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# **INTERPRETATION OF THE DEFINITION OF TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN THE LIGHT OF EUROPEAN AND INTERNATIONAL CASE LAW**

**The need to preserve legal and jurisprudential evolutions and  
acquis**

A report presented to  
the EU Network of Independent Experts in Fundamental Rights  
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## PRELIMINARY REMARKS

The aim of this report is to produce a study highlighting evolutions in the interpretation of the definition of torture and cruel, inhuman or degrading treatment or punishment (ill-treatment) and the necessity to preserve legal and jurisprudential *acquis* in this domain. Its objective is to provide the E.U. Network of Independent Experts on Fundamental Rights with a framework for a comprehensive approach to the torture and ill-treatment definition and its impact on the enjoyment of human rights, in particular when monitoring the respect and implementation of article 4 of the Charter of Fundamental Rights of the EU by Member states.

This report will highlight the main elements of the evolutionary interpretation of the original definition of torture by the international and European human rights mechanisms together with a presentation of OMCT's approach in this respect. It will stress in particular the need for maintaining those evolutions while interpreting the legal definition of torture and ill-treatment (Chapter 1) by focussing, on one part, on the indispensable indivisibility and interdependence of rights, whether they are civil and political rights or economic, social and cultural rights, and the importance of looking at the root causes of violence (Chapter 2) and, on the other part, on violence against women (Chapter 3) and children (Chapter 4).

These different issues have been a focus point for the World Organisation Against Torture (OMCT) ever since its first plenary Assembly, and in particular since the realization, in 1989, of a report concerning development and human rights in the Least Developed Countries (LDCs)<sup>1</sup> and the Manila Declaration adopted by all its members in 1991. At this time, OMCT decided to develop strategies taking into account, and acting on, the root causes of violence and torture:

- Since then OMCT has examined, through its programme on Economic, Social and Cultural Rights, the indivisibility and interdependence of all human rights with a view to addressing the socio-economic context within which violence, including torture and ill-treatment, occur.
- In 1991, as an essential component of this strategy, the creation of a programme in favour of children was also conceived. The aim was to analyse the specific vulnerability of children and raise awareness of the need for greater protection against torture and all other forms of violence.
- Last but not least, in 1996, OMCT decided to establish a special programme which addresses and analyses the gender-related causes and consequences of torture and other forms of violence against women.

Within this report, examples of relevant recent cases will come mainly from four countries: *The Czech Republic*, *Germany*, *Greece* and *The Slovak Republic*; from late 2003 and during 2004. The focus on these particular states does not imply that the situation regarding torture and ill-treatment is worse than in other European Union Member States. Those four states have been singled out for the reason that a greater amount of data and information regarding the practice of torture and ill-treatment was available to us: OMCT has established connections with partner non

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<sup>1</sup> OMCT, *The Least Developed Countries: Development and Human Rights*, OMCT, Geneva, 1990

governmental organisations (NGOs) in the field. These organisations were able to provide first hand information about local ill-treatment cases and domestic legislation and practices.

This report does not have the ambition to be exhaustive, but to provide a structure for a comprehensive approach to torture and ill-treatment in their continuously varying forms. As such, this study might be of interest for other EU Member States in their national plans of action aimed at fighting torture and ill-treatment.

Finally, it is to be noted that some dimensions (such as detention conditions or asylum and immigration policies) have been voluntarily not addressed in this report for lack of resources reasons.

# Chapter 1: INTERPRETING THE DEFINITION OF TORTURE AND ILL-TREATMENT

## 1. Legal basis and definition

Article 4 of the Charter of Fundamental Rights of the EU states that: “*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*”.

The prohibition of torture and cruel, inhuman or degrading treatment or punishment is set out in all the major international instruments dealing with civil and political rights, including:

- Art. 5 of the Universal Declaration of Human Rights of 1948;
- Art. 3 of the European Convention of Human Rights of 1950;
- Art. 7 of the International Covenant on Civil and Political Rights of 1966;
- U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984;
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987;
- Art. 37 (a) of the Convention on the Rights of the Child.

It is also prohibited by the four Geneva Conventions of 12 August 1949 and their two Additional Protocols and in national Constitutions and domestic legislation throughout the world.

Most of these instruments, including the Charter, do not provide a definition of the concept of torture and ill-treatment.

One of the major instruments dealing with torture that does provide a definition is the UN Convention against Torture<sup>2</sup>. Consequently, when a definition of this concept is needed, it is usually referred to this treaty<sup>3</sup>.

The UN Convention against Torture definition provides that torture is “*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising from, inherent in or incidental to lawful sanctions*”.

This definition has been held to constitute customary international law<sup>4</sup>.

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<sup>2</sup> Other international provisions providing a definition of torture are article 1 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by General Assembly resolution 3452 (XXX) of 9 December 1975), article 2 of the Inter-American Convention to Prevent and Punish Torture (9 December 1985) and article 7 of the Rome statute of the International Criminal Court (17 July 1998)

<sup>3</sup> See Eur. Ct. H.R., *Selmouni v. France*, Judgment of 28 July 1999, § 97

<sup>4</sup> ICTY, 10 December 1998, *Prosecutor v. Anto Furundzija* [1998] ICTY 3, § 160

In accordance with article 1, the international concept of torture comprises five elements:

- a) severe pain and suffering, whether physical or mental;
- b) intentional infliction;
- c) for such purposes as obtaining information or a confession, punishing, intimidating or coercing, or for any reason based on discrimination of any kind;
- d) inflicted by or at the instigation of or with the consent of a public official and other person acting in an official capacity;
- e) exclusion of torture related to pain arising from lawful sanctions.

In addition, it should be pointed out that there is no international legal definition of a cruel, inhuman or degrading treatment.

Many describe torture as the highest point of a continuous development which comprises cruel, inhuman or degrading treatment<sup>5</sup>. As a result, a cruel, inhuman or degrading treatment could be considered as a form of ill-treatment that is not sufficiently serious as to amount to torture<sup>6</sup>.

Under such a threshold, once a certain level of gravity is reached, an act can be qualified as degrading treatment. Degrading treatment, when it reaches a certain severity, can be re-classified as inhuman treatment which, in turn, if particularly serious can be classified as torture.

The distinction between these concepts depends on the circumstances and on the gravity of each case: the UN Human Rights Committee stated that it does not consider necessary to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied<sup>7</sup>.

Moreover, some human rights experts consider that creating a hierarchy between torture and the different forms of ill-treatment should be avoided<sup>8</sup>.

## **2. Brief overview of some of the constitutive elements of the definition of torture**

### **2.1. Severe pain or suffering**

An act of torture or ill-treatment, whether it is cruel, inhuman or degrading treatment or punishment, must attain a minimum level of seriousness to be held as a reprehensible act: an entry level threshold of severity must be reached to fit this particular qualification.

The assessment of this minimum is relative: as the European Court of Human Rights deemed in the *Ireland v. The United Kingdom Case*, it depends on the duration of the treatment, its physical or mental effects and on the sex, age and state of health of the victim<sup>9</sup>.

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<sup>5</sup> N. MAN, *Enfants, Torture et Pouvoir; La torture exercée sur les enfants par les Etats et les groupes d'opposition armés*, OMCT – Save the Children, London, 2000, p. 13

<sup>6</sup> It is the position held in article 1 § 2 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

<sup>7</sup> U.N. Doc. HRI\GEN\1\Rev.1 at 30 (1994), Human Rights Committee, General Comment 20, Article 7, § 4

<sup>8</sup> ASSOCIATION FOR THE PREVENTION OF TORTURE, *The Definition of Torture. Proceedings of an Expert Seminar*, APT, Geneva, 2001, p. 18

<sup>9</sup> Eur. Ct. H.R., *Ireland v. The United Kingdom*, Judgement of 18 January 1978, § 162; Eur. Ct. H.R., *Soering v. The United Kingdom*, Judgment of 07 July 1989, § 100; A. NEJAD, *How does the Current Definition of Torture apply to Children?*, in ASSOCIATION FOR THE PREVENTION OF TORTURE, *op. cit.*, p. 80



Once an act crosses this entry level threshold, a distinction can be drawn between acts of torture, acts amounting to inhuman treatment and acts amounting to degrading treatment. This distinction is based upon a threshold of severity: the first one presents a higher degree of seriousness than the second one, which is more severe than the last one<sup>10</sup>.

## 2.2. Official capacity

A broadening of what falls within the scope of an “act of a public official” has taken place and is now largely accepted.

It certainly includes being ill-treated by a police officer or prison warden.

But, there is an increased tendency to focus on what the State can legitimately be held responsible for and to present its reasoning through the lens of State responsibility.

Some authors and jurists still cling to the notion that in order to amount to a violation of the prohibition of torture and ill-treatment, an act must have been meted out by state actors themselves. But, it is now quite clear that a State may in certain circumstances be in breach of its obligation when it fails to prevent forms of ill-treatment that attain the requisite degree of seriousness from occurring.

This conclusion ensues from article 1 of the CAT: as mentioned above, article 1 incriminates violations resulting from actions committed with the consent or acquiescence of the State. Thus, the mere fact that the perpetrator is a private individual rather than a State official does not lead to the exclusion of this violence from the scope of the Convention against Torture<sup>11</sup>.

The UN Human Rights Committee, in its General Comment n° 20, stated that art. 7 of the International Covenant on Civil and Political Rights applies to the acts prohibited “*whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity*”<sup>12</sup>.

Many other human rights instruments do not discriminate between the private or public status of the perpetrator to engage responsibility as they criminalize acts whether they are committed by private or public individuals: art. 7 §2 (e) of the Rome Statute of the International Criminal Court, art. 4 (c) of the UN Declaration on the Elimination of Violence against Women, art. 19 §1 of the Convention on the Rights of the Child, art. 1 and 2 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,...

The same conclusion arises from the examination of the jurisprudence of international human rights jurisdictions.

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<sup>10</sup> Eur. Ct. H.R., *Tyrer v. The United Kingdom*, Judgement of 25 April 1978, § 29; Eur. Ct. H.R., *Ireland v. The United Kingdom*, Judgement of 18 January 1978, § 167; F. SUDRE, *Article 3*, in L.E. PETTITI, E. DECAUX et P.H. IMBERT, *La Convention européenne des droits de l’homme. Commentaire article par article*, Economica, Paris, 1999, p. 155

<sup>11</sup> U.N. Doc. E/CN.4/2001/66/Add.1, Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43 - Visit to Azerbaijan, § 73

<sup>12</sup> *Op. cit.*, § 2

In the *Velasquez Rodriguez v. Honduras Case*, the Inter-American Court of Human Rights took the view that the State can also be responsible for acts by private persons: “an illegal act which violates human rights and which is initially not directly imputable to a State (for example because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as is required by the Convention”<sup>13</sup>.

Accordingly, whilst the State will be responsible for acts by its own officials or agents and fails in its duty to prevent and to investigate violations, the Court held that the “same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by the Convention”<sup>14</sup>.

The jurisprudence of the European Court of Human Rights is remarkable concerning this issue.

On the one hand, the ECHR has reached similar conclusions than the IACHR: in *H.L.R. v. France*, whilst the source of the risk of ill-treatment was from private actors and not the public authorities themselves, the Court nevertheless held that: “Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials”<sup>15</sup>.

The same reasoning was held in several subsequent cases<sup>16</sup>.

On the other hand, in *Selmouni v. France*, the ECHR makes an unprecedented reference to the UN Convention against Torture definition, which holds such a divide between public and private spheres<sup>17</sup>.

The fact that these precedents can coexist in the ECHR case law may suggest that the Court has accepted that the definition of torture and ill-treatment must be interpreted in a way that will permit a more efficient fight against this kind of criminal misconduct. As the Court stated, “the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies”<sup>18</sup>.

In that sense, the Court has allowed itself a degree of flexibility when considering the prohibited acts and concluded that the European Convention of Human Rights should be regarded as a “living instrument which must be interpreted in the light of present-day conditions”<sup>19</sup>.

Therefore, this jurisprudence strengthens the CAT definition as a focusing point in the struggle against torture and ill-treatment and highlights the need for a broader interpretation of its components.

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<sup>13</sup> *Velasquez Rodriguez v. Honduras*, *op. cit.*, § 172

<sup>14</sup> *Ibid.*, § 176

<sup>15</sup> Eur. Ct. H.R., *H.L.R. v. France*, Judgment of 29 July 1997, § 40

<sup>16</sup> Eur. Ct. H.R., *A. v. The United Kingdom*, Judgment of 23 August 1998, § 22; Eur. Ct. H.R., *Mahmut Kaya v. Turkey*, Judgment of 28 March 2000, § 115; *Z. and others v. The United Kingdom*, Judgment of 10 May 2001, § 73; Eur. Ct. H.R., *Pretty v. The United Kingdom*, Judgment of 29 April 2002, § 51

<sup>17</sup> Eur. Ct. H.R., *Selmouni v. France*, Judgment of 28 July 1999, § 97; see also Eur. Ct. H.R., *Ilhan v. Turkey*, Judgment of 27/06/ 2000, § 85

<sup>18</sup> *Selmouni v. France*, *op. cit.*, § 101

<sup>19</sup> *Ibid.*

Last but not least, the International Criminal Tribunal for the Former Yugoslavia, in *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, has ruled that the characteristic of the offence of torture was “to be found in the nature of the act committed, rather than in the status of the person who committed it”<sup>20</sup>.

### 2.3. Purpose

An act of torture or ill-treatment must be inflicted for various purposes (punishment, intimidation, getting information,...)<sup>21</sup>.

As far as some categories of disadvantaged people (children, women, minorities, indigent people,...) are concerned, purpose as a component of torture and ill-treatment can be too restrictive. Because of their particular vulnerability, those categories require higher standards of protection than other groups and specific positive measures. In particular, the State must assume a higher degree of responsibility in cases of torture or cruel, inhuman or degrading treatment or punishment perpetrated against them.

This means that, in some cases, it must be held responsible even though these acts may be perpetrated without any specific purpose.

### 3. State obligations

Traditionally, the prohibition of torture and ill-treatment has focused upon the duty of the State and its officials to abstain from committing acts of torture.

This emphasis is reflected in the historical notion that torture is an act committed by a public official or someone acting at the instigation, consent or acquiescence of a public official.

Yet, the notion that States have a responsibility not only to abstain but also to protect individuals from human rights violations is enshrined in various instruments, such as article 3 of the ECHR or article 2 (1) of the CAT, which states that: “*Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction*”.

The nature of a State’s obligation is therefore twofold: a duty to abstain and a duty to protect; the former being a negative obligation, to refrain from a certain action, and the latter a positive obligation to ensure individuals are not subjected to a violation.

Recently, it is arguable that there has been a growing emphasis placed upon the positive obligation of States to protect individuals.

States also have an obligation to fulfill the protected rights. The obligation to fulfill requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right<sup>22</sup>.

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<sup>20</sup> ICTY, 22 February 2001, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case no. IT-96-23-T, § 495. This statement was made, however, in the context of a humanitarian law case.

<sup>21</sup> Eur. Ct. H.R., *Ilhan v. Turkey*, Judgment of 27 June 2000, § 85

Consequently, State responsibility for acts of torture and ill-treatment has been engaged, even though the act has been committed by a private actor, because there was a real risk of a future violation or because there has been a lack of an effective investigation<sup>23</sup>.

In the *Velasquez Rodriguez v. Honduras Case*, the Inter-American Court of Human Rights judged that State Parties not only have the obligation not to violate the enshrined rights but also that the Convention “requires to take reasonable steps to prevent situations which are truly harmful to the rights protected”<sup>24</sup>.

The Court, in that case, concluded that the test for establishing whether a State has carried out its duties responsibly is whether the State has acted with “due diligence”, either to prevent or to investigate violations.

Likewise, the UN Human Rights Committee considers, in its General Comment n° 20, that art. 7 of the International Covenant on Civil and Political Rights leads to positive action: “It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7”<sup>25</sup>.

This obligation is also included in article 1 of the CAT, which holds that State will be in breach of article 1 if violations result from actions committed with the consent or acquiescence of the State.

Indeed, the failure of the State authorities to react to torture or ill-treatment amounts to unlawful acquiescence, which violates article 1<sup>26</sup>.

Therefore, States must be held responsible not only for intentional acts but also for negligence. Obligation of due diligence means that States must examine the adequacy and implementation of legal safeguards to address and counter torture. It imposes various possible measures that States must adopt.

This obligation is applicable for all human rights, whether they are civil and political rights or economic, social and cultural rights.

#### **4. The importance of the prohibition of torture and ill-treatment in international law**<sup>27</sup>

The prohibition of torture and other forms of ill-treatment has achieved the status of *jus cogens*: it is a non-derogable norm of international law which holds the highest hierarchical position among other norms and principle<sup>28</sup>.

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<sup>22</sup> U.N. Doc. E/C.12/2000/4 (2000), *Committee on Economic, Social and Cultural Rights, General Comment 14*, The right to the highest attainable standard of health, § 33

<sup>23</sup> D. LONG, *Aspects of the Definition of Torture in the Regional Human Rights Jurisdictions and the International Criminal Tribunals of The Former Yugoslavia and Rwanda*, in ASSOCIATION FOR THE PREVENTION OF TORTURE, *The Definition of Torture. Proceedings of an Expert Seminar*, APT, Geneva, 2001, p. 61

<sup>24</sup> Inter-Am. Ct. H.R., *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, § 187

<sup>25</sup> U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), Human Rights Committee, General Comment 20, Article 7, § 2

<sup>26</sup> CAT/C/29/D/161/2000., Communication No 161/2000 : *Hajrizi Dzemajl v. Yugoslavia*, § 9.2

<sup>27</sup> See REDRESS, *Terrorism, counter-terrorism and torture*, July 2004

<sup>28</sup> Eur. Ct. H.R., *Al Adsani v The United Kingdom*, Judgement of 21 November 2001, § 60-61; Eur. Ct. H.R., *Ireland v. The United Kingdom*, Judgement of 18 January 1978, § 163; *the Prosecutor v. Anto Furundzija*, 10 December 1998, *Trial Chamber II case N° IT-95-17/1T*; *General Comment No. 24* on "Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto or in relation to declarations

Nevertheless, since the 11 of September 2001 attacks, arguments have been put forward to legitimate the use of torture or ill-treatment in the fight against terrorism<sup>29</sup>: no criminal liability would exist if torture or ill-treatment is used in that particular case on the grounds that this kind of actions are necessary to prevent a greater harm to human life.

Consequently, some States have relied on “national security interests” to suggest that an override of human rights protections including the prohibition against torture and cruel, inhuman or degrading treatment or punishment may be warranted (mainly the U.S.A. and Israel<sup>30</sup>).

For example, in the view of the European Commission, there is room for a “balancing act” between the interests of national security and that of an individual to be free from torture and ill-treatment, despite the status of the prohibition of torture in international law<sup>31</sup>.

The argument that there is a need to violate human rights while countering terrorism is fundamentally flawed. As explained by Mary Robinson, former UN High Commissioner for Human Rights, “*the only long-term guarantor of security is through ensuring respect for human rights and humanitarian law*”<sup>32</sup>.

Therefore, any fight against terrorism that does not maintain scrupulous respect for human rights cannot achieve national security, but instead undermines it.

The UN Committee against Torture, while recognising the need for effective measures to fight against crime, believes that such measures must fully respect the rights and fundamental freedoms of the individuals concerned<sup>33</sup>.

Furthermore, following the September 11 attacks the Committee issued a statement where it reminded States parties to the Convention against Torture of the non-derogable nature of the obligations contained in the Convention<sup>34</sup>.

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under Article 41 of the Covenant”, issued on 4 Nov. 1994 by the *United Nations Human Rights Committee*, § 10 (“*the prohibition of torture has the status of a peremptory norm*”). In 1986, the *United Nations Special Rapporteur*, P. Kooijmans, in his report to the *Commission on Human Rights*, took a similar view (E/CN. 4/1986/15, p. 1, § 3). That the international proscription of torture has turned into *jus cogens* has been among others held by U.S. courts in *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699 (9<sup>th</sup> Cir. 1992) Cert. Denied, *Republic of Argentina v. De Blake*, 507 U.S. 1017, 123 L. Ed. 2d 444, 113 S. Ct. 1812 (1993); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F. 2d 929, 949 (D.C. Cir. 1988); *Xuncax et al. v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996); and *In re Estate of Ferdinand E. Marcos*, 978 F. 2d 493 (9<sup>th</sup> Cir. 1992) Cert. Denied, *Marcos Manto v. Thajane*, 508 U.S. 972, 125 L. Ed. 2d 661, 113 S. Ct. 2960 (1993). The House of Lords also considered the prohibition of torture to be part of *jus cogens*: see *Regina v. Bartle and the Commissioner of Police for the Metropolis and other (Appellants), Ex-Parte Pinochet (Respondent) (On appeal from a Divisional Court of the Queen’s Bench Division)*; *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On appeal from a Divisional Court of the Queen’s Bench Division)*

<sup>29</sup> See OMCT, *Position paper of the World Organisation Against Torture*, 2004 United Nations Commission on Human Rights, 60<sup>th</sup> session (March 15<sup>th</sup> to April 23<sup>rd</sup> 2004), Geneva

<sup>30</sup> See A.M. DERSHOWITZ, “The torture warrant: A response to Professor Strauss”, *N.Y.L. Sch. L. Rev.*, vol. 48, 2003, p. 277; REDRESS, *Terrorism, counter-terrorism and torture*, July 2004, p. 39; E. PRESS, “In Torture We Trust?”, *The Nation*, New-York, March 31, 2003

<sup>31</sup> The European Commission Working Document, “The relationship between safeguarding internal security and complying with international protection obligations and instruments”, <http://www.statewatch.org/news/2001/dec/immcom743.pdf>

<sup>32</sup> M. ROBINSON, statement at 59<sup>th</sup> session of UNHRC, 20 March 2002, in REDRESS, *Terrorism, counter-terrorism and torture*, July 2004, p. 3

<sup>33</sup> C.A.T., 5 June 2000, *Arana v. France*, n° 63/1997, § 11.5

The jurisprudence of the European Court of Human Rights has similarly ruled out the possibility of a balancing act between interests of national security and the interest of the individual to be protected against torture or cruel, inhuman or degrading treatment and punishment<sup>35</sup>. In the *Soering v. The United Kingdom Case*, the Court established that “[the] absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 (art. 3) enshrines one of the fundamental values of the democratic societies making up the Council of Europe”<sup>36</sup>.

Furthermore, the Court stated that “the requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals”<sup>37</sup>.

Therefore, OMCT would like to recall once again that the prohibition of torture is a norm that cannot be derogated from or suffer any kind of limitation under any circumstance. It is a norm that is widely regarded as *jus cogens* and that, as such, cannot be altered by treaty or by a subsequent customary rule but only by the emergence of a new contrary norm of *jus cogens*.

Moreover, OMCT would like to note that the prohibition against ill-treatment is also non-derogable under general human rights treaties and that, as such, cannot be suspended under any circumstance. Under the Geneva Conventions, the use of ill-treatment constitutes a grave breach giving rise to universal jurisdiction. The Rome Statute lists ill treatment as a separate category (in addition to torture) in its list of acts which may constitute crimes against humanity.<sup>38</sup> Similarly, ill-treatment is also considered by the Rome Statute as a war crime in both international and non-international armed conflict.<sup>39</sup>

In conclusion, States have an obligation to prevent not only torture, but also any forms of ill-treatment. In addition, States have an obligation to punish those who perpetrate such acts. Under no circumstance can the use of ill-treatment be authorized.

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<sup>34</sup> CAT/C/XXVII/Misc.7, Statement of the Committee Against Torture, 22/11/2001; see also C.A.T., 28 April 1997, *Tapia Paez v. Sweden*, n°39/1996, § 14.5

<sup>35</sup> Eur. Ct. H.R., *Chahal v. The United Kingdom*, Judgment of 15 November 1996, §. 79

<sup>36</sup> Eur. Ct. H.R., *Soering v. The United Kingdom*, Judgment of 07 July 1989, § 88

<sup>37</sup> Eur. Ct. H.R., *Tomasi v. France*, Judgment of 27 August 1992, § 115

<sup>38</sup> Article 7 Crimes Against Humanity: (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9\*

<sup>39</sup> Article 8 War Crimes :

- a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
  - ii) Torture or inhuman treatment, including biological experiments; (...)
- c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
  - (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

## **Chapter 2: TORTURE AND VIOLATIONS OF ECONOMIC SOCIAL AND CULTURAL RIGHTS**

### **1. The importance of looking at the root causes of violence**<sup>40</sup>

As far as the risk of being subjected to torture and the category of victims are concerned, the following approach will draw attention to the correlation existing between the occurrence of torture and a situation characterised by poverty, along with violations of economic, social and cultural rights, lack of development opportunities and deep inequalities. This correlation is highlighted by the fact that the poor are overwhelmingly represented, in many situations, among the victims of torture.

While evidence shows that the poor constitute an important proportion of torture's victims, the dynamics underpinning this reality can be multiple and can involve different realities. In fact, the socio-economic context can affect personal security in different ways, creating situations favourable to the emergence of torture and other cruel, inhuman or degrading treatment or punishment.

Indeed, nowadays, torture and ill-treatment are not so much the result of forceful imposition of ideologies resisted by the population, it is increasingly the consequence of social tensions created by socio-economic imbalances and the growing number of excluded or marginalized who see their income diminishing and preventing them from filling their most basic needs.

A situation where repression and violence are increasingly related to poverty, marginalisation and violations of economic, social and cultural rights requires a holistic approach taking into account the existing complexity of the situation, as well as the increased vulnerability of a growing number of the world population, in order for effective action to be taken.

#### **1.1. The indivisibility of human rights**

##### **1.1.1. International and EU level**

The United Nations have asserted the notion of indivisibility, interdependence and interrelatedness of all human rights on numerous occasions<sup>41</sup>.

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<sup>40</sup> See N. MIVELAZ, *Torture and Violations of Economic, Social and Cultural Rights : Appraisal of the Link and Relevance to the Work of the United Nations Committee Against Torture*, Paper presented by the World Organisation Against Torture (OMCT) to the United Nations Committee Against Torture, Geneva, 2001

<sup>41</sup> U.N. Doc. A/CONF. 157/23, *Vienna Declaration and Programme of Action*, 12 July 1993, §5; U.N. Doc. E/CN.4/SUB.2/RES/2001/2; U.N. Doc. E/CN.4/SUB.2/RES/2000/8; U.N. Doc. E/CN.4/SUB.2/RES/1999/29; U.N. Doc. E/CN/RES/2001/31; U.N. Doc. E/CN/RES/2001/30, § 4 (a) (d); U.N. Doc. E/CN/RES/2000/9, §3 (a) (d); U.N. Doc. E/CN/RES/1999/59

The UN Committee against Torture itself recognized the relevance of the socio-economic context to the protection against torture and ill-treatment<sup>42</sup>.

In the same way, in the *Airey v. Ireland Case*, the ECHR stated that, although the Convention protects essentially civil and political rights, many of these rights have implications of a social or economic nature. The Court, acknowledging that there is no water-tight division separating the socio-economic sphere from the field covered by the Convention, clearly recognized that the effective enjoyment of civil and political rights often involves a particular socio-economic situation<sup>43</sup>.

In this ruling, the Court clearly affirms that the enjoyment of civil and political rights, including the protection against torture and ill-treatment, is dependent upon a certain number of socio-economic factors whose absence makes the realization of civil and political rights illusory and theoretical.

In its intermediary report for the year 2000, the UN Special Rapporteur on Torture, Sir Nigel Rodley, noticed that common law criminals, very often coming from disadvantaged social strata, constitute today the overwhelming majority of the victims of torture or other forms of ill treatment<sup>44</sup>. Based on this acknowledgement, the Special Rapporteur concludes that as long as the international community and the different societies do not tackle the problem of the poor, the marginalised and the vulnerable groups, they will feed the vicious circle of violence and brutality that threatens any aspiration for a better life in the respect and dignity of all<sup>45</sup>.

This evolution, also highlighted by the Special Rapporteur on Torture on many country reports<sup>46</sup>, has been attested by the Independent UN Expert on extreme poverty, Mrs Anne-Marie Lizin. She points out in her report to the UN Commission on Human Rights in 2000 that extreme poverty often drives individuals to be in conflict with the law, and that prison's population is

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<sup>42</sup> U.N. Doc. CAT/A/56/44, *Concluding observations of the Committee Against Torture: Canada*, § 57 (f); U.N. Doc. CAT/A/56/44, *Concluding observations of the Committee Against Torture: Australia*, § 51 (e), 53 (g)

<sup>43</sup> Eur. Ct. H.R., *Airey v. Ireland*, Judgment of 9 October 1979, § 26

<sup>44</sup> U.N. Doc. A/55/290, Report by the Secretary General, incorporating Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 11 August 2000, § 35

<sup>45</sup> *Ibid.*

<sup>46</sup> U.N. Doc. E/CN.4/2001/66/Add.2, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43, Addendum, Visit to Brazil, 30 March 2001, § 9; U.N. Doc. E/CN.4/2000/9/Add.4, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43, Addendum, Visit to Kenya, 9 March 2000, § 17; U.N. Doc. E/CN.4/1997/7/Add.3, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43, Addendum, Visit to Venezuela, 13 December 1996, § 5; U.N. Doc. E/CN.4/1998/38/Add..2, Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1997/38, Addendum, Visit to Mexico, § 77; U.N. Doc. E/CN.4/1997/7/Add.3, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43, Addendum, Visit to Venezuela, § 83; U.N. Doc. E/CN.4/1995/34/Add.1, Report of the Special Rapporteur on the question of torture, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1994/37, visit to the Russian Federation, § 9; U.N. Doc. E/CN.4/2000/9/Add.2, Report of the Special Rapporteur, Sir Nigel Rodley, Visit to Cameroon, 11 November 1999, § 21



today mostly made up of poor people<sup>47</sup>. Last but not least, the UN Committee against Torture also recognises, when examining the reports presented by State Parties to the Convention against Torture, the importance played by socio-economic disadvantages in terms of vulnerability to torture<sup>48</sup>.

The Special Rapporteur on Torture, the Independent Expert on extreme poverty as well as the Committee against Torture recognise and underline the link between the socio-economic context - characterised by an extreme poverty, a marginalisation of certain groups and a lack of enjoyment of economic social and cultural rights - and the emergence of torture. Their approach underline that this link operates through 2 different dynamics: the integration of disadvantaged social groups, in socio-economic terms, in the typology of victims as well as the creation of framework condition, in socio-economic terms, favourable to the emergence of torture. It also underlines that the prevention of torture cannot be dissociated from the problem of the poor, the marginalised and the vulnerable groups and therefore must take into account this dimension and its evolution.

### 1.1.2. OMCT's contribution

Since 1989, OMCT's work has highlighted that the occurrence of torture and ill-treatment can not be dissociated from socio-economic factors and from the enjoyment of economic, social and cultural rights.

An OMCT report<sup>49</sup>, published in 1990, highlighted two related trends:

- i) that torture and other violations within OMCT's mandate were increasingly the result of growing social tensions, which often lead to violent clashes;
- ii) that the overwhelming majority of those who are being subjected to torture and other violations within OMCT's mandate are persons who come from the poorest strata of society.

Today, through its Programme on Economic, Social and Cultural Rights, OMCT examines the indivisibility and interdependence of all human rights with a view to addressing the particular vulnerability of certain groups to torture and ill-treatment.

In particular, OMCT is currently carrying out a study<sup>50</sup> of the link between violence and repression on one hand and poverty and marginalisation on the other hand, in partnership with the International Labour Office (ILO), the Graduate Institute of International Studies (IUHEI), the University of Geneva (UNIGE), the University of Lausanne (UNIL) and the UN Special

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<sup>47</sup> U.N. Doc. E/CN.4/2000/53, 25 February 2000, Report submitted by Ms. A.-M. Lizin, independent expert, pursuant to Commission resolution 1999/26, § 107-110

<sup>48</sup> U.N. Doc. CAT/C/XXV/Concl.4., *Concluding Observations of the Committee Against Torture: Canada*, § 4(f); U.N. Doc. CAT/C/XXV/Concl.3, *Concluding Observations of the Committee Against Torture: Australia*, § 5(e) and 7(g)

<sup>49</sup> OMCT, *The Least Developed Countries: Development and Human Rights*, OMCT, Geneva, 1990

<sup>50</sup> "Analysis of the socio-economic dimensions of violence, including torture, through a human rights perspective: the relationship between socio-economic and institutional factors and violence", A collaborative international research project, August 2003 - August 2005

Rapporteurs on torture, on the human rights of indigenous people and on the right to adequate housing, as well as the 266 members of the network. The study comprises a general analysis that will examine the way in which the relationship between the enjoyment of economic, social and cultural rights and violations of civil and political rights is being handled and addressed, along with an analysis of national situations in 5 countries (Argentina, South Africa, Egypt, Uzbekistan and Cambodia) that will examine the impact, for each selected country, of a lack of enjoyment of one or several economic, social and cultural rights on the occurrence of torture, ill-treatment, forced disappearances, summary executions and other violations of physical and psychological integrity. This review of five national situations will allow for the validation of the hypothesis formulated in the general analysis.

## 1.2. Correlating violence and socio-economic inequality: an empirical analysis

What really constitutes violence is based on one's interpretation.

At its narrowest, violence has been defined as the unlawful exercise of physical force, at its broadest violence has been understood to include harm caused by structural inequalities in society.

It is believed that violence and socio-economic inequalities are positively correlated: countries with higher levels of inequality would experience higher levels of violence both state and non-state. Or, in other words, the higher the inequality, the greater likelihood or probability of violence.

The reasoning behind this is derived from the relative deprivation thesis, which stipulates that the cause of violent behaviour lies in the discontent generated from the gap between an individual's expected and achieved wellbeing<sup>51</sup>.

Empirical studies have been able to disprove the statement that socio-economic variables have no effect on violence<sup>52</sup>.

A recent OMCT analysis based on statistical association, part of the ongoing study of the link between violence and poverty mentioned in chapter 2 of this document, showed that, after income inequality, youth (male) unemployment rate is the next strongest correlate of homicides<sup>53</sup>. Generally speaking, the higher the youth (male) unemployment rate, the higher the homicides. This can suggest that homicides are more prevalent where there are less job opportunities for young males.

This finding is in accordance with numerous studies on violence, showing that violence is often higher in areas that combine high unemployment and a high percentage of young males amongst the population.

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<sup>51</sup> A. WOOD, *Correlating violence and socio-economic inequality: an empirical analysis*, 2004, unpublished, p. 15

<sup>52</sup> See A. WOOD, *Correlating violence and socio-economic inequality: an empirical analysis*, 2004, unpublished; P. KEEFER and S. KNACK, *Polarization, Politics and Property Rights: Links Between Inequality and Growth*, Kluwer, Washington, D.C., 2002; P. FAJNZYLBER, D. LEDERMAN and N. LOAYZA, "What causes violent crime?", *European Economic Review*, 2002, vol. 46, issue 7, p. 1323

<sup>53</sup> A. WOOD, *op. cit.*, p. 24

This analysis put forward other key structural relationships<sup>54</sup>:

- Income inequality and development are strong predictors of the level of non-state violence in and between countries.
- Non-state violence is higher in countries where unemployment is higher.
- The greater empowerment and equality of women, the lower the state violence and vice-versa.
- Torture in a country is highly correlated with indicators of industrialization and economic wealth.
- Those at the bottom income bracket are more likely to experience police violence and those at the top income bracket, least.
- Uneducated respondents are more likely to be a victim of any kind of violence and perceive violence to be more of a problem than those educated.
- Black people experience more violence (especially police violence)<sup>55</sup>.

This study of statistical association cannot prove causal connections.

However, it is reasonable to suggest that influencing socio-economic development and inequality may be a realistic strategy to provoke change in the levels of violence both non-state and state. There is no critical mass by which a country's socio-economic situation creates an ideal environment for torture and ill-treatment. Yet, as these findings demonstrate, there is a higher probability for torture and ill-treatment, the lower the level of development of a country and higher the income inequality: the level of development is a strong predictor of torture and ill-treatment.

In sum, the realization of human rights for all will become increasingly difficult in a climate of violence, which is antithetical to the notion of rights, whether they are economic, social, cultural or political.

Violence can undermine people's spiritual and material well-being, compromise human dignity and create a climate of fear that endangers personal security and erodes the quality of life. Living conditions that would permit people to lead peaceful and secure lives require good governance, whereby a state is willing to provide a political and socio-economic enabling environment. Conversely, bad governance can worsen social conditions that contribute to a rise in violence where the fruits of political and socio-economic development are not equitably distributed among the people.

The current context of economic globalization, with its undeniable impact on income distribution, poverty and on the enjoyment of economic, social and cultural rights, reveals in clearer terms than ever that the fight against torture and ill-treatment cannot be accomplished without addressing the socio-economic context in which it takes place<sup>56</sup>. While the occurrence of torture and ill-treatment can be diminished through the adoption of appropriate legal, administrative or judicial measures, an effective approach has to address the structural causes of poverty and therefore the socio-economic context.

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<sup>54</sup> *Ibid.*, p. 62

<sup>55</sup> Part of the study was an analysis at the micro level centred on Argentina and South Africa

<sup>56</sup> U.N. Doc. E/CN.4/Sub.2/2000/13, *The realization of economic social and cultural rights*.

Moreover, a growing trend in human rights jurisprudence is to broaden the concept of torture and ill-treatment in a way that its definition covers violations of economic, social and cultural rights as well as civil and political ones.

## **2. Violations of economic, social and cultural rights**

The Committee on Economic, Social and Cultural Rights defined poverty as “*a human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights*”<sup>57</sup>.

This multi-dimensional understanding of poverty, by reflecting the indivisible and interdependent nature of all human rights, also highlights the broad implication that poverty can have on the enjoyment of all human rights. In this respect, the Committee on Economic, Social and Cultural Rights pointed out that poverty constitutes a denial of human rights.

Indeed, a situation characterised by widespread poverty often leads or highlights flagrant violations of essential economic, social and cultural rights that could, in some cases, be considered as a form of ill-treatment.

For example, forced evictions and poor housing conditions can constitute a form of ill-treatment prohibited under international human rights law.

In the case *Selçuk and Asker v. Turkey*, the European Court of Human Rights ruled that the destruction of the defendants’ homes could be categorized as inhuman treatment within the meaning of article 3<sup>58</sup>.

While the Court clearly refuted that all destruction of homes amount to ill-treatment, stressing the need to adopt a case by case approach depending upon each case’s circumstances, this litigation still represents an important precedent with regard to the qualification of violations of economic, social and cultural rights as ill-treatment.

On this basis, the reflection of the ECHR can be clearly applied to other situations, which combine similar features of destitution, vulnerability and suffering resulting from the actions of the State or with its acquiescence, under the principle of due diligence<sup>59</sup>.

In the same way, the Committee against Torture has stated that Israeli policies on house demolition and “closures” may, in certain instances, amount to cruel, inhuman or degrading treatment or punishment<sup>60</sup>.

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<sup>57</sup> U.N. Doc. E/C.12/2001/10, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, 4 May 2001, § 8

<sup>58</sup> Eur. Ct. H.R., *Selçuk and Asker v. Turkey*, Judgment of 24 April 1998, § 78

<sup>59</sup> N. MIVELAZ, *op. cit.*, p. 19

<sup>60</sup> CAT/C/XXVII/Concl.5., *Conclusions and Recommendations of the Committee against Torture: Israel*, § 6 (i) and (j)

In the *Hajrizi Dzemajl v. Yugoslavia Case*, the Committee considered that the burning and destruction of houses constitute, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment<sup>61</sup>. Moreover, in their individual opinion concerning this case, two members of the Committee assessed that this situation was not merely ill-treatment but amounted to torture within the meaning of article 1: they considered that “*the failure of the State authorities to react to violent evictions, forced displacement and the destruction of homes and property by individuals amounts to unlawful acquiescence which, in our judgment, violates article 1, paragraph 1...*”<sup>62</sup>.

Consequently, the Committee made clear that torture, inhuman and/or degrading treatment or punishment has to be seen in a positive obligations context. States have a duty not only to refrain from such acts themselves, but also to prevent and suppress human rights violations between private individuals as well as to provide redress to victims of abuse perpetrated by non-state actors. Acting otherwise would be a breach of article 1 of the CAT: the occurrence of such violations would imply acquiescence by the State in the meaning of article 1.

### The socio-economic context and the protection against torture

- *Greece*: The right to adequate housing of a group of Romani families who were evicted from their homes in the vicinity of the Olympic Stadium construction site are being eroded due to the failure of the Greek authorities to uphold an agreement to subsidize their rent in alternative accommodation. On 1 August 2002, as part of the preparation in the Athens suburb of Maroussi for the 2004 Olympic Games, the Mayor of Maroussi and Stelios Kalamiotis, a representative of a group of 50 Romani families, some of whom had been living close to the site for over 30 years, signed an agreement which stipulated that the families would leave their homes on condition they would receive subsidies to help them rent new accommodation. This was to be a temporary measure, as under the terms of the agreement, the Municipality of Maroussi also undertook to find a plot of land and relocate the Roma in heavy-duty prefabricated houses. The agreement, which affects a total of 137 people, guaranteed a monthly payment for each family. However, there are reports that by October 2002 the families had already begun making complaints that they were not receiving payments, or that the payments were erratic. Some families allege that they faced discrimination whilst looking for new accommodation and when they did finally find a house to rent they would lose it through lack of funds, caused by the non-punctual payment of the rent subsidies. The Mayor of Maroussi himself has admitted that there have been considerable delays in the payments of the monthly rent subsidies. Thus, according to a letter from the Mayor to the Greek Ombudsman’s Office, dated 19 February 2004, only 14 families had been paid by January 2004; the remaining 36 families had not been paid since November 2003. In the same letter, the Mayor noted that the main reason behind these delays was the fact that the Ministry of Interior (which was not a signatory to the agreement) had not provided him with the necessary funds. Nevertheless, the Mayor of Maroussi proceeded to blackmail the Roma, informing them that no further subsidies would be forthcoming until all the families filed loan applications. This condition, which was

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61 CAT/C/29/D/161/2000., Communication No 161/2000 : Yugoslavia, § 9.2

62 Ibid., Individual opinion by Mr Fernando Mariño and Mr Alejandro González Poblete under rule 113 of the Rules of Procedure

not included in the contract, was imposed arbitrarily by the Mayor. It should be noted that the Mayor imposed this condition even before the Maroussi Municipal Council and the state Auditor's Board approved it. In other words, the Mayor is effectively calling upon the Roma to shoulder a significant economic burden without being certain as to whether it will be illegal for the municipality to pay back the loans on behalf of the Roma.

Despite the families' persistence, and the intervention of local NGOs, the Greek Ombudsman, and the former Deputy Minister of the Interior, the Mayor has so far failed to honour his commitments, and the competent authorities have failed to intervene, leaving some families unable to afford rent elsewhere.<sup>63</sup> The municipality paid up the Romas on the eve of the Olympic Games, in early August 2004, but has, since then through October 2004, defaulted on monthly payments, as Mr Panayote Petrou, Chairman of the Municipality of Maroussi Welfare Organisation confirmed to OMCT's Greek member GHM on 26 October 2004.

The town of Maroussi is only the most symbolic case of Roma eviction on the fringe of the Olympic Games: about 2000 Romas might have been evicted and lost track of in the midst of the Olympic Games<sup>64</sup>.

There are an estimated 100,000 Roma without decent housing in Greece. The total security bill for the Olympics is estimated at more than 1.6 billion U.S. dollars, four times the amount that was spent on security for the 2000 Sydney Olympics.<sup>65</sup>

- *Slovakia*: Housing conditions in major slum settlements in Slovakia are extreme. One such settlement -- Patoracka, outside Rudnany -- is located on the grounds of a former mercury mine. Most such slum settlements are characterised by substandard or extremely substandard housing, a prevalence of environmental hazards including toxic waste, rubbish tips, intermingling of waste and drinking water, etc. They generally are partially or completely lacking in formal infrastructure such as paved roads, electricity, heating, sewage removal and the provision of adequate drinking water, and are frequently excluded from other public services, such as bus or postal services.<sup>66</sup>
- *Slovakia*: Officials in the village of Tornal'a, in southern Slovakia, have, in recent months, been evicting Roma from housing in the village to mobile homes on the outskirts of the village. In some cases, local officials have apparently expelled local Roma to the neighbouring village of Barca, a fact which has caused the mayor of Barca to send a complaint to the mayor of Tornal'a about the matter. The Romani evictees are reportedly in rent arrears, but according to the LHRA, non-Romani tenants in the same blocks of flats have also defaulted on rent payments, since unemployment in the area is high. However, non-Roma in the village have reportedly not been evicted from housing.<sup>67</sup>

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<sup>63</sup> AMNESTY INTERNATIONAL, *Greece - Preparing for the Olympic Games : Evicting the Roma*, <http://web.amnesty.org/library/print/ENGEUR250042004>

<sup>64</sup> S. PETITE, "Expulsion des Roms, la face sombre des J.O.", *Le Courrier*, 13 August 2004; see also the collective complaint against Greece brought by the ERRC, GHM and COHRE to the European Committee of Social Rights of the Council of Europe regarding the housing rights abuse of Romas in Greece, *infra* p. 24

<sup>65</sup> J. VASSILOPOULOS, "'Celebrating humanity' or worshipping mammon?", *Green Left Weekly*, Broadway, 18 August 2004

<sup>66</sup> E.R.R.C., *Written Comments of the European Roma Rights Center Concerning the Slovak Republic for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 65<sup>th</sup> Session, August 2-20, 2004*, 30 July 2004

<sup>67</sup> *Ibid.*

- *Slovakia*: Since 1995, the city of Kosice -- Slovakia's second city -- has been by policy progressively evicting Roma from the city centre and re-housing them in a housing estate called Lunik IX. At the same time, it has allocated housing in other housing estates to non-Romani residents of Lunik IX, such that they may move away.  
In November 2003, the last non-Romani individual living in Lunik IX moved out, leaving a pure, extremely substandard, mono-ethnic ghetto.  
A number of recent building projects undertaken to provide housing to Roma in Slovakia are set several kilometres from town and village centres and appear to be efforts to move Roma away from urban settlements and settlement infrastructure, as well as away from key public services, including schooling.<sup>68</sup>
- *Slovakia*: In June 2004, after an outbreak of Hepatitis A in a Romani community in Dunavska Cesta in Slovakia, occurring after officials cut off the water supply and electricity to the community, health workers in a clinic in the town of Lucenec reportedly put sticking plaster over the mouths of Romani children aged 4-7, and beat them with wet towels for being unruly in the waiting room; the nurses also reportedly used abusive racist language while beating the children.<sup>69</sup>

### **3. The incidence of violation of economic, social and cultural rights on the occurrence of torture and ill-treatment**

Violence perpetrated against minorities, women and children, either by State agents or by private individuals, is also intrinsically linked to the problems of poverty, marginalisation and violations of economic, social and cultural rights.

For example, in its report on the Roma in the Czech Republic<sup>70</sup>, OMCT considered that violence perpetrated against the Roma needed to be put into perspective within the overall human rights situation of the Roma. Indeed, the violence is often triggered and fuelled by a whole range of prejudices which stem directly from the socio-economic condition of the Roma. This reality highlights that the questions of discrimination, violations of economic, social and cultural rights, and of civil and political rights have to be considered as a whole and not as separate entities. The infringement of any one of these three elements triggers violations of the others.

In the case of *East African Asians v. The United Kingdom*, the European Commission of Human Rights held that “*discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3*”<sup>71</sup>.

In a more recent case, the European Court of Human Rights found in view of their living conditions that Greek Cypriots living in the Turkish Cypriot administered area of northern Cyprus had been subjected to “*discrimination amounting to degrading treatment*”<sup>72</sup>.

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<sup>68</sup> E.R.R.C./M.S.F./C.O.H.R.E., *Appeal to the Slovak Government, Advocating Housing Rights*, 9 July 2004

<sup>69</sup> *Ibid.*

<sup>70</sup> O.M.C.T., *The Roma in the Czech Republic: Discrimination, Violence and Violations of Economic, Social and Cultural Rights*, Report prepared for the United Nations Committee on Economic, Social and Cultural Rights, Geneva, 2002, p. 8

<sup>71</sup> Eur. Com. H.R., *East African Asians v. The United Kingdom*, Report of 14 December 1973, § 207

<sup>72</sup> Eur. Ct. H.R., *Cyprus v. Turkey*, Judgment of 10 May 2001, § 309-311

Racial discrimination could therefore, in itself, in certain circumstances, amount to torture or inhuman or degrading treatment.

### 1. Racially motivated violence

- *Slovakia*: According to a testimony made to the League of Human Rights Activists (LHRA), in the Slovak village of Zahorska Ves, at around 9:00 PM on September 29, 2003, approximately seven men wearing facemasks attacked the homes of Romani families Sarkozi and Malik with baseball bats and other unidentified objects.

The two families comprise 16 people in total, including 7 children and one pregnant woman, all of whom were beaten during the assault. The Sarkozi family members were seriously injured during the attack: they underwent 6 weeks of medical treatment for their injuries.

Later in the same year, at about 8:30 PM on December 25, 2003, nine men wearing facemasks again forcibly entered the homes and violently attacked the families with baseball bats, iron bars and truncheons.

The perpetrators destroyed the belongings of the two families, then poured inflammable liquid substances throughout the houses and set them on fire. In the fire, Roman Malik Jr, a 2-year-old infant, sustained third degree burns to 25 percent of his body according to a medical certificate issued subsequently. The buildings and property inside belonging to the families were completely burned in the fire.

The attackers then moved to the home of Mr Josef Zeman, a Romani man living nearby, and attacked his family.

According to the victims, the perpetrators shouted racial slurs during both the September and December attacks.

On October 3, 2003, the LHRA reportedly filed a complaint with the Malacky police regarding the September attack and, at the beginning of January 2004, regarding the December attack. After having called the victims to give testimony, the investigating officer, Captain Jan Paucik, reportedly refused to allow the Romani victims to enter the police station, alleging that they carried infectious diseases, as one of the children had Hepatitis.

On January 21, 2003, the LHRA complained to Mr Jaroslav Spisak, vice-president of Slovak police, about the failure of Slovak police to properly investigate the attacks and requested that Mr Spisak ensure thorough investigation into the attacks. A preliminary investigation by police set to begin on January 23, 2004 reportedly did not take place, allegedly at the instruction of Mr Simkovic, the mayor of Zahorska Ves.

On July 3, 2004, security guards again assaulted Roma in the village of Zahorska Ves, striking them with baseball bats. Mr Stefan Sarkozi was, according to his testimony, knocked unconscious during the attack and his left wrist was broken. The LHRA has filed criminal complaints on behalf of the victims of the attacks of September 2003, December 2003 and July 2004.

The ERRC has sent a letter of appeal to Slovak authorities in connection with the first two events. To date, however, no one has been brought to justice in connection with the attacks.<sup>73</sup>

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<sup>73</sup> E.R.R.C., *Written Comments of the European Roma Rights Center Concerning the Slovak Republic for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 65<sup>th</sup> Session, August 2-20, 2004*, 30 July 2004



- *Czech Republic:*

According to a January 5, 2004 report by Radio Prague, Judge Milos Kubicek of the Jesenik First Instance Court ordered three year suspended sentences for three Czech youths who had violently attacked a Romani couple in their home in the Czech town of Jesenik.

On June 28, 2003, the three Czech youths, in a drunken state and impersonating police officers, knocked at the door of Mr Ziga and Ms Zigova. Ms Zigova, who was pregnant at the time, opened the door and was hit in the eye with a cobblestone. She lost the sight in the injured eye as a result of the attack. Mr Ziga was cut in his face and chest by broken bottles.

The Olomouc Appeals Court ordered a retrial in the case, after the Prosecutor failed to appeal the verdict of the lower court, reportedly due to political interference.

On February 11, 2004, Ms Zigova and Mr Ziga were chased by a group of Neo-Nazi youths shouting racial epithets. One of the previous attackers, Mr Stiskala, was part of that group.

On March 3, 2004, the two other attackers, Mr Jas and Mr Blajze, assaulted a young mentally handicapped Romani man at a bus station, verbally insulting him, breaking his nose and threatening him to death.

On April 14, 2004, Mr Stiskala attacked a 19-year old Romani man, kicking him while shouting racial slurs.<sup>74</sup>

- *Greece:* Around 100 Albanians were injured on 4 September 2004 during clashes across Greece following a football match between the two countries.

The most serious clashes erupted in Greece's biggest cities Athens and Salonica and were the work of local far-right extremists, the Forum of Albanian Immigrants (FAI), a group speaking for the 600,000 strong Albanian community in Greece, told a news conference.

One Albanian was stabbed to death by a Greek fan on the western Greek island of Zakynthos. At least another six were stabbed. Two remained hospitalised in Athens, but their lives were not in danger.

The FAI said it would sue Greek police for standing aside or cooperating with the attackers during the clashes.

Greece's conservative government condemned the attacks. But Salonica's conservative prefect, Panayiotis Psomiadis, and the city's bishop Anthimos accused Albanian fans of having provoked the Greeks.<sup>75</sup>

- *Slovakia:* On February 24, 2004, the shop assistant in the town of Caklov's state-owned grocery store invited Romani women to take items from the shop. The shop assistant had allegedly made an accounting shortfall of 118,000 Slovak crowns (approximately 2,900 Euros) and thought that she could justify it by blaming Roma for having committed thefts from the shop equalling that amount.

Some thirty to forty Romani women went to the shop and peacefully left with a bag of unpaid groceries each. There was no damage to the shop.

On February 25, 2004, the police stormed into the Romani settlement chasing women with batons.

A 3 years-old boy, A.G., was unfortunately in the way of a policeman, who beat him about the head with his truncheon. The boy received medical treatment for his injuries. The policeman later returned and apologized for his actions.

The police detained 37 women and 2 men, but not a single arrest or search warrant was reportedly shown. The police refused to give any information to the close relatives about the detainees or about the place where they were held.<sup>76</sup>

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<sup>74</sup> E.R.R.C., *Suspended Sentences for Perpetrators of Violent Attack on Roma in the Czech Republic*, 4 June 2004, <http://www.errc.org/cikk.php?cikk=1864>

<sup>75</sup> <http://greekhelsinki.gr/bhr/english/>, 07/09/2004

<sup>76</sup> E.R.R.C., *Extreme Rights Deprivation among Roma in Slovakia Leads to Unrest*, 4 June 2004, <http://www.errc.org/cikk.php?cikk=1884>

- *Czech Republic:*

The Committee against Torture expressed concern about the persistent occurrence of acts of violence against the Roma and the alleged reluctance on the part of the police to provide adequate protection and to investigate such crimes<sup>77</sup>.

## 2. Marginalisation of a community

The Roma suffer the worst health conditions: according to the World Bank, the proportion of Roma living in poverty exceeds 75% in Central and Eastern Europe, access to preventive and curative healthcare services is low. Thus, the health status of Roma is considerably worse than that of the population as a whole.<sup>78</sup>

- *Czech Republic:*

Antipathy towards Roma in Czech Republic continues to infect most of society. In January 2004, the Czech weekly newspaper Respekt published a poll in which 79 % of Czechs stated that they would not want Roma as neighbours.<sup>79</sup>

- *Slovakia:* Official data for the 3rd quarter of 2003 indicates that approximately 87.5% of the Slovak Romani population was unemployed during the period, as compared with an unemployment rate of 14.2% for the population as a whole.<sup>80</sup>

- *Greece:* On 11 October 2004, the European Committee of Social Rights held a hearing concerning a collective complaint lodged by the European Roma Rights Center against Greece. It was alleged that Greece does not comply with Article 16 (the right of the family to social, legal and economic protection) and the Preamble (non-discrimination) of the European Social Charter insofar as there is discrimination both in law and in practice against Roma in the field of housing. The Committee now starts its deliberations and will adopt its decision on the merits of the complaint.<sup>81</sup>

- *Slovakia:* Anti-Romani hate speech is a regular part of public discourse in Slovakia. Anti-Romani statements are a standard and often unquestioned part of public life and officials as high-ranking as the Prime Minister have made anti-Romani statements. Provisions of the criminal code sanctioning hate speech have rarely if ever been applied in cases where Roma are at issue. A new draft criminal code, currently before Slovak parliament, would remove some legal protections against hate speech, if adopted in its present proposed form<sup>82</sup>.

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<sup>77</sup> CAT/C/CR/32/2, *Conclusions and recommendations of the Committee against Torture: Czech Republic*, 3 June 2004, § 5 (a)

<sup>78</sup> D. RINGOLD, M.A. ORENSTEIN and E. WILKENS, *Roma in an Expanding Europe: Breaking the Poverty Circle*, The World Bank, Washington D.C., 2003

<sup>79</sup> E.R.R.C., *Czech Police Attack Roma in Casino*, 4 June 2004, <http://www.errc.org/cikk.php?cikk=1863>

<sup>80</sup> E.R.R.C., *Written Comments of the European Roma Rights Center Concerning the Slovak Republic for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 65<sup>th</sup> Session, August 2-20, 2004*, 30 July 2004

<sup>81</sup> COUNCIL OF EUROPE, *Hearing on a Collective Complaint by European Roma Rights Center against Greece*, 11 October 2004, <http://www.coe.int/DEFAULTEN.asp>

<sup>82</sup> E.R.R.C., *Slovakia Before UN Body in Hearing on Racial Discrimination*, 10 Aug 2004, [http://www.romea.cz/english/index.php?id=servis/z\\_en\\_2004\\_0116](http://www.romea.cz/english/index.php?id=servis/z_en_2004_0116)

### 3. Violence against migrants

- *Greece*: S. Shabani from Albania, who says that he was legally in Greece, was arrested on 10 November 2003 in the town of Agrinio. In a statement to Albanian border police on 12 November, he alleged that three Greek police officers entered the bar where he was drinking coffee, asked to see his papers, and then, in public view beat him with their guns, kicked and punched him. He was then taken to a police station, where he was held for two days, before being forcibly returned to Albania.<sup>83</sup>
- *Greece*: On September 15th, 2003, at about 5:00, Albanian citizens L. Halimi, M. Halimi and R. Pashollari, were severely abused by Greek policemen. The three Albanians had been working since September 5th, 2003 in Greece and were returning to Albania when they were stopped near the border by six Greek police patrol officers dressed in camouflage uniforms and black hoods. The officers searched them, took the money they were carrying, and reportedly began to punch, kick and hit them with wooden batons on all parts of their bodies.<sup>84</sup>

### 4. The emergence of social tension and State's response<sup>85</sup>

Non equitable distribution of income, land and other productive resources, as well as repeated violations of economic, social and cultural rights tend to exacerbate social, ethnic or communitarian tensions. Conflicts are therefore likely to emerge under these socio-economic conditions, especially when the state is unable or unwilling to address them.

In that case, torture and ill-treatment can be seen as a manifestation of the aggravation of socio-political conflicts that surround the distribution of rare resources, worsened by racial discrimination.

The current rise of unemployment and economic insecurity within the European society is a cause of concern regarding the emergence of such tensions. Indeed, these tendencies could intensify opposition and fuel hostility between social groups in a context of increasing inequalities both within and between EU Member States.

Moreover, social tension calls for a State's response, and this latter has a tendency to be of a purely repressive nature, when a holistic approach of the problem is indispensable to eradicate such tensions.

As, under international human rights law, the State is ultimately responsible for guaranteeing the realisation of economic, social and cultural rights, it falls within the global role of EU Member States to make sure that responses to social tensions are taking into perspective the socio-economic aspects of the issue and that States bring appropriate answers to such problems.

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<sup>83</sup> AMNESTY INTERNATIONAL, *Greece: Immigration control – Human rights abuses against Albanians*, 14 November 2003, <http://web.amnesty.org/library/Index/ENGEUR250082003?open&of=ENG-ALB>

<sup>84</sup> OMCT, <http://groups.yahoo.com/group/balkanhr/message/6066>

<sup>85</sup> "Social tension" needs to be understood as tension arising between groups within society, whether these groups represent different ethnic communities or different social classes.

## 1. State's response to social unrest

- *Slovakia*: On the evening of Tuesday February 24, 2004, the Slovak government ordered the largest mobilisation of its armed forces since 1989, in order to address the problem of spreading unrest among Roma in a number of communities in central and eastern Slovakia.

Although figures varied according to reports, approximately 1600 police officers and 650 members of the army had been mobilised, with a further 350 soldiers put on active alert.

The engagement of supplementary armed forces came as a response to a series of riots by members of the Slovak Romani community, during which crowds of Roma looted and damaged food shops.

The riots were triggered by changes to the social welfare system. Many Roma have been particularly affected by the changes to the social welfare law due to provisions cutting support for families with more than four children, as well as due to provisions linking parts of social benefit payments to evidence of legally registered housing.

Judging by the comments of influential Slovak politicians as well as debates in the media prior to the adoption of the amendments, these provisions appear to have been specifically adopted to reduce the number of Roma on social welfare.

On the early hours of February 24, several hundred masked police officers raided the Romani settlement of Trebisov and began a police action that lasted throughout the day. During the course of this action, officers reportedly:

- Indiscriminately entered houses without showing any form of warrant or other authorisation;
- Struck violently with truncheons a large number of Romani individuals;
- Beat and verbally abused Romani women, minors and people with physical and mental handicaps;
- Used electric cattle prods on the head, arms, chest and legs of a number of individuals.

Forty persons have been seen in police custody, and nearly all of them have been physically abused while in custody (stripped to the waist, struck in the midriff, officers jumped on the lower legs/calves of the detainees,...).

In addition to a number of adult males who alleged that police had physically abused them during the raid, the E.R.R.C. also interviewed:

- 16 years-old D.N., a mentally handicapped youth who had been beaten with truncheons and had been subjected to electric shocks while lying face down on the floor. He also had been detained for two hours, physically abused in custody and forced to sign a form prior to his release which he neither read nor had read to him;
- 16 years-old P.D., who testified that policemen used an electric truncheon against him;
- 14 years-old A.B., whom officers reportedly struck in the back with a truncheon;
- 16 years-old J.K., whom officers struck in the stomach and sides until he vomited;
- 17 years-old I.D., who is pregnant, was kicked by a police officer while she was carrying a baby in her hands;
- Ms L.K., who testified that police beat her three minor sons, two of whom are mentally handicapped;
- Mr E.L., who testified that police broke into his house and beat him, though he had been released from hospital several days previously where he had been treated for severe burns all over his body. The burns were still fresh at the time the E.R.R.C. spoke with him.

In addition of the above, a number of eyewitnesses alleged that police officers were drunk during the raid and that they used abusive language.

The E.R.R.C. presented a summary of the information above to the Director of the District Police Directorate, Mr Mlynarik, and requested an investigation into the actions of the police. Director Mlynarik declined to open such an investigation.

On March 7, the body of Mr Puky was found in the Ondava River near the Romani settlement of Trebisov. In the early hours of February 24, Mr Puky was seen with broken ribs and a broken hand, reportedly the result of a beating by about ten police officers.

Later that morning, Mr Puky was also reportedly among a group of Roma caught in a field and beaten by about fifty armed officers. Some of the Roma were tied up beside a nearby bridge.

Mr Puky was not seen following the police action and there was no record of him having been detained. A police search for Mr Puky was unsuccessful.

On March 6, a group of Roma from Trebisov performed a search for Mr Pucky after receiving information that the beaten body of dead man was bound to a tree in a local park. On March 7, Mr Puky's body was found in about fifty centimetres of water in the Ondava River, about 25 meters from where the police had held and beaten Roma earlier. The body was not bloated as the body of a drowned person would be. According to the death certificate, Mr Puky died as a result of drowning.<sup>86</sup>

Following the unrest of February 2004, after refusing to visit affected communities for a number of days, Prime Minister Mikulas Dzurinda finally travelled to eastern Slovakia, where he accused Roma of "speculating" on the social welfare system rather than working.<sup>87</sup>

## 2. Criminality, illegal immigration and State's repression

An important rise in criminality has often been observed in societies characterised by a poor socio-economic situation and economic instability.

Indeed, stealing and common criminality can emerge as coping strategies in response to food insecurity, declining living standards, unemployment and inability to provide for one self and family. In turn, such situations often create a climate of uncertainty or fear of crime, and nourish a sense of personal insecurity, fuelling demands for strong and effective official intervention, which might lead to the use of torture or ill-treatment, particularly against minorities or foreign nationals.

Extreme poverty and violations of economic, social and cultural rights lead to the immigration of numerous people suffering from various deprivations in their native countries and searching for means of survival in neighbouring countries that are not as affected by socio-economic crisis. Though persons resorting to such means are not criminals, they are treated as such by law enforcement agencies.

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<sup>86</sup> E.R.R.C., *Extreme Rights Deprivation among Roma in Slovakia Leads to Unrest*, 4 June 2004, <http://www.errc.org/cikk.php?cikk=1884>; E.R.R.C., *Written Comments of the European Roma Rights Center Concerning the Slovak Republic for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 65<sup>th</sup> Session, August 2-20, 2004*, 30 July 2004

<sup>87</sup> E.R.R.C., *Written Comments of the European Roma Rights Center Concerning the Slovak Republic for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 65<sup>th</sup> Session, August 2-20, 2004*, 30 July 2004

- *Czech Republic:*  
In June 2004, two police officers, P. Turon and A. Salak, received ten months conditional sentences for beating a young Nigerian citizen and a homeless man from Slovakia, for no apparent reason, under the influence of alcohol.<sup>88</sup>
- *Czech Republic:*  
14 railway police officers headquartered at Prague's Main Station have been charged with the brutal beating of homeless people.<sup>89</sup>
- *Czech Republic:*  
On November 11, 2003, police officers attacked a group of Roma in a casino in the Czech town of Dobruska.  
One witness filed a complaint against the police actions. On March 10, 2004, the investigating officer informed the E.R.R.C. that no police officers were charged in connection with the incident.<sup>90</sup>
- *Germany:* In Cologne, pick-pocketing Roma children were brought to police stations, ID'ed and X-rayed to determine their age, undressed, photographed and exposed to having their transpiration examined for smell and their underwear examined for dirt and photographed. Girls were forced to lower their slips down to their knees to facilitate the photographing of the inner side of their slips.<sup>91</sup>
- *Greece:* On September 23rd 2003, an 18-year old Albanian, V. Bytyçi, was shot in the back of the head and killed by members of the Greek police near the Kristalopigi checkpoint while he was attempting to escape arrest. Four other Albanian persons with whom he was travelling to Greece in order to find work were arrested and were later released and returned to Albania. A sixth person, L. Metaliaj, reportedly escaped arrest and hid for 24 hours before returning to Albania. A bullet reportedly went through his jacket without injuring him during his escape.  
The Greek police reported that one police border guard shot in the air to prevent their escape as well as their threatening attitude towards one of his fellow guards. There are reports that at the time of his shooting, Mr. Bytyçi had stopped running away and did not present any danger.<sup>92</sup> The trial of the perpetrator was set for November 3, 2004.
- *Greece:* The whereabouts of 25-year-old Sokol Allkja, 31-year-old Ardian Allkja and Edmond Sula have remained unknown, according to their relatives, since they left for Greece from Cerrik, Albania, allegedly on September 19th, although reports indicate that Sokol Allkja was wounded by the Greek police and is possibly in Korca hospital, while his brother Ardian is in prison. Nothing further is currently known about Edmond's situation.<sup>93</sup>
- *Greece:* 35-year-old G.I. Rama was reportedly shot at on September 25th by Greek soldiers, wounding him in the arm, as he was running to evade them having crossed the border illegally. He was arrested and detained for several days before being released and returned to Albania.<sup>94</sup>

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<sup>88</sup> THE LEAGUE OF HUMAN RIGHTS, O.M.C.T. *Questionnaire*, July 2004

<sup>89</sup> *Ibid.*

<sup>90</sup> E.R.R.C., *Czech Police Attack Roma in Casino*, 4 June 2004, <http://www.errc.org/cikk.php?cikk=1863>

<sup>91</sup> <http://www.foerdervereinroma.de/archiv/koeln1003.htm>

<sup>92</sup> O.M.C.T., <http://groups.yahoo.com/group/balkanhr/message/6066>

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

### 3. Access to justice, impunity and proper restitution for the victims

Access to justice for poor people often remains illusory.

Indeed, the absence or inadequacy of legal defence for indigent people, legal costs or the unawareness of one's rights may act as impediments when access to justice is at stake.

Moreover, torture and ill-treatment victims, due to their socio-economic situation, may be reluctant to lodge a complaint, notably because they cannot afford the legal costs involved, both the official ones or those due to widespread corruption.

Last but not least, illiteracy, which affects the poor sectors of a given population or people with insufficient knowledge of the host country language like foreign citizens or minorities, can also limit one's access to justice. Indeed, in order for a violation to be reported in the proper form, the victims and their relatives must first be aware that their rights have been violated, and informed of the legal mechanisms available for their protection.

Secondly, they must be in a position to take all the necessary steps involved in making a denunciation, as in some proceedings a written denunciation submitted to the authorities is required to establish the facts.

Furthermore, reluctance to investigate abuse by the police, particularly when the victim is from the Roma community or from another minority, or to redress violations of human rights tends to increase.

- *Greece*: Roma and immigrants often encounter difficulties in securing access to effective legal representation in Greece.

Following press reports on two cases of alleged rape of young children by their fathers, it was revealed that in both cases local lawyers had declined from representing the accused. G.H.M. noted that while lawyers reportedly decline to take up cases of persons belonging to vulnerable social groups, it has not been reported that other categories of offenders, such as persons accused of drug-dealing, face similar problems concerning access to legal representation.<sup>95</sup>

- *Czech Republic*:

Mr Pecha lost his life on June 19, 2002, allegedly by suddenly jumping out of a window at the Malátova police station in Brno.

The public prosecutor was forced to recognize several of the basic objections submitted by the attorney for the aggrieved after the Interior Ministry Inspectorate adjourned the case in August 2002, but the investigation still did not proceed. In March 2003 after ordering one expert opinion, which did not take the entire situation into account, the Inspectorate again adjourned the case with the direct consent of the public prosecutor.

The expert opinion was written by a person who teaches at the Czech Republic Police Academy (which is financed by the Interior Ministry). The case was adjourned again after the attorney for the bereaved filed complaints in October 2003 and was definitively closed in November 2003.

It is known that members of the Roma minority in the Czech Republic practically never commit suicide. It is strange that when one of them does, it is under unclear circumstances at a police station.<sup>96</sup>

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<sup>95</sup> OMCT, GHM, MRG-G, SOKADRE, KEDE, SOCEDACT, *State Violence in Greece*, Alternative report to the U.N.C.A.T., Athens-Geneva, 27 Oct. 2004, p. 41

<sup>96</sup> J. KOPAL, "Public prosecutor halts investigation into death at police station", *League News*, Prague, January 2004, p. 2

- *Czech Republic:*

During the night of May 12 and the morning of May 13, 2003, five persons, who at the time were off-duty police officers, broke into an apartment building in Popovice where the Danišový family, who are Roma, lives.

Three of the officers violently physically attacked both Mrs Danišova and her minor son and daughter, who was in the 9th month of pregnancy. During this attack the officers shouted various racial slurs.

The result of the attack was that both Mrs Danišova and her son were unable to go to work for several weeks. All those attacked experienced great psychological shock.

Criminal charges were prosecuted against the two persons that could be identified.

On October 27, 2003 the investigation was terminated and the Regional Public Prosecutor's Office sent a motion recommending the two persons be acquitted. On December 1, 2003 the Regional Public Prosecutor acquitted the two persons at the Regional Court in Jicín.

The investigation was insufficient: no attention was paid to the racist motivation for the attack. Mrs Danišova's testimony was ignored and was not compared to the testimony of two witnesses who had seen the accused exchanging the Nazi salute.

However, the biggest insufficiency lies in the legal qualification of the act. The acquittal is formulated only for the crime of violating the right to privacy in one's home. Given the length of time during which Mrs Danišova and her son were unable to go to work, and given the verbal taunts made during the attack, this obviously concerns the crime of actual bodily harm with a racist motivation.<sup>97</sup>

- *Czech Republic:*

In June 2001, Karel Billy, a Czech Roma, was transported into the forest near Karlovy Vary and was beaten by four police officers. The police officers are alleged to have stuck the barrel of a pistol into Mr Billy's mouth and to have closed their session of abuse by urinating on him.

The case came to light thanks to the intervention of doctors at the Karlovy Vary hospital who treated the aggrieved after the brutal attack. The aggrieved had been beaten twice by the Karlovy Vary police during the past three months and was afraid to report the matter.

At the end of June 2003 the District Court in Cheb issued a verdict: three of the accused were given conditional sentences of nine months with a probation period of two years.<sup>98</sup>

- *Czech Republic:*

On July 4, 2001, following a fight in which Mr Sendrei was allegedly involved, Mr Ondrej Hudak, a police officer, went to the home of Mr Sendrei and gave him a brutal beating.

On July 5, Mr Sendrei reportedly went to the home of Mr Ondrej Hudak Sr, mayor of Magnezitovce and father of Officer Hudak. There, upon entry into the house, he was allegedly knocked to the floor and severely beaten by Ondrej Hudak Jr. The mayor himself reportedly joined in the beating.

Mr Sendrei's wife and three of his sons subsequently went to the home of Mayor Hudak where they found their relative laying motionless on the ground with his teeth knocked out.

Mr Sendrei's sons reportedly came to his aid and a fight ensued between the three sons on the one hand and the mayor and his son on the other.

Police arrested Mr Sendrei and two of his sons and took them to a police station in the town of Jelsava.

At the police station all three men were reportedly handcuffed to a radiator and beaten for a period of approximately twelve hours, throughout the night of July 5-6, 2001, causing the death of Mr Sendrei. According to reports by the Czech Press Agency of July 28, 2001, the autopsy report concluded that Mr Sendrei had died of shock caused by a torn liver, cranial and pericardial bleeding, a broken jaw, sternum and ribs, and other serious, unspecified, injuries.

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<sup>97</sup> J. KRATOCHVIL, "The Case in Jicín", *League News*, Prague, January 2004, p. 3

<sup>98</sup> J. KOPAL, "First-instance court condemns brutal police officers, appeal proceedings underway", *League News*, Prague, January 2004, p. 3



On July 10, Mayor Hudak and Mr Ondrej Hudak have been charged with damage to health resulting in death, as well as five police officers. In October 2001, charges were dropped against Mayor Hudak and his son.

Since then, there have been no rulings on the substance of the case.

On July 22, 2004, the Slovak Supreme Court ordered the Banska Bystrica Regional Court to rule in the case. To date, it has not done so.

All of the officers indicted have been released from custody, and one has reportedly been reinstated to the Revuca police force. The family of the deceased victim has reportedly received threatening letters and on at least one occasion been physically assaulted by neighbours in Magnezitovce.<sup>99</sup>

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<sup>99</sup> E.R.R.C., *Written Comments of the European Roma Rights Center Concerning the Slovak Republic for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 65<sup>th</sup> Session, August 2-20, 2004*, 30 July 2004

## **Chapter 3: VIOLENCE AGAINST WOMEN**

It should be pointed out that women and children are not so much the victims of violence in relation to political repression than due to their socio-economic marginalisation within certain societies. As a matter of fact, as highlighted in several OMCT documents, violence against children mostly affects minors who are economically and socially marginalised (street children,...). Similarly, violence against women is often related to their role in societies that tend to marginalize them and treat them as second-class citizens.

### **1. Interpretation of torture and ill-treatment within the framework of violence against women**

#### **1.1. Gender-related violence**

Violence continues to be part of the everyday life of many women and children throughout Europe.

Although the distinct social, cultural, and political contexts in which domestic violence exists give rise to different forms of domestic violence, its prevalence and pattern are remarkably consistent, spanning national and socio-economic borders and cultural identities. Most violence in marriage or within relationships is carried out by men against women in the supposedly safe haven of their own home.

Historically, the popular understanding of torture and ill-treatment has helped to maintain a gender-biased image of the torture victim: it is the male who pervades the political and public sphere and thus it is the male who is likely to be targeted by state violence and repression. Such an image, however, neglects women's experiences as victims and survivors of torture. The major obstacle to bringing violence against women within the consideration of human rights bodies is the traditional public/private divide. Much violence against women takes place in the private sphere - domestic violence, rape, trafficking, violence in the name of honour, and female genital mutilation, for example.

In the past, a strict judicial interpretation made States responsible only for actions committed by State agents and not those by private individuals.

Today, however, a developing corpus of international law has led to the recognition of state responsibility to address the acts of private individuals.

#### **1.2. Violence against women and human rights law**

All States are required to pay particular attention to the issue of violence against women, and to take active steps to eradicate it, through prevention, investigation and punishment.

This has been spelt out by international political bodies<sup>100</sup> as well as human rights treaty bodies<sup>101</sup>.

Article 4 (c) of the UN Declaration on the Elimination of Violence against Women calls on states to: “*exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons*”.

Furthermore, the General Recommendation 19 of the Committee on the Elimination of All Forms of Discrimination against Women states: “*Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation*”<sup>102</sup>.

This State obligation can even be deducted from the UN Convention against Torture.

According to article 1, torture means not only acts by a public official, but also at the instigation of or **with the consent or acquiescence** of a public official or other person acting in the official capacity, of severe pain and suffering intentionally inflicted on a person for certain purposes or **for any reason based on discrimination**.

Thus, while it is obvious that not all violence against women can be qualified as torture within the meaning of the Convention against Torture, the mere fact that the perpetrator is a private individual rather than a State official should not automatically lead to the exclusion of this violence from the scope of the Convention against Torture<sup>103</sup>.

Domestic violence in many cases conforms to the definition of torture in the Convention. Domestic violence commonly involves severe pain or suffering and is a purposeful and intentional behavior intended to bring about a desired effect, such as punishment and/or control of a woman’s sexuality. The State’s unwillingness to take all possible measures to prevent domestic violence and to protect women from such violence suggests official consent or acquiescence to torture under Article 1 of the convention<sup>104</sup>.

In the case of *Osman v The United Kingdom*, the European Court of Human Rights made observations about the efforts that States must take to protect rights where non-State actors are threatening to cause harm.

The Court stated that: “*It is sufficient for an applicant to show that the authorities did not do all that could have reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge*”<sup>105</sup>

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<sup>100</sup> Such as the UN General Assembly in its Declaration on the Elimination of All Forms of Discrimination against Women and its Resolution 52/86 on Crime prevention and criminal justice measures to eliminate violence against women; the Commission on Human Rights in its resolutions, particularly on violence against women; and the UN Security Council in its Resolution 1325 on the rights of women and children in armed conflict

<sup>101</sup> Such as the Committee on the Elimination of All Forms of Discrimination against Women, in its General Recommendation 19 and the Human Rights Committee in its General Comment 28

<sup>102</sup> U.N. Doc. HRI\GEN\1\Rev.1 at 84 (1994), § 9

<sup>103</sup> C. BENNINGER-BUNDEL, *Gender-inclusive and Gender-sensitive Interpretation of Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, OMCT, Geneva, 2001, p. 3

<sup>104</sup> C. BENNINGER-BUNDEL and L. O’HANLON, “Expanding the definition of torture”, *Human Rights Dialogue*, New-York, September 2003, p. 15

<sup>105</sup> Eur. Ct. H.R., *Osman v The United Kingdom*, Judgment of 28 October 1998, § 116

Moreover, the UN Special Rapporteur on Torture, about the notion of “with the consent or acquiescence of a public official” included in the article 1 of the CAT, noted that: “*Under international law, this element of the definition makes the State responsible for acts committed by private individuals which it did not prevent from occurring or, if need be, for which it did not provide appropriate remedies*”<sup>106</sup>.

## **2. The lack of adequate and effective legislation**

### **2.1. Legislative void**

All European States provide with legislation recognizing that everyone is equal before the law and that no one will be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds.

However, although domestic laws provide for the equality of all citizens,

- they do not always contain a specific definition of discrimination against women, which prohibits both direct and indirect discrimination;
- sometimes, there are no specific provisions making marital rape a crime or criminalizing domestic violence.

- *Greece*: Despite the recommendations to Greece both by the Committee on Economic, Social and Cultural Rights (May 2004)<sup>107</sup> and the Committee on the Elimination of Discrimination against Women (August 2002)<sup>108</sup> to proceed with the adoption of legislation criminalizing domestic violence and marital rape and to strengthen its assistance to victims of domestic violence and marital rape, a related draft law, in the works for years, has not been submitted to the Parliament.

- *Czech Republic*:

As of June 1, 2004, domestic violence is considered a crime in the Czech legal system.

However, it is necessary to state that the Czech Republic is still at the very beginning of the process as far as effective aid to domestic violence victims is concerned.

For the time being most of the necessary legal and other measures remain at the level of discussion only.

These include the training of police officers, state prosecutors, judges, social workers and other professionals, the cooperation of the relevant institutions, etc.

The new Criminal Code is a very significant step forward in this area, but in and of itself it will not mean much if the approach of the police in particular does not change.

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<sup>106</sup> U.N. Doc. E/CN.4/2001/66/Add.1, Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43 - Visit to Azerbaijan, § 73

<sup>107</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: GREECE, Thirty-second session (26 April – 14 May 2004), *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant*, E/C.12/1/Add.97, 14 May 2004

<sup>108</sup> Committee on the Elimination of Discrimination against Women, Exceptional session 5-23 August 2002, Draft report, Rapporteur: Ms. Rosalyn Hazelle, Consideration of reports of States parties: Greece, Combined fourth and fifth periodic reports, CEDAW/C/2002/EXC/CRP.3/Add.9/Rev.1, 23/08/2002

Other legislative changes are necessary as well. Currently it is very difficult for the victim to defend herself against violence committed by her partner. If the victim files a criminal complaint and the batterer is not taken into custody (which is the case most of the time), the victim is subjected to permanent pressure from her partner to withdraw her consent with the criminal prosecution, to not testify, etc.

The only effective defense against this is for the victim to leave her home and move to a shelter with a hidden address. But, there is a catastrophic lack of such shelters in the Czech Republic and several of them, moreover, do not permit children.

The situation could be improved by instituting the legal remedy of various types of restraining orders which would prevent the batterer from continuing his activity by threatening him with sanctions.<sup>109</sup>

## 2.2. Access to justice, impunity and proper restitution for the victims

Most countries have ratified international instruments criminalizing torture and ill-treatment, and, sometimes, even domestic law ensures protection against this kind of life-threatening misconduct. Despite these legal provisions, local NGOs keep reporting violence against women cases, which indicates that this phenomenon is not declining.

Two important socio-cultural factors work to deter many women from reporting domestic or state violence: a strong sense of privacy and an emphasis on the unity of the family.

Victims also frequently have difficulties reporting cases of violence because they are emotionally involved with the aggressor, they fear retaliation from the perpetrator and because they do not regard the violence as a public affair. Other factors are the possible repercussions of their decisions for the family or even for the aggressors.

But one of the main obstacles that women have to face while trying to obtain redress for violations that they might have suffered is the prevailing opinion that domestic violence is a private issue and that women are almost always seen as being responsible for this violence. Police and other law enforcement officials often take the attitude that domestic violence is a minor offence and that, as it is essentially a 'family matter', they should not be required to intervene. Frequently, police refuse to investigate incidents of domestic violence in the absence of compelling evidence of the violence which must, most of the time, be provided by the victim.

Several studies have revealed that the majority of police officers, in some countries, are of the belief that domestic battering is not a criminal offence and 60 % of the police officers interviewed in one survey stated that battered women contribute to the violence of which they are victims "to some extent."<sup>110</sup>

Prosecutors and members of the judiciary as well as health care professionals and other officials who have contact with victims of this violence also, in large measure, share the attitudes of police officers. Many officials question the motives of women wishing to bring complaints of domestic

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<sup>109</sup> H. LANGHANSOVA, "Domestic violence in the Czech Republic in 2004", *League News*, Prague, February 2004, p. 1

<sup>110</sup> MINNESOTA ADVOCATES FOR HUMAN RIGHTS, WOMEN'S RIGHTS CENTER and INTERNATIONAL WOMEN'S HUMAN RIGHTS CLINIC, *Domestic Violence in Poland*, Minnesota Advocates for Human Rights, Minneapolis, 2002, p. 22.

violence. The low sentences imposed on men found guilty of domestic violence reflect the perception amongst the judiciary that family-based violence is not as serious as crimes committed outside of the context of intimate relationships.

Similar difficulties are faced by women victims of rape and other forms and sexual violence: relatively few cases of rape are actually reported to the police and fewer cases proceed to prosecution. As with other forms of violence against women, victims of rape are often unwilling to report the crime, largely due to shame, fear, social attitudes and the lack of confidence in law enforcement responses to rape.

Furthermore, in rape trials, the victim often finds her or himself as the object of the investigation instead of the perpetrator: the past and the sexual behavior of the victim is painstakingly scrutinized, and seems to be the object of trial.

Another deterrent for victims of violence lies in the economic situation of women. It constitutes often a brake to an effective redress of the harm, as it causes fluctuations of the motivation to seek justice. Indeed, women are seldom financially independent and therefore need to secure their economic well-being. For that reason, the need to take care of children, the financial dependence to the spouse or the prohibitive cost of legal representation can alter one's motivation. Consequently, the lack of shelters or other protective structures provided by the state constitutes an obstacle for economically dependent women.

Many women victims of trafficking hesitate to report the crime of trafficking to the police. Because many trafficking victims do not have the correct legal residency permit, when they report the crimes committed against them, they may be recognized as a victim as well as be accused of a crime. As an illegal immigrant, a trafficking victim may be held in detention, while other victims of crimes are not subjected to such treatment.

- *Greece:* In May 2004, the Committee on Economic, Social and Cultural Rights,<sup>111</sup> expressed its concern about the high incidence of domestic violence and marital rape in Greek society, which often remain unreported for cultural reasons and economic dependency of female spouses on their husbands. In practice, conviction rates for rape were low for first time offenders, but sentences were harsh for repeat offenders. While non-consensual sex in any setting is a crime, law enforcement and courts did not treat spousal rape as harshly as extramarital rape.
- *Greece:* In May 2004, the Mixed Grand Jury of Chania acquitted unanimously a 47-year-old computer science professor and three Bulgarians that were charged with the rape of a 30-year-old woman from Latvia, whom they had also recorded in video. The crime took place in the Greek professor's apartment, where the Latvian woman was taken by a Bulgarian friend. When she refused to have sex with all of the accused, they gang raped her. The victim pressed charges against them at the police, leading to the arrest of three of them. The rape had been confirmed by the forensic report findings and the video recording as well. The woman appeared in the Criminal Court of Chania stating that she did not wish the trial to go on because she would suffer a psychological shock. The court accepted her statement as sincere –

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<sup>111</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: GREECE, Thirty-second session (26 April – 14 May 2004), *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant*, E/C.12/1/Add.97, 14 May 2004

according to Article 344 of the Greek Criminal Code – and the acquittal proposal of the prosecutor, thus ending the criminal prosecution of all four defendants-charged with gang rape.

This case indicates why very few rape cases reach the courts and are effectively prosecuted, as the law itself offers a “way out”, which implicitly encourages the blackmailing of the victims. This is even more so if the victims are in a vulnerable position, being migrants or unable to afford a lawyer.

The crime of rape is prosecuted *ex officio*. However, there is an exception laid down in article 344 of the Greek Criminal Code that reads: “...the prosecutor may exceptionally, with a justified ruling approved by the appeals’ prosecutor, abstain from criminal prosecution or, if he has already ordered the criminal prosecution, introduce the case to the relevant misdemeanors’ judicial council; the latter can drop the criminal charges, considering the victim’s statement (...) that the publicity following the criminal prosecution will result in a grave psychological injury of the victim.”

This particularity in the prosecution of the crime of rape allows for practices such as blackmail, corruption, bribery and defamation to take place behind the scenes.<sup>112</sup>

### **3. Discrimination: Women as a vulnerable group**

Relation between discrimination and torture in general has been highlighted previously<sup>113</sup>. Discrimination affects women in the same way as a specific vulnerable group.

But, women in immigrant communities are particularly vulnerable to violence because of their marginalization due to their immigrant status as well as the fact of being a woman. Immigrant communities are often the poorest communities. Women immigrants who are victims of violence face different challenges and obstacles than other women because of their precarious legal residency status, the traditions from their country of origin, their lack of knowledge of the language and lack of access to information.

Consequently, some women face intersectional discrimination<sup>114</sup> based on gender, ethnicity and/or socio-economic background.

- *Germany*: The UN Committee on the Elimination of Discrimination against Women (CEDAW), on January 30, 2004, issued its Concluding Comments on Germany’s compliance with its obligations under the International Convention on the Elimination of Discrimination against Women. In its Concluding Comments, the Committee expressed concern about the situation of migrant and minority women, including Sinti and Roma women, who suffer from multiple forms of discrimination based on sex, ethnic or religious background and race, and at the vulnerability of some of these women to trafficking and sexual exploitation.

The Committee regrets the lack of specific information provided in the reports with regard to their access to health, employment and education, as well as various forms of violence committed against

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<sup>112</sup> OMCT, GHM, MRG-G, SOKADRE, KEDE, SOCEDACT, *State Violence in Greece*, Alternative report to the U.N.C.A.T., Athens-Geneva, 27 Oct. 2004, p. 59

<sup>113</sup> See *supra* Chapter 2, Point 3

<sup>114</sup> “Intersectional discrimination” has been defined as multiple forms of discrimination described as compound discrimination, interlinking forms of discrimination, multiple burdens or double or triple discrimination. See DAW, OHCHR and UNIFEM, *Gender and racial discrimination*, Report of the Expert Group Meeting, Zagreb, 21-24 Nov 2000

them and, in particular, data and information about forced marriages. The Committee is also concerned about the situation of some foreign women domestic workers in the households of diplomats.<sup>115</sup>

#### **4. Domestic and sexual violence**

For centuries strong traditional patterns of a patriarchal society have developed in Europe. Female characteristics and women's activities were often underestimated and women's work was not valued to the same extent as men's work. The patriarchal structure has changed through times but many attitudes and stereotypes treating men's central role have survived until today. There are at present no exact figures on the prevalence of violence in marriage and intimate relationships. Only a fraction of these acts of violence become public. As an example, each year, about 45,000 women and their children escape into one of the approximately 400 shelters and other places of refuge in Germany alone<sup>116</sup>.

According to one recent study, over two million women in Spain have suffered physical and/or mental violence at the hands of their partners, while 97 percent of women victims of violence in the family do not report such incidents. Between 2002 and 2003, 131 women were murdered by members of their families – a 59 percent increase in one year<sup>117</sup>.

Despite those figures, family violence and violence against women as an area of concern is not regularly measured and statistically covered.

Statistics concerning domestic violence are higher than reported in national surveys as many women are hesitant to report or even speak about the violence they suffer within the home as gender-related violence is still a taboo subject. Moreover, women victims of domestic violence are reluctant to report the crime because they are often economically dependent on their husband or partner, and thus find it difficult to break away from the abusive relationship.

Additionally, domestic violence in immigrant communities is reportedly a widespread problem. Immigrant women are particularly vulnerable for multiple reasons. Firstly, they rarely speak the language of the country competently and thus their access to information is limited. Another factor of vulnerability to violence is their immigration status. Immigrant women are also particularly vulnerable as they are often unaware of their rights and of protections that can be afforded to them. Besides, racial discrimination persists, and the police are reported to have a reputation for being discriminatory. Thus immigrant women are often reluctant to seek help from and file reports with the police. They are also isolated because they often live in the poorest communities of the country and experience high rates of unemployment.

In addition, because of a lack of resources, many shelters must ask women who board there for rent and immigrant women are often turned away because they have no way to pay the necessary fees.

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<sup>115</sup> CEDAW/C/2004/I/CRP.3/Add.6/Rev.1

<sup>116</sup> <http://www.wibig.uni-osnabrueck.de/wibig1.htm>

<sup>117</sup> AMNESTY INTERNATIONAL, *Spain: New report urges action on women's rights*, 5 July 2004, <http://www.amnesty.org.uk/news/press/15468.shtml>



- *Czech Republic:*

In 2003 - 2004 an international research project on violence against women was conducted on a wide range of indicators of physical violence.

The research was undertaken by the Sociological Institute of the Academy of Sciences of the Czech Republic and the Philosophical Faculty of Charles University.

This research shows that **37.7 %** of women in the Czech Republic become victims of violence committed by their partners and 37.2% become victims of assault by other persons.

Domestic violence involves a wide range of acts, from very brutal physical attacks causing serious health damage -- one case, in March 2004, involved a man who had abused his female partner long-term, including breaking her lower jaw and trying to cut off one of her legs -- to "lighter" cases in which the women are not attacked physically but become victims of psychological violence.

The State is not tackling the issue in order to prevent domestic violence. Often, when requested for help police refuses to intervene unless the violence is at the level of blood flowing.<sup>118</sup>

- *Greece:* Girls as young as 13 to 16 years-old, members of the socially excluded minority of Roma Muslims become easily victims of domestic violence in Greece. The Social and Educational Action-Center for the Support of Children and Family, that has served 450 families of Roma Muslims and economic migrants of that area, has reported 40 cases of women victims of domestic violence just in the first half of 2004<sup>119</sup>.

- *Czech Republic:*

In 2004, the Czech League of Human Rights had to deal with a brutal domestic violence case.

Ms M. has been hospitalized several times with serious injuries following attacks by her boyfriend, who behaves violently under the influence of alcohol.

They lived with their children in a one-room apartment. Therefore, the victim never cried out when she was attacked, because it occurred mostly at night and she didn't want to wake up the children. Despite her efforts, the children witnessed brutal violence against their mother several times. Ms M.'s boyfriend punched and kicked her. Once in a fit of jealousy he tried to cut off her feet so that she would not be able to leave the apartment. He also cut off her hair out of jealousy.

When a warrant for the arrest of Ms M.'s boyfriend was granted, several days elapsed before the police were able to locate the boyfriend, despite the fact that Ms M. had informed them as to where he most probably was. Before he was taken into custody, the boyfriend tried to follow the children on their walk to school. Luckily they were prepared for this situation and fled.<sup>120</sup>

## Forced sterilisation

Romani women have in recent years been coercively sterilized by medical professionals in Slovakia and it is reported that this practice is ongoing to the present day in the Czech Republic<sup>121</sup>.

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<sup>118</sup> THE LEAGUE OF HUMAN RIGHTS, O.M.C.T. *Questionnaire*, July 2004

<sup>119</sup> OMCT, GHM, MRG-G, SOKADRE, KEDE, SOCEDACT, *State Violence in Greece*, Alternative report to the U.N.C.A.T., Athens-Geneva, 27 Oct. 2004, p. 97

<sup>120</sup> H. LANGHANSOVA, "The case of Ms M.", *League News*, Prague, February 2004, p. 2

<sup>121</sup> E.R.R.C., LEAGUE OF HUMAN RIGHTS, LIFE TOGETHER, IQ ROMA SERVICE, *Coercive Sterilisations in the Czech Republic*, 16 Sept 2004, <http://www.errc.org/cikk.php?cikk=2014>

- *Slovakia*: Effective as of April 1, 2004, the Slovak government has amended domestic law in the area of sterilisations, incorporating international standards on informed consent into its legal system. Notably, the government has not, however, indicated that it is prepared to offer redress to victims of coercive sterilisations.

Indeed, there are a number of lawsuits on behalf of Romani women who allege that they have been coercively sterilised currently open before Slovak and international courts.

A number of these lawsuits have had to address issues giving rise to serious concerns about the state of the rule of law in Slovakia. For example, courts have had to rule repeatedly on the refusal by hospitals to provide and/or allow access to medical files to representatives of alleged victims. In one case, the court applied an overly stringent evidentiary standard that effectively blocked the plaintiff's access to redress.<sup>122</sup> In other instances, police have reportedly conducted interviews with alleged victims while simultaneously threatening to prosecute their partners for statutory rape. The European Commission against Racism and Intolerance (ECRI) has also expressed concern over the way in which investigations have been carried out so far and that "*given the public and serious nature of the reports concerning sterilisation of Roma women without their full and informed consent, it is necessary to ensure that the investigation is seen to be as impartial and transparent as possible*".<sup>123</sup>

- *Czech Republic*:

In June 2004, the UN Committee against Torture expressed concern about allegations regarding some incidents of uninformed and involuntary sterilisations of Roma women, as well as the government's inability to investigate<sup>124</sup>.

## **5. Trafficking of women**

Trafficking in human beings has become a serious global concern. International criminal groups, whose activities frequently include other forms of illicit trade, often control trafficking in persons as well. In addition to abusing human rights, and violating labour and migration laws, trafficking in persons is also a problem of national and international security.

The socio-economic situation of women is generally worse than that of men as women are mostly in occupations that have lesser prestige and smaller wages. Therefore, women are more likely to become the victim of trafficking. Because of their even less favourable position, members of minorities constitute a large part of the number of victims.

Most of the EU countries are countries of destination and transit for trafficked persons. Traffickers isolate and intimidate victims and force them into prostitution through both psychological and physical abuse. These methods include depriving the woman of her identification papers and passport, sequestering her, beating her, and raping her.

Since in many European countries there is no comprehensive anti-trafficking legislation, since trafficked women risk detention, forced deportation and further human rights abuses at the hands of their traffickers, procurers, or other people involved, including state officials, since there is no

<sup>122</sup> Case summary based on E.R.R.C. casework. See also *Slovak Spectator*, Vol. 9, No. 12, 31 March – 6 April, 2003

<sup>123</sup> ECRI Third Report on Slovakia, § 97

<sup>124</sup> CAT/C/CR/32/2, *Conclusions and recommendations of the Committee against Torture: Czech Republic*, 3 June 2004, § 5 (k)

service for trafficked women and no effective witness protection program, trafficked women and girls are afraid to file a complaint with the authorities or to testify in criminal cases.

Consequently, trafficked women remain trapped in an abusive situation and the human rights abuses committed against them often go unpunished.

- *Greece*: The situation for trafficking victims in Greece has seen little effective change since 2002, when the Greek state was admitting that “*due to a lack of specific legislation on human trafficking, victims [are] being deported*”, despite the adoption of an impressive array of legal and policy measures, which have though hardly been implemented.<sup>125</sup>

Thus, in its recommendations, the Committee on Economic, Social and Cultural Rights (May 2004)<sup>126</sup> expressed its concern about the high numbers of trafficked women and children who are subjected to forced labour and sexual exploitation and who are often being deported to their countries of origin, rather than being granted a residence permit, reportedly in an expeditious manner and without the necessary procedural safeguards. In this framework it also urged Greece to intensify its cooperation with neighbouring countries in combating trafficking in persons.

Characteristically, although a clear regulation on residence permits for victims was issued in June 2004, only two such permits were issued by the end of October 2004: all other recognized victims were still without legal residence, nor work permit, legal aid or any other form of protection.<sup>127</sup>

This is why, seeing no benefit to seek state protection, the overwhelming majority of trafficking victims are still often expeditiously repatriated to their countries of origin without necessary procedural safeguards.

- *Greece*: On 23 May 2003, a Mixed Jury Felony Court of Patras, acquitted a police officer who was accused of raping a 19-year old Ukrainian trafficking victim, Olga B..

Olga B. was however never summoned to be present at the proceedings, due to deliberate malpractice by the bailiff, against whom a complaint has been filed.

In the absence of the victim at the trial, the court concluded that she had consented to sexual intercourse with the police officer, ignoring Olga B.’s multiple sworn testimonies to the contrary during the judicial investigation, and even though in the same verdict the court had convicted four persons for the trafficking of Olga and of 13 other foreigners. The other two witnesses, who had testified on behalf of the victim at the preliminary hearings, were also not summoned and were not present at the trial.

Previously, there had been a lack of due diligence in investigating the victim’s claim of rape and the relating trafficking charges: the main judicial investigation “froze” for two-and-a-half years, thus resulting in the setting of a court date after the end of the 5-year statute of limitation (prescription) of the misdemeanour charges (all but the rape one).

At the trial, the police officer was given a 2-year suspended sentence, the bar owner was sentenced to 3 years in prison for trafficking and three other defendants were also sentenced to two years in prison. However, all 5 co-defendants’ sentences were converted into fines as the court concluded that “*a pecuniary fine is sufficient to deter them all from repeating the crime, after evaluating their characters and surrounding circumstances*”. Two of them were involved in other trafficking cases afterwards.

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<sup>125</sup> CEDAW Press Release, 19/08/02: [www.un.org/News/Press/docs/2002/WOM1361.doc.htm](http://www.un.org/News/Press/docs/2002/WOM1361.doc.htm)

<sup>126</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: GREECE, Thirty-second session (26 April – 14 May 2004), *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant*, E/C.12/1/Add.97, 14 May 2004

<sup>127</sup> OMCT, GHM, MRG-G, SOKADRE, KEDE, SOCEDACT, *State Violence in Greece*, Alternative report to the U.N.C.A.T., Athens-Geneva, 27 Oct. 2004, p. 62

After initial rejections and much media pressure, the Prosecutor filed a motion for cassation. The Supreme Court followed the Prosecutor's motion and, on 13 November 2003, issued its ruling that nullifies the first instance judgment, but only concerning the rape charges. It is to be noted that the Supreme Court gave full copies of the two decisions documents to journalists who then covered the stories with full reference to the victim's name.

One consequence of this ruling was that Olga B. had to face two criminal trials: at first instance a retrial on the rape charges and at the appeals level a trial on the trafficking charges. All of these trials without any state legal aid to pay for her lawyers. Moreover, she was seeking compensation in the civil court. But she could not constitute herself civil claimant in the trafficking trial, since such possibility exists only through the beginning of the first instance court trial: since she was not present there, she has lost that right.

Her deportation was suspended by the Patras Prosecutor's Office as late as 16 January 2004, but only for the period until there is an irrevocable verdict on the trafficking case. It does not cover the rape case, as the anti-trafficking law does not include among the offences for which protection (and suspension of deportation) is offered the crime of rape in the context of trafficking. So, a collateral result of the separation of the two cases by the Supreme Court is that Olga B. cannot be protected for the most serious of the crimes related to her trafficking ordeal.

Then, Olga B. applied on 12 February 2004 for a special residence permit. The Secretary General of Western Greece informed her that the request was approved –the first ever such decision- but that the permit could not be issued as the state had forgotten to print the necessary stickers for such residence permits. The problem was settled on June 25 when special stickers were issued. Olga B. was the only trafficking victim to have also been issued a work permit on September 19, 2004.

The trial on rape charges took place on 29 March 2004. After a fifteen hour hearing, the Mixed Jury Felony Court of Patras acquitted the defendant giving him the benefit of the doubt. On 5 April 2004, the Appeals Prosecutor of Patras appealed against the acquittal. Hence the trial on the rape charges will be brought before the Mixed Jury Felony Appeals Court of Patras on December 8, 2004. GHM underlines that, as is the procedure in Greece, the names of the jurors were known before the trial date and jurors were not secluded for the intervening period.

On 21 June 2004, NGO representatives were present in court for Olga B's trial on appeal for the trafficking-related misdemeanours, but it was once more postponed, on 8 December 2004.<sup>128</sup>

- *Greece* is a major destination and transit center for the trafficking of women and children. It is estimated there are at least 14,000 women currently in Greece who have been forced into prostitution after leaving their home countries of Eastern Europe.

However, there are just three functioning shelters in the whole country to help the victims of trafficking who manage to escape, where only a handful of victims are hosted<sup>129</sup>.

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<sup>128</sup> OMCT, GHM, MRG-G, SOKADRE, KEDE, SOCEDACT, *State Violence in Greece*, Alternative report to the U.N.C.A.T., Athens-Geneva, 27 Oct. 2004, p. 63

<sup>129</sup> R. GALPIN, *Fears of Athens sex slave boom*, 21 June 2004, <http://news.bbc.co.uk/2/hi/europe/3827127.stm>

## Chapter 4: VIOLENCE AGAINST CHILDREN

### 1. Interpretation of torture and ill-treatment within the framework of the rights of the child<sup>130</sup>

As children are more vulnerable to the effects of violence than adults and have limited capacity to express, to defend and to understand, the general international definition of torture and ill-treatment must be interpreted in a way which will effectively protect their rights.

A child-oriented perspective requires a new interpretation of several components of the definition of torture.

#### 1.1. Severe pain and suffering

As underlined in chapter 1, an act of torture or ill-treatment, whether it is cruel, inhuman or degrading treatment or punishment, must attain a minimum level of seriousness to be held as a reprehensible act: there is an entry level threshold of severity to be reached for an act to fit this particular qualification.

In the case of a child, the threshold of pain and suffering amounting to torture or ill-treatment will vary with the age, sex, health, maturity and personal circumstances of the victim. Without denying the need for a threshold, this threshold is likely to be lower than that of an adult.

Consequently, the assessment of this minimum must be relative.

In this respect, the Inter-American Court of Human Rights considers that “*in order to establish if torture has been inflicted and its scope, all the circumstances of the case should be taken into consideration, such as the nature and context of the respective aggressions, how they were inflicted, during what period of time, the physical and mental effects and, in some case, the sex, age and state of health of the victims*”.<sup>131</sup>

The European Court of Human Rights deemed, in the *Ireland v. The United Kingdom Case*, that it depends on the duration of the treatment, its physical or mental effects and on the sex, age and state of health of the victim<sup>132</sup>. However, although this case did not implicate minor victims but grown up men, the ruling of the Court may also be applied in cases where the victim is a minor.

Moreover, in the case *Aydin v. Turkey* the European Court of Human Rights deemed that the level of pain and suffering imposed on a 17 year-old girl by Turkish security forces had to be evaluated “*having regard to her sex and youth and the circumstances under which she was held*”.<sup>133</sup>

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<sup>130</sup> See O.M.C.T., *Children, torture and other forms of violence: Facing the facts ,forging the future*, International Conference, 27 November – 2 December 2001, Tampere, Finland, p. 35

<sup>131</sup> Inter-Am. Ct. H.R., *Villagran Morales et al.*, Judgment of 19 November 1999, § 74.

<sup>132</sup> See *supra*, note 8

<sup>133</sup> Eur. Ct. H.R., *Aydin v. Turkey*, Judgment of 25 September 1997, § 84.

Therefore, in order to evaluate the pain inflicted on children, both objective and subjective criteria must be taken into account.

## 1.2. Official capacity

Within the framework of the rights of the child, the scope of State legal responsibility for torture or cruel, inhuman or degrading treatment or punishment should be subject to wide interpretation. Due to the fact that most cases of violence against children are committed within private spheres, such as the family, the workplace, schools and other institutions, State responsibility cannot be strictly confined to acts directly perpetrated by State officials.

The obligation of due diligence also requires the State to adopt preventive, protective and reparative measures against abuses perpetrated by private actors. If the State does not fulfil this obligation, it must be held responsible, because it may be considered that the abuses were committed “*with the consent or acquiescence of a public official*”, as stated in article 1 of the Convention against Torture (CAT).

In other words, within the framework of the rights of the child, States must be held responsible not only for torture or cruel, inhuman or degrading treatment or punishment directly imputable to their officials, but also for failing to address violence perpetrated by private actors.

Moreover, article 16 § 2 of the CAT states that the provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment.

In this respect, article 37 (a) of the Convention on the Rights of the Child (CRC) stipulates that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Thus, the latter will prevail over the CAT.

Anyhow, article 19 § 1 of the CRC calls on States to take all appropriate measures to protect the child from all forms of violence “*while in the care of parent(s), legal guardian(s) or any other person who has the care of the child*”.

The same principle applies in the Council of Europe’s human rights protection system. Indeed, the European Court of Human Rights found States responsible to be in breach of article 3 when ill-treatment was administered to children by private individuals<sup>134</sup>.

Finally, article 24 of the Charter of Fundamental Rights of the European Union provides that “*children shall have the right to such protection and care as is necessary for their well-being*”.

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<sup>134</sup> Eur. Ct. H.R., *A. v. The United Kingdom*, Judgment of 23 September 1998, § 22; Eur. Ct. H.R., *Z. and others v. The United Kingdom*, Judgment of 10 May 2001, § 73

### 1.3. Purpose

Through the broad ratification of the Convention on the Rights of the Child, the international community has recognized that children need special protection under international law. Because of their particular vulnerability, children require higher standards of protection than adults and specific positive measures. In particular, the State must assume a higher degree of responsibility in cases of torture or cruel, inhuman or degrading treatment or punishment perpetrated against children.

Consequently, as far as children are concerned, purpose as a component of torture can be too restrictive.

This means that States must be held responsible even though these acts may be perpetrated without any specific purpose.

## **2. Main situations where children are at risk of being submitted to violence**

### 1. Children in the justice system

Only when children in need of protection come in conflict with the law, (for instance by committing offences), do they fully attract public attention. OMCT would thus like to remind that the great majority of children in conflict with the law are first and foremost in need of support and are often victims of violence themselves.

- *Greece:* In the early hours of March 18, 2004, at around 00:30, plainclothes police officers, with weapons drawn, carried out a raid in the “Piccadilly” bar in Athens. They then proceeded to arrest twenty people, one of them seventeen years old M.M., an Albanian immigrant in Greece. When the police officers asked M.M. how old he was, he answered that he was twenty years old.

The persons arrested were handcuffed and taken to the General Police Directorate of Athens. There, they were taken to the Juveniles Department. All twenty persons (including M.M.) were allegedly subjected to verbal abuse concerning their sexual orientation (“Piccadilly” was a known gay bar). M.M. was not allowed to call his parents. He made a first deposition, as a witness, at 4:30 am. According to the deposition there was evidence that M.M. was involved in illegal acts and hence he was then officially an accused. The police officers refused to read out the deposition to him as he requested since he does not know how to read Greek. Instead they slapped him, asking him to sign the deposition. He was also not informed on his rights, particularly his right to a legal counsel.

M.M. alleged that he was slapped several times because of his refusal to testify that the owners of the “Piccadilly” bar were prostituting him, as the police officers asked him to. Even though at that time the police was aware that M.M. was a minor and that he was officially considered as a defendant, he was not brought before a Juveniles’ Prosecutor. Rather, in the evening of March 18, 2004, he was taken to the

“ordinary” prosecutor who did not refer him to the juveniles’ prosecutor but proceeded to indict him as an adult, in violation of the criminal procedure specific to juveniles.<sup>135</sup>

- *Greece*: In April 2004, in the Special Detention Unit for Juvenile Delinquents in Avlona, there were 283 minors, of whom 118 of Greek origin and 165 foreign nationals of various ethnic origins. The Deputy Ombudsman of Children’s Rights stated that “*The number of foreign nationals appearing in courts and sentenced for crimes is higher than 40%. However, the overall reported minor delinquency rate has not increased as importantly as to justify the percentage of minor immigrants involved in criminality*”.<sup>136</sup>
- *Czech Republic*:  
The Committee against Torture expressed concern about the fact that in the Czech Republic minors are not kept separately from adults in all situations of detention<sup>137</sup>.

## 2. Children in institutions

Deprivation of liberty must be understood as any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which this person is not permitted to leave at will by any judicial, administrative or other public authority<sup>138</sup>.

Provisions of the CRC limiting restriction of liberty apply to all instances welcoming minors and restricting their liberty, including for example, in health and welfare institutions and in relation to asylum-seekers and refugee children.

Furthermore, deprivation of liberty for children must only be considered as a measure of last resort and in case of necessity for the society and the minor, i.e. according to his/her best interest. It must be ordered only for the shortest appropriate time.

- *Greece*: According to a report by the Swiss N.G.O. “Fondation Terre des Hommes”, 487 out of the 644 street children that had been accommodated in the “Saint Barbara” institution, between November 1998 and October 2001, have disappeared.

Despite the gravity of these allegations, no investigation was undertaken in order to ascertain how and under which conditions the children had disappeared and possibly launch administrative or criminal proceedings. Following a fact finding investigation by the Greek Ombudsman’s Office, 502 out of the 661<sup>139</sup> children accommodated in the “Saint Barbara” institution during 1998-2002 were officially mentioned as “missing”.

The number of disappeared children might in fact be even higher, as according to the Ombudsman’s Report, 22 children were taken by the Hellenic Police to the Albanian-Greek border. It appears that no prior arrangements had been made with the Albanian authorities and, as a result, the children were

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<sup>135</sup> OMCT, GHM, MRG-G, SOKADRE, KEDE, SOCEDACT, *State Violence in Greece*, Alternative report to the U.N.C.A.T., Athens-Geneva, 27 Oct. 2004, p. 75

<sup>136</sup> *Ibid.*, p. 87

<sup>137</sup> CAT/C/CR/32/2, *Conclusions and recommendations of the Committee against Torture: Czech Republic*, 3 June 2004, § 5 (c)

<sup>138</sup> CRC/C/58, *General Guidelines for Periodic Reports*, 20/11/96, § 138

<sup>139</sup> The small discrepancy between these numbers and the ones mentioned in the Terre des Hommes report is due to the fact that the latter referred to children accommodated in the “Saint Barbara” institution between 1998 and late 2001.



literally dumped at the border and left to fend for themselves. Despite all of the above, the Ombudsman's Office did not forward the Findings Report to the Misdemeanours Prosecutor's Office. As for the fate of the children, it remains to this day unknown.

On May 21, 2004, G.H.M., appalled by the absence of any judicial investigation into the disappearance of five hundred children who were in the care of the state, filed a criminal complaint report with the Misdemeanours Prosecutor's Office of Athens.

Unfortunately, the Misdemeanours Prosecutor ordered the Minors Department of the Police Directorate to launch a preliminary inquiry into these allegations. Considering that the complaint is also directed against police officers of that service the investigation should have been entrusted to a peace judge, as is the usual practice. GHM thus addressed a letter to the Director of the Misdemeanours Prosecutor of Athens, Dimitris Papagelopoulos, explaining the reasons why the investigation should be assigned to a peace court magistrate. The request was rejected and the preliminary inquiry was launched by the police agency.<sup>140</sup>

- *Czech Republic/Slovakia:*

"Cage beds" - beds which are fitted with a metal-barred construction above the mattress, or a metal frame covered with netting, designed to enclose a person within their confines - are currently endemic within the Czech and Slovak psychiatric and social care systems.

The Czech and Slovak authorities make a distinction between "cage beds" and "net beds": while on 13 July 2004, the Czech Minister of Health Jozef Kubinyi issued a press statement stating that he had instructed directors of all health institutions to immediately cease use of cage beds, the use of net beds has not been immediately banned.

Furthermore, a similar prohibition in institutions for children and adults with mental disabilities is yet to occur.<sup>141</sup>

### 3. Children in the education system

As education is vital to the development of children, it is recognized as a universal right in article 28 of the Convention on the Rights of the Child, which binds its signatories to fulfil their obligation in providing it. It has to be stressed that being uprooted does not negate a child's right to education nor the responsibility of States to provide it.

Consequently, it is necessary to stop and prohibit any tendency towards segregation between national and foreign or minority pupils and to take all necessary measures to prevent discrimination of foreign children within the educational system.

- *Slovakia/Czech Republic:*

A research undertaken in Slovak schools revealed that during the 2002/2003 school year, in most of the schools for the mentally disabled, more than half the students were Romani, and in some of those schools, every single pupil was Romani.<sup>142</sup>

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<sup>140</sup> OMCT, GHM, MRG-G, SOKADRE, KEDE, SOCEDACT, *State Violence in Greece*, Alternative report to the U.N.C.A.T., Athens-Geneva, 27 Oct. 2004, p. 82

<sup>141</sup> X., *Harry Potter joins the fight to end Czech "cage bed" use*, Joint press release, London, Prague and Budapest, 16 July 2004, <http://www.helcom.cz/print.php?rid=46&cid=555>

<sup>142</sup> E.R.R.C., *Written Comments of the European Roma Rights Center Concerning the Slovak Republic for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 65<sup>th</sup> Session, August 2-20, 2004*, 30 July 2004

In the Czech Republic, Mr A. Gil-Robles, Commissioner for Human Rights of the Council of Europe, noted that the young members of the Roma community are drastically over-represented in “special schools” and classes for children suffering from slight mental disability. Some figures indicate that 70 % of all Roma children are placed in these schools, while children from this community make up less than 5 % of primary age pupils; they reportedly form 50 % of the special school enrolment.<sup>143</sup>

#### 4. Children asylum seekers

States must take appropriate measures to ensure that a child who is seeking refugee status or who is considered as a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights in the Convention on the Rights of the Child and in other international human rights or humanitarian instruments to which the States are parties.<sup>144</sup>

This is particularly true for unaccompanied children seeking asylum, who face the essential problem of living in a foreign country without the care of their parents or legal guardian and therefore run a high risk of not receiving proper protection and care.

- *Germany*: On February 26, 2004, the UN Committee on the Rights of the Child issued its Concluding Observations on Germany. The Committee expressed concern that Romani children may be forcefully expelled to countries from which their families have fled, and recommended that German authorities take all necessary measures to review its legislation and policies regarding Roma children and other children belonging to ethnic minorities seeking asylum.<sup>145</sup>
- *Czech Republic*: The Committee against Torture recommends that the Czech Republic review the strict regime for illegal immigrants with a view to its repeal and ensure that all children held in these detention centres are removed with their parents to family reception centres<sup>146</sup>.

#### 5. Child trafficking and forced labour

According to the UN Special Rapporteur on the sale of children, child prostitution and child pornography, “*Sexual freedom is considered one of the new attractions which the market economy can offer (...). Thus, girls and boys become more easily involved in prostitution and/or pornography, most of the time without really knowing what it is all about*”<sup>147</sup>.

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<sup>143</sup> Report by Mr A. Gil-Robles, Commissioner for Human Rights, on his visit to the Czech Republic from 24 to 26 February 2003, Strasbourg, 15 October 2003, p. 2

<sup>144</sup> Article 22 CRC

<sup>145</sup> CRC/C/15/Add.226, *Concluding observations: Germany*, 26 February 2004, § 54 (b)

<sup>146</sup> CAT/C/CR/32/2, *Conclusions and recommendations of the Committee against Torture: Czech Republic*, 3 June 2004, § 6 (m)

<sup>147</sup> *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography*, E/CN.4/1997/95/Add.1, 17 February 1997, § 13

Child victims of trafficking are often intimidated and isolated due to their ignorance of their new surroundings and are subject to serious attacks on their physical integrity, accompanied by psychological, moral and social harms that are immeasurable

Trafficking has also led to the persistence of forced domestic labor, the victims of which are frequently children or women.

It has to be stated that working children are not only a phenomenon of socio-economically disadvantaged regions, but also of the richer areas.

Implementation of laws forbidding child labour, which are not fully respected in practice, raises serious concerns. Major breaches of rules on child labour include: non-observance of the minimum employment age, failure to provide mandatory periodical health check-ups, young people performing forbidden jobs, and violation of rules relating to rest periods, holidays and working time.

- *Greece*: A 17 year-old girl and an 18 year-old girl, both from Lithuania, jumped from the first floor of a hotel, where they were forced to work as prostitutes. One of them suffered severe spinal injuries. Three suspected gang members were arrested and charged with procuring and sex trafficking. The next day, all three suspects were released on bail and none was remanded, despite the fact that one of the victims is a minor and one of the suspects has a past conviction for procuring.<sup>148</sup>
- *Greece*: According to Greek criminal law, begging is still a ground of arrest even when it is committed by a minor (Art 407 Civil Code) despite the recommendation of the CRC in 2002 to decriminalise begging by children.<sup>149</sup>

## 6. Domestic and sexual violence

The issue of domestic and sexual violence, already approached in previous chapters, is also applicable to children.

Indeed, they are the victim of the same status of economic and affective dependence than women and the difficulty to access justice is even greater: there is a strong reticence on the part of a victim of sexual abuse to make an official accusation and lodge a complaint. The accusation procedure obliges the young victim of sexual abuse to explain the facts over and over again and to be interrogated by several people thus leading to a situation which often dissuades the child from lodging an official complaint.

According to the Special Rapporteur of the United Nations on violence against women, the age below which a victim is considered to be minor should be set at 18 years-old in order to insure protection from abuses to children.

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<sup>148</sup> G.H.M., *Greek Courts Set Free Traffickers of Minor !*, Press release, 18 June 2004

<sup>149</sup> CRC/C/15/Add.170, Concluding observations of the CRC: Greece, 2 April 2002, § 79 (b); G.H.M., report to C.A.T., 31 July 2004, Part 3, p. 6

## Corporal punishment

Article 19 of the CRC requires States Parties “to protect the child from all forms of physical or mental violence (...), while in the care of parent(s), legal guardian(s) or any other person who has the care of the child ». Thus, the provision asserts children’s human right to personal, both physical and mental integrity.

Despite such provisions, in most European countries corporal punishment by parents remains lawful and socially approved and research reveals that a majority of children are being hit, including babies and very young children.

The European Committee of Social Rights of the Council of Europe issued, in 2001, a general observation that stated that compliance with article 17 of the Charter requires “a prohibition in legislation against any form of violence against children (including corporal punishment), whether at school, in other institutions, in their home or elsewhere”<sup>150</sup>.

OMCT is committed to upholding all children’s rights to protection from all forms of violence. Therefore, OMCT has submitted formal complaints to the European Committee of Social Rights against five European countries which have not prohibited all corporal punishment of children, including in the family (Greece, Ireland, Italy, Portugal and Belgium).

OMCT hopes that this action will speed up the process of protecting children throughout Europe from currently legalised violence.

- *Belgium*: Despite some positive constitutional and legislative changes, there is no explicit prohibition of parental corporal punishment, and the Government has not interpreted the recent changes as implying prohibition. While there is no special defense available to parents and others who use corporal punishment, corporal punishment by parents is tolerated in society. Article 398 of the Penal Code (2000) prohibits any form of violence, including slapping and causing injury. But it appears that this does not effectively criminalize all parental corporal punishment, and prosecution for violence to children tends to be restricted to severe cases. An amendment to the Penal Code in the Law Concerning the Penal Protection of Minors increases the penalties for violence towards children. It also recognizes as aggravating factors the victim being a minor and the relation of authority between perpetrator and victim – but again this has not been interpreted as prohibiting all corporal punishment of children by parents.<sup>151</sup>
- *Greece*: Corporal punishment of children remains lawful in the home, and parents have a right to take “corrective measures”, although according to section 1518 of the Civil Code “only if these are necessary from a pedagogic point of view and do not cause injury to the child’s dignity”<sup>152</sup>.

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<sup>150</sup> European Committee of Social Rights, *Children’s Rights under the European Social Charter*, Council of Europe, p. 5, <http://www.coe.int/T/F/Droits de l’Homme/Cse/Childrens rights under the Charter.pdf>

<sup>151</sup> O.M.C.T., Collective Complaint against Belgium submitted by the World Organisation Against Torture (OMCT) under the 1995 Additional Protocol

<sup>152</sup> O.M.C.T., Collective Complaint against Greece submitted by the World Organisation Against Torture (OMCT) under the 1995 Additional Protocol

- *Ireland*: Corporal punishment remains lawful by parents and some other carers. The common law provides a defence for “*reasonable and moderate chastisement*”. This is confirmed in the Children Act 1908, section 37.  
The Children Act 2001, when brought fully into force, will repeal the whole of the 1908 Act. But there is no equivalent to section 37 of the 1908 Act in the 2001 Act, and section 37 has not as yet been repealed. In any case, it is important to emphasise that removing the common law defence would require an explicit provision in addition to repealing this statutory confirmation of the defence. Moreover, there is no legislation protecting children from corporal punishment and other humiliating forms of punishment or treatment in foster-care, residential care institutions or from childminders looking after children of relatives, children of the same family or not more than 3 children of different families.<sup>153</sup>
- *Italy*: There is no legislative prohibition of all corporal punishment of children by parents. A judgment of the Supreme Court in Rome in 1996 declared that “*the use of violence for educational purposes can no longer be considered lawful*”. But the implications of this judgment have not as yet been confirmed in legislation.<sup>154</sup>
- *Portugal*: There is no explicit prohibition of all corporal punishment of children by parents. Less severe corporal punishment of children by parents remains lawful. According to the Civil Code, parent-child relations are characterised by obedience and “paternal power” (article 1878), under which parents should direct the child’s education.<sup>155</sup>

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<sup>153</sup> O.M.C.T., Collective Complaint against Ireland submitted by the World Organisation Against Torture (OMCT) under the 1995 Additional Protocol

<sup>154</sup> O.M.C.T., Collective Complaint against Italy submitted by the World Organisation Against Torture (OMCT) under the 1995 Additional Protocol

<sup>155</sup> O.M.C.T., Collective Complaint against Portugal submitted by the World Organisation Against Torture (OMCT) under the 1995 Additional Protocol

## CONCLUSION

The aim of this report is, as already mentioned, to highlight evolutions in the interpretation of the definition of torture and cruel, inhuman or degrading treatment or punishment (ill-treatment) and the necessity to preserve legal and jurisprudential *acquis* in this domain. Its objective is to provide the E.U. Network of Independent Experts on Fundamental Rights with a framework for a comprehensive approach of the torture and ill-treatment definition and its impact on the enjoyment of human rights, in particular when monitoring the respect and implementation of article 4 of the Charter of Fundamental Rights of the EU by Member states.

OMCT would like to underline that:

- The notion of risk of being submitted to torture or ill-treatment, as well as the type of victims show that the poor as well as those whose economic, social and cultural rights are being violated, are particularly vulnerable. The dimension of poverty is often coupled with other causes of vulnerability, such as belonging to a minority or to an indigenous population. Similarly, the fact of being a woman or a child often constitutes an additional factor of vulnerability.

In this respect, the struggle against torture and ill-treatment cannot be conceived solely in legal terms, regardless of the necessity and importance of legislative, administrative or judicial measures to address torture. In a society affected by unemployment, economic insecurity and poverty, the fight against torture and ill-treatment will have to address the structural dimensions of poverty: poverty often goes hand in hand with violations of economic, social and cultural rights, lack of development opportunities and deep inequalities.

Similarly, any approach related to the enjoyment of economic, social and cultural rights shall take into account the current process of economic and financial globalisation. Indeed, while globalisation brought tremendous opportunities, it has also led to significant social dislocation and increasing disparities within and among countries. Whereas the benefits of globalisation still have to reach half of the world's population, some groups are simply not in a position to take advantage of this process and are being gradually marginalised, economically, socially and culturally. The process of globalisation, if not carefully regulated, is therefore likely to accentuate these socio-economic conditions under which torture and other forms of cruel, inhuman or degrading treatment are likely to occur.

- Women and children do not always benefit from a protection as extensive as the one available to other victims of human rights violations. Indeed, national reports do not always raise this issue and, when they do, there is no coherence among them of where the issue of violence against women and children should be tackled. Moreover, many judicial and law enforcement bodies still consider the problem as an issue pertaining to “private life” and consequently abstain from intervening.

A broad interpretation of article 4 would give more suiting arms for victims of such violence to achieve security by giving a rights based approach to this issue instead of a purely social or family approach. Hence, it is necessary to recognize that this type of acts fall under the scope of article 4.

- Under international human rights law, the State is ultimately responsible for guaranteeing the protection of human rights as well as their realisation, whatever their nature may be: whether they are civil and political rights or economic, social and cultural rights. Therefore, it falls within the global role of EU Member States to make sure that responses to human rights violations and social tensions are taking into perspective the socio-economic aspects of the issue and that States bring appropriate answers to such problems. This is why we consider that it is not possible to isolate the EU policy against torture and ill-treatment from the other external and internal policies of the EU.

Article 4 of the Charter of Fundamental Rights of the EU does not provide a definition of the concepts that it sets out and is still clear of any interpretation.

Consequently, while monitoring the implementation of article 4, the EU Network of Independent Experts on Fundamental Rights is *de facto* taking on the responsibility to give some kind of interpretation of the nature of the rights enshrined in that article.

Therefore, OMCT urges the EU Network of Independent Experts on Fundamental Rights to take into account case-law and doctrinal evolutions relating to the definition of torture and ill-treatment while elaborating their national as well as thematic reports. Doing so will set up the foundations of a broad and effective protection of the individuals in the European Union's legal system, in particular against any form of torture and ill-treatment, while preserving the flexibility required to consider societal evolutions.

Last but not least, the Network should take into account the absolute and non-derogable nature of the prohibition of torture and underline the necessity to preserve the *acquis* resulting from the CAT definition. Such a positioning is of utmost importance, particularly in light of the ongoing fight against terrorism and its potential consequences on the absolute prohibition of torture and ill-treatment.