law as codified in the Convention against torture and the Optional Protocol contain a broad range of very specific positive State obligations aimed at preventing and combating torture. No further standard setting is required to combat torture; what is needed is robust *implementation* of existing standards.

There are numerous methods of prevention that have been developed in the past, which, if adequately implemented by States, could help eradicate torture. These include:

- abolition of secret detention;
- abolition or tight regulation and control of incommunicado detention;
- proper registration of every detainee from the moment of arrest or apprehension;
- prompt access to legal counsel from the moment of arrest and access to relatives;
- prompt access to an independent judge with powers to rule on the legality of arrest and the conditions of detention;
- strict respect for the presumption of innocence;
- prompt and independent medical examination of all detainees;
- video/audio recording of all interrogations;
- prompt, impartial and effective investigation of all allegations or suspicions of torture ex officio; and
- effective training of all officials involved in the custody, interrogation and medical care of detainees.

1. The exclusionary rule

In my thematic reports to the UN General Assembly and the Human Rights Council, I regularly elaborate on issues related to the prevention of torture under international law. I have for example outlined the important role of Commissions of Inquiry and issued a series of recommendations related to the prevention of torture and other cruel, inhuman and degrading treatment in health care settings.

Most recently, I have presented a thematic report on one of the most important tools to prevent torture and other ill-treatment, the exclusionary rule and the use of torture-tainted information. I have identified State practices regarding this matter and elaborated on the rationale and scope of the exclusionary rule as contained in Article 15 of the Convention in relation to formal proceedings and on the use of information likely obtained by torture or other ill-treatment by executive agencies, not in "any proceedings" but in collecting, sharing and receiving such information between States during intelligence gathering or covert operations. I have found that, regrettably, some States have diluted cardinal principles necessary for preventing and suppressing torture and other ill-treatment. I take this opportunity to remind States that the prohibition against torture and other ill-treatment is absolute and non-derogable under any circumstances, and that States have a duty to prevent torture. I concluded that the exclusionary rule must therefore also be absolute, including in respect of national security.

I have found that in the context of formal judicial proceedings, some progress has been made. Confessions, once considered the 'queen of evidence,' now require corroboration in most countries. Extrajudicial confessions are not generally considered as full evidence or given weight as presumptive or even circumstantial evidence. However, the practices in a number of countries show that forced confessions are still deemed admissible.

Since the "war on terror", executive agencies have been under extreme pressure to obtain information in order to protect their citizens. Many States refuse to subject the work of their intelligence and security agencies to scrutiny or international oversight. Similarly, domestic courts follow this lead and reject motions to submit these executive practices to judicial review, even when the issue is the absolute prohibition of torture.

I call on States to restrain from creating a market for the fruits of illegal and abhorrent interrogation practices by collecting, sharing or receiving information obtained by torture or other cruel, inhuman or degrading treatment or punishment. It is not sufficient to ensure that the judicial process is free from the taint of torture; torture must not be encouraged, condoned, or acquiesced in through all manifestations of public power, executive and judicial.

In order to implement the States' obligation to prevent and discourage torture, and in order to avoid responsibility for complicity for an internationally wrongful act, I conclude that the exclusionary rule must be interpreted to apply much more widely, to include the activities of executive actors. The standards of the exclusionary rule should be interpreted in good faith and applied by way of analogy to executive actions that purposely and objectively promote torture by taking advantage of its results, including the collection, sharing or receiving information obtained by torture or other ill-treatment, even if not used in "proceedings" narrowly defined. Torture-tainted information, even when not intended to be used in court proceedings, must be treated in the same way that a court would treat evidence obtained by torture or other ill-treatment.

2. The Non-refoulement provision

Another important obligation under the overarching aim of preventing torture and other ill-treatment is the customary non-refoulement provision as contained in Article 3 of the CAT, which clearly states that States cannot expel, extradite or return a person to a place where he or she could be in danger of being subjected to torture, even outside the territory and control of a State.. In order to satisfy this obligation States must also provide an effective remedy against the decision to transfer the detainee, which means that the decision needs to be known and subject to judicial scrutiny.

In the case of *Soering v. the United Kingdom,* the European Court of Human Rights ruled that even though the European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain a specific non-refoulement provision prohibiting the extradition of a person to another State where he would be subject, or be likely to be subjected, to torture or other ill-treatment, such obligation was already inherent in the general terms of the prohibition against torture by referring to the recognition of its absolute nature and its fundamental value for

democratic societies. The non-refoulement obligation is a specific manifestation of a more general principle that States must ensure that their actions do not lead to a risk of torture anywhere in the world. There is a clear negative obligation not to contribute to a risk of torture.

Because of the importance of this rule, diplomatic assurances do not release States from their non-refoulement obligations nor are they necessarily the best way to prevent torture. Indeed, diplomatic assurances have been proven to be unreliable, and cannot be considered an effective safeguard against torture and ill-treatment, particularly in States where there are reasonable grounds to believe that a person would face the danger of being subjected to torture or ill-treatment.

Like my predecessor, I regard the practice of diplomatic assurances "as an attempt to circumvent the absolute prohibition of torture and non refoulement".

3. Secret detention

My predecessor and other mandate holders in a joint study on secret detention (A/HRC/13/42; 19 February 2010) have already considered the practice of secret detention as irreconcilably in violation of international human rights law, including during states of emergency and armed conflict. No jurisdiction should allow for individuals to be deprived of their liberty in secret for potentially indefinite periods, held outside the reach of the law, without the possibility of resorting to legal procedures, including *habeas corpus*. I find that every instance of secret detention is by definition incommunicado detention. Incommunicado detention may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment, and may in itself constitute such treatment. The suffering caused to family members of a secretly detained person may also amount to torture or other form of ill-treatment and at the same time violates the right to the protection of family life.

The practice of "proxy detention", involving the transfer of a detainee from one State to another outside the realm of any international or national legal procedure (also called "rendition" or "extraordinary rendition"), often in disregard of the principle of non-refoulement, also involves the responsibility of the State at whose behest the detention takes place.

The very purpose of secret detention is to facilitate and, ultimately, cover up torture and inhuman and degrading treatment used either to obtain information or to silence people. While in some cases elaborate rules have been put in place to authorize "enhanced" techniques that violate international standards of human rights and humanitarian law, most of the time secret detention has been used as a kind of defense shield to avoid scrutiny and control, as well as to make it impossible to learn about treatment and conditions during detention. I therefore urge States to abolish and prohibit secret detention in all its forms in order to prevent acts of torture and other ill-treatment as well as other human rights violations.

3. Inspection of places of detention

The regular inspection of places of detention is one of the most effective preventive measures against torture and ill-treatment. It can ensure the adequate implementation of safeguards against torture, create a strong deterrent effect and provide a means to generate timely and adequate responses to allegations of torture and ill-treatment by law enforcement officials. With the entry into force of the Optional Protocol in 2006, one may conclude that its ratification by States parties and the creation of independent national visiting bodies can be considered as one of the most effective legislative measures to prevent torture in the sense of Article 2(1) of the Convention. The rationale behind this is based on the experience that torture and ill-treatment usually takes place in isolated and unmonitored places of detention.

As the Subcommittee on Prevention of Torture can only sporadically conduct monitoring visits to the increasing number of States parties to the Optional Protocol, the main responsibility for systematic monitoring rests with the national preventive mechanisms. Given that many of the existing national preventive mechanisms are still at an initial stage and have yet to develop their practices, the current phase is absolutely crucial in terms of paving the way for the Optional Protocol to exert its full potential for the prevention of torture.

At the same time, the national preventive mechanisms face growing challenges including to their independence, composition and resources; guarantees and powers; and working methods. Most fundamentally, many national preventive mechanisms lack a clear legal basis specifying their powers and ensuring their complete independence from the State authorities. Regrettably, some States fail to provide their national preventive mechanism with the necessary security and

stability. Even the most independent national preventive mechanisms, with a robust mandate, cannot function without sufficient resources. Particular problems can arise for a national preventive mechanism that functions within a previously existing institution such as a national human rights institution, for a national preventive mechanism composed of several bodies and for a national preventive mechanism that cooperates institutionally with civil society organizations. Those models all require a particular effort of planning and coordination and a clarification of the exact roles and tasks within the institution.

Many countries already have national mechanisms in place for the inspection of places of detention, in addition to already established regional mechanisms such as the European Committee for the Prevention of Torture and international mechanisms including the Subcommittee on Prevention of Torture, the Working Group on Arbitrary Detention and the Special Rapporteur on torture, all of which inspect places of detention.

3. Coordination between various disciplines and key actors

While suggesting that the Optional Protocol to the Convention against Torture is one of the most effective and innovative method for the prevention of torture and ill-treatment worldwide, it is important to stress that effective prevention requires coordinated action between various disciplines and different key actors, both domestically and internationally. Combating impunity for torture, providing victims of torture with an effective remedy and adequate reparation, as well as monitoring conditions of detention is integral to the global efforts to prevent and suppress torture and ill-treatment and requires involvement of various actors, including judges, prosecutors, lawyers, forensic experts, doctors, detainees, police officers, interrogators, torture survivors, governmental officials, academics and the media.

It is important to note the critical role played by judges, lawyers and prosecutors in the prevention of torture, including with respect to arbitrary detention, due process safeguards and fair trial standards, and bringing perpetrators to justice. Similarly, it is essential that State institutions uphold unambiguously the zero tolerance policy against torture and ill-treatment and make further efforts to reduce the risk of ill-treatment and excessive use of force by the police at the time of apprehension and while in detention. Instructions to this effect must reach from the very top of the chain of command down to every member of the force. This will ensure that no

agents of law-enforcement, State security or intelligence services are exempted from criminal liability for acts of ill-treatment or torture committed by them or their subordinates, and that they are bound to disobey orders to the contrary.

4. Forensic science

Furthermore, the work of a forensic scientist is germane to the efforts to address impunity for acts of torture. Forensic expertise ensures that torture traumas, whether visible or invisible, physical or mental, are scrupulously documented before they disappear. Similarly, the corroborative effect of this professional opinion, and its role in assessing the overall credibility of alleged victims, provides a stronger basis for prosecutions. Additionally, the work of forensic scientists provides significant insight into the methods and pattern of torture employed in places of detention. This has been essential to framing recommendations aimed at addressing systemic cause or facilitators of torture and ill-treatment in places of detention. In addition, forensic sciences provide a much sounder and more effective way to investigate crime and successfully prosecute offenders. I also strongly believe that scientific methods of detecting crime are a far more effective way of obtaining safe convictions and reducing criminality than the brutality of interrogation under torture. If forensic sciences were more systematically applied, they would go a long way in refuting the perceived need to resort to torture.

5. Victim centered approach

I am convinced that efforts to combat torture require more involvement of victims as we seek an integrated long-term approach to adequate redress and reparation, including compensation, rehabilitation for victims of torture and their families and their reintegration into society. The respective costs should ideally be borne by the individual perpetrators, their superiors and the authorities responsible for human rights violations. If States provided effective remedies ensuring that the individual perpetrators are held accountable to pay all the costs of long term rehabilitation for torture victims, this would probably have a strong deterrent effect to complement criminal punishment (A/65/273, 2010). As far as the preventive aspect of rehabilitation centers is concerned, it is important to note that the services provided to the victims of torture go beyond the medical aspects of rehabilitation. They also contribute to raising awareness of the issue of torture and the establishment of justice. Alerting and informing society

of the prevalence of torture and States' involvement in it can trigger public pressure and eventually bring about policy changes.

States must commit themselves to establish suitable mechanisms to enable victims of torture to obtain redress. A State must demonstrate a willingness to examine each case of torture and apply a transparent procedural process to realize effective redress. It is important that victims of torture themselves be entitled to initiate and to participate actively in such procedures. In my final conclusions and recommendations following on site visits, I urge States to provide victims of torture and ill-treatment with substantial compensation proportionate to the gravity of the physical and mental harm suffered, and adequate medical treatment and rehabilitation.

6. International Mechanisms

Implementation at an international level is also critical. Mechanisms such as State party reviews of the Committee against Torture (CAT) and the Universal Periodic Review (UPR) process must be effectively used to have States report on steps undertaken to realize redress for victims of torture and to ensure follow-up on recommendations made by these bodies. In addition, the UN Voluntary Fund for the Victims of Torture is an established mechanism at the universal level to support civil society organizations that are willing to provide essential services to victims.

OSCE Prevention of Torture

Ladies and Gentlemen,

I recall that the 2003 Supplementary Human Dimension Meeting focused on the prevention of torture and put forward recommendations to address the specific concerns and challenges related to the prevention of torture and other cruel, inhuman, and degrading treatment. I previously advocated that OSCE, its member states, and civil society become more active in the prevention of torture and further strengthen the domestic and regional standards. The gradual implementation of National Preventative Measures is admirable, but more widespread application and implementation is still necessary. The first step in achieving greater progress is attained, here today, through the consideration of progress made and assessing what next steps must be taken to eradicate torture and ill-treatment.

The 37 member states of OSCE that have ratified OPCAT and embraced the international scrutiny that accompanies the Optional Protocol have actively sought to eliminate torture through observation, recognition, disclosure, and correction. It is imperative that the remaining OSCE member states also take similar steps towards the ratification of OPCAT. Further, national legal frameworks should encourage and require frequent periodic monitoring visits that extended beyond those permitted by international agreements. The creation of a National Ombudsman charged with monitoring detention centers and other locations where individuals are deprived of liberty or isolated in such a fashion as to permit torture should be further supplemented with the involvement of civil society and non-governmental organizations.

OSCE and more specifically the Office for Democratic Institutions and Human Rights have worked to promulgate standards, legislation, and recommendations that advance the principles and legally binding international requirements of the CAT and OPCAT. Ultimately, it is the duty and responsibility of the 57 OSCE member states to implement national preventative mechanisms that bring them into compliance with international legal norms. The prevention of torture and other cruel, inhuman, and degrading treatment and punishment has been encapsulated in numerous OSCE agreements that reaffirm the inhumanity of torture and ill-treatment. Under OSCE agreements, CAT, and OPCAT, OSCE member states are bound to ensure that all individuals in detention or incarceration are treated with humanity and with respect for the inherent dignity of the human person. Further, member states are called upon to implement standards that comply with the United Nations Standard Minimum Rules for the Treatment of Prisoners and Code of Conduct for Law Enforcement Officials if they have not already done so. The OSCE dedication to the universal condemnation and eradication of torture is admirable and should serve as a launching point for individual state legislation and procedural norms that holistically and effectively seek to end the ill-treatment of all persons deprived of liberty.

Conclusion

If States effectively implement national preventative measures and take affirmative steps to enforce their obligations torture could be eradicated. Standard setting has been achieved at the international and regional level, the burden now rests on national governments to acknowledge and embrace the legal norms they have obligated themselves to uphold.

Ladies and Gentlemen, I would like to thank OSCE for the opportunity to speak on the prevention and eradication of torture and commend the continued dedication of the organization and its member states in their ongoing efforts. Together with the Committee Against Torture, the Subcommittee on the Prevention of Torture, and civil society groups, I am confident that through continued promotion of effective national preventative measures and careful monitoring we can successfully eradicate torture and ill-treatment on a massive level.

I thank you for your attention, and look forward to a further discussion.