The Functioning of the Judicial System in the Republic of Turkey

Report of an Advisory Visit

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by

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European Commission
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Glossary of Abbreviations

ATL Anti-Terror Law

CCP Code of Criminal Procedure

EC European Commission

ECHR European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR European Court of Human Rights

EU European Union

TGNA Turkish Grand National Assembly (the Turkish Parliament)

HRA Human Rights Association of Turkey

HRFT Human Rights Foundation of Turkey

SSC State Security Court

TPC Turkish Penal Code

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Executive Summary

Since the decision in 1999 on Turkey's candidate status for European Union membership, the Turkish Grand National Assembly has, under difficult political and economic circumstances, adopted numerous important Constitutional and legal reforms intended to strengthen democracy, the rule of law and the protection of human rights. Many of these reforms have related directly to the functioning of the Turkish judicial system.

The determination of Turkey's political leaders to align the legal system further with the values and standards of the European Union is impressive. In a relatively short period of time, procedures in the State Security Courts have been harmonised with those applied in the ordinary courts and persons who have suffered a violation of the European Convention of Human Rights as a result of a court judgement in Turkey have been granted the right to a re-trial. The scope of Articles 159, 169 and 312 of the Turkish Penal Code has been narrowed and Article 8 of the Anti-Terror Law has been abolished. Pre-trial detention periods have been reduced and all persons under the age of 18 are now tried in juvenile courts. This list could continue.

However, as this report demonstrates, despite all the legal amendments there is still a considerable amount of work that needs to be done if the functioning of the judicial system is to be brought into line with accepted international standards. On the one hand, there is still a need for proper, timely and effective implementation of certain of the reforms that have been introduced to date. On the other, there are numerous important issues that the reform packages have yet to engage at all. The administration of the judiciary remains, to an unacceptable degree, subject to the potential influence of the political will of the Ministry of Justice. The relationship between judges and public prosecutors is such as to call into question the objective impartiality of the judiciary. Turkey's public prosecutors face restrictions in their ability to resolutely investigate and prosecute suspected criminal offences and numerous obstacles continue to serve to seriously undermine the extent to which members of the legal profession are able to perform their professional duties. In addition, there is still an urgent need for significant improvements to be made in the functioning of the judicial system as a whole with a view to establishing an efficient high quality system for the administration of justice.

The reforms proposed in this report are intended to strengthen democracy, the rule of law, human rights and respect for and protection of minorities so that Turkey may satisfy both its international obligations and the popular aspirations and demands of its people.

Kjell Bjornberg
Paul Richmond

I – INTRODUCTION

This is the Report of an Advisory Mission sent by the Directorate General for Justice and Home Affairs and the Directorate General for Enlargement of the European Commission ("EC") to Turkey. The Mission's mandate was to assess Turkey's progress in fulfilling the following Accession Partnership priority:

> Strengthen the independence and efficiency of the judiciary and promote consistent interpretation of legal provisions relating to human rights and fundamental freedoms in line with the European Convention on Human Rights. Take measures with a view to ensuring that the obligation for all judicial authorities to take into account the case law of the European Court of Human Rights is respected. Align the functioning of State Security Courts with European standards. Prepare the establishment of intermediate courts of appeal.

Within this framework, the main topics examined by the Mission were: (i) the jurisdiction of the courts, including the State Security Courts and military courts; (ii) the independence and impartiality of the judiciary; (iii) the training of the judiciary and prosecutors; (iv) the ability of lawyers to provide effective representation for their clients before the courts and to engage freely in professional activities; (v) procedural rules in criminal cases and the rights of the defence; and (vi) the capacity of the courts to deal with cases expeditiously.

The European Commission appointed two experts from European Union Member States to conduct the assessment, Kjell Bjornberg (Sweden), Judge Chamber President of the Court of Appeal for Western Sweden, former Head of the United Nations Judicial System Assessment Programme in Bosnia-Herzegovina and Paul Richmond (United Kingdom), Barrister of England and Wales. The experts were accompanied by Tobias King, Desk Officer, External Relations and Enlargement Unit, EC Directorate General for Justice and Home Affairs; Marie-Sofie Sveidqvist, Desk Officer, EC Directorate General for Enlargement; and Sedef Koray-Tippkamper, Sector Manager for Justice and Home Affairs, EC Delegation, Ankara.

The Mission arrived in Turkey on Sunday 28 September 2003 and left on Saturday 10 October 2003. During this time we held a total of 58 meetings with judges, public prosecutors, lawyers, physicians, human rights advocates and government officials in Ankara, Istanbul, Diyarbakir and Izmir. A list of those whom we met is attached as an appendix to the Report in Annex A. The Mission received full co-operation from the Government of Turkey and we observed a willingness on the part of all of the interviewees to maintain and develop further the dialogue between the European Commission and themselves. We would like to express our gratitude to all those agencies, organisations and individuals that contributed to the information presented in this report. We are particularly grateful to Mr. Celattin Donmez of the Ministry of Justice Directorate General for EU Affairs for facilitating our meetings with judges, public

prosecutors and representatives of the Turkish government. We would also like to thank Ms. Kutlay Bensan, Ms. Zeynep Ener and Ms. Hande Caglayansu for acting as the Mission's interpreters.

Chapter II of the Report sets out a brief history of the main Constitutional and legal reforms to have been introduced in the last two years regarding the functioning of the Turkish judicial system. In Chapter III we describe the organisation of the Turkish court system. Chapter IV focuses exclusively on the State Security Courts ("SSCs"). We examine the various reforms to have been introduced regarding their functioning and discuss to what extent their continued existence can be justified within the Turkish legal system. In Chapter V we report on the extent of judicial independence in Turkey and discuss the degree to which the relationship between judges and public prosecutors can be said to constitute a threat to judicial impartiality. Chapter VI examines the role and effectiveness of public prosecutors and in Chapter VII we look at the ability of lawyers to perform their role within the Turkish legal system. Chapter VIII assesses the degree of quality and efficiency within the Turkish legal system and suggests various reforms that could potentially serve to improve its functioning. Finally, our conclusions and recommendations are set forth in Chapter IX

For ease of reference, *he* has been used rather than *she* throughout the report when referring to an unidentified individual. This should be understood as being gender neutral unless the context indicates otherwise.

This report contains the views of the experts and does not necessarily reflect the views of the European Commission.

II – BACKGROUND

In April 1987 Turkey made a formal application to become a full member of the European Community. At the European Council of Helsinki in December 1999, Turkey was given official status as a candidate for European Union membership. The political criteria for EU membership are that Turkey must achieve, “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”

In March 2001 the Turkish Government published its "National Programme for the Adoption of the Acquis", which set out the steps which it planned to take to enable Turkey to meet the criteria for membership of the EU. The Programme entails the Turkish Parliament enacting 89 new laws, and agreeing changes to 94 existing laws by 2004. These changes are in a wide variety of areas: freedom of thought and expression, freedom of association and peaceful assembly, combating torture, pre-trial detention, strengthening opportunities to seek redress for human rights violations, training of law enforcement personnel and civil servants on human rights, improving the functioning and effectiveness of the judiciary, banning of capital punishment, detention conditions, cultural life and individual freedoms, mitigating regional differences to increase citizens' economic, social and cultural capabilities, freedoms of thought, religion and conscience, harmonisation of the Constitution and other relevant legislation with EU political criteria, and lifting the state of emergency.

On 3 October 2001 Turkey completed its biggest legislative overhaul in two decades, when the Turkish Grand National Assembly approved a package of 34 amendments to the Constitution designed to pave the way for EU membership. Law No. 4709 came into force on 17 October 2001. The amendments, ranging from easing restrictions on using the Kurdish language, reducing maximum detention periods for suspects before they are charged, and making it harder to ban political parties, to reshaping the powerful National Security Council to give more weight to civilian politicians, represented the first major shake-up of Turkey's Constitution since it was drafted after the 1980 military coup. Implementation in many cases however required changes, which were already in the pipeline, to the Penal Code, or other pieces of enabling legislation whose imminence varied.

The constitutional amendments of October 2001 led to the adoption of three sets of implementing legislation in 2002. The three "reform packages", adopted in February, March and August 2002 in Laws No. 4744, 4748 and 4771, modified various provisions in Turkey's major legislation and addressed a wide range of human rights issues, including the death penalty, the exercise of fundamental rights and freedoms, pre-trial detention and legal redress.

First Reform Package: Law No. 4744

On 6 February 2002 the Turkish Parliament adopted Law No. 4744 (the so-called "Mini-Democracy Package") to adjust some Turkish laws to these constitutional amendments. Law No. 4744 amended articles 159 and 312 of the Turkish Penal Code, Articles 7 and 8 of the Anti-Terror Law, Article 16 of the Law on Establishment and Trial Procedures of the State Security Courts as well as Articles 107 and 128 of the Code of Criminal Procedure.

Amendments to the Turkish Penal Code (TPC)

The first amendment to Article 159 ("insult to the State and to State institutions and threats to the indivisible unity of the Turkish Republic") redefined the available punishments. The lower limit, which was one year, was maintained while the six-year upper limit was reduced to three years. In addition, "heavy imprisonment" was transformed into "imprisonment" while the "heavy fine" for criticising Turkish laws was abolished. Notwithstanding these amendments, the actual definition of the offence under Article 159 remained the same following the first amendment.[1]

The description of the offence under Article 312 ("incitement to hatred on the basis of differences of social class, race, religion, sect or region") was also amended by the first reform package. The notion of incitement "in a manner that may be detrimental to public order" was added as an element of the offence. This amendment served to narrow the scope of Article 312 by rendering the act of "fomenting enmity and hatred" insufficient alone to punish a person accused of committing the offence defined in the article. Only a person "who has openly fomented enmity or hatred among the public based on differences between social classes, races, sects or regions in a manner that could be detrimental to public order" can now be punished under the revised Article 312. Additionally, the revised law introduced "insulting a segment of the population or people's honour" as a new offence.

Amendments to the Anti-Terror Law (ATL)

The first reform package narrowed the scope of Article 7 of the Anti-Terror Law as compared to the previous law by emphasising that not all terror-related propaganda constitutes a crime, but only that which actually encourages people to use terrorist methods. After the words "those who have spread terror-related propaganda," the words "in a manner encouraging people to resort to terrorist methods" were inserted. By this amendment, propaganda for illegal organisations can only now be punishable under Article 7 if done in a manner that incites the use of "terrorist" methods.

[1] In the second amendment to Article 159, of August 2002 (as part of the third reform package), the scope of the provision was amended so that criticism of the state could no longer be subject to penalty unless such expression could be said to be intended to "insult" or "deride" state institutions. A third amendment to Article 159 of August 2003 (as part of the seventh reform package) decreased the minimum sanction for crimes under article 159 from “one year” to “six months”. The August 2003 amendment also sought to introduce a clear distinction between criticism and insult /derision/curse in order to eliminate deficiencies which were present in the implementation, in spite of the previous amendments.

The first reform package also amended Article 8 of the Anti-Terror Law, but in such a way as to limit freedom of thought rather than broaden its scope. During parliamentary debates that preceded enactment of the first reform package, it was suggested that propaganda, as defined in Article 8, should be deemed to constitute a crime only if "it was spread in a manner encouraging people to resort to terrorist methods". However, this proposal was not accepted and "spreading of propaganda in a manner encouraging people to resort to terrorist methods" was instead defined as a matter of aggravation. In this way, the scope of the offence was actually extended. Further, the first reform package rendered separatist propaganda punishable under Article 8 if advocated through visual means, rather than limiting the offence to written or verbal propaganda as previously defined.[2] In this way, the scope of the offence under Article 8 was further extended by the first reform package.[3]

Amendments to the Law on Establishment and Trial Procedures of the State Security Courts and Amendments to the Code of Criminal Procedure

The first reform package reduced the maximum length of police and gendarmerie detention before detainees must be brought before a judge to four days. An exception was provided for in respect of provinces under a State of Emergency, where the four-day period could be extended to seven days upon the request of a prosecutor and decision of a judge.

An amendment to Articles 107 and 128 of the Code of Criminal Procedure ("CCP") required that relatives of detainees be informed of the arrest of their family member, or a decision to extend the period of their custody, 'without delay' and 'by decision of the prosecutor'.

The first reform package also amended Article 16 of the Law on the Establishment and Trial Procedures of the State Security Courts so as to reduce the length of incommunicado detention, that is when the detainee has no contact with people from the outside world such as relatives and lawyers, for persons suspected of offences within the scope of the State Security Court. Previously, detainees suspected of SSC offences could only see a lawyer after four days. Following the amendment introduced by the first reform package, detainees falling under the scope of the SSCs were afforded the right of access to a lawyer and relatives after 48 hours in detention.

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[2] The former text of Article 8 read as follows: "*Spreading of written or verbal propaganda and organizing meetings, demonstrations and marches aimed at destroying the indivisible unity between the State of the Republic of Turkey and its territory and nation is hereby prohibited. Any person, who has spread such propaganda or organized such meetings shall be sentenced to imprisonment ranging from one year to three years and a heavy fine of.......... The punishment shall be increased by a third should the crime be perpetrated in a manner encouraging people into resorting terrorist methods.*" The new text of Article 8 after the amendment read as follows: "*Any person, who has spread written, verbal or visual propaganda or organized a meeting, demonstration or march in an effort to destroy the indivisible unity between the State of the Republic of Turkey and its territory and nation, shall be sentenced to imprisonment ranging from one year to three years and a heavy fine ranging between one billion Turkish liras and three billion Turkish liras unless they act warrant a heavier punishment. The punishment shall be increased by a third should the crime be perpetrated in a manner encouraging people into resorting terrorist methods.*"

[3] Article 8 of the Anti-Terror Law was subsequently abolished by the sixth reform package (Law No. 4928) adopted on 10 July 2003.

Second Reform Package: Law No. 4748

On 26 March 2002, the Turkish Grand National Assembly adopted Law No. 4748 to further adjust Turkish laws to the constitutional amendments of October 2001. The second reform package amended the Provincial Administration Law, the Press Law, the Civil Servants Law, the Political Parties Law, the Associations Law, the Law on Meetings, Demonstrations and Marches, as well as the law on Establishment and Responsibilities of the Gendarmerie Command. Whilst several of the reforms were important in their own right, the only reform of note for the purposes of the present report was an amendment to Article 13 of the Civil Servants Law. Following the amendment, this now stipulates that where, following a judgment of the European Court of Human Rights ("ECtHR"), a civil servant is found to have been responsible for torture or inhuman or degrading treatment, that civil servant may be held personally liable for the payment of any compensation that is awarded by the ECtHR.

Third Reform Package: Law No. 4771

On 3 August 2002, the Turkish Parliament formally approved a third package of key democratic reforms. More comprehensive than the first two packages and covering more "sensitive" issues, this package amended the laws providing for the death penalty (the Turkish Penal Code, the Law on Prohibition and Prosecution of Smuggling, the Forestry Law, the Juvenile Courts Law, the Law on Execution of Punishments), the Turkish Penal Code, the Associations Law, the Law on Meetings, Demonstrations and Marches, the Foundations Law, the Code of Civil Procedure, the Code of Criminal Procedure, the Law on Establishment and Broadcasts of Radio and Television Stations, the Press Law, the Law on Responsibilities and Powers of the Police, the Law on Learning and Teaching Foreign Languages and the Free Zones Law.

Whilst Law No. 4771 introduced several important reforms such as the possibility of television and radio broadcasting in the Kurdish language, the possibility for Kurdish dialects to be taught in special courses at private schools and the easing of restrictions on public demonstrations and association, two reforms are of particular note for the purposes of the present report, namely an amendment to the laws providing for the death penalty and an amendment to Article 159 of the Turkish Penal Code.

Amendment to laws providing for the Death Penalty

Article 1 of the third reform package introduced an end to the death penalty in peacetime and replaced it with sentences of life imprisonment without the possibility of parole. Capital punishment, however, remains on the statute books for "crimes perpetrated during a war or under circumstances indicating that there is an imminent war".

Amendments to the Turkish Penal Code (TPC)

The third reform package introduced a second amendment to Article 159 of the Turkish Penal Code, which intended to bring an end to penalties for written, vocal or

pictorial criticism (as opposed to insult) of state institutions, including the armed forces. According to the new text of Article 159, "Written, oral or visual expressions of thought made only for criticism, without the intention to insult or deride the bodies or institutions listed in the first paragraph do not require a penalty."

The period January-October 2003 saw the Turkish government adopt four further sets of implementing legislation. The fourth, fifth, sixth and seventh reform packages, adopted in January, February, July and August 2003 in Laws No. 4778, 4793, 4928 and 4963 respectively provided for yet further modifications to various provisions of Turkish legislation in an effort to meet European Union Accession standards.

Fourth Reform Package: Law No. 4778

The government's fourth reform package was approved by the President on 10 January and entered into force on 11 January 2003. The package introduced amendments to the Turkish Penal Code, Code of Criminal Procedures, Foundations Law, Press Law, Stamp Tax Law, Political Parties Law, Law on the Election of Parliamentarians, Associations Law, Law on the Use of the Right to Petition, Criminal Records Law, Law Decree on Additional Measures during the Emergency Rule, Law on the Trial of Civil Servants and other Public Officials and the Civil Code. Some articles were cancelled in the Law on the Establishment and Judicial Procedures of Children's Courts, Law on the Establishment and Judicial Procedures of the State Security Courts, Associations Law, and Criminal Records Law, Legal Procedures Law and High Education Law.

The reform package included a number of important provisions but perhaps most notably for the purposes of the present report, detainees other than those detained for offences under the remit of the State Security Courts were given the right to meet with a lawyer immediately after being detained. Other reforms of relevance to the present report were as follows: sentences for the crimes of torture and ill-treatment could no longer be converted to fines, suspensions on probation or postponement; the requirement to secure permission from the relevant senior official in order to proceed with investigation and prosecution of an official accused of acts of torture or ill-treatment was lifted; and medical examinations of prisoners on being transferred to and from prison were made obligatory.

Fifth Reform Package: Law No. 4793

The fifth reform package came into effect on 4 February 2003. It opened the way for re-trials for those persons whom the European Court of Human Rights ("ECtHR") ruled had suffered a violation of the European Convention of Human Rights as a result of a court judgment in Turkey.[4] In order to be eligible for a re-trial, an applicant must apply to the court where he was tried within 12 months of the judgment of the European Court. However, even following the provisions of the new package, around 1000 defendants are

[4] This reform built upon an earlier reform introduced as part of the third reform package in August 2002 that opened the way for the possibility of retrials to take place only in respect of future decisions of the European Court where the application to the European Court was made after August 2003.

not able to apply for a re-trial (including PKK leader Öcalan), as the definition of those eligible to apply leaves out those cases where the ECtHR judgements had not been issued at the publication date of the new law.

Sixth Reform Package: Law No. 4928

The sixth reform package entered into force on 10 July 2003. The package amended various articles of the Turkish Penal Code, the Law on Basic Provisions of Elections, the Law on Population, the Law on Administrative Trial Procedures, the Law on State Security Courts, the Law on Public Works, the Law on Cinema, Video and Music Works and the Law on Broadcast. The sixth reform package provided for two particularly important reforms to the Turkish justice system.

Amendments to Law on State Security Courts (SSCs)

Article 7 of the package amended the Law on State Security Courts by abrogating Paragraph 1 of Article 31 of the Law on amendment of some articles of the Law on Criminal Procedures and the Law on State Security Courts. That article, in force since 1992, had introduced special criminal procedure rules (mainly related to interrogation, detention, access to legal counsel etc) in the State Security Courts. The July 2003 reform extended normal criminal procedures to cases dealt with by the SSCs, thus re-instating a return to procedural normality.

Amendments to Anti-Terror Law (ATL)

A further important development brought about by the sixth reform package was the abrogation of Article 8 of the Anti-Terror Law (regarding propaganda against the indivisibility of the State). Some commentators hailed this reform as a positive attempt to re-examine the issue of terrorism by identifying a more articulated approach to the question of what could be considered terrorism. Others pointed out however that various other articles, including Article 312 of the Turkish Penal Code, would still cover the offence of propaganda against the integrity of the state.

Other relevant provisions

Other relevant provisions of the sixth reform package were Article 2 which foresaw that prosecutions under abrogated articles be revoked or, if pending in higher courts, be re-sent for final judgment to the Court; and Article 6 that amended the Law on Administrative Trial Procedures so as to extend the possibility of re-trial in cases involving civil law judgments which were considered by the European Court to be in violation of the European Convention on Human Rights.

Seventh Reform Package: Law No. 4963

The seventh reform package was approved by the TGNA on 30 July 2003, approved by the President on 6 August and published in the Official Gazette on 7 August.

This latest package has tackled a number of very important issues ranging from freedom of expression, freedom of association and peaceful demonstration, respect for cultural rights, expansion of basic freedoms, fight against torture, control of civilians over the military and civilianisation of the State.

Amendments to the Turkish Penal Code (TPC)

Article 1 of the seventh reform package provided for a further amendment to Article 159 of the Turkish Penal Code. It decreased the minimum sanction for crimes under Article 159 from "one year" to "six months". The amendments brought to the last paragraph of Article 159 introduced a distinction between criticism and insult/derision/curse that was aimed at eliminating deficiencies still present in the implementation, in spite of the previous amendments. This could be seen as a limited improvement in the framework of what is still a generally restrictive article. It offers more space to defendants and opens the door to more articulated interpretations by the judiciary.

Article 2 of the seventh reform package provided for an amendment to Article 169 of the Turkish Penal Code ("aiding and abetting an illegal organization"). The excessively vague expression "facilitates their actions in any manner whatsoever" in Article 169 was deleted, thus eliminating an ambiguous formulation that could be applied to a very broad range of actions. This was a positive step from the legislative point of view, particularly since, as the EU stated in its 2002 progress report, this article has been used in curbing freedom of thought and expression and has been extensively used as a replacement article for Article 312 of the Turkish Penal Code and Article 8 of the Anti-Terror Law. The impact of the amendment on judicial practice will need to be monitored.

Article 3 of the seventh reform package amended Article 426 of the Turkish Penal Code so as to exclude scientific and artistic works from the list of publications and works against moral principles. This was a positive step, recognising the independence of science and art from moral judgments subject to legal sanctions.

Article 4 of the seventh reform package amended Article 427 of the Turkish Penal Code by replacing destruction with confiscation, for publications considered "hurting people's feelings or provoking and exploiting their sexual desires". This was symbolically an historical step, eliminating practices, which seem more appropriate to non-democratic cultures. The amendment could have positive implications in terms of the possibility for publishers to re-distribute confiscated issues, in case of favourable sentence. However, the expression "hurting people's feelings" is still ambiguous and could leave space for crimes of thought.

Amendments to the Code of Criminal Procedure (CCP)

The amendment brought to Article 7 of the Code of Criminal Procedure by Article 5 of the seventh reform package represents significant progress. According to

this amendment, cases involving the investigation and prosecution of individuals suspected of committing acts of torture and maltreatment must be considered as a priority and dealt with as a matter of urgency without delay. Unless absolutely necessary, hearings in such cases may not be adjourned for more than thirty days and such hearings will also be held during the judicial recess. The aim of this amendment is to ensure the speedy conclusion of the investigation and prosecution of cases of torture and maltreatment in line with EU requirements.

Amendment to the Law on the Establishment and Trial Procedures of Military Courts

Article 6 of the seventh reform package amended Article 11 of the Law on the Establishment and Trial Procedures of Military Courts so as to restrict the application of the Military Penal Code to civilians in the case of crimes of "inciting soldiers against the law" and "inciting people against the army" committed in times of peace.

Amendment to the Law on the Establishment, Duties and Trial Procedures of Juvenile Courts

Article 8 of the seventh reform package amended Article 6 of the Law on the Establishment, Duties and Trial Procedures of Juvenile Courts so as to increase from 15 to 18 the minimum age needed for being tried in ordinary courts. This reform brings Turkey in line with the UN Convention on the Rights of the Child, which states that every individual who has not completed 18 years of age is to be considered a "child." Article 35 of the reform package provides that the cases relating to offences committed by children under the age of 18 shall be tried in juvenile courts. We note that in the draft Turkish Penal Code (version 27 March 2003) a distinction is made between "minors" and "children" without these terms being defined.

Amendments to the Anti-Terror Law (ATL)

Article 30 of the seventh reform package amended Article 7 of the Anti-Terror Law so as to stipulate that those who provide assistance to "terrorist group members or hold activities encouraging people to commit acts of terrorism and acts of violence" shall be sentenced to imprisonment from 1 to 5 years or fined. The amounts of fines were significantly increased. This amendment has been criticised as reintroducing the concept of 'assistance to terrorist groups,' that was amended in Article 2 of this (7th) package, as well as the concept of crimes of thought.

III – THE JURISDICTION OF THE COURTS

According to Article 142 of the Constitution, "the organisation, functions and jurisdiction of the courts, their functioning and trial procedures shall be prescribed by law." The court system in Turkey may be viewed as being comprised of five sections: the Constitutional Court, the Court of Jurisdictional Disputes, the General Courts (which include the High Court of Appeals as a court of last instance and various specialised and general courts of first instance, both criminal and civil), the Administrative Courts (which include the Council of State as a court of last instance, Regional Administrative Courts as a second instance and first instance Administrative Courts and Tax Courts) and Military Courts (which include a Military High Court of Appeals, Military courts of first instance and a High Military Administrative Court of Appeals).[5]

The Constitutional Court (Anayasa Mahkemsi)

Articles 146 to 155 of the Constitution establish a Constitutional Court that has a primus inter pares place among the higher courts of the judiciary. It consists of eleven regular and four substitute members. The President of the Republic is charged with appointing two regular and two substitute members from the High Court of Appeals, two regular and one substitute member from the Council of State, and one member each from the Military High Court of Appeals, the High Military Administrative Court and the Audit Court. The President of the Republic also appoints one member from the teaching staff of the higher education institutions and three members and one substitute member from among senior administrative officers and lawyers (Article 146).[6]

According to Article 148 of the Constitution, the Constitutional Court examines the constitutionality of laws, decrees having the force of law and rules of procedure of the Grand National Assembly. Article 150 of the Constitution provides that it may undertake such an examination at the request of either the President of the Republic or one-fifth of the members of the Turkish Grand National Assembly. Further, according to Article 152 of the Constitution, if a court trying a case finds that a law or a decree having force of law which is to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue.[7]

The Constitutional Court, in its capacity as the Supreme Court, also has exclusive jurisdiction to try the President of the Republic, members of the Council of Ministers and members of the judiciary for offences relating to their official functions (Article 148).[8]

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[5] Information Note on the Turkish Judicial System, Ministry of Justice, 4 July 2003, p. 1.

[6] "Quality and Justice in Turkey" by Oguz Onaran and Koray Karasu, paper produced as part of the GROTIUS project "Assessing Quality of Justice in Europe", 2001-2003, para. 1.5.5.

[7] Report on the Independence of Judges and Lawyers in Turkey, International Commission of Jurists, 14-25 November 1999, p.67.

[8] *ibid* p.68.

Any challenge to the constitutionality of a law must be made within sixty days of its promulgation (Article 151). Decisions of the Constitutional Court require the vote of an absolute majority of its members, with the exception of decisions to annul a constitutional amendment, that require a two-thirds majority (Article 149). Decisions of the Constitutional Court on the constitutionality of legislation and government decrees are final (Article 153).[9]

We note that, according to Article 148 of the Constitution, "no action shall be brought before the Constitutional Court alleging the unconstitutionality as to the form or substance of decrees having the force of law, issued during a state of emergency". We can see no legitimate justification for this restriction upon the right to challenge the constitutionality of decrees having the force of law.

We recommend that the Constitution be amended so as to permit the constitutionality of decrees issued under a state of emergency, martial law, or in time of war to be challenged before the Constitutional Court.

The Court of Jurisdictional Disputes (Uyusmazlik Mahkemesi)

Pursuant to Article 158 of the Constitution, the Court of Jurisdictional Disputes is empowered to determine disputes between general courts of law, and administrative and military courts concerning competence and venue.[10] The Court is composed of members appointed by the High Council of Judges and Public Prosecutors from among the candidates nominated by the Council of State and Court of Cassation and members appointed by the President of the Republic from among the candidates nominated by the Military Court of Cassation and the High Military Administrative Court.[11] In total the Court is composed of one president and six other judges.[12]

The General Courts

The High Court of Appeals (Yargitay)

Established by virtue of Article 154 of the Constitution, the High Court of Appeals (also known as Court of Cassation) is the only competent authority for reviewing decisions and verdicts of lower level judicial courts, both civil and criminal, including the State Security Courts (Article 143). Turkey has no intermediate appellate court as is common in many jurisdictions. With just a few exceptions, all decisions of the general courts may be appealed to the High Court of Appeals. The Court reviews the decisions and judgements given by courts of justice from the perspective of conformity with the

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[9] *ibid.*
[10] Information Note on the Turkish Judicial System, Ministry of Justice, 4 July 2003, p. 3.
[11] "Quality and Justice in Turkey" by Oguz Onaran and Koray Karasu, paper produced as part of the GROTIUS project "Assessing Quality of Justice in Europe", 2001-2003, para. 1.5.4.
[12] Report of the European Commission's 2000 Justice and Home Affairs Mission to Turkey, 18-29 September 2000, p. 64.

law, so as to ensure a unity of legal practice and to enlighten the interpretation of provisions of legal codes. The High Court of Appeals also has both original and final jurisdiction in specific cases defined by law (i.e. trials of certain high-ranking civil servants such as governors and ambassadors).[13]

The High Court of Appeals is not a single court; rather, it is divided into thirty-two civil and criminal chambers that function independently of each other. There are 21 civil and 11 criminal chambers. Each chamber has its own caseload. The quorum for a meeting of a chamber is five judges, the president of the chamber and four member-judges. Judgments are taken on the basis of majority decisions.[14]

Judgments of the High Court of Appeals are not legally binding upon the inferior courts, however, in practice, the lower courts generally follow them. This is partly due to the fact that judges of inferior courts respect decisions made by the High Court of Appeals and partly due to the fact that the High Court of Appeals, in considering the professional advancement of judges, evaluates the decisions of the judges of the inferior courts.[15]

All presidents and judge members of civil chambers form a Plenary Civil Bench, and all presidents and judge members of criminal chambers constitute a Plenary Criminal Bench. The Plenary Benches conclude appellate review of the lower court's judgement, if the lower court does not comply with the chamber's decision, instead persisting in its own decision.[16]

Members of the High Court of Appeals are appointed by the High Council of Judges and Public Prosecutors from among first grade judges and public prosecutors of the ordinary civil and criminal courts (Article 154). The First President, first deputy presidents and heads of division are elected by a Plenary Assembly of the High Court of Appeals from among its own members, for a term of four years. They may be re-elected at the end of their term of office.[17]

We note that a draft law to introduce Regional Courts of Appeals as a second instance between the first instance courts and the High Court of Appeals is in the agenda of the Parliament.[18] We assess the potential impact of the establishment of such a court in chapter VIII.

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[13] *ibid* p.69.
[14] Report of the European Commission's 2000 Justice and Home Affairs Mission to Turkey, 18-29 September 2000, p. 62.
[15] "Quality and Justice in Turkey" by Oguz Onaran and Koray Karasu, paper produced as part of the GROTIUS project "Assessing Quality of Justice in Europe", 2001-2003, para. 1.5.3.
[16] Report of the European Commission's 2000 Justice and Home Affairs Mission to Turkey, 18-29 September 2000, p. 62
[17] Report on the Independence of Judges and Lawyers in Turkey, International Commission of Jurists, 14-25 November 1999, p.69.
[18] Information Note on the Turkish Judicial System, Ministry of Justice, 4 July 2003, p. 3.

First Instance Courts

First instance courts within the general court system may be sub-divided into "general" and "specialised" courts of first instance. Both categories of first instance courts may be further sub-divided into criminal and civil courts of first instance.

Regarding the general courts of first instance, criminal courts of original jurisdiction consist of Justice of the Peace Courts (*Sulh Ceza Mahkemeleri*), Courts of General Criminal Jurisdiction (*Asliye Ceza Mahkemeleri*), and Heavy Penal Courts (*Agur Ceza Mahkemeleri*). Justice of the Peace Courts are comprised of a single judge and have jurisdiction over minor offences. They also have responsibility for matters pertaining to criminal investigations, such as the issuing of search warrants, and for matter relating to pre-trial detention. Courts of General Criminal Jurisdiction also have one judge, are generally located in the capitals of sub-provinces (ilce) and have jurisdiction over all criminal cases not specifically indicated by law as being subject to the jurisdiction of the Justice of the Peace Courts or the Heavy Penal Courts. Heavy Penal Courts are composed of three judges, one of whom is the president, and are located in the provincial capitals (il). They have jurisdiction over serious crimes carrying sentences of heavy imprisonment and imprisonment for ten years or more. Civil courts of original jurisdiction consist of Civil Courts of Peace that try disputes involving not more than 400 million Turkish liras and General Civil Courts that try disputes involving more than 400 million Turkish lira.

In addition to the general courts, Turkey also has a system of specialised courts of first instance, both civil and criminal. These courts are specially authorised to try particular categories of disputes. Thus, specialised courts of civil jurisdiction include Land Registration Courts, Labour Courts, Intellectual and Industrial Property Rights Courts, Commercial Courts and Family Courts. Specialised courts of criminal jurisdiction include State Security Courts, Juvenile Courts, Enforcement Courts and Traffic Courts.

Juvenile Courts

There are presently a total of 8 juvenile courts throughout Turkey.[19] The courts deal with all criminal proceedings in respect of juveniles. In provinces where juvenile courts do not exist, juveniles continue to be tried by ordinary courts. In such cases, the special procedural rules applied in juvenile courts are applicable.

The seventh reform package (Law No. 4963), adopted on 7 August 2003, amended Article 6 of the Law on the Establishment, Duties and Trial Procedures of Juvenile Courts so as to increase from 15 to 18 the minimum age needed for being tried in ordinary courts. The competence of juvenile courts therefore now covers all juveniles between the ages of 11 and 18. The Juvenile Court is competent to try juveniles for

[19] Juvenile courts are located in Istanbul (2), Ankara (2), Izmir, Trabzon, Diyarbakir and Kocaeli. A third juvenile court has been established in Istanbul but its members had not been appointed at the date of the visit.

offences that would normally be considered to fall within the jurisdiction of the State Security Courts. Trials of children under the age of 15 must be conducted in closed session and all persons under 18 must be appointed a lawyer.

Each court comprises three judges, one of whom is the President. Judges must be married and have children of their own and the panel must comprise both male and female judges.

Family Courts

The Law on the Establishment of Family Courts was adopted on 18 January 2003 and family courts have been operating in Turkey since July 2003. According to statistics provided to the Mission by the Ministry of Justice, 63 family courts are currently operational in Turkey, and a further 51 are planned. The law foresees the eventual establishment of family courts in all towns with a population of more than 100,000 in all 81 provinces. Where family courts do not presently exist, the general civil courts deal with family issues.

The family courts deal with cases concerning the protection of the financial entity of the family, fulfilment of financial obligations resulting from marriage, placement of poor members of families in social homes, protection of children, fulfilment of obligations regarding allowances for children, placement of deserted children in relevant institutions, management and protection of the property of children and protection of physically or mentally disabled children.

Family courts are comprised of a single judge. In order to be appointed to a family court, a judge must be older than 30 years of age and be married with children.

State Security Courts

The jurisdiction, responsibilities and functioning of the State Security Courts is addressed in detail in Chapter IV.

Administrative Courts

The Council of State

According to Article 155 of the Constitution, the Council of State is the final instance for reviewing decisions and judgments given by lower administrative courts. In other words it acts as an appellate court in respect of judgments of first and second instance administrative courts. The Council of State also has jurisdiction to consider original administrative disputes in cases specified in law,[20] and, if requested, give its opinions on draft legislation submitted by the Prime Minister and Council of Ministers,

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[20] The actions which can be brought before the Council, as a first degree court, are actions for annulment and actions for damages against: decision of the Council of Ministers, joint decrees, decision of the Prime Minister, regulatory acts and measures of the Ministries etc. *ibid.*

examine draft regulations and the conditions and contracts under which concessions are granted (Article 155). The Council of State therefore has both a judicial and an administrative function.[21]

The Council of State is composed of twelve chambers, ten of which function as judicial chambers and two of which function as administrative chambers. Each chamber convenes with five justices and renders its judgments by a majority. The personnel of the Council of State also include prosecutors, similar to the French "Commissaire de Gouvernement," and reporter judges.[22]

Three-fourths of the judges of the Council of State are appointed by the High Council of Judges and Public Prosecutors from among first grade administrative judges and public prosecutors. The remaining one-fourth of the member judges are appointed by the President of the Republic from among qualified bureaucrats or academicians. The President, Chief Public Prosecutor, deputy president, and heads of division of the Council of State are elected by a Plenary Assembly of the Council of State from among its own members for a term of four years. They may be re-elected at the end of their term of office (Article 155).[23]

Regional Administrative Courts

Regional Administrative Courts were established by virtue of Law No.2576 on the Establishment and Functions of the Regional Administrative Courts, Administrative Courts and Tax Courts. According to Article 4 of Law No. 2576, each court sits in a committee of three judges, one being the president. Regional Administrative Courts function as courts of conflicts at the regional level and solve problems of competence and venue. In addition, the Regional Administrative Courts act an appellate court for judgments rendered by single judge first instance administrative courts and tax courts.

First Instance Administrative Courts

Single judge first instance administrative courts have jurisdiction to hear all applications for judicial review of actions and acts of the administration, except those that are tried by the Council of State as a first instance court.

Tax Courts

Tax courts hear cases whose subject matter concerns taxes, tolls, charges and tariffs relating to either the general budget or the local administration.

Article 125 of the Turkish Constitution states that Administrative Courts are competent to review all acts and actions of the administration. However, this provision is

[21] Report on the Independence of Judges and Lawyers in Turkey, International Commission of Jurists, 14-25 November 1999, p.70.
[22] "Quality and Justice in Turkey" by Oguz Onaran and Koray Karasu, paper produced as part of the GROTIUS project "Assessing Quality of Justice in Europe", 2001-2003, para. 1.5.2.
[23] *ibid.*

contradicted elsewhere in the Constitution in so far as there is provision for four instances where it is not possible to subject certain administrative actions and decisions to judicial supervision.[24] In this regard, Article 105/2 of the Constitution regarding presidential accountability provides:

> *"No appeal shall be made to any legal authority, including the Constitutional Court, against the decisions and orders signed by the President of the Republic on his or her own initiative."*

Article 125/2 of the Constitution regarding the availability of recourse to judicial review provides:

> *"The acts of the President of the Republic on his or her own competence, and the decisions of the Supreme Military Council are outside the scope of judicial review."*

Article 129/3 of the Constitution relating to disciplinary proceedings against public servants provides:

> *"Disciplinary decisions shall be subject to judicial review, with the exception of warnings and reprimands".*

Article 159/4 of the Constitution regarding the High Council of Judges and Public Prosecutors provides:

> *"There shall be no appeal to any judicial instance against the decisions of the Council."*

We consider that one of the principle conditions of the rule of law is that all administrative actions and decisions must be subject to judicial supervision. The exclusion of certain administrative actions and decisions from judicial supervision is not in conformity with the principle of the rule of law.

We recommend that Articles 105/2, 125/2, 129/3 and 159/4 of the Constitution be amended so as to make it possible to appeal against the lawfulness of the decisions mentioned in the Articles where the decisions concern the determination of a criminal charge or a civil right or obligation.

Military Courts

Military High Court of Appeals

Established by Article 156 of the Constitution, the Military High Court of Appeals is the last instance for reviewing decisions and judgments issued by military

[24] *ibid.* See also speech made by President of the High Court of Appeals, Mr. Eraslan Ozkaya at the opening of the judicial year 2003-2003 on 8 September 2003.

courts of first instance. Members of the Military High Court of Appeals are appointed by the President of the Republic from among three candidates nominated for each vacant office by a Plenary Assembly of the Military High Court of Appeals from among first grade military judges who have at least a rank of lieutenant colonel. The President, Chief Public Prosecutor, second presidents and heads of division of the Military High Court of Appeals are appointed according to rank and seniority from among the members of the Military High Court of Appeals. Decisions of the court are final.

Military Courts of First Instance

Military courts of first instance are organised by the Ministry of National Defence and contain two judges and one regional commissioned officer of the military. The regional commissioned officer takes a place in the council of the court to inform the judges about the peculiarities of the region. Military courts are entitled to try military personnel for military offences, for offences committed by them against military personnel, or in military areas, or in connection with military services and duties. Decision of the military courts of first instance may be appealed to the Military High Court of Appeals.

Until recently, military courts were competent to try civilians for a number of criminal offences as defined in the provisions of Article 11 of Law No. 353 on the Establishment and Proceedings of Military Courts.[25] However, on 7 August 2003, Article 6 of the seventh reform package amended Article 11 of the Law on the Establishment and Trial Procedures of Military Courts so as to provide that where offences such as "inciting soldiers to mutiny or disobey", "discouraging the public from military duty" or "undermining national resistance" are committed by civilians in times of peace, these cases must be tried in civilian courts. This amendment has served to narrow the jurisdiction of military courts in respect of civilians.

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[25] Article 11 of Act. No. 353 on the Establishment and Proceedings of Military Courts provided that civilians charged with the following offences could be tried in military courts: discouraging the public from undertaking compulsory military service, military espionage, offences related to avoiding military service (i.e. new conscripts charged with desertion due to absence at the 1st muster, etc.), intentionally damaging military vehicles, encouraging soldiers to disobey their commanders; physically or verbally attacking, or using force or threatening to use force either to force military personnel to carry out their duties, or to prevent them from carrying out their duty, off-limits military zones of patrols, patrol stations, barracks, headquarters, military institutions, and buildings and areas used as residences or accommodation; the assault and battery, or use of force against, or resistance to soldiers on sentry or on patrol, and at patrol stations, soldiers carrying out duties as military police, on military traffic duty, or carrying out security, rescue or assistance duties (with the exception of gendarmerie officers, non-commissioned officers, and privates carrying out preventative or judicial police duties related to the protection of public security and order.) (Submissions by Turkey concerning the judiciary to Sub-Committee No. 8, 20-21 March 2002, p.9).

We welcome the decision of the Turkish Parliament to limit the competency of the Turkish military courts to try civilians.

High Military Administrative Court of Appeals

According to Article 157 of the Turkish Constitution, the High Military Administrative Court of Appeals is the first and last instance for the judicial supervision of disputes arising from administrative acts involving military personnel or relating to military service. The High Military Administrative Court has a complex structure that includes the judges appointed by the President of the Republic from among the candidates nominated by the Chief of General Staff and from among the candidates nominated by the members of the court. Judgments rendered by the court cannot be appealed; however the losing party may move for reconsideration by the same chamber.[26]

[26] T. Ansay, D. Wallace Jr: Introduction to Turkish Law, p.16 and 17 (Kluwer Law International, 1996)

IV – STATE SECURITY COURTS

A. Introduction

In addition to general criminal and civil courts, Turkey also has a system of specialised courts of first instance, both civil and criminal. Of the specialised criminal courts of first instance, the jurisdiction, powers, responsibilities and functioning of the State Security Courts (SSCs) (*Devlet Guvenlik Mahkemesi*) deserve particular attention in the context of compatibility with EU norms regarding the functioning of the judicial system.

B. Establishment and functioning of the SSCs

SSCs were first introduced in Turkey in 1973 in accordance with the constitution in existence at that time.[27] The Constitutional Court annulled that law in 1976, ending the SSC jurisdiction for a time. Following the 1982 military takeover, however, a new constitution was promulgated in which the SSC system was reinstated. The current constitution provides for SSCs in Article 143, which describes them as special courts:

> "[E]stablished to deal with offences against the indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the State."[28]

Provisions relating to the functioning, duties, jurisdiction and trial procedures of the SSCs are prescribed by Law No. 2845 on the Establishment and Prosecution Procedures of State Security Courts, adopted on 16 June 1983.

SSCs are concerned solely with the adjudication of political and serious criminal cases deemed threatening to the security of the state. Most of the offences tried relate to the use of violence, drugs smuggling, membership of illegal organisations, or espousing or disseminating prohibited ideas. As such, SSCs predominantly adjudicate upon cases under the Anti-Terror Law and Article 312 of the Turkish Penal Code (incitement to racial or ethnic enmity). They are also responsible for determining prosecutions brought under Articles 125-139, 146-157, 161, 168, 169, 171, 172, and 174 of the Penal Code. Recent legislative amendments have served to reduce the number of crimes within the jurisdiction of the SSCs.

SSCs sit in eight cities across Turkey.[29] Some cities have more than one SSC. For example in Istanbul there are six SSCs. Each court comprises a president, two regular members and one substitute who are appointed by the High Council of Judges and

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[27] See law number 1773 (1973) in accordance with Article 136 of the 1962 Turkish Constitution.

[28] Turkish Constitution, Article 143.

[29] There are SSCs in Ankara, Istanbul, Diyarbakir, Adana, Konya, Trabzon and Van.

Public Prosecutors (Article 143). On 18 June 1999, the Turkish Parliament amended Article 143 of the Constitution, so as to exclude military judges from SSCs. In light of this amendment, all members of the judicial panel are now appointed from the civilian judiciary. All SSC members are appointed for a period of four years, although upon expiry of this period they may be re-appointed (Article 143).

The competent authority to examine appeals against decisions of the SSCs is the High Court of Appeals (Article 143).

C. Reforms regarding the functioning of the SSCs

The operation of the SSCs has been modified considerably in recent years following the adoption of a number of legislative amendments, notably to the Law on the Establishment and Prosecution Procedures of State Security Courts and the Law on the Fight Against Criminal Organisations. These amendments have resulted in the removal of military judges, a reduction in the number of crimes within the court's jurisdiction and a harmonisation of procedures as between the SSCs and the general criminal courts.

1. Removal of military judges from SSCs

Prior to June 1999, SSC panels consisted of two civilian judges and one military judge. The presence of a military officer, exercising jurisdiction over civilians appearing before the court, had, since the court's inception, been a target for sustained criticism from both internal and international bodies. Such criticism focused upon the fact that the presence of a military judge on the SSC panel was contrary to the fundamental requirement of an independent and impartial tribunal.

Concerns in this regard centred firstly on the manner and term of appointment for military judges. Military judges, even while sitting on a SSC, remained under the oversight of their military superiors.[30] A special committee of military members appointed them to a four-year term on the Court and their re-appointment depended upon the committee's evaluation of the judge's performance and ability during that term.[31] At the same time, the Ministers of Justice and Defence were responsible for determining the aptitude of the military judges for advancement in rank and salary.[32] This evaluation and appointment process gave rise to the potential for a clear conflict of interest. Put simply, it might be a rare military judge who, faced with the prospect of re-evaluation and re-appointment every four years, would not have felt the pressure of those superior officers responsible for his evaluation. Strong concerns were also voiced that the independence

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[30] Pursuant to the Military Legal Service Act, Law No. 357, Sections 18,29 and 38.

[31] The Military Legal Services Act, Law No. 357, Additional Section 8 (translated in *Incal v. Turkey* (ECHR, 41/1997/825/1031), Judgment 9 June 1998: "Members of the National Security Courts belonging to the Military Legal Service shall be appointed by a committee composed of the personnel director and legal advisor of the General Staff, the personnel director and legal advisor attached to the staff of the arm to which the person concerned is serving and the Director of Military Judicial Affairs at the Ministry of Defence."

[32] Pursuant to the Military Legal Service Act, Law No. 357, Additional section 7 (translated in *Incal v. Turkey* (ECHR, 41/1997/825/1031), Judgment 9 June 1998.

of the court was threatened by the Turkish military's central role in both law enforcement and politics.

Both the European Commission on Human Rights and the European Court of Human Rights found that the presence of a military judge on the SSC panel violated the principle of the independence and impartiality of the judiciary as safeguarded by Article 6(1) of the European Convention.[33] The Court based its reasoning on the fact that military judges were servicemen who still belonged to the army, which in turn took its orders from the executive. They remained subject to military discipline whilst exercising a judicial function and decisions pertaining to their appointment were to a great extent taken by the administrative authorities and the army.

By Law No. 4388, which was adopted by Parliament on 18 June 1999 and came into force following its publication in the Official Gazette on the same day, Article 143 of the Constitution was amended so as to remove military judges from the SSCs. Parallel amendments to Law No. 2845 on the Establishment and Prosecution Procedures of State Security Courts were made by Law No. 4390, which was adopted by Parliament on 22 June 1999 and came into force on the same day. Since this enactment, all members of the SSCs have been appointed from among the civilian judiciary.[34]

We welcome the decision of the Turkish Parliament of 18 June 1999 to amend Article 143 of the Constitution so as to exclude military judges from all SSCs in order to comply with the judgements of the European Court.

2. *Reforms to the jurisdiction of SSCs*

The number of crimes under the jurisdiction of the SSCs was reduced by an amendment brought by Law No. 3842 to Law No. 2845 on the Establishment and Prosecution Procedures of State Security Courts. Law No. 3842 was approved by Parliament on 18 November 1992 and entered into force following its publication in the Official Gazette on 1 December 1992. With this amending law, the jurisdiction of the SSC to hear cases involving violations of the Law on Demonstrations and Rallies, the Law on Strikes and Lockouts and the Law on Associations was removed. The jurisdiction of the SSCs was restricted to offences committed against the State, terrorist crimes, illicit trafficking of weapons and drugs, and crimes that caused or contributed to the continuation of the state of emergency.[35]

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[33] See for example *Incal v. Turkey* (Comm. Report 25.2.97); *Incal v. Turkey* (ECHR 41/1997/825/1031), 9 June 1998; *Ciraklar v. Turkey* (App. No. 70/1997/854/1061), 28 October 1998.

[34] Submissions to and conclusions of the UN Committee against Torture concerning Turkey, 22 July 2002, p.7.

[35] Submissions to and conclusions of the UN Committee against Torture concerning Turkey, 22 July 2002, p.13.

On 6 December 2001 a further amendment to Law No. 2845 on the Establishment and Prosecution Procedures of State Security Courts was brought by Law No. 4723. This amendment excluded offences of "forming societies with the purpose of committing felonies" (Article 313 TPC) and "wilfully providing assistance to those societies" (Article 314 TPC) from the jurisdiction of the SSC.[36]

The competence of the SSC was revised again in December 2002. Offences relating to organised crime and major fraud in the banking sector were removed from the jurisdiction of the SSC.

We welcome the decision of the Turkish Parliament to decrease the number of criminal offences falling within the jurisdiction of the State Security Courts.

3. *Reforms to the rules of procedure in SSC cases*

From a rule of law/human rights perspective, one of the most significant reforms to be introduced by the Turkish Parliament as part of the harmonisation process has been an amendment to the rules of procedure in SSC cases. Until recently, paragraph 1 of Article 31 of the Law on amendment of some articles of the Law on Criminal Procedures and the Law on State Security Courts, which had been in force since 1992, imposed special procedures in the SSCs as distinct from those applied in ordinary criminal courts. In particular, the period of pre-trial detention prior to formal arrest, the interval between detention and access to legal counsel and the length of time permitted in law between initial detention and presentation of a detainee before a judge were all longer in SSC cases. In so far as such procedural irregularities offered SSC detainees fewer protections, they had a negative bearing on the overall fairness of proceedings before SSCs. However, as part of the harmonisation process, Article 7 of the sixth reform package (Law No. 4928), which entered into force on 10 July 2003, amended the Law on State Security Courts by abrogating Paragraph 1 of Article 31. The result of this amendment is that criminal procedural safeguards for SSC defendants have now been regularised with those applicable to defendants in ordinary criminal courts, thus re-instating a return to procedural normality.

Following the July 2003 reform package, the improvement in the position for SSC detainees in terms of access to legal counsel, period of time spent in pre-trial detention prior to formal arrest and period of time before being presented before a judge may be summarised as follows:

Access to legal counsel

Article 16 of Law No. 2845 on the Establishment and Prosecution Procedures of State Security Courts which was introduced on 16 June 1983, originally provided that detainees suspected of offences within the jurisdiction of the SSC could only access a

[36] Submissions by Turkey concerning the judiciary to EU Sub-Committee No.8, 20-21 March 2002, p.8.

lawyer after four days. Law No. 4229 on Amending the Code of Criminal Procedure, which came into effect on 12 March 1997, extended the right of access to defence counsel for those in custody on suspicion of having committed crimes falling under the jurisdiction of the SSC by providing that access to defence counsel was possible after the expiry of 48 hours if the suspicion related to individual crimes, and four days if the suspicion related to collective crimes.[37] On 6 February 2002, the first reform package (Law No. 4744) amended Article 16 of the Law on the Establishment and Prosecution Procedures of State Security Courts so as to grant all detainees falling within the scope of the SSC the right to access a lawyer after 48 hours in detention.[38] On 10 July 2003, the sixth reform package (Law No. 4928) entered into force and this harmonized the position of SSC detainees with those accused of ordinary crimes. This enabled persons detained on suspicion of SSC offences to benefit from Article 136 of the Code of Criminal Procedure (as amended by Law No. 3842)[39] which, since December 1992, had afforded individuals suspected of ordinary crimes the right of immediate access to a lawyer.[40] It can now be concluded therefore that all persons, whether suspected of ordinary crimes or SSC crimes, are entitled to access a lawyer from the moment that they are taken into custody.

Period of pre-trial detention without formal arrest

Prior to March 1997, persons accused of crimes falling with the SSC jurisdiction outside of the State of Emergency Region could be detained without formal arrest for a total of either seven days (individual crimes) or 14 days (collective crimes). Within a State of Emergency Region, the same pre-trial detention without formal arrest could last 15 days (individual crimes) or 30 days (collective crimes).[41] Law No. 4229 on Amending the Code of Criminal Procedure, which came into effect on 12 March 1997 permitted a reduced initial period of detention without formal arrest for offences falling under the jurisdiction of the SSCs of four days. Upon the request of a prosecutor and decision of a judge, this four-day period could be extended to seven days outside of a State of Emergency Region and to 10 days within such a region.[42] In 2002, the Code of Criminal Procedure was amended so as to reduce the maximum period for which a SSC suspect could be detained in police custody for questioning prior to formal arrest to 48 hours for

[37] Submission to the UN Committee against Torture concerning Turkey, 22 July 2002, paras. 43 and 46.

[38] October 2003 Regular Report on Turkey's Progress Towards EU Accession; Amnesty International: Turkey: Briefing on Law No. 4744 ("Mini-Democracy Package") AI INDEX: EUR 44/012/2002, 19 February 2002

[39] Law No. 3842 on Amending some Provisions of the Code of Criminal Procedure and the Law on the Establishment and Prosecution Procedures of State Security Courts and on Abolishing from Provisions of the Law on Police Duties and Powers and the Law on Combating Terrorism was approved by Parliament on 18 November 1992 and entered into force following its publication in the Official Gazette on 1 December 1992.

[40] Article 136 of the Code of Criminal Procedure provides: "Any defendant or person under custody may benefit from the assistance of one or more lawyers of his or his legal representative's choice, at any stage or level of the investigation."

[41] Report on the Independence of Judges and Lawyers in Turkey, International Commission of Jurists, 14-25 November 1999, p.82.

[42] Report on the Independence of Judges and Lawyers in Turkey, International Commission of Jurists, 14-25 November 1999, p.82.

individual crimes and 4 days for collective crimes. In areas under a state of emergency, this 4-day period could be extended to 7 days at the request of a pubic prosecutor and decision of a judge.[43] Meanwhile, pursuant to Article 128 of the Code of Criminal Procedure, the maximum period of detention without formal arrest for a person suspected of an offence falling within the jurisdiction of the ordinary courts was set at 24 hours for individual crimes and 4 days for collective crimes, extendable to 7 days upon the request of a public prosecutor and decision of a judge. On 10 July 2003, the sixth reform package (Law No. 4928) entered into force and this harmonised the position of SSC detainees with those accused of ordinary crimes. It can now be concluded therefore that the maximum period of detention without formal arrest for all persons, whether suspected of ordinary crimes or SSC crimes, is 24 hours for individual crimes and 4 days for collective crimes, extendable to 7 days only upon the request of a public prosecutor and decision of a judge.

Interval between detention and presentation before a judge

According to Law No. 3842, which came into effect on 1 December 1992, the maximum interval between being detained and presented before a judge in an SSC case was forty-eight hours in connection with an individual offence, and fifteen days in connection with a collective offence. These periods were extended to 96 hours and 30 days respectively in provinces under a State of Emergency. [44] An amendment introduced by Law No. 4229, which came into effect on 12 March 1997, shortened the maximum interval between being detained and presented before a judge for an individual crime falling under the jurisdiction of SSC to 48 hours, whether the crime was committed within a State of Emergency or not. The maximum interval between being detained and presented before a judge for a collective crime falling under the jurisdiction of the SSC was shortened to 48 hours in the first instance, whether the crime was committed within a State of Emergency Region or not, this being extendable to a total of 7 days outside of a State of Emergency Region and 10 days within a State of Emergency Region upon request of a prosecutor and decision of a judge.[45] Meanwhile, according to Article 128 (as amended by Law No. 3842)[46]of the Code of Criminal Procedure, ever since 1 December 1992, a person who had been detained on suspicion of an ordinary crime was entitled to the protection of being brought before a competent judge within a maximum period of 24 hours.[47] On 10 July 2003, the sixth reform package (Law No. 4928) entered into force and this harmonized the position of SSC detainees with those accused of ordinary crimes. This enabled persons detained on suspicion of SSC offences to benefit from Article 128 of the Code of Criminal Procedure. It can now be concluded therefore

[43] United Kingdom Home Office Country Information and Policy Unity Country Assessment on Turkey (April 2003) para. 5.38.
[44] Submission to the UN Committee against Torture concerning Turkey, 22 July 2002, para. 27.
[45] Submission to the UN Committee against Torture concerning Turkey, 22 July 2002, para. 44..
[46] Law No. 3842 on Amending some Provisions of the Code of Criminal Procedure and the Law on the Establishment and Prosecution Procedures of State Security Courts and on Abolishing from Provisions of the Law on Police Duties and Powers and the Law on Combating Terrorism was approved by Parliament on 18 November 1992 and entered into force following its publication in the Official Gazette on 1 December 1992.
[47] Submission to the UN Committee against Torture concerning Turkey, 22 July 2002, para. 27.

that all detained persons, whether suspected of ordinary crimes or SSC crimes, are entitled to be brought before a judge no later than 24 hours after their initial detention.

On the basis of the foregoing, we are pleased to note that not only have criminal procedural safeguards for SSC defendants now been regularised with those applicable to defendants in ordinary criminal courts, but also the procedural rules for all accused persons have been brought into compliance with international norms.

We welcome the decision of the Turkish Parliament to (i) harmonise procedural safeguards for SSC defendants with those applicable in ordinary criminal courts; and (ii) bring such procedural safeguards into compliance with international norms.

D. Continuing concerns regarding the functioning of the SSCs

Nevertheless, notwithstanding the removal of military judges, the reduction in the number of offences within the jurisdiction of the courts and the improvement in procedural safeguards for SSC detainees, we remain of the firm opinion that the extraordinary jurisdiction, responsibilities and functioning of the SSCs continue to represent an obstacle to the development of the rule of law in Turkey.

Most international standards do not prohibit *per se* the establishment of special courts. What is required, however, is that such courts are competent, independent and impartial, and that they afford applicable judicial guarantees so as to ensure that the proceedings are fair. Whilst it can no longer be argued that the participation of a military judge undermines the independence of the SSC or that special procedures afford fewer protections for defendants than in the ordinary criminal courts, we consider that one fundamental problem remains, namely the relationship between the SSCs and the 1982 Constitution.

Established to deal with offences against the indivisible integrity of the State, SSCs fulfil a powerful function within the Turkish Republic as described in the rhetorical language of the 1982 Turkish Constitution. Even following the amendments of 17 October 2001, the Turkish Constitution still stipulates that countering threats to the integrity of the eternal Turkish Nation and motherland is the reason for its promulgation.[48] The preamble of the Constitution proclaims the absolute supremacy of the will of the nation. The preamble further asserts that:

> "No protection shall be afforded to thoughts and opinions contrary to Turkish National interests, the principle of the existence of Turkey as an indivisible entity with its State and territory, Turkish historical and moral values, or the nationalism, principles, reforms and modernism of Ataturk."[49]

[48] Turkish Constitution, pmbl.
[49] *Ibid.*

Article 5 of the Constitution declares that:

> " The fundamental aims and duties of the state are: to safeguard the independence and integrity of the Turkish nation, the indivisibility of the country, the Republic and democracy …"[50]

However, perhaps more importantly, the language of the 1982 Constitution prior to the 17 October 2001 amendments had a potential to have a negative impact on human rights in Turkey since, adopted under military rule in 1982, it left room for conceptions regarding the relationship of the State to the individual that were authoritarian and not compatible with the European Convention on Human Rights.

Both the underlying tone and explicit provisions of the 1982 Constitution as originally drafted favoured national security and the indivisible integrity of the Turkish State at the expense of the rights and liberties of its citizens. Prior to being amended, Article 13 of the Constitution declared:

> " Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the state with its territory and nation, national sovereignty, the Republic, national security …"[51]

Prior to being amended, Article 14 of the Constitution declared:

> " None of the rights and freedoms embodied in the constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, of endangering the existence of the Turkish state and Republic …"[52]

Although these provisions have now been amended,[53] they were in force for almost 20 years. Given the historical background and context of such constitutional language, which clearly emphasised the primacy of the state over the protection of the

[50] Turkish Constitution, Article 5.

[51] *Ibid.* Article 13.

[52] *Ibid.* Article 14.

[53] Article 13 of the Turkish Constitution as amended on 17 October 2001 provides: "Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality." Article 14 of the Turkish Constitution as amended on 17 October 2001 provides: "None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights. No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution. The sanctions to be applied against those who perpetrate these activities in conflict with these provisions shall be determined by law."

fundamental rights and freedoms of its citizens, we consider that the SSCs are no longer, and probably never were, able to function as independent and impartial courts within the Turkish judicial system.

The SSCs were not merely established by the 1982 Constitution; ultimately they have worked in accordance with the Constitution for a little under 20 years. Their very existence has been justified by the threat posed to the state by the crimes that comprise their jurisdiction. However, what this has meant in practice is that the authoritarian language of the 1982 Constitution has permeated to the core of the SSCs to the point where they have adopted objectives that are wholly inconsistent with the principle of the rule of law and the protection of fundamental rights and liberties. The emphasis within the 1982 Constitution, prior to 17 October 2001, on the promotion of the interests of the Turkish state over the rights and freedoms of the individual has led to an ethos or culture within the SSCs that that they exist, as their name implies, to vindicate "state security", rather than to adjudicate impartially as between state and citizens. In any court this is problematic, but in a special court with jurisdiction over cases of a political nature it is particularly so.

We accept that certain criminal cases are more complex than others and should only be handled by prosecutors, judges and lawyers who possess a high degree of competence in such matters. But, we see no reason why a competence of this kind should be concentrated in such a limited number of specialised courts. Cases of this kind could be handled by judges and prosecutors within the regular court system, provided that they are equipped with the necessary competence to do so. In this respect we note that with the narrowing in the number of offences within the competence of the SSCs, the Heavy Penal Courts have, for some time, been handling cases that previously fell within the exclusive jurisdiction of the SSCs. We also note that the juvenile courts presently determine so-called SSC offences when the accused is under the age of 18.

We note that with one exception relating to the investigation powers of SSC prosecutors, the procedures for the prosecution of offences within the SSCs is now identical to that applied in the ordinary penal courts. Regarding that exception, we accept that the nature of certain criminal offences is such that public prosecutors need to be able to undertake nationwide rather than provincial investigations. But, we see no reason why special investigative powers of this kind should be vested solely with a limited number of prosecutors. Investigations of this kind could be handled by prosecutors within the regular court system, provided that they are equipped with the necessary authority to do so.

We accept that the nature of certain criminal offences is such that there is a need for special security measures to be provided for the protection of judges and prosecutors. But, we see no reason why such security measures should not be made available within the regular court system as and when required.

We remind ourselves of Principle 5 of the UN Basic Principle on the Independence of the Judiciary which states: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals." Mindful also of the international reputation that the SSCs have developed over the past two decades as political courts, we can see no remaining legitimate justification for their continued existence in Turkey.

We recommend that:

(i) the Constitution be amended so as to abolish the State Security Courts;

(ii) the existing functions of the State Security Courts be transferred to the Heavy Penal Courts;

(iii) cases previously within the jurisdiction of the State Security Courts be assigned to judges and prosecutors within the Heavy Penal Courts who possess the necessary competence to conduct such cases;

(iv) public prosecutors within the Heavy Penal Courts appointed to investigate cases formerly within the jurisdiction of the State Security Courts be vested with power to undertake nationwide rather than provincial investigations as and when required.

V – INDEPENDENCE OF THE JUDICIARY

A. Introduction

An independent judiciary is the basis for a democratic society governed by the rule of law. Such independence demands freedom from interference by both the executive and legislature with the exercise of the judicial function. It requires a set of institutions that assure that judges decide according to law, rather than according to their own whims or to the will of others, including other branches of the government. A judiciary that remains subject to the influence of political power loses its objectivity, its respectability and its ability to effectively protect human rights and fundamental freedoms.

B. Turkey's legal obligations to the judiciary

1. Turkey's obligations under international law

Independence of the judiciary is recognised in the UN Basic Principles on the Independence of the Judiciary ("Principles on the Judiciary").[54] The UN General Assembly endorsed the Principles on the Judiciary in November 1985. The Assembly later specifically welcomed the Principles and invited governments "to respect them and to take them into account within the framework of their national legislation and practice".[55]

The Principles are the international community's authoritative statement of acceptable practices with regard to the independence of the judiciary. According to Special Rapporteur Joinet, French Expert of the UN Sub-Commission on Human Rights, the Basic Principles, "general though they are, represent the first intergovernmental standards spelling out the minimum standards of judicial independence and are the acknowledged yardstick by which the international community measures that independence."[56]

The twenty Basic Principles set forth core standards for the independence of the judiciary and the freedom of expression and association of judges, as well as rules regarding the qualification, selection, training, conditions of service, tenure, immunity, discipline, suspension and removal of judges. They also emphasise that the independence of the judiciary should be guaranteed by the state and enshrined in the Constitution or law of the country.

[54] UN Basic Principles on the Independence of the Judiciary, 29 November 1985, A/RES/40/32.
[55] UN Resolution A/RES/40/146, 13 December 1985.
[56] E/CN.4/Sub.2/1990/35, para. 15.

Independence of the judiciary is also recognised in Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges ("Recommendation on Judges"). The Committee of Ministers adopted the Recommendation on Judges on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

The recommendation calls upon member states to adopt or reinforce, as the case may be, all measures necessary to promote the role of judges and strengthen their efficiency and independence. It contains six principles that should be applied by governments of member states. These principles relate to the independence of judges, the authority of judges, proper working conditions, the right to form associations, judicial responsibilities and the consequences of failure to carry out responsibilities and disciplinary offences.

Article 6(1) of the European Convention on Human Rights also guarantees a fair and public hearing, "by an independent and impartial tribunal established by law".[57] The requirement of independence has been interpreted to mean that the courts must be independent of both the executive and the parties.[58] This independence must be both institutional and functional.[59] To ascertain whether a court meets the requirements of independence, regard must be had to the manner of appointment of its members and the duration of their term of office,[60] the existence of guarantees against external influences,[61] and the question whether the body presents 'an appearance of independence'.[62] The requirement for trial by an 'impartial tribunal' embodies the protection against actual and presumed bias.

The International Covenant on Civil and Political Rights states in its Article 14(1) that, "all persons shall be equal before the courts and tribunals" and further, that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The Human Rights Committee has unambiguously held that, "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception".[63] It is thus a right that is applicable in all circumstances and to all courts, whether ordinary or special.

2. Domestic guarantees of judicial independence

[57] Art. 6(1) European Convention on Human Rights and Fundamental Freedoms.
[58] *Ringeissen v. Austria*, (1979-80) 1 EHRR 455 at para. 95.
[59] *X and Y v. Ireland*, (1981) 22 DR 51, EcmHR, p. 73.
[60] *Le Compte, Van Leuven and De Meyere v. Belgium*, (1982) 4 EHRR 1.
[61] *Piersack v. Belgium*, (1983) 5 EHRR 169 at para. 27.
[62] *Delcourt v. Belgium*, (1979-80) 1 EHRR 355 at para. 31; *Campbell and Fell v. United Kingdom* (1985) 7 EHRR 165 at para. 78.
[63] Communication No. 263/1987, *M. Gonzalez del Río v. Peru* (Views adopted on 28 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 20, para. 5.2.

Various provisions of the Turkish Constitution guarantee judicial independence. Article 9 of the Constitution declares: "[j]udicial power shall be exercised by independent courts on behalf of the Turkish Nation."[64] Under Article 138, judges are protected from instructions, recommendations or suggestions that may influence them in the exercise of their judicial power.[65] Further, no legislative debate may be held concerning the exercise of judicial power in a pending trial and both legislative and executive organs are required to comply with court decisions without alteration or delay.[66] Article 139 of the Constitution provides judges with security of tenure, although certain legitimate exceptions are authorised.[67] Article 140 provides that judges shall discharge their duties in accordance with the principles of the independence of the courts and the security of tenure of judges and also provides detailed regulations in respect of the personnel status of judges.[68] These constitutional guarantees of an independent judiciary are reflected in various provisions of domestic law, including, the Law on Judges and Public Prosecutors, the Criminal Procedure Law, the Civil Procedure Code and the Turkish Penal Code.[69]

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[64] Turkish Constitution, Article 9.

[65] Article 138 of the Constitution states that:

"Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, law, and their personal conviction conforming with the law;

No organ, authority, office, or individual may give order, or instructions to courts or judges relating to the exercise of judicial power, or send them circulars, make recommendations or suggestions;

No question shall be asked, debate held, or statement made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial;

Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution."

[66] *Ibid.*

[67] Article 139 of the Constitution states that:

"Judges and public prosecutors shall not be dismissed, or retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of court or post;

Exception indicates in law relating to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties on account of ill health; and those determined unsuitable to remain in the profession, are reserved."

[68] Article 140 of the Constitution states, in relevant part, that:

"Judges shall discharge their duties in accordance with the principles of the independence of the courts and the security of tenure of judges;

The qualifications, appointment, rights and duties, salaries and allowances of judges and public prosecutors, their promotion, temporary or permanent change in their duties or posts, the initiation of disciplinary proceedings against them and the subsequent imposition of disciplinary penalties, the conduct of investigation concerning them and the subsequent decision to prosecute them on account of offences committed in connection with, or in the course of, their duties, the conviction for offences or instances of incompetence requiring their dismissal from the profession, their in-service training and other matters relating to their personnel status shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of judges."

[69] By way of example, Article 2 of the Judges and Public Prosecutors Law (Law No.2802) provides that "This law shall apply to ordinary judges, public prosecutors and administrative judges" while Article 4 of the same Law states that "Judges shall perform their duties under the principle of independence of courts and be entitled to the jurisdictional immunity." The Law on Judges and Public Prosecutors also guarantees the terms of office and remuneration of judges and establishes that they are not obliged to report on the merit of their cases to anyone outside the judiciary (Article 4 of the Law on Judges and Public Prosecutors). Various other laws introduce sanctions and preventative measures in order to prevent any restriction, improper influence, inducement, pressure, threat or interference with justice (i.e. Articles 282-310 TPC, Article 30 Press Law). A case cannot be withdrawn from a particular judge except for a valid reason

C. Independence and the Role of the Ministry of Justice

Whilst important, constitutional and legal protections are, however, only one component of judicial independence. Equally as important, for any judiciary to be truly independent there must exist both an institutional and functional independence in the sense that there must be institutions and structures in place that allow the judiciary to control the environment in which judges do their work without political influence; put simply, there must be an independent administration of the judiciary by the judiciary.

The experts are both in agreement that, when measured against the core standards of the UN Basic Principles on the Independence of the Judiciary and Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe, true institutional and functional judicial independence is not yet a feature of the Turkish justice system. We conclude that the administration of the Turkish judiciary remains, to an unacceptable degree, subject to the potential influence of the political will of the Ministry of Justice.

In the remainder of this section we examine the various aspects of the Turkish judicial system which we consider serve to undermine the independence of judges and also suggest possible reforms which we believe, if implemented, would serve to assist in bringing the Turkish judicial system into line with accepted international standards on judicial independence.

1. Constitutional impediment to judicial independence

Any assessment of the degree of judicial independence in Turkey must start by noting paragraph 6 of Article 140 of the Turkish Constitution that provides that, "Judges and public prosecutors shall be attached to the Ministry of Justice insofar as their administrative functions are concerned." This provision is highly questionable when viewed in the light of the guarantees set forth in Articles 9, 138, 139 and 140 of the Constitution as set out above. Principle 1 of the UN Basic Principles on the Independence of the Judiciary provides that "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary." Similarly, Principle 1(2)(a) of the Council of Europe Recommendation on the Independence of Judges states: "The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law." Yet, paragraph 6 of Article 140 of the Turkish Constitution not only fails to enshrine the independence of the judiciary in the Constitution, it in fact serves to significantly undermine the independence of judges by expressly attaching their administrative functions to the executive branch of the government.

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described in the Law on Criminal Procedure (Articles 14, 21-24) or the Law on Civil Procedure (Article 28-37) and in the event of disciplinary offences, the Law on Judges and Public Prosecutors stipulates the legal procedure to be followed (Articles 82-97) (Submissions by the Ministry of Justice concerning the judiciary to EU Sub-Committee No. 8 (20-21 March 2002), p.12)

We recommend that, in accordance with Principle 1 of the UN Basic Principles on the Independence of the Judiciary and Principle 1(2)(a) of the Council of Europe Recommendation on the Independence of Judges, paragraph 6 of Article 140 of the Turkish Constitution be removed and that it be replaced with a provision that emphasises that the administrative functions of the judiciary are the sole responsibility of the judiciary themselves.

2. Entry into the profession

In Turkey, judicial service is a profession that is chosen after graduation from a law faculty (for general court judges) or a social sciences faculty (for administrative court judges).[70] It is axiomatic that if judicial independence is to be maintained, any method of selecting candidate judges from the university graduates who apply to join the profession must safeguard against selection on the basis of improper motives (for example, on the basis of political opinion).

Principle 10 of the UN Basic Principles on the Independence of the Judiciary provides: "Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory." Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges similarly states: "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration."

In our opinion, the system for entry into the judicial profession presently in operation in Turkey does not respect these fundamental principles. The system is such as to create the potential for the Ministry of Justice, a political entity, to have a profound influence over the decision as to who will, and who will not, be selected as a candidate judge.

After the four-year education in a law school or social sciences faculty, when a graduate decides that he wishes to become a judge, he must apply to the Ministry of Justice after the announcement of the examination that is held for choosing judge nominees. The Ministry of Justice determines the number of people that will be accepted at the end of the examination and this number is also announced. The written examination, set by the High Council of Student Affairs, is followed by an oral

[70] The only exception to this rule is that practicing lawyers or academics may be accepted to the profession under certain conditions relating to age, success etc.

examination conducted by personnel from the Ministry of Justice and background security checks are also undertaken on the applicant. Only those graduates who are successful in both the written and oral examination are permitted to commence their profession in the judiciary as a judge nominee.[71]

In our opinion, the involvement of the Ministry of Justice in the selection of candidate judges is inconsistent with the notion of judicial independence and contrary to the principles already highlighted. We have two principle concerns. First, it may be said that entrusting selection of candidate judges, at least in part, to a political entity leaves open the clear potential for partiality and prejudice on political grounds in decisions relating to admission to the profession. In this regard, we find the fact that applicants for the position of candidate judge are required to undergo an oral interview with personnel from the Ministry of Justice prior to their application being accepted as particularly concerning.[72] Second, we are concerned that the requirement that aspiring judges refer to the Ministry of Justice for the announcement of the examination date for entry to the School for Candidate Judges, apply to the Ministry of Justice in order to sit the admission examination and then attend for an interview with personnel from the Ministry of Justice, has the potential to create the impression in the minds of aspiring judges that the profession into which they are about to embark is inextricably dependant upon the Ministry of Justice when the converse ought to be true.

We recommend that, in accordance with Principle 10 of the UN Basic Principles on the Independence of the Judiciary and Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges, the influence of the Ministry of Justice in the process of selecting candidate judges be removed. We suggest that those aspects of the selection process presently performed by the Ministry of Justice be brought within the remit of either the Justice Academy or the High Council of Judges and Public Prosecutors.

3. Training of candidate judges

Those graduates who are selected as candidate judges enter into a two-year period of vocational training at the School for Candidate Judges and Public Prosecutors based in Ankara.[73] According to Article 8 of Law No. 3221, this two-year period of vocational training is divided into three terms. The first term lasts three months. In this term the candidate judges receive instruction on various topics such as the application of law in practice, the drafting of judgments and professional ethics. The second term lasts eighteen months. During this period the candidate judges undertake 12 months of training

[71] Information Note on the Turkish Judicial System, Ministry of Justice, 4 July 2003, p. 4.
[72] Oguz Onaran and Koray Karasu in their paper "Quality and Justice in Turkey", produced as part of the GROTIUS project "Assessing Quality of Justice in Europe", 2001-2003, para. 2.4 comment: "Cases of political favouritism are observed. For instance, one Ministry of Justice recruited 130 candidates, and his successor who was from a different political party, recruited 230 candidates without having regard to whether there was a need or not."
[73] *Ibid.*

in a General Court and three months training in the High Court of Appeal. During this term, the judges whom they work alongside evaluate the candidates. The third term lasts three months. In this term the candidates return to the classroom where they discuss and apply the knowledge that they have developed in the previous two terms in the context of Public Law, Private Law, and Administrative Law. Having finished this two-year education period, the candidate judges must pass a final written examination in order to be eligible for appointment as a judge.[74]

We understand that the Court of Appeal and the Council of State determine the form of the training in the School for Candidate Judges and Public Prosecutors. We also understand, however, that the content of the training (i.e. the curriculum) is under the control of the Education Department of the Ministry of Justice and the School as a whole is a subordinated institution of the Ministry of Justice. Therefore, both the content of the training and the administration of the School remain strongly dependent on the executive power. In the opinion of the experts, the body responsible for the pre-service training of candidate judges should be under an authority independent of the executive and legislative powers. The judiciary itself or an independent association of judges should ultimately be responsible for the promotion of the professional education and/or training of judges. The same principle applies equally to the in-service training of judges that is presently administered, not by members of the judiciary themselves, but by the Education Department of the Ministry of Justice. Support for this proposition is found in Principle 9 of the UN Basic Principles on the Independence of the Judiciary[75] and also the Chisinau Declaration, adopted in the framework of the Annual Conference of the Judicial Training Centres from Central and Eastern European countries which took place on 12 and 13 May 2000. The Declaration provides that, "the training of the members of the judiciary should be arranged in an independent way by an independent body of the judiciary itself."

We note that the Turkish Parliament has now adopted the long awaited Law on the Establishment of the Justice Academy. It is anticipated that the Justice Academy will be operational in April 2004. Once established, the Justice Academy will be responsible for all the pre-service and in-service training of judges, prosecutors, lawyers, notaries and auxiliary justice personnel. We welcome the decision to opt for a multi-professional training centre but consider that certain provisions of the Law on the Establishment of the Justice Academy relating to the organisational structure of the Justice Academy undermine its independence and functioning.

As we understand it, the Justice Academy will be strongly dependent on the Ministry of Justice. The President of the Justice Academy will be appointed by the Ministry of Justice from among three candidates proposed by the Board of Directors. The Board of Directors will consist of a President, the General Director for Personnel from the Ministry of Justice and five members elected by the General Assembly. The General Assembly will be a body composed of 27 members of whom 11 will depend on

[74] Information Note on the Turkish Judicial System, Ministry of Justice, 4 July 2003, p. 2.

[75] Principle 9 of the UN Basic Principles on the Independence of the Judiciary provides: "Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence."

the executive power. Of the remainder, 5 will be members of the judiciary, 5 will be academics from the universities, 4 will be representatives of the Academy staff and 2 will represent the other legal professions. Therefore, members of the executive will have a relative majority in the General Assembly. In addition, three members appointed by the Ministry of Justice will constitute the Board of Auditors. Given this constitution, it may be concluded that the Justice Academy will inevitably be strongly dependent on the Ministry of Justice. To compound matters, we also note that concerning pre-service judicial training in particular, the Presidency of the Centre for the Training of Candidate Judges and Public Prosecutors, which will be incorporated within the Academy once it is established, will be appointed by the Ministry of Justice on proposal of the President of the Academy who, in turn, is appointed by the Ministry.[76]

The Chisinau Declaration, adopted in the framework of the Annual Conference of the Judicial Training Centres from Central and Eastern European countries which took place on 12 and 13 May 2000 provides that, "the training of the members of the judiciary should be arranged in an independent way by an independent body of the judiciary itself." Principle 9 of the UN Basic Principles on the Independence of the Judiciary similarly provides that judges should be free to promote their own professional training. In accordance with these principles, we consider that the judiciary itself or an independent association of judges should ultimately be responsible for the promotion of the pre-service and in-service education and training of judges.[77] We would like to see this shortcoming addressed.

We recommend that, in accordance with the provisions of Principle 9 of the UN Basic Principles on the Independence of the Judiciary and the Chisinau Declaration, the influence of the Ministry of Justice in the pre-service and in-service training of judges be removed.

4. Appointment and promotion of judges

Candidate judges who are successful in the final written examination are admitted into the profession by the High Council of Judges and Public Prosecutors ("High Council"). There is no oral examination prior to appointment. The place where the newly appointed judges begin their career is determined by the drawing of lots. Following their first appointment, and throughout their career, judges are supervised and their performance is regularly monitored and recorded.[78]

The general and administrative jurisdiction areas of Turkey are divided into five regions according to their geographical and economic conditions, social, health, cultural,

[76] Comments on the Draft Law on the Organisation and Duties of the Justice Academy of Turkey (19/4/2002) by Carlos Martinez for the Council of Europe, p.4.
[77] Principle 9 of the UN Basic Principles on the Independence of the Judiciary provides: "Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence."
[78] Information Note on the Turkish Judicial System, Ministry of Justice, 4 July 2003, p. 3.

transportation opportunities and development degrees, with region five being the least developed. There is no single geographical area for each region; one may find examples of each of the five regions throughout Turkey. As a general rule, a newly appointed judge will commence his/her career in region five. This is likely to be a rural area that is underdeveloped. As the duration of their service increases, so they will progress up through the regions. The period of time spent in each region is different and is determined in advance but judges are transferred from region to region in the country, normally following a schedule with intervals of 2 - 5 years.[79]

Alongside this mechanism, the judicial profession is itself divided into nine degrees. Each degree carries a different salary and employment opportunities. The High Council decides upon promotions of judges through the degrees. It conducts performance appraisals of judges three times a year in order to decide their advancement by taking into consideration (i) employment records given by their superiors; (ii) performance appraisals of the inspectors of the Ministry of Justice; (iii) notations given by the Court of Cassation and Council of State during the review of appellate cases, according to factors such as appropriateness of the judgment, resolving cases as fast as possible, effective formulation of the judgment; (iv) the ratio of the number of cases resolved by a judge to the number of cases a judge has dealt with in a given period; (v) articles written by the judge. This information, which forms the basis of the appraisal, is recorded in two files, one confidential and one that the judge is able to view. The performance appraisals of the inspectors of the Ministry of Justice are stored in the confidential file. In order to be appointed to a higher degree, a judge should work for at least two years, avoid any disciplinary punishment, and obtain a positive report from the judicial inspectors on the basis of the criteria set out above. There are three types of promotion: (C) means distinguished, (B) means preference and (A) means ordinary promotion.[80]

The lists containing advancements of judges, which are determined by the High Council of Judges and Public Prosecutors, are promulgated in the Official Gazette in April, August and December of each year. Judges whose names are not stated in these lists may apply to the High Council for re-examination of their situation. The High Council rejects the application if it is not made within the required period or it is not justified. Then the person in question may appeal to the Board for the Examination of the Appeals. In case of the acceptance of the appeal, the names of the concerned persons are stated as an annex to the list in the Official Gazette.[81]

On the basis of the foregoing it will be observed therefore that in terms of appointment and promotion, the High Council determines the careers of all judges in Turkey. In fact, the responsibilities of the High Council are somewhat broader than merely appointing and promoting judges. Article 159 of the Turkish Constitution establishes the High Council of Judges and Public Prosecutors as a body of executive and

[79] Information Note on the Turkish Judicial System, Ministry of Justice, 4 July 2003, p. 4.
[80] Oguz Onaran and Koray Karasu in their paper "Quality and Justice in Turkey", produced as part of the GROTIUS project "Assessing Quality of Justice in Europe", 2001-2003, para. 4.2; Information Note on the Turkish Judicial System, Ministry of Justice, 4 July 2003, p. 4.
[81] *Ibid.*

judicial personnel that oversees the judiciary. The High Council of Judges and Public Prosecutors is responsible for the admission of judges and public prosecutors of courts of justice and administrative courts into the profession, appointments, transfers to other posts, the delegation of temporary powers, promotion to the first category, the allocation of posts; decisions concerning those whose continuation in the profession is found to be unsuitable; the imposition of disciplinary penalties and removal from office.[82] [83]

The High Council is composed of seven members. The Minister of Justice is the President of the High Council and his Under-Secretary is an *ex-officio* member. Of the remainder of the High Council, the President of the Republic appoints three members from a list nominated by the High Court of Appeals from its ranks and two members from a list nominated by the Council of State. All appointments are for four-year terms but members may be re-elected at the end of their term of office.[84] Decisions of the High Council are taken in camera.

Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges states: "The authority taking the decision on the selection and career of judges should be independent of the government and the administration." In the opinion of the experts, the membership structure of the High Council, as described in the foregoing paragraph, is such that, contrary to this principle, it cannot be said to be independent from political influence. The experts received numerous complaints from a variety of sources that the presence of the Minster of Justice and his Under-Secretary results in the High Council, a supposed judicial organ, being effectively dependent upon and controlled by the executive. We share the concerns of our interviewees. We consider that in so far as the Minister of Justice is the President of the High Council and the Under-Secretary is an *ex-officio* member, there is, at the very least, a potential for the executive to influence decisions relating to the professional future of all judges in Turkey. This being the case, there is the possibility for judges themselves to have undue regard to ruling administrative and political policies at the expense of the exercise of their own independent judgment according to law.

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[82] Article 159(3) of the Turkish constitution states:

"The Supreme Council of Judges and Public Prosecutors shall deal with the admission of judges and public prosecutors of courts of justice and of administrative courts into the profession, appointments, transfers to other posts, the delegation of temporary powers, promotion, and promotion to the first category, the allocation of posts, decisions concerning those whose continuation in the profession is found to be unsuitable, the imposition of disciplinary penalties and removal from office. It shall take final decisions on proposals by the Ministry of Justice concerning the abolition of a court or an office of judge or public prosecutor, or changes in the jurisdiction of a court. It shall also exercise the other functions given to it by the Constitution and laws."

[83] In addition to the High Council, the President of the Republic also has authority to appoint judges. The president appoints members of the Constitutional Court, one fourth of the judges of the Council of State, the Chief Public Prosecutor and Deputy Chief Public Prosecutor of the High Court of Appeals, the members of the Military High Court of Appeals, and members of the High Military Administrative Court of Appeals.

[84] Turkish Constitution, Art. 159.

We recommend that, in accordance with Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges, Article 159 of the Turkish Constitution be amended so as to remove the Minister of Justice and his Under-Secretary from the High Council of Judges and Public Prosecutors.

5. The power to transfer judges

This executive influence over the functioning of the judiciary is particularly concerning given the power of the High Council to transfer judges between posts.

We are aware that the High Council may, at any time, transfer a judge, against his will, to work in either a different court or a different region. By way of example, a judge of the Court of General Criminal Jurisdiction may be transferred to work as a judge in a Juvenile Court. Alternatively, a judge of a criminal Justice of the Peace Court may be transferred to work as a judge in a Civil Court of Peace. The power may also be exercised in such a way as to result in a judge in Region 3 being transferred to work as a judge in Region 5, a less attractive region.

Various non-governmental organisations have, in the past, expressed extreme disquiet at the application of this power of transfer. On the basis of their interviews with judges it has been suggested that the presence of a political entity within the High Council has meant that rather than being used merely as a means for ensuring administrative efficiency, the power of transfer has been exercised as a disciplinary penalty. In short, there have been credible reports that judges who, by their words or actions, have been perceived to be critical of the political establishment, have been transferred to work in a less appealing region as a form of punishment.[85] The possibility of such executive influence in the functioning of the judiciary has a clear potential to encourage judges to have undue regard for ruling administrative and political policies at the expense of the exercise of their own independent judgment in accordance with the law. As such, it is a clear violation of Principle 2 of the UN Basic Principles on the Independence of the Judiciary.[86]

We did not receive any complaints from judges to the effect that the power of transfer may be used as means of silencing criticism of the political establishment. However, we would note the concerns that have been raised in the recent past by other non-governmental organisations and suggest that this in itself provides further justification for the removal of the Minister of Justice and his Under-Secretary from the High Council.

We recommend that the power to transfer judges be removed from the Minister of Justice and his Under-Secretary. Such authority should be vested with the High Council of Judges and Public Prosecutors.

restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

6. *Further concerns relating to the independence of the High Council*

In our opinion, however, removal of the Minister of Justice and his Under-Secretary from the High Council will not in itself be sufficient to establish the High Council as a truly independent body. Such is the absolute power of the High Council regarding the professional future of judges, that unless and until such time as every aspect of its organisation and function is rendered completely independent of the Ministry of Justice, and in one instance the President, there will remain the possibility for undue executive influence in the exercise of the judicial function.

i. *Presidential power to appoint members of the High Council*

Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges provides that the authority taking decisions in relation to the selection and career of judges should be independent of government and the administration. As a corollary, that authority must safeguard its own independence by ensuring that, for instance, its own members are selected by the judiciary. However, according to Article 159 of the Turkish Constitution, the President of the Republic appoints all members of the High Council of Judges and Public Prosecutors with the exception of the Minister of Justice and his Under-Secretary. We find the fact that the power to appoint members of the High Council is vested in the President of the Republic significantly undermines the independence of the High Council as a whole since there is the danger that the President may, wittingly or unwittingly, reflect his political opinion in his appointments. In our opinion, the power to appoint judges ought more properly be vested in judges themselves.

We recommend that, in accordance with Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges, the President be absolved of his power to appoint members of the High Council and judges and public prosecutors themselves be empowered to elect their representatives on the High Council. In the alternative, the President could retain his power to formally appoint members of the High Council but any appointment should be made only from among candidates brought forward by judges and public prosecutors themselves.

ii. *Reliance upon the Ministry of Justice for administrative support*

The High Council does not have its own secretariat that it can rely upon for its administrative tasks. Instead, the High Council is entirely dependent upon a personnel directorate of the Ministry of Justice for administrative support. The secretariat functions of the High Council are therefore carried out by the Ministry of Justice on behalf of the High Council, thereby failing to achieve a separation of powers. In practice, this system means that both the confidential and non-confidential appraisal files held on judges are in

fact retained, not by the High Council, but by the Ministry. Two concerns flow from this. First, should it see fit, the Ministry is able to scrutinise the performance of judges at any time of its choosing. Second, whenever members of the High Council take decisions in respect of judges, be it to promote, transfer or discipline them, they are effectively bound by information given to them by the Ministry. In our opinion, this system serves only to enforce an impression that the Turkish judiciary is besieged and controlled by the executive.

We recommend that the High Council be provided with its own adequately-funded Secretariat and premises.

We should also state at this juncture that, in our opinion, the fact that confidential files are held by any body that is responsible for the professional careers of judges is, in any event, incompatible with the principles of equality, impartiality and transparency that should lie at the heart of any modern liberal democracy.

In this regard, however, we welcome the decision of the TGNA of 9 October 2003 to adopt the Law on the Right of Access to Information (Law No. 4982). If approved by the President of the Republic, it would appear that this law will enable judges to apply to the High Council of Judges and Public Prosecutors for access to all information and documents held that may potentially affect their personal working life and professional dignity. In accordance with the terms of the law, the High Council will be required to ensure that the judge is afforded access to such information or documents within 15 working days of the application. We welcome the adoption of this law as a positive step towards ensuring greater transparency in the process of determining the professional careers of judges.

However, we also note that, according to the new law, the disclosure or untimely disclosure of information and documents concerning administrative investigations conducted by inspection boards that may constitute a clearly unfair interference in the private life of individuals, may endanger the life or security of individuals or those conducting the investigation, may endanger the safety of the investigation, may reveal confidential sources of information or may make it more difficult to access information and sources of information relating to the investigation will remain outside the scope of the law. This proviso to the right of access to information otherwise embodied within Law No. 4982 appears to be capable of a broad interpretation. We would like to express our hope that, if and when the law does come into force, the proviso will not be interpreted in such a manner as to unduly restrict the ability of judges to access files containing information relating to their professional careers.

iii. Reliance upon the Ministry of Justice for judicial inspectors

In order to monitor judicial behaviour, judges in Turkey are regularly evaluated. Article 144 of the Constitution entrusts the supervision of judges to judiciary inspectors.[87]

[87] Article 144 of the Turkish Constitution provides: “Supervision of judges and public prosecutors with regard to the performance of their duties in accordance with laws, regulations, by-laws and circulars

As foreseen in the Law on Judges and Prosecutors No. 2802, the judiciary inspectors are civil servants who work within the central organisation of the Ministry of Justice in the inspection unit known as the Head of Inspection Board, although in practice they are actually judges and prosecutors.[88] They formulate performance appraisals of judges based on their observations that are then sent to the High Council to be taken into consideration when considering advancement of judges. The judiciary inspectors also investigate whether judges have committed offences in connection with their duties and whether their behaviour and attitude are in conformity with their status and duties. In the event of such an investigation, an investigation report is provided to the Minister of Justice who then decides whether or not to place it before the High Council for a final decision on disciplinary action. In this manner, it can be said that the inspectors' reports have primary influence over the promotion, appointment, transfer, discipline and even expulsion from duty of judges throughout Turkey.

Although we recognise that the ultimate decision on such matters lies with the High Council, we consider that the fact that inspectors working under the Minister of Justice have so much influence in the personnel affairs of judges is inconsistent with the principle of independence of the judiciary.

Principle 13 of the UN Basic Principles on the Independence of the Judiciary provides: "Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience." Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges provides: "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency." When a body under the control of a political entity is charged with evaluating the performance of judges with a view to promotion, as is the case in Turkey, there is real potential for political partiality and prejudice in the decision-making process. Principle 17 of the UN Basic Principles on the Independence of the Judiciary provides: "A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure." We consider that where the body that is charged with investigating a complaint against a member of the judiciary is not independent of the

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(administrative circulars, in the case of judges), investigation into whether they have committed offences in connection with, or in the course of their duties, whether their behaviour and attitude are in conformity with their status and duties and if necessary, inquiry and investigations concerning them shall be made by judiciary inspectors with the permission of the Ministry of Justice. The Minister of Justice may request the investigation or inquiry to be conducted by a judge or public prosecutor who is senior to the judge or public prosecutor to be investigated."

[88] The duties of the Head of Inspection Board of the Ministry of Justice are defined as including: To inspect the judges and the public prosecutors of the general and administrative courts, the offices of the court clerks of the general and the administrative courts and the chief public prosecutor, and the execution and the bankruptcy offices, the notary offices, the prisons, the detained houses, the juvenile reformatories and the other units taking place in the Ministry of Justice; To investigate the matters which are given permission for the investigation or are wanted to be inspected through the inspector by the Justice Minister; To investigate the matters, which are learnt during the investigation, necessitating the investigation.

government and the administration, as is the case in Turkey, then this cannot be said be either a fair or appropriate procedure.

We recommend that, in accordance with Principles 13 and 17 of the UN Basic Principles on the Independence of the Judiciary and Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges, Article 144 of the Constitution and the Law on Judges and Prosecutors No. 2802 be amended so as to remove judicial inspectors from within the central organisation of the Ministry of Justice. Judicial inspectors should be re-assigned to work directly under the control of the High Council of Judges and Public Prosecutors, the High Council having sole authority to request and/or grant permission for an investigation or inquiry in respect of a member of the judiciary.

iv. Reliance upon the Ministry of Justice for financial resources

The High Council does not have its own independent budget. Instead it is reliant upon the discretion of the Ministry of Justice for its financial resources. In practice this means that even its building is allocated by the Ministry. In our opinion, the fact that the High Council is dependent upon the Ministry of Justice for determining and implementing its financial resources is inconsistent with the principle of independence of the judiciary.

We recommend that the High Council be granted its own budget, the members of the High Council to be both consulted in the preparation of the budget and to be responsible for its internal allocation and administration.

v. Absence of availability of judicial review

Under the Turkish Constitution, there can be no appeal to any judicial body against a decision of the High Council. Paragraph 4 of Article 159 of the Turkish Constitution expressly provides that: “There shall be no appeal to any judicial instance against the decisions of the Council.” Instead, any objection to a decision of the Council must be raised before an eleven-person panel composed of the seven original Council members plus four additional members. This panel is referred to as the Board for the Examination of Appeals. Given the composition of this Board it is apparent that any review of a High Council decision will, in many cases, be futile.

Principle 20 of the UN Basic Principles on the Independence of the Judiciary provides: “Decision in disciplinary, suspension or removal proceedings should be subject to an independent review.” Principle 6(3) of the Council of Europe Recommendation on the Independence of Judges similarly provides that the competent body tasked to apply disciplinary sanctions and measures should be controlled by a superior judicial organ.

In our opinion, the inability of judges in Turkey to appeal to a judicial instance against decisions of the High Council is contrary to the foregoing principles on the independence of the judiciary. The absence of such an independent judicial review mechanism has the potential to render some judges disposed to follow the official line when deciding cases rather than exercise their own independent judgment. We recognise that in view of the fact that between nine and eleven judges sit on the High Council and only five judges sit on the Council of State, an appeal to the Council of State would be ineffectual. We foresee therefore that an entirely new appellate body, presided over by a greater number of judges than presently constitute the High Council, will need to be established.

We recommend that, in accordance with Principle 20 of the UN Basic Principles on the Independence of the Judiciary and Principle 6(3) of the Council of Europe Recommendation on the Independence of Judges, Article 159 of the Turkish Constitution be amended so as to permit decisions of the High Council adverse to a judge to be appealed to an independent judicial body comprised of members of the judiciary other than those responsible for the taking of the original decision.

7. Issuing of circulars to public prosecutors

The Director General for Penal Affairs of the Ministry of Justice informed the delegation that the Ministry regularly issues circulars to public prosecutors throughout Turkey. These circulars are effectively instructions to public prosecutors on how, in the opinion of the Ministry, particular laws should be interpreted.

We consider that the use of such circulars is problematic in so far as they constitute a threat to the independence of the judiciary. Although we have been assured that such circulars are never sent to judges, it is inconceivable that members of the judiciary do not know that such circulars are sent to public prosecutors. The result is that whenever a public prosecutor addresses a judge in oral argument regarding the correct interpretation of a particular legal provision, the judge is likely to be mindful of the fact that the argument being advanced by the prosecutor is, or may be, based upon a directive from the Ministry. When it is recalled that the Ministry of Justice has, through its influence in the High Council, a pervasive influence in the professional careers of all judges in Turkey, and that inspectors attached to the Ministry regularly monitor the performance of judges, one may conclude that the existence of such circulars has the potential to render judges more inclined to adopt the official line with regards to the interpretation of the law rather than to exercise their own independent judgment.

8. Ability to form professional associations

We recommend that the practice of the Ministry of Justice sending circulars to public prosecutors regarding the interpretation of Turkish law cease immediately.

Unlike members of other professions, judges in Turkey are presently prohibited from organising and forming professional associations to safeguard their independence, protect their interests, improve professional ethics, enable them to express their opinions and take positions on matters pertaining to their functions and to the administration of justice.[89]

This situation is in direct contravention of Principle 9 of the UN Basic Principles on the Independence of the Judiciary which provides: "Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence." The restriction on the establishment of a professional association of judges in Turkey is also contrary to Principle 4 of the Council of Europe Recommendation on the Independence of Judges which provides: "Judges should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protect their interests."

We can see no justification for the continued prohibition on the establishment of a professional association of judges in Turkey whose activities are confined to defending the independence and the interests of the profession. The opportunity for dialogue and consultation between judges that such a judicial association would permit could only assist in strengthening judicial independence. Such an association would be able to organise assemblies, conferences, general or specialised meetings, for the entire judiciary or sections of it, as well as issue reports and communicate its views in an appropriate manner.

We found strong support for the creation of such a judicial association amongst the judges that we met and were given to understand that a draft Bill to enable judges to organise and form an association has been prepared.

We recommend that, in accordance with Principle 9 of the UN Basic Principles on the Independence of the Judiciary and Principle 4 of the Council of Europe Recommendation on the Independence of Judges, the draft Bill to enable judges to organise and form professional associations be enacted as soon as possible.

D. Conclusion

[89] Oguz Onaran and Koray Karasu in their paper "Quality and Justice in Turkey", produced as part of the GROTIUS project "Assessing Quality of Justice in Europe", 2001-2003, para. 3.3.2; Submissions by Turkey concerning the judiciary to EU Sub-Committee No. 8, 20-21 March 2002; Report on the Independence of Judges and Lawyers in Turkey, International Commission of Jurists, Report of a Mission 14-25 November 1999 p.102.

On the basis of the foregoing, we consider that despite various domestic guarantees of judicial independence, when measured against the core standards of the UN Basic Principles on the Independence of the Judiciary and the Council of Europe Recommendation on the Independence of Judges, true institutional and functional independence is not yet a feature of the Turkish judicial system. There remains the potential for an unacceptable degree of executive influence in the process of selecting, training, appointing, promoting, transferring and disciplining of judges in Turkey. We urge the Turkish government to undertake further reforms in this regard.

E. Impartiality and the relationship between judges and public prosecutors

The notions of judicial "independence" and "impartiality" are closely linked yet each has its own specific meaning and requirements. The notion of independence connotes not only a state of mind but also a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees. This status or relationship of independence of the judiciary involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

By contrast, the concept of judicial impartiality may be considered as referring to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. This view has been confirmed at the international level, where, for instance, the Human Rights Committee has held that the notion of "impartiality" in Article 14(1) of the International Covenant on Civil and Political Rights, "implies that judges must not harbour preconceptions about the matters put before them, and that they must not act in ways that promote the interests of one of the parties".[90] As for the European Court of Human Rights, it has consistently ruled that judicial impartiality has two requirements, namely, one *subjective* and one *objective* requirement. In the first place, "the tribunal must be *subjectively impartial*", in that "no member of the tribunal should hold any personal prejudice or bias". This personal "impartiality is presumed unless there is evidence to the contrary".[91] Secondly, "the tribunal must also be impartial from an objective viewpoint", in that "it must offer guarantees to exclude any legitimate doubt in this respect".[92] With regard to the *objective test*, the Court has added that it must be determined whether there are ascertainable facts, which may raise doubts as to the impartiality of the judges, and that, in this respect, "even appearances may be of a certain importance", because "what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings".[93]

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[90] Communication No. 387/1989, *Arvo O. Karttunen v. Finland* (Views adopted on 23 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 120, para. 7.2.

[91] Eur. Court HR, Case of *Daktaras v. Lithuania,* judgment of 10 October 2000, para. 30; emphasis added.

[92] *Ibid.*

[93] *Ibid*, para. 32.

With these principles in mind, we are concerned that the relationship between judges and public prosecutors in Turkey is such that there remains the potential for legitimate doubt as to the objective impartiality of the judiciary. To be clear what we mean by this, we do not seek to allege that members of the judiciary, individually or as a whole, hold personal prejudices or bias such that they act in a manner that promotes the interests of the prosecution over the interests of defence (i.e. that they are subjectively impartial) although, as is the case in any jurisdiction, we cannot exclude the possibility that this may occur. Our real concern is that, from an objective viewpoint, there are various aspects of the functioning of judges and public prosecutors in Turkey that fail to afford the sort of objective guarantee of impartiality that is referred to by the European Court. We consider that for both the public and parties to proceedings to be able to have confidence in the impartiality of the judiciary in Turkey, a clearer separation of tasks, responsibilities and powers of judges and public prosecutors is needed in order to create, or secure the existence of, a system with the appearance and reality of two equal parties acting before an independent and impartial court.

Unlike in most other jurisdictions, there is a most apparent union between judges and public prosecutors in Turkey. Both in law and in practice, they are regarded as equals. Neither the Constitution nor the Law on Judges and Public Prosecutors envisage any distinction between the two in terms of professional rights and responsibilities. In Part III of the Constitution entitled "Judicial Power", Article 139 provides for the security of tenure of both judges and public prosecutors. Article 140 establishes that the qualifications, appointment, rights and duties, salaries and allowances of judges and public prosecutors, their promotion, temporary or permanent change in their duties or posts, the initiation of disciplinary proceedings against them and the subsequent imposition of disciplinary penalties, the conduct of investigations concerning them and the subsequent decision to prosecute them on account of offences committed in connection with, or in the course of, their duties, the conviction for offences or instances of incompetence requiring their dismissal from the profession, their in-service training and other matters relating to their personnel status shall both be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of judges. Article 140 also establishes the retirement age of both judges and public prosecutors at sixty-five, provides that neither judges nor public prosecutors shall assume official or public functions other than those prescribed by law and provides that both judges and public prosecutors are attached to the Ministry of Justice where their administrative functions are concerned.

Aside from the evident constitutional connection between judges and public prosecutors in Turkey, various aspects of their everyday functioning serve to reinforce the notion that there exists an organic relationship between the two professions.

From the earliest stage of their careers, judges and public prosecutors are treated as equals. They apply to, take the entrance examination for and then attend the same school for their pre-service training (the School for Judges and Public Prosecutors) whilst defence lawyers are trained elsewhere. After graduation, the appointment, promotion and discipline of judges and public prosecutors is determined by the same body, the High

Council for Judges and Public Prosecutors, whilst the professional career of defence lawyers is regulated by the Bar Associations. The in-service training provided by the Ministry of Justice is provided for judges and public prosecutors only. Defence lawyers receive their training from the Bar Associations. The salaries of judges and public prosecutors remain equal throughout their entire career, thus reinforcing the notion that they are to be regarded as equals. The prohibition on the establishment of professional associations applies to both judges and public prosecutors whilst there is no such prohibition for defence lawyers. Neither judges nor public prosecutors have a formal Code of Conduct whereas the defence bar does. Judges and public prosecutors both have offices within the courthouses in Turkey whilst the defence lawyers do not. Judges and public prosecutors even live in the same quarters. In our opinion, these matters serve to create the impression that the office of prosecutor, rather than being both separate and subordinate to the office of judge, is in fact attached to the office of judge.

A further matter of importance is that when appearing in court, public prosecutors do not represent the state before different panels of judges on different days. Instead, they are assigned to work in a particular courtroom with a particular judge or panel of judges for the duration of their appointment. This inevitably leads to the establishment of an organic relationship between judge and prosecutor. The appearance of such a relationship is reinforced by the procedures adopted in the courtroom. Judges and prosecutors enter and exit the courtroom simultaneously and through the same door situated behind the bench, whilst the defence lawyers enter through the public entrance and are expected to be in court before the entrance of the judge and public prosecutor. Thereafter, the public prosecutor sits next to the judge or panel of judges on an elevated platform whilst the defence lawyer is relegated to a table at ground level, the same level as the defendants. Whenever the judges retire to their ante-chamber to consider a ruling, the public prosecutor will invariably retire with them. The prosecutor does not need the permission of the court in order to call witnesses for the state, whereas defence lawyers can only call a witness to give evidence if the presiding judge has approved his/her attendance. Whereas defence submissions are only entered into the official court record on the basis of a summary prepared by the judge, prosecution submissions are entered verbatim into the court record. In our opinion, these and other matters of courtroom procedure serve to seriously undermine the appearance and reality of two equal parties acting before an impartial court.

A final matter that we consider gives rise to legitimate doubt regarding the impartiality of the judiciary in Turkey is the fact that public prosecutors have overall responsibility for all aspects of the day-to-day administration and support work of the courts. It is their duty to ensure that the necessary services are provided to the judiciary and court users so as to ensure the efficient functioning of the justice system. In this capacity, public prosecutors are responsible for matters such as informing witnesses that their attendance is required at court. They are also responsible for matters such as the maintenance of lighting, the provision of electricity, the cleaning of the buildings and ensuring that there is adequate stationary. They are also responsible for overseeing the administration of the quarters where judges and public prosecutors live. We consider that

this administrative role inevitably serves to render the judiciary dependent upon the office of the prosecutor, thereby undermining the appearance of an impartial judiciary.

According to recognised international standards, there should be both an institutional and functional separation of the tasks, responsibilities and powers of judges and public prosecutors. In this regard, Guideline 10 of the Guidelines on the Role of Prosecutors regarding the role of the prosecutor in criminal proceedings provides, "the office of prosecutors shall be strictly separated from judicial functions".[94] Moreover, the position of the public prosecutor should be subordinate to the office of the judge. Principle 2(1) of the Council of Europe Recommendation on the Independence of Judges provides, "All persons connected with a case, including state bodies or their representatives, should be subject to the authority of the judge." Yet, in Turkey, the office of prosecutor, rather than being both separate and subordinate to the office of judge, appears to be regarded as attached to, and therefore equal, to the office of judge. In order to inspire the parties to proceedings and the public that members of the judiciary are in fact able to decide matters before them impartially without any restriction, improper influence, inducement, pressure, threat or interference, direct or indirect, from the office of the public prosecutor, we consider that there is a need for reform.

We recommend that:

(i) The Constitution be amended so as to provide for an institutional and functional separation of the professional rights and duties of judges and public prosecutors;

(ii) Administrative duties currently undertaken by public prosecutors should be transferred to administrative staff of the Ministry of Justice;

(iii) Public prosecutors be re-assigned to different courtrooms on a regular basis;

(iv) Public prosecutors either be required to have their offices outside of the courthouse or, if this is not practicable, then public prosecutors have their offices located in a completely separate part of the courthouse from that occupied by judges;

(v) Measures be taken to ensure an equality of arms between prosecution and defence counsel during the course of criminal proceedings. In this regard we repeat and adopt the matters addressed in further detail in Chapter VII.

F. Conclusion

In the opinion of the experts, despite the considerable efforts of the Turkish government to achieve EU norms in the seven reform packages passed to date, the issue

[94] UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

of the independence of the judiciary, which is a precondition for the protection of fundamental rights and liberties and the rule of law, has not been adequately addressed. Indeed, none of the reform packages adopted by the TGNA to date have attempted to address the issue of the apparent dependency of the judiciary on the Ministry of Justice.

We are of the opinion that there is an urgent need to guarantee the independence of the judiciary in Turkey in order to ensure that its functioning is not subject to the possibility of undue executive influence. We would urge the Turkish government to take measures that are directed at establishing an independent administration of the judiciary by the judiciary and ensuring that members of the judiciary are effectively separated from, and regarded as superior to, the office of the public prosecutor.

VI – ROLE AND EFFECTIVENESS OF PUBLIC PROSECUTORS

A. Introduction

A legal system based on respect for the rule of law and human rights standards needs strong, independent and impartial prosecutors who are willing and able to resolutely to investigate and prosecute suspected crimes committed against citizens, even if these crimes have been committed by persons acting in an official capacity. Unless prosecutors are able to fulfil this role in maintaining justice in society, there is a serious risk of a culture of impunity taking root.

B. Turkey's legal obligations to public prosecutors

1. Turkey's obligations under international law

The importance of the role of prosecutors in maintaining justice in society is recognised in the UN Guidelines on the Role of Prosecutors ("Guidelines on Prosecutors").[95] The Guidelines on Prosecutors were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and are intended, "to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings".[96]

This Guidelines set forth 24 core standards covering the following issues: qualifications, selection and training; status and conditions of service; freedom of expression and association; role in criminal proceedings; discretionary functions; alternatives to prosecution; relations with other government agencies or institutions; disciplinary proceedings; and observance of the Guidelines**.**

As noted in the fifth preambular paragraph of the Guidelines as read in conjunction with the second preambular paragraph, "prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect and compliance with ... the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal..." for the purpose of "contributing to fair and equitable criminal justice and the effective protection of citizens against crime".

2. Domestic constitutional guarantees regarding the status of public prosecutors

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[95] UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

[96] *ibid.* final preambular paragraph.

Article 139 of the Constitution provides public prosecutors with security of tenure, although certain legitimate exceptions are authorised.[97] Article 140 provides detailed regulations in respect of the personnel status of public prosecutors.[98] These constitutional guarantees of the status of public prosecutors are reflected in various provisions of domestic law, including, the Law on Judges and Public Prosecutors, the Criminal Procedure Law, the Civil Procedure Code and the Turkish Penal Code.

C. The role and functioning of public prosecutors in Turkey

Prosecutors in Turkey discharge both a judicial and an administrative function. Their judicial function comprises carrying out criminal investigations, bringing legal actions against suspects, appealing against the decisions of criminal courts and ensuring the enforcement of criminal judgments. Their administrative functions are related to the administration of courthouses and prisons, meeting the needs of these institutions and ensuring correspondence for courts with related persons or institutions.[99]

1. Judicial functions of public prosecutors

Regarding their judicial functions, public prosecutors are empowered to oversee the investigation, indictment and prosecution of any case. The law gives prosecutors far-reaching authority to both collect and present evidence and safeguard the rights of defendants, including those detained for pre-trial interrogation. They are expressly empowered to conduct the preparatory investigation, determine the jurisdiction for the case and supervise the security forces during the pre-trial investigation period.[100]

The system of preliminary investigation operates as follows. The public prosecutor, upon being informed of the occurrence of an alleged offence, makes a preparatory investigation in order to ascertain the identity of the offender and to decide

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[97] Article 139 of the Constitution states that:

"Judges and public prosecutors shall not be dismissed, or retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of court or post;

Exception indicates in law relating to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties on account of ill health; and those determined unsuitable to remain in the profession, are reserved."

[98] Article 140 of the Constitution states, in relevant part, that:

"Judges shall discharge their duties in accordance with the principles of the independence of the courts and the security of tenure of judges;

The qualifications, appointment, rights and duties, salaries and allowances of judges and public prosecutors, their promotion, temporary or permanent change in their duties or posts, the initiation of disciplinary proceedings against them and the subsequent imposition of disciplinary penalties, the conduct of investigation concerning them and the subsequent decision to prosecute them on account of offences committed in connection with, or in the course of, their duties, the conviction for offences or instances of incompetence requiring their dismissal from the profession, their in-service training and other matters relating to their personnel status shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of judges."

[99] Information Note on the Turkish judicial system, Ministry of Justice, 4 July 2003, p.7.

[100] By Article 154 of the Turkish Criminal Procedure Code, police officers are obliged to execute orders of the prosecutor concerning the legal procedure.

whether it is necessary to institute a public prosecution. If his investigation reveals no evidence upon to which to base a prosecution against an identifiable individual then the prosecutor will decide not to commence an action. However, if the investigation reveals even a single item of inculpatory evidence against an identifiable individual, then a public action, to a wide extent, seems to be deemed necessary and an indictment will be instituted before a competent court. Public prosecutors seem to act as if they have no power to evaluate the evidence obtained at the investigation stage in order to assess whether, on the balance of the evidence, criminal proceedings should or should not be instituted. Evaluation of evidence is regularly seen to be exclusively a function of the judiciary.

The public prosecutor may, for the purpose of his enquiry, demand any information from any public employee. He is authorised to make his investigation either directly or through police officers. The police are obliged to inform the public prosecutor immediately of events, detainees, and measures taken, and to execute orders of the prosecutor concerning legal procedures.

In cases where a private complaint is submitted to the public prosecutor, and the prosecutor finds no reason for prosecution or decides not to prosecute after a preparatory investigation, he informs the petitioner of his decision. If the petitioner is, at the same time, the aggrieved party the petitioner may, within 15 days of notice, object to the Chief Justice of the nearest court that hears aggravated felony cases. If the court is convinced that the petition is well founded and rightful, it will order a public prosecution; the prosecutor in charge of the case executes this decision. Otherwise, the court refuses the petition, and after such action a public prosecution may be opened only upon production of newly discovered evidence.

A public prosecution will be dismissed when the perpetrator of an offence which is punishable by a fine or a maximum of three months' imprisonment deposits the minimum amount of the fine prescribed for the specific offence (or, in the case of imprisonment, the sum which is the amount prescribed by the Law of Execution of Penalties for one day of imprisonment) in the appropriate office before the court hearing. If this amount is paid by the offender before a public prosecution has been initiated, and within ten days of the date of the offence, the perpetrator shall not be prosecuted at all.

The preparatory investigation is, in principal, secret, performed without the presence of the parties and in written form.

The final investigation or trial begins when the indictment is sent by the public prosecutor to the court that will try the case. The final investigation has two stages: the preparation for trial and the trial itself. Its object is to examine all the evidence before the court, and to reach a judgement with respect to the guilt of the accused. During this process the public prosecutor presents the case on behalf of the Republic.

2. *Administrative functions of public prosecutors*

The administrative functions of public prosecutors are related to the management of courthouses and prisons. Public prosecutors have overall responsibility for all aspects of the day-to-day administration and support work of the courts and the prisons. It is their duty to ensure that the necessary services are provided to the judiciary, court users and personnel within the prisons so as to ensure the efficient functioning of the justice system. In this capacity, public prosecutors are responsible for matters such as informing witnesses that their attendance is required at court. They are also responsible for matters such as the maintenance of lighting, the provision of electricity, the cleaning of the buildings and ensuring that there is adequate stationary. Public prosecutors are also responsible for overseeing the administration of the quarters where judges and public prosecutors live. In order to illustrate this function, the Chief Public Prosecutor of Diyarbakir informed us that, as well as having 14 public prosecutors under his authority, he is also responsible for 1 administrative director, 71 secretaries, 2 electricity technicians, 3 chauffeurs, 3 radiator technicians and 16 general service staff.

D. Concerns relating to the role and functioning of public prosecutors

Many of the concerns that we raised in Chapter V regarding the independence and impartiality of the judiciary apply equally to the role and functioning of public prosecutors in Turkey. This is so because the system for entry into the profession, pre-service and in-service training, appointment, promotion and transfer is the same for both professions. Moreover, the numerous concerns raised in relation to the functioning of the High Council apply equally to public prosecutors as they do to judges since the High Council is responsible for the professional careers of public prosecutors as well as judges. Furthermore, our comments regarding the inability of judges to form professional associations should also be read as applying to public prosecutors since they too are denied the ability to form and join associations to represent their interests. We do not propose to repeat our concerns in relation to these matters in this Chapter. It suffices to say that we adopt our analyses of these issues in Chapter V and ask that they be read as being applicable to the role and functioning of public prosecutors as well.

Also in Chapter V we addressed our concerns relating to the organic relationship that exists between judges and public prosecutors in Turkey and the fact that this relationship results in the office of the public prosecutor, rather than being both separate from and subordinate to the office of judge, in fact being effectively attached to the office of judge. Again, we do not propose to repeat our concerns in relation to this matter in this Chapter. We do however adopt our analysis of this issue in Chapter V and ask that it be read as being applicable to any assessment of the role and functioning of public prosecutors as well.

Effective implementation of any reforms aimed at breaching the organic relationship that presently exists between judges and public prosecutors would, we accept, result in a diminution in the power and authority of the public prosecutor. However, there are aspects of the role and functioning of public prosecutors that we consider need to be strengthened if they are to effectively fulfil their role within the judicial system.

1. Role of public prosecutors in the investigation of alleged criminal offences

Turkish law envisages public prosecutors having ultimate responsibility for conducting the investigation of any case. The law gives them far-reaching authority to both collect and present evidence and safeguard the rights of defendants during the investigation period. They are expressly empowered to conduct the preparatory investigation and supervise the investigating police during the pre-trial investigation period.[101] However, there is considerable concern among certain quarters that public prosecutors regularly exercise little or no supervision over police officers during the pre-trial investigation period. Instead, both the collection of evidence and the protection of the rights of detainees is left largely to the police themselves, the file only being brought to the attention of the public prosecutor when it becomes necessary to decide whether to prepare an indictment or not. Effectively then, it is said, the police undertake the investigation of the case and the prosecutor makes a decision on prosecution solely on the basis of the evidence that is placed before him. This was a problem highlighted in particular by the Diyarbakir Human Rights Association and the Istanbul Contemporary Lawyers Association during the course of our interviews. Indeed, the President of the Istanbul Contemporary Lawyers Association informed the experts that he had never witnessed an investigation that had been conducted in any other way; the decision on whether or not to prefer an indictment was always made solely on the basis of the evidence presented by the police, the public prosecutor never securing any supplemental evidence.[102] [103] This would appear to be contrary to Guideline 11 of the Guidelines on the Role of Prosecutors which provides: "Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations…"[104]

The lack of prosecutorial supervision over the investigation of criminal offences may in part be explained by the prosecutor's heavy caseload, limited human resources, and inefficient administrative system, matters addressed elsewhere in this Report. However, there is a further, more problematic obstacle in the way of effective prosecutorial supervision. Although public prosecutors are theoretically empowered to order polices officers to conduct investigations, in practice, they have little control over them. One reason for this stems from the fact that while public prosecutors are dependent upon the Ministry of Justice, the police depend upon the Ministry of Internal Affairs. This separation of the two forces results, it is said, in an unwillingness on the part of police officers to respond whole-heartedly to commands or requests from a public prosecutor. Instead, the police take their orders, including those relating to criminal

[101] By Article 154 of the Turkish Criminal Procedure Code, police officers are obliged to execute orders of the prosecutor concerning the legal procedure.
[102] Interview with the Istanbul Contemporary Lawyers Association, 3 October 2003.
[103] This scenario casts a somewhat different light on the statistic that the average period for the investigation of a file at the Public Prosecution Offices in 2002 was just 36 days. Rather than being the result of efficiency on the part of the prosecutors, the relatively short investigation period may be the result of ineffective investigations being carried out by the security forces.
[104] Guidelines on Prosecutors, Principle 11.

investigations, from persons responsible to the General Directorate of the Police and the Ministry of Internal Affairs. But, it is not just a question of willingness; it is also a question of ability. When it is considered that there is no specialisation within the police force, individual officers being required to undertake crime prevention and administrative duties in addition to their responsibilities with regards to criminal investigation, then it is understood that police officers only have limited ability to act on the orders of a public prosecutor. And, if police officers are unable to act on the orders of the prosecutor as and when required, then the ability of the prosecutor to control any investigation that is undertaken in respect of an alleged offence is limited.

The preponderance of the influence of the police force over the pre-trial investigation period and the associated diminution in the authority of the prosecutor over the criminal investigation process invites abuse of human rights and is likely to have an adverse effect on the quality of criminal investigations. We consider that public prosecutors should be empowered to take independent action to carry out their full investigative function as envisaged in Turkish law.

Many of those whom we interviewed advocated the creation of a specialised juridical police force as the most effective way of breaking the control of the security forces over the pre-trial period. The officers of such a force would be affiliated directly to a public prosecutor and be under overall control of the Ministry of Justice rather than the Ministry of Internal Affairs. This would enable the detaining authority to be separated from the investigating authority. While the existing police force would undertake administrative duties and effect arrests, all criminal investigations would be undertaken by the juridical police force under the leadership of a public prosecutor. We support this proposal as an effective means by which to conclude criminal cases accurately and without bias within a reasonable time and also put an end to torture claims.

We recommend that, in accordance with Guideline 11 of the Guidelines on the Role of Prosecutors, the Turkish authorities consider the advantages of creating a juridical police force with officers affiliated directly to individual public prosecution offices and the force as a whole placed under the overall control of the Ministry of Justice.

2. Role of the Ministry of Justice in decisions on prosecution

Once a preliminary investigation has been completed, a public prosecutor must decide whether it is necessary to institute a public prosecution. In theory, if he concludes that a public action is necessary, he institutes a case by an indictment before the competent court. If he considers that a public action is not necessary then he will decide not to prefer an indictment before a court. However, according to Article 148 of the Code

of Criminal Procedure, the Minister of Justice has competence to, by order, direct a prosecutor to commence a prosecution before the criminal courts if he sees fit.[105]

Although we recognise that the Minister of Justice has no competence to order a prosecutor not to commence an action or to stop an investigation, we consider that, provided an impartial and effective investigation has been undertaken prior to the decision of non-prosecution, for a political entity to have the power to effectively overrule the decision of a prosecutor regarding non-institution of proceedings and thereafter compel him to prepare an indictment and commence a prosecution, not only directly undermines the role of the prosecutor in criminal proceedings but serves to introduce the possibility for political considerations to override evidential requirements in any decision to prosecute. Indeed, such a power would appear to undermine compliance with Principle 14 of the Guidelines on Prosecutors which states: "Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded."

The possibility for the Minister of Justice to initiate a criminal prosecution can also be said to constitute a threat to the independence of the judiciary. This is so because, recalling the role of the High Council of Judges and Public Prosecutors in the process of appointing, promoting, transferring and disciplining judges, together with the influence of the Minister of Justice and his Under-Secretary within the High Council, it could be concluded that judges seized of a trial initiated at the behest of the Ministry of Justice would be left in the invidious position of knowing that individuals capable of exercising a profound influence over their entire judicial career had already found there to be a prima facie case to answer. In such circumstances, there would be the potential for judicial independence to be compromised.

According to the Director-General for Penal Affairs of the Ministry of Justice, the power of the Minister of Justice to override a decision of a public prosecutor not to initiate a criminal prosecution has not been used in the last 15 years. This would suggest that any loss of this power would not be readily missed.

We recommend that Article 148 of the Code of Criminal Procedure be amended so as to remove the power of the Ministry of Justice to override a decision of a public prosecutor not to initiate a criminal prosecution in circumstances where an impartial investigation has shown the charge to be unfounded.

3. Power of public prosecutors to discontinue proceedings

As we understand how the legislation is, to a large extent, applied in practice, if at the conclusion of the preliminary investigation, there is no evidence upon which to base a prosecution against an identifiable individual then the prosecutor will decide not to commence an action. However, if the investigation reveals even a single item of

[105] Information note on the Turkish judicial system, Ministry of Justice, 4 July 2003, p.7; Submission by Turkey concerning the judiciary to EU Sub-Committee No. 8, March 2003.

inculpatory evidence against an identifiable individual, then a public action will normally be deemed necessary and an indictment will have to be instituted before a competent court. Public prosecutors give themselves little power to evaluate the evidence obtained at the investigation stage in order to assess whether, on the balance of the evidence, there is any reasonable prospect of a conviction being secured if the matter is taken to trial. Evaluation of evidence is regularly regarded as a matter for the judiciary. However, according to Article 164 of the Code of Criminal Procedure, a prosecutor is entitled to make a decision of non-prosecution on the basis that there exists an insufficiency of evidence.[106] As we were informed, the reason why this power is rarely exercised in practice is probably because of internal administrative problems or even because prosecutors feel under pressure from Ministry of Justice inspectors to continue unmeritorious prosecutions.

In our opinion, the fact that public prosecutors do not take decisions of non-prosecution or decisions to postpone a lawsuit in circumstances where, although there may be some evidence again a suspect, there is clearly insufficient evidence upon which to discharge the burden of proof in a court of law, can only be contributing to a large number of unmeritorious cases featuring among the workload of the criminal courts in Turkey. Indeed, support for such a proposition is found in the fact that in 2002 25% of all the cases in the criminal courts in Turkey did not end in a conviction or acquittal but were instead concluded by the action being withdrawn. It may be suggested that if public prosecutors had taken a decision of non-prosecution or a decision to postpone the lawsuit prior to the commencement of proceedings, then 1 in 4 of all cases in the criminal courts in Turkey would never have been commenced at all.

However, we note that the Ministry of Justice has prepared a draft Code of Criminal Procedure. The draft legislation opens up the possibility for both prosecutors and courts to discontinue investigations and cases respectively at an early stage and thus reduce the number of unnecessary cases in court. According to the draft legislation, the court will be given three options: to accept an indictment, to reject it or to send it back to the prosecutor for amendment.

Guideline 14 of the Guidelines on Prosecutors provides: “Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.” Principle 18 provides: “In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s).” With these Guidelines in mind, in our opinion, the present practice of prosecutors almost always filing indictments prevents prosecutors from fulfilling their role as envisaged in international law.

[106] See also Article 175 of the Draft Criminal Procedure Code, version 27 March 2003.

We recommend that Chief Public Prosecutors take an active role in ensuring that public prosecutors use their discretion to take decisions of non-prosecution or to postpone a public lawsuit in circumstances where circumstances reasonably require such a decision.

We welcome the provision set out in the draft legislation giving the courts power to reject or require the amendment of indictments as a step in the right direction.

4. Administrative functions of public prosecutors

Principle 3(1)(e) of the Council of Europe Recommendation on the Independence, Efficiency and Role of Judges provides that states should take appropriate measures to assign non-judicial tasks carried out by judges to other persons so as to reduce excessive workload. We can see no legitimate reason as to why the same principle should not also apply to prosecutors.

Removing the public prosecutor's responsibility for administrative tasks would ease the burden upon them and enable them to concentrate on their judicial function of investigating cases and presenting prosecutions. This in turn should strengthen their role in criminal proceedings and lead to an increase in both efficiency and quality.

We would suggest that the day-to-day administration and support work of the courts and the prisons could more effectively be carried out by a dedicated agency that is funded by central government and staffed by civil servants.

We recommend that administrative duties currently undertaken by public prosecutors should be transferred to administrative staff of the Ministry of Justice.

E. Conclusion

In the opinion of the experts there is a need for reform in order to ensure that the Turkish legal system is able to benefit from strong, independent and impartial prosecutors who are willing and able to resolutely investigate and prosecute suspected criminal offences. In particular, we would urge the Turkish government to take measures directed at ensuring that public prosecutors can be viewed as being separate from and subordinate to the office of judge. We would also invite the government to take measures aimed at increasing the role of public prosecutors in the criminal investigation process and empowering them to exercise their power to take decisions of non-prosecution in circumstances where an impartial investigation reveals an insufficiency of evidence. Finally, we would call on the Turkish government to relieve public prosecutors of their administrative functions.

VII – ROLE AND EFFECTIVENESS OF LAWYERS

A. Introduction

In addition to independent and impartial judges and prosecutors, lawyers constitute the third fundamental pillar for maintaining the rule of law in a democratic society and ensuring the effective protection of human rights. All persons are entitled to have effective access to legal services provided by an independent legal profession. In order to be able to carry out their professional duties effectively, lawyers must not only be granted all the due process guarantees afforded by domestic and international law, but must also be free to carry out their work without fear of intimidation, harassment and improper interference.

B. Turkey's legal obligations to lawyers

The importance of the role of the legal profession in safeguarding fundamental rights and liberties is recognised in the UN Basic Principles on the Role of Lawyers ("Principles on Lawyers").[107] The UN General Assembly adopted the Principles on Lawyers in September 1990 as an authoritative statement of acceptable practices with regard to the role of lawyers.

The Principles on Lawyers begin with a declaration of the importance of effective legal representation to the protection of the fundamental rights of all persons.[108] The Principles then set out 29 core standards that pay special attention to the following issues: provision for effective access to legal assistance for all groups within society; the right of the accused to counsel and legal assistance of their own choosing; education of the public on the role of lawyers; training and qualifications of lawyers, and the prevention of discrimination with respect to entry into the legal profession; the role of governments, bar associations and other professional associations; the right of lawyers to undertake representation of clients or causes without fear of repression or persecution; and lawyers' obligations to keep communications with their clients confidential. Articles of particular relevance to the situation in Turkey are addressed in detail below.

In its resolution 45/121 of December 1990, the General Assembly "welcomed" the Basic Principles on the Role of Lawyers and invited governments, "to be guided by them in the formulation of appropriate legislation and policy directives and to make efforts to implement the principles contained therein … in accordance with the economic, social, legal, cultural and political circumstances of each country." In resolution 45/166 of December 1990, the General Assembly welcomed the Basic Principles, inviting governments "to respect them and to take them into account within the framework of their national legislation and practice."

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[107] Basic Principle on the Role of Lawyers, 7 September 1990, A/CONF.144/28/Rev.1.

[108] The Preamble states, "adequate protection of human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession." *Ibid.*

A legal obligation to protect the role of lawyers is implicit within the right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms.[109] According to Strasbourg jurisprudence, legal representation must be "practical and effective" rather than "theoretical and illusory."[110]

C. Role and effectiveness of lawyers within the Turkish judicial system

1. Access to lawyers

The right of accused persons to consult and communicate with a lawyer in confidence is recognised in all relevant international standards. For example, Principle 5 of the UN Basic Principles on the Role of Lawyers provides: "Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence." Principle 8 provides: "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials." The European Court of Human Rights has stated that it, "considers that an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from" Article 6(3)(c) of the Convention. "If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective."[111] [112] [113]

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[109] The relevant paragraphs of Article 6 state as follows:

"1. In the determination of civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …

3. Everyone charged with a criminal offence has the following minimum rights:

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

[110] *Artico v. Italy* (1981) 3 EHRR 1.

[111] Eur. Court HR, Case of *S. v. Switzerland*, judgment of 28 November 1991, Series A, No. 220, p. 15, para. 48.

[112] Rule 93 of the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners further provides that: "For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official." (Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977)

[113] Principle 18 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides further details in this respect:

"1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

i. Ability of persons to access lawyers upon arrest or detention

Article 136 of the Code of Criminal Procedure provides that all persons detained on suspicion of having committed ordinary individual or collective crimes are entitled to access a lawyer from the moment that they are taken into custody.[114] [115] Article 135 of the Code of Criminal Procedure provides that detainees must be reminded of their right to have a defence lawyer present.[116] Following the fourth reform package of 11 January 2003 which abolished Paragraph 4 of Article 16 of Law No. 2845 of 16 June 1983 on the Establishment and Trial Procedures of State Security Courts, defendants under the competence of the SSCs also have the right to be reminded of their right to access a lawyer, and to in fact access a lawyer, as soon as they are taken into detention. Therefore, according to law, all persons now have the right to access legal counsel immediately upon being deprived of their liberty.

The Code of Criminal Procedure also provides that if the detainee requests a lawyer but lacks the financial resources to instruct one, the Bar Association shall assign a lawyer for the defence of the detainee. A request is not necessary in cases where the detainee is under 18 years old, deaf, mute or handicapped to such a degree that he cannot defend himself. In such cases, the appointment of a defence lawyer is mandatory. Therefore, according to law, all persons who are unable to afford a lawyer have the right

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime."

[114] Submissions by Turkey to the UN Committee Against Torture, 22 July 2002, p.10.

[115] Articles 136 of the Code of Criminal Procedure provides:

"Any defendant or person under custody may benefit from the assistance of one or more lawyers of his or his legal representative's choice, at any stage or level of the investigation.

During the interrogation phase, only one lawyer may be present to follow the proceedings. The number of such lawyers may be increased to a maximum of three during interrogation by the public prosecutor.

At any stage of the investigation, the defence lawyer has the unrestricted and unhindered right to meet the defendant or person under custody, take his testimony, accompany him during the interrogations and provide him with legal assistance."

[116] The relevant part of Article 135 is provides:

"The identity and personal status of the testifying or interrogated person is registered. The charges are related to the persons, who is also reminded of his rights related to having a defence lawyer present and to notify his relatives about his custody, refraining from responding to the charge being made as well as of his right to request the collection of concrete evidence to be relieved from doubt, to be given the opportunity to eliminate the suspicion cast over him, and the right to be able to submit facts whish are in favour of the defence. A detailed record of the interrogation or testimony, indicating the place and the date, as well as the names and capacities of the persons present, must be made. This record must also bear the signatures of the defendant or person under custody as well as that of his lawyer and, if such is the case, the reasons why they have not signed the record."

of free access to counsel, the costs being borne from a fund that is vested with the Union of Turkish Bar Associations and allocated by the Ministry of Justice.[117]

Notwithstanding these formal guarantees, however, our interviews reveal a significant regional variation in the extent to which, in practice, detainees are presently being afforded their right to access free legal counsel from the outset of the deprivation of their liberty.

In Ankara, neither the Bar Association, the Contemporary Lawyers Association, nor Mr. Yusuf Alatas, an eminent lawyer, raised any concerns regarding implementation of the right of detainees to access free legal counsel immediately upon being deprived of their liberty. In Istanbul, the Bar Association considered that the requirement that detainees be afforded immediate access to free legal representation was being respected in practice but the Contemporary Lawyers Association sought to draw a distinction between implementation of the right of detainees to be immediately informed of their right to access free legal counsel and the actual provision of legal counsel. The Contemporary Lawyers Association informed us that although the police do immediately inform detainees of their right to access a lawyer for free, there are instances where, if a request for a lawyer is made, that request is not passed on to the Bar Association for 2-3 hours. During this time, interrogation of the detainee does on occasion take place, usually to obtain information regarding suspected accomplices. We were informed that sometimes the information provided by a detainee during such interrogation does not appear in the detainees file but in SSC cases such information both appears in the file and is relied upon as evidence against the accused in court.

In Izmir, the Bar Association informed us that in 2003, lawyers have been appointed in 1671 cases, but that 279 of the cases involved juveniles (where appointment of a lawyer is mandatory) and 689 appointments were made at the request of a prosecutor. Therefore, detainees have requested the services of a lawyer in 703 cases, which, as a percentage of all cases, is very low. Lawyers from the Human Rights Association informed the delegation that detainees are routinely not informed of their right to access free legal counsel, be it immediately or at any time during their deprivation of liberty. The police do have a standard form that asks detainees whether they wish to employ the services of a lawyer but the usual practice is for the police to tick the box that says “no” before handing the form to the detainee to sign. This practice was confirmed by the Contemporary Lawyers Association. We were informed that the National Assembly’s Human Rights Committee, accompanied by the Izmir Human Rights Association, visited a police station in Izmir in August 2003 and asked to examine the police record of how many detainees had requested a lawyer in previous months and this revealed that not a single detainee had requested the services of a lawyer during his period of police detention. The Izmir Bar Association stated that an investigation of police stations showed that in one station, as many as 98 % of detainees had not requested a lawyer. We were also informed that the Human Rights Association had sought permission to place a poster explaining the rights of detainees on an interior wall of a police station but permission had been refused because the poster displayed the logo

[117] Submissions by Turkey to the UN Committee Against Torture, 22 July 2002, p.11.

of the Human Rights Association. The Bar Association informed us that there is a lack of awareness among the population regarding their right to access a defence lawyer in detention, if necessary for free, and no state agency provided such information. The Association informed us that it had printed posters that displayed the basic rights of detainees and it was endeavouring to display them in police stations.

In Diyarbakir, the Contemporary Lawyers Association considered that, in their experience, detainees were being informed of their right to access free legal counsel immediately upon being deprived of their liberty but that the lawyers were sometimes obstructed in gaining access to their clients by, for example, being told by the police that the detainees did not wish to see them when this was untrue. The picture painted by both the Diyarbakir Bar Association and lawyers from the Diyarbakir branch of the Human Rights Association however was far more pessimistic. The Bar Association informed us that the provisions of the Criminal Procedure Law that provide for detainees to be informed of the right of access to legal counsel are rarely implemented. Throughout the whole of 2002, the Bar Association received a total of only 150 applications for legal aid and only 10% of all defendants over the age of 18 were represented by a lawyer at trial. The Bar Association considered that the problem was particularly acute in the Diyarbakir region because of the low standard of education amongst the population. This meant that detainees were not aware of their rights. The Bar Association informed us that in an attempt to educate people about their basic rights they had designed a poster that explained that detainees had a right to free legal assistance 24 hours a day, 7 days a week. However, when they sought permission to display the poster in the police stations, permission was refused. As a consequence, the Association handed out leaflets on the street bearing the same message. This saw applications for free legal assistance increase by 200%. Lawyers from the Diyarbakir branch of the Human Rights Association considered that less than 20% of all persons detained by the police in their region requested a lawyer. They concurred that in southeast Turkey the population are not aware of their basic rights, including the right to free legal representation immediately upon detention, but also alleged that the police and gendarmes usually do not inform detainees of their rights or if they do, they seek to dissuade detainees from exercising their rights by, for example, providing them with false information that if they request a lawyer and are found guilty then they will have to pay the lawyers costs.

Principle 5 of the UN Basic Principles on the Role of Lawyers provides: "Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence."[118] Principle 4 states: "Governments… shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers".[119]

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[118] Principle 5 of the UN Basic Principles on the Role of Lawyers.
[119] Principle 7 of the UN Basic Principles on the Role of Lawyers.

In Turkey, as our interviews reveal, despite the formal provisions of Articles 135 and 136 of the Criminal Procedure Code, for many detainees outside Ankara the right of immediate access to free legal counsel remains illusory. Large numbers of detainees remain ignorant of their right to free legal counsel because they are routinely not informed that they possess such a right. Others still are lulled into unwittingly signing forms that waive their right to counsel. Those who are aware of their right to counsel are, on occasion, subjected to measures intended to dissuade them from exercising this right. There are also reports of instances where even those who do make a formal request for a lawyer are nevertheless interrogated in the absence of a lawyer or else their lawyer is obstructed in gaining access to them.

We consider that there remains a significant disparity between law and practice in most of Turkey regarding respect for the right of access to free legal counsel upon deprivation of liberty. The Turkish state authorities must take urgent steps to negate this disparity. It is imperative that persons taken into police custody are expressly informed, without delay and in a language that they understand, of all their rights, including their right to free legal advice and representation. The right to prompt legal assistance upon arrest and detention is essential both in order to guarantee the right to an efficient defence and for the purpose of protecting the physical and mental integrity of the detainee.

We recommend that steps be taken to monitor and enforce existing requirements that all persons be immediately informed by a competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence. In particular, we recommend that Bar Associations be permitted to place posters advocating the rights of detainees within police stations and other detention facilities. We also recommend that once a week police stations and gendarme stations be required to submit to the local Bar Association a list of all persons detained during the previous week Such a list would assist Bar Associations in monitoring compliance with Articles 135 and 136 of the Criminal Procedure Code and enable them to make representations regarding further improvements if necessary.

ii. Ability of lawyers to access clients held in pre-trial detention

For the assistance of any lawyer to be effective, he must be afforded adequate time and facilities in which to communicate with his client prior to trial. Where an accused person is held in pre-trial detention, this requirement means that the lawyer must be able to enter and leave the detention centre without unnecessary obstruction and once inside, he must be able to communicate with his client outside the hearing of institution officials. As an additional aspect, the detainee should be supplied with writing materials and be able to prepare and hand to his legal advisor confidential instructions regarding his defence.

Lawyers from Ankara, Istanbul, Diyarbakir and Izmir all complained of facing obstructions when attempting to enter detention centres, particularly F-Type Prisons, for the purpose of visiting their clients. They characterised these obstructions as a form of official harassment or intimidation aimed at dissuading them from visiting their clients.

Lawyers from the Istanbul Contemporary Lawyers Association complained that sometimes they travel 200km to the detention facility, only to be informed on arrival that they cannot enter because a general search is taking place. They also complained of having their identity cards taken away and background checks being undertaken about them. Lawyers from the Ankara Bar Association complained that they had to declare all documents that they intended to take into the detention centre and if they failed to do so then an investigation could be started against them. However, the most common complaint that we received from lawyers practising throughout Turkey related to the application of intimidatory searches upon entry to the detention facilities.

According to our interviewees, prior to February 2003 all items carried into prison, including legal documents relating to the defence case, were subject to a search by gendarme officers. However, following an amendment to Law No. 4806, since February 2003 if a lawyer declares that a particular document is a legal document related to the defence of his client then it is not searched. To compensate for their loss of power, however, the gendarmes have, it is alleged, purposely increased the sensitivity of the metal detectors situated at the entrances to the detention facilities. If a metal detector is activated, then the lawyer has to submit to a body search or else he will be refused entry to the facility. This search, it is alleged, is used as a means of harassing and intimidating lawyers.

The Istanbul Bar Association informed us that it had received numerous complaints from its members regarding searches carried out at the entrances to detention facilities as a result of over-sensitive metal detectors. The Diyarbakir Contemporary Lawyers Association complained that the metal detectors at the entrance to detention facilities were too sensitive. The Izmir Bar Association recounted that in F-Type prisons lawyers had to pass through extra sensitive metal detectors that, if triggered, resulted in their bags being searched and documents seized. The most disturbing complaints, however, came from the Ankara Bar Association and the Istanbul Contemporary Lawyers Association. The latter explained that the metal detectors are so sensitive that they can be activated by a metal button on a pair of trousers and that when this occurs, the lawyers are forced to remove their trousers. Both organisations reported that in the case of female attorneys, metal within their brassieres is capable of triggering the metal detectors and when this happens, it results in the lawyer concerned being forced to remove her underwear, which is then subjected to an examination. Lawyers from the Istanbul Contemporary Lawyers Association informed the delegation that female lawyers had even been forced to remove sanitary dressings prior to entering the detention facilities.

All detention centres have a duty to maintain adequate security and that may legitimately require lawyers to pass through metal detectors. We can see nothing objectionable in this practice per se. However, Principle 16 of the Basic Principles on the

Role of Lawyers provides that governments must take measures to ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference. Accordingly, the need to maintain security must not be used as a justification for the intimidation and harassment of lawyers.

We are extremely concerned at the high number of complaints that we received regarding the treatment of defence lawyers at the entrances of detention centres throughout Turkey. Given the nature and extent of these complaints, we have no hesitation in finding that this treatment goes beyond the legitimate enforcement of security measures. We consider that such treatment is in reality a form of official intimidation and harassment. That any lawyer should be forced to remove their clothes is objectionable, but that female lawyers are being forced to remove their underwear and sanitary dressings is particularly intolerable. Such practices must not be allowed to continue.

We recommend that, in accordance with Principle 16 of the UN Basic Principles on the Role of Lawyers, the Turkish government take measures to ensure that lawyers are not intimidated or harassed when seeking entry to detention centres for the purpose of visiting their clients. In particular, metal detectors used at prison entrances should be set at the same level as in airports.

In addition to the numerous complaints received in relation to the treatment of lawyers when seeking entry to detention facilities in Turkey, we also received complaints, although not universally, regarding the availability of facilities within the detention centres for lawyers to consult and communicate with their clients in full confidentiality. Lawyers from the Ankara Bar Association complained that once inside the detention centres they have no facility for confidential consultation with their client. Instead, they are afforded a room, 20 square metres in size, in which 5 or 6 guards will stand within hearing distance of the lawyer and the detainee. The Istanbul Bar Association complained that, particularly in cases involving individuals charged with so-called terrorist offences, lawyers face difficulties in being able to communicate with their clients in private.

As had already been mentioned, all international standards recognise the right of accused persons to consult and communicate with a lawyer in confidence. It is worth repeating again that the European Court of Human Rights has stated that it, "considers that an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from" Article 6(3)(c) of the Convention. "If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective."[120]

We recommend that, where such facilities do not already exist, visiting rooms in all detention centres in Turkey be equipped with consultation rooms that enable lawyers to communicate with their clients in full confidence. Such consultations may be within the sight, but not within the hearing, of security staff.

In addition to the inadequacy of the physical facilities for lawyer-client consultation within certain detention centres in Turkey, there is an unnecessary procedural obstacle that, in our opinion, also serves to undermine the effectiveness of any such consultation. Lawyers from the Istanbul Contemporary Lawyers Association maintained that they were forbidden from exchanging any documents with their clients during the course of their consultations. The Izmir Bar Association also said that its members faced a difficulty in F-Type prisons in that they were not allowed to exchange documents with their clients.

We consider that such restrictions undermine an important element of the right to a fair trial. Article 6(3)(b) of the European Convention on Human Rights speaks of an accused person's right to "adequate time and facilities for the preparation of his defence". According to Strasbourg jurisprudence, "facilities" are not limited to the opportunity to engage and communicate with counsel but include access to documents and other evidence that the accused requires to prepare his defence.[121] As well as the right of the detainee to receive documents necessary for the preparation of his defence, the detainee should also be able to provide written instructions to his lawyer. Rule 93 of the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners provides that: "For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and *to prepare and hand to him confidential instructions.* For these purposes, he shall if he so desires be supplied with writing material …" (emphasis added).

We recommend that, in accordance with Article 6(3)(b) of the European Convention on Human Rights and Rule 93 of the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners, all persons held in pre-trial detention (i) be afforded the possibility of accessing documents and other evidence that they require for the preparation of their defence; and (ii) be afforded the possibility of preparing and handing to their lawyer confidential instructions.

Lawyers from the Istanbul Contemporary Lawyers Association stated that in addition to not being able to exchange any documents with their clients, their clients were also not allowed to have any pens or paper in the interview room.

As has already been noted, Rule 93 of the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners provides that: "For the purposes of his defence, an untried prisoner shall … if he so desires be supplied with writing material …".

We recommend that, in accordance with Rule 93 of the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners, all persons held in detention be supplied with writing material prior to and during consultations with their legal representatives if such material is requested.

iii. Ability of lawyers to communicate with clients during trial

The right to privileged communications with one's lawyer is also applicable at the stage of trial, during which the accused must be ensured adequate time and facilities for consulting with his lawyer confidentially. Without the possibility of such privileged consultation, the ability of the lawyer to provide representation before the court that is both practical and effective is undermined.

In criminal courts in Turkey, lawyers whose clients are produced from a detention facility and who therefore, apart from during their court appearance, are held in the cells of the court, are not able to consult with their clients in the cells either prior to the hearing, during any adjournment of the hearing or after the hearing. This practice is not acceptable by international standards. The only justification advanced to us for the prohibition on lawyer-client consultations in the cells of the court was a practical one, namely that because defendants awaiting trial are held in a single communal cell, rather than individual cells, it is not possible to provide facilities for confidential communication. We observed the detention facilities in the Izmir State Security Court and noted the existence of two communal cells, one designated for male detainees and another for female detainees. Whilst we accept that there may be legitimate reasons as to why a lawyer-client consultation cannot properly take place in a communal cell, for example because the case may involve multiple defendants who implicate each other, we can see no obstacle to the construction of a consultation room or rooms, outside of the communal cell itself but still within the secure facility, where defendants and their lawyers could meet, in confidence, as and when necessary. Such a facility would serve to significantly enhance the right to defence in criminal proceedings in Turkey in accordance with international standards.

A further restrictive practice relating to the ability of lawyers to communicate with their clients during trial is that, as a general rule, no communication is permitted to take place between a lawyer and his client during the course of the court proceedings. Exceptionally, a defence lawyer may ask a judge for permission to consult with his client during the course of a hearing but such requests are, so we are given to understand, dealt with extremely reluctantly.

We recommend that lawyers and their clients be provided with adequate facilities to be able to communicate in confidence within the detention facilities of all criminal courthouses throughout Turkey. Where the possibility of such confidential communication does not already exist, we recommend that consultation rooms be constructed outside of the communal cell area in court

We recommend that provided the due process of the court is not unduly disturbed, lawyers be permitted to consult with their clients during the course of court proceedings as and when required.

iv. Ability of lawyers to access convicted persons in prison

The right to privileged communications with one's lawyer is also applicable at the stage of appeal proceedings, during which the accused must be ensured adequate time and facilities for consulting with his or her lawyer confidentially.

We are concerned that the right of convicted persons who have exhausted their domestic appeal rights to submit an application to the European Court of Human Rights may be being unduly threatened by difficulties experienced by lawyers in visiting their convicted clients in prison.

As we understand the position in Turkey, if a convicted person has an ongoing appeal before the High Court of Appeals regarding his criminal prosecution then he is entitled to consult and communicate with his lawyer in prison. However, since December 2001, if the convicted person has exhausted his domestic appeal rights and is serving a sentence of greater than 1 year in prison then he may not receive visits from the lawyer who conducted his criminal proceedings, which are deemed to be finalised, or indeed any other lawyer. Although it is recognised that convicted persons may have legal affairs that need attending to, for example in relation to property rights outside of prison, if this is the case then a public prosecutor appoints a legal guardian for any convicted person who receives a custodial sentence of greater than one year in prison and that legal guardian is responsible for the administration of the legal affairs of the convicted person whilst he is in prison. The sentenced prisoner may receive legal visits from his legal guardian, but he may not receive visits from any other lawyer.

The difficulty with this system is that even after convicted persons have exhausted their domestic appeal rights, they retain the right to submit an application to the European Court of Human Rights and, not unsurprisingly, most convicted persons seek to instruct the lawyer who was responsible for their criminal trial for the purposes of their application to the European Court. However, since they can only receive legal visits from their legal guardian, they are not allowed to instruct the lawyer of their choice.

Convicted persons circumvent this restriction on their ability to access their trial lawyer by transferring power of attorney from the legal guardian to their trial lawyer, thus enabling the trial lawyer to visit them in prison. However, the problem with this system is that strict time limits apply to any application to the European Court of Human Rights. Where the complaint relates to a criminal conviction or sentence, an applicant has 6 months to apply after domestic remedies have been exhausted. The 6-month period runs from the final court decision in the domestic appeal process. Therefore, if a public prosecutor delays in the initial appointment of a legal guardian, this results in delay in the transfer of power of attorney from the legal guardian to the trial lawyer, by which time there is the possibility of 6 months having elapsed since the final court decision in the domestic appellate process and any application to the European Court therefore being procedurally barred.

As a further obstacle to the ability of defence lawyers to meet with convicted persons in prison, the Izmir Bar Association and the Contemporary Lawyers Associations of Istanbul, Diyarbakir and Izmir informed the delegation about a circular issued by the

Ministry of Justice towards the end of July or beginning of August 2003. The Circular apparently provides that before a defence lawyer can visit a convicted person in prison he must document the reason for wishing to visit his client. Therefore, any lawyer who wishes to consult with a convicted person serving more than 1 year in prison regarding proceedings before the European Court of Human Rights now has to both secure a transfer of the power of attorney from the legal guardian and also document the reason for wishing to visit his client.

We consider that at best these requirements represent an unnecessary restriction upon the ability of lawyers to access their convicted clients in prison. At worst, they could serve to threaten the ability of convicted persons to pursue an appeal before the European Court of Human Rights.

We recommend that convicted persons be afforded the right to appoint a lawyer of their own choosing to advise and represent them in relation to all matters pertaining to their criminal conviction, including any subsequent appeal against that conviction. There should be no delay in the appointment of a lawyer for a convicted person and an appointed lawyer should be able to visit and consult with his convicted client, without obstruction, as and when required.

2. Equality of arms

The right to equality of arms in criminal proceedings forms an intrinsic part of the right to a fair hearing and means that there must at all times be a fair balance between the prosecution and the defence. At no stage of the proceedings must any party be placed at a disadvantage vis-à-vis his or her opponent.

The European Court of Human Rights has explained the principle of equality of arms as "one of the features of the wider concept of a fair trial" as understood by Article 6(1) of the European Convention, which implies that "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent"; in this context, "importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice".[122]

In our opinion, from an objective viewpoint, neither the organisation of the courtrooms in Turkey nor the procedures adopted within them, presently affords a fair balance as between the prosecution and defence. The appearance, and in certain instances the reality, is that the interests of the prosecution are promoted vis-à-vis the interests of the defence.

i. Entry into the courtroom and exit from the courtroom

At the start of every hearing, prosecutors and judges simultaneously enter the courtroom through the same door whilst defence lawyers are required to enter the

[122] Eur. Court HR, Case of *Bulut v. Austria*, judgment of 22 February 1996, Reports 1996-II, p. 359, para. 47.

courtroom from a side door along with the public. Whenever the judges rise, the prosecutor also retires with the judges through the same door, leaving the defence lawyers to exit along with members of the public.

We consider that the fact that prosecutors and judges enter and exit the courtroom together undermines the appearance of there being proceedings where two equal parties are acting before an independent and impartial tribunal. The appearance created by this procedure is that the position of the prosecutor is elevated vis-à-vis the defence lawyer, thereby undermining the principle of equality of arms.

We recommend that public prosecutors be required to enter and leave the courtroom through a door other than that used by the judge.

ii. Layout of the courtroom

During court hearings, the prosecutor sits on an elevated platform, on the same level as the judges and directly adjacent to them. In some courtrooms, notably the Ankara State Security Court, this platform raises the prosecutor and the judges some 2-3 metres off the ground. Meanwhile, the defence lawyers sit at a table at ground floor level, the same level as the public and the defendants.

We consider that the layout of the courtroom and the proximity of the judges and the prosecutor, who are all physically removed from the defence lawyer, is problematic. The fact that the prosecutor sits so close to the judges and on the same level as them again creates the impression that the prosecutor is given more importance and is held in higher esteem than the defence lawyer. In other words, the layout of the courtroom directly undermines the appearance of an equality of arms.

We recommend that the position of the public prosecutor in the courtroom be altered so that rather than sitting on an elevated platform adjacent to the judges, the public prosecutor is required to sit at a table at ground floor level, either next to or opposite the defence lawyer.

iii. Availability of information technology within the courtroom

In some courtrooms in Turkey, the prosecutor, like the judges, is provided with a computer and a terminal that enable him to see the record of the proceedings as it is being entered by the court stenographer. Where such facilities exist, however, defence lawyers are not provided with any similar technology. Instead, they are required to listen and take notes if they wish to have a record of proceedings during the course of the hearing.

We can see no justification for the prosecutor being able to have a record of the court proceedings appear on a screen in front of him in circumstances where the defence lawyer cannot have access to the same facility. Such a state of affairs is contrary to the notion of there being a fair balance between the prosecution and defence.

We recommend that where courtroom facilities exist for the prosecutor to observe the record of proceedings as it is being entered by the court stenographer, defence lawyers be provided with access to the same facility.

iv. Communication between judges and prosecutor during the course of proceedings

Whenever judges retire during the course of proceedings, for example to consider the merits of a defence application, the prosecutor also retires with the judges to the same ante-chamber. The defence lawyers meanwhile remain in court. When the judges return to court to deliver their ruling, the prosecutor returns to court alongside them.

We consider that the practice of the prosecutor and the judges retiring to the same ante-chamber whenever there is a need to consider a defence application is particularly concerning. Such a practice affords the prosecutor access to, and the opportunity to communicate with, the panel of judges outside the courtroom to the absolute exclusion of the defence lawyers. We consider this to be contrary to the principle of equality of arms between the prosecution and the defence in so far as it places the latter at a substantial disadvantage.

v. Procedure for the calling of witnesses

We recommend that whenever judges retire to their ante-chamber for the purposes of deliberating on their rulings, the public prosecutor be required to remain inside the courtroom. Where judges remain in the courtroom in order to conduct their deliberation, the prosecutor should not enter into any discussion with the judges during the course of their deliberation.

In criminal courts in Turkey, if a defendant wishes to call a witness to give evidence on his behalf then, according to the procedure rules, before that witness can be heard, either the defendant or his lawyer must apply to the judge for permission to call the witness. Whether that witness is permitted to give testimony or not is entirely a matter within the discretion of the judge. In contrast, the prosecutor is entitled to call any witnesses that he wishes in order to give evidence on behalf of the prosecution case and there is no requirement that he seek the permission of the judge in order to do so.

Article 6(3)(d) of the European Convention on Human Rights provides that everyone charged with a criminal offence has the right, "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." In our opinion, the procedure as outlined in the foregoing paragraph prevents a defendant from obtaining the attendance of witnesses on his behalf under the same conditions as the prosecution. We

We recommend that upon the request of a defence lawyer, the court be obliged to summon all defence witnesses, unless the court, on the basis of substantial facts, finds that hearing the witness would not contribute to the determination of the case.

consider that both parties should have the opportunity to present their case to the court under conditions that do not place them at a substantial disadvantage vis-à-vis the other. The disparity that presently exists in Turkey is inconsistent with the principle of equality of arms.

vi. Examination of witnesses

Normal procedures in criminal trials in Turkey preclude the defence from examining witnesses directly. Instead, defence lawyers suggest questions to the Presiding Judge who then decides both whether to ask the questions suggested and if so, how the questions should be phrased. In this manner, the defence are restricted as to both the form and content of the questions that they may ask witnesses. According to both the Deputy Chief Public Prosecutor of the Izmir State Security Court and Mr. Yusuf Alatas, an eminent lawyer, however, when the public prosecutor examines a witness, although he too has to direct his questions through the Presiding Judge, the Presiding Judge asks every question that the public prosecutor seeks an answers to. There is no restriction as to the form or content of the questions that the prosecutor may ask of witnesses.

We consider that this procedure for the examination of witnesses subjects the defence to a procedurally inferior position vis-à-vis the prosecution in contravention of the principle of the equality of arms.

We recommend that the procedure for the examination of witnesses be amended so as to ensure that both the defence and prosecution are placed in a procedurally equal position regarding the form and content of witness questions.

vii. Recording of witness evidence and submissions of counsel

Turkish courts have no mechanism for accurately recording the evidence of witnesses or the submissions of counsel. The only facility available is a court stenographer who, using a computer, generates an account of what is said in the courtroom. However, different procedures are adopted for recording the evidence, argument and submissions of the defence and prosecution respectively.

Defence lawyers are barred from dictating their submissions directly into the court record. Instead, they must rely upon the judge to summarise the testimony of witnesses, the statements of their clients and their own arguments and submissions. The court stenographer only records the summary that the judge dictates to her. In contrast, the court stenographer enters evidence and submissions on behalf of the prosecution directly into the court record, verbatim, without waiting for a summary from the judge.

We are concerned that in so far as the procedure for recording defence submissions in Turkey relies upon the Presiding Judge's recollection and summary of the

We recommend that all court proceedings be sound-recorded so that an accurate record of all evidence, argument and submissions on behalf of both the prosecution and defence is made.

defence case, it potentially fails defendants in three key respects. First, during the course of the trial it risks creating the impression that defence submissions are not as important as those made by the prosecutor. Second, in so far as there is room for doubt as to the veracity or accuracy of the court record, it may prevent defendants from arguing on appeal matters advanced on their behalf during the course of their trial. Third, the procedure as presently followed could be said to deprive appellate courts, whose role is to scrutinise the fairness of trial proceedings, of any accurate record of the proceedings in the lower court. In our opinion, these matters, which do not apply to the prosecution, serve to place the defence at a substantial disadvantage during the course of criminal proceedings in Turkey.

3. Criminal proceedings against lawyers

Not only is the right to defence undermined by a most apparent inequality of arms in criminal proceedings in Turkey, but it is further jeopardised by the fact that lawyers who repeatedly conduct defences in cases of a political nature or who comment on the human rights practices of Turkey, continue to find themselves subject to criminal prosecution.

The UN Basic Principles on the Role of Lawyers sets forth various guarantees against the intimidation and harassment of lawyers with a view to prevailing upon them to relinquish the defence of clients seeking to claim their rights and freedoms. The Principles make clear that it is essential that Governments do their utmost to protect lawyers against such interference in the exercise of their professional duties. In particular, Principle 16 provides: “Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.” Furthermore, Principle 18 provides, “Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.” The Principles also guarantee lawyers freedom of expression. In this regard, Principle 23 provides: “Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action of their membership in a lawful organisation.”

Notwithstanding these guarantees however, in Turkey there continue to be numerous examples of lawyers who represent clients charged with or convicted of political offences, or who comment on their country’s human rights practices, being both threatened with and exposed to prolonged and repeated criminal prosecutions for activities carried out in the exercise of their professional duties. A summary of the

criminal proceedings against lawyers that were brought to our attention is included in Annex B.

We are extremely concerned at the fact that, as the cases cited in Annex B demonstrate, lawyers in Turkey continue to be prosecuted for offences arising out of the exercise of their legitimate professional duties and the exercise of their legitimate right to freedom of expression. We urge the relevant state authorities to refrain from identifying lawyers with their clients' causes and allow lawyers to perform their professional functions without intimidation, hindrance, harassment or prosecution in line with international standards

We recommend that:

(i) All pending prosecutions against lawyers be reviewed at the highest level of the appropriate prosecuting authority to consider (i) the adequacy of evidence favouring conviction; (ii) the extent to which, despite a formal sufficiency of evidence, there is any real prospect of conviction; and (iii) whether the criminal proceedings could be said to violate the UN Basic Principles on the Role of Lawyers or other international human rights standards;

administration of justice.

4. Influence of the Ministry of Justice in the functioning of lawyers

i. Influence of the Ministry of Justice in disciplinary proceedings against lawyers

Until recently, whenever the Bar Association made an adverse disciplinary ruling against a lawyer, the lawyer concerned had the right to appeal to the Union of Turkish Bar Associations. If the Union of Turkish Bar Associations upheld the decision of the Bar Association, the concerned lawyer had a right of appeal to the Ministry of Justice. If the Ministry of Justice approved of the decision of the Bar Association and the Union of Turkish Bar Associations then the disciplinary decision became final. If the Ministry of Justice disagreed with the decision of the Bar Association and the Union of Turkish Bar Associations, then the only remedy was for the latter to challenge the decision of the Ministry of Justice by way of a lawsuit in the Council of State. In practice, this system meant that the Ministry of Justice was the final instance for the administrative review of decisions relating to disciplinary actions against lawyers and so whenever the Bar Association sought to discipline one its members, such a course of action had, absent seeking recourse to judicial review, to be approved by the Ministry of Justice.

In so far as this procedure meant that the Ministry of Justice effectively had a final say on decisions taken by the Bar Association and the procedures for performing their professional function, the independence of lawyers was undermined since the Bar Associations were effectively dependent upon and under the control of the Ministry of Justice. In an attempt to strengthen the independence of the legal profession, recent reforms have sought to reduce the influence of the Ministry of Justice in respect of disciplinary decisions against lawyers.

As we understand the procedure now, if a complaint is made to a Bar Association about the conduct of a practicing lawyer, the Bar Association undertakes an investigation and evaluates the complaint. If the Bar Association deems the complaint to be arguable then it transfers the matter to a Discipline Board. The Discipline Board of the Bar Association then makes a decision on disciplinary action. The decision of the Discipline Board can be appealed to the Union of Turkish Bar Associations. The Union of Turkish Bar Associations considers the appeal and decides to either uphold or overturn the decision of the Discipline Board. The decision of the Union of Turkish Bar Associations is then sent to the Ministry of Justice. If the Ministry of Justice agrees with the decision of the Union of Turkish Bar Associations then its decision stands. If the Ministry of Justice disagrees with the decision of the Union of Turkish Bar Associations then it sends the case back to the Union for reconsideration. If, upon reconsideration, two-thirds of the Board of Directors of the Union of Turkish Bar Associations vote to maintain their original decision then their decision stands. If less than two-thirds of the Board vote to maintain the decision then the decision of the Ministry of Justice stands. In either case, the losing party, be it the lawyer or the original complainant, can initiate proceedings in a court of law against the decision on disciplinary action.

In our opinion, despite the reform, the procedure for disciplinary action against lawyers is still deficient. Although the Ministry of Justice no longer acts as a final instance for the administrative review of decisions relating to disciplinary action against lawyers in the same manner as it did prior to the reform (i.e. where the Ministry of Justice disagrees with the decision of the Union of Turkish Bar Associations it cannot now overrule the decision of the Union, it can only force a revote which may or may not result in its own decision being adopted), for our part we can no see no justification for the decision of the Union of Turkish Bar Associations on disciplinary action to be sent to the Ministry of Justice for review in the first place. We consider that in so far as the Ministry of Justice still has a role in the regulation of decisions taken by the Bar Associations relating to the procedures for performing their profession, this represents an obstacle to the independence of lawyers in Turkey.

In reaching this conclusion, we do not underestimate the effect of a decision by the Ministry of Justice to remit a case back to the Union of Turkish Bar Associations for reconsideration if it disagrees with the decision of the Union. Although technically the Union can vote to maintain its original decision, as we understand the situation in Turkey, members of the Union of Turkish Bar Associations regularly hold aspirations of high political or judicial office upon completion of their term of office within the Union. In this regard, we recall in particular that pursuant to Article 146 of the Turkish

Constitution, senior lawyers may be appointed to the Constitutional Court. We would simply observe that it could be argued that it would be a brave Union member who, with aspirations of high political or judicial office in the near future, would be prepared to maintain his initial decision on disciplinary action against an individual lawyer in the face of a decision by the Ministry of Justice that that decision was not in accordance with its own view on the matter.

We recommend that the role of the Ministry of Justice in relation to the functioning of the Bar Associations be removed with a view to establishing professional self-regulation as a step towards securing the independence of lawyers. In pursuit of this aim, we recommend that the appeal to the Union of Turkish Bar Associations be the final appeal to a non-judicial instance in the case of disciplinary action against lawyers. The decision of the Union should not be forwarded to the Ministry of Justice.

ii. Influence of the Ministry of Justice in the criminal prosecution of lawyers

Pursuant to Articles 58 and 59 of the Law on Lawyers, whenever criminal proceedings are commenced against a Turkish lawyer for offences alleged to have been committed during the course of their professional duties, both the preliminary investigation and the prosecution itself must be approved, not only by the Public Prosecutor's Office, but also by the Minister of Justice and the Under-Secretary of the Minister of Justice. Articles 58 and 59 of the Law on Lawyers outline the conditions of inquiry for lawyers accused of offences committed during the course of their professional duties. Article 58 provides as follows:

> "All investigations concerning offences committed by lawyers during the course of their duty shall be carried out by the Public Prosecutor, responsible for the area, following the grant of permission by the Minister of Justice. The offices and homes of lawyers may only be searched with a court order, and under the supervision of a Public Prosecutor and a representative of the Bar Association. Such a search may only be undertaken in respect of the matter in relation to which the court order was obtained. Lawyers should not be subjected to body searches, unless they are suspected of offences requiring heavy sentencing."

Article 59 of the Law on Lawyers provides as follows:

> "The file in respect of an investigation carried out in pursuance of Article 58 shall be sent to the Under-Secretary of the Minister of Justice responsible for Heavy Penal matters. Following their investigation, if it is decided that legal action is necessary then the file will be sent to the Public Prosecutor of the Heavy Penal Court nearest to where the offence was committed. Within five days, the Public Prosecutor shall prepare an indictment and pass it to the Heavy Penal Court to decide whether there are grounds for a final investigation or not.

> A copy of the indictment shall, in accordance with the Procedure Rules of the Penal Court, be given to the lawyer against whom there is an investigation. Following receipt of the indictment, the lawyer may, within the time period set by law, request that further evidence be obtained. If the request is acceptable it is taken into consideration and, if necessary, the judge will order further, more detailed investigation.
>
> The trial of a lawyer against whom it is decided to open an investigation will be held at the Heavy Penal Court nearest to where the offence was committed. The Bar Association of which the lawyer is a registered member will be notified of the prosecution."

We consider that the requirement that a public prosecutor obtain the permission of the Ministry of Justice before commencing an investigation against a lawyer in respect of offences alleged to have been committed during the course of their professional duties, and that he thereafter secure the authorisation of the Under-Secretary of the Ministry before preparing an indictment, constitutes a threat to the right of lawyers to be tried by an independent and impartial tribunal. This is so because, recalling the role of the High Council of Judges and Public Prosecutors in the process of appointing, promoting, transferring and disciplining judges, together with the influence of the Minister of Justice and his Under-Secretary within the High Council, it could be concluded that judges seized of a trial against a lawyer are left in the invidious position of knowing that individuals capable of exercising a profound influence over their entire judicial career have already found there to be a prima facie case to answer. In such circumstances, there is the potential for judicial independence to be compromised.

We recommend that Articles 58 and 59 of the Law on Lawyers be amended so as to remove the influence of the Ministry of Justice in the process of instituting criminal proceedings against lawyers for offences alleged to have been committed during the course of their professional duties.

D. Conclusion

The guarantee of a fair trial depends, inter alia, on the ability of lawyers to provide effective legal representation to and on behalf of their clients. In Turkey, however, numerous obstacles continue to serve to seriously undermine the extent to which members of the legal profession are able to perform their professional duties. This is true at every stage of criminal proceedings.

We urge the government to take urgent measures to ensure that accused persons are afforded their right of access to a lawyer immediately upon being detained, that accused persons are able to effectively consult and communicate with a lawyer in confidence, that the organisation of the courtrooms and procedures adopted within them guarantee an equality of arms between the prosecution and defence, that lawyers are not

harassed or intimidated in the exercise of their professional duties and that the influence of the Ministry of Justice in the functioning of lawyers is removed.

VIII – QUALITY AND EFFICIENCY IN THE JUSTICE SYSTEM

A. Introduction

For any democratic society governed by the rule of law, an efficient system of administration of justice is, practically speaking, a necessary compliment to the establishment of an independent judiciary, an effective prosecution service and a free legal profession. The effective protection of human rights and fundamental freedoms requires that both judges and prosecutors be provided with adequate resources so as to enable them to provide a simple, fast, cost-effective remedy.

B. Turkey's legal obligations to ensure quality and efficiency

1. Turkey's obligations under international law

The importance of quality and efficiency in the judicial system is recognised in the UN Basic Principles on the Independence of the Judiciary ("Principles on the Judiciary").[123] Principle 7 states: "It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions." Principle 11 also provides for adequate remuneration and conditions of service. The UN General Assembly endorsed the Principles on the Judiciary in November 1985. The Assembly later specifically welcomed the Principles and invited governments "to respect them and to take them into account within the framework of their national legislation and practice".[124]

The necessity of providing judges with proper working conditions in order to improve efficiency and fairness of justice is recognised in greater detail in Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges ("Recommendation on Judges").[125] The Recommendation calls upon member states to adopt or reinforce, as the case may be, all measures necessary to promote the role of judges and strengthen their efficiency and independence. Principle 3 of the Recommendation, entitled "Proper working conditions", provides as follows:

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[123] UN Basic Principles on the Independence of the Judiciary, 29 November 1985, A/RES/40/32.
[124] UN Resolution A/RES/40/146, 13 December 1985.
[125] Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

"1. Proper conditions should be provided to enable judges to work efficiently and, in particular, by:

a. recruiting a sufficient number of judges and providing for appropriate training such as practical training in the courts and, where possible, with other authorities and bodies, before appointment and during their career. Such training should be free of charge to the judge and should in particular concern recent legislation and case law. Where appropriate, the training should include study visits to European and foreign authorities as well as courts;

b. ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and burden of responsibilities;

c. providing a clear career structure in order to recruit and retain able judges;

d. providing adequate support staff and equipment, in particular office automation and data processing facilities, to ensure that judges can act efficiently and without undue delay;

e. taking appropriate measures to assign non-judicial tasks to other persons, in conformity with Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts."

Regarding the conditions of service of prosecutors, Guideline 6 of the Guidelines on the Role of Prosecutors ("Guideline on Prosecutors") provides that they should be afforded "reasonable conditions of service" and "adequate remuneration". The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Guidelines on the Role of Prosecutors in 1990 "to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings".[126]

A requirement of efficiency is also implicit within the right to trial within a reasonable time as guaranteed under Article 5(3) of the ECHR for those in pre-trial detention, and more generally for anyone facing criminal proceedings under Article 6(1) of the ECHR.[127] The workload of the courts is not a good reason for delay (and in any event should be supported with evidence of steps taken to alleviate the position),[128] neither is a shortage of resources. Article 6(1) imposes on Contracting States a duty to

[126] Guidelines on the Role of Prosecutors, final preambular paragraph.
[127] Time begins to run under Article 5(1) and Article 6(1) when an individual is 'charged'. This may stretch back to arrest, rather than formal charge (*Eckle v. Germany* (1982) 5 EHRR 1, ECtHR, para. 73; *Ewing v. Unuted Kingdom* (1988) 10 EHRR 141, EcmHR, para. 143). Time ends for Article 5(3) purposes with the finding of guilt or innocence (*B v. Austria* (1990) 13 EHRR 20, ECtHR); time ends for Article 6(1) purposes when the proceedings are over, including any appeal.
[128] *Majaric v. Slovenia*, (8 February 2000), ECtHR, para. 39.

organise their judicial system in such a way that their courts can meet the requirement to hear a case within a reasonable time.

Recommendation No. R (86) 12 of the Committee of Ministers of the Council of Europe to Member States Concerning Measures to Prevent and Reduce the Excessive Workload in the Courts ("Recommendation on Excessive Workload")[129] invites governments of member states to consider the advisability of pursuing one or more of seven objectives that are set out within the Recommendation as part of their judicial policy on preventing and reducing excessive workload in the courts. The seven objectives range from encouraging, where appropriate, a friendly settlement of disputes, to reducing the non-judicial tasks entrusted to judges, to generalising trial by a single judge at first instance in all appropriate matters.

2. Domestic guarantee of quality and efficiency

A single provision of the Turkish Constitution guarantees efficiency of justice. Article 141 declares: "It is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost."

C. Quality and Efficiency within the Turkish judicial system

A comparison of the number of judges and prosecutors in Turkey, the number of cases that they are responsible for each year and the average duration of court proceedings, provides a valuable indication of the extent of efficiency within the Turkish judicial system.

1. The number of judges and public prosecutors in Turkey

Function	Female	Male	Total
Judge	1,600	4,341	5,941
Public Prosecutor	154	3,067	3,221
Total	**1,754**	**7,408**	**9,162**
Candidate	65	314	379
Total	**1,819**	**7,722**	**9,541**

According to official figures from the Ministry of Justice, as of July 2003 there were 5,941 judges and 3,221 public prosecutors working in Turkey.[130] The population of Turkey is in the region of 65 million people.

2. The caseload of judges

i. *Criminal Courts:*

[129] Recommendation No. R (86) 12 of the Committee of Ministers of the Council of Europe to Member States Concerning Measures to Prevent and Reduce the Excessive Workload in the Courts, adopted by the Committee of Ministers on 16 September 1986 at the 399th meeting of the Ministers' Deputies.

[130] Information Note on the Turkish Justice System, Ministry of Justice, 4 July 2003, p.6.

During 2002, there were a total of 3,116,632 cases entered in the criminal courts of Turkey. Of these 1,864,308 were new cases and 1,252,322 were cases remaining from previous years. Of the 3,116,632 cases within the criminal courts, 1,191,759 reached a final resolution in 2002 (61.8%). Therefore, 1,924,873 cases continued into 2003.[131]

CRIMINAL COURTS				
	CASES ENTERED IN 2002	**CASES FINALISED IN 2002**	**REMAINING CASES**	**RATIO OF FINALISED CASES %**
State Security Courts	11,439	5,988	5,451	52.3
Heavy Penal Courts	122,244	59,117	63,127	48.4
Criminal Courts of First Instance	1,071,228	455,449	615,779	42.5
Criminal Courts of Peace	611,613	412,974	198,639	67.5
Criminal Courts of Enforcement	1,281,898	981,334	300,564	76.6
Traffic Courts	6,463	6,241	222	96.6
Juvenile Courts	11,747	3,770	7,977	32.1

According to the Ministry of Justice, 2002 saw a decrease in the total number of cases in criminal courts when compared to the year 2001.[132]

Of the new cases filed in the criminal courts, the most common type of action related to the Enforcement and Bankruptcy Law and the Check Law. Of the new cases filed, 838,396 (or nearly 44%) related to non-payment of debts or checks.[133]

ii. Civil Courts:

During 2002, there were a total of 1,982,920 cases entered in the civil courts of Turkey. Of these, 1,306,614 were new cases, 632,182 were remaining from previous years and 44,124 were cases where the decision at first instance had been reversed on appeal and remitted for re-hearing. Of the 1,982,920 cases within the civil courts, 1,324,068 reached a final resolution in 2002 (66.8%). Therefore, 658,852 cases continued into 2003.[134]

CIVIL COURTS				
	CASES ENTERED IN 2002	**CASES FINALISED IN 2002**	**REMAINING CASES**	**RATIO OF FINALISED CASES %**
Commercial Courts	95,613	40,003	55,610	41.8
Civil Courts of First Instance	884,420	517,122	367,298	58.5
Civil Courts of Peace	599,099	509,743	89,296	85.1
Labour Courts	152,205	79,219	72,986	52.0
Land Registration Courts	52,890	23,339	29,551	44.1
Civil Courts of Enforcement	193,353	150,399	42,954	77.8
Consumer Courts	5,400	4243	1,157	78.6

[131] Addendum to Information Note on the Turkish Justice System, Ministry of Justice, submitted shortly after completion of the Advisory Visit, p.1
[132] *ibid.*
[133] *ibid.*
[134] *ibid.*

According to the Ministry of Justice, 2002 saw an increase in the total number of cases in civil courts when compared to the year 2001.[135]

Of the cases dealt with by the civil courts, the most common type of action related to determination of heirship (319,890). The next most common were actions for divorce (153,409), objections (114,767), personal actions, (97,988) and compensation actions (87,987).[136]

3. Average trial periods

i. *Criminal Courts:*

AVERAGE TRIAL PERIOD IN CRIMINAL COURTS (DAYS)			
	2000	**2001**	**2002**
State Security Courts	406	336	364
Heavy Penal Courts	363	331	347
Criminal Courts of First Instance	406	311	427
Criminal Courts of Peace	167	160	169
Criminal Courts of Enforcement	140	127	147
Traffic Courts	23	24	19
Juvenile Courts	755	408	557

According to official figures from the Ministry of Justice, in 2002 the average trial period for all criminal courts in Turkey was 290 days.[137] This represented an increase on the previous year. In 2001 the average trial period for all criminal courts was 242 days and in 2000 the figure stood at 322 days. It is clear from the table above however that, as is to be expected, there is a clear variation in average trial periods between courts.[138]

ii. Civil Courts:

AVERAGE TRIAL PERIOD IN CIVIL COURTS (DAYS)			
	2000	**2001**	**2002**
Commercial Courts	372	383	434
General Civil Courts of First Instance	241	241	242
Civil Courts of Peace	75	71	65
Labour Courts	274	284	312
Land Registration Courts	590	551	468
Civil Courts of Enforcement	104	104	111
Consumer Courts	-	-	43

[135] *ibid.*
[136] *ibid.*
[137] This figure is an average based on, in part, the unusually low duration of trial periods experienced in Traffic Courts. If the statistics for the Traffic Courts were to be removed from the equation, then the average trial period for criminal courts would stand at 335 days.
[138] Addendum to Information Note on the Turkish Justice System, Ministry of Justice, submitted shortly after completion of the Advisory Visit, p.1

According to official figures from the Ministry of Justice, if, for comparison purposes, one excludes Consumer Courts from the equation (since they were only established in 2002), in 2002 the average trial period from submission of a case to a court to final determination in the civil courts was 272 days. This figure represented a broadly similar average trial duration as in previous years. In 2001 the average trial period for all civil courts was 272 days and in 2000 the figure stood at 276 days. Again, however, it is clear from the table above that, as is to be expected, there is a clear variation in average trial periods between courts.[139]

4. The caseload of public prosecutors

There are 3,045 public prosecutors in Turkey. Each public prosecutor completes, on average, 669 preliminary investigations each year. In 2002, a total of 2,035,300 preliminary investigation files reached Public Prosecution Offices in Turkey. Of these, 100,236 were investigation files that were transferred from the previous year and 1,935,064 were new investigations. In the same year, 1,761,716 preliminary investigation files were finalised. This left 273,584 investigation files pending at the start of 2003. The average period for the investigation of a file at the Public Prosecution Offices in 2002 was 36 days.

In addition there are 70 State Security Court public prosecutors in Turkey. Each SSC prosecutor completes, on average, 388 preliminary investigations each year. In 2002, a total of 27,130 preliminary investigation files reached State Security Court Public Prosecution Offices in Turkey. Of these, 19,695 were investigation files that were transferred from the previous years and 7,435 were new investigations. In the same year, 8,004 preliminary investigation files were finalised. This left 19,126 investigation files pending at the start of 2003. The average period for the investigation of a file at the State Security Court Public Prosecution Offices was 905 days.

5. Assessment

The judicial system is faced with a large backlog. At the beginning of 2003 there were 1,924,873 criminal cases and 658,852 civil cases pending before the courts.

The workload of judges is excessive. Assuming for present purposes that the number of judges in Turkey throughout 2002 was the same as in July 2003, then the 5,941 judges were, between them, responsible for 5,099,552 case files (3,116,632 criminal cases; 1,982,920 civil cases). This equates to an average of 858 cases each over the course of the year. Of these 5,099,552 case files, 2,515,827 reached a final determination in 2002 (1,191,759 criminal cases; 1,324,068 civil cases). This equates to each judge, on average, finally determining 423 cases over the course of the year, an excessive figure in itself and well short of that required to meet the demands of the case backlog.

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[139] *ibid.* p.2.

Public prosecutors are similarly overworked. At the beginning of 2003 there were 273,584 ordinary investigation files and 19,126 SSC investigation files pending. Ordinary public prosecutors complete, on average, 669 preliminary investigations each year and SSC public prosecutors complete, on average, 388 preliminary investigations each year. Although the average period for the investigation of a file at the ordinary public prosecutor's office is only 36 days,[140] it takes an average of 905 days before a preliminary investigation is completed by the SSC public prosecutor's office.

The average duration of judicial proceedings remains long: 290 days in criminal courts and 272 days in civil courts. Regarding the criminal courts, the duration is significantly longer than the average in State Security Courts (364 days), Heavy Penal Courts (347 days), Criminal Courts of First Instance (427 days) and Juvenile Courts (557 days). Regarding the civil courts, the duration is significantly longer than average in Commercial Courts (434 days) and Land Registration Courts (486 days).

In the opinion of the experts, these statistics leave no doubt that there is a compelling need to improve the efficiency and functioning of the judicial system in Turkey. In the remainder of this chapter we suggest various reforms that we consider, if implemented, will serve to increase both the quality and efficiency of the justice system in line with international standards. Some of the proposed reforms are directly related to the role of judges, some are directly related to the role of prosecutors, others are of more general application.

D. Potential reforms concerning measures to improve quality and efficiency within the Turkish judicial system

1. Working Conditions

i. Increase in the financial resources of the judicial system

With the exception of the High Courts (Constitutional Court, High Court of Appeals, Council of State and Audit Court), the judicial organs in Turkey do not have their own budget. Instead, all of their expenditure on personnel, buildings and equipment is financed from the budget of the Ministry of Justice. The High Council of Judges and Public Prosecutors is afforded no role whatsoever in either establishing or implementing the budget for the judicial system. Instead, such matters, including the salaries of judges and prosecutors, are entirely within the discretion of the Ministry of Justice. In a very real sense then, contrary to any notion of independence, the financial resources of the judiciary are left to the absolute will of the executive.[141]

[140] This low figure should not necessarily be read as being indicative of either efficiency or quality in the investigation of criminal offences. As was noted in Chapter VI D(i), despite being empowered to take overall responsibility for any criminal investigation, public prosecutors regularly play little part in the investigation of criminal offences. Instead, criminal investigations are left solely to the discretion of the police. The fact that on average a criminal investigation takes just 36 days therefore may be more indicative of an inadequate investigation having been carried out rather than efficiency or quality in the investigation process.

Moreover, although the allocation for judicial services in the general budget has increased every year, this has been as a result of high inflation; the budget share itself has not increased, in fact it has decreased. For several years, judicial services were allocated 1% of the general budget but in the last five years this figure has been reduced by 20% to 0.8% of the general budget.[142]

That such a sum is inadequate is self-evident from an examination of the court buildings and equipment within them, most of which are old and insufficient. The majority of the budget for the judicial system is taken up with salaries and other personal expenditure, with precious little left for investment in buildings and equipment. In the general budget of the fiscal year 2002, a total of 879,941,100,000,000 TL (approx. 675 million Euros (January 2002) was allocated to judicial services. Of this, expenditure on salaries and other personal expenditure accounted for 626.339.900.000.000 TL (approx. 480 million Euros) or 71.1% of the allocation.[143]

Such a state of affairs recently led the President of the High Court of Appeals, Mr. Eraslan Ozkaya, speaking on the occasion of the Opening of the Judicial Year 2003-2004, to comment:

> "The judiciary has become the weakest power of the state as all the financial resources of the judiciary are left to the discretion of the legislative and executive organs. This discretion has been exercised in such an ungenerous manner that the judiciary's share in the budget has been reduced to less than 1 %, the lowest level in its history.
>
> There are no indications that the problems of the judiciary such as premises, equipment and insufficient (especially in the post of public prosecutor and judge) and poorly educated staff will be solved soon. Despite our insistence, the shortage of staff even at the Court of Appeals is increasing.
>
> Heavy workloads and extreme financial and physical shortcomings are preventing well-educated jurists and personnel who speak foreign languages from seeking employment in the judiciary. This makes it more difficult for us to follow up the developments in the EU."[144]

We recommend that:

(i) the proportion of the budget allocated to the administration of justice be substantially increased;

(ii) judges be consulted in the preparation of the budget and the judiciary be responsible for its internal allocation and administration.

ii. Increase in the number of judges and public prosecutors

Principle 3(1)(a) of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges spells out the necessity of recruiting judges in sufficient numbers to avert an excessive workload and enable proceedings already started, regardless of their volume, to be finalised within a reasonable time.

Whilst we recognise that there has been some effort to increase human resources within the judicial system in recent years, we consider that there is still an insufficient number of judges and public prosecutors in Turkey. Indeed, there is evidence to suggest that the number of judges and public prosecutors in Turkey has actually fallen in the last three years. In 1999, including candidates, there were a total of 8,300 judges and public prosecutors in Turkey.[145] In 2000, this figure increased substantially to 9,947.[146] By March 2002, however, the total number of judges and public prosecutors had dropped slightly to 9,810.[147] By July 2003, the total number of judges and public prosecutors had dropped again to 9,541,[148] and by the end of September 2003 there had been a further reduction in numbers as a result of seasonal retirements such that the total number of judges and public prosecutors in Turkey stood at 9,459, the lowest level since 1999.[149]

In previous missions to Turkey, judges have mentioned the figure of 12,000 judges and public prosecutors as being needed in order for them to be able to adequately manage the high density of work that they face.[150] It is not possible to evaluate the needs of the Turkish judicial system by comparing the figures cited above with figures from other jurisdictions as the court systems and the ways in which cases are handled varies considerably from country to country. The number of judges and prosecutors needed is related not only to the size of the country and the number of inhabitants, the criminality, the number of civil and administrative cases and so on but also, which is harder to account for, the internal organisation of the judiciary and its functioning. What we are able to conclude, however, is that the present number of judges and public prosecutors is insufficient, particularly when it is recalled that as their numbers have been decreasing, their workload has actually increased.

We recommend that the number of judges and public prosecutors in Turkey be substantially increased.

concerning the European Commission funded Judicial Modernisation and Penal Reform programme; "Quality and Justice in Turkey" by Oguz Onaran and Koray Karasu, paper produced as part of the GROTIUS project "Assessing Quality of Justice in Europe", 2001-2003, Table 6.

[146] *Ibid.*

[147] Submissions by Turkey concerning the judiciary to EU Sub-Committee No. 8, 20-21 March 2002 p.8.

[148] Information Note on the Turkish Justice System, Ministry of Justice, submitted shortly after completion of the Advisory Visit, p.6

[149] *ibid.*

[150] Report of the European Commission's 2000 Justice and Home Affairs Mission to Turkey, 18-29 September 2000, p.84.

iii. Increased use of available courtrooms

When visiting certain criminal courts, we were informed that the courtrooms were used for just 2 or 3 days each week. For the remainder of the week judges worked in chambers reviewing case files and drafting judgments. Meanwhile, their courtrooms remained empty. If this practice is common to all courtrooms in Turkey then there would appear to be a large unused capacity within the justice system.

An obvious method of increasing the efficiency of the judicial system without the need for any additional expenditure, other than perhaps on personnel, would be to ensure that all courtrooms are used on every day of the working week. This would of course necessitate each courtroom being used by more than one judge or panel of judges but such a practise is commonplace within other jurisdictions.

We recommend that the existing capacity of the available courtrooms in Turkey be exploited more effectively by ensuring that the courtrooms are used on everyday of the working week, by different panels of judges if necessary.

iv. Increased training of judges and public prosecutors

To ensure both quality and efficiency in the justice system, the law must be properly applied. To achieve this, judges must receive training that keeps them abreast of important new developments, such as recent trends in legislation and case law, social trends and relevant studies on topical issues or problems. Principle 3(1)(a) of the Council of Europe Recommendation on the Independence, Efficiency and Role of Judges urges member states to provide appropriate training for judges, both before appointment and during their career.

The standard of education in the law faculties in Turkey has been the subject of criticism among certain quarters. In their paper entitled, "Quality and Justice in Turkey" Oguz Onaran and Koray Karasu write, "… almost all writers agree on the fact that the law education in the universities is not very satisfactory."[151] Commenting on the need for proper, effective and timely implementation of laws, the President of the High Court of Appeals, Mr. Eraslan Ozkaya, stated in his speech given at the Opening of the Judicial Year 2003-2004:

> "One of the most important conditions of improving the quality and reducing errors is to employ well-educated and competent jurists who are able to make sound interpretations and correct conclusions.

[151] "Quality and Justice in Turkey" by Oguz Onaran and Koray Karasu, paper produced as part of the GROTIUS project "Assessing Quality of Justice in Europe", 2001-2003, para. 4.2.

> Unfortunately, the ever-increasing Faculties of Law, which are only so in name, are rapidly corrupting law education. Unless radical measures are taken, this corruption will increase. Professional ethics and the objectivity of judges are only possible through quality education."[152]

The pre-service training of candidate judges and public prosecutors has in the past also been criticised as relying upon outdated teaching methods and been found lacking in terms of its coverage and quality.[153] The European Commission funded Judicial Modernisation and Reform Programme commented in particular on the lack of expertise and curriculum in the fields of EU legislation, comparative law, international conventions, human rights, intellectual and industrial property rights and crimes related with new technologies. The Programme also noted that judges and public prosecutors did not receive regular in-service training and concluded that there was a substantial need for increasing the quantity and quality of training for judges and prosecutors as well as other judicial staff.[154]

We are pleased to report that, perhaps in recognition of such criticism, the Ministry of Justice has instituted a number of projects to provide required and updated pre-service and in-service training for judges and public prosecutors.

Regarding the pre-service training of candidate judges and public prosecutors, we were informed by the Director of the School for Candidate Judges and Public Prosecutors that in the last three years training courses concerning human rights and EU law have become mandatory for candidate judges and public prosecutors. The following developments have been implemented:

- Courses on EU law, intellectual and industrial property law and human rights law have been added to the curriculum for candidates;
- In co-operation with Ankara University, candidates now undergo 82 hours of training on the EU acquis, the training being provided by expert judges and specialist professors. Candidates receive a further 20 hours of training in human rights law;
- At the request of the Director General for EU Affairs, members of the European Court of Human Rights have attended the School and lectured to candidates on the experiences of practitioners;
- Candidates regularly attend relevant seminars and conferences, both within Turkey and abroad;[155]

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[152] Speech made by the President of the High Court of Appeals, Mr. Eraslan Ozkaya, at the Opening of the Judicial Year 2003-2004 on 8 September 2003.
[153] European Commission funded Judicial Modernisation and Reform Programme.
[154] *Ibid.*
[155] We were informed that 120 candidates attended a seminar organised by the Danish Government entitled "The Court of Justice and the National Law", that between 6-8 October 2003, candidates will attend a seminar entitled "General Principles of EU Law" and that on 1 March 2004, candidates will travel to France in order to present a report on environmental law, road safety and security, free movement of companies, technological progress and ethics.

- In March 2003, the School organised a 1 week training programme on evaluating the Turkish judicial system in light of ECtHR case-law and the responsibilities of prosecutors within the framework of the EU harmonisation laws;
- The School has been involved in the development of a textbook on EU law based on the theory and case law of the EC.

In terms of the coverage of the curriculum, we are pleased to note that the Ministry of Justice has taken on board the criticisms of the European Commission funded Judicial Modernisation and Reform Programme and instituted a dedicated programme of compulsory training on EU law and human rights. The absence of any training on the EU acquis was a matter of particular concern to the European Commission's Justice and Home Affairs Mission to Turkey in 2000 and we are pleased to note that this situation does now appear to have been remedied.[156]

Within the confines of a 1-½ hour interview, it was not possible to assess the quality of the training being provided by the School for Candidate Judges and Public Prosecutors in any detail and we recommend that this is a matter that should be addressed by suitably qualified persons on a future occasion. Nevertheless, even on the basis of our limited assessment, we consider that there are two areas where the training of candidate judges and public prosecutors could be improved. First, there are little or no opportunities for candidate judges or prosecutors to learn foreign languages within the School. The Director of the School recognised the importance of candidates having a working knowledge of a language other than Turkish and asked for support from the European Union in order to institute language-training programmes. We would recommend that, whether such support is forthcoming or not, the Ministry of Justice take steps to ensure that the necessary financial resources are available for language courses to be offered within the School. Such a course of action may already be in motion however because we were given to understand that the Judicial Academy, once established, will offer language training to candidates. We would regard this as both a desirable and necessary development.

Second, it would appear that although the curriculum does include a 24-hour course on professional ethics, specific instruction on the guarantee of an independent and impartial judiciary and the principles underlying that guarantee is lacking. Candidates are neither provided with copies of, nor instructed about, for example, the UN Basic Principles on the Independence of the Judiciary[157] or Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges,[158] both of which provide core standards for the independence of the judiciary. Similarly, candidate judges and prosecutors are not informed about the UN Basic Principles on the Role of Lawyers,[159] an instrument that sets

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[156] Report of the European Commission's 2000 Justice and Home Affairs Mission to Turkey, 18-29 September 2000, p.85.

[157] UN Basic Principles on the Independence of the Judiciary, 29 November 1985, A/RES/40/32.

[158] Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

[159] UN Basic Principles on the Role of Lawyers, 7 September 1990, A/CONF.144/28/Rev.1.

forth acceptable practices with regard to lawyers. We consider that in a country where, as this report demonstrates, serious and legitimate questions have been raised regarding the extent of judicial independence and the ability of lawyers to effectively perform their role within the justice system, the provision of specific training for candidate judges and public prosecutors on these core standards would not only benefit the judicial profession as a whole, but would enable the Ministry of Justice to demonstrate its commitment to establishing an independent and impartial judiciary in Turkey.

Regarding the in-service training of judges and public prosecutors, in 2001 the Ministry of Justice commenced a EU and human rights law training project. The aim of the project is to educate 9,500 judges and public prosecutors on human rights and EU law within 3 years.

In the period 2001-2002, the Education Department of the Ministry of Justice, in co-operation with the British Council, established a programme to train 71 judges and public prosecutors as trainers in EU and human rights law. Three five-day symposiums were held in Istanbul, Nevsehir and Izmir. In Istanbul, 10 judges and public prosecutors were trained as trainers and they have now trained 1,041 other judges and public prosecutors. In Nevsehir, 30 judges and public prosecutors were trained as trainers and they have now trained 1,868 other judges and public prosecutors. In Izmir, 31 judges and public prosecutors were trained as trainers and they have now trained 1,818 other judges and public prosecutors. Therefore, in the period 2001-2002, almost 5,000 judges and public prosecutors received training in EU law and human rights.[160]

On 12 May 2003, the Education Department of the Ministry of Justice, in co-operation with the Council of Europe, initiated a separate project to train a further 225 judges and public prosecutors as trainers in EU and human rights law. Initially, 25 judges and prosecutors were trained in Ankara. Similar courses were then run in Istanbul, Diyarbakir and Adana so that to date, a total of 125 judges and public prosecutors have been trained as trainers under this programme. Four more training sessions are planned before the end of the year. It is anticipated that all 225 judges and public prosecutors will have been trained as trainers by the end of 2003.[161]

In addition, the Ministry of Justice has organised 14 separate human rights training visits to various EU institutions. This has enabled in the region of 70 judges and public prosecutors to receive human rights training in the EU for periods of between 3 days and 2 months. A further 26 judges and public prosecutors have travelled to Belgium, Germany, Holland and France in order to observe the functioning of the judicial systems in these countries.[162]

The Ministry of Justice has also organised an ad hoc training programme of regional symposiums on the legal amendments introduced by the seven reform packages.

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[160] Interview with the Head of the Education Department of the Ministry of Justice, Mr. Haluk Mahmutogullari, 29 September 2003.
[161] *ibid.*
[162] *ibid.*

Six two-day symposiums have been held across Turkey in which 890 judges and public prosecutors have been trained. These judges and public prosecutors have been asked to pass the information that they have received on to their colleagues.[163]

We should state quite clearly that it was not possible for us to assess the quality of the in-service training being provided by the Ministry of Justice. Neither was it possible for us to undertake any meaningful assessment of the practical impact of the training programmes on the practice of judges and public prosecutors. Nevertheless, we welcome the introduction of the EU/human rights law training project in principle. The training and continued education of judges and prosecutors in national and international human rights law is essential if it is to become a meaningful reality at the domestic level. Without such training, implementation of human rights law will remain illusory. The Human Rights Committee has on several occasions emphasized the importance of providing training in human rights law for judges and other legal professionals.[164] We would draw the attention of the Turkish authorities however to the Recommendation of the Council of Europe that such training should, wherever possible, include study visits to European and foreign authorities as well as courts.[165]

In addition to these programmes, the Turkish Parliament has now adopted the long awaited Law on the Establishment of the Justice Academy. It is anticipated that the Justice Academy will be operational on 1 November 2003 although according to the Head of the Education Department of the Ministry of Justice, Mr. Haluk Mahmutogullari, the buildings for the Academy are not ready and staff members have yet to be appointed. Once established, the Justice Academy will be responsible for all the pre-service and in-service training of judges, prosecutors, lawyers, notaries and auxiliary justice personnel. It is anticipated that the Academy will institute a regular programme of compulsory in-service training in place of the somewhat ad hoc programme presently in operation.

We recommend that:

(i) measures be taken to ensure that the Justice Academy offers judges, prosecutors and lawyers optional foreign language education courses in addition to the provision of compulsory legal education;

(ii) all judges and public prosecutors receive comprehensive training in international standards relating to the guarantee of an independent and impartial judiciary and the role and functioning of prosecutors and lawyers. Such training should be based upon, but not limited to, the guarantees set forth in the UN Basic Principles on the Independence of the Judiciary, the UN Guidelines on the Role of Prosecutors and the UN Basic Principles on the Role of Lawyers.

authorities as well as courts.”

v. Increase in the remuneration of judges and public prosecutors

The monthly salary of judges and public prosecutors, which is determined by the Ministry of Justice, varies according to their position. At the start of their professional career they are paid 920,400,000 TL (557 Euro). After 10 years in practice, a successful judge or public prosecutor can expect to receive 1,024,000,000. T.L. (620 Euro). Members of the highest courts have an income of 2,305,000,000. T.L. (1396 Euro). Judges and public prosecutors do enjoy the advantage of being provided with housing with a reduced rent but the fact remains that they are ill paid. The increase in salary that they have received in recent years has not been sufficient to compensate for the high level of inflation.

Position	Degree/Years in the profession	Net Salary after Income Tax (Lira)[•]	EURO
Candidate judges and prosecutors	9/1	787,000,000 T.L.	476
Judge and Prosecutor	8/1- First year in the profession	920,400,000 T.L.	557
Judge and Prosecutor	7/1-3 years	944,000,000. T.L.	572
Judge and Prosecutor	6/1-5 years	957,000,000. T.L.	580
Judge and Prosecutor	5/1-7 years	999,500,000. T.L.	605
Judge and Prosecutor	4/1-9 years	1,024,000,000. T.L.	620
Judge and Prosecutor	3/1-11 years	1,083,000,000. T.L.	656
Judge and Prosecutor	2/1-13 years	1,134,000,000. T.L.	687
Judge and Prosecutor (Who is not qualified to the 1st Rank)	1/1-15 years	1,148,000,000. T.L.	698
Judge and Prosecutor (Who is qualified to the 1st Rank and acquired to receive an extra payment named High Judgeship Payment	1/1-15 years	1,577,000,000. T.L.	955
Judge and Prosecutor (Who is qualified to the 1st rank and eligible to be a member of the Supreme Courts)	¼- 18 years	1,787,000,000 T.L.	1083
Judge and Prosecutor (1st rank)	¼- 22 years	2,278,000,000. T.L.	1380
Judge and Prosecutor (Member of a Supreme Court)		2,305,000,000. T.L.	1396
Judge and Prosecutor (President of a Chamber in a Supreme Court)		2,370,000,000. T.L.	1435
Judge and Prosecutor (President of a Supreme Court)		2,900,000,000. T.L.	1757

Principle 3(1)(b) of the Council of Europe Recommendation on the Independence, Efficiency and Role of Judges expressly states that adequate financial remuneration is an important factor in the maintenance of quality and efficiency within the judiciary. In the

[•] The figure includes the extra payments for the spouse who does not work and the 2 children

context of Turkey, increased remuneration for judges would provide greater quality and efficiency in the justice system in two respects. First, adequate financial remuneration would increase the independence of the judiciary by recognising the importance of their role. The remuneration afforded to judges should represent sufficient compensation for their burden of responsibilities. If it did so in Turkey then the judiciary would be more likely to be both willing and able to exert its independence. Second, adequate financial remuneration would serve to increase the quality and competence of judges. Turkey, as in other jurisdictions, has difficulty in attracting the best lawyers to the judge's profession. There is intense competition with the private sector because the latter is perceived to offer more attractive career prospects. The possibility of a financially rewarding career as a judge would serve to encourage able young lawyers to the bench rather than the bar.

To an extent these same considerations also apply to the office of public prosecutor. However, there is one caveat. As mentioned in Chapter V, we consider that the fact that public prosecutors receive the same salary as judges throughout their entire career contributes to the understanding in Turkey that rather than being separate from and subordinate to the office of judge, the office of public prosecutor is in fact attached to and equal to the office of judge. This is something that we consider should be changed. In recognition of their greater burden of responsibility, members of the judiciary should ordinarily receive greater remuneration than public prosecutors. The difference in salary need not be vast, but if implemented, the effect upon the objective impartiality of the judiciary may be significant.

We recommend that, in accordance with Principle 3(1)(b) of the Council of Europe Recommendation on the Independence, Efficiency and Role of Judges, the salaries of both judges and public prosecutors be substantially increased but in recognition of their greater burden of responsibility the salaries of judges be increased proportionality more than the salary of public prosecutors.

vi. Increase in the use of information and communication technology

Principle 3(1)(d) of the Council of Europe Recommendation on the Independence, Efficiency and Role of Judges urges states to provide adequate equipment, in particular office automation and data processing facilities, to ensure that judges can act efficiently and without undue delay. Judges in any jurisdiction are able to work more efficiently and deliver their judgments more promptly if they are assisted by adequate back-up staff and equipment. In order to ensure improved management of courts and of case files, it is necessary to make all office automation and data processing facilities available to judges.

Turkey has given prime importance to the modernisation of the judiciary through the improvement of information and communication technology. The National Judicial Network Project ("NJNP") started in late 2001 with a budget of 170 million Euros.[166] The project, which the Ministry of Justice hopes to complete by the end of June 2004,[167] aims to establish an information system between the courts and all other institutions of the Ministry of Justice, including prisons, with a view to accelerating court proceedings and ensuring uniformity and efficiency. More specifically, it is planned to equip all courts and institutions of the Ministry of Justice with computers and internet connections that will provide them with access, via a Ministry database, to legislation, decisions of the High Court of Appeals, judicial records, judicial data of the General Directorate of Security and General Command of Gendarmerie of the Ministry of Interior, as well as ECHR jurisprudence. It is also intended that lawyers' offices and citizens should have access to information concerning their individual cases. We are given to understand that ultimately it is intended that all bureaucratic procedures and formal writings will be made in an electronic environment, thereby avoiding delays and reducing mistakes, as well as ensuring some degree of transparency.[168]

The first phase of the NJNP aimed at increasing the speed and efficiency of procedures carried out by the Ministry of Justice. This phase of the project has already been completed and has seen a Local Area Network (LAN) established between the offices of the Ministry of Justice.[169] The NJNP is now in its second phase. This is aimed at the automation of courts and public prosecutors offices and their integration with institutions such as notaries, census bureaus and title deeds directorates.[170]

As ambitious as the project is, it appears that there is still some work to be done before it will be fully realised. Regarding the national information system between the courts and all other institutions of the Ministry of Justice, we were informed by the Head of the General Directorate for Judicial Records and Statistics that there are still provinces in Turkey that have no computer system. Asked as to how many provinces this applied to he replied that out of 832 offices in the provinces, only 186 are presently on-line. However, we were given to understand that since the computer systems have been established in the most densely populated areas in the first instance, the national information system does presently cover 80% of the population. Clearly though, in order to avoid a two tier justice system as between the urban and rural areas of Turkey, it is important that all provincial courts have the ability to access the national information system via a computerised network.

A further concern centres on the continued absence of any effective system for the management of the courts and judges' case files. Even in the Izmir General Courthouse,

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[166] Submissions by Turkey concerning the judiciary to EU Sub-Committee No. 8 (20-21 March 2002) p.8.
[167] Interview with Mr. Orhan Yertutanol, Head of General Directorate for Judicial Records and Statistics, 30 September 2003.
[168] Agreement concerning the European Commission funded Judicial Modernisation and Penal Reform programme.
[169] *Ibid.*
[170] "Quality and Justice in Turkey" by Oguz Onaran and Koray Karasu, paper produced as part of the GROTIUS project "Assessing Quality of Justice in Europe", 2001-2003, para. 4.4.1.

an impressive new facility that one would expect would have been equipped with the latest technology, the only case management facility used by judges is a hardback log book in which they enter basic details regarding the case files that they have dealt with on any given day. This is the system used in all courthouses throughout Turkey and it is a system that is both out-dated and hard to maintain. What is required is an electronic case management system that enables court staff to efficiently manage the court's cases from the filing of the case to termination, keeping track of all court processes in the litigation. Such a system would automatically track court dates, actions taken and relevant deadlines. It could create lists of actions needed with appropriate reminders being forwarded to judges as and when necessary. As an additional feature, such a system could provide a management tool for analysis of work-flow, case status, and types of cases opened and closed. In our opinion, there is an urgent need for such a court case management system to be developed, with appropriate training being provided to judges and court personnel in its application.

Finally, there are still judges in Turkey who do not have access to personal computers equipped with internet access. We observed, for example, that the only computer available to the President of the General Criminal Court of First Instance in Izmir was the one used by the court stenographer. We did not have the opportunity to assess availability of information technology in the more rural areas of Turkey but we may be permitted the observation that if a senior judge in a new courthouse in Turkey's third largest city has not been provided with a personal computer then the likelihood of such facilities being available elsewhere is low.

We consider that the NJNP is a source of hope for the judiciary in terms of access to information, the reduction of errors and the acceleration of proceedings. However, there remains work to be done.

We recommend that:

(i) **All provincial offices that do not presently have the ability to access the national information of the Ministry of Justice via a computerised network be equipped with facilities to do so;**

(ii) **An electronic case-management system be introduced in all courts in Turkey with appropriate training being provided to judges and court personnel in its application;**

(ii) All judges be provided with personal computers capable of accessing the internet.

2. Workload

i. Establishment of an Intermediate Court of Appeal

As we have already explained in Chapter III, the basic structure of the court system for criminal and civil cases in Turkey is a two-tier system, with courts of first instance throughout the country and a single court of last instance (the High Court of Appeals) situated in Ankara. There are no regional intermediate appellate courts to hear appeals in criminal and civil cases, as is found in the administrative court system in Turkey and as is common in many other jurisdictions.

The High Court of Appeals is grossly overloaded with work. According to official figures from the Ministry of Justice, in 2002 the number of cases entered in the 11 Criminal Chambers of the High Court of Appeals was 244,223. This compared with 103,918 cases in 1986. This indicates that the number of cases has doubled in this period. Likewise, the number of finalised cases has nearly doubled, rising from 88,479 in 1986 to 156,349 in 2001. The average trial period in the Criminal Chambers of the High Court of Appeals was 138 days in 2002, whilst it was 49 days in 1986. The number of cases entered in the 21 Civil Chambers of the High Court of Appeals was 320,547 in 2002 whereas it was 233,076 in 1986. This indicates that there has been an increase in the number of cases of 27% in this period. Likewise, the number of finalised cases has increased, rising from 167,710 in 1986 to 284,478 in 2002, an increase of 58%. The average trial period in the Civil Chambers of the High Court of Appeal was 67 days in 2002, whereas it was 134 days in 1986.[171]

Despite the reduction in the average trial period in the Civil Chambers of the High Court of Appeals, it is clear that the average duration of appellate proceedings in the High Court of Appeals remains too long. Moreover, what these official statistics reveal is that the High Court of Appeals is faced with a backlog. At the beginning of 2003 there were 87,874 appeals yet to be concluded in the Criminal Chambers and 36,069 outstanding appeals in the Civil Chambers. Further, the statistics also reveal the extraordinary work-load of the judges of the High Court of Appeals. In 2002, each of the 11 Criminal Chambers of the High Court of Appeals finalised, on average, 14,214 cases and each of the 21 Civil Chambers finalised, on average, 13,546 cases.

The idea of establishing regional courts of appeal as a second instance in order to ease the workload of the High Court of Appeals has been mooted for some time.[172] [173] It is proposed that the second instance court would hear appeals on the merits and on the law,

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[171] Addendum to Information Note on the Turkish Justice System, Ministry of Justice, submitted shortly after completion of the Advisory Visit, p.2

[172] The proposal has been under discussion since 1932, indeed a bill was even drafted. However, since there has been no consensus on the issue, the bill has never been passed by Parliament ("Quality and Justice in Turkey" by Oguz Onaran and Koray Karasu, paper produced as part of the GROTIUS project "Assessing Quality of Justice in Europe", 2001-2003, para. 4.3.3). The Report of the European Commission's 2000 Justice and Home Affairs Mission to Turkey, 18-29 September 2000 referred to the existence of a draft law on creating regional courts of appeal at p.84, as did the Report on the Independence of Judges and Lawyers in Turkey by the International Commission of Jurists, 14-25 November 1999 at p.69.

[173] Speaking on the occasion of the Opening of the Judicial Year 2003-2004, the President of the High Court of Appeals, Mr. Eraslan Ozkaya, commented on the shortage of staff in the Court of Appeals (Speech made the President of the High Court of Appeals, Mr. Eraslan Ozkaya, at the Opening of the Judicial Year 2003-2004 on 8 September 2003).

thereby allowing the High Court of Appeals to act as a final appellate court to determine appeals on points of law only.

For our part, we would wholeheartedly support such a proposition. Increasing the number of members of the High Court of Appeals from the 250 judges who presently sit is not a viable solution because this would create additional potential for differences in decisions reached by different chambers in cases involving substantially similar facts. The establishment of an intermediate court of appeal however would not only decrease the workload of the High Court of Appeals, but it would enable the High Court of Appeals to fulfil its main function, which is to ensure a unity of legal practice and to enlighten the interpretation of provisions of legal codes. In our opinion, the introduction of a court of second instance to the judicial system would be an important step forward in both ensuring the right to a fair trial and in increasing the speed and efficiency of the judiciary. A reduced number of decisions by the High Court of Appeals would also contribute to giving the decisions of this last instance an even more pervasive force than today. We are given to understand that a draft law on the establishment of regional intermediate Courts of Appeal is in the agenda of the present Parliament.[174]

We recommend that the draft law on the establishment of regional intermediate Courts of Appeal be enacted at the earliest opportunity.

ii. Establishment of mechanisms for Alternative Dispute Resolution

During the course of the Advisory Visit we received several complaints to the effect that a substantial number of the cases presently before the civil courts in Turkey involve very minor disputes between individuals or between individuals and the administration. Examples of such cases included rental disputes and objections of students against marks awarded in university examinations. It appears that the reason why such cases are taken to court is the absence of any form of alternative dispute resolution mechanism for private law disputes in Turkey.

Objective 1 of Recommendation No. R (86) 12 of the Council of Europe on Measures to Prevent and Reduce the Excessive Workload in the Courts promotes: "Encouraging, where appropriate, a friendly settlement of disputes, either outside the judicial system, or before or during judicial proceedings." Drawing on the experience of other jurisdictions, in our opinion, the introduction of a mechanism for citizens involved in private law disputes to receive advice and conciliation prior to the commencement of legal action could serve to reduce the number of unnecessary lawsuits within the court system in Turkey. As an added advantage, such a system could benefit the parties involved by avoiding the expense and emotional disruption of litigation.

Alternative dispute resolution ("ADR") is designed to be a less formal and less complex means of resolving disputes quickly and more cheaply than via court proceedings. ADR can take various forms but in essence it generally involves the use of

[174] Information Note on the Turkish Judicial System, Ministry of Justice, 4 July 2003, p. 3.

a mediator to encourage open communications by helping the disputants identify the specific areas of dispute and agreement with the aim of ultimately reaching a negotiated settlement of their differences. The negotiated settlement may be placed before a judge so as to give it the form of a judicial settlement that is readily enforceable, or it may be left merely as an agreement between the parties which is not readily enforceable and which would thus require a regular judgment from a court after examination on the merits to be enforced. Either way, however, the important point remains the same, namely that the parties in dispute are required to submit to conciliation before adjudicating the matter before a court.

We understand that work on a draft bill on the establishment of Conciliation Councils has commenced within the Ministry. We believe that the establishment of alternative dispute resolution mechanisms in Turkey could serve to significantly reduce the number of minor disputes before the civil courts and thereby lead to an increase in overall efficiency.

iii. Reduction in artificial suits

We recommend that, in accordance with Objective 1 of Recommendation No. R (86) 12 of the Council of Europe on Measures to Prevent and Reduce the Excessive Workload in the Courts, necessary amendments be made to procedural rules and legislation so as to facilitate the settlement of private law disputes involving individuals and public bodies in conciliation committees or similar institution. As a compliment to the establishment of such institutions, we recommend that lawyers be trained in basic alternative dispute resolution methods and techniques.

A significant proportion of the cases within the Turkish judicial system are artificial suits. By this we mean lawsuits that do not deal directly with the merits of the case but deal with, for example, challenges to jurisdiction or the joining/separating of cases. Such suits cause significant delays in proceedings.

According to the Director General for Judicial Records and Statistics of the Ministry of Justice, on average, just 51% of the cases in any criminal court result in a conviction or acquittal on the merits. As for the remainder, 25% of cases result in the complaint being withdrawn and a further 24% have to be either transferred to another court because of lack of jurisdiction or have decisions made on joining or separating the parties to the proceedings.

To our minds there is a need to reduce the number of the criminal cases in which the courts have to decide on matters of jurisdiction and joinder. The fact that 1 in 4 prosecutions are either being brought in the wrong courts or against the wrong parties or both is not satisfactory. This suggests that there is a need to (i) simplify the procedural rules relating to jurisdiction; (ii) improve the role of the prosecutors and their role in criminal investigations in order to concentrate the work of the judiciary in criminal cases to matters with substantial merits; and (iii) improve the training of public prosecutors, in particular on matters of competence and venue.

In the area of civil law, we were given to understand that the existence of separate peace and general civil courts is problematic in so far as this leads to numerous disputes relating to jurisdiction (so called *gorevsizlik* decisions).[175] We experienced firm support for the abolition of separate peace and general civil courts and the establishment of a single civil court in order to avoid such disputes. As an additional attribute, the division of labour in such a court could be based on specialisation, thereby further increasing efficiency.

We recommend that:

(i) the criminal procedural rules relating to jurisdiction be simplified;

(ii) measures be taken to improve the role of prosecutor in criminal investigations in order to concentrate the work of the judiciary in criminal cases to matters with substantial merits. As previously recommended in Chapter VI, in this regard the Turkish authorities might consider the advantage of creating a juridical police force with officers affiliated directly to individual public prosecution offices and the force as a whole placed under the overall control of the Ministry of Justice;

(iii) the pre-service and in-service training of public prosecutors on matters of competence and venue be improved;

(iv) the distinction between the Civil Courts of Peace and General Civil Courts of First Instance be abolished and the division of labor between civil courts be based on specialisation.

iv. Introduction of a system of plea bargaining

A plea bargain is an agreement between the defence and the prosecutor in which a defendant pleads guilty or elects not to contest criminal charges. In exchange, the

[175] Civil courts of original jurisdiction consist of Civil Courts of Peace which try disputes involving not more than 400 million Turkish lira and General Civil Courts which try disputes involving more than 400 million Turkish lira.

prosecutor withdraws some charges, reduces a charge or recommends that the judge enter a specific sentence that is acceptable to the defence.

In Turkey, parties to criminal proceedings have no possibility of entering into a plea bargain. Yet, whilst the average trial takes months, guilty pleas can often be arranged in minutes. Also, the outcome of any given trial is usually unpredictable for both sides, but a plea bargain provides both prosecution and defence with some control over the result.

For these reasons and others, plea bargaining is very common in other jurisdictions. In the United States for example, more than 90% of all convictions result from negotiated pleas. This means that less than 10% of the criminal cases that result in a guilty verdict actually proceed to trial.

In theory, a plea bargain may be negotiated at any time after formal arrest. In practice, however, the time to plead depends on the court and the jurisdiction. Some jurisdictions allow plea bargains only during certain phases of the criminal process. In many other places, however, plea bargains can be agreed upon at virtually any time from from shortly after the defendant is arrested (before the prosecutor files criminal charges) up to the time a verdict is reached, even during trial itself.

Provided that written rules set out explicitly how plea bargains could be arranged and accepted by the court, we think that a system of plea-bargaining might successfully be introduced into the Turkish judicial system as a means of increasing efficiency. However, we recognise that such a system, which is unknown in most civil law countries, would be quite an innovation. Before any such system is introduced, careful consideration must be given to whether it would be suitable bearing in mind both the domestic legal context and the Turkish cultural environment.

We recommend that consideration be given to whether a system of plea bargaining might be introduced in criminal proceedings.

v. Change in practice regarding the presentation of prosecution evidence

A further reason for the delays that are inherent to criminal proceedings in Turkey would appear to be that in many criminal cases, public prosecutors send case files to court and the case is listed for hearing without important avenues of investigation having been explored. The result is that when the case is listed for hearing, there is not infrequently an application for an adjournment in order for further evidence to be obtained. This may be repeated at consecutive hearings until sufficient evidence is obtained, the total number of hearings in any case therefore being proportionate to how complete the case file was when the case first came to court. In the course of our interviews, the President of the Istanbul Heavy Penal Court cited incomplete pre-trial investigations as a particular source of delay within the criminal justice system. We would observe at this juncture that this complaint casts a different light upon the statistic

that the average period for the investigation of a file at the ordinary public prosecutor's office is only 36 days. It would appear that rather than being a sign of administrative efficiency, this relatively short period is, taken together with the complaint of incomplete files being placed before the court, suggestive of the fact that inadequate pre-trial investigations are being carried out.

The repeated adjournment of cases in this manner constitutes a serious obstacle to the efficient functioning of the judicial system and has a negative impact on the overall fairness of proceedings. We asked the President of the Heavy Penal Court in Diyarbakir whether the functioning of his court would be improved if public prosecutors were required to present all of the evidence upon which the state proposed to rely on the first day of hearing. He agreed that this would be a useful development and gave an example of a murder trial over which he had presided last year when the entire proceedings were finalised within a single day simply because all of the witnesses were present at court and all of the necessary evidence had been obtained in advance of the trial.

In our opinion, the efficiency of court proceedings in Turkey could be significantly enhanced if, on the first day of trial, public prosecutors were required to present at least sufficient evidence upon which, if taken at its highest, a judge properly directed in law could convict. Although it would be unfair to completely exclude the possibility of the prosecution submitting further evidence during the course of the trial, we consider that any additional evidence should only be capable of being served by the prosecution up until the close of the prosecution case and even then the judge should retain a discretion to exclude the admission of the evidence if the defence would require an adjournment to properly consider it and such an adjournment would not be in the public interest.

We recommend that on the first day of a criminal trial, public prosecutors be required to present at least sufficient evidence upon which, if taken at its highest, a judge properly directed in law could convict. Any additional prosecution evidence should only be capable of being served up until the close of the prosecution case, the judge retaining a discretion to exclude the admission of such evidence if the defence would require an adjournment to properly consider it and such an adjournment would not be in the public interest.

vi. Abolition of the practice of substituting members of the judicial panel

A matter that affects both the quality and efficiency of the judicial system in Turkey is the routine practice of substituting members of the judicial panel. It appears to be the case that not infrequently a file is allocated to a panel of three judges but during the course of the proceedings, which may last several months, one or more of the judges finds himself unable to attend a particular hearing due to, for example, ill-health or because he is on vacation. This situation is dealt with by substituting a different judge for the one who is unable to attend.

In our opinion, this use of alternative judges is problematic in two respects. It affects the quality of justice in Turkey in so far as it means that the judge who is tasked with making a final ruling on the guilt or innocence of the accused will regularly not have been a party to the entirety of the proceedings. It also affects the efficiency of the justice system as a whole in so far as it requires substitute judges to spend valuable time reviewing case files for proceedings in respect of which they will only attend one hearing and which they will not ultimately be involved in finally determining.

We recommend that the practice of using substitute judges should cease immediately. In circumstances where a file has been allocated to a panel of judges and one or more members of the judicial panel finds themselves unable to attend a particular hearing in the case, the proceedings should be adjourned and re-listed for a date when all members of the original judicial panel are able to attend.

vii. Introduction of judicial power to reject indictments

Judges in Turkey have no authority to reject indictments that are not brought on sufficient evidence. Instead, even where it is patently clear that there is insufficient evidence upon which any judge properly directed in law could convict, judges are still required to hear the entirety of the prosecution and the defence case before returning a not guilty verdict. This situation inevitably leads to a significant amount of court time being unnecessarily devoted to the determination of unmeritorious prosecutions.

We were informed by the Director General for Laws and Legislation of the Ministry of Justice, Mr Mehmet Atapek, that a new Criminal Procedure Law is currently before the TGNA and, if enacted, this will empower judges to reject indictments that are brought on insufficient evidence. Mr. Atapek estimated that the new law would be in force by the beginning of 2004.

We recommend that the draft legislation providing for criminal judges to reject indictments that are not brought on sufficient evidence be adopted as soon as possible.

viii. Amendments to the role and functioning of the public prosecutor

In Chapter VI we advanced various potential reforms that we believe could serve to improve the role and functioning of public prosecutors in Turkey. These ranged from the establishment of a juridical police force so as to enable public prosecutors to pursue a more active role in the criminal investigation process, to encouraging public prosecutors to exercise their power of non-prosecution in circumstances where an impartial investigation reveals an insufficiency of evidence in support of a criminal charge, to removing the administrative functions of public prosecutors. As well as serving to

strengthen the functioning of the public prosecutor in the judicial system, these reforms would, we consider, also be extremely beneficial in terms of increasing quality and efficiency in the justice system. If public prosecutors are better able to fulfil their role in the pre-trial investigation process then when cases go to court there should be less need for them to be constantly adjourned in order for further investigatory work to be undertaken. Further, if public prosecutors exercise their power of non-prosecution in circumstances where an impartial investigation reveals an insufficiency of evidence in support of a criminal charge then there should be fewer unmeritorious cases within the judicial system. We therefore adopt the recommendations that have already been advanced in Chapter VI.

3. Basic Requirements

i. Reduction in use of expert witnesses

One factor that contributes to the excessive duration of legal proceedings in Turkey is the over-use of expert witnesses. In most jurisdictions the opinion of an expert is only admissible where he has specialist knowledge and experience of a technical subject that is likely to be outside the experience of the tribunal of fact. For example, an arson expert could testify about the probable cause of a suspicious fire or a medical expert may express an opinion on whether wounds on a body could have been self-inflicted. Expert evidence is not necessary in circumstances where the so-called expert will only furnish the tribunal of fact with information that is already within its own knowledge and experience. For example, a psychiatrist is not necessary to say how an ordinary person who is not suffering from mental illness is likely to react to the stresses and strains of life. Similarly, expert evidence is not usually necessary on the issue of whether particular material is obscene. These are non-technical matters upon which an ordinary person is capable of forming an opinion based upon their own knowledge and life experience.

In Turkey, however, in certain proceedings there appears to be a tendency for so-called expert witnesses to be called to provide testimony in relation to matters that are within the knowledge and experience of the tribunal. Indeed, the use of experts is not limited to matters of fact; experts are also employed to provide judges with an opinion on matters of law. For example, we were informed that in a prosecution brought under Article 159 of the Turkish Penal Code ("insult to the State and to State institutions and threats to the indivisible unity of the Turkish Republic"), judges regularly do not exercise their own judgment in order to decide whether the written, oral or visual expression of thought was made with an intention to insult or deride a particular state institution or whether it was merely criticism of that state institution. Instead, they instruct an academic from a law school to provide his professional opinion on the matter.

The reason for this over-reliance upon so-called expert witnesses appears to be the reluctance of members of the judiciary to make rulings on such matters without a safety-net to fall back on should their ruling be criticised by a higher authority at a later date.

Yet, the use of so-called experts to determine matters that require no specialist technical knowledge usurps the function of the judge and leads to delays in proceedings.

We recommend that measures be taken to remind members of the judiciary that rather than resorting to the use of expert opinions on matters that are within their own knowledge and experience, they should exercise their own legal judgement.

ii. Increase in translation and interpretation facilities within the courts

The official language of the courts in Turkey is the Turkish language. However, a significant number of the defendants and witnesses who appear before the courts do not speak Turkish as their first language. Others still do not speak Turkish at all.

While certified translators and interpreters are available for most languages, provision of translation and interpretation facilities in the Kurdish language is deficient in Turkey. Indeed, there is not a single recognised expert Kurdish interpreter in the whole of the country. This is despite the fact that the Kurdish population in Turkey is estimated at being in the region of 15 million people (or 20% of the population).

According to both lawyers and judges that we interviewed, when a court is faced with a defendant or a witness whose mother tongue is Kurdish and that person has difficulty in understanding or expressing themselves in Turkish, the court uses either a member of court staff such as a secretary or clerk, or a relative or friend of the party concerned, to translate the court proceedings.

No state is required to make provision for more than one official court language, although the constitutions and legislation of certain European countries such as Austria and Finland do in fact provide for more than one official court language. Furthermore, the requirement of a fair hearing does not mandate a state to make available to citizens whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language. But, it is axiomatic that ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence. If the accused or a defence witness has *difficulty* in understanding, or in expressing themselves in the court language then an interpreter should be made available. And, if an accused *cannot* understand or speak the language used in court then, according to Article 6(3)(e) of the European Convention on Human Rights, in order to have the benefit of a fair trial, he must be provided with the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against

him which it is necessary for him to understand.[176] Importantly, the court also has an obligation to ensure the quality of interpretation:

> "In view of the need for the right guaranteed by paragraph (3)(e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided."[177]

We are concerned that in so far as the courts in Turkey rely upon untrained and unqualified translators and interpreters for the provision of Kurdish language interpretation, in circumstances where a Kurdish speaking defendant or witness is not capable of understanding or expressing himself in Turkish, the right to an interpreter and translation enshrined with the European Convention on Human Rights may be violated.

We recommend that, in accordance with Article 6(3)(e) of the European Convention on Human Rights, all Kurdish speaking citizens of Turkey charged with a criminal offence be provided with the free assistance of a competent interpreter if they cannot understand or speak the Turkish language.

iii. Establishment of a Code of Judicial Conduct

Although the Law on Judges and Public Prosecutors sets forth certain details of behaviour that is deemed to be inappropriate for judges, there is no Code of Judicial Conduct that establishes formal, written standards for the ethical conduct and discipline of judges and others serving in a judicial capacity in Turkey. We consider that the establishment of such a Code, similar those already adopted by lawyers, doctors and engineers for example, could only serve to assist in improving the quality of the judiciary in Turkey.

A Code of Judicial Conduct would provide guidance to judges and candidates for judicial office to assist them in establishing and maintaining high standards of judicial and personal conduct. This would be achieved by the imposition of both binding obligations and non-binding statements of what is and is not appropriate conduct. Although not designed or intended to be a basis for civil or criminal liability, such a Code would also provide a structure for regulating the conduct of judges through disciplinary agencies. We recognise that such a Code could never be an exhaustive guide for conduct. Judges and judicial candidates would still be governed in their judicial and personal conduct by general ethical standards. However, a Code would serve to enshrine certain fundamental basic standards and provide guidance to judges and candidate judges to assist them in maintaining high standards of judicial office.

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[176] Article 6(3)(e) of the European Convention on Human Rights provides that everyone charged with a criminal offence has the right "to have the free assistance of an interpreter if he cannot understand or speak the language."
[177] *Kamsinski v. Austria*, (1989) 13 EHRR 36, ECtHR, para. 74.

We recommend that a Code of Judicial Conduct be drafted.

4. Other

i. Improvements in the quality and efficiency of Juvenile Courts

In 2002, 11,747 cases were filed in the Juvenile Courts (of these, a total of 6,296 were cases transferred from the previous year). Of the 11,747 cases before the Juvenile Courts in 2002, only 3,770 were finalised. This means that of the cases entered in the Juvenile Courts in 2002, only 32.1% were finalised. This left 7,977 cases pending at the start of 2003. The average trial period in the Juvenile Courts in 2002 was 557 days. Although this figure represented a reduction when compared with the figure for 2000 (755 days), it also represented an increase when compared with the figure for 2001 (408 days) and was over double the average trial period in criminal courts in general (232 days).[178]

These figures clearly demonstrate that the juvenile courts in Turkey face a considerable backlog, the judges are overburdened with work and the average duration of proceedings is excessive. We also note that the workload of the Juvenile Courts has recently substantially increased further still as a result of the amendment to Article 6 of the Law on the Establishment, Duties and Trial Procedures of Juvenile Courts, introduced in August 2003 as part of the seventh reform package, which saw the minimum age for proceedings to be commenced in the ordinary criminal courts increased from 15 to 18.

There are presently only 8 functioning juvenile courts in Turkey. We consider that there is an urgent need to increase the number of juvenile courts throughout the country. We also consider that where the young offender is accused of a very minor offence (i.e. a misdemeanour), it could be possible for the judges' panel to be comprised of a single judge rather than the three presently required to determine such cases. This procedure should, it is emphasised, be reserved only for the most minor of offences.

We additionally note that each juvenile court should have at least one psychologist, one psychiatrist and one pedagogue attached to it in order to assess young offenders with a view to providing an expert recommendation to the court on issues such as the child's ability to accept criminal responsibility and the most appropriate method of disposal. However, in the Diyarbakir juvenile court for instance, no experts have been appointed and the court continues to refer children to practitioners within the state hospital. We consider that this procedure is likely to contribute to delay in the proceedings and it is therefore important that all juvenile courts be provided with such experts as they require in order to prepare specialist reports in an efficient and timely manner.

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[178] Addendum to Information Note on the Turkish Justice System, Ministry of Justice, submitted shortly after completion of the Advisory Visit, p.6

We also note that in the draft Turkish Penal Code (version 27 March 2003) a distinction is made between "minors" and "children" without these terms being defined.

We recommend that:

(i) the number of juvenile courts be substantially increased throughout Turkey;

(ii) very minor offences involving young persons be determined by single judge courts;

(iii) where they do not already exist, psychologists, psychiatrists and pedagogues be appointed to the juvenile courts.

ii. Improvements in the quality and efficiency of Family Courts

The family courts in Turkey have only been operational since mid-July 2003 and so it is too early to assess their efficiency. We simply note that as of 2 October 2003, each of the 6 courtrooms in the Izmir Family Court were responsible for approximately 1,250 files but the family court for Diyarbakir had yet to become operational.

Nevertheless, we do have some concerns regarding the quality of family court proceedings in Turkey. It was suggested to us that the family courts that are operational have been set up very quickly and that the judges who have been appointed to administer them, although having some experience in family law from their positions in the general civil courts, have not been provided with any specialist training in family law matters. Further, certain of those courts that are supposedly operational are not in fact fully functional because they are still awaiting the appointment of, for example, social services personnel and child psychologists. This means that there are presently no facilities for mediation or other auxiliary services necessary for the efficient functioning of the courts.

We recommend that:

(i) all judges appointed to the family courts be provided with sufficient specialist family law training to enable them to properly discharge their judicial function;

(ii) where such appointments have not already been made, social services personnel and child psychologists be appointed to the family courts;

(iii) the law relating to family proceedings be amended so as to enable to family courts to hold closed proceedings when necessary in order to protect family and/or private life.

iii. Reduction in number of judges in Commercial Courts

There is a pressing need to improve the efficiency of the first instance commercial courts in Turkey. Of all cases entered in the commercial courts in 2002, only 41.8% were finalised and the average trial lasted 434 days.

Objective 5 of Recommendation No. R (86) 12 of the Council of Europe on Measures to Prevent and Reduce the Excessive Workload in the Courts promotes: "Generalising, if not yet so, trial by a single judge at first instance in all appropriate matters." In our opinion, the assignment of three judges to civil commercial courts can only exceptionally be justified in particularly complex or high value cases. As a general rule, commercial courts could function under the responsibility of a single judge. If such a reform were to be implemented, this would have the effect of significantly increasing the number of commercial courts functioning in Turkey.

We recommend that, in accordance with Objective 5 of Recommendation No. R (86) 12 of the Council of Europe on Measures to Prevent and Reduce the Excessive Workload in the Courts, the law establishing commercial courts be amended so as to provide that, with the exception of proceedings involving particularly complex or high value cases, commercial courts function under the responsibility of a single judge.

E. Human Rights Related Issues

1. Change in approach to treatment of evidence alleged to have been obtained through the use of coercive interrogation techniques

Article 38 of the Turkish Constitution provides: "No one shall be compelled to make a statement that would incriminate himself or his legal next of kin, or to present such incriminating evidence." This constitutional prohibition on coercive interrogation techniques and the use of evidence obtained as a result of such interrogation techniques finds reflection in domestic law in the Code of Criminal Procedure. Article 135(a) of the Code of Criminal Procedure prohibits methods of interrogation that invalidate the will of the person and also establishes that testimony extracted through such methods shall not be admitted as evidence in a court of law.[179] The text of Article 135(a) is as follows:

> "The statements of the defendant and the testifying person must reflect his own free will. Physical or emotional interventions such as ill-treatment, torture, forceful administration of medicine, tiring or deception to hinder such a reflection, or the use of physical force or violence or devices that distort the will are prohibited.

[179] Submissions to the UN Committee against Torture concerning Turkey, 22 July 2002, p.8.

No illegal advantage can be promised.

Even if there is consent, testimonies extracted by use of the above-mentioned prohibited methods cannot be considered as evidence."

Clearly, before any evidence that is alleged to have been obtained as a result of physical or psychological ill-treatment can be excluded under the foregoing provision, a judge must be satisfied that the evidence in question was in fact obtained as a result of such ill-treatment, since only a judge can rule the evidence inadmissible. The implementation of Article 135(a) of the Code of Criminal Procedure therefore depends entirely upon the attitude of the judiciary towards claims of coerced evidence and the quality of forensic reports submitted by defendants in support of such claims.

Lawyers in both Ankara and Diyarbakir informed us that there is a general reluctance amongst the judiciary, perhaps as an effort to avoid extra work, to take allegations of ill-treatment in detention seriously. In certain instances, this reluctance can manifest itself in the form of an outright refusal of permission to undergo a forensic medical examination or a complete failure to record a claim of ill-treatment. In most instances however, it does appear that where an allegation of ill-treatment is made by a defendant, some form of investigation is undertaken, albeit perhaps reluctantly.

Sole responsibility for the preparation of official court forensic reports lies with the Institute of Forensic Medicine, a subordinated institution of the Ministry of Justice. Independent bodies such as the Turkish Human Rights Foundation ("HRFT") are authorised to submit forensic reports, but only as a supplementary report in cases where a defendant is not satisfied with the official report of the Institute of Forensic Medicine. If a defendant is in custody and he wishes to submit such an alternative forensic report then he must obtain the permission of the court. If he is released on bail then there is no such restriction upon his ability to secure an independent medical report. We were informed that where an alternative report is obtained, it is always accepted into evidence by the court. This is a positive development that has taken place since the High Court of Appeals relied upon a report of the HRFT in preference to the official report of the Institute of Forensic Medicine in the well-known "Manisa" case.[180]

Notwithstanding the possibility for defendants to submit alternative forensic medical reports, many require the permission of the court to do so and the resources of organisations such as the HRFT are, in any event, extremely limited. In the vast majority of cases therefore, the decision on whether or not to exclude evidence on the basis that it was obtained as a result of coercion is based solely upon the report of the Institute of Forensic Medicine.

As well as being examined by physicians from the Institute of Forensic Medicine as a result of a claim of ill-treatment made in open court, detainees are, as a matter of

[180] A case in which the Manisa High Criminal Court sentenced one police chief and 10 policemen to imprisonment terms between 60-130 months on charges of torturing young people who were detained for allegedly being members of a terrorist organisation.

policy, examined immediately prior to and at the conclusion of their period of detention. During the daytime, the examination of detainees and the preparation of court forensic reports is undertaken by some 180-190 physicians working within the general courthouses throughout Turkey. During the night, or where courthouse resources do not otherwise permit, detainees are transferred to emergency units of state hospitals for examination and the preparation of a report by a practitioner physician.[181]

The quality of any decision on the exclusion of evidence under Article 135(a) of the Code of Criminal Procedure is directly related to the quality of the report prepared by the physician working for the Institute of Forensic Medicine in either the courthouse or the state hospital. On the basis of both information provided by our interviewees and our own observations of the courthouse facilities for the forensic examination of detainees however, we have numerous serious concerns regarding the quality of official court forensic reports in Turkey.

The physical conditions of the courthouse examination rooms appear wholly unsuitable for the purposes of a proper forensic medical examination. We visited the examination rooms in the general courthouses in both Diyarbakir and Izmir in order to inspect their facilities and, despite being informed by the President of the Institute of Forensic Medicine, Dr. Keramettin Kurt, that the courthouse examination rooms across Turkey contained "all standard medical devices", in both instances we discovered nothing more than an examination table and a screen. Indeed, one could be forgiven for concluding that the so-called forensic medicine examination room within the Izmir general courthouse was in fact simply an office given the number of desks, filing cabinets and administrators gainfully employed within it. Again, the information provided by Dr. Kurt that there is always "one room for the examination, one room for the secretary" appears to be inaccurate. Indeed, our own observations support the comments of practitioners from the HRFT to the effect that conditions within the courthouse examination rooms do not always allow for privacy and that examinations are sometimes conducted with the secretary remaining sitting in the examination room.

Aside from the physical conditions of the courthouse examination rooms, we have serious misgivings regarding the location of the examination rooms. It was suggested to us, we think quite properly, that the fact that the examination rooms are situated within the precincts of the courthouses, combined with the fact that the forensic physicians only receive referrals from the public prosecutors of those courthouses, has a tendency to undermine the objectivity of the assessments that are undertaken. On the one hand, constantly examining accused persons at the request of the public prosecutor leads the physician to develop perceptions of criminality that are closely aligned with those of the prosecutor. On the other, such is the close working relationship between the forensic physician and the public prosecutor that there is a tendency for the forensic physician to develop a perception of his role as being to serve the interests of the public prosecutor.

[181] If a physician considers that a more advanced examination is required then he may refer the detainee to a specialist committee of the Institute of Forensic Medicine based in Istanbul. The Institute was not able to provide us with any statistics regarding the number of referrals made to it in the course of the last year, if any.

Both scenarios serve to undermine the possibility of an impartial assessment being undertaken.

The President of the Institute of Forensic Medicine, Dr. Keramettin Kurt, informed us that in light of the problems we have just described, two months ago he moved all forensic physicians to different courthouses. He did not go so far as to say that he had instituted a system of regular rotation but he did consider that no physician should work in one courthouse for longer than one year. Whilst recognising the efforts of Dr. Kurt to break the personal ties between individual physicians and prosecutors, we would observe that even a system of physician rotation cannot prevent the tendency for physicians working within general courthouses to develop a perception of their role as being to serve the purposes of the public prosecutor, nor can it prevent the development of perceptions of criminality that are closely aligned with those of the prosecutor. Such a reform also does nothing to address a further obstacle which was brought to attention, namely that the location of the examination rooms within the courthouses and the fact that the examinations are carried out by physicians attached to the Ministry of Justice serves to inhibit some detainees from providing a full account of their ill-treatment.

Not all physicians who prepare official court forensic reports succumb to the temptation of perceiving themselves to be mere servants of the public prosecutor however. We were informed that many good physicians working for the Forensic Medicine Institute labour under indirect, but nonetheless real, pressure not to document torture. Representatives of both the Turkish Medical Association and the HRFT informed us that once every 12 or 18 months a criminal investigation is opened against a physician who has written a report documenting torture, the alleged offence usually being "insulting a law enforcement officer". Alternatively, there are instances of physicians being transferred or dismissed for writing reports that document torture. Although these instances do not occur very often, they occur with sufficient regularity to send a clear message to physicians working for the Forensic Medicine Institute regarding the consequences that may befall them in the event that they document the occurrence of torture. This, of course, has an inevitable impact upon the quality of their reports.

We were informed that a typical forensic medical examination for the purposes of an official court report, whether it takes place within a courthouse or within a state hospital, lasts 2-3 minutes. The forensic physicians working for the Institute of Forensic Medicine almost exclusively state "no evidence of physical beating on body", even in cases where there is clear evidence of tissue damage. In some instances this is seemingly stamped onto the report, whilst in others pre-printed reports are used. We were told that such examinations are never conducted in accordance with the Manual on Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. This Manual, otherwise known as "the Istanbul Protocol", became an official United Nations document in 1999. It is intended to serve as a set of international guidelines for the assessment of persons who allege torture and ill treatment, for investigating cases of alleged torture, and for reporting such findings to the judiciary or other investigative bodies. Most notable in its absence during the course of the official forensic medical examination is any form of psychological assessment, which, as the

Istanbul Protocol makes clear, should have a central role in any investigation of alleged ill-treatment. Moreover, victims are often required to pay for their medical examinations. This too is contrary to the Istanbul Protocol.

We were informed by several of our interlocutors that they continue to receive allegations that the police or gendarme officers who bring the detainees to the examination actually remain in the examination room during the course of the examination. The Izmir branch of the HRFT suggested that this continued to occur in 50% of all cases. The Izmir branch of the HRFT also informed us that in every case a copy of the forensic medical report is handed to the law enforcement officer responsible for bringing the detainee to the examination. This practice is entirely contrary to the Istanbul Protocol and contradicts the assurance of the President of the Institute of Forensic Medicine, Dr. Keramettin Kurt, that “We never give reports to law enforcement officers”. To compound matters, we learnt that if the law enforcement officer is not satisfied with the report that he has been given then he is free to destroy that report and have the detainee examined by another physician.

Regarding the possibility for lawyers to be present during the course of official forensic medical examinations, we were informed that according to law this is possible but there are two obstacles. First, as discussed elsewhere in this report, many detainees do not have lawyers. Second, any lawyer who wishes to be present at a forensic medical examination has to have the permission of the Bar Association’s Group for the Prevention of Torture and this can present a bureaucratic obstacle. The ability of lawyers to challenge the contents of official court forensic reports prepared by the Institute of Forensic Medicine is also limited by the fact that the authors of the reports do not attend court to give oral evidence.

In our opinion, for the guarantee in Article 135(a) of the Code of Criminal Procedure (prohibition on coercive interrogation techniques and the use of evidence obtained as a result of such interrogation techniques) to have any meaning, there is a need for a radical change in practice in Turkey regarding the preparation of official court forensic reports. We note that since the conclusion of the Advisory Visit, the Council of State has decided that the provisions of the October 1998 detention regulations that provide for a copy of any medical report issued in respect of a detainee to be provided to a police or gendarme officer should be annulled. We warmly welcome this decision. However, there is still much that needs to be done.

We recommend that:

(vii) **measures be taken to ensure that all forensic examinations of detainees be conducted out of the sight and hearing of law enforcement officials, unless the physician concerned specifically requests otherwise, with written reasons, in a particular case. We recommend that posters be displayed in all examination rooms providing information to this effect, such posters also containing a warning that any violations will be reported to the Prime Minister's Human Rights Presidency;**

(viii) **measures be taken to enforce the decision of the Council of State to annul provisions in the detention regulations of 1 October 1998 that permitted medical reports to be provided to police or gendarme officers following the examination of a detainee. Under no circumstances should medical reports be handed to law enforcement officers. Instead they should be immediately sent to the responsible public prosecutor who should promptly furnish a copy to the detainee and/or his lawyer;**

(ix) **measures be taken to afford lawyers the right to attend the forensic medical examination of their clients in circumstances where their client requests their attendance and measures be taken to inform detainees of their right to have their lawyer in attendance at any forensic medical examination;**

(x) **measures be taken to enable lawyers and public prosecutors to request the attendance of physicians responsible for the writing of court forensic medical reports at court for the purposes of giving oral evidence as expert witnesses;**

(xi) **measures be taken to ensure that all forensic medical examinations of detainees for the purposes of the preparation of official court reports are undertaken at no cost to the detainee themselves.**

2. Increased application of the European Convention on Human Rights by the courts

Article 90 of the Turkish Constitution establishes that international treaties ratified by the government and approved by the Turkish Grand National Assembly have

the force of law.[182] As such, the European Convention on Human Rights, to which Turkey has been a State Party since 1954, has become part of Turkish domestic law. The provisions of the Convention may be directly invoked before Turkish courts and they must be afforded priority over other domestic laws.

Notwithstanding the formal status of the European Convention within Turkish law, however, we received numerous complaints that judges are insufficiently sensitive to arguments based upon its provisions and do not cite the case-law of the European Court within their own judgments. Indeed, several of the lawyers and human rights advocates that we interviewed referred to the day that the European Convention is routinely applied in the domestic courts of Turkey as being a benchmark by which real progress in the implementation of the reform programme could be measured.

Both the Ministry of Justice and the higher courts have taken steps to encourage the judiciary to apply the European Convention. On 20 March 2002, the Constitutional Court ruled that the ECHR is a source on which the Turkish courts can base their decisions.[183] The decisions of the European Court of Human Rights are published on the website of the High Court of Appeals.[184] As discussed elsewhere in this report, within the framework of a joint Council of Europe/European Commission initiative, the Ministry of Justice has established an ECHR training programme for all judges and prosecutors throughout Turkey. The Ministry has also recently prepared a book that contains summaries of ECtHR judgments against Turkey with the intention of distributing it to all judges and public prosecutors. Finally, the Minister of Justice himself has also issued a recent statement calling on all judges and prosecutors to directly apply international human rights conventions within their own practice.

Such efforts are of course positive but we have yet to see concrete examples illustrating the direct effect of the jurisprudence of the European Court within the Turkish court system. Indeed, notably absent during the course of any of our interviews with numerous judges and public prosecutors throughout Turkey, was any reference to the manner in which they apply the Convention on a day-to-day basis. This was perhaps surprising given the context of our visit.

We recommend that the significant efforts that have been made to date to encourage the Turkish judiciary to directly apply the European Convention on Human Rights within their own practice continue and be enhanced.

[182] Article 90 of the Turkish Constitution provides that:

"International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements on the ground that they are unconstitutional."

[183] European Commission's Regular Report on Turkey's Progress Towards EU Accession, October 2002.

[184] Speech made by the President of the High Court of Appeals, Mr. Eraslan Ozkaya, at the Opening of the Judicial Year 2003-2004 on 8 September 2003.

3. *Implementation of reforms relating to "freedom of thought offences"*

Numerous Articles of the Turkish Penal Code and the Anti-Terror Law have in the past been used to restrict the right to freedom of expression in Turkey in contravention of Article 10 of the European Convention on Human Rights. We do not propose to enter into any sort of an analysis of such cases because such information is readily available elsewhere. For the purposes of the present report it suffices to note that the seven reform packages introduced between February 2002 and August 2003 have introduced several legislative amendments that have restricted the field of application of these articles and, in certain instances, lowered their level of sanctions.

Article 159 of the Turkish Penal Code ("insult to the State and to State institutions and threats to the indivisible unity of the Turkish Republic") has received three amendments during the course of the reform packages. On 6 February 2002, the First Reform Package (Law No. 4744) redefined the available punishments. The lower limit, which was one year, was maintained while the six-year upper limit was reduced to three years. In addition, "heavy imprisonment" was transformed into "imprisonment" while the "heavy fine" for criticising Turkish laws was abolished. On 3 August 2002, the Third Reform Package (Law No. 4771) introduced an amendment intended to bring an end to penalties for written, vocal or pictorial criticism (as opposed to insult) of state institutions, including the armed forces. According to the new text of Article 159, "Written, oral or visual expressions of thought made only for criticism, without the intention to insult or deride the bodies or institutions listed in the first paragraph do not require a penalty." On 7 August 2003, the Seventh Reform Package (Law No. 4963) decreased the minimum sanction for crimes under Article 159 from "one year" to "six months" and further clarified the distinction between criticism and insult/derision/curse.

Article 169 of the Turkish Penal Code ("aiding and abetting an illegal organization") has received a single amendment in the Seventh Reform Package (Law No. 4963) introduced on 7 August 2003. The excessively vague expression "facilitates their actions in any manner whatsoever" has been deleted.

Article 312 of the Turkish Penal Code ("incitement to hatred on the basis of differences of social class, race, religion, sect or region") was amended as part of the First Reform Package (Law No. 4744) introduced on 6 February 2002. The notion of incitement "in a manner that may be detrimental to public order" was added as an element of the offence so as to narrow the scope of the article. Since the amendment, the act of "fomenting enmity and hatred" has not been sufficient alone to punish a person accused of committing the offence defined in the article. Only a person "who has openly fomented enmity or hatred among the public based on differences between social classes, races, sects or regions in a manner that could be detrimental to public order" has been able to be punished under the revised Article 312. Additionally, the revised law introduced "insulting a segment of the population or people's honour" as a new offence.

Article 7 of the Anti-Terror Law ("propaganda for a terrorist organisation") has received two amendments during the course of the reform packages. On 6 February 2002, the First Reform Package (Law No. 4744) narrowed the scope of Article 7 of the

Anti-Terror Law as compared to the previous law by emphasising that not all terror-related propaganda constitutes a crime, but only that which actually encourages people to use terrorist methods. After the words "those who have spread terror-related propaganda", the words "in a manner encouraging people to resort to terrorist methods" were inserted. On 7 August 2003, the Seventh Reform Package (Law No. 4963) amended Article 7 of the Anti-Terror Law so that those who provide assistance to "terrorist group members or hold activities encouraging people to commit acts of terrorism and acts of violence" shall be sentenced to imprisonment from 1 to 5 years or fined.

Article 8 of the Anti-Terror Law ("propaganda against the indivisibility of the Turkish State") was amended by the First Reform Package (Law No. 4744) introduced on 6 February 2002. The entire provision was subsequently abolished by the Sixth Reform Package (Law No. 4928) introduced on 10 July 2003.

We welcome these legislative amendments but note that ultimately increased respect for the right to freedom of expression in Turkey depends upon the manner of their judicial implementation.

Some indication of the degree of implementation to date can be gained from a comparison of statistical data relating to the number of prosecutions filed and the conviction rate concerning the various so-called "freedom of thought offences" prior to the reform packages with statistics relating to the number of prosecutions filed and the conviction rate since the introduction of the reform packages.

In Turkey, judicial statistics are generally compiled annually, with the statistics for any given year becoming available in the July of the following year. However, within the framework of monitoring the fulfilment of the Copenhagen Political Criteria, in 2003 the Turkish government began compiling quarterly (i.e. 3 month) statistics in relation to the application of Articles 159, 169 and 312 of the Turkish Penal Code and the Articles of the Anti-Terror Law (Law No. 3173). It is therefore possible to compare the number of prosecutions filed in 2001, averaged out into four equal three-month periods, with the number of prosecutions filed in a three-month period in 2003 (Table I). It is also possible to compare the conviction rate for an average three-month period in 2001 with the conviction rate for a three-month period in 2003 (Tables II and III).

Table I: Cases filed by public prosecutors

CRIME TYPES	**CASES FILED BY PUBLIC PROSECUTORS**			**PERCENTAGE OF DECREASE –INCREASE BETWEEN THE YEARS OF 2001 AND 2003**	
	2003 THE SECOND THREE MONTH PERIOD	**2001 FILED CASES IN TOTAL**	**2001 THREE MONTH PERIOD**		
TPC 159	**103**	**647**	**162**	**36,32 %**	**DECREASE**

TPC 169	320	1461	365	12,39 %	DECREASE
TPC 312	48	352	88	45,45 %	DECREASE
ANTI-TERROR LAW	37	509	127	70,92 %	DECREASE

Table II: Cases finalised in 2001

NUMBER OF FINALISED CASES IN AN AVERAGE THREE MONTH PERIOD IN 2001			
CRIME TYPES	NUMBER OF JUDGMENTS	NUMBER OF CONVICTIONS	PERCENTAGE OF CONVICTIONS
TPC 159	401	104	25,94%
TPC 169	2002	352	17,58%
TPC 312	398	129	32,41%
ANTI-TERROR LAW	463	202	43,63%

Table III: Cases finalised in the second three months of 2003

NUMBER OF FINALISED CASES IN THE SECOND THREE MONTH PERIOD OF 2003			
CRIME TYPES	NUMBER OF JUDGMENTS	NUMBER OF CONVICTIONS	PERCENTAGE OF CONVICTIONS
TPC 159	152	15	09,87 %
TPC 169	1189	134	11,27 %
TPC 312	95	26	27,37 %
ANTI-TERROR LAW	79	12	15,19 %

These statistics demonstrate that whereas public prosecutors filed 162 cases alleging a breach of Article 159 of the Turkish Penal Code in an average three month period in 2001, 103 such lawsuits were filed in the second three months of 2003. This indicates a reduction in the number of prosecutions brought under Article 159 of approximately 36%. Whereas public prosecutors filed 365 cases alleging a breach of Article 169 of the Turkish Penal Code in an average three month period in 2001, 320 such lawsuits were filed in the second three months of 2003. This indicates a reduction in the number of prosecutions brought under Article 169 of approximately 12%. Whereas public prosecutors filed 88 cases alleging a breach of Article 312 of the Turkish Penal Code in an average three month period in 2001, 48 such lawsuits were filed in the second three months of 2003. This indicates a reduction in the number of prosecutions brought under Article 312 of approximately 45%. Whereas public prosecutors filed 127 cases alleging a breach of the Anti-Terror Laws in an average three month period of 2001, 37 such lawsuits were filed in the second three months of 2003. This indicates a reduction in the number of prosecutions brought under the Anti-Terror Laws of approximately 71%. Moreover, the conviction rate for lawsuits filed as a breach of

Articles 159,169 and 312 of the Turkish Penal Code, as well as for offences under the Anti-Terror Law, appear to have significantly decreased when one compares an average three month period in 2001 with the second three months of 2003.

Taken at face value then, the statistics supplied by the Ministry of Justice do evidence a substantial reduction in both the number of prosecutions brought and the number of convictions entered for so-called freedom of thought offences between the years 2001 and 2003. This in itself is to welcomed. However, we feel it only right to point out that there are several important caveats that must be borne in mind when assessing these figures.

First, we have only been provided with complete statistics for the second three-month period of 2003. We have not been provided with a complete set of statistics for the first three-month period of 2003 and no explanation has been offered for this omission.[185]

Second, the comparison between 2001 and 2003 cannot be regarded as precise because whereas the figure quoted for the number of prosecutions filed in the second quarter of 2003 is an exact figure, the figure quoted for the number of prosecutions filed in a three-month period in 2001 is an average figure calculated by dividing the total number of cases filed in the whole of 2001 by 4. It does not therefore take account of any seasonal variations that may occur.

Third, whilst we have been provided with specific figures for Articles 159, 169 and 312 of the Turkish Penal Code, we have been provided with merely a global figure for all offences under the Anti-Terror Law. We therefore have no way of assessing to what extent the number of prosecutions brought specifically under Articles 7 and 8 of the Anti-Terror Law have altered, if at all.

Fourth, the figures for the second quarter of 2003 cover the period April-June 2003. Therefore, they provide no indication of the degree of implementation with respect to the amendments introduced in either the sixth reform package of July 2003 or the seventh reform package of August 2003. This is particularly important because Article 8 of the Anti-Terror Law was abolished in the Sixth Reform Package and the scope of Article 169 of the Turkish Penal Code was reduced as part of the Seventh Reform Package.

Fifth, the figures do not reveal to what extent, despite the overall decline in the number of prosecutions filed, prosecutors have resorted to “alternative charging”, by which we mean the use of one article of the Turkish Penal Code or the Anti-Terror Law in preference for another in order to achieve the same ends. In this regard, it should be noted that there is a marked disparity in Table I between the percentage decrease in

[185] A careful reading of the text that accompanied the statistical tables does reveal that in so far as Table I is concerned, 129 prosecutions were filed under Article 159 of the Turkish Penal Code in the first three months of 2003 and 55 prosecutions were filed under Article 312 of the Turkish Penal Code during the same period, but no further statistics for the first three months of 2003 are discernable.

prosecutions brought under Article 169 of the Turkish Penal Code (12%) and the percentage decrease in prosecutions brought under other Articles, in particular those brought under the Articles of the Anti-Terror Law (71%). This could be read as an indication that rather than there having been a substantial reduction in the criminalisation of behaviour that was previously regarded as "terrorist" activity per se, a class of cases that in 2001 would have been brought under Article 8 have, in 2003 (perhaps in anticipation of the abolition of Article 8) simply been filed under Article 169 instead. We consider this to be a distinct possibility given that Article 169 itself criminalises conduct that is deemed to constitute support for "terrorist" activity.

Sixth, and perhaps most important of all, the figures provided to us offer no indication as to the subject matter of the prosecutions that have been brought in either 2001 or 2003. Even if one were to accept that the figures demonstrate an overall reduction in the number of prosecutions initiated under Articles 159, 169 and 312 of the Turkish Penal Code and the various offences under the Anti-Terror Law therefore, we have no way of assessing whether there has in fact been any change in the number of prosecutions brought against individuals and groups for the non-violent exercise of their right to freedom of expression. .

With these considerations in mind, rather than relying upon raw statistical data relating to the number of prosecutions filed and the conviction rate for so-called freedom of thought offences, the extent and manner of implementation of the reform packages in this regard is perhaps better assessed by way of reference to the results of our interviews with judges, prosecutors, lawyers and human rights advocates throughout Turkey.

On the basis of our interviews, so far as those cases that are either within the judicial system or have passed through the judicial system are concerned, it does appear that the reforms are being implemented in one sense. Where a person has been charged with an offence under Articles 159, 169 or 312 of the Turkish Penal Code or Articles 7 or 8 of the Anti-Terror Law, but their case has not yet come to trial, their file is reviewed in order to determine whether or not the prosecution should proceed in light of the legislative amendments. Where the person concerned was charged with an offence under Article 8 of the Anti-Terror Law, the prosecution cannot proceed under that article because Article 8 has now been abolished. Where a trial under Articles 159, 169 or 312 of the Turkish Penal Code or Articles 7 or 8 of the Anti-Terror Law is in progress, with the exception of cases involving Article 8, the trial continues and the judge applies the amended law when determining the guilt or innocence of the accused. Proceedings under Article 8 of the Anti-Terror Law are stayed. Where a person has been convicted of an offence under Articles 159, 169 or 312 of the Turkish Penal Code or Articles 7 or 8 of the Anti-Terror Law and that person is still serving a custodial sentence, their file is sent back to court and their conviction and sentence are reviewed in light of the legislative amendments. This review may lead to their release or a re-trial. We were given to understand that in all of the aforementioned scenarios the courts have either undertaken, or are in the process of undertaking, an active review of all cases that may be affected by the legislative amendments. The result has been a large number of acquittals in cases that

previously would have resulted in a conviction and a large number of prisoners being released from prison.

On the basis of the foregoing information alone, there does appear to be a very good level of implementation of the legislative amendments to Articles 159, 169 and 312 of the Turkish Penal Code and Articles 7 and 8 of the Anti-Terror Law. We welcome the apparent willingness of the authorities to actively review the files of persons who might potentially be able to benefit from the legislative amendments. However, our interviews also revealed that there is a widespread practice of alternative charging whereby public prosecutors who find themselves unable to secure a conviction under one amended article simply re-charge the person concerned under an alternative provision. Thus, for example, we were informed that instead of bringing a prosecution under Article 8 of the Anti-Terror Law, public prosecutors now initiate proceedings under Article 169 of the Turkish Penal Code or, to a lesser extent, Article 312 of the Turkish Penal Code. Alternatively, where the amendment to Article 169 of the Turkish Penal Code prevents a prosecution from being brought under that provision, indictments routinely charge an offence under Article 7 of the Anti-Terror Law or Article 312 of the Turkish Penal Code instead. In this way, we were informed, despite the active review of files described in the previous paragraph, the legislative amendments have not brought about any real change in terms of what conduct is, and what is not, deemed to be criminal behaviour. Freedom of thought is still criminalised in post-reform Turkey, albeit under different provisions than before.

We would observe that, despite the amendments to date, the broad formulation of certain of the provisions does still leave them open to abuse. Article 159 of the Turkish Penal Code is still a generally restrictive article so far as freedom of expression is concerned. That people can be even prosecuted, let alone imprisoned, for offences such as “insulting the state” betokens an authoritarian state with scant respect for free speech. In a democratic society, the state exists to serve the people, not require reverence from them. Moreover, Article 7 of the Anti-Terror Law, as amended, continues to incorporate the notion of crimes of thought and appears to reintroduce the concept of ‘assistance to terrorist groups’ that was removed from Article 169. Despite the abolition of Article 8 of the Anti-Terror Law, the offence of propaganda against the integrity of the state is still covered by various other articles, including Article 312 of the Turkish Penal Code, and the impact of the reform to Article 169 on judicial practice remains to be seen. Whilst we welcome the efforts of the Turkish government to date, we consider that a more thorough reform of law and practice in a way that fully guarantees the right to freedom of expression is needed.

We recommend that Articles 159, 169 and 312 of the Turkish Penal Code and Article 7 of the Anti-Terror Law be reviewed and further amended or abolished in order to ensure compliance with Article 10 of the European Convention on Human Rights.

4. *Amendments to the role and functioning of prison enforcement judges*

On 23 May 2001, Law No. 4675 on the Establishment of Supervisory Judges came into effect. In an effort to strengthen judicial supervision of all practices and activities in prisons, this law established prison enforcement judges as a new judicial function in Turkey. These judges are responsible for reviewing complaints made by prisoners concerning matters such as admittance to the penitentiary institutions, accommodation, food, heating, hygiene, health care, work and communication; and the execution of sentences, the authorisation to be transferred to an open penitentiary, decisions on transfers and release and disciplinary precautions and measures. Complaints are examined by enforcement judges who take a decision on the merits. An adverse decision at first instance may be appealed to the Heavy Penal Court and thereafter to the Ministry of Justice. The spouses, lawyers or legal representatives of inmates may also submit complaints.[186]

In total, 140 prison enforcement judges have been appointed. By July 2002 they had received 4,527 applications regarding various issues, mainly concerned with enforcement of sentences, disciplinary punishments and conditions in prisons. Of these applications, 1,308 were admitted, 140 partially admitted and 3,079 rejected by the enforcement judges.[187] By 29 September 2003, the prison enforcement judges had received a total of 10,569 applications of which 3,138 were admitted, 286 partially admitted and 7,235 rejected. Of the 7,235 rejected applications, 481 were appealed to the Heavy Penal Court. The Heavy Penal Court admitted 81 of these applications and rejected the remaining 400.[188]

We welcome the introduction of prison enforcement judges as a positive measure to strengthen judicial supervision of practices and activities in Turkish prisons and thereby contribute to the advancement of prisoner's rights. However, on the basis of information received during the course of our interviews, we do have various concerns regarding the functioning of the prison enforcement judges.

The Ankara Human Rights Association informed the delegation that the prison enforcement judges never visit the complainant inmates themselves. Instead, they simply make a decision on the complaint on the basis of the contents of the file that is placed before them. The Diyarbakir Contemporary Lawyers Association informed us that the appointments to the position of prison enforcement judge had been made without regard to whether the judges in question had any relevant background experience, nor had the newly appointed judges been provided with any appropriate training in order to enable them to discharge their duties. The Association also placed little value on the system in so far as the persons charged with determining the complaints were ordinary judges and, in their view, were therefore not sufficiently sensitive to human rights issues to be of any practical benefit.

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[186] Submission to the UN Committee against Torture concerning Turkey, 22 July 2002, p.32.
[187] European Commission Regular Report on Turkey, October 2002.
[188] Interview with Mr. Mehmet Oztosun, Acting Director General, General Directorate of Prisons and Detention Houses of the Ministry of Justice, 29 September 2003.

The Izmir Bar Association's main concern was that the competence of the prison enforcement judges was limited to complaints made by convicted persons in prison. Therefore, the only avenue of redress for individuals held in pre-trial detention, whether at a police station or at a detention centre, remained a responsible prosecutor. The Izmir Contemporary Lawyers Association considered that the new legislation relating to prison enforcement judges was merely a paper reform. The majority of their work involved the review of disciplinary actions rather than any substantive contribution to the welfare of prisoners. They did not subject the prison management to any proper assessment. The Association also noted that military prisons fell outside the competence of the enforcement judges.

If these views are to be accepted as a fair reflection of the operation of the institution as a whole, and given their various geographical and organisational origins there would be appear to be no reason why they should not be, the impression we are left with is that far from providing an effective mechanism for the advancement of prisoners rights, the untrained enforcement judges who have no relevant background experience and whose competence is limited to only a proportion of those persons deprived of their liberty, are in fact undertaking merely a paper review of disciplinary actions. That said, however, we recognise that the introduction of a system of prison enforcement judges is at least a step in the right direction.

In addition to the concerns of our interviewees we would also observe that less than 7% of all adverse decisions by the prison enforcement judges are appealed to the Heavy Penal Court. There could be many reasons for this. On the one hand it may be simply that the original applications were unmeritorious and the inmates considered it worthless pursuing their complaints any further. On the other, this low figure may point to a lack of knowledge regarding the possibility of an appeal, a restriction upon the ability to pursue such an appeal or a belief that such an appeal would not provide an effective remedy. Further information would be useful in this regard.

5. Role and functioning of the Prime Ministry's Human Rights Presidency

We recommend that:

(i) prison enforcement judges be provided with training in relation to both relevant domestic legal provisions and international standards relating to the rights of persons under any form of detention or imprisonment;

(ii) the competence of prison enforcement judges be extended so as to enable them to receive complaints from any individual who is deprived of his liberty in any law enforcement facility in Turkey;

(iii) measures be taken to ensure that, where the substance of the complaint necessitates, prison enforcement judges undertake site visits to detention facilities in order to assess the merits of the complaint.

Role of the Human Rights Presidency

The Prime Ministry Human Rights Presidency ("Human Rights Presidency") was established in 2001 by virtue of the Law Regulating the Organisation of the Prime Ministry. According to Article 17/A of this law, the role of the Human Rights Presidency is defined as follows:

> "a) To maintain co-ordination between the state agencies dealing with human rights;
>
> b) To monitor the implementation of the legislation, decrees, and by-laws regarding human rights; assess the outcome of monitoring; to co-ordinate the efforts for improving the shortcomings in the legislation and in the implementation and for making Turkey's national legislation in harmony with international documents to which Turkey becomes a party in the field of human rights, and to make suggestions about these issues;
>
> c) To monitor, assess and coordinate the implementation of the state agencies both probationary, trainee and in-service training programs relating to human rights;
>
> d) To process the petitions regarding alleged human rights violations;
>
> e) ...."

According to law, therefore, the Human Rights Presidency is designated as a permanent co-ordinating body for all state projects related to human rights. It acts on behalf of the Prime Minister and is responsible for co-ordinating all other ministerial departments, including the Ministry of Interior and Ministry of Justice. It has the authority to both investigate alleged violations of human rights and also recommend changes in the law in favour of increased respect for human rights.

The Human Rights Presidency has been in operation since 2001 but we were told that under the previous coalition government it was largely ineffectual. Human rights organisations that we spoke to characterised the Presidency as being "not very functional" and "having limited powers". They referred to an October 2002 survey that revealed a significant lack of public awareness regarding its role and function. With a single party government now in power, however, and a greater political will to increase respect for human rights, they recognised that there is hope for the future.

Organisation

The Human Rights Presidency is comprised of a central office in Ankara staffed by a total of 25 people including secretaries. It has established, or is in the process of establishing, regional Human Rights Commissions in all provinces and sub-provinces.

These regional Commissions send monthly reports to the central office in Ankara regarding the state of human rights in their area. However, we were told that there is a need to increase the quality of these reports and to create a standard format for them.

It is intended that the regional Commissions be composed of representatives from both the public sector and civil society. However, the public sector is presently regarded as being over-represented. There are presently an insufficient number of non-governmental organisations ("NGO's") operating in the provinces to achieve a proper balance. Educational programmes are now organised within provincial cities in the hope of encouraging local people to establish small NGOs that can address the problems in their local area. Work on a book that will contain details of all human rights organisations in Turkey, both governmental and non-governmental is on-going.

Complaints and investigations

Citizens may register a complaint of a human rights violation by telephone or, in certain cities, there are mail boxes where a complaint may be posted. The Human Rights Presidency also has an internet site that includes a facility for the registration of complaints. Once a complaint is received a decision is taken by the central office of the Presidency on whether to investigate the complaint itself or refer it to the relevant regional commission. In addition, The Presidency itself also monitors newspapers from across Turkey for reports of potential human rights violations.

Regarding the investigation of alleged human rights violations, each province or sub-province has a human rights desk in the office of the governor or sub-governor where an aggrieved individual may file a complaint. Each regional human rights commission has one inspector and if they are able to resolve the complaint then they will. If the regional commission takes the view that the complaint raises a matter of such significance that it ought to be investigated by the central body of the Human Rights Presidency then it refers the complaint to Ankara. The central body in Ankara has 3 investigators at its disposal, one each from the Ministry of Justice, the Ministry of the Interior and the Police. They have power to interview any person and examine any document necessary for the purposes of their investigation.

Following an investigation, if the Presidency or one of its regional commissions concludes that a human rights violation has been established and that violation also constitutes a criminal offence, then it transfers the case file to a public prosecutor. If the breach is purely administrative in nature then it has power to impose an administrative sanction.

Official and public awareness

The newly appointed President of the Human Rights Presidency, Mr. Bicak recognised the importance of establishing a human rights consciousness within the judiciary as a basis for improving human rights for all persons throughout Turkey. He told us that he wanted to see an increase in activities that would serve to raise the

awareness of human rights within the judiciary so as to develop a perspective of respect for human rights and fundamental freedoms. Mr. Bicak saw the opportunity for judges to undertake study visits to other jurisdictions as particularly important in this regard. He hoped that the judiciary would begin to cite decisions of the ECtHR in their judgments.

Mr. Bicak recognised that another key element to the effective implementation of the reforms introduced by Turkey to date would be public awareness. He considered that at present too few people were sufficiently informed regarding the additional rights and freedoms that they had been granted as part of the reform packages. This meant that they were unable to actually exercise their rights and freedoms in practice.

In 2004, the Human Rights Presidency intends to place summaries of its case files on its internet site and also produce an annual report that will include statistics relating to the complaints that have been received.

Comments

As already stated, the Human Rights Presidency has not been particularly functional since its establishment in 2001. However, we formed the strong impression that its new president is genuinely committed to increasing human rights standards within Turkey to a level equal to that enjoyed by those within the European Union. In the absence of any reliable statistics it is too early for us to make any proper assessment of the current effectiveness of the Human Rights Presidency but we note that it does have the potential to make a real contribution to the improvement of the human rights situation of all persons throughout Turkey. At this stage we would simply note that the effectiveness of the Presidency will ultimately depend upon both the public being made aware of its role and functions and the Presidency itself being provided with sufficient resources. We urge the authorities to ensure continued efforts in both of these directions.

We welcome:

the apparent willingness of the Human Rights Presidency to work in co-operation with civil society organisations throughout Turkey.

We recommend that:

(i) measures be taken to increase public awareness regarding the role and function of the Prime Ministry's Human Rights Presidency;

(ii) measures be taken to ensure that the Prime Ministry's Human Rights Presidency is provided with sufficient resources to enable it to fulfill its function.

F. Conclusion

In 2002, a total of 5,099,552 case files were entered in criminal and civil courts in Turkey. Assuming that there are at least two persons to any dispute and that there are 65 million people living in Turkey, we can conclude that, statistically, at least 15 people out of every 100 persons living in Turkey were party to a legal dispute before the courts last year.

The high demand placed upon the Turkish legal system shows no sign of abating. If the rule of law and the effective protection of human rights and fundamental freedoms are to be safeguarded in Turkey then there is a need to improve the efficiency and functioning of the judicial system. Human resources need to be increased, support structures need to be modernised and courtroom procedures need to be streamlined. We urge the government to give serious consideration to adopting the various reforms that we have recommended in this chapter.

IX – SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

As emphasised throughout this report, Turkey's judges, prosecutors and lawyers all play a crucial role in the administration of justice and in the prevention of impunity for human rights violations. They are consequently also essential for the preservation of a democratic society and the maintenance of a just rule of law. It is therefore indispensable that the Turkish state authorities assume their international legal duties to permit judges, prosecutors and lawyers to carry out their professional responsibilities independently and impartially without undue interference.

Turkey's duty to secure the independence and impartiality of judges and prosecutors and the independence of lawyers is not necessarily fulfilled by passively allowing these professions to go about their business. The legal obligation to *ensure* their independence, means that Turkey must take positive actions to protect judges, lawyers, and prosecutors against all forms of improper interference so as to enable them to perform all their professional functions effectively.

In situations where judges, prosecutors and lawyers are either unwilling or unable fully to assume their responsibilities, the rule of law cannot be maintained and human rights cannot be enforced. It is not only individual Turkish citizens who will suffer in such a situation: it is the entire free and democratic constitutional order of the Turkish Republic that will ultimately be in jeopardy. With these considerations in mind, we set forth the following recommendations:

The Constitution of the Republic of Turkey

We recommend that the Constitution be amended so as to:

- abolish the State Security Courts;
- permit the constitutionality of decrees issued under a state of emergency, martial law, or in time of war to be challenged before the Constitutional Court;
- make it possible under Articles 105/2, 125/2, 129/3 and 159/4 to appeal against the lawfulness of the decisions mentioned in the Articles where the decisions concern the determination of a criminal charge or a civil right or obligation;
- provide for an institutional and functional separation of the professional rights and duties of judges and public prosecutors;
- in accordance with Principle 20 of the UN Basic Principles on the Independence of the Judiciary and Principle 6(3) of the Council of Europe Recommendation on the Independence of Judges, Article 159 of the Turkish Constitution be amended

to permit decisions of the High Council adverse to a judge to be appealed to an independent judicial body comprised of members of the judiciary other than those responsible for the taking of the original decision;

- in accordance with Principle 1 of the UN Basic Principles on the Independence of the Judiciary and Principle 1(2)(a) of the Council of Europe Recommendation on the Independence of Judges, paragraph 6 of Article 140 of the Turkish Constitution be removed and replaced with a provision that emphasises that the administrative functions of the judiciary are the sole responsibility of the judiciary themselves.

The State Security Courts

On the functions of now existing State Security Courts, we recommend that:

- the functions of the courts be transferred to the Heavy Penal Courts;

- cases previously within the jurisdiction of the courts be assigned to judges and prosecutors within the Heavy Penal Courts who possess the necessary competence to conduct such cases;

- cases formerly dealt with by the prosecutors in the courts be handled by prosecutors within the Heavy Penal Courts vested with power to undertake nationwide investigations rather than provincial investigations as and when required.

The Minister of Justice and the Ministry of Justice

We recommend that:

- in accordance with Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges, Article 159 of the Turkish Constitution be amended so as to remove the Minister of Justice and his Under-Secretary from the High Council of Judges and Public Prosecutors;

- in accordance with Principle 10 of the UN Basic Principles on the Independence of the Judiciary and Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges, the influence of the Ministry of Justice in the process of selecting candidate judges be removed. We suggest that those aspects of the selection process presently performed by the Ministry of Justice be brought within the remit of either the Justice Academy or the High Council of Judges and Public Prosecutors;

- the power to transfer judges be removed from the Minister of Justice and his Under-Secretary. Such authority should be vested with the High Council of Judges and Public Prosecutors.

- in accordance with the provisions of Principle 9 of the UN Basic Principles on the Independence of the Judiciary and the Chisinau Declaration, the influence of the Ministry of Justice in the pre-service and in-service training of judges be removed;

- in accordance with Principles 13 and 17 of the UN Basic Principles on the Independence of the Judiciary and Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges, Article 144 of the Constitution and the Law on Judges and Prosecutors No. 2802 be amended so as to remove judicial inspectors from within the central organisation of the Ministry of Justice. Judicial inspectors should be re-assigned to work directly under the control of the High Council of Judges and Public Prosecutors, the High Council having sole authority to request and/or grant permission for an investigation or inquiry in respect of a member of the judiciary;

- the Minister of Justice be deprived of the power under Article 148 of the Code of Criminal Procedure to override a decision of a public prosecutor not to initiate a criminal prosecution in circumstances where an impartial investigation has shown the charge to be unfounded;

- the practice of the Ministry of Justice sending circulars to public prosecutors regarding the interpretation of Turkish law cease immediately;

- the role of the Ministry of Justice in relation to the functioning of the Bar Associations be removed with a view to establishing professional self-regulation as a step towards securing the independence of lawyers. In pursuit of this aim, we recommend that the appeal to the Union of Turkish Bar Associations be the final appeal to a non-judicial instance in the case of disciplinary action against lawyers. The decision of the Union should not be forwarded to the Ministry of Justice;

- Articles 58 and 59 of the Law on Lawyers be amended so as to remove the influence of the Ministry of Justice in the process of instituting criminal proceedings against lawyers for offences alleged to have been committed during the course of their professional duties.

<u>The High Council of Judges and Prosecutors</u>

We recommend that the High Council of Judges and Prosecutors:

- in accordance with Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges, the President be absolved of his power to appoint members of the High Council and udges and public prosecutors themselves be empowered to elect their representatives on the High Council. In the alternative, the President could retain his power to formally appoint members of the High Council but any appointment should be made only from among candidates brought forward by judges and public prosecutors themselves;

- be provided with its own adequately funded Secretariat and premises;

- be granted its own budget, the members of the High Council to be both consulted in the preparation of the budget and to be responsible for its internal allocation and administration.

Judges

We recommend that:

- in accordance with Principle 9 of the UN Basic Principles on the Independence of the Judiciary and Principle 4 of the Council of Europe Recommendation on the Independence of Judges, the draft Bill to enable judges to organise and form professional associations be enacted as soon as possible;

- a Code of Judicial Conduct be drafted;

- the number of judges in Turkey be substantially increased;

- the salaries of judges be substantially increased but in recognition of their greater burden of responsibility the salaries of judges be increased proportionately more than the salary of public prosecutors.

- the practice of using substitute judges should cease immediately. In circumstances where a file has been allocated to a panel of judges and one or more members of the judicial panel finds themselves unable to attend a particular hearing in the case, the proceedings should be adjourned and re-listed for a date when all members of the original judicial panel are able to attend.

Public Prosecutors

We recommend that:

- administrative duties currently undertaken by public prosecutors should be transferred to administrative staff of the Ministry of Justice;

- measures be taken to improve the role of prosecutors in criminal investigations in order to concentrate the work of the judiciary in criminal cases to matters with substantial merits. In this regard the Turkish authorities might consider the advantage of creating a juridical police force with officers affiliated directly to individual public prosecution offices and the force as a whole placed under the overall control of the Ministry of Justice;

- Chief Public Prosecutors take an active role in ensuring that public prosecutors use their discretion to take decisions of non-prosecution or to postpone a public lawsuit in circumstances where circumstances reasonably require such a decision;

- Public Prosecutors be re-assigned to different courtrooms on a regular basis;

- Public Prosecutors either be required to have their offices outside of the courthouse or, if this is not practicable, then public prosecutors have their offices located in a completely separate part of the courthouse from that occupied by judges;

- the pre-service and in-service training of public prosecutors on matters of competence and venue be improved;

- Public Prosecutors be required to enter and leave the courtroom through a door other than that used by the judge;

- whenever judges retire to their ante-chamber for the purposes of deliberating on their rulings, Public Prosecutors be required to remain inside the courtroom. Where judges remain in the courtroom in order to conduct their deliberation, the prosecutor should not enter into any discussion with the judges during the course of their deliberation;

- the position of Public Prosecutors in the courtroom be altered so that rather than sitting on an elevated platform adjacent to the judges, the public prosecutor is required to sit at a table at ground floor level, either next to or opposite the defence lawyer;

- the salaries of public prosecutors be substantially increased;

- the number of public prosecutors in Turkey be substantially increased.

<u>Education and Training of Judges and Prosecutors</u>

On education and training of judges and prosecutors we recommend that:

- measures be taken to ensure that the Justice Academy offers judges, prosecutors and lawyers optional foreign language education courses in addition to the provision of compulsory legal education;

- all judges and public prosecutors receive comprehensive training in international standards relating to the guarantee of an independent and impartial judiciary and the role and functioning of prosecutors and lawyers. Such training should be based upon, but not limited to, the guarantees set forth in the UN Basic Principles on the Independence of the Judiciary, the UN Guidelines on the Role of Prosecutors, the UN Basic Principles on the Role of Lawyers and the Council of Europe Recommendation on the Independence of Judges.

Defence, Fair Trial and Equality of Arms

To promote fair trial and equality of arms and strengthen the role of the defence we recommend that:

- measures be taken to ensure an equality of arms between prosecution and defence counsel during the course of criminal proceedings. In this regard we repeat and adopt the matters addressed in further detail in Chapter VII;

- steps be taken to monitor and enforce existing requirements that all persons be immediately informed by a competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence;

- Bar Associations be permitted to place posters advocating the rights of detainees within police stations and other detention facilities;

- once a week police stations and gendarme stations be required to submit to the local Bar Association a list of all persons detained during the previous week. Such a list would assist Bar Associations in monitoring compliance with Articles 135 and 136 of the Criminal Procedure Code and enable them to make representations regarding further improvements if necessary;

- in accordance with Principle 16 of the UN Basic Principles on the Role of Lawyers, the Turkish government take measures to ensure that lawyers are not intimidated or harassed when seeking entry to detention centres for the purpose of visiting their clients;

- where such facilities do not already exist, visiting rooms in all detention centres in Turkey be equipped with consultation rooms that enable lawyers to communicate with their clients in full confidence. Such consultations may be within the sight, but not within the hearing, of security staff;

- lawyers and their clients be provided with adequate facilities to be able to communicate in confidence within the detention facilities of all criminal courthouses throughout Turkey, and, where the possibility of such confidential communication does not already exist, consultation rooms be constructed outside of the communal cell area but within the secure facility;

- provided the due process of the court is not unduly disturbed, lawyers be permitted to consult with their clients during the course of court proceedings as and when required;

- where courtroom facilities exist for the prosecutor to observe the record of proceedings as the court stenographer is entering it, defence lawyers be provided with access to the same facility;

- upon the request of a defence lawyer, the court be obliged to summon all defence witnesses, unless the court, on the basis of substantial facts, finds that hearing the witness would not contribute to the determination of the case;

- the procedure for the examination of witnesses be amended so as to ensure that both the defence and prosecution are placed in a procedurally equal position regarding the form and content of witness questions;

- all pending prosecutions against lawyers be reviewed at the highest level of the appropriate prosecuting authority to consider (i) the adequacy of evidence favouring conviction; (ii) the extent to which, despite a formal sufficiency of evidence, there is any real prospect of conviction; and (iii) whether the criminal proceedings could be said to violate the UN Basic Principles on the Role of Lawyers or other international human rights standards;

- where resort to civil or administrative procedures in respect of alleged professional misconduct would not provide an adequate remedy, the criminal prosecution of lawyers in respect of their professional activities should only occur where (a) there is evidence that is both clear and credible; and (b) where the alleged wrongdoing involves some serious impediment to the administration of justice.

Structure of the Court System

On the structure of the court system and the Court proceedings we recommend:

- the enactment at the earliest opportunity of all necessary regulations for the implementation of the establishment of the regional intermediate Courts of Appeal;

- that the number of juvenile courts be substantially increased throughout Turkey.

Court Proceedings in Criminal Cases

We recommend that:

- the criminal procedural rules relating to jurisdiction be simplified;
- on the first day of a criminal trial, public prosecutors be required to present at least sufficient evidence upon which, if taken at its highest, a judge properly directed in law could convict. Any additional prosecution evidence should only be capable of being served up until the close of the prosecution case, the judge retaining a discretion to exclude the admission of such evidence if the defence would require an adjournment to properly consider it and such an adjournment would not be in the public interest;
- the draft legislation, giving criminal judges the authority to reject indictments that are not brought on sufficient evidence, be enacted as soon as possible;
- single judge courts determine very minor offences involving young persons;
- where they do not already exist, psychologists, psychiatrists and pedagogues are appointed to the juvenile courts;
- in accordance with Article 6(3)(e) of the European Convention on Human Rights, all Kurdish speaking citizens of Turkey charged with a criminal offence be provided with the free assistance of a competent interpreter if they cannot understand or speak the Turkish language;
- measures be taken to remind members of the judiciary that rather than resorting to the use of expert opinions on matters that are within their own knowledge and experience, they should exercise their own legal judgement;
- consideration be given to whether a system of plea-bargaining might be introduced in criminal proceedings;
- court proceedings be sound-recorded so that an accurate record of all evidence, argument and submissions on behalf of both the prosecution and defence is made;
- wherever possible, state authorities resort to civil or administrative procedures in respect of alleged professional misconduct rather than criminal proceedings.

- the significant efforts that have been made to date to encourage the Turkish judiciary to directly apply the European Convention on Human Rights within their own practice continue and be enhanced;

Court Proceedings in Civil Cases

We recommend that:

- in accordance with Objective 5 of Recommendation No. R (86) 12 of the Council of Europe on Measures to Prevent and Reduce the Excessive Workload in the Courts, the law establishing commercial courts is amended so as to provide for their functioning, in all but the most high cost or complex cases, under the responsibility of a single judge;

- in accordance with Objective 1 of Recommendation No. R (86) 12 of the Council of Europe on Measures to Prevent and Reduce the Excessive Workload in the Courts, necessary amendments are made to procedural rules and legislation so as to facilitate the settlement of private law disputes involving individuals and public bodies in conciliation committees or similar institutions. As a compliment to the establishment of such institutions, we recommend that lawyers be trained in basic alternative dispute resolution methods and techniques;

- the distinction between the Civil Courts of Peace and General Civil Courts of First Instance be abolished and the division of labour between civil courts be based on specialisation;

- the court proceedings be sound-recorded so that an accurate record of all evidence, argument and submissions on behalf of both parties is made;

- the significant efforts that have been made to date to encourage the Turkish judiciary to directly apply the European Convention on Human Rights within their own practice continue and be enhanced;

Family Courts

On Family Courts we recommend that:

- all judges appointed to the family courts be provided with sufficient specialist family law training to enable them to properly discharge their judicial function;

- where such appointments have not already been made, social services personnel and child psychologists be appointed to the family courts;

- the law relating to family proceedings be amended so as to enable to family courts to hold closed proceedings when necessary in order to protect family and/or private life.

Court Budget and Court Facilities and Equipment

We recommend that:

- the proportion of the budget allocated to the administration of justice be substantially increased;

- judges be consulted in the preparation of the budget and the judiciary be responsible for its internal allocation and administration;

- the existing capacity of the available courtrooms in Turkey be exploited more effectively by ensuring that the courtrooms are used on everyday of the working week, by different panels of judges if necessary;

- all provincial offices that do not presently have the ability to access the national information of the Ministry of Justice via a computerised network be equipped with facilities to do so;

- an electronic case-management system be introduced in all courts in Turkey with appropriate training being provided to judges and court personnel in its application;

- all judges be provided with personal computers capable of accessing the internet.

Detained Persons

For detained persons, we recommend that:

- in accordance with Article 6(3)(b) of the European Convention on Human Rights and Rule 93 of the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners, all persons held in pre-trial detention (i) be afforded the possibility of accessing documents and other evidence that they require for the preparation of their defence; and (ii) be afforded the possibility of preparing and handing to their lawyer confidential instructions;

- in accordance with Rule 93 of the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners, all persons held in detention be supplied with writing material prior to and during consultations with their legal representatives if such material is requested;

- convicted persons be entitled to instruct and receive visits from lawyers of their own choosing throughout the duration of their period in custody;

- prison enforcement judges be provided with training in relation to both relevant domestic legal provisions and international standards relating to the rights of persons under any form of detention or imprisonment;

- the competence of prison enforcement judges be extended so as to enable them to receive complaints from any individual who is deprived of his liberty in any law enforcement facility in Turkey;

- measures be taken to ensure that, where the substance of the complaint necessitates, prison enforcement judges undertake site visits to detention facilities in order to assess the merits of the complaint;

- the regulation on legal guardians for convicted persons be abolished.

Forensic Medicine, Medical Examinations and alleged Victims of Torture

On the subject of forensic medicine and medical examinations, which to a large extent is connected with the issue of torture, we recommend that:

- all facilities within the general courthouses for the forensic medical examination of detainees and the documentation of torture and other cruel, inhuman or degrading treatment or punishment be transferred to state hospitals and health centres;

- responsibility for the preparation of official court forensic reports be removed from physicians attached to the Institute of Forensic Medicine and assigned to physicians working within the national health service in order to ensure the independence of medical personnel required to carry out forensic examinations;

- the Turkish Medical Association, Society of Forensic Medicine and Human Rights Foundation of Turkey be authorised to implement training programmes for physicians responsible for the preparation of official court forensic reports and such physicians be required to attend these training programmes;

- judges and public prosecutors receive training on the Istanbul Protocol and the proper procedure for the effective forensic examination of detainees in order to enable them to subject official courts forensic reports to substantive scrutiny;

- measures be taken to strengthen the protection of physicians who report torture from any form of state-sponsored or state-tolerated harassment or intimidation;

- measures be taken to ensure that the law enforcement officers who bring the detainee to the medical examination are not the same as those involved in the detention or interrogation of the detainee or the investigation of the incident provoking the detention;

- measures be taken to ensure that all forensic examinations of detainees be conducted out of the sight and hearing of law enforcement officials, unless the physician concerned specifically requests otherwise, with written reasons, in a particular case;

- posters be displayed in all examination rooms providing information to this effect, such posters also containing a warning that any violations will be reported to the Prime Minister's Human Rights Presidency;

- measures be taken to enforce the decision of the Council of State to annul provisions in the detention regulations of 1 October 1998 that permitted medical reports to be provided to police or gendarme officers following the examination of a detainee. Under no circumstances should medical reports be handed to law enforcement officers. Instead they should be immediately sent to the responsible public prosecutor who should promptly furnish a copy to the detainee and/or his lawyer;

- measures be taken to afford lawyers the right to attend the forensic medical examination of their clients in circumstances where their client requests their attendance and measures be taken to inform detainees of their right to have their lawyer in attendance at any forensic medical examination;

- measures be taken to enable lawyers and public prosecutors to request the attendance of physicians responsible for the writing of court forensic medical reports at court for the purposes of giving oral evidence as expert witnesses;

- measures be taken to ensure that all forensic medical examinations of detainees for the purposes of the preparation of official court reports are undertaken at no cost to the detainee themselves.

Criminal Legislation

On Criminal legislation, we recommend that:

- Articles 159, 169 and 312 of the Turkish Penal Code and Article 7 of the Anti-Terror Law be reviewed and further amended or abolished in order to ensure compliance with the right to freedom of expression under Article 10 of the European Convention on Human Rights.

The Prime Ministry's Human Rights Presidency

On the Prime Ministry's Human Rights Presidency we recommend that measures be taken to:

- increase public awareness regarding the Presidency's role and function;
- ensure that the Presidency is provided with sufficient resources to enable it to fulfil its function.

Further Verification Mission

We recommend that there should be a further verification mission to Turkey in the autumn of 2004 in order to assess the progress in implementing the recommendations set forth in this report.

Annex A - List of Interviewees

Ankara

- Ms. Saadet Arikan, Director General, General Directorate for EU Affairs
- Mr. Abdulkadir Kaya, Director General, General Directorate of International Law and Foreign Afffairs
- Mr. Ahmet Civgin, Deputy Director General, Personnel Department
- Mr. Mehmet Oztosun, Acting Director General, General Directorate of Prisons and Detention Houses
- Mr. Abuzer Duran, Director General, General Directorate for Criminal Affairs
- Mr. Mehmet Atapek, Deputy Director General, General Directorate for Laws and Legislation
- Mr. Haluk Mahmutogullari, Head of Department, Ministry of Justice Education Department
- Mr. Fahri Kasirga, Ankara Chief Public Prosecutor and subsequently Under-Secretary to the Minister of Justice
- Mr. Eraslan Ozkaya, President, High Court of Appeals
- Mr. Orhan Yertutanol, General Directorate for Judicial Records and Statistics
- Mr. Rifki Ergun, President, Regional Administrative Court
- Mr. Cevdet Volkan, Chief Public Prosecutor, State Security Court
- Ms. Fatma Camlibel, Director, School for Candidate Judges and Prosecutors
- Mr. Yusuf Alatas, Lawyer
- Mr. Vahit Bicak, President, Prime Ministry Human Rights Presidency and Professor at Bilkent University
- Mr. Fehmi Ulusoy, President, and Mr. Ali Guven, Mr. Cengiz Divanlioglu, Mr. Celal Altunkaynak, Mr. Yasar Engin Selimoglu, Members, High Council of Judges and Public Prosecutors
- Mr. Husnu Ondul, President, Human Rights Association
- Mr. Semih Guner, President, Ankara Bar Association
- Mr. Huseyin Bicen, President, Contemporary Lawyers Association

Istanbul

- Mr. Ferzan Citici, Istanbul Chief Public Prosecutor
- Ms. Neylan Feke, President, Heavy Penal Court
- Mr. Huseyin Aksoy, President, Commercial Court
- Mr. Kemal Eskici, President, Juvenile Court
- Mr. Oguz Ozkan, President, Administrative Court
- Mr. Aykut Engin, Chief Public Prosecutor, State Security Court
- Mssr. Muzaffer, Hadi and Erkan, Judges, State Security Court
- Mr. Suleyman Sensoy, President, Contemporary Lawyers Association
- Dr. Sebnem Korur Fincanci, President, Turkish Medical Association

- Dr. Turgut Tarhanli, Istanbul Bilgi University
- Dr. Kerametti Kurt, President, Forensic Medicine Institute
- Mr. Kazim Kolcuoglu, President, Istanbul Bar Association
- Dr. Sukran Irencin, Forensic Medicine Specialist, Human Rights Foundation

Diyarbakir

- Mr. Huseyin Canan, Diyarbakir Chief Public Prosecutor
- Mr. Mehmet Oztas, President, Heavy Penal Court
- Ms. Figen Eren, President, General Criminal Court
- Mr. Kazim, President, General Civil Court
- Mr. Abdullah Yesil, President, Juvenile Court
- Mr. Saban Erturk, Chief Pubic Prosecutor, State Security Court
- Mr. Hamza Yaman, Judge, State Security Court
- Mr. Devrim Baris Baran, President, Contemporary Lawyers Association
- Mr. Sezgin Tanrikulu, President, Bar Association and Human Rights Foundation
- Mr. Selahattin Demirtas, Human Rights Association

Izmir

- Mr. Ilhan Mesutoglu, Izmir Deputy Chief Public Prosecutor
- Mr. Ahmet Hekimoglu, President, General Criminal Court
- Ms. Semra Eren, President, Criminal Court of Peace
- Mr. Mustafa Uyan, President, General Civil Court
- Mr. Huseyin Narin, President, Commercial Court
- Mr. Hayri Ayhan, President, Family Court
- Mr. Mehmet Dogar, Chief Public Prosecutor, State Security Court
- Ms. Selma Baktir, University Secretary General and former judge
- Prof. Durmus Tezcan, Law Faculty
- Mr. Mustafa Rollas, President, Human Rights Association
- Ms. Gunseri Kaya, Human Rights Foundation
- Mr. Bahattin Ozcan Acar, President, Izmir Bar Association

- Mr. Mustafa Ufacik, President, Contemporary Lawyers Association

Annex B – Criminal Proceedings Against Lawyers

In 2001, a prosecution was commenced against the General Secretary of the Diyarbakir Bar Association for an offence of "obstruction" contrary to Article 266(1) of the Turkish Penal Code. A prison warden and gendarmes commenced proceedings after he was critical of the manner in which he was searched upon entering a prison in order to visit a client. The trial took place before Diyarbakir Heavy Penal Court No 3. The lawyer was convicted, sentenced to 3 months in prison, this sentence later being transferred to a fine and delayed. The lawyer has appealed against the conviction and his case is presently before the High Court of Appeals.

On 9 May 2002, 11 July 2002 and 31 October 2002, hearings took place before No. 1 Ankara Heavy Penal Court in the case of the "Ankara 27". The 27 lawyers were charged with "professional misconduct", a criminal offence pursuant to Article 240 of the Turkish Penal Code. This charge stemmed from the lawyers' representation of political prisoners at Ulucanlar prison during a court proceeding in December 2000. It was alleged by a gendarme commander that at this hearing the lawyers "shouted slogans" at the court and "incited those persons present in the courtroom to resist the gendarmes"**.** Yet, the court minutes during the December 2000 proceeding made no reference to a disruption in the courtroom by the lawyers; the state agent who filed the complaint was not present in the courtroom on the day in question; several of the defendants who were alleged to have disrupted court proceedings were not present in the courtroom; the lawyers' reports on the proceedings were corroborated by an independent journalist who was present in the courtroom; and the court file did not contain any statements from witnesses despite an 11-month investigation. At the hearing on 31 October 2002, 22 months after the initial complaint against the lawyers was made, the prosecutor invited the court to enter a not guilty verdict on the basis of insufficient evidence.

In January 2002, the President of the Diyarbakir Bar Association, Mr. Sezgin Tanrikulu, applied to the Governor's Office for compensation on behalf of 28 Kurdish villagers who had been forcibly displaced from the village of Deveboyu (also known as Adrok), Çağlayan, in southeast Turkey. The villagers originated from the same village as

the applicants in the case of *Orhan v. Turkey*[189] before the European Court of Human Rights. A gendarme commander made a complaint to a public prosecutor accusing Mr. Tanrikulu of fabricating a human rights claim on behalf of the villagers. The public prosecutor preferred an indictment against Mr. Tanrikulu accusing him of "professional misconduct", a criminal offence pursuant to Article 240 of the Turkish Penal Code. The first hearing in the case took place before No. 1 Diyarbakir Heavy Penal Court on 17 October 2003.

On 30 January 2003, Diyarbakir Penal Court of First Instance No. 3 started to hear a separate case against the President of Diyarbakir Bar Association, Mr. Sezkin Tanrikulu, in connection with a speech that he made during a human rights symposium organised by the Diyarbakir branch of the Human Rights Association on 8 December 2001.[190] Mr. Tanrikulu is charged with "insulting the security forces", an offence contrary to Article 159 of the Turkish Penal Code. Mr. Tanrikulu testified at the first hearing and said: "I just talked on torture during the symposium. But only parts of the speech were included in the indictment. If the whole speech was taken into consideration this case would not have been launched at all. In fact during the investigation for the case the prosecution did not ask my testimony." Mr. Tanrikulu also presented a written copy of his speech to the court. Hearings have been held on 30 January, 10 April, 11 July and 17 October 2003. The next hearing will take place on 5 December 2003.

An unknown lawyer of a detainee who was undertaking a death fast in Malatya Prison was, until February 2003, subjected to a criminal investigation in relation to an offence contrary to Article 169 of the Turkish Penal Code. The lawyer told his client that he had been to other prisons and prisoners on hunger strike in those prisons had been drinking mint tea in addition to normal tea. After the lawyer left the prison, his client asked the prison authorities if he could drink mint tea. This led to an investigation being opened against the lawyer for "aiding and abetting" the prisoner. The investigation, and therefore the threat of prosecution, lasted for 8 months, before being discontinued on the basis of "no adequate evidence found". Had the inmate died, the lawyer could have faced a sentence of up to 20 years imprisonment under the Turkish Penal Code for an offence of homicide.

On 20 March 2003, the Ankara State Security Court continued hearing a case against Irfan Dündar, lawyer of the PKK/KADEK leader Abdullah Öcalan who is charged with an offence contrary to Article 169 of the Turkish Penal Code in connection with an interview that he gave on Medya TV. The next hearing in the case is scheduled for 3 December 2003.

On 20 May 2003, No. 4 Ankara Heavy Penal Court concluded the trial against the lawyer Ms. Filiz Kalayci on charges of "insulting the state" contrary to Article 159 of the Turkish Penal Code and "professional misconduct" contrary to Article 240 of the Turkish

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[189] *Orhan v Turkey,* application no. 25656/94.

[190] Mr. Tanrikulu is also the Diyarbakir representative of the Human Rights Foundation of Turkey. He is charged alongside former chair of Istanbul Branch of the Human Rights Association (HRA), Eren Keskin and Sociologist Pinar Selek

Penal Code. The case was launched in connection with a press release that she had issued regarding F-type prisons. In his closing remarks, the prosecutor stated that following an amendment to Article 159 of the Turkish Penal Code, "criticism" of state institutions, as opposed to "insult", was no longer an offence and the allegation against the lawyer did not fall under the scope of the revised Article. The court acquitted Ms. Kalayci. Nevertheless, the amendment to Article 159 had been in force for 9 months before the prosecutor asked for an acquittal and Ms. Kalayci was the subject of criminal proceedings for a total period of almost 15 months.

The President of the Istanbul Contemporary Lawyers Association, Mr. Suleyman Sensoy, is currently facing the possibility of criminal proceedings in relation to a charge of "serving as an intermediary to assist in an escape" contrary to Article 307(b) of the Turkish Penal Code, a new offence introduced in February 2003. The allegation against him is that he persuaded his client, a detainee who had previously taken part in a death fast but had decided to end his protest, to remove a container of serum from his arm. The allegation is based upon the fact that Mr. Sensoy's client had renounced his death fast prior to the visit of his lawyer to the detention centre, but decided to resume the death fast at some point after his departure. According to Mr. Sensoy, there is no evidence of any causal connection between his visit to the detention centre and the action of his client in deciding to resume his death fast. The case is at the stage of asking permission from the Ministry of Justice for the prosecution to continue.

On 6 November 2003, the first hearing in the case against a lawyer and member of the Board of the Izmir Human Rights Association will take place before the Izmir State Security Court. The prosecution arises out of a speech that he gave at a conference held on 9 March 2003 in which he argued that Turkey's foreign policy should not be based on racial factors. The lawyer was originally charged under Article 169 of the Turkish Penal Code but following the amendments introduced to this article in the reform packages, his case has been reviewed and he is facing a charge of supporting/facilitating terrorism contrary to Article 7 of the Anti-Terror Law.