Report on the findings and recommendations of the Peer Review Mission on criminal justice (Istanbul and Ankara, 19-23 May 2014)

Disclaimer

This peer review was conducted from 19 to 23 May 2014 by an independent expert in agreement between the European Commission and the Turkish authorities with the support of TAIEX, and followed by a series of exchange of comments and additional information, including during a meeting held in Brussels on 24 November 2014.

The views expressed in this report are entirely those of the independent expert and do not represent the views neither of the European Commission nor of the Turkish government.

Criminal Justice

Luca Perilli
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CRIMINAL JUSTICE

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EXECUTIVE SUMMARY

The expert performed, in the capacity of an independent expert, four visits to Turkey in the period March 2012 to May 2014, to assess the reforms in the field of criminal justice; the expert focused particularly on the special courts which dealt with cases involving crimes against the security of the state, organized crime and terrorism.

The number of visits to Turkey has been the result of frequent and profound changes to the legal framework of procedural and substantive criminal law and to the structure and organization of the special courts, which were finally abolished in February 2014.

The special courts were established by articles 250, 251 and 252 of the Turkish Criminal Procedural Code of 2005, as specially authorized heavy criminal courts equipped with special powers. Specially authorized prosecutors were attached to the special courts. The specially authorized heavy criminal courts were subsequently abolished by the so-called third judicial reform package of 2 July 2012. Instead, special heavy criminal courts were set up under art. 10 of the anti-terror Law (, together with special prosecutor offices and liberty judges, tasked to deal with the so called "protective measures" (pre-trial detention orders, searches, interception of communications, undercover agents, seizures). The art. "250" courts had been authorized, by transitional provisions, to complete pending trials.

In February 2014 an Omnibus Law (Law n° 6526 amending the anti-terror law, the criminal procedure code and various laws) abolished the "art. 250" courts still functioning, the special courts set up under the umbrella of art. 10 of the anti-terror Law, the liberty judges and the special prosecutors, without further prorogations of their operations.

These changes occurred while investigations and trials on high profile cases were going on.

Special courts have been at the center of controversy since their establishment. Criticism has focused on the wide interpretation of their special powers, imposition of a strict pre-trial detention regime, limitations on the rights of the defense, excessively long indictments, the role of the police in launching investigations and handling arrest decisions, the slow pace of judicial proceedings linked to the very large number of individuals tried by the courts. All the high profile cases of recent years – such as *Sledgehammer*, *Ergenekon*, *Oda TV*, *KCK*- were tried by the special courts.

The recent abolition of special courts, and in particular the suppression of their special powers, is considered a positive development by the society as a whole and by all political forces. The representative of Ngo's and the members of the Parliamentary Justice Commission, representing different political parties, unanimously spoke in favor of the suppression of special courts.

However the whole process that brought, in only few years, from the establishment of specially authorized courts to their abolishment and from the establishment of the special heavy criminal courts provided by the anti-terror Law to the overall suppression of special courts, special prosecutor and liberty judges, raises serious concerns both for the independence and the effectiveness of Turkish criminal justice.

Concerns regard the coherency and the transparency of the decisional process for the establishment and the abolishment of special courts. The parliamentary deliberations did not follow public consultation with civil society and relevant stakeholders[1].

[1] In the first set of comments on the report, Turkish Authorities claimed that "*Before the draft law was submitted to the Parliament, there was already a common position among civil society and other stakeholders in favor of abolishment of specially authorised courts. In the absence of noticeable objection against the government's legislative proposal, the Parliamentary committees did not see a reason for further public consultation and just sought to quickly enact the draft law that was widely backed by public*".

In the second set of comments on the report, Turkish Authorities further claim that "*The government programme, development plan, decisions of higher judicial bodies, action plans of the Ministry of Justice, Accession Partnership Documents, National Programme for the Adoption of the EU Acquis, decisions of ECHR, opinions of the High Council of Judges and Public Prosecutors, opinions of the universities, citizen petitions as well as the opinions of all relevant non-governmental organizations are taken into consideration while making a law*".

Further serious concern regard the "internal independence" of judges and prosecutors with reference to the lack of transparency in the procedure followed by the High Council of Judges and Prosecutors (henceforth: HSYK) for the re-location of judges belonging to abolished courts and prosecution offices and for the appointment of judges and prosecutors to the courts newly set up**.** A number of judges and prosecutors were transferred by HSYK to different courthouses without their consent and without clear justification. The assignment of judges and prosecutors to the new posts was decided by the HSYK in few days[2], without opening a call for applications and without even consulting the judges and the prosecutors who were selected for the new tasks[3]. The absence of transparent rules and procedures for the management of judges and prosecutors mobility by the HSYK clearly conflicts with the relevant standards, because the HYSK discretionary power to move judges and prosecutors without their consent undermines their internal independence and is a potential source of undue interference in pending investigations and trials.

Moreover concerns must be expressed because of the absence of a transitional provision in the Omnibus Law, that would allow the abolished courts to complete pending cases. Such a provision is usual when measures are adopted for the reorganization of courts; the transitional provision would aim at avoiding interferences by the legislative power in pending trials, at not infringing the principle of the "natural judge", and at not disrupting the regular operation of courts. A transitional provision was adopted when the specially authorized courts were abolished to allow them to complete pending trials. Because of the lack of this provision in the Omnibus Law, new panels of judges will have to re-consider the evidence obtained by previous panels, by reading documents and minutes of hearings that may consist of thousands of pages. This risks seriously affecting the effectiveness of the courts that were already overburdened by very long trials[4].

Further negative consequences to the effectiveness of the criminal justice system are very likely to stem from the abolition of the special prosecution offices and of the liberty judges. Specialisation of members and extended geographic jurisdictions was an effective response to the prosecutions offices' need to tackle modern forms of organised crime and to deal in a reasonable period of time with complex investigations[5].

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[2] In their first set of comments on the report, Turkish Authorities claim that: "*The aim of the concerned process was to finalise the appointment as soon as possible. Moreover, it is clear that all judges and prosecutors who were transferred to different courthouses have the right to raise an objection for the re-examination of the decision of the First Chamber, and have the right to contest this decision at the Plenary".*

In the second set of comments on the report, Turkish Authorities claim that: *"The Law no 6526 entered into force upon its promulgation on the Official Gazette. Therefore, all judges and prosecutors are aware of this Law. As per the Article 1, Paragraph 2 of the Law, HSYK is required to appoint the judges and prosecutors within 10 days to the posts that are convenient for their vested rights".*

[3] In the first set of comments on the report, Turkish Authorities claim that: "*The first Chamber of the HYSK published an announcement on 11 March 2014 to call for applications from all the judges and prosecutors belonging to specially authorised heavy criminal courts that were abolished as per the Law No. 6256 and their requests were received accordingly. The decision dated 22 March 2014 was taken in line with these requests and the current needs".*

[4] In the second set of comments on the report, Turkish Authorities claim that: *"As regards the comment that the new panel of judges will have to examine the files again; the judges and prosecutors in our country might be appointed to larger cities where the workload is higher from smaller cities periodically according to the regions system. Sometimes, they might be transferred to another court within the provinces they are already assigned. In this case, the judges and prosecutors can examine the new files that they take over in a short period of time thanks to the nature of their duties and can get a good command of the file. Therefore, the lack of such provision in the Omnibus Law is not thought to influence the capacity of the new panels of judges*".

[5] In the second set of comments on the report, Turkish Authorities claim that: "*the chief prosecution offices have some prosecution offices specialized in specific areas in cities where the number of investigations is high. For example, there are some prosecution offices that are specialized in "Combating Smuggling and Organized Crimes", "Combating Constitutional Crimes" and "Economic Crimes". The prosecutors that investigate only specific types of offences are specialized in their fields just like the specially authorized prosecution offices are. This shows that the positive development brought by the specially authorized prosecution offices still persists*".

As regards liberty judges, they were overall considered a very positive development, because of their specialisation in dealing with the so called protective measures that are related to liberty and fundamental rights (property and privacy) of the defendants[6].

The Omnibus Law adopted on 20 February 2014, beyond the abolition of liberty judges, further impinges on the conditions for the issuance of "protective measures"; it requires 'strong suspicions based on *solid evidence*' to issue a pre-trial detention order, to seize assets or to decide interception of communications. It further requires the *unanimity* of a three-member panel of judges for intercepting communications and appointing undercover agents, and the unanimity a three-member panel of judges in first and in second instance, both for the decision and the objection (appeal), for seizing assets.
The government claims that the amendments are intended to mainly prevent violations of freedom to liberty and security of suspects. However they might create insurmountable problems in practice. This is about the investigation phase, when prosecutors try to collect evidence to charge the defendant. If solid evidence is already available, the prosecutor would issue the indictment and the case should be ready for trial. In particular interception of communications is used to look for evidence. If prosecutors have already collected solid evidence, then they have no need to intercept communications. Moreover the unanimity rule brings the potential to block every investigation (it would sufficient the opposition of one among three judges[7]) and it is indeed totally inconsistent with further CPC provisions.

The adoption of the Omnibus law does not contribute instead to the solution of the serious problems affecting the criminal justice system, that mainly derive from the judicial practice.
One of the main problem of criminal justice is personal liberty in particular if looked upon through the case law of the European Court of Human Rights.
The "third judicial reform package" tackled the problem of excessive use of pre trial detention**,** by adopting four different measures. It will not be possible to implement detention measures for the offences whose upper limits are not more than two years, instead of the previous limit amounting to only one year. The upper three years limit for judicial control was lifted and new forms of judicial control were introduced. It was made clear in the law the obligation of judges to duly and fully reason their opinion about pre-detention. Liberty Judges were created who are exclusively entrusted for handling with decisions and objection against decisions regarding "protection measures" such as: search, seizure, apprehension, detention, and detection of communication.

Statistics show that, following the implementation of the third judicial reform package, the pre-trial detention rate felt remarkably and that resort to judicial control significantly increased. However figures also show that Turkish judges still often resort to pre-trial detention and do not use is it as an *extrema ratio.* Furthermore judges seem to perpetuate the old habit of not giving concrete reasons for the adoption of detention measures, if not by resorting to stereotyped wordings.
Liberty judges, who had been trained to overcome those problems, were suppressed by the Omnibus Law.

As regards the duration of pre-trial detention, that is a consequence of long trials, by decision of 4 July 2013 the Constitutional Court found unconstitutional article 10 of the anti-terror law which

[6] In the second set of comments, Turkish Authorities claim that: "*the Liberty Judges were not abolished, civil judges of peace, replacing the Liberty Judges who exercised their powers in a limited jurisdiction, were created as per the Law no 6545 dated 18.6.2014to deal with cases involving all crimes in every province and every district (…) with the power to decide especially on protective measures"*.
[7] The decision is adopted by heavy criminal court composed by a panel of three judges. In case of seizure the decisions can be contested before an appellate heavy criminal court composed by a panel of three judges. In this case, one among six judges can prevent the prosecutor from seizing assets.

allowed double duration of pre-trial detention for serious crimes, because it collided with the principle of proportionality. Art. 10 of the anti-terror Law was subsequently abrogated by the Omnibus Law. However, even the lower statutory maximum time limit of five years of pre-trial detention remain excessive if compared with the practice of EU Member States.

On 11 April 2013, following the so called "fourth judicial reform package", the Law no 6459 amended some provision of the Criminal procedural Code and the Anti-terror law with the aim to bring Turkish legislation in line with case law of the European Court of Human Rights about art. 5 (the *right of liberty*) and 6 (the *fair trail*) of the European Convention. These are all steps in the right direction of guaranteeing procedural rights. However Turkey still lacks a genuinely adversarial remedy that allows the accused to challenge the lawfulness of his/her pre-trial detention and a remedy that allows parties to access an authority which can exercise its supervisory jurisdiction over the trial court to expedite the proceedings.

As to the relation of prosecutors with the police, a proper judicial police, functionally dependent on the prosecution office, is still far to be established.
Prosecutors have to be encouraged and trained to keep a stricter control over the relevant evidence obtained by the police in the course of the investigations, to avoid that long time is needed to prepare the indictments while the suspects are remanded in custody, and avoid that indictments contain information which is not relevant to the essence of the case.

As regards the anti-terror Law, the expert considers welcome development for the protection of the freedom of expression the novelties contained in the third package of judicial reforms about suspension of investigations, trials and execution of decisions for criminal offences committed via press and annulment of judicial decisions confiscating, prohibiting or preventing the sale and distribution of printed materials. Further welcome developments were brought by the fourth package with reference to the amendments to the criminal provisions about propaganda and the publication of declarations emanating from a terrorist organization. However concerns persist about the legal framework on organised crime and terrorism, which should clarified and defined as precisely as possible and be implemented in accordance with the Council of Europe Recommendation No 1426 (1999) and in compliance with the principle of proportionality.

METHODOLOGY

The expert drafted the present report, in the capacity of an independent expert, relying on information gathered during four subsequent visits to Turkey performed in March 2012, November 2012, May 2013 and May 2014 and on documents provided by the Turkish authorities and the European Commission before and during the mission.

The first visit to Istanbul and Ankara took place from 12 to 16 March 2012 and was aimed at assessing the specially authorized heavy criminal courts (henceforth: SAC), regulated, at that time, by article 250, 251 and 252 of the Turkish Criminal Procedural Code (henceforth: CPC).

On 2 July 2012 the Turkish Parliament adopted the third package of justice reforms[8], by which articles 250, 251 and 252 of the CPC and the courts regulated thereof were abrogated.

[8] It introduces amendments to 107 articles of a number of pieces of legislation including the Criminal Code (CC), the Criminal Procedures Code (CPC), the Anti-Terror Law (ATL), the Enforcement and Bankruptcy Law, the Law on the Council of State, the Administrative Procedure Law, the Law on the Establishment of Regional Administrative Courts, the Law on Competition, the Law on the LPG Market, the Cadastre Law and the Law on the Court of Cassation. This

Instead, special heavy criminal courts (henceforth: ATLHCC) were set up under Article 10 of the anti-terror Law (henceforth: ATL), as amended by Law no 6352.

The second visit to Ankara and Dyiarbakir took place from 6 to 8 November 2012 . It was a follow up to the previous one and was aimed at assessing the legislative changes introduced by the third judicial reform package entered into force on 5 July 2012.

On 11 April 2013, following the fourth judicial reform package[9], the Law no 6459 on *Amendments in certain Laws on Human Rights and Freedom of Expression* entered into force. The law amended some provision of the criminal procedural code and the anti-terror law with the aim to comply with judgments of the European Court of Human Rights against Turkey, regarding, among others, the *right of liberty* (art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms) and the *fair trail* principle (art. 6 of the same Convention).

The third visit to Ankara took place from 27 to 31 May 2013. It was a follow up to the previous two missions and was aimed at assessing the functioning of ATLHCC after 6 months since their establishment and at evaluating the legislative changes introduced by the fourth judicial reform package.

The fourth visit to Istanbul and Ankara took place from 19 to 23 May 2014. This further visit followed the adoption by the Parliament in February 2014 of an Omnibus Law (Law n° 6526 amending the anti-terror law, the criminal procedure code and various laws –henceforth "Omnibus Law"-) that abolished the special courts (both the SAC still functioning and the ATLHCC) and introduced significant amendments to the criminal procedural code.

The first visit to Turkey consisted of four full days meetings arranged by the Turkish Authorities with the following stakeholders: the deputy President, the President of the second chamber, two members, the secretary general and a deputy secretary general of the High Council for Judges and Prosecutors (henceforth: HSYK); the deputy undersecretary and representatives of the Ministry of Justice (henceforth: MoJ); representatives of the 9th criminal chamber of the Court of Cassation; representatives of Prosecution Office of the Court of Cassation; Istanbul Chief Public Prosecutor and some prosecutors attached to the Istanbul specially authorised heavy criminal courts; Ankara Chief Public Prosecutor, deputy prosecutor and some prosecutors attached to the Ankara specially authorised heavy criminal courts; presidents and judges of the Istanbul 10th, 11th and 17th authorised heavy criminal courts; presidents of the Ankara 10th and 11th authorised heavy criminal courts; Mr. Riza Türmen, member of the Turkish Parliament and former Judge of the Court of Human Rights in Strasbourg; professor Bahri Öztürk**,** professor at the Istanbul Kültür Üniversitesi; the President and members of the Board of the Union of Turkey Bar Associations; the president and members of the Board of Ankara Bar Association; representatives of the following NGOs: Democrat Judiciary, YARSAV, Human Rights Watch, Human Rights Agenda Association, Contemporary Lawyers Association; representatives from the civil society, namely: Mr. Ahmet Insel; Mr. Akin Atalay, Mrs. Emma Sinclair-Webb and Mr. Osman Kavala.

The second visit to Turkey consisted of two and a half days meetings arranged by the Turkish Authorities with the following stakeholders: the President and the members of the first chamber and two deputies secretary general of HSYK; the Undersecretary and representatives of the MoJ; judges and prosecutors of abolished Ankara authorised heavy criminal courts; judges and prosecutors of newly set up Ankara ATLHCC ; judges of abolished Dyiarbakir authorised heavy

package, together with the two adopted in 2011, aims at speeding up judicial processes and putting in place a more effective and efficient judiciary.

[9] The package was submitted to the Turkish National Assembly on 7 March 2013.

criminal courts; liberty judges and trial judges of newly set up Dyiarbakir ATLHCC; prosecutors attached to Dyiarbakir ATLHCC; the deputy President and representatives of the Board of the Union of Turkey Bar Associations; the president and members of the Board of Dyiarbakir Bar Association; representatives of the following NGOs: Democrat Judiciary, YARSAV, Human Rights Agenda Association.

The third visit consisted of one day of meetings arranged with the following Authorities: the Undersecretary and representatives of the MoJ; a judge from the ninth Chamber of the Court of Cassation; liberty judges and trial judges of Ankara serious crime courts; prosecutors attached to Ankara ATLHCC.

The fourth visits consisted of three and a half days of meetings arranged by the Turkish Authorities with the following stakeholders: the President and the members of Parliamentary Justice Committee; the President and members of the first Chamber of HSYK; directors from the MoJ; members of the Court of Cassation; the Istanbul chief prosecutor; judges and prosecutors of abolished Istanbul and Ankara special courts; Istanbul and Ankara prosecutors who deal with terror related crimes and organized crimes; judges from Istanbul and Ankara heavy criminal courts; the secretary general and representatives of the Board of the Union of Turkey Bar Associations; lawyers from the Istanbul Bar; representatives of the following NGOs: Human Rights Watch; Democrat Judiciary, Union of Judges, Human Rights Agenda.

During the meetings the expert was accompanied by Mr. Christos Makridis, the Deputy Head of the Turkey Unit within the Directorate general Enlargement of the European Commission and by Ms. Didem Bulutlar Ulusoy and Ms Nur Önsoy from the EU Delegation in Ankara. Some meetings were also attended by Michael Miller, head of the Political Affairs Section of the EU Delegation. Judges Hasan Söylemezoglu , Serkan Taş, Ulvi Altinişik, Ziya Bekir Bugucam, Ahmet Güven and Mehmet Yavuz guided the expert through the official part of the programme as representatives of the Turkish MoJ.

The expert conducted his analysis of the Turkish justice system by referring to the data included in reports of the European Commission or elaborated in the framework of projects, missions and studies supported by the European Commission and the Council of Europe, in particular: 2013, 2012 and 2011 *EC progress reports on Turkey*, the Third Advisory Report of 2005 by Kjell Björnberg and Ross Cranston on "The Functioning of the Judicial System in the Republic of Turkey"; the reports drafted by the expert Thomas Griegerich following the 2008, 2010, 2011, 2013 and 2014 peer review missions to Turkey about independence of Justice; Commissioner of Human rights of the Council of Europe, Thomas Hammarberg's, report "*Administration of justice and protection of human rights in Turkey"* of 10 January 2012.

The expert further conducted his analysis by referring to the reports issued in 2013, by the short term experts[10] and the Long-Term Consultant[11] of the EU/Coe Joint programme[12] "*Improving the efficiency of the Turkish criminal justice system"*.

[10] Assist. Prof. Dr. Neslihan GÖKTÜRK at Gazi University, Faculty of Law in Ankara (TR) ; Prof. Dr. Hakan HAKERI, Professor of criminal law and medical law, Dean of Law School of İstanbul Medeniyet University (TR) ; Holger HEMBACH, Former Attorney at law, EU High-Level Policy Advisor to the Prosecutor General in Moldova (DE) ; Att. Naim KARAKAYA, İstanbul Bar Association (TR) ; Mikael LYNGBO, Former Chief of Police, Prosecution and Detention Centre, Project Manager in The Danish Helsinki Committee for Human Rights (DK) ; Dr. Pejman POURZAND, Lecturer and researcher at Collège de France, Chair of Comparative Legal Studies and İnternationalisation of Law (FR/IR) ; Arne STEVNS, Former Senior Chief Prosecutor (DK) ; Nico TUIJN, Deputy Chief Justice, Judge at the Court of Appeal of Den Bosch (NL) ; Françoise TULKENS, Former Vice-President of the European Court of Human Rights (BE) ; Att. Aynur TUNCEL YAZGAN, İstanbul Bar Association (TR), Associate

The expert consulted the following sources of Turkish Law: the Constitution of the Republic of Turkey; law no 6087 of 11 December 2010 on the *High Council of Judges and Prosecutors*; law no 2797 of 04 February 1983 on the *Court of Cassation;* law no 5235 on *The establishment, duties and powers of the ordinary courts of first instance and regional courts of appeal;* law no 2802 *on judges and prosecutors;* the criminal code (henceforth: TCC) and the criminal procedural code (henceforth: CPC); the anti-terror Law no. 3713 of 12 April 1991, as amended in July 2012 by law no 6352 ; (henceforth: ATL); by-law no 25832 *on apprehension, detention and statement taking*; and by-law no. 25832 on judicial police, of 01 June 2005.

This assessment is guided by the reference to the European standards derived mainly from the following sources: the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth: ECHR) and the case-law of the European Court for Human Rights (henceforth: ECtHR); the Charter of Fundamental Rights of European Union; Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies; Recommendation Rec(2000)19, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 on "The role of public prosecution in the criminal justice system"; the "Budapest Guidelines" adopted in Budapest on 31 May 2005 by the Conference of Prosecutors General of Europe; Recommendation Rec(2006)13 of the Committee of Ministers on the use of remand in custody; Recommendation 1426 (1999) of the Parliamentary Assembly of the Council of Europe, 'European democracies facing up to terrorism', of 23 September 1999; the Guidelines of the Committee of Ministers of the Council of Europe on human rights and, the fight against terrorism of 11 July 2002; Resolution 54/164, Human Rights and terrorism, adopted by the General Assembly of United Nations on 17 December 1999.

The assessment takes note of the progress and efforts made by the Turkish Authorities to improve the fairness of the Turkish criminal justice system and of the Judicial Reform Strategy and related Action Plan drafted by the Turkish Ministry of Justice.

The report takes note of the thorough comments provided by the Turkish Authorities on the draft report after each mission.
The report was finalised in August 2014 after the final comments of the Turkish Authorities (henceforth: fist set of comments) were received, taken into account and partially inserted –in their original text- in the footnotes of the report.

In November 2014 the expert received further comments and new statistical figures (henceforth: second set of comments). The Turkish Authorities asked the expert to revise the report in accordance with the comments and the figures. Following a confrontation with the Turkish Authorities, it was agreed a partial revision of the report. At the end of December 2014 the MoJ send to the expert updated statistical information on preventive detention, pieces of legislation and informative notes about pre-trial detention.
In the last version of the report the expert has included the updated statistical figures about the pre-trial detention rate and has inserted the text of the Turkish Authorities comments in boxes that are included in the main body of the report, instead of in footnotes.

Prof. Ilhan ÜZÜLMEZ at Gazi University, Faculty of Law in Ankara (TR), Prof. Dr. Feridun YENISEY at Bahçeşehir University in İstanbul (TR).

[11] Judge Marcel LEMONDE.

[12] The short term consultants conducted a series of fact-finding visits to courthouses in Ankara (from 8 to 11 October and 10-17 December 2012), Izmir (05-08 November 2012), Malatya (26-29 November 2012) and Istanbul (8-13 2013).

After revising the report, the expert has maintained the original recommendations that result still valid.
Turkish Authorities'comments about the expert's recommendations have been placed in footnotes.

The report does not contain any evaluation on the merit of the reforms introduced by Law No 6545, about "criminal judges of peace", because the law was adopted on 18 June 2014, after the performance of the last mission and after the completion of the draft report. This evaluation would require accurate researches and the consideration of the judicial practice. It may be the subject of a future peer review.

This report has been made possible thanks to the constant cooperation of the Turkish Authorities and the expertise and support provided by the representatives from the European Commission DGs Enlargement and Justice, as well as the EC Delegation in Turkey.

1. THE SPECIAL ANTI-TERROR COURTS AND THEIR ABOLISHMENT

1.1. THE FORMER STATE SECURITY COURTS

There is a long standing tradition in Turkey of special courts established to try cases involving crimes against the security of the state, organized crime and terrorism. At first, in 1983, State Security Courts (henceforth: SCC) were established by the special law No 2845 and according to article 143 of the Constitution. They were to be composed of a president, two other full members and two substitute members: the president of the SCC, one full member and one substitute member were to be civilian judges, while the other full member and substitute member were to be military judges[13].

The ECtHR consistently held that the presence of military judges in the adjudicating panel made the SCCs' independence from the executive questionable with respect to Article 6§1 of the European Convention[14].

In 1999, article 143 of the Turkish Constitution was amended and provided that members of SCC should be civilian judges only[15]. Law no. 2845 on SCC was consequently amended by Law no. 4390 of 22 June 1999[16].

By constitutional amendment of May 2004 SCC were finally abolished. In 2004 Turkey adopted a new criminal code and a new criminal procedural code. The latter, which entered into force on 1 June 2005, established the specially authorised heavy criminal courts.

1.2. THE SPECIALLY AUTHORISED HEAVY CRIMINAL COURTS

The specially authorised heavy criminal courts (henceforth also: SAC) were established pursuant to articles 250, 251, and 252 of the Turkish Criminal Procedural Code to try criminal cases involving, among others, crimes against the security of State, organised crime and terrorist crimes[17]. According to articles art. 250§1 and 215§1of the CPC, SAC were to established by HSYK upon

[13] As armed forces officers, such military judges remained dependent on the military for salary and pension, subject to military discipline.

[14] The relevant part of which provides as follows: "*In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an independent and impartial tribunal ...*" The ECtHR held that the appearance of civilians before a court composed, even if only in part, of members of the armed forces seriously affected the confidence the courts must inspire in a democratic society (see ECtHR *Incal v. Turkey*, June 1998 and *Çıraklar v. Turkey*, 28 October 1998).

[15] Art 143 provided as follows: *National security courts shall be composed of a president, two other full members, a substitute member, a public prosecutor and a sufficient number of assistant prosecutors. The president, two full members, a substitute member and the public prosecutor shall be appointed from among judges and public prosecutors of the first rank and assistant prosecutors from among public prosecutors of other ranks.*

[16] Under provisional section 1 of the Law, the terms of office of the military judges and military prosecutors in service in State security courts were to end on the date of publication of Law (22 June 1999). Under provisional section 3 of the same Law, proceedings pending in State security courts on the date of publication of the law were to continue from the stage they had reached by that date.

[17] According to art. 250 of the CPC the competence of SAC covered the following criminal offences: a) Producing and trading with narcotic or stimulating substances committed within the activities of a criminal organization; b) Crimes committed by using coercion and threat within an organization formed in order to obtain unjust economic gain; c) Crimes as defined by the second book, section 4, chapters 4, 5, 6 and 7 (except for Articles 305, 318, 319, 323, 324, 325 and 332).

proposal of the MoJ and judges and prosecutors dealing with the offences falling within the scope of courts' jurisdiction were to be appointed by HSYK[18].
The circuit of adjudication of the SAC encompassed more than one province[19]. 25 SAC were established[20] with in total 80 judges assigned to them, each court being presided over by a court's president and adjudicating in a panel of three judges. Cases were assigned to courts randomly by the courts' IT system called UYAP. The number of judges who passed from the previous SCC to the SAC was 44. As regards prosecutors, 82 specially authorized prosecutors were distributed among 8 prosecution offices attached to the respective courts. 30 specialised prosecutors were located in Istanbul and 10 in Ankara[21]. Cases were assigned to prosecutors by the deputy chief prosecutors, after consulting the Chief prosecutor[22].

Special prosecutors and courts were provided by the law with special powers to restrict severely the rights of the defense by derogating from normal procedural guarantees. These restrictions included the following: prosecutor could limit to only one the number of persons who could be informed of custody[23]; the prosecutor could restrict to only one the number of defense lawyers during police custody[24]; a judge may restrict, upon the prosecutor's request, the right of the suspect to confer with their defense counsel (*incommunicado);*while a suspect's statement was taken by police, only one lawyer could be present[25]; the presidents of the specially authorised courts had the power to expel from the hearing room the defendants or their defense counsel, in case they were breaching the order of the hearing in court.[26] Further restrictions to the defense rights, mostly during the police custody period, were provided for by the Anti-terror law for cases[27] falling under its scope.
Articles 251 and 252 of CPC provided for longer custody and pre-trial detention[28] periods for cases falling under the jurisdiction of SAC.

1.3. THE HEAVY CRIMINAL COURTS ASSIGNED UNDER ARTICLE 10 OF ANTI-TERROR LAWTL

An a last-minute addition to the third judicial reform package, that was adopted by the Turkish Parliament on 2 July 2012 and entered into force on 5 July 2012, abrogated articles 250-252 of the CPC, abolished the specially authorised courts ad set up, under the amended Article 10 of the anti-

[18] Pursuant to article 251 of the CPC, *investigation of crimes, within the scope of Article 250, shall be conducted by public prosecutors who have been entrusted with the task of investigation and prosecution of such crimes by HSYK in propria persona. Even if these crimes had been committed during the duty or due to the duty, they shall be investigated by the public prosecutors directly. The public prosecutors shall not be appointed by the Office of the Chief Public Prosecutor to courts other than the SAC that try crimes that fall in the scope of Article 250, nor shall they be entrusted with other tasks*.
[19] Art. 250§1 of the CPC.
[20] 3 courts are in Adana, 2 in Ankara, 4 in Diyarbakir, 2 in Erzurum, 9 in Istanbul, 2 in Izmir, 1 in Malatya, and 2 in Van.
[21] 12 in Adana, 10 in Diyarbakir, 4 in Erzurum, 8 in Izmir, 4 in Malatya, and 4 in Van.
[22] In order to increase the efficiency of specialised courts and prosecution offices, the actual HSYK increased the number of specially authorised heavy criminal courts from the previous number of 20 to 25, by establishing 3 additional courts in Istanbul, 1 in Erzurum and 1 in Diyarbakir. Consequently specialized judges passed form 62 to 80 and prosecutors form 68 to 82.
[23] If the prosecutor considered that there was risk of jeopardising the aim of the investigation, only one relative could be informed that the suspect was being taken into custody (former article 10.a of ATL).
[24] Former article 10.b of ATL.
[25] Former article 10.b of ATL.
[26] Art. 252§1 lett. G). The expert was informed by the Board of the Turkish Bar Association and by the Board of the Ankara Bar association that the Istanbul Court of Assizes did not allow lawyer Hasan Basri Ozbey and his client to be present at the trial for 16 consecutive hearings.
[27] Listed in article 3 and 4 of the Anti Terror Law.
[28] For double pre-trial detention periods, please see chapter 5 about duration of pre-trial detention.

terror Law special heavy criminal courts (henceforth: ATLHCC) to deal with cases involving crimes against the security of the State, organized crime and terrorism.
The ATLHCC heard the same criminal cases as the former SAC[29].
A significant novelty introduced by the third judicial reform package was the creation of liberty judges, who had been entrusted with the task to decide[30] on "protective measures" during the investigation phase such as arrest and objection to arrest, search, seizure and interception of communications. Thus, judges who decided on preventive measures regarding the accused during investigation did not participate in the trial on the merits of the case anymore

The third Judicial reform package decreased special powers of ATLHCC. Under the new legislation it was no longer possible to expel the accused or the defense from any future or all hearings on the grounds of behavior deemed to disturb court order and discipline; limit to one the number of defense lawyers while the suspect's statement is being taken or during custody. Furthermore it was no longer possible for the security forces to immediate summoning of suspects, witnesses, victims and experts, without the need for previous invitation. A number of provisions, however, remained the same in the text of the 3rd judicial reform package. The detention period for the offences falling into the remit of heavy criminal courts had been determined as forty eight hours in parallel with the former practice. However, the provision which provided that the detention period may be extended for further seven days in the regions where state of emergency is declared was excluded in the new regulation. Upon the instruction of the prosecutor, only one relative was to be informed in cases where there might be a threat to the investigation. The detained suspect's right to meet his/her lawyer might still be restricted for twenty-four hours upon request of the prosecutor and decision of the judge.

The number and location of the new courts, their territorial jurisdiction and judges and prosecutors assigned to the ATLHCC were decided by the HSYK in only 6 days since the entering into force of the third judicial reform package.
The Proposal of the Ministry of Justice dated 09/07/2012 concerning the determination of number and location of ATLHCC was discussed and voted on the same day by the general Assembly of the HSYK, which decided to establish 13 high criminal courts in 11 places[31].
The First Chamber of the HSYK, in charge with the appointment and transfer of judges and prosecutors, by decision no 1888 dated 10.07.2012, appointed unanimously:

- 65 judges, including 13 presidents of courts, 26 members of courts and 26 liberty judges;
- 80 prosecutors, including 11 deputy prosecutors and 69 prosecutors.

Only a small number of the judges and prosecutors of the former SAC had been appointed to the new ATLHCC[32].

[29] According to Article 10(4) of the Anti-terror Law the following crimes were included in the functional scope of Regional Serious Crime Courts: 1. The offences within the scope of the Anti-Terror Law; 2. The offence of manufacturing and trafficking narcotic drug in the framework of organisational activity or the offence of laundering of assets value acquired as a result of offence 3. The offences committed by coercion and threat in the framework the activity of an organisation established with a view to gaining unfair economic advantage, 4. The offences defined in Fourth, Fifth, Sixth, Seventh Sections in the Fourth Chapter of Second Volume (except for Articles 305, 318, 319, 323, 324, 325 and 332).
[30] For the cases falling under the competence of RSCC.
[31] Ankara, Istanbul, Izmir, Adana, Erzurum, Diyarbakir, Bursa, Samsun, Antalya, Van, Malatya. According to the information provided by the HSYK, the judicial circuits of regional serious crime courts were determined by the Plenary session of the HSYK by way of taking into account the geographic proximity, transportation, facilities and work status in a way that each court encompasses more than one city.
[32] Out of 145 judges and prosecutors appointed to the new regional serious crime courts, 41 were selected among judges and prosecutors already working at the suppressed SAC. In more details: 3 out of 11 chief prosecutors; 29 out of 69 prosecutors; 1 out of 13 presidents of courts and 8 out of 52 judges came from previous specialized courts and prosecution offices.

The appointment of judges and prosecutors did not follow a public call for applications; judges and prosecutors were not consulted prior their appointment; the reasons for their appointment were neither made public nor communicated to them. The HSYK decision about the appointment was not reasoned[33].

The Turkish Authorities claim that[34]: ""*the 1st Chamber respects the "*Regulation on the Appointment and Transfer of the Judges and Public Prosecutors*" in its decisions on appointment. Furthermore, principle decisions to apply for the prospective decrees are annually made available to judges and prosecutors in the beginning of each year. Decrees are drafted in full compliance with the foreknown regulations and principle decisions*"".

In the **transitional period**, on-going cases, i.e. cases for which indictments have already been accepted such as *Ergenekon* and *KcK*, continued to be tried until their conclusion by the specially authorised courts.
Cases in the investigation phase were transferred to special prosecutors attached to the new RCSS.

1.4 THE ABOLISHMENT OF THE SPECIAL COURTS

In February 2014 an Omnibus Law (Law n° 6526 amending the anti-terror law, the criminal procedure code and various laws[35]) abolished the art. 250 courts still functioning, the special courts set up under the umbrella of art. 10 of the anti-terror Law, the liberty judges and the special prosecutors, without further prorogations of their operations.

Three months before, in December 2013, special prosecutors initiated proceedings against cabinet members and/or their close relative for suspicion of corruption. Under Turkish criminal procedural law prosecutors are obliged to investigate in a neutral manner, collecting evidence for and against potential suspects.
The first reaction by the Government to those proceedings was an amendment of 26 December 2013 to the by-law on the Judicial Police, which required police investigators assisting prosecutors in the investigations to report those investigations to their police superiors.
The HSYK thereupon issued a public statement in which it qualified such a reporting requirement ad interference in the independence of prosecution.

The Turkish Authorities claim that: "*The amendments made to the by-law on the Judicial Police do not prevent the prosecutors from performing the investigations independently. In fact, the administrative authorities are not entitled to give orders to the judicial police. Judicial investigations are carried out completely under the initiative of the prosecutor. Those who will fulfill judicial tasks under the police organization are identified in advance*".[36]

On 26 of February 2014 the Parliament adopted Law No 6524 that dramatically increased the control of the Government over the HSYK. Many provisions of this law were subsequently struck down by the Constitutional Court (decision of 10 April 2014).

[33] The HSYK reported the expert that judges and prosecutors were appointed according to the merit principle. The Council selected judges and prosecutors having a master degree (41), a doctorate (3) and good knowledge of foreign languages (15); other judges and prosecutors (5) were selected because of the high rate (70 points and above) in the professional evaluation. 24 judges were chosen because their participation in in-service training programmes about: "Financial and Economic Crimes in context of Financing terrorism" (6), "collection and evaluation of evidence in the Investigation Phase" (4), "Fight against Counterfeiting" (1).
[34] Second set of comments.
[35] The law was adopted on 20 February 2014 and entered into force on 6 March 2014.
[36] Second set of comments.

On 6 of March 2014, the Law n° 6526, that abolished special courts, special prosecutors and liberty judges entered into force.

Following the abolition of special courts and prosecution offices, special judges and prosecutors were relocated by HSYK to other tasks in only 15 days. 92 % of judges and prosecutors stayed in the same courthouse; 8% were transferred by HSYK to different courthouses without their consent. The expert asked to be provided by the HSYK with the decisions about these transfers, in order to understand the reasoning of those decisions. However, at the time of the report, the expert had not yet received the text of the decisions[37]. At the same time, new heavy criminal courts were set up to deal with the workload of the abolished special courts and new judges were assigned to those courts by HSYK without opening a call for the applications to the new posts and even without consulting the judges who were selected for the new task.
In the prosecution offices, the pending files, previously assigned to special prosecutors, were redistributed by the Chief Prosecutor and his deputies.

The Chief prosecutors of the most important prosecution offices (Ankara, Istanbul, Izmir) were transferred by HSYK to different locations before and after the abolishment of special courts.

All these changes occurred while investigations and trials on high profile cases were going on.

1.5. EFFECTIVENESS OF THE SPECIAL COURTS

According to information provided by the Ministry of Justice in the course of the second visit to Turkey, the workload of specialised courts and specialised prosecution offices increased dramatically in 2009 and continued to be heavy in the following years. Since 2004 to 2008, the number of cases dealt with by SAC rose from 4,594 (2004) to 6,881 (2008). In 2009 the number of cases grew more than six folds, passing to 46,237. In 2010 it grew further to 68,112. In 2011 it decreased to 50,995, remaining, however, ten folds higher than eight years before. Similarly, whilst the number of indictments rose from 3,983 in 2005 to 7,461 in 2007, it increased dramatically to 62,283 in 2009, remaining almost stable in the following two years (62,911 in 2010 and 58,214 in 2011). In the same vein, the number of accused passed from 12,547 in 2004 to 23,316 in 2008; it increased dramatically to 66,183 in 2009, reaching the number of 86,800 in 2010 and 75,687 in 2011.

As a consequence, the workload[38] of specially authorized heavy criminal courts and prosecution offices grew significantly[39] and, together with the workload, the duration of trials rose, amounting in some cases to several years.

[37] In their first set of comments on the report, Turkish Authorities claim that: *There appears to be a misunderstanding. Although the expert stated he did not receive the text of the decisions yet, the President of the First Chamber provided the expert with thorough information about the concerned transfers during the peer-review meeting, and then the relevant documents were communicated to him".*

[38] The heavy workload is also significantly determined by the high number of cases quashed and sent back by the Court of Cassation (according to information gathered by the expert, the annulment rate amounts to almost 50% of the cases appealed). Although the main reason for quashing judgments is connected to amendments to laws, many cases are quashed because of shortcomings in the process of collecting evidence.
It has, however, to be remarked that in the past few years it emerged a tendency among first instance courts to "resist" Court of Cassation decisions to quash the appealed judgments: this resistance leads thus to a decision by the plenary assembly of the Court of Cassation.

[39] As a way of example, the Ankara specialised prosecution office, in terms of new files opened during the year, dealt with 435 files in 2005 and 414 files in 2006. In 2010 the number of new files was more than doubled passing to 951 and

CONSIDERATIONS

Special courts have been at the center of controversy since their establishment. Criticism has focused on the wide interpretation of their special powers, imposition of a strict pre-trial detention regime, limitations on the rights of the defense, excessively long indictments, the role of the police in launching investigations and handling arrest decisions, the slow pace of judicial proceedings linked to the very large number of individuals tried by the courts. All the high profile cases of recent years – such as *Sledgehammer*[40]*, Ergenekon*[41]*, OdaTV, KCK*.- were -and continued to be[42]- tried by the special courts.

Strong criticism was expressed by NGOs, Bar Associations and associations of judges and prosecutors regarding the previous SAC special powers to restrict severely the rights of the defense by derogating from normal procedural guarantees. The third judicial reform package already decreased special powers of special courts and suppressed most of the restrictions on the rights to defense. Under the new legislation it would no longer be possible to expel the accused or the defense from any future or all hearings on the grounds of behavior deemed to disturb court order and discipline, or to limit to one the number of defense lawyers during custody. Furthermore, it would no longer be possible for the security forces to immediate summoning of suspects, witnesses, victims and experts, with no prior invitation. A number of provisions had, however, remained the same. The detention in custody period for the offences falling into the remit of heavy criminal courts had been determined as forty eight hours in parallel with the former practice. Upon the instruction of the prosecutor, only one relative was to be informed in cases where there might be a threat to the investigation. The detained suspect's right to meet his/her lawyer might still be restricted for twenty-four hours upon request of the prosecutor and decision of the judge.

Although highly criticized, specially authorized courts presented positive features also. Different to ordinary courts, they fully ensured the equality of defendants in front of the law; because the accused were tried *whatever their capacity and status as civil servant* (article 250§3 of CPC); similarly, prosecutors were empowered to investigate criminal offences *directly* (..) *even if these crimes had been committed during the duty or due to the duty* (art. 251§2 of CPC).

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in 2011 it became almost four times bigger, amounting to 1,406 new files. A similar trend was registered in the first two and a half months of 2012, with the opening of 594 new files.
The Ankara SAC dealt with 28 cases and 72 accused persons in 2005. The cases became 177 and the number of accused persons 644 in 2010, passing to 183 and 1,012, respectively, in 2011. In the first two and half months of 2012, 44 new cases were registered and 538 persons accused (that is only 75 days, the total number of accused persons is seven times bigger than those tried in the whole 2005). In November 2009 a second SAC was established in Ankara (it was the 12th Ankara court).

[40] In *Sledgehammer* case : a fist instance court on 21 September 2012 sentenced a total of 323 (out of 365) suspects, being retired and active duty military personnel including three former army commanders -250 of whom were under arrest- , to 13-20 years on charges of attempting to remove or prevent the functioning of the government trough force and violence. The court handed down mass verdicts (information extracted from the 2012 Progress Report about Turkey).

[41] *Ergenekon* case refers to a landmark trial of the 1990 and the following 1997 postmodern coup perpetrators. The armed forces former chief of General Staff was arrested in January 2012 on charges of attempting to overthrow the government and membership of a terrorist organization The trial began in April 2012. At the time of the third expert visit the number of defendants was 279 of whom 65 were under arrest. On Monday 5 august 2013 an Istanbul court sentenced the former chief of General Staff to aggravated life imprisonment without parole and handed down harsh sentences to nearly 250 defendants including many military force commanders accused of plotting to topple the Government. 21 Defendants were acquitted. Four retired generals, one retired colonel, one journalist, one lawyer and one workers' party leader were sentenced to aggravated life imprisonment.

[42] According to the transitional provisions of the third package of judicial reforms SAC continued to try pending cases.

The amended art. 10 of the ATL partially reintroduced the "immunity" of civil servants because prior approval of the Authorities for investigating and trying government officials was actually needed, also for crimes committed in the framework of the organisation to gain illegal economic advantage, launder money or produce or traffic drugs[43]. .

The recent abolition of special courts, and in particular the suppression of their special powers, is considered a positive development by the society as a whole and by all political forces.
The representative of Ngo's and the members of the Parliamentary Justice Commission, representing different political parties, unanimously spoke in favor of the suppression of special courts.

However the whole process that brought, in only few years from the establishment of specially authorized courts to their abolishment and from the establishment of the special serious crime courts to the overall suppression of special courts, special prosecutor and liberty judges, raises serious concerns both for the independence and the effectiveness of Turkish criminal justice.

First of all the adoption by the same political majority of consecutive and contradictory (special courts set up twice and then abolished) structural changes in the courts and prosecution offices organisation does not allow the stabilization of the justice system and brings the great risk that the normal course of pending investigations and trials is undermined.

Then, concerns must be expressed about the transparency of legislative process**.** Both in the case of the "third package" which abolished the SAC and set up new special courts under art. 10 of the anti-terror Law, and in the case of the February 2014 Omnibus law that cancelled the special courts established only a year and a half before, NGOs, associations of judges and lawyers and stakeholders – the High Council of Judges and Prosecutors- alleged that they were neither consulted nor informed.
The establishment of the Art. 10 anti-terror Law courts seemed to be a last minute addition to the third package.
The lack of public consultation and public debate about structural changes of the Justice system not only seriously impacts on the transparency of the legislative process but also affects the accuracy of legislative changes that, sometimes, result in inconsistent, if not contradictory, provisions (such as the unanimity rule for the issuance of "protective measures" –please see chapter 3. below- or the case of the direct civil liability for compensation of damages that the Omnibus Law suppressed for public officials who do not enforce judges' decision, while introducing instead direct liability for judges and prosecutors).

The Turkish Authorities observe that "*The government programme, development plan, decisions of higher judicial bodies, action plans of the Ministry of Justice, Accession Partnership Documents, National Programme for the Adoption of the EU Acquis, decisions of ECHR, opinions of the High Council of Judges and Public Prosecutors, opinions of the universities, citizen petitions as well as the opinions of all relevant non-governmental organizations are taken into consideration while making a law*"[44].

[43] Direct investigation without permission was and is currently foreseen for the crimes against the security of the State, constitutional order, national defense or state secrets (Articles 302, 309, 311, 312, 313, 314, 315 and 316 of TCC), for the crimes committed in the course of the performance of judicial duties or tasks pertaining to the Article 161 of the criminal procedural code, and for the crimes of malversation, bribe, embezzlement, smuggling on duty or due to duty, rigging official tenders and purchases and sales, disclosure of State secrets or causing disclosure of State secrets as per art. 17 of the Law No 3628.
[44] Second set of comments.

For what regards the "internal" independence of judges and prosecutors, serious concerns must be further expressed about the transparency of the procedure followed by the HSYK for the re-location of judges belonging to abolished courts and prosecution offices and for the appointment of judges and prosecutors to the courts newly set up**.**

Following the adoption of the 3rd judicial reform package, the number and location of the new courts, their territorial jurisdiction and the assignment of judges and prosecutors to the new posts were decided by the HSYK in only six days since the entry into force of the law, without opening a call for applications to the new posts and without consulting the judges and the prosecutors who were selected for the new tasks.

The Turkish Authorities claim that "*even though the concerned decision was taken in 6 days since the entering into force of the law as also mentioned in the report, as a matter of fact the General Secretariat of HSYK made the necessary preparations within the knowledge of HSYK's Plenary during the time spent from the adoption of the Law by the TGNA to its promulgation in the Official Gazette. On the other hand, these appointments helped avoiding significant risks that might have occurred with respect to the individual rights and freedoms if the courts had lacked judges for a longer period of time"*[45].

Pursuant to the Omnibus Law and following the abolition of special courts and prosecution offices, judges and prosecutors were relocated by HSYK to other tasks in only 15 days. Whilst 92 % of judges and prosecutors stayed in the same courthouse, 8% of them were transferred by HSYK to different courthouses without their consent and without clear justification.

At the same time, new heavy criminal courts were set up to deal with the workload of the abolished courts and new judges were assigned to those courts by HSYK without opening a call for the applications to the new posts and even without consulting the judges who were selected for the new task.

The Turkish Authorities claim that: "*The Law no 6526 entered into force upon its promulgation on the Official Gazette. Therefore, all judges and prosecutors are aware of this Law. As per the Article 1, Paragraph 2 of the Law, HSYK is required to appoint the judges and prosecutors within 10 days to the posts that are convenient for their vested rights. For that reason, as a requirement of the standard practice, the 1st Chamber of HSYK published an announcement on 11.03.2014 to call for applications from all the judges and prosecutors for the new appointment. The requests of the judges and prosecutors who submitted their applications as well as their tenure were taken into consideration for the new appointments. Under the Law, 38 Heavy Criminal Courts were abolished and replaced by 22 Heavy Criminal Courts. 210 out of 245 judges and prosecutors assigned at the abolished courts were reappointed to the posts in the provinces they were already serving in line with their requests, 19 were appointed to posts in the provinces they requested, 4 were appointed to the provinces that were close to the ones they requested, and 13 were appointed to the other provinces due to the excess staffing. All judges and prosecutors who were transferred to different courthouses have the right to demand for the re-examination of the decision of the First Chamber from the same Chamber and they also have the right to raise an objection for the decision of this Chamber at the Plenary. Moreover, some judges and prosecutors exercised their right to demand for re-examination and right to raise an objection for the decision*".

The expert was further informed that in major cases, such as *Ergenekon, Sledgehammer and KCK*, prosecutors in charge with the investigations were withdrawn from the case by the chief prosecutor and assigned to other tasks, and judges in on-going cases were subject to disciplinary investigation[46]

[45] Second set of comments.

[46] Judge Zafer Baskurt, president of the 10th Istanbul court of assize, judge Erkan Canak and judge Koksal Sengun, involved in the *Ergenekon* case, were subject to disciplinary sanctions and "authorised to other duties" by HSYK. Judge Erkan Canak and judge Koksal Sengun appealed against the disciplinary decisions of HSYK – their appeals were pending at the time of the missions. Judge Yilmaz Alp, former judge of the 9th Istanbul court of assize, who issued decisions to release suspects both in the *Sledgehammer* and the *Ergenekon* case, was transferred by HSYK to other duties, while at the same time he had not been subject to any disciplinary procedure. As regards the *Sledgehammer* case,

and transferred by HSYK to other duties before the formal adoption of a disciplinary sanction or were transferred to other duties even without being subject to any prior disciplinary investigation and, thus, without being given the possibility to defend themselves[47]. Such interventions by chief prosecutors and HSYK in the course of proceedings can lead the public to question judicial independence

The Turkish Authorities claim that: "*as per Article 18/2 of the Law no 5235 on the Establishment, Duties and Powers of First Instance Courts in Ordinary Justice and Regional Courts of Appeals, one of the duties of the chief public prosecutor is to divide tasks among public prosecutors. Under this scope, the chief public prosecutors changed the division of tasks pursuant to the abovementioned article in order to ensure more robust performance of the investigations. The appointments in relation with these investigations which were criticized, were made because it was believed that the relevant persons committed a criminal act under the disciplinary law. No judge or prosecutor was appointed just because of the investigations they performed or cases they dealt with*".

The expert notes that the above process conflicts with the relevant standards. REC (2010)12 of the Council of Europe states that decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit[48], having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity[49]. Not to say that the procedure to evaluate and weigh the qualifications, skills and capacity of the judges and prosecutors, would imply sufficient time and the possibility for candidates to participate in.
The HSYK practice to decide, pending investigations and trials, the mandatory and "express" re-location of judges and prosecutors for reasons different form disciplinary sanctions, should be immediately abandoned, as it is contrary to principle 52 of Recommendation CM/Rec(2010)12 of the Council of Europe, according to which *a judge should not (..) be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions.*
It is furthermore recommended that the discretionary powers of HSYK and Chief prosecutors to remove judges and prosecutors from cases is regulated in a transparent way in order to preserve the internal independence of judges and prosecutors.

Therefore:

1) HSYK should establish clear rules for chief prosecutors regarding the assignment and re-assignment of cases to prosecutors to meet requirements of impartiality and independence; it

Deputy Chief Prosecutor Turan Colakkadi and prosecutors Bilal Bayraktar and Mehmet Berk were removed from the case by former Chief Prosecutor Aykut Cengiz Engin, after issuing a motion for an arrest warrant of 95 military personnel.
In the *KCK* case the prosecutor Sadrettin Sarikaya, who was investigating in the MIT (National Intelligence Organisation), was removed from the case by the chief prosecutors. The Chief Prosecutor, in explaining his decision to the expert, mentioned that ""There were some claims in the media that he was acting intentionally and he was not impartial. Media was engaged with this issue for a long time. In this process we did not desire the prosecutor affected badly. Removing the investigation file from the prosecutor we wanted to relief him from the pressure of public opinion and the media on one hand and at the same time we aimed to prevent damages coming to the judiciary via debates on impartiality and credibility of the judiciary in the eyes of public".

[47] . Of particular concern is the case of judge Yilmaz Alp, who was transferred against his will by the HSYK from one Istanbul court of assizes to an ordinary court, without being subject to any prior disciplinary investigation and, thus, without being given the possibility to defend himself.

[48] According to the Opinion n. 10 of the Consultative Council of European Judges in the process of appointment of judges by Judicial Councils, there must be total transparency in the conditions for the selection of candidates, so that judges and society itself are able to ascertain that an appointment is made exclusively on a candidate's merit..

[49] § 44 of the REC (2010)12.

should also establish that decisions to withdraw cases from prosecutors are given in written form and are subject to internal review to ascertain the lawfulness of the procedure;

2) every HSYK decision concerning the career of judges should be based on objective and pre-established criteria. Such decisions should be based on merit, having regard to the qualifications, skills and capacity;

3) every HSYK decision regarding judges' and prosecutors' careers, involuntarily transfer included, should be subject to judicial review.

The Turkish Authorities claim that: "*The First Chamber of HSYK cannot be claimed to appoint judges and prosecutors with discretion and without having regard to any rules. The First Chamber abides by the provisions stipulated in the "By-Law on the Appointment and Transfer of Judges and Prosecutors". Furthermore, the resolutions taken at the beginning of each year and to be applicable to the decrees in that year are announced to the judges and prosecutors. The decrees are prepared completely based on the provisions of the by-laws as well as the resolutions that were already known.*
As per the Constitution, it is not possible to provide possibility with applying judicial review of appointment decisions of the 1st Chamber of HSYK. On the other hand, it is provided with an internal objection mechanism against appointment decisions of HSYK in itself. When the relevant party demands for the re-examination of the appointment decision, the related Chamber shall reverse the appointment decision or appoint the person to another location, if there are reasonable grounds. The appointment decision of the 1st Chamber can also be challenged before the Plenary. Every now and then the Plenary overrules the appointment decisions of the 1st Chamber. The internal mechanisms of objection mentioned above provide judges with the required security. For example, 20% of disciplinary decisions taken by HSYK's Second Chamber are overruled by the same chamber upon the request for re-examination. Similarly, 20% of decisions taken by the Second Chamber are annulled by HSYK's Plenary upon objections".

For what regards the effectiveness of criminal justice, serious concerns must be expressed because of the absence of a transitional provision in the Omnibus Law, that would allow the abolished courts to complete pending cases. Such a provision is usual when measures are adopted for the reorganization of courts; the transitional provision would aim at avoiding interferences by the legislative power in pending trials, at not infringing the principle of the "natural judge", and at not disrupting the regular operation of courts. A transitional provision was adopted when the SAC were abolished to allow them to complete pending trials.

The Turkish Authorities claim that: "*The reason why such a transitional provision was not adopted to allow the abolished courts to complete the pending cases was because there was a concern that presence of such a transitional provision might lead to the perception that these courts were not closed and that they sill continued to exercise their powers. Not only such a perception would compromise the effect that was desired to be created upon the abolishment of these courts, but also the perception of the public that these courts did not try fairly would continue to persist. Furthermore, the existence of these courts was found to contradict in essence with the principle of natural judge because the creation of special courts for specific crimes was contrary to the principle of "natural judge". Therefore, the main criticism directed at these courts was that they infringed the principle of natural judge. For that reasons, if such a transitional provision stating that these courts would continue to hear the pending cases had been adopted, they would have continued to be criticized claiming that they infringed the principle of natural judge. The principle of natural judge was put in place in real sense once the pending cases were redistributed to the general courts following the abolishment of the specially authorised courts"*[50]

[50] First set of comments.

Because of the lack of this provision in the Omnibus Law, new panels of judges will have to re-consider the evidence obtained by previous panels, by reading documents and minutes of hearings that may consist of thousands of pages. This risks seriously affecting the effectiveness of the courts that were already overburdened by very long trials.

The Turkish Authorities claim the following "*The judges and prosecutors in our country might be appointed to larger cities where the workload is higher from smaller cities periodically according to the regions system. Sometimes, they might be transferred to another court within the provinces they are already assigned. In this case, the judges and prosecutors can examine the new files that they take over in a short period of time thanks to the nature of their duties and can get a good command of the file. Therefore, the lack of such provision in the Omnibus Law is not thought to influence the capacity of the new panels of judges*"[51].

Neither the Ministry of Justice not the Justice Commission of the Parliament provided any convincing justification for the absence of such transitional provision, that had the effect of removing and replacing prosecutors and judges who were dealing with the most sensitive cases, including the high profile investigations about corruption cases, and, therefore, resulted as an interference by the political majority in pending investigations and trials.

Further negative consequences to the effectiveness of the criminal justice system are very likely to stem from the abolition of the special prosecution offices and of the liberty judges.
Following the abolishment of special courts, more than 120 prosecution offices, that are the prosecution offices attached to heavy criminal courts, are competent to deal with organized crime and terror related criminal offences. They were only 13 "under the art. 10 ATL system", with enlarged jurisdiction.
As a consequence, whilst in larger prosecution offices –such as Istanbul and Ankara- special units were established to deal with organized crimes and terrorism related crimes, prosecutors from small and even very small prosecution offices could face very complex and delicate investigations, without being properly trained for the task.

Moreover those structural changes were adopted in the wrong time. The expert has noted the astonishing increase of cases, suspected persons and long duration of investigations and trials since 2005. The reasons for this increase should be further investigated: it might be due to the extended implementation by prosecutors and courts of the vaguely defined criminal offences contained in articles 220 and 314 of the CC and in the anti-Terror law, as well as to the rather low threshold required by the Court of Cassation for the prosecution and punishment of criminal offences provided for in the anti-terror Law. Such size of workload would require an effective response by prosecutors and judges. Specialisation of members and extended geographic jurisdictions were an effective response to the prosecutions offices' need to tackle modern forms of organised crime and to deal in a reasonable period of time with complex investigations.
Specialised prosecutors, composing a small judicial community, may be easily trained on special issues and may have the opportunity to meet and debate their practices.

As to the specialisation of prosecutors, the Turkish Authorities claim that "*the Ministry of Justice and Justice Academy of Turkey organize many training events in order to maximize the knowledge level of judges and prosecutors on (..)organized crimes and terror crimes".*

As regards the duration of investigations and trials they claim that "*It is observed that an investigation file was resolved by the chief public prosecution office within 317 days on average in 2006 which is one year following the entry into force of Turkish Criminal Code and Criminal Procedures Code, while it was concluded within 306 days in 2013.As regards the cases filed at Heavy Criminal Courts assigned as per*

[51] Second set of comments.

article 10 of ATL; the average duration of trial was 352 days in 2006 while it was 257 days in 2013, which was a remarkable decline".

They further claim that "*The astonishing increase of cases and suspected persons since 2005 highlighted in the report was (...) because of the misinterpretation of the data delivered to the expert. Insofar as; until 2009, the number of the cases was taken into account while collecting statistical data. After 2009, however, not only the number of cases but also the number of suspects and offences in each case have been counted. However in this report, the number of cases in 2004-2008 was compared with the number of offences in 2009-2013 and thus this led to misleading results because different sorts of data were compared. When these figures are evaluated, it is understood that the number of cases was 5406 in 2003, while it was 7665 in 2013, that it decreased in some years while increasing in other years within a period of a decade but there wasn't any remarkable difference between the numbers*"[52].

On the latter point the expert has to remark that the figures, reported in the chapter 1.5 and in footnote 41 above, were provided by the MoJ. Those figures are separately displayed for: 1. number of cases; 2 number of indictments: 3. number of accused persons. All figures (separately considered) follow the same trend and indicate an astonishing increase of number of cases, number of indictments and number of accused persons.

As regards liberty judges, they were overall considered a very positive development , because of their specialisation in dealing with the so called protective measures that are related to liberty and fundamental rights (property and privacy) of the defendants.

No clear reasons were provided by the Parliamentary Justice Commission and the Ministry of Justice for the abolition of special prosecutors and liberty judges, after they had been trained for the task; however during the meetings with the MoJ the expert was informed about a new draft reform package, having the aim to establish *peace criminal judges,* to be entrusted with tasks similar to those of abolished liberty judges. The expert was not provided with the text of the draft reform[53].

The Turkish Authorities claim that "*Civil judges of peace, replacing the Liberty Judges who exercised their powers in a limited jurisdiction, were created as per the Law no 6545 and dated 18.6.2014 to deal with cases involving all crimes in every province and every district identified, taking account of the geographical requirements of regions and the workload while they were entrusted with the power to decide especially on protective measures. These judges do not have the power to exercise jurisdiction but instead they are entrusted exclusively with the task to take necessary decisions that should to be taken by judges during the investigation phase. Therefore, a more comprehensive legal arrangement was introduced compared to the liberty judges and the practice of liberty judges was extended to the national level. In this way, the individual rights and freedoms can be protected in our country more effectively than what is desired in the report*"[54].

RECOMMENDATIONS

We **RECOMMEND**

- every significant reform of the judicial system be preceded by public consultation with civil

[52] Second set of comments.
[53] In their comments on the report, Turkish Authorities claim that Law No 6545 dated 18 June 2014, introduced "peace criminal judges with functions just the same as liberty judges".
[54] First and second set of comments.

society and relevant stakeholders;

- the approval of the Authorities for investigation and trials regarding government officials be abolished, in order to ensure the equality of defendants before the law[55];
- HSYK to establish clear rules for the assignment and re-assignment of cases by the chief prosecutors to prosecutors, in order to meet the requirements of impartiality and independence; also, to establish that decisions to withdraw cases from prosecutors are given in written form and are subject to internal review to ascertain the lawfulness of the procedure;
- every HSYK decision concerning the career of judges and prosecutors be grounded on objective and pre-established criteria. Such decisions should be based on merit, having regard to the qualifications, skills and capacity;
- every HSYK decision regarding judges' and prosecutors' careers, involuntary transfer included, to be subject to judicial review;
- specialised prosecution offices with extended jurisdiction be re-established[56];
- liberty judges be re-established.

2. PREVENTIVE DETENTION

Personal liberty is one of the main problems in Turkish Justice[57] in particular if looked upon through the case law of the ECtHR.[58]

As regards preventive detention in general, a distinction can be drawn between detention following initial police arrest (art. 5.1. ECHR) on the one hand, and detention following a judicial decision that a person should remain in custody [59](art. 5.3. ECHR), on the other.

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[55] In the second set of comments the Turkish Authorities claim the following : "*In Turkish law, direct investigation by the prosecutors is foreseen for the crimes committed in the course of the performance of judicial duties or tasks pertaining to the Article 161 of the CPC and for the crimes of malversation, bribe, embezzlement, smuggling on duty or due to duty, rigging official tenders and purchases and sales, disclosure of State secrets or causing disclosure of State secrets as per art. 17 of the Law No 3628 on Declaration of Property, and Combating Bribery and Corruption. Therefore, there isn't any requirement to obtain prior permission for the investigation especially of the crimes that can be deemed as corruption. Permission has to be taken for the petty acts such as breach of a duty. These acts are usually subject to the disciplinary legislation. Without such a permission mechanism for the investigation of these acts, the complaints against the civil servants would have been filed directly at the public prosecution offices and they could have been directly investigated. This would have hindered the fulfillment of routine tasks of civil servants, and thus there would have been delays in the access of citizens to public service. For that reason, the mechanism for investigation permission is not a system which prevents the investigation of crimes committed by civil servants. The aim of such a system is to ensure the uninterrupted delivery of public service*".

[56] In second set of comments, the Turkish Authorities consider this recommendation *not appropriate* for the following reasons: "*The prosecutors attached to the Heavy Criminal Courts assigned as per article 10 of ATL and that were abolished pursuant the Omnibus Law no 6526 were entrusted with a wide jurisdiction that covered multiple provinces. This created challenges for the prosecutors to transfer their specialization and experience to the cities and districts that were distant from their offices. On the other hand, the prosecutors used to have limited control over the police in the provinces and districts where the crime was committed. For that reason, local prosecutors used to perform the investigations. The local prosecutors used to send the documents of completed investigations with a summary of proceedings to chief public prosecution offices attached to the specially authorized courts. Therefore, the pace and efficiency of the investigations were not at the desired level*".

[57] Thomas HAMMARBERG, Commissioner of Human rights of the Council of Europe, in his report "*administration of justice and protection of human rights in Turkey"* observes that in the period 1995-2010 the European Court of human rights delivered more than 500 judgments against Turkey related to the right to personal liberty and security. The figures are extracted by European Court of Human Rights, annual Report 2010, statistics at page 157.

[58] Article 90 of the Turkish Constitution was amended in 2004, in order to give full effect to international treaties, including the ECHR.

Police custody for serious crimes and its maximum duration in Turkey, that is 24 hours according to the amendment contained in the Omnibus Law, do not conflict with the principles of the ECHR, the ECtHR case-law and the standards of EU Member States.

The perspective is barely different with reference to remand in custody. According to the Commissioner for Human rights of the Council of Europe, Turkish prosecutors and courts continue to rely very heavily on remands in custody to the detriment of existing non-custodial supervision measures. The Commissioner pointed at the proportion of persons remanded in custody in percentage of the total prison population, which was 43% as of April 2011[60], as a telling sign of the extent of the problem. Furthermore, the Commissioner for Human rights of the Council of Europe reported that in several cases domestic courts had failed to take into account alternative, non-custodial restrictions on personal freedom[61], such as bans on leaving the country, release on bail or judicial controls, despite the fact that such measures are provided for in the CPC[62].

The 43% rate of persons remanded in custody in percentage of the total prison population, alleged by the Commissioner of Human rights, is strongly contested by the Turkish Authorities which claim that, as of April 2011[63], that rate was around 25% and that it progressively decreased in the following years after the adoption of the third package of judicial reforms.

2.1. STATISTICAL INFORMATION ON PRE-TRIAL DETENTION

According to the most recent statistical figures provided by the MoJ[64], the **preventive** detention rate (referred to detainees waiting for first instance decision only), considered as a percentage of total number of prisoners (detainees and convicted), fell from its maximum in 2004 -when it was equal to 47,8%- to its minimum of 14,36% as of 8 December 2014, being of 28 % at the beginning of 2012.
If the number of persons on remand pending appeal are added, the above percentage raises to 21,79%

More in details, the figures provided by the Moj show that:

- the number of total detainees was 136 020 at the end of 2012; it grew by 6,9% at the end 2013, becoming 145 478 and further grew in 2014 by 8,2% in 2014, to the number of 157 499 as of 8 December 2014;
- at the same pace the number of detainees finally convicted grew significantly, passing from 89 783 in 2012 to 105 176 in 2013 (17,1% more) and becoming 123 199 in December 2014 (growing by 17,13 % in 2014);
- in the same years the number of detainees waiting for trial decreased from 31 707 in 2012 to 27 693 in 2013 (-12,6%) and became 22 632 in December 2014 (-18,2%);
- the number of "persons on remand pending appeal" decreased form the number of 14 530 in 2012 to 12 609 in 2013 (-13,2%) and became 11 668 in December 2014 (-7,46%).

[59] As regards detention following a judicial decision that a person should remain in custody, please see chapter below.
[60] Thomas HAMMARBERG, Commissioner of Human rights of the Council of Europe, "*administration of justice and protection of human rights in Turkey"*dated 10 January 2012, § 30.
[61] See also ECtHR *Mehmet Yavuz v. Turkey,* 24 July 2007, § 40.
[62] Thomas HAMMARBERG, Commissioner of Human rights of the Council of Europe, "*administration of justice and protection of human rights in Turkey"* dated 10 January 2012, § 37.
[63] The time of Thomas Hammerberg visit to Turkey
[64] The figures have been provided in December 2014.

In considering the picture it has to be taken into account that the number of total detainees grew by 22,3% in only four years from the beginning of 2012 –when they were 128 748- to the end of 2014 when they became 157 499, reaching, by far, the highest figure in Turkish history, Ten years before, in 2004, total prisoners were 59 930[65] : therefore in ten years time, prison population in Turkey grew by 162,8 %.

In EU Countries comparable to Turkey for size and population[66]:

- in 2014 the total prison population was composed of 65 710 units in Germany (they were 81 166 in 2004), 68 295 units in France (they were 55 355 in 2004); 54 428 units in Italy (they were 56 068 in 2004);
- in 2014 pre-trial detainees/remand prisoners as a percentage of the prison population were 17,1% in Germany; 26% in France; 34,4% in France.

The prison/population rate (per 100 000 of national population) in 2014 is 202 in Turkey, 81 in Germany; 102 in France; 88 in Italy[67].

According to the figures provided by the Ministry of Justice[68], , the rate of persons who are kept under pre-trial for more than 3 years was 2.42% (529 individuals) as of 07.11.2014.

2.2. CONDITIONS AND GROUNDS FOR PRE-TRIAL DETENTION

The general conditions for pre-trial detention are regulated by art. 100§1 of the CPC, that, before the Omnibus Law amendments (please see below chapter 3.) required *"facts that tend to show the existence of a strong suspicion of a crime"* and *"an existing ground for arrest"* for rendering *an arrest warrant against the suspect or accused.* The same article 100 of the CPC further upholds the principle of proportionality**,** according to which *there shall be no arrest warrant rendered if arrest is not proportionate to the importance of the case, expected punishment or security measure.*
An application of the principle of proportionality is included in article 101§1 CPC which requires decisions on detention to include legal and factual reasons[69] indicating why the alternative of judicial control would be inadequate in each case[70].

[65] The source is www.prisonstudies.org.
[66] The source is www.prisonstudies.org.
[67] The source is www.prisonstudies.org.
[68] In the second set of comments .
[69] According to paragraphs 2 and 3 of article 101 of the CPC, the motions of public prosecutors must contain reasons and an explanation for why the application of judicial control would not be sufficient in a given case, based on legal and factual grounds. The decisions on arrest with a warrant, continuation of the detention or a decision denying the motion of release from detention must be furnished with the legal and factual grounds and reasons. The contents of the decision shall be explained to the suspect or accused orally, additionally a written copy of the decision shall be handed out and this issue shall be mentioned in the decision.
[70] Judicial control is regulated by article 109 of the CPC, according to which (1) In cases where the grounds as regulated in art. 100, which would have resulted in arrest with a warrant are present, a decision to put the suspect under judicial control may be rendered, instead of arresting him with a warrant, if the conducted investigation is about a crime that carries a punishment of imprisonment at the upper level of 3 years or less. (3) Judicial control includes one or more obligations inflicted on the suspect as stated below: a) not being permitted to travel outside of the country, b) regularly applying to places that will be specified by the judge within the specified time periods, c) obeying the calls of authorities or persons specified by the judge and, when necessary, fulfilling the measures of control with respect to the professional activities or issues of continuing education. d) Not being able to drive any or some of the vehicles and, when necessary, leaving his driving license to the office of registry in return for a receipt, e) obeying and accepting the measures of medical diligence, treatment or examination, especially being hospitalized for purification from dependency on narcotics, stimulating or evaporating substances and alcohol, f) depositing an amount of the money as a safeguard, which shall be determined by the judge upon the motion of the public prosecutor, after taking into account the financial conditions of the suspect, and whether it shall be paid by more than one installments and the period of

Art 100§2 CPC lists the following grounds for pre-trial detention:
a) If the suspect or accused had fled, eluded justice or if there are specific facts which justify the suspicion that he is going to flee.
b) If the conduct of the suspect or accused tends to show the existence of a strong suspicion that he is going to attempt: 1. to destroy, hide or change the evidence, 2. to put unlawful pressure on witnesses, the victims or other individuals.

2.3. REASONING OF PRE-TRIAL DETENTION ORDERS AND THE CATALOGUE CRIMES

The CPC provides that decisions to detain or extend detention[71] and decisions denying the motion of release from detention must be duly reasoned and communicated to the accused or suspect. As indicated above, article 101§1 CPC requires decisions on detention to include legal and factual reasons indicating why the alternative of judicial control would be inadequate in each case.

ECtHR consistently held in several decisions that Turkish criminal courts *failed to give consideration to the application of other preventive measures foreseen by Turkish law, such as prohibition of leaving the Country and release on bail, other than the continued detention of the applicant* [72].

According to the Commissioner of Human Rights of the Council of Europe the large body of case-law of the European Court of Human Rights[73] in this matter confirms that Turkish courts had failed to reason their decisions to authorize and to extend detention in custody adequately, using instead stereotyped wordings such as 'having regard to the nature of the offence, the state of the evidence and the content of the file, which constitutes a violation of Article 5§3 ECHR. The Commissioner found that the problem identified by the ECtHR continues in practice – decisions authorising detention in custody continue to be non case-specific and mostly repeat the letter of the law, stating that there is a "well grounded suspicion of evasion of justice and tampering with the evidence", and that "it is determined that the alleged crimes fall under the list provided by Article 100, paragraph 3 CPC". "It appears that in most cases, judges do not state the exact grounds for suspicion in their decision, but fail to evaluate specific evidence regarding the risk of absconding or interfering with the course of justice. Moreover, they rarely accept any dissenting grounds the defense may bring to their attention. According to information provided to the Commissioner, including by members of the Turkish judiciary, in particular the decisions to extend detention seem to be almost automatic, judges approving most requests without a detailed examination of the case file.

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payment, g) No being permitted to have or to carry weapons and, if necessary, leaving the guns to the judicial depositary in return for a receipt, h) providing real or personal guarantee for the money to assure rights of the injured party; the judge upon the motion of the public prosecutor shall specify the amount and the payment period of the money.

[71] According to art. 101 par. 1 of the CPC, during the investigation phase the arrest warrant for the accused is issued by the Justice of the Peace upon the motion of the public prosecutor and during the prosecution phase by a trial court upon the motion of the public prosecutor or upon its own motion.

[72] ECtHR, *Cahit Demirel v. Turkey*, 7 July 2009 § 45; *Mehmet Yavuz v. Turkey*, 24 July 2007 § 40; *Duyum v. Turkey*, 27 March 2007 § 38; *Getiren v. Turkey*, 22 July 2008 § 107.

[73] ECtHR *Cahit Demirel v. Turkey*, 7 July 2009, paragraph 45. "The Court further observes that in almost all of its judgments against Turkey where there was a violation of Article 5 § 3, it found that the domestic courts ordered the applicants' continued detention pending trial using identical, stereotyped terms, such as "having regard to the nature of the offence, the state of the evidence and the content of the file" (see, among many others, *Dereci v. Turkey*, no. 77845/01, § 38, 24 May 2005; *Solmaz*, cited above, § 41; *Akyol v. Turkey*, no. 23438/02, § 30, 20 September 2007)".

Article 100, paragraph 3 of CPC provides a list of offences (the so-called *'catalogue crimes'*) [74], part of which felt within the jurisdiction of the special courts and for which the judge may authorise detention, provided that there are strong grounds to believe that they have been committed by the suspect[75]. According to the Commissioner of Human Rights of Council of Europe, whilst Turkish courts have a legal obligation to provide an explicit reasoning justifying detention on remand, as well as each extension, it appears that many Turkish judges authorise detention only after having determined whether the alleged crime falls under this list and without examining in detail the remaining conditions of detention[76].

2.4. THE MEASURES OF THIRD PACKAGE OF JUDICIAL REFORMS TO LIMIT EXCESSIVE USE OF DETENTION. LIBERTY JUDGES.

The third judicial reform package tackled the problem of excessive use of pre trial detention, by adopting four different measures: by increasing the offences' upper limit to two years of detention instead of the previous limit amounting to only one year; by lifting the upper three years limit for judicial control and introducing new forms of judicial control; by clearly stating the obligation of judges to duly and fully reason their decision about pre-trial detention.

Furthermore, as mentioned above, liberty judges were established for dealing with protection measures under the article 10c. of the Anti-terror Law
Liberty Judges were exclusively entrusted for handling with decisions and objections against decisions regarding "protection measures" such as: search, seizure, apprehension, detention, and detection of communication. Liberty Judges were prevented from participating in the trial phase to preserve the impartiality of trial judges.
Liberty Judges were targeted by dedicated in-service training. Some judges visited Italian "liberty courts" to learn their practices.

Liberty judges were suppresses by the February 2014 "Omnibus Law".

2.5. JUDICIAL PRACTICE ABOUT PRE-TRIAL DETENTION

In the course of the first visit to Turkey the expert was shown the pre-trial detention order issued in the so called *Oda TV* case against journalists Nedim Şener and Ahmet Şık[77] and acknowledged that

[74] 1. Genocide and crimes against humanity (Arts. 76, 77, 78), 2. Killing with intent (Arts. 81, 82, 83), 3. Intended wounding committed by a gun (Art. 86/3-a) and intended wounding which has been aggravated by its result (Art. 87) 4. Torture (Arts. 94, 95), 5. Sexual assault (Art. 102, except for subparagraph 1), 6. Sexual abuse of children (Art. 103), 7. Theft (Arts. 141, 142) and aggravated theft (Arts. 148, 149), 8. Producing and trading with narcotic or stimulating substances (Art. 188), 9. Forming an organization in order to commit crimes (Art. 220, except for subparagraphs 2, 7 and 8), 10. Crimes against the security of the state (Arts. 302, 303, 304, 307, 308), 11. Crimes against the Constitutional order and crimes against the functioning of this system (Arts. 309, 310, 311, 312, 313, 314, 315), b) Smuggling with guns, as defined in Act on Guns and Knifes and other Tools, dated 10.7.1953, No. 6136, (Art. 12), c) The crime of embezzlement as defined in Act on Banks, dated 18.6.1999, No. 4389, Art. 22, subparagraphs (3) and (4), d) Crimes defined in Combating Smuggling Act, dated 10.7.2003, No. 4926, and carry imprisonment as punishment, e) Crimes defined in Act on Protection of Cultural and Natural Substances, dated 21.7.1983, No. 2863, Arts. 68 and74, f) Crime of intentionally start a fire in forests, as defined in Acton Forests, dated 31.8.1956, No.6831, Art. 110, subsections 4 and 5.

[75] Paragraph 3 states *If strong grounds for suspicion are present, that the below mentioned crimes have been committed, then "the ground for arrest with a warrant" may be deemed as existing.*

[76] Thomas HAMMARBERG, Commissioner of Human rights of the Council of Europe, "*Administration of justice and protection of human rights in Turkey"*dated 10 January 2012, point. 33.

[77] Journalist Nedim Şener and Ahmet Şık were released on 12 March 2012, the same day the expert visited the Istanbul specially authorised heavy penal courts.

the judicial order contained neither any factual reporting nor any justification on the grounds for pre-trial detention; instead, it simply mentioned that the case falls under the provisions of article 100§3 CPC (the *catalogue crimes).* The expert was informed by members of the Court of Cassation that some judges refrain from such an examination on the assumption that a duly reasoned decision concerning the grounds for suspicion and detention would prejudice their opinion on the merits of the case and thus would constitute 'comments reflecting bias'; these can be invoked for launching proceedings to dismiss a judge from a case.

After the second mission the expert was provided by the MoJ with 14 decisions[78] issued by Diyarbakir liberty judges in October and November 2012.
From the minutes of statements given by defendants and lawyers it is possible to infer that most cases, if not all of them, refer to participation in street demonstrations following a call by a "terrorist organization".

From the analysis of the decisions it comes out that: the facts of the case are not reported; in most decisions the charge is reported only in very general term, as, for example, *being a member of a terror organisation or of armed terror organisation[79];* decisions do not specify the facts and the evidence *that tend to show the existence of a strong suspicion of a crime;* decisions do not clarify the grounds, with reference to the circumstances of the case, for ordering detention or o applying a judicial control measure; the test of proportionality is not conducted; decisions regarding more defendants do not propose the due distinction of the individual conducts and do not clarify the specific role of the participants in the criminal offence; decisions of detention do not specify the reasons for not applying judicial control in the case; in most decision it is reported that the offence is one of the catalogue crimes stated in article 100 of CPC and stereotyped wordings is used such as the following: *pursuant to Articles 100 of CPC owing to the fact that the offence is one of the catalogue crimes stated in article 100 of CPC; taking into account the existence of strong suspicion of offence in consideration of the qualification and nature of the offence imputed to the suspect, the current state of evidence, the apprehension warrant and the declarations of the suspect; considering suspicion of escape and the fact that judicial control provision will remain insufficient due to the quality of the offence.*

In April 2013 the expert was provided by the MoJ with further 6 decisions on pre-trial detention, issued by Ankara (1 decision), Izmir (2 decisions) and Istanbul (3 decisions) liberty judges. Three decisions, two of them issued by Istanbul liberty judges (one related to a premeditated murder and the second to the offence of providing arms to armed terrorist organization) and the third issued by Izmir liberty judge (related to "Possession of explosive substances") contain a sufficiently clear description of facts, identification of criminal charge, analysis of the grounds which justify the continuation of detention and a proper application of the principle of proportionality. A third

[78] Order of judicial control for one defendant (cases 2012/2000; 2012/5; 2012/16; 2012/199).
Acceptance of objection by one defendant and order of judicial control (case 2012/29).
Order of detention for two defendants and judicial control for remaining two defendants (cases 2012/31; 2012/22).
Ordering detention for one defendant (cases 2012/6; 2012/7; 2012/10).
Ordering detention for three defendants (case 2012/21).
Rejection of request for release by one defendant (cases 2012/127; 2012/32)
Examination of "detention since the investigation" and ordering the continuation of detention for one defendant (case 2012/163)

[79] In only three cases further charges are reported as following:
Resisting of performance of duty, participating in an unlawful meetings and marching without gun and not to disperse o their own initiatives, participating in meetings and marching with guns and tools stated in Article 23 (case 2012/28).
Disrupt the unity and territorial integrity of the state (case 2012/21).
Disrupt the unity and territorial integrity of the state; purchasing, carrying and having weapons or bullets which are fatal in terms of number and quality (case 2012/10).

decision issued by Istanbul judge lacks entirely the description of facts, charge and grounds to the point that it is even not possible to infer what criminal offence it refers to. A second decision issued by the Izmir Judge, and related to participation in street demonstration and *resistance committed in the name of an armed terrorist organization despite not being a member of the organisation"*, contains the description of the relevant facts (throwing stones) only for three out of four defendants but does not give any concrete reason for the grounds of continuation of detention and for the necessity of the detention instead of judicial control for all defendants; it simply refers to the catalogue crimes by stating that: *the crime imputed is one of the catalogue crimes in Article 100/3-a-11 of Code of criminal procedure and therefore a legal reason for apprehension is deemed to exist".* In the last decision, related to the criminal offences of "*overthrowing the Turkish Republic by force, preventing, attempting to prevent the duties of the government, attempting to stage a coup*" by a Chief of Staff of a Special Forces Command, the Ankara liberty judge entirely failed to substantiate his/her ruling with facts and reasons and tended to simply replicate the wording of the law.

CONSIDERATIONS

In most EU Member States the concept of pre-trial detention, in the light of guarantees ensured by national procedural laws, covers the whole period spent by the accused in preventive detention up to the final decision; this concept is reflected in statistical information on pre-trial detention above.

The Turkish statistics about the pre-trail detention rate in percentage of total prison population refer instead only to accused who are detained up to first instance conviction.
As a consequence of this divergent consideration of pre-trial detention in the statistics, a proper comparison between pre-trial detention rate in Turkey and EU Member States is not possible unless the same parameter is adopted, which is the number of people in detention before the final decision.
The latest figures provided by the Turkish Authorities show that the rate of pre-trial detention/remand prisoners as a percentage of the prison population decreased remarkably since the beginning of 2012. This rate, which also includes the number of persons on remand pending appeal, was 21,79% in December 2014 in Turkey. This rate is higher than in Germany (17,1%) but lower than in France (26%) and in Italy (34.4%).
However the mere consideration of this rate can be misleading, if the absolute number of total detainees is neglected.
As the most recent statistics provided by the Turkish Authorities show (see paragraph 2.1. above), the number of total prisoners in Turkey grew astonishingly since 2004, passing from 59 930 units to 157 499 units in December 2014. The latter figure is almost three folds the figures in comparable EU Countries: total prisoners were 65 710 units in Germany; 68 295 units in France and 54 428 units in Italy in 2014. The prison/population rate per 100 000 of national population in 2014 in Turkey was 202, that is more than twice the German (81) and Italian (88) rates and twice the France one (102).
From the figures about total prisoners it stems that the number of pre-trial detention/remand prisoners per 100 000 of national population (which is not reported by the international statistics) is much higher in Turkey than in Germany (more than double figure), it is around 70% higher in Turkey than in France, and it is more than 45% higher in Turkey than in Italy, that has the highest pre-trail detention rate in percentage of total prisoners among the bigger EU Member States-.

The above considerations show that the Turkish rate of detention before final conviction, as a percentage of the total population, is still significantly higher in Turkey than EU Member States comparable for size and population; they also show that Tukish judges, despite of remarkable

progress achieved in the past three years, still often resort to pre-trial detention and do not use is it as an *extrema ratio*, as emphasized by the Commissioner of Human Rights.

However the attitude of Turkish judges to heavily resort to pre-trial detention has started to be changed by the adoption of the third package, because cases of judicial control almost doubled since 2012, passing from 16 598 to 32 402 in 2014.

According to the figures provided by the MoJ, the **duration of pre-detention** before first instance decision was longer than three years for 529 individuals (that is 2,42% of cases) as of 07.11.2014 . This figure shows a very long duration of pre-trial detention in a significant number of cases (hundreds).

As reported above, according to Turkish CPC, pre-trial detention must be justified by the coexistence of three different conditions: 1) the evidence that a criminal offence has been committed; 2) grounds for arrest, which are: the risk of elusion of justice and/or of destruction or change of evidence by the accused; and 3) the proportionality of the arrest to the importance of the case, to the expected punishment or security measure (article 100§ 1 and 2).

According to the same CPC (article 101§2), decisions on arrest with a warrant, continuation of the detention, or a decision denying the motion of release from detention must be furnished with the legal and factual grounds and reasons.

The samples of decisions, of different nature, provided to the expert by the Turkish Authorities show that the decisions of every kind and nature, issued by Dyiarbakir liberty judges, do not contain any specification of facts and do not contain any concrete reasoning about the existence of the strong suspicion that a criminal offence has been perpetrated and the grounds for detention or judicial control; furthermore the judge does not show to have conducted any test of proportionality.
As regards Ankara, Istanbul and Izmir liberty judges, only half of them gave full reasons for their decisions.

As stated by the Commissioner of Human rights Thomas Hammerberg, this practice violates art. 5§3 ECHR.
The lack of reasoning prevents the defendant from understanding the grounds for h/is pre-trial detention.
This affects also the right to file an opposition, because the defendant does not have any concrete basis to contest the decision.

The Turkish Authorities claim that the consideration about the reasoning of decisions by the liberty judges *""is not appropriate due the article 101/2 of CPC stating "evidence concerning pre-trial detention decisions must be justified through solid facts"". They claim that : "On the other hand, Justice Academy of Turkey carries out training activities for the Civil Judges of Peace to raise their awareness for the fact that they should justify their pre-trial detention orders. The syllabus of the Justice Academy of Turkey includes a course entitled "Justification of Court Orders in the light of the Case-law of the European Court of Human Rights", which has been delivered since 2012 to the trainee judges and prosecutors in civil and criminal justice. In this way, training of trainee judges and prosecutors as well as the Civil Judges of Peace will bring tangible results in practice in the following years. In addition to this, the due attention has been given to this matter through the organization of the following activities regarding the protection measures: Symposium on "Case-Law of the European Court of Human Rights in the field of Enforcement of Protection Measures and Freedom of Expression" held on 12 March 2012; Training Seminar on "Protection Measures under the Criminal Procedural Code" on 30 September 2013-1 October 2013; Seminar on "Protection of Private Life and Protection Measures within the framework of the European Court of Human Rights and Convention on*

Human Rights" on 28-30 April 2014; the Project entitled "Improving the Efficiency of the Turkish Criminal Justice System" implemented by the Justice Academy of Turkey has a training module titled "Pre-trial Detention and Judicial Control Measures"[80].

The negative attitude of judges in reasoning pre-trial detention orders could be positively changed by the third package of judicial reform, that introduced liberty judges with the sole task to devote time and efforts in reasoning "protective measures".
Judges with similar competences exist in UE Member States (for example in Italy).
Liberty judges were specifically trained for the new task.
Furthermore liberty judges were not involved into the merit of the case and could not, therefore, justify the poor reasoning of their decisions by the fear that a duly reasoned decision concerning the grounds for suspicion and detention would prejudice their opinions on the merits of the case and thus would constitute 'comments reflecting bias'.

However the "Omnibus Law" suppressed Liberty Judges.

It conclusion, the expert must recommend that every single decision on pre-trial decision is substantiated and justified upon the legal and factual grounds and reasons, connected with the specific circumstances and evidence of the case.

It is further highly recommended that, according to the principle of necessity (detention as *extrema ratio*[81]*)*, each judge performs the test or proportionality by giving specific reasons for not resorting to judicial control.

As regards judges who deal with liberty of persons in the whole Country**,** it is highly recommended that they, as a matter of urgency, undergo judicial training, about articles 5 and 6 of the European Convention of Human rights and about the practice of reasoning pre-trial detention order followed by liberty judges in EU Member States.

Liberty judges, entrusted for handling with decisions and objection against decisions regarding "protection measures" such as: search, seizure, apprehension, detention, and detection of communication, should be re-established.

The provision on *catalogue crimes,* art. 100, paragraph 3 of the c.p.c., should be suppressed and until it is suppressed, full justification should be given for pre-trial detention orders falling under the umbrella of this provision[82].

[80] Second set of comments.
[81]Recommendation Rec (2006)13 of the Committee of Ministers on the use of remand in custody[81], provides that the use of remand in custody must always be exceptional and justified. It is crucial to safeguard the principle of presumption of innocence and bear in mind that the only justification for detaining persons whose guilt has not been established by a court could be to ensure that the investigations are effective (securing all available evidence, preventing collusion and interference with witnesses) or to avoid evasion of justice. Where less restrictive alternative measures (such as judicial control, release on bail or bans on leaving the country) could address these concerns, they must be used instead of detention.
[82] The Tukish Authorities observe in the second set of comments the following :" *The first sentence of article 100/3 of CPC states that "if strong grounds for suspicion are present, that the below mentioned crimes have been committed, then 'the ground for arrest with a warrant' may be deemed as existing."; however, this cannot be interpreted as an absolute ground for arrest against the crimes listed. To the contrary, the practice of catalogue crimes restricts the rendering of pre-trial detention orders by the judges for the crimes outside the scope of the catalogue crimes. In this way, the rights and freedoms of persons are protected more effectively".*

RECOMMENDATIONS

We **RECOMMEND**

- every single decision on pre-trial decision be substantiated and justified upon the legal and factual grounds and reasons, connected with the specific circumstances of the case;
- according to the principle of necessity (detention as *extrema ratio),* judges deciding over pre-trial detention to perform the test or proportionality by giving specific reasons for not resorting to judicial control;
- the provision on *catalogue crimes,* art. 100, paragraph 3 of the CPC, be suppressed and, until it is suppressed, full justification be given for pre-trial detention orders falling under the umbrella of this provision;
- judges dealing with liberty of persons undergo, as a matter of urgency, judicial training about article 5 and 6 of the European Convention of Human rights and about the practice of reasoning pre-trial detention order followed by liberty judges in EU Member States;
- liberty judges, entrusted with handling decisions and objection regarding "protection measures" such as: search, seizure, apprehension, detention, and detection of communication, be re-established.

3. THE CONDITIONS FOR ISSUING A PRE-TRIAL DETENTION ORDER, SEIZING ASSETS OR INTERCEPTING COMMUNICATIONS PURSUANT TO THE OMNIBUS LAW

The Omnibus Law adopted on 20 February 2014, beyond the abolition of liberty judges, impinges on the conditions for the issuance of protective measures; it requires 'strong suspicions based on *solid evidence*' to issue a pre-trial detention order, to seize assets or to decide interception of communications. It further requires the *unanimity* of a three-member panel of judges for intercepting communications and appointing undercover agents; the unanimity rule applies in first and in second instance, both for the decision and the objection (appeal), for seizing assets. Furthermore, the Omnibus Law, by amending article 128 of the CPC, requires judges, before deciding on the judicial seizure of "immovable properties, claims and receivables" , to previously get a report by the relevant administrative Authority (the Banking Regulatory and Supervisory Board, Capital Market Board, Financial Crimes Investigation Board) "stating "the quantity of property or other assets claimed to be obtained out of the committed crime".

Another law - n° 6532- adopted in April 2014, amends the law on state intelligence services and national intelligence organization, and broadens the power of the intelligence service to investigate, intercept private communications –upon the authorization of a single judge-, and collect secret information.

CONSIDERATIONS

The new law requires broadly *solid evidence* to issue a pre-trial detention order (art. 1 paragraph 1 of the CPC), to order searches (art. 116 of the CPC) to seize assets (art. 128 of the CPC), to decide interceptions of communications (art. 135 of the CPC), to appoint an undercover agent (art. 139 of the CPC). The government claims that it is intended to mainly prevent violations of freedom to liberty and security of suspects. However it might create insurmountable problems in practice. This is about the investigation phase, when prosecutors try to collect evidence to charge the defendant. If solid evidence is already available, the prosecutor would issue the indictment and the case should be

ready for trial. In particular interception of communications is used to look for evidence. If prosecutors have already collected solid evidence, then they have no need to intercept communications.

The above provision together with the further rule that provides for a panel of three judges to *unanimously* issue an authorization for the interception of communication (art. 135 of the CPC) was a reaction by the Government to the December investigations about high profile corruption cases; it has the evident effect of limiting prosecutors in performing the investigations[83].

The unanimity rule brings the potential to block every investigation (it would sufficient the opposition of one among three judges for interception, technical surveillance and appointment of undercover agents and among six judges in case of seizure – three for the decision and three in case of objection-) and is indeed totally inconsistent with further CPC provisions: for example a single judge can deprive a person of his/her liberty and a panel of judges by a simple majority can order a life imprisonment. The inconsistency of the provision is aggravated by the consideration that another law, N° 6532, adopted in April 2014, allows the secret services, that depend on the Prime Minister, to intercept private communication upon the authorization of a single judge and without the need to justify the request with specific grounds.

The further rule that requires judges to get a report by the relevant administrative Authority to seize immovable properties is a clear interference in the independent exercise of jurisdiction by judges[84].

It goes without further saying that the above provisions must be erased as soon as possible, in order to allow Justice to take its natural course.

RECOMMENDATIONS

We **RECOMMEND**

- the provision of law no 6526 requesting *solid evidence* to issue a pre-trial detention order (art. 1 paragraph 100 of the CPC), to order searches (art. 116 of the CPC) to seize assets (art. 128 of the CPC), to decide interceptions of communications (art. 135 of the CPC), to appoint an undercover agent (art. 139 of the CPC) be abrogated [85];
- the provision of law no 6526 requesting for a panel of three judges to *unanimously* issue or

[83] In their first set of comments on the report, Turkish Authorities claim that: *The Law No 6526 aims to provide better security for the fundamental rights and freedoms such as personal liberty and security, the right to privacy and freedom of communication. (...) Such measures should be resorted to a limited extent given the importance of presumption of innocence that is applicable to the investigation phase".*

[84] In their first set of comments on the report, Turkish Authorities claim that: *Law No 6526 is not related to whether the property was obtained out of the committed crime, it is rather related to the value generated out of the committed crime. Besides, such report is not binding on the panel of judges of the heavy criminal court who will decide, while it is subject to the rules set forth in the CPC and applicable to the expert opinions. In another word, the concerned provisions does not interfere in the independent exercise of jurisdictions by judges".*

[85] In the second set of comments the Turkish Authorities report the following "*As regards the solid evidence criteria recommended in the report to be abrogated, Article 21 of the Bill that was accepted by the Parliamentary Justice Commission on 13 November 2014 and submitted to the General Assembly of the Parliament stipulates an amendment to the article 116 of the Criminal Procedural Code no 5271. This amendment requires "reasonable suspicion" to search the suspect or the accused. This amendment is in line with the recommendation in the report*".

confirm, if opposed, an authorization for the interception of communication (art. 135 of the CPC) be abrogated[86];

- the provision of law no 6526 requiring judges to get a report by the relevant administrative Authority to seize immovable properties and other assets be abrogated[87].

4. DURATION OF PRE-TRIAL DETENTION

The Turkish CPC provides that the maximum length of pre-trial detention shall not exceed specified periods, depending on the gravity of the offence (Article 102). Where the crime is not within the jurisdiction of the special courts, the maximum period of detention is one year. If necessary and provided the reasons are explained, this period may be extended by six more months.
Where the crime relates to serious criminal offences, the maximum period of detention is two years. If necessary and provided the reasons are explained, this period may be extended by three years, which makes a total of five years.
These time limits were part of the reform of the CPC in 2004, but their entry into force had been postponed until the end of 2010.

However, longer detention periods were provided by article 10 of the ATL with reference to the previous 252§5 CPC, according to which[88] the upper limit for detention on remand becomes twice as long (and therefore up to ten years) for crimes falling under the competence of special courts.

By decision of 4 July 2013[89] the Constitutional Court (henceforth: CC) annulled the legal provision contained in the ATL which allowed long pre-trial detention up to 10 years, because it collided with the principle of proportionality.

The principle of proportionality can been infringed, according to the CC ruling, also if total pre-trial detention time does not exceeds five years. As to latter category of cases, the CC leaves a certain margin appreciation to the first instance courts[90]. However, the Court also stated that if the first instance court decides to extend detention period, the reasons for the extension must be relevant and sufficient with reference to the concrete conditions of the case[91]. When the criminal court uses stereotype reasons for extension, these criteria are not met[92].
Although the CC found that 10 years in detention is disproportionate time, it gave the Parliament one year time to amend this rule, according to Article 153 (3) of the Constitution.

The Omnibus Law implemented the CC ruling and abrogated art. 10 of the ATL.

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[86] In the second set of comments the Turkish Authorities claim that: "*During the investigation, detection of communication, appointment of an undercover agent and seizure of assets are ordered without the suspect being aware of such decisions and there is no possibility to raise an objection to these decisions because they are confidential. The concerned legal arrangement created a safer system for the suspects with respect to this situation that is directly related to the individual rights and freedoms*"..

[87] In the second set of comments the Turkish Authorities claim that: "*Article 128 of the Criminal Procedures Code amended by the Law no 6526 introduced the requirement to get a report to seize the immovable properties and assets. This report is an expert opinion report on a technical subject-matter. This is not binding on the court. Therefore, the court can take a decision without taking account of the report*".

[88] The maximum duration of the arrest with a warrant as foreseen by the Code shall be applied doubly in relation to the crimes mentioned in Article 250, subparagraph one, subsection (c).

[89] Judgment of 4.7.2013, no. E:2012/100, K:2013/84.

[90] B. No: 2012/239, para. 49.

[91] B. No: 2012/1137, 2/7/2013, para. 63.

[92] No. 2012/1158, 21.11.2103, para. 56.

According to the recent case law of the Court of Cassation (henceforth CoC), time limits do not apply while the case is pending before the CoC. The decision was adopted by the 10th chamber of the CoC[93] and confirmed by the Criminal General Council of the Court of Cassation[94]. This interpretation have been upheld by the CC in the context of the "Individual Complaint" mechanism, envisaged by the 2010 amendments to the Constitution for the protection of individual fundamental rights.

The CC made also clear that detention time cannot exceed five years, even if a person is tried for more than one criminal offence in a single case. In a number of individual cases[95], the Court stated that if the detention time, pending trial, is separately assessed for every single criminal charge , the total detention period becomes unforeseeable for the accused. Thus, it is also a violation of the principle of proportionality.
According to the information received by the expert, the CoC does not fully accept the latter interpretation by the CC. As a consequence it is still possible that defendants are kept in pre-trial detention for a period longer than five years, if they are charged with more than one criminal offence.

CONSIDERATIONS

The Turkish CPC does not define pre-trial detention.
In most EU Members States the notion of pre-trial detention, in the light of guarantees ensured by national procedural laws, covers the entire period spent by the accused in preventive detention from the moment of the police arrest or the judicial order for detention on remand up to the final judgment.

In 2010 the 10th department of the Court of Cassation, reversing its previous case law, considered that the statutory maximum duration of pre-trial detention is applicable to the preventive detention up to the first instance judgment and does not cover the period spent in detention following the first instance decision until the final judgment.
In the course of the first, third and fourth missions, the Court of Cassation judges maintained that the above interpretation is supported by the case-law of the Court of Human Rights, according to which time spent in custody following the conviction, even though not final, cannot be counted as pre-trial detention in the light of art. 5 ECHR[96].

[93] Whilst the 9th chamber maintained the interpretation according to which the statutory maximum duration covers also the second instance phase.
[94] In its Decision No. 2011/42 dated 12 April 2011, the Criminal general Council of the CoC stated the following: "*The time spent until the local court renders its judgment should be taken into consideration in counting the detention time, whereas the time spent in detention during the appeal proceedings following the judgment of the local court should not be counted as detention time since the accused will be imprisoned as per the verdict of the local court. The verdict of conviction against the accused means indeed that the local court has concluded that the accused has actually committed the alleged offence; hence the continuation of detention is justified by the verdict of conviction after this phase. As matter of fact, the ECtHR takes into consideration the time spent in detention after conviction by a first instance court in calculating the reasonable detention time in its decisions in which it enforces the Article 5 of the ECHR".*
[95] Amongst others, see CC, First Section, no. 2012/239, k.t. 2.7.2013, para. 54.
[96] ECtHR, 27 June 1968 in case *2122/64 Wemhoff v. Germany: "*a person convicted at first instance, whether or not he has been detained up to this moment, is in the position provided for by Article 5 (1) (a) (art. 5-1-a) which authorises deprivation of liberty "after conviction". It cannot be overlooked moreover that the guilt of a person who is detained during the appeal or review proceedings, has been established in the course of a trial conducted in accordance with the requirements of Article 6 (art. 6). It is immaterial, in this respect, whether detention after conviction took place on the basis of the judgment or - as in the Federal Republic of Germany - by reason of a special decision confirming the order of detention on remand. A person who has cause to complain of the continuation of his detention after conviction because of delay in determining his appeal, cannot avail himself of Article 5 (3) (art. 5-3) but could possibly allege a

According to the above interpretation, a defendant charged with a serious criminal offence, could, until July 2013, be detained up to ten years while waiting for the first instance judgment.
This was an enormously disproportionate time.

On 4Th July 2013 the Constitutional Court annulled the provision contained in art. 10 of the ATL allowing the "double" pre-trial detention duration. Article 10 was subsequently abrogated by the Omnibus Law in February 2014.
As a consequence the statutory maximum duration of pre-trial detention for serious criminal offences is five years.

The abrogation of art. 10 can be considered a great improvement in the direction of bringing duration of pre-trial detention in line with the principle of proportionality.

However, it has to be remarked that, according to international standards and the ECtHR case law, even where the national law has been complied with, the deprivation of liberty cannot be considered lawful if domestic law allows for excessive detention in the concerned case[97]. The ECtHR held that the duration of pre-trial detention must not exceed a reasonable time. By way of example, the Court has found excessive periods of pre-trial detention lasting from two and a half to nearly five years[98].

As mentioned above, in chapter 2.1., as of 07.11.2014 the duration of pre-detention before first instance decision was longer than three years for 529 individuals.

Pre-trial detention should, instead, be limited to those circumstances where it is strictly necessary in the public interest, but also the continuing detention must be justified, as long as it lasts, by adequate grounds of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.
The persistence of a strong suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention. However, after a certain lapse of time, it no longer suffices: other grounds must exist to justify the continuation of deprivation of liberty. The national authorities must display special diligence in the conduct of proceedings; the complexity and special characteristics of the investigations are factors to be considered in this respect[99].
The experts recalls that article 5§3 ECHR imposes a special diligence on prosecutors in bringing the case to trial if the accused is detained and implies that a detained person is entitled to having the case given priority and conducted with particular expedition.

Moreover, when the defendant is charged with more than one criminal offence, if the detention time, pending trial, is separately considered for every single criminal charge , the total detention period becomes unforeseeable for the accused and this constitutes a violation of the principle of proportionality, as established by the Turkish Constitutional Court.

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disregard of the "reasonable time" provided for by Article 6 (1) (art. 6-1). (see also: ECtHR, *Labita v. Italy*, 6 April 2000; *Olstowski v. Poland* 15 November 2011; *Karabulut v. Turkey* 24 January 2008; *Demirbaş and others v. Turkey,* 9 December 2008 § 79; *Solmaz v. Turkey*, 16 January 2007 § 34; *Wemhoff v. Germany*, 25 April 1968).
[97] ECtHR, *Scott. V. Spain,* 18 December 1996.
[98] ECtHR, *Punzelt v. Czech Republic*, 25 April 2000; *Pantano v. Italy*, 6 November 2003.
[99] ECtHR, *Letellier v. France,* 26 June 1991 §35; *Tomasi v. France,* 27 August 1992, §84; *Kemmache v. France*, 27 Novembre 1991, §45.

For what regards the period spent in detention following a conviction that is not final, it has to be remarked that the European Court also said that[100], even though a person who has cause to complain of the continuation of his detention after conviction due to delays in deciding on his appeal cannot avail himself of article 5§3 ECHR, he or she could possibly allege a disregard of the "reasonable time" provided for by Article 6§1 ECHR.

In any case the period spend in detention after the first instance decision has been quashed by the Court of Cassation should be counted as pre-trial detention also in the light of article 5§3 ECHR[101].

RECOMMENDATIONS

We reiterate the **RECOMMENDATIONS**

- that pre-trial detention be limited to those circumstances where it is strictly necessary in the public interest and that the continuing detention should be justified, as long as it lasts, by adequate grounds of a genuine requirement of public interest[102];
- that, in any case, pre-trial detention do not exceed a reasonable time;
- that special diligence be displayed by prosecutors in bringing the case to trial if the accused is detained;
- that a detained person be entitled to having the case given priority and conducted with particular expedition[103].

5. DOMESTIC REMEDIES TO CHALLENGE THE LAWFULNESS OF THE PRE-TRIAL DETENTION

During the investigation phase, upon the motion of the public prosecutor, the peace criminal judge shall issue an arrest warrant for the suspect (CPC Art. 101/1,162). During the prosecution phase, the trial court shall issue an arrest warrant for the accused upon the motion of the public prosecutor, or ex officio (CPC Ar.101/1).
If the interrogation of the accused has not been conducted, decision of arrest with a warrant may be rendered upon interrogation.

[100] *Wemhoff v. Germany*, 25 April 1968.

[101] ECtHR 23 September 1998, *I.A. v. France* and 16 January 2007 *Solmaz v. Turkey* §34. In the later case the court observes the following: "in the present case, the applicant's pre-trial detention began when he was arrested on 23 January 1994. He was detained for the purposes of Article 5 § 3 of the Convention until his conviction by the Istanbul State Security Court on 12 June 2000. From that date until 15 May 2001, when the Court of Cassation quashed the decision of the first-instance court, he was detained "after conviction by a competent court", within the meaning of Article 5 § 1 (a) and therefore that period of his detention falls outside the scope of Article 5 § 3 (see *B. v Austria* §§ 33-39, and *Kudła v. Poland* § 104, , cited above.). From 15 May 2001 until his release pending trial on 18 February 2002, the applicant was again in pre-trial detention for the purposes of Article 5 § 3 of the Convention".

[102] In the second set of comments, the Turkish Authorities consider this recommendation *inappropriate* because "Article 101/2 of CPC stipulates "*the decision on arrest should be furnished with the legal and factual grounds and reasons"*;.

[103] In the second set of comments the Turkish Authorities observe the following. "*Pursuant to the article 108/1 of the Criminal Procedures Code, during the investigation phase in time limits not exceeding 30 days each, an evaluation on whether the continuation of the status of the arrest with a warrant is necessary or not, shall be conducted by the Civil Judge of the Peace upon the motion of the public prosecutor. The suspect may also file a motion of evaluation of the status of his arrest with a warrant. The cases related to the persons remanded in custody shall also be tried during the judiciary recess period. In practice, the hearing intervals are determined by judges in a way not to exceed 30 days for cases in which the suspect is detained in order to avoid any damage to the person's rights and freedoms. The accused or her/his defense counsel may always file a motion for the hearing to be held on an earlier date. In practice, the judges are sensitive to this matter and hold hearings on an earlier date in case of a relevant motion*".

Pursuant to art. 101§4 CPC, decisions on arrest with warrant, on continuation of detention, or denying the motion of release from detention may be subject to a motion of opposition.

Opposition to the decision of arrest with a warrant shall be made within seven days since the concerned persons learn about the decision. According to art. 271 of the CPC, decision upon the motion of opposition shall be rendered without conducting a main trial. However, if deemed necessary, the public prosecutor, and subsequently the defense counsel or the representative shall be heard.

Furthermore, according to article 104 CPC, a suspect or accused is entitled to file a motion of release at any stage of the investigation or prosecution. The judge or trial court decides whether detention should continue or the suspect or accused should be released.
Article 105 CPC provides that the decision on approving the motion, denying it or ordering judicial control is rendered by the competent authority within three days, after the opinions of the Public Prosecutor, suspect, accused or defense counsel have been obtained. These decisions may be subject to a motion of opposition.

The fourth package of judicial reforms brought an amendment to article 105 by establishing that "*when deciding outside a hearing, the opinions of the public prosecutor, suspect, accused or their lawyers are not received*". The amendment is justified by the need to ensure the "equality of arms" principle between prosecution and defense (art. 5§4 of the European Convention).

Before the third package of judicial reforms was approved, the motion for release was dealt with by the "judge on duty", and the motion of opposition by a panel of three judges. If the accused filed more than one motion, each motion was dealt with by a different specially authorized court.
Following the third package the motion for release and the motion of opposition were to be assigned to a liberty judge different from that one who issued the decision of detention.
After the abrogation of liberty judger, it was the again the "single judge on duty" to deal with pre-trial detention orders, until Law No 6545, passed in June 2014, entrusted Civil Judges of the Peace with the competence of dealing with personal liberty .

The fourth package of judicial reforms, by amending article 108§1 of the CPC, established the duty of the Justice of the Peace to decide every 30 days in a hearing about the continuation of the pre-trial detention.

The CPC also provides for the right to compensation for unlawful detention, comprising both pecuniary and non-pecuniary damages (Articles 141 to 144).

According to the Commissioner of Human Rights of the Council of Europe, the practice of the domestic courts and prosecutors continues to confirm the established case-law of the European Court of Human Rights[104], stressing that the Turkish legal system lacks an effective and genuinely adversarial domestic remedy that could offer applicants the opportunity to challenge the lawfulness of their pre-trial detention, as well as reasonable prospects of success[105].

The Turkish Authorities claim that: " *As per the Article 101/5 of CPC, decisions on pre-trial detention may be subject to a motion of objection. Law no6545 introduced a remarkable amendment regarding the motion of objection to all judge and court orders including pre-trial detention orders. Pursuant to the article 268/3*

[104] *Kürüm v. Turkey*, 26 January 2010, §17.
[105] Thomas HAMMARBERG, Commissioner of Human rights of the Council of Europe, "*administration of justice and protection of human rights in Turkey"* dated 10 January 2012.

of CPC, objection against the decisions of a civil judge of peace on pre-trial detention shall definitely be handled by another civil judge of peace. This means that pre-trial detection orders as well as objections shall be handled by specialized judges on this matter. By this provision a remedy which is effective and subject to judicial review has been introduced for effective protection of individual rights and freedoms" [106].

They further claim that: "*Pursuant to the article 108/1 of the Criminal Procedures Code, during the investigation phase in time limits not exceeding 30 days each, an evaluation on whether the continuation of the status of the arrest with a warrant is necessary or not, shall be conducted by the Civil Judge of the Peace upon the motion of the public prosecutor. The suspect may also file a motion of evaluation of the status of his arrest with a warrant. The cases related to the persons remanded in custody shall also be tried during the judiciary recess period. In practice, the hearing intervals are determined by judges in a way not to exceed 30 days for cases in which the suspect is detained in order to avoid any damage to the person's rights and freedoms. The accused or her/his defense counsel may always file a motion for the hearing to be held on an earlier date. In practice, the judges are sensitive to this matter and hold hearings on an earlier date in case of a relevant motion*"[107].

CONSIDERATIONS

The expert notes that the current procedure to challenge the lawfulness of pre-trial detention initial order, that is the opposition to the decision of arrest with a warrant regulated by articles 101, 267, 268. 270 and 271 of CPC, is carried out by the judge on the basis of documents, without the accused having the right to a hearing . The expert also notes that under article 5 (1) (c) ECHR an adversarial oral hearing with legal representation is always required.

The amendment brought to article 105 of CPC by the fourth package of judicial reforms has not substantially improved the situation to this respect.
In the previous practice the justice of peace (and then the liberty judge) used to collect the opinion by the prosecutors without submitting a copy of it to the defense lawyer and without giving him/her the opportunity to reply. This infringed the principle of equality of arms protected by the European Convention on Human Rights[108].
In order to remedy the infringement of the Convention, to ensure the "equality of arms" and, at the same to ensure the right of the detainee to be heard by a judge, the legislator would have been expected to establish a full adversarial hearing and to empower the defense with the right to receive a copy of prosecutor's opinion and to reply in front of the judge.
The Parliament decided instead to simply shortcut the adversarial phase of the proceeding.

The amendment to article 108§1 of the CPC about the right of the accused to be heard by the judge before he/she takes the decision on continuation of the detention, 30 days after the initial arrest and every 30 subsequent days, is instead an important step forward the protection of rights of detainees..

The expert further underlines that the Turkish legal system does not provide for any access by parties to an authority which can exercise its supervisory jurisdiction over the trial court to expedite the proceedings[109].

RECOMMENDATIONS

[106] Second set of comments.
[107] Second set of comments.
[108] ECtHR, *Altinok v. Turkey*, 29 November 2011.
[109] ECtHR, *Tendik and others v. Turkey,* 22 December 2005 § 36.

We **RECOMMEND**

- a genuinely adversarial remedy be introduced, in order to allow the accused to challenge the lawfulness of their pre-trial detention and to be heard by the judge adjudicating upon the opposition to the decision of arrest with a warrant;
- a remedy be introduced to allow parties to access an authority which can exercise its supervisory jurisdiction over the trial court to expedite the proceedings.

6. DISCLOSURE OF THE INVESTIGATIVE FILE

Pursuant to former article 10 let. d) of the Anti-Terror Act, access by the defense lawyer to the prosecution file, to examine the content or make copies of documents, could be fully limited by a decision of a judge further to a request by a public prosecutor, if it was deemed that such access might put to risk the aim of the investigations.
The reported ATL provision was abrogated by the third package.

However a similar restriction is provided under article 153 of CPC, according to which the right of the suspect and the defense lawyer to access the case file can be restricted by the judge upon the request of the public prosecutor, if such access may endanger the purpose of the initial investigation.
This applies only for the criminal offences listed in article 153 as amended by art. 44 Law No 6572 dated 02.12.2014 and does not apply for certain types of documents, such as records of suspect's statements, written expert opinions, and records of other judicial proceedings during which the suspect in entitled to be present.

Lawyers and NGO representatives, who the expert met, claim that the power to restrict the access to the prosecution files is used extensively by judges, upon prosecutors requests.

The Turkish Authorities claim that: "*As per Article 153 of CPC amended by the Law no 6526 on 21.02.2014; limitations that might prevent the defense counsel from reviewing the full content of the file related to the investigation phase and taking a copy of his choice of documents have been removed. Accordingly, the defense counsel may review the full content of the file during the investigation phase and may take a copy of his choice of documents without paying any fees for such. The counsel of the victim also has the same right*"[110].

CONSIDERATIONS

The expert remarks that limitations to the fundamental right of the arrested to access to the case file to challenge the basis of the allegations against him, must be highly exceptional and must depend on the specific circumstances of the case.
With specific reference to the possibility of non-disclosure of certain evidence to the defense, it is important to note that the lawyers´ access to files concerning the defendant is a crucial element in the right to a fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (§ 3 letter b) establishes that those charged with a criminal offence are to have adequate time and facilities for the preparation of a defense
However, one needs to take into account that in Turkey, as in most continental criminal procedures, much or most of the evidence is compiled in the pre-trial stage, in particular during the investigation. In the pre-trial phase, one needs to ensure both the rights of the accused and the conditions for the public prosecutor to conduct the investigation and prepare the indictment efficiently and rapidly. The accused may abuse information about incriminating evidence, if made

[110] Second set of comments.

aware. Or he may destroy evidence that would further incriminate him or instruct others to do so. Evidence obtained may also assist the accused in committing further offences. Finally, the public prosecutor may wish to protect witnesses, in particular victims in a vulnerable situation, such as juveniles. In this kind of situation, the public prosecutor has every interest in keeping the relevant evidence confidential for as long as possible in order to conduct the proceedings effectively. This interest directly clashes with the interest of the accused, as regards being on an equal level with the public prosecutor and, in particular, being entitled to comment on the evidence and ask questions to the witnesses.

The European Convention strikes indeed a balance between the different interests. The public prosecutors must be aware that, as a rule, the accused shall have access to the relevant documents pointing at innocence or guilt already early in the proceedings; any limitation of this right has to be justified by the need to protect concrete public interests. In particular, the ECtHR has held that in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity to effectively challenge the basis of the allegations against him[111].

It is therefore essential that as much information as possible regarding the allegations and evidence against a suspect is disclosed, without compromising national security or the safety of others. Where full disclosure is not possible because of the necessity to safeguard specific and concrete public interests, Article 5§4 ECHR requires that the difficulties this causes are counterbalanced in such a way that the persons concerned still have the possibility to challenge the allegations against them effectively[112].

RECOMMENDATIONS

We **RECOMMEND**

- the accused to have access to the relevant documents pointing at innocence or guilt already early in the proceedings and the limitation of the right to access the prosecution file be justified by the need of protection of concrete public interests;
- where full disclosure is not possible, the persons concerned still have the possibility to access information necessary to effectively challenge the allegations against them.

7. QUALITY OF INVESTIGATIONS AND OF INDICTMENTS. JUDICIAL POLICE

According to article 161 CPC, it is the Public Prosecutor - either directly himself or through the judicial police under his/her command – who conducts investigations. Pursuant to article 164 of the same code, investigations are undertaken primarily by the judicial police upon instructions of the Public Prosecutor. The judicial police is obliged to notify Public Prosecutors immediately about

[111] See, *inter alia*, *Jasper v. United Kingdom*, judgment of 16 February 2000, § 52.

[112] See *A and others v. the United Kingdom*, judgment of 19 February 2009**.** Germany lost several cases before the Court of Human rights because of the strict implementation of article 147 (2) of the criminal procedural code, according to which the right of access to the file can be restricted until the end of the pre-trial period if and in so far access to the case file might impede the investigations (*Erden vs. Germany*, 5 July 2001; *Lietziv vs. Germany*, 13 February 2001; *Garcia Alva vs. Germany*, 13 February 2001.) In *Mooren vs. Germany*, 13 December 2007, the defence counsel had applied for a review of detention at the local court and, at the same time requested access to the public prosecutor's files, but the public prosecutor had refused access to the files completely, because otherwise the investigation would have been impeded. The ECtHR objected this refusal and ruled that a detained suspect or accused must have access to the relevant information at least to the extent that would enable him to argue against the lawfulness of his detention.

developments, persons apprehended and measures applied; it is also obliged to comply with the judicial orders[113] of Public Prosecutors without delay (Article 161§2 CPC).

In 2005, in order to define relations between prosecution and judicial police, a "By-law on Judicial Police" was adopted jointly by the MoJ and the Ministry of the Interior as foreseen in article 167[114] of CPC. It came into force on 1 June 2005, together with the new CPC. Pursuant to the above by-law, the public prosecutors should have full supervision over the police forces in judicial investigations and cases; they should also assess its performance. However, this has not yet materialised.

Short term experts and the Long-Term Consultant within EU/Coe Joint programme[115] "*Improving the efficiency of the Turkish criminal justice system"*repeatedly emphasised that judicial police is entirely dependent on the chief of police -who is responsible for their career and prioritise their work- and that the investigation is directed by the police rather independently.

As reported above, in December 2013, when special prosecutors initiated proceedings against cabinet members and/or their close relatives for suspicion of corruption, the first reaction by the Government to those proceedings was an amendment of 26 December 2013 to the by-law on the Judicial Police, that required police investigators assisting prosecutors in the investigations to report those investigations to their police superiors.
The HSYK thereupon issued a public statement in which it qualified such a reporting requirement an interference in the independence of prosecution.

The Turkish Authorities claim that : "*The amendments made to the by-law on the Judicial Police do not prevent the prosecutor from performing the investigations independently. In fact, the administrative authorities are not entitled to give orders to the judicial police. Judicial investigations are carried out exclusively under the initiative of the prosecutors. Those who will fulfill judicial tasks under the police organization are identified in advance. On the other hand, only the top ranking superior is authorized and charged with the duty to identify the tasks to be carried out by the judicial police within the police organization, identify the adequate number of judicial police officers for judicial tasks, and organize the activities through performing the overall supervision and control over the police officers. For that reason, it is important to inform the police superiors about the judicial investigations for the effective and efficient operations of the police organization*"[116].

During his first visit to the prosecution office attached to the Ankara specially authorize heavy criminal court, the expert was informed that prosecutors do not resort to general written guidelines or to written protocols to guide and direct the police in its investigations. The prosecutors practically keep control over the investigations by issuing written instructions for each individual case. After the first visit the expert was provided with some samples of written instructions addressed by the prosecutors to the police security directorate counter-terrorism branch office or to the security directorate smuggling and organized crime office. These instructions consisted of guidance given by prosecutors to the police on how to implement the investigative activities;

[113] According to paragraph 3 of article 161 of CPC public prosecutor shall give his orders to the law enforcement officials in writing; in urgent cases, the orders may be given verbally.
[114] Article 167 of CPC states that (1) *the qualifications of the members of the judicial police, their pre- and in-service training, their relations with other service units, the preparation of evaluation reports, the departments where they will work according to their areas of specialization and other issues shall be laid down in a regulation to be issued jointly by the ministries of Justice and Interior within six months after the date of entry into force of this Law*.
[115] The short term consultants conducted a series of fact-finding visits to courthouses in Ankara (from 8 to 11 October and 10-17 December 2012), Izmir (05-08 November 2012), Malatya (26-29 November 2012) and Istanbul (8-13 2013).
[116] Second set of comments

however those instruction were often of a non-specific character, giving little direction and leaving much discretion and legal decisions to the police; prosecutors did not prioritize between potential targets and did not select the proper investigation methods; furthermore prosecutors did not established time-limits and specific communication channels for the police to report back on development in the investigations.
The practice of not reporting back to prosecutors about developments in the investigations, if not seldom and only verbally ad not in written, was confirmed by the Judicial Police met by the expert in the Police Directorate in Diyarbakir, in the course of the second visit to Turkey.

The expert was not provided with official statistical information about the duration of the investigations. In the course of the first visit, the Istanbul Chief prosecutor affirmed that Istanbul prosecutors tend to observe a six-month time period – which is not prescribed by the law- between the arrest and the issuing of the indictment.
However, apparently, prosecutors have not established methods and procedures to monitor the timeframes of investigative activities and to verify that their instructions are effectively implemented by the police and do not calculate the average duration of the investigations performed by the police since the registration of the criminal reports.

The Commissioner of Human Rights of the Council of Europe has expressed his concerns about the quality of the indictments, as the length of these documents, especially in cases relating to terrorism and organised crime, can become excessive, sometimes exceeding thousands of pages. The Commissioner of Human Rights stated that this is due to the fact that indictments contain a compilation of pieces of evidence, such as long, indiscriminate transcripts of many wire-tapped telephone conversations, some of which reportedly bear little relevance to the offence in question. In its reply to the report, the Turkish Government admitted that indictments often take a very long time to prepare, frequently while the suspects are remanded in custody.

The problem of quality of indictments explained above was also raised by lawyers and representatives of NGOs who the expert met in the course of the missions. They affirmed that the poor quality of indictments is due to the fact that many prosecutors do not filter the criminal reports prepared by the police and simply forward it to the court in the form of an indictment.

On 10 April 2013 at 13th Heavy Penal Court of Ankara an independent monitoring group[117] monitored the first hearing at trial which is held within the scope of KCK investigation, where a total of 72 members of the union, -22 being detained pending trial- including the President of KESK Lami Özgen, were being prosecuted. The presiding judge stated that the indictment which consisted of 1144 pages would have not be read through. The defence lawyers claimed that, among the 1144 pages, the assessment of the prosecutor on the relation between the 72 accused persons and the evidence lasted only 7 pages and there was no individual assessment of criminal responsibility.

CONSIDERATIONS

Under Turkish criminal procedural law prosecutors are obliged to investigate in a neutral manner, collecting evidence for and against potential suspects and have the responsibility to guide the judicial police to this aim.

[117] Composed by The EUD, Netherlands Embassy, Euro-Mediterranean Human Rights Network (Executive director M. Marc Schade-Poulsen, and international lawyer M. Jonathan Cooper, mandated by the UK member-organization Solicitors International for Human Rights Group), Turkish MPs and international union organisations.

Pursuant to Rec (2000)19[118], *in countries where police investigations are either conducted or supervised by the public prosecutor, State should take effective measures to guarantee that the public prosecutor may: a. give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.; b. carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law; c. sanction or promote sanctioning, if appropriate, of eventual violations.*

According to the information received by the expert, the capacity of the prosecutor's office to effectively guide the investigations and to keep a strict control over police activity is jeopardised. This is due to the fact that the prosecutors currently operate availing themselves of judicial police units within the police directorates, which operate under the hierarchical control of the Ministry of the Interior.

The capacity of the prosecutors to effectively and independently guide the judicial police was seriously undermined by the December 2013 amendment to the by-law on the Judicial Police, that required police investigators assisting prosecutors in the investigations to report those investigations to their police superiors, before than to prosecutors. This was a clear interference by the Government in the independence of the investigations.

The above situation reinforces the recommendation included by the experts in previous reports, that a proper judicial police, functionally dependent on the prosecution office, should be established; that police units attached to the prosecution office should be set up; and that, within the bigger prosecution offices, specialized judicial police units for investigating organized crime should be established.

The expert reiterates the recommendation, included in previous reports, that prosecutors should guide the police in the investigations by establishing written guidelines and protocols, and by assigning police time-limits for reporting back on the implementation of the investigation.

The Turkish Authorities claim that: "*Article 161 of the Criminal Procedures Code states that the public prosecutor shall perform the criminal investigations. Judicial police is dependent on the prosecution office with respect to their judicial tasks and only the public prosecutor can order and instruct the judicial police within the scope of judicial investigations. The chiefs of judicial police who have administrative capacities can neither order nor instruct the judicial police in relation to criminal investigations. The superiors of judicial police are subject to the same investigation procedures in terms of investigation methods as the judges and prosecutors are. In this sense, the judicial police in our country is quite independent from the administration with respect to judicial tasks and they are safeguarded enough*"[119].

The expert takes note that investigations about organised crimes may generate an exceptionally voluminous case file. The expert, therefore, recommends that prosecutors keep a strict control over relevant evidence obtained in the course of the investigations, in order to avoid that long time is needed to prepare the indictments while the suspects are remanded in custody, and that the indictments only contain information strictly related to the essence of the case.

[118] Recommendation Rec(2000)19, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 on "The role of public prosecution in the criminal justice system".
[119] Second set of comments.

The expert recommends that prosecutors take control and report periodically to the chief prosecutors about the duration of the investigations and about the reasons for delays in the investigative activities performed by the police.

RECOMMENDATIONS

We reiterate the **RECOMMENDATIONS**

- that a proper judicial police, functionally dependent on the prosecution office be established;
- that police units attached to the prosecution office and specialized judicial police units attached to the prosecution office for the investigations about organized crimes be set up[120].;
- that the prosecutors instruct the police about the investigative techniques, issue written guidelines and establish written protocols about the priorities of police investigations, issue guidelines for the contents of police reports, smooth communication lines, preferably along IT means, the duration of the investigations, means for searching evidence, covenants on quality and quantity of police work and feedback from the prosecutor's offices;
- that the prosecutors assign to the police time-limits for reporting back on the implementation of the investigation[121]

We **RECOMMEND**

- that prosecutors keep a stricter control over the relevant evidence obtained in the course of the investigation, avoid that long time is needed to prepare the indictments while the suspects are remanded in custody, and avoid that indictments contain information which is not relevant to the essence of the case.

[120] The Turkish Authorities in the second set of comments claim that: "*Article 161 of the Criminal Procedures Code states that the public prosecutor shall perform the criminal investigations. Judicial police is dependent on the prosecution office with respect to their judicial tasks and only the public prosecutor can order and instruct the judicial police within the scope of judicial investigations. The chiefs of judicial police who have administrative capacities can neither order nor instruct the judicial police in relation to criminal investigations. The superiors of judicial police are subject to the same investigation procedures in terms of investigation methods as the judges and prosecutors are. In this sense, the judicial police in our country is quite independent from the administration with respect to judicial tasks and they are safeguarded enough*",

[121] The Turkish Authorities in the second set of comments claim that: ""Article 332 of CPC stipulates that "*the request for the information, given in a written form by the public prosecutor, the judge, or the court during a pending investigation or prosecution, a response must be given within 10 days. If it is not possible to comply with the inquiry within this period, the ground for that and when the response shall be delivered the latest shall be informed within the same period. The writing that asks for the information shall also contain the caution with a statement about the provision of the previous subparagraph, and of non-compliance would mean the violation of Art. 257 of the Turkish Criminal Code. In such cases, except for parliamentary immunities, the investigation regarding persons for whom the opening a public case requires an authorization or a decision, shall be investigated directly*"".

8. CRIMINAL OFFENCES COMMITTED IN ORGANISED FORMS. IMPLEMENTATION OF ANTI-TERROR LAW BY COURTS

The expert remarks that the Council of Europe[122] and the ECtHR[123] noted on a number of occasions that the investigation of terrorist offences undoubtedly brings about special problems for the authorities, taking into consideration the risk that other members of the terrorist organisation could destroy evidence or put the lives of witnesses or even of judges in danger[124].

8.1 OFFENCES IN ORGANISED FORMS AND PROPAGANDA IN THE CPCP.

Article 220 of Turkish Criminal Code (TCC) sanctions membership in criminal organisations. Paragraph 1 punishes any person who establishes or directs an organisation[125] for the purposes of committing offences prescribed by law and provides for an imprisonment of two to six years. Paragraph 2 of the same article punishes membership of an organisation established to commit offences by imposing a penalty of imprisonment of one to three years. According to the third paragraph, if the organisation is armed, the penalty stated in afore-mentioned sections will be increased from one fourth to one half.

However, under the same article of the TCC, the law allows that a person is punished as a member of a criminal organisation, *even if he or she is not a member of that organisation* or *part of its hierarchical structure*, if he or she commits an offence on behalf of that organisation (paragraph 6), or aids or abets it knowingly and willingly (paragraph 7). In the first case (paragraph 6), the accused receives *an additional penalty of imprisonment as if he were a member of that organization*. In the latter case (paragraph 7) he is punished *as if he were a member of such an organisation.*

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[122] See Guideline X §3 of Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism adopted by the Committee of Ministers at its 804th meeting (11 July 2002), according to which:
3. The imperatives of the fight against terrorism may nevertheless justify certain restrictions to the right of defense, in particular with regard to:
(i) the arrangements for access to and contacts with counsel;
(ii) the arrangements for access to the case-file;
(iii) the use of anonymous testimony.
4. Such restrictions to the right of defence must be strictly proportionate to their purpose, and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.

[123] The Court recognises that an effective fight against terrorism requires that some of the guarantees of a fair trial may be interpreted with some flexibility. Confronted with the need to examine the conformity with the Convention of certain types of investigations and trials, the Court has, for example, recognised that the use of anonymous witnesses is not always incompatible with the Convention. In certain cases, like those linked to terrorism, witnesses must be protected against any possible risk of retaliation against them which may put their lives, their freedom or their safety in danger. See ECtHR, *Van Mechelen and others v. The Netherlands*, 23 April 1997, §. 57.
In another case the Court recognised that the interception of a letter between a prisoner – terrorist – and his lawyer is possible in certain circumstances: *Erdem v. Germany*, 5 July 2001, § 65, text only available in French: "*Il n'en demeure pas moins que la confidentialité de la correspondance entre un détenu et son défenseur constitue un droit fondamental pour un individu et touche directement les droits de la défense. C'est pourquoi, comme la Cour l'a énoncé plus haut, une dérogation à ce principe ne peut être autorisée que dans des cas exceptionnels et doit s'entourer de garanties adéquates et suffisantes contre les abus (voir aussi, mutatis mutandis, l'arrêt Klass précité, ibidem).*"

[124] With reference to the disclosure of evidence in *Rowe and Davies v. United Kingdom*, 16 February 2000, § 61 the ECtHR stated that the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keeping police methods of investigation of crime secret, which must be weighed against the rights of the accused.

[125] Provided the structure of the organisation, number of members and equipment and supplies are sufficient to commit the offences intended. However, a minimum number of three persons is required for the existence of an organisation.

The third judicial reform package for those who are not members of an organisation but who commit a crime on its behalf (Article 220 (6) CC), established that the penalty imposed for being a member of the organisation may be decreased by half.
Under the new provisions, a person, not involved in an organisation, who aids it knowingly and willingly (Article 220 (7) CC), the penalty for being member of the organisation can be decreased by two thirds depending on the assistance provided.

Paragraph 8 of Article 220 TCC provides for imprisonment ranging from one to three years for a person who makes propaganda in favor of a criminal organisation or its aims. If the crime is committed through media and press the sentence is increased by one half.
In order to comply with the principle of the freedom of expression the fourth judicial reform package amended paragraph 8 by establishing that the accused would be punished only if makes propaganda *in a manner which justify or praise or apply its methods which contain violence, force or threat.*

8.2. OFFENCES IN ORGANISED FORMS AND PROPAGANDA UNDER THE ANTI-TERROR LAW

Offences in organized forms and propaganda are more severely punished if committed in the context of the Anti-Terror Law.
Article 2 of this Law establishes that any member of an organization, founded to attain the aims defined in its Article 1, who commits a crime in line with these aims, individually or in concert with others, or any member of such an organization, even if he does not commit such a crime, shall be deemed to be a terrorist offender. Paragraph 2 of the same article reproduces the same provisions as article 220§6 TCC in the context of terrorism: *persons, who are not members of a terrorist organization, but commit a crime in the name of the organization, are also deemed to be terrorist offenders and shall be subject to the same punishment as members of such organizations*.

Article 5 of the Anti-Terror Law provides that the sentence automatically increases by half, if the crime is considered a terrorism offense.

Article 7 of the Anti-terror law provides the legal basis for linking the offenses prescribed by Article 220 TCC with the harsh punishments provided for under Article 314 TCC by establishing that: *those who found, manage and are members of organizations as specified in article 1 to commit offences by using force and violence and by pressure, intimidation, oppression or threat methods shall be punished in accordance with article 314 of the Turkish Criminal Code. Those who organize activities of an organization shall be punished as managers of that organization.*

The charge of "membership in an armed political organization" under Article 314§2 of the Criminal Code carries a five to ten year prison sentence. For those who establish or command an armed organisation with the purpose of committing the offences prescribed under article 314§1, TCC provides for a penalty of imprisonment for a term of ten to fifteen years. Furthermore, article 314§3 states vaguely that: *Other provisions relating to the offense of forming an organized group for the purpose of committing crimes are treated [punished] in the same way as for this offense.*

Article 7 (2) of the Anti-terror law states that those who make propaganda for a terrorist organization shall be punished from one to five years imprisonment. It further provides that should the offence of propaganda be committed via press and publication, the sentence should be increased by half.

8.3. ANTI-TERRORR LAW AND DEMONSTRATORS

The Commissioner of Human Rights of the Council of Europe noted in his 2009 Report that persons participating in demonstrations following public calls by the illegal organization PKK were brought into the ambit of paragraph 6 of article 220 TCC, in accordance with a ruling of the Court of Cassation of March 2008[126].

The statement of the Commissioner of Human Rights is supported by a report drafted by the NGO Human Rights Watch and titled "*Protesting as a terrorist offence*"[127]. The report is based on the examination of 50 cases of the prosecution of adult and child demonstrators in the Diyarbakir and Adana courts. According to the report, in which 18 cases against 26 individuals are analysed in greater detail, article 220§6 TCC is applied to "many hundreds of people" whose "crime was to engage in peaceful protest, or to throw stones or to burn tires at protest". The report also states that to date adult demonstrators convicted under Articles 220 and 314 TCC have typically been sentenced to between seven and 15 years in prison.

In addition to the charge of "membership in an armed organization" and for "committing a crime on behalf of an organization," the defendant also faces other charges for violating the Law on Demonstrations and Public Meetings. The combination of charges, in theory, means that a defendant could face up to 28 years' imprisonment, and an even higher sentence if there are multiple violations.[128].

In the course of first mission the Judges of the Ankara SAC and the Judges of the 9th chamber of the Court of Cassation acknowledged that demonstrators were convicted for being members of a criminal organisation, even though the organization did neither exert any violence nor threaten to use violence, as in the case of the religious organisation known as *hizbutahrir*.

The Diyarbakir judges met by the expert in the course of the second visit maintained that in case the crime committed on behalf of the organisation is qualified as propaganda, they tend to inflict the minimum penalty that is 3 year, 1 month and 15 days in prison.
The lawyers of Diyarbakir bar denied the practice and asserted that punishment for the participation in demonstrations usually exceeds ten years in prison.
The expert was not provided with samples of judgments.

A judge from the ninth Chamber of the Court of Cassation met by the expert in the course of the third visit stated that, following the implementation of the fourth package of judicial reform, the

[126] Report by the Commissioner for Human Rights following his visit to Turkey on 28 June-3 July 2009 about: *Human rights of minorities*, CommDHf2009)30 §36.
[127] The report can be found at the following link: http://www.hrw.org/reports/2010/11/01/protesting-terrorist-offense.
[128] According to the report *Protesting as a Terrorist Offender* by Human Rights Watch, the possible 28-year total prison sentence consists of the following components: a 10-year sentence for "membership in an armed organization" on the basis of having "committed a crime on behalf of the organization" under Articles 314§2, 314§3, and 220§6 of the Turkish Criminal Code (increased by one-half to 15 years, on the basis of Article 5 of the Anti-Terror Law providing for aggravated sentences), a five-year sentence for "making propaganda for a terrorist organization" under Article 7§2 of the Anti-Terror Law and an eight-year sentence for having forcibly resisted dispersal of a demonstration by the police under Article 33/c of the Law on Demonstrations and Public Assemblies. This leaves out other possible charges, such as "damaging property," (Articles 151§1 and 152§1a, Turkish Criminal Code), which would increase the sentence by up to three years, "damaging public property" (Article 152§1a, Turkish Criminal Code), which could increase it up to six years, and "resisting a public official" (article 265§1, Turkish Criminal Code), which would increase the sentence by up to three years.

mere participation, without violence or intimidation, in demonstrations which follow a call by a terror organization is not anymore punishable[129].
However, if the Law on demonstrations is violated, like in case of resistance or throwing stones (article 32-33), the accused is sentenced, as an average, to four years in jail, which comes from the punishment for resistance (6 months), the punishment for having committed resistance on behalf of a terror organization (7 years and 6 months in jail according to article 7 of the ATL and art 314 of the CC), and the possible decrease by half pursuant to article 220/6 of CC as modified by the third package.

In the course of the first visit, the expert was informed by the judges of the Ankara SAC that the criminal offence of membership of a criminal or terrorist organization presupposes that continuity of actions, variety of actions, intensity of actions and organic link with the organization are proved by the prosecutor.
During the second visit, Diyarbakir judges confirmed the above interpretation by Ankara Judges.
In the course of the third visit this interpretation was upheld by a representative of the 9th Chamber of the Court of Cassation.

On the contrary, in the cases considered by Human Rights Watch, this organization claims in its report that demonstrators were convicted as members of terrorist organizations even though these requirements were not proved.
Human Rights Watch claims that:

- in some of the considered cases, prosecutors and courts have focused on the number of demonstrations an individual has attended as an important factor in determining whether he or she has been acting on behalf of an armed organization, even though the defendant committed no violent acts and the content of slogans cannot be argued to amount to incitement to violence;
- as regards the evidence, the verdicts depend on video footage showing the role of the individuals in demonstrations and in other cases the evidence against the defendants consisted solely of police reports alleging participation in criminal acts during demonstrations without any corroboration.

As highlighted above in the decisions of pre-trial detention against demonstrators in South-East Turkey, sent to the expert after the second mission, a proper reasoning about the existence of the conditions for declaring the membership of a criminal or terrorist organization can be hardly found; the judges did not even mention facts or circumstances from which it could be possible to infer the conditions for this membership, which are, as reported above, continuity of actions, variety of actions, intensity of actions and organic link with the organization.

8.4. ANTI-TERROR LAW AND FREEDOM OF EXPRESSION

Article 6§2 of the Anti-Terror Law establishes that those who print or publish leaflets and declarations of terrorist organizations shall be punished from one to three years imprisonment.

[129] In their comments on the report, Turkish Authorities claim that: "*As per the Provisional Article 1 of the Law No 6352, the 9th Criminal Chamber of the Court of Cassation considers the meetings and demonstrations as a way of "expressing thoughts and opinions" and thus decides, under this law, on the adjournment of the resulting cases already filed. There are hundreds of decisions adopted by the 9th Criminal Chamber in this regard (9th Criminal Chamber, Decision No. 2014/348, Docket No 2013/10119). And even if the demonstrator exerts violence, it is decided to adjourn the case filed for the violation of the Law No 2911. The Criminal General Council of the Court of Cassation considered, in its Decision No 386-353 and dated 11 July 2014, that the decision of the 9th Criminal Chamber was right".*

The problem of freedom of expression has come to the forefront of public attention particularly following the arrests in March 2011 of journalist Nedim Şener and Ahmet Şık (mentioned above). The Commissioner of Human Rights of the Council of Europe observes that the implementation by courts of article 6 of the Anti-Terror Act, which establishes that those who print or publish leaflets and declarations of terrorist organizations shall be punished from one to three years imprisonment, can result in a violation of article 10 ECHR, as this provision did not require judges to carry out a textual or contextual examination of the statements in question, as already ascertained by the ECtHR[130]. Thus, the mere fact that they emanated from a terrorist organisation was sufficient to condemn the publishers, without having to evaluate the context of their publication or whether their contents actually constituted incitement to violence or apology of terrorism.

The third judicial reform package intervened to substantially reduce the punishment for criminal offences committed via press and to prevent the execution of past criminal convictions based on the mere expression of opinions.
Committing crimes via press was an aggravating circumstance for the crimes in the Articles 132, 133 and 134 of Turkish Penal Code. This provision has been repealed by the package and the sentences will not be increased when the crimes are committed via press.
Investigations, criminal proceedings and execution of sentences for offences committed before 31 December 2011 were postponed. This provision applied to offences carrying a maximum prison sentence of five years and relates to opinions declared by press, provided the crime is not repeated in three years.
All judicial decisions taken prior to 31 December 2011 confiscating, prohibiting or preventing the sale and distribution of printed materials had to be annulled.

In order to comply with the principle of the freedom of expression[131] the fourth judicial reform package amended article 6§2 of the Anti-Terror Law by establishing that publication of leaflets or declarations emanating from a terrorist organization is a criminal offence if the declarations *justify or praise or apply its methods which contain violence, force or threat.*

CONSIDERATIONS

The expert, although fully acknowledging the extraordinary challenged posed by terrorism and the deep difficulties it causes in the daily work and in the personal security of prosecutors and judges, expresses concerns both for the imprecise definition of some criminal offences concerning terrorism and membership of criminal organisations, as well as for their wide interpretation by courts.

With regard to the legislation, most concerns are related to:

- the imprecise definition of a terrorist organization (article 220§ 1, 2 e and 3 TCC and articles 2 and 7§1 of the anti-terror law), with particular reference to whether violence or threat to use violence are essential components of a terrorist organization;
- article 220§ 6 and 7 TCC, which allow the punishment of members of criminal organisations, of those who commit an offence on behalf of such an organisation (paragraph 6) or help such an organisation knowingly and willingly (paragraph 7) even if they are not members or part of its hierarchical structure. Under the current law, those who are not members of a criminal organisation but commit a crime "on behalf" of such

[130] *Gozel and Ozery. Turkey*, judgment of 6 July 2010.
[131] ECtHR, *Gözel and Özer v. Turkey*, 4 July 2010.

an organisation are punished for the crime they have committed, as well as for being a member of the organization, but the punishment can be decreased up to by half.

The further concerns about the broad definition of propaganda in favor of a criminal or a terrorist organization (punished under article 220§8 TCC and article 7§2 of the anti-terror law) and the broad definition of the criminal offence which consists of publishing declarations and statements of a terrorist organization (article 6§2 of the anti-terror law) were lifted by the fourth package of judicial reform.

As regards the courts' interpretation, particular reasons for concern are related to cases in which:

A) participants in demonstrations were convicted, according to the Human Rights Watch report, for being members of a criminal or a terrorist organization even though continuity of actions, variety of actions, intensity of actions and an organic link with the organization were not demonstrated by prosecutors;
B) participants in demonstrations are collectively arrested and kept in pre-trial detention without a clear distinction of conducts and responsibilities of each defendant, as clearly shown by the decisions examined by the expert, which do not highlight facts, evidence and ground for detention separately for each accused;
C) members of alleged terrorist organizations are arrested and kept in pre-trial detention for being members of the terrorist organization even though the organization did not resort to any violence or threat to use violence;
D) journalists were charged of being members of a criminal or terrorist organization for having carried out research or written their books, supposedly, under the instructions of such an organisation, with a view to helping that organization;

The further concern about journalists punished for printing or publishing leaflets and declarations of terrorist organizations, even though the context of their publications had not been evaluated by judges in their rulings, has been lifted by the fourth package of judicial reform

In the first group of cases (A) the interpretation of the national legal framework could run contrary to freedom of assembly which is a fundamental right and one of the foundations of a democratic society[132] [133].

In the second group of case (B), the lack of reasoning about individual responsibility constitutes a violation of Article 5§3 ECHR.

In the third group of cases (C) the interpretation of the national legal framework given by courts appears to be contrary to Recommendation 1426 (1999) of the Parliamentary Assembly of the Council of Europe, *'European democracies facing up to terrorism'*, of 23 September 1999. In this connection, it is crucial to bear in mind that violence or the threat to use violence is an essential

[132] ECtHR, *G. v. the Federal Republic of Germany*, 6 March 1989.
[133] See EctHR, *Ezelin v. France*, 26 April 1991 "This right, of which the protection of personal opinion is one of the objectives, is subject to a number of exceptions which must be narrowly interpreted and the necessity for any restrictions must be convincingly established. When examining whether restrictions on the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Contracting States enjoy a certain but not unlimited margin of appreciation.… the freedom to take part in a peaceful assembly is of such importance that a person cannot be subjected to a sanction—even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which has not been prohibited, so long as this person does not himself commit any reprehensible act on such an occasion" .

component of an act of terrorism[134] and that restrictions of human rights in the fight against terrorism 'must be defined as precisely as possible and be necessary and proportionate to the aim pursued"[135].

As regards the fourth group of cases (D) the boundary between propaganda and freedom of expression is very subtle and the risk of infringement of article 10 ECHR is very high, not only in case judges do not conduct an evaluation of the context of the publications but also if the organic link between journalists and the organization is not proved on the ground of concrete facts different from those reported in the research or book.

As regards the criminal provisions according to which a person may be punished as a member of a criminal organisation, even if not an actual member of that organisation, if he or she commits an offence on behalf of that organisation or aids or abets it knowingly and willingly, the expert consider welcome developments the possible reduction of punishment envisaged by the third package of judicial reforms.
However the definition of the criminal provisions of article 220 CC remains totally unclear; it allows for a very wide margin of appreciation, in particular in cases where membership in a terrorist organisation has not been proven (Article 220 (6) CC) and when an act or statement may be deemed to coincide with the aims or instructions of a terrorist organisation (Article 220 (7) CC). Furthermore the third package of judicial reforms does not make clear the grounds on which reductions of penalties will be decided.

In the cases *Maestri v Italy*[136], the ECtHR re*iterated that the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*[137].

The expert recommends therefore that the legal framework on organised crime and terrorism is clarified and defined as precisely as possible. This will help avoiding that a low case-law threshold in the implementation of the anti-terrorism legal framework results in detention or trials of persons for acts falling under the umbrella protection of freedoms of assembly and of expression.

The expert recommends that the current legal framework on organised crime and terrorism is implemented in accordance with the Council of Europe Recommendation No 1426 (1999) and in compliance with the principle of proportionality[138].

The expert recommends that, in order to charge the suspects with the crime of membership in a terrorist organization, judges always verify that continuity of actions, variety of actions, intensity of actions and organic link with the organization occur.

[134] See the Recommendation 1426 (1999) of the Parliamentary Assembly of the Council of Europe, 'European democracies facing up to terrorism', 23 September 1999, paragraph 5.
[135] See the Guidelines of the Committee of Ministers of the Council of Europe on human rights and, the fight against terrorism. 11 July 2002, Section III.
[136] 17 February 2004, § 30
[137] ECtHR, *the Sunday Times v. the United Kingdom* , 26 April 1979 § 49; *Larissis and Others v. Greece*, 24 February 1998, § 40.
[138] ECtHR, *Klass v Germany*, 6 September 1978; *Hulki Gunes v. Turkey*, 19 June 2003.

As regards the freedom of expression, the expert consider welcome development the novelties contained in the third package of judicial reforms about suspension of investigations, trials and execution of decisions for criminal offences committed via press and annulment of judicial decisions confiscating, prohibiting or preventing the sale and distribution of printed materials. The third package introduces a conditional amnesty, which has not only tangible effects on defendants and detainees charged of criminal offences committed via press but also a symbolic value.
Further welcome developments were brought by the fourth package with reference to the amendments to the criminal provisions about propaganda and the publication of declarations emanating from a terrorist organization.

RECOMMENDATIONS

We **RECOMMEND**

- the whole legal framework on organised crime and terrorism be clarified and defined as precisely as possible and be implemented in accordance with the Council of Europe Recommendation No 1426 (1999) and in compliance with the principle of proportionality;
- in order to charge the suspects with the crime of membership in a terrorist organization, judges always verify that continuity of actions, variety of actions, intensity of actions and organic link with the organization occur.

9. APPEARANCE OF IMPARTIALITY OF JUDGES AND PROSECUTORS

Six years after the entry into force of the CPC,
- prosecutors and judges still sit in the same buildings;
- the maintenance of the entire building and the management of the court's budget is still entrusted with the Chief Prosecutor;
- judges and prosecutors enter and leave the hearing room together through the same door, sit close to each other in the same elevated position and wear quite similar robes, while defense lawyers, dressed in different robes, enter and leave the courtroom through another door together with the public and sit at a level lower to that of judges and prosecutors.

CONSIDERATIONS

The prosecutors in Turkish courts are in charge of court administration. They have their offices in the court buildings next to those of judges, sit next to and at the same elevated position as the judges in the courtroom, enter and leave the courtroom together with the judges and wear quite similar robes. This continues to affect the appearance of impartiality of judges. As underlined in the previous advisory and peer assessment reports, those attitudes need to be changed.

RECOMMENDATIONS

We reiterate the **RECOMMENDATIONS**

- that public prosecutors should have their offices located in a completely separate part of the courthouse from that occupied by judges[139];
- that public prosecutors should be required to enter and leave the courtroom through a door other than that used by the judge;
- that public prosecutors and defense lawyers should be positioned on an equal level in court rooms.

Draft completed in June 2014; report finalised in August 2014 and further revised in January 2015.
By Luca PERILLI
Italian Judge

[139] The Turkish Authorities in the second set of comments observe the following. "*The policy adopted in the 10th Development Plan (2014-2018) is "to implement the principle of equality of arms that strikes a fair balance between the parties in a judicial process". One of the objectives of the Draft Judicial Reform Strategy is to restructure the location of courts and public prosecution offices within the courthouses in parallel to the Development Plan. It is planned to separate the physical locations in order to achieve this objective. Attention is shown to avoid locating the judges and prosecution offices in the same block within the newly-constructed larger courthouses. In smaller courthouses, however, the judges and prosecutors are enabled to have their offices in separate spaces by means of the method for creating restricted spaces inside the building. The subject-matter of this recommendation was implemented in 20 pilot courthouses under the Project for Strengthening the Court Management System co-implemented with the Council of Europe. Within the scope of the project activities, the architecture of courthouses was analyzed, the offices of judges and prosecutors are designed to be located in separate blocks if the available land permits in the courthouses to be constructed in the light of the project outcomes, however, if the land does not permit for such a design, the court units are designed to be located in different wings of the building or at separate floors. The Ministry of Justice considers extending this practice*".

LIST OF RECOMMENDATIONS

Abolishment of special courts

- Every significant reform of the judicial system should be preceded by public consultation with civil society and relevant stakeholders.
- HSYK should establish clear rules for the assignment and re-assignment of cases by the chief prosecutors to prosecutors, in order to meet the requirements of impartiality and independence; it should establish that decisions to withdraw cases from prosecutors are given in written form and are subject to internal review to ascertain the lawfulness of the procedure;
- Every HSYK decision concerning the career of judges and prosecutors should be grounded on objective and pre-established criteria. Such decisions should be based on merit, having regard to the qualifications, skills and capacity.
- Every HSYK decision regarding judges' and prosecutors' careers, involuntary transfer included, should be reasoned and subject to judicial review.
- Specialised prosecution offices with extended jurisdiction should be re-established.

Preventive detention

- Liberty judges, entrusted with handling decisions and objections regarding "protection measures" such as: search, seizure, apprehension, detention, and detection of communication, should be re-established.
- Every single decision on pre-trial decision should be substantiated and justified upon the legal and factual grounds and reasons, connected with the specific circumstances of the case.
- According to the principle of necessity (detention as *extrema ratio)*, judges deciding over pre-trial detention should perform the test or proportionality by giving specific reasons for not resorting to judicial control.
- The provision on *catalogue crimes*, art. 100, paragraph 3 of the CPC, should be suppressed and, until it is suppressed, full justification should be given for pre-trial detention orders falling under the umbrella of this provision;
- Judges dealing with liberty of persons should, as a matter of urgency, undergo judicial training about article 5 and 6 of the European Convention of Human rights and about the practice of reasoning pre-trial detention order followed by liberty judges in EU Member States.

The conditions for issuing a pre-trial detention order, seizing assets or intercepting communications pursuant to the Omnibus Law

- The provision of law no 6526 requesting *solid evidence* to issue a pre-trial detention order (art. 1 paragraph 100 of the CPC), to order searches (art. 116 of the CPC), to seize assets (art. 128 of the CPC), to decide interceptions of communications (art. 135 of the CPC), to appoint an undercover agent (art. 139 of the CPC) should be abrogated.
- The provision of law no 6526 requesting for a panel of three judges to *unanimously* issue an authorization for the interception of communication (art. 135 of the CPC) should be abrogated.
- The provision of law no 6526 requiring judges to get a report by the relevant administrative Authority to seize immovable properties or other assets should be abrogated.

Duration of pre-trial detention

- Pre-trial detention should be limited to those circumstances where it is strictly necessary in the public interest and the continuing detention should be justified, as long as it lasts, by adequate grounds of a genuine requirement of public interest.

- In any case, pre-trial detention should not exceed a reasonable time.
- Special diligence should be displayed by prosecutors in bringing the case to trial if the accused is detained.
- A detained person should be entitled to having the case given priority and conducted with particular expedition.

Domestic remedies to challenge the lawfulness of the pre-trial detention

- A genuinely adversarial remedy should be introduced, in order to allow the accused to challenge the lawfulness of their pre-trial detention and to be heard by
- the judge adjudicating upon the opposition to the decision of arrest with a warrant.
-
- A remedy be introduced to allow parties to access an authority which can exercise its supervisory jurisdiction over the trial court to expedite the proceedings.

Disclosure of the investigative file

- The accused should have access to the relevant documents pointing at innocence or guilt already early in the proceedings and the limitation of the right to access the prosecution file should be justified by the need of protection of concrete public interests.
- Where full disclosure is not possible, the persons concerned still should have the possibility to access information necessary to effectively challenge the allegations against them.

Quality of investigations and of indictments. Judicial Police

- A proper judicial police, functionally dependent on the prosecution office should be established.
- Police units attached to the prosecution office and specialized judicial police units attached to the prosecution office for the investigations about organized crimes should be set up.
- The prosecutors should instruct the police about the investigative techniques, issue written guidelines and establish written protocols about the priorities of police investigations, issue guidelines for the contents of police reports, smooth communication lines, preferably along IT means, the duration of the investigations, means for searching evidence, covenants on quality and quantity of police work and feedback from the prosecutor's offices.
- The prosecutors should assign to the police time-limits for reporting back on the implementation of the investigation.
- Prosecutors should keep a stricter control over the relevant evidence obtained in the course of the investigation, avoid that long time is needed to prepare the indictments while the suspects are remanded in custody, and avoid that indictments contain information which is not relevant to the essence of the case.

Criminal offences committed in organised forms. Implementation of anti- terror law by courts

- The whole legal framework on organised crime and terrorism should be clarified and defined as precisely as possible and be implemented in accordance with the Council of Europe Recommendation No 1426 (1999) and in compliance with the principle of proportionality.
- In order to charge the suspects with the crime of membership in a terrorist organization, judges should always verify that continuity of actions, variety of actions, intensity of actions and organic link with the organization occur.

Appearance of impartiality of judges and prosecutors

- Public prosecutors should have their offices located in a completely separate part of the courthouse from that occupied by judges.
- Public prosecutors should be required to enter and leave the courtroom through a door other than that used by the judge.
- Public prosecutors and defense lawyers should be positioned on an equal level in court rooms.

ABBREVIATIONS

ATL: Anti-terror Law
CC: Constitutional Court
CoC: Court of Cassation
CPC: Turkish Criminal Procedural Code
ECHR: Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR: European Court of Human Rights
EU: European Union
HSYK: High Council for Judges and Prosecutors
MoJ: Ministry of Justice
Omnibus Law: Law n° 6526 amending the anti-terror law, the criminal procedure code and various laws
ATLHCC: special heavy criminal courts set up under art. 10 of the anti-Terror Law
SAC**:** specially authorized heavy criminal courts
SCC: State Security Courts
TCC: Turkish criminal code