



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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REPORT

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Following his visit to Turkey
from 10 to 14 October 2011

Administration of justice and protection of human rights in Turkey

Summary

The Council of Europe Commissioner for Human Rights ('the Commissioner') and his delegation carried out a visit to Turkey from 10 to 14 October 2011, which focused on certain major aspects of the administration of justice and the protection of human rights.

The European Court of Human Rights (hereinafter 'the ECtHR') has identified a number of long-standing, systemic problems concerning the administration of justice in Turkey, which have adversely affected the enjoyment of human rights, as well as the Turkish public's perception about the effectiveness, independence and impartiality of the justice system.

The Commissioner recognises the efforts undertaken and the progress achieved by Turkey in tackling some of these problems in recent years, and the substantial constitutional, legislative, institutional and practical reforms that have already taken place. He appreciates the constructive dialogue he has enjoyed with the Turkish authorities during this reform process.

However, the Commissioner considers that these reforms have not yet reached their full and desired potential in aligning Turkish law and practice with the case-law of the ECtHR and that further efforts are necessary. One of the major factors hampering progress seems to have been the established attitudes and practices followed by judges and prosecutors at different levels giving precedence to the protection of the state over the protection of human rights.

Some of these attitudes are closely connected with the letter and spirit of the 1982 Constitution of Turkey. The Commissioner welcomes the broad consensus within Turkish society and political establishment concerning the need to review the Constitution in an inclusive and democratic process. While this process is ongoing, the Commissioner considers that further efforts are needed to give full effect to Article 90 of the present Constitution, which gives precedence to international treaties on human rights over national laws.

The present Report focuses on the following major issues concerning the administration of justice and human rights protection in Turkey:

I. Excessive length of proceedings and resort to remands in custody

The Commissioner observes that the excessive length of proceedings has been a chronic dysfunction in the Turkish justice system and notes the very high number of judgments of the ECtHR finding violations on this ground. He highlights various reasons for excessive delays, including the serious backlog and heavy workload of courts and prosecutors, and encourages the authorities to step up their efforts to increase judicial and para-legal staffing. The Commissioner acknowledges existing efforts to accelerate proceedings, and encourages the authorities to consider further measures, such as introducing procedural time limits and reducing interruptions during the trial period, and to draw on the expertise of the Council of Europe on judicial time management.

The Commissioner reiterates the need to reinforce the 'gate-keeping function' of Turkish prosecutors, that is, the initiative they can use to filter those cases which do not merit being prosecuted at public expense. When they decide to go forward with a case, prosecutors should be given adequate resources to conduct and co-ordinate investigations and to assess evidence transmitted by the police, while the functioning of the judicial police system should be improved in order to fully support them in fulfilling these tasks. Attention should also be paid to the quality of indictments.

The Commissioner reiterates his concern about the excessive resort to remands in custody and their length, notably in the light of the case-law of the ECtHR. He urges the authorities to avoid situations where persons spend unreasonable periods in detention before they are sentenced which could amount to 'internment by remand'. For this purpose, the exceptional nature of detentions on remand should be made clear to prosecutors and judges and the use of existing or other appropriate non-custodial alternatives should be encouraged. The Commissioner also urges the authorities to reduce the excessively long time limits for detention on remand, which can currently go up to ten years.

The Commissioner also urges the authorities to introduce, in accordance with the case-law of the ECtHR, effective domestic remedies both for lengths of proceedings and unlawful detentions and to ensure that persons can avail themselves of these remedies even while the principal trial is ongoing.

II. The role of courts in combating impunity for serious human rights violations

The Commissioner welcomes important progress made in combating impunity for serious human rights violations, in particular in connection with torture and ill-treatment, but considers that problems remain, some of which have been demonstrated in the investigations into the murder of the writer and journalist Hrant Dink. The Commissioner is particularly concerned about the need to obtain prior administrative authorisation for investigating cases not relating to torture, short prescription periods, and lack of statistics concerning the fight against impunity.

The Commissioner urges the authorities to improve the standing of victims in criminal investigations and proceedings, and to reinforce the admissibility of reliable independent medical evidence by courts. He encourages the establishment of an effective police complaints mechanism, and the mandatory recording of all interrogations. The authorities are also invited to address the Commissioner's concerns about the treatment of counter-charges brought by police officers. He reiterates his serious concerns about the village guards system in the context of impunity and proposes its abolition.

The Commissioner is concerned about disproportionately lenient sentences handed down and extenuating circumstances taken into account in some cases of serious human rights violations, for example those involving violence against LGBT persons. He acknowledges efforts made in fighting violence against women and encourages the authorities to pursue them, considering that this work could provide inspiration for other problem areas where the judicial system plays a crucial role.

III. Other major aspects of criminal proceedings

The Commissioner expresses his concern about the definition of some offences concerning terrorism and membership of a criminal organisation and their wide interpretation by courts. While fully acknowledging the enormous challenges posed by terrorism and the difficulties it causes in the daily work of prosecutors and judges, he recalls that full respect of human rights must be at the centre of the anti-terrorist fight. The Commissioner considers that prosecutors and judges need to be further sensitised to the case-law of the ECtHR concerning in particular the frontier between terrorist acts and acts falling under the scope of the rights to freedom of thought, expression, association and assembly.

The Commissioner raises concerns about adversarial proceedings and equality of arms, important components of the right to a fair trial. He is particularly concerned about rules concerning the non-disclosure of evidence to suspects, the resort to 'protective measures', and the lack of adversarial proceedings relating to certain phases of the criminal procedure. He also points to practical problems concerning the possibility for the defence to cross-examine and summon witnesses and experts, despite legislative improvements in this field, and voices concerns about the way resort is made to secret witnesses.

The Commissioner encourages the authorities to review the need for assize courts with special powers, owing to the severe restrictions to the rights of defence before these courts, by derogation from normal procedural guarantees.

IV. Issues relating to the independence and impartiality of the judges and prosecutors

The Commissioner welcomes recent improvements concerning the independence of members of the judiciary, such as the institutional framework following the 2010 constitutional referendum, but considers that there is scope for further affirming independence from the executive and developing internal democracy within the judiciary. He is concerned that the role of the Minister of Justice in the High Council of Judges and Prosecutors (HSYK) and in the appointment of judges may have adverse effects on the appearance of independence. He encourages the competent authorities to refrain from disciplinary actions against prosecutors and judges which may affect that appearance, and to ensure transparency of and judicial control over the decisions of the HSYK.

The Commissioner reiterates his concerns about the state-centred attitudes of judges and prosecutors, and their root causes, including the letter and spirit of the 1982 Constitution but also practical aspects relating to their entry into service and career. He welcomes the authorities' awareness of these problems and encourages them to continue their efforts with a view to ensuring adequate training for judges and prosecutors, and establishing clear and objective performance criteria fully incorporating ECHR-related concerns.

The Commissioner observes that judges and prosecutors are considered members of the same profession in the Turkish justice system and that their proximity, including within the courtroom, has an effect on the appearance of impartiality and equality of arms. He also considers that a clearer distinction is needed between prosecutors and judges fulfilling judicial functions on the one hand and administrative functions on the other hand.

The Commissioner's conclusions and recommendations are found at the end of the Report.

The comments of the Turkish authorities are appended to this Report.

Introduction

1. The Commissioner conducted a visit to Turkey from 10 to 14 October 2011.¹ The purpose of the visit, which included Istanbul, Diyarbakir and Ankara, was to assess the situation of the administration of justice and the level of protection of human rights therein.
2. In the course of the visit, the Commissioner held discussions with representatives of the national authorities, including the Minister of Justice, Mr Sadullah Ergin, the Minister of the Interior, Mr İdris Naim Şahin, and the Director General of Multilateral Political Affairs of the Ministry of Foreign Affairs, Ambassador Erdoğan İşcan. He also met the Chair of the Commission of Human Rights of the Turkish Grand National Assembly, Mr Ayhan Sefer Üstün. He held discussions with representatives of the Court of Cassation and the Constitutional Court, as well as of the High Council of Judges and Prosecutors.
3. The Commissioner had the opportunity to visit Turkish courts and meet with judges and prosecutors, including prosecutors with special powers. He also held discussions with representatives of the Bar Associations in Istanbul and Diyarbakir, and lawyers, academics, as well as representatives of NGOs. In addition, the Commissioner visited the Silivri Penitentiaries Campus in Istanbul and the D-type prison in Diyarbakir, where he met several prisoners.
4. The Commissioner wishes to thank the Turkish authorities, in particular the Permanent Representation of Turkey to the Council of Europe and the Ministry of Justice, for their assistance in organising the visit and facilitating its independent and smooth execution. He wishes to thank all of his interlocutors for their willingness to share their knowledge and insights. Unless otherwise indicated, the present Report is based on information received by the Commissioner until the end of this visit.
5. As the Commissioner underlined in his July 2011 Report on freedom of expression in Turkey,² certain shortcomings of the Turkish judicial system are an important source of violations of the European Convention on Human Rights (hereinafter 'ECHR') in Turkey. The European Court of Human Rights delivered more than 2 200 judgments against Turkey in the period 1995-2010. Almost 700 of these judgments concerned violations of the right to a fair trial, and more than 500 related to the right to personal liberty and security.³ The Commissioner observes that the Turkish justice system has not managed to date to effectively tackle and prevent such violations, even though some of the dysfunctional aspects of the system have been identified by the ECtHR as the direct cause of human rights violations in many cases.
6. The Turkish legislation has been subject to important changes in recent years, in order to bring it into line with ECHR standards, such as the adoption of a new Turkish Criminal Code (hereinafter 'TCC') and a new Turkish Code of Criminal Procedure (hereinafter 'TCCP') in 2004. In particular the amendments to the TCCP, which entered into force on 1 June 2005, sought to address many procedural shortcomings identified in the case-law of the ECtHR.
7. However, following these reforms, it became increasingly apparent that the interpretation and application of the new legislation by courts and prosecutors often followed established patterns which were incompatible with ECHR standards. Together with many structural problems affecting the administration of justice in Turkey (such as the heavy workload of courts and prosecutors leading to significant backlogs, in particular of High Courts), this situation has prevented the legislative reforms from achieving their full potential. It has to be pointed out, however, that many shortcomings remain in the statutes themselves, and importantly in the letter and spirit of the Turkish Constitution.

¹ During the visit the Commissioner was accompanied by the Deputy to the Director of his Office, Mr Nikolaos Sitaropoulos, and his Adviser, Mr Hasan Bermek.

² Report of the Commissioner for Human Rights following his visit to Turkey from 27 to 29 April 2011, Issue reviewed: Freedom of expression and media freedom in Turkey, [CommDH\(2011\)25](#).

³ European Court of Human Rights, Annual Report 2010, statistics at p. 157.

8. Among the cases where the ECtHR pointed directly to the Turkish justice system as a source of violations, those concerning Articles 5 (right to liberty and security) and 6 (right to a fair trial) of the ECHR figure prominently. In particular, excessive resort to detentions on remand and excessively lengthy judicial proceedings have been consistently identified as problems in many Turkish cases. In addition, the role of the judicial authorities has been subject to the scrutiny of the ECtHR in connection with Articles 2 (right to life) and 3 (prohibition of torture) of the ECHR, notably in the context of effective investigations and impunity for state actors, often in combination with Article 13 ECHR (right to an effective remedy). Finally, the case-law of the ECtHR indicates that the over-restrictive, state-centred attitude of the judicial authorities has played a major role as regards undue restrictions of Articles 10 (freedom of expression) and 11 (freedom of assembly and association) of the ECHR.
9. Recent high-profile cases, such as *Ergenekon*, *Sledgehammer (Balyoz)* and *KCK (Union of Communities in Kurdistan)*, as well as the domestic proceedings related notably to the murder of the writer and journalist Hrant Dink, have led to an increased awareness of specific, long-standing shortcomings in the administration of justice. This has arguably created relatively favourable conditions for judicial reform.
10. The Turkish authorities have recognised⁴ and sought to address structural dysfunctions of the justice system. A crucial step was the publication of a Judicial Reform Strategy in 2009, which aims at, *inter alia*, strengthening the independence and impartiality of the judiciary, enhancing its efficiency, facilitating access to justice and enhancing confidence in the judiciary.⁵
11. It is to be noted that a significant part of the constitutional amendments approved in the referendum of 12 September 2010 also concerned judicial reform. This involved a number of provisions in the Constitution that regulate, *inter alia*, the Constitutional Court, the High Council of Judges and Prosecutors (HSYK), the relationship between military and civilian courts, and the administration of the judicial sector (Articles 144-149, 156-157 and 159).⁶ Article 90 of the Constitution had been amended in 2004, in order to give full effect to international treaties on human rights, including the ECHR. However, there is little evidence that this Article has had a substantial impact on judicial practice, including in the case-law of the Turkish Constitutional Court.⁷
12. The Commissioner considers that it is imperative to effectively tackle the long-standing, systemic shortcomings of the justice system in Turkey. He therefore wishes to continue his constructive dialogue with the Turkish authorities on these issues. He trusts that this dialogue will be facilitated by the present Report which consists of the following sections: I. Excessive length of proceedings and resort to remands in custody; II. The role of courts in combating impunity for serious human rights violations; III. Other major aspects of criminal proceedings (courts' practice concerning legislation on terrorism and criminal organisations; adversarial proceedings and equality of arms; assize courts with special powers); IV. Issues relating to the independence and impartiality of judges and prosecutors.

⁴ See, for example, the [interview](#) given by the Minister of Justice, Sadullah Ergin, to Hurriyet Daily News on 15 September 2011.

⁵ See the 2009 [Judicial Reform Strategy](#) of the Turkish Ministry of Justice.

⁶ Other changes included the introduction of an Ombudsman system, collective bargaining rights for public servants, positive discrimination for women, children and the elderly, and the lifting of protection for military coup leaders.

⁷ For example, in a preliminary ruling published on 21 October 2011 (ruling 2011/49), the Constitutional Court upheld by a majority opinion a provision in the Turkish Civil Code allowing different treatment between married men and women as regards their surname, seemingly in contradiction with the judgment of the ECtHR in the case of *Ünal Tekeli v. Turkey* of 16 November 2004. The Constitutional Court decided, by 9 votes to 8, that there was no need to assess the compatibility of the said provision with Article 90 of the Constitution, despite the reasoned opinions of lower courts, at the source of the preliminary ruling procedure.

I. Excessive length of proceedings and resort to remands in custody

13. The Commissioner observes that the excessive length of proceedings has been a chronic dysfunction in Turkish justice which has caused the delivery by the ECtHR of repetitive judgments. As of 22 September 2011, the execution of 233 judgments concerning excessively lengthy proceedings before criminal, administrative, civil, labour, commercial, consumers', cadastre, and military courts in Turkey was pending before the Council of Europe Committee of Ministers.⁸ In 2010, the ECtHR found in 83 cases that there had been violations of the Convention owing to the excessive length of proceedings before Turkish courts.⁹ As noted by the Commissioner in his report on freedom of expression in Turkey, there are many examples of cases lasting for more than 10 or even 15 years.¹⁰ As will be examined below, this problem also has major human rights implications, both as regards lengthy detention periods and the fight against impunity.
14. As stated by the Committee of Ministers on numerous occasions, excessive delays in justice constitute a grave danger, in particular for the respect of the rule of law and access to justice. Inordinately long court proceedings undermine the credibility of and the public confidence in the justice system as a whole.

I.a. Major causes of excessive delays in courts

15. The heavy workload of the judges and prosecutors is often cited as the principal reason of the excessive length of proceedings in Turkey. The Commissioner observes that the official figures released by the Ministry of Justice concerning the workload of first instance courts, as well as of high courts, indeed demonstrate that the entire Turkish justice system is suffering from increasing numbers of new cases brought, growing backlogs and relatively low clearance rates.¹¹
16. A case in point is the workload of the Court of Cassation, which deals with all appeals, in the absence of functioning appeal courts.¹² According to the official figures published on its website, of the approximately 1.1 million cases pending before the Court of Cassation in 2010, 450 000 had been transferred from the previous year and 540 000 rolled over to 2011.¹³ Compared to the figures in 2000 (when 44 500 cases had been carried over to 2001), this represents a 12-fold increase in the backlog in the space of 10 years. While the use of information technology (in particular the UYAP system, allowing integrated computerised court-management solutions) has reportedly accelerated judicial proceedings, the situation remains critical.
17. The Commissioner recognises the efforts deployed by the Turkish government to increase human resources in courts and to fill the high numbers of existing vacancies, including by substantially increasing the number of judges at the high courts and recruiting experienced lawyers as judges and prosecutors. He supports the efforts to hire and train more judges and prosecutors, but observes that the large number of new prosecutors and judges employed in recent years has not been enough to alleviate the burden of the judicial mechanism.
18. The lack of judges and prosecutors cannot be seen as the sole source of the excessive delays in the administration of justice. The heavy workload of prosecutors and judges also seems to be

⁸ For details of the cases, see the website of the Department for the execution of judgments of the European Court of Human Rights, <http://www.coe.int/t/dghl/monitoring/execution>. The relevant leading case is *Ormanci and Others v. Turkey*, judgment of 21 December 2004.

⁹ See the statistics of the ECtHR, http://www.echr.coe.int/NR/rdoonlyres/596C7B5C-3FFB-4874-85D8-F12E8F67C136/0/TABLEAU_VIOLATIONS_2010_EN.pdf.

¹⁰ Report of the Commissioner for Human Rights following his visit to Turkey from 27 to 29 April 2011, Issue reviewed: Freedom of expression and media freedom in Turkey, [CommDH\(2011\)25](http://www.adliscil.adalet.gov.tr/en/default.htm).

¹¹ See the website of the General Directorate of Criminal Records and Statistics of the Ministry of Justice, <http://www.adliscil.adalet.gov.tr/en/default.htm>. For example, for all criminal courts, the clearance rate was around 60% between 2001 and 2009 (around 50% for assize courts with special powers under Article 250 TCCP).

¹² The Act No. 5235 of 26 September 2004 on first instance and regional appeal courts entered into force in June 2005. This Act introduced regional courts of appeal in the Turkish judicial system and provided that they become operational two years after the entry into force of the Act. However, they are not as yet operational, more than four years after the deadline foreseen in the legislation.

¹³ See <http://www.yargitay.gov.tr/belgeler/site/istatistikler/2010.pdf>.

- closely linked to the lack of clerical or paralegal personnel in Turkish court administration and the fact that the prosecutors and judges have to devote a great deal of their time to administrative tasks.
19. Procedural delays during the trial period are seen as another major reason for lengthy trials in Turkey. A typical Turkish court case, regardless of the type of the court, is characterised by repeated adjournments and long periods during which the case file is sent to experts. In most cases, hearings are scheduled with delays of several months.
 20. This can be particularly problematic in criminal proceedings, since it may lead to the accused person remaining in custody for long periods without having been interrogated. The Commissioner was informed that, owing to such delays and interruptions, many persons are immediately released from detention following their conviction given the time already served in custody. In the absence of uninterrupted trials, the practice of grouping the cases of many suspects together in organised crime or terrorism cases, as is often the case in assize courts with special powers (on these courts see below), is of particular concern since it leads to the further lengthening of the proceedings in some cases.
 21. The Commissioner considers that the quality of investigations in the pre-trial period and the role of the prosecutors also have a strong bearing on the length of criminal proceedings. He notes that in 2005, Turkey adopted for the first time a by-law on judicial police (By-law No. 25832 of 01 June 2005), which gave authority to public prosecutors to supervise police forces in judicial investigations, in accordance with Article 164 TCCP. However, there is no separate judicial police organisation, and the judicial police functions are fulfilled by ordinary police or gendarmerie officers under the supervision of prosecutors, which is reported to lead to some confusion.¹⁴ Moreover, the Commissioner heard from many interlocutors that the prosecutors do not have the necessary resources to properly lead and co-ordinate investigations and have to rely mostly on evidence collected by the police forces at their own initiative. Investigations are therefore reported to be driven mainly by the police, who may lack the specialised competence in judicial matters, and the evidence often consists in great volumes of wiretaps.
 22. Another problem connected to the role of prosecutors is the fact that arrests of suspected persons happens at a very early stage of the investigations, which is one of the reasons for which suspects spend a long time remanded in custody before even their indictment. The Commissioner heard from many interlocutors that Turkish prosecutors have a long-established practice of going from arrest of suspected persons towards evidence, rather than collecting evidence to establish well-founded suspicions in the first place.¹⁵ He was informed that in most cases the collection of evidence continues even after the indictment, which leads to repeated postponements of the trial and has a direct impact on the length of criminal proceedings and detentions. The Commissioner considers that, before conducting operations leading to arrests, the police and prosecutors should gather all available evidence, including evidence justifying the need for detention on remand, to the extent possible.
 23. As already observed by the Commissioner in his Report on freedom of expression,¹⁶ the prosecutors appear to exercise little restraint in initiating proceedings, including in unmeritorious cases, which compounds this problem. They appear to have a difficulty in perceiving their role as including a filtering component, i.e. determining which cases go forward into the justice system to be prosecuted at public expense (the so-called 'gate-keeping function'), despite the fact that the new TCCP clearly provides for this possibility (Articles 170-175). It is reported that they prefer instead to bring proceedings and defer the evaluation of evidence to the courts, in particular when state security issues are believed to be at stake.

¹⁴ See, for example, [Circular No. 7 of the HSYK](#) on judicial police of 18 October 2011, which refers to a number of issues leading to hesitations.

¹⁵ This has notably been criticised by the Turkish Union of Bar Associations, see the speech of its President for the opening of the judicial year 2011-2012, <http://www.barobirlik.org.tr/Detay.aspx?ID=9878&Tip=Acis>.

¹⁶ Report of the Commissioner for Human Rights following his visit to Turkey from 27 to 29 April 2011, Issue reviewed: Freedom of expression and media freedom in Turkey, [CommDH\(2011\)25](#), paragraph 50.

24. As regards the practice of the prosecutors, another problem often mentioned during the Commissioner's visit concerned indictments, which often take a very long time to prepare, frequently while the suspects are remanded in custody. The Commissioner is concerned about reports that these documents can become overly long, sometimes running into thousands of pages, especially in cases relating to terrorism and organised crime. This is due to the fact that they 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. The Commissioner considers that the Turkish authorities should ensure that the prosecutors have the qualifications and resources needed in order to appropriately filter the existing evidence or to collect the necessary new evidence in such highly complex cases, which would allow them to prepare indictments of a high quality, containing sound legal analysis which connects essential pieces of evidence to the accusation.
25. Finally, the Commissioner is concerned at the fact that the Turkish legal system currently lacks an effective domestic remedy allowing applicants to challenge the length of proceedings before the outcome of an ongoing trial. He notes that the ECtHR has repeatedly found that the Turkish legal system offers no such remedy, in the sense of Article 13 ECHR, observing in particular that the authorities were unable to submit any domestic case-law proving the contrary. The ECtHR reached this conclusion for criminal,¹⁷ civil,¹⁸ as well as administrative¹⁹ proceedings.
26. More specifically, the ECtHR has observed that the Turkish legal system does not provide any remedies to accelerate the proceedings or to provide litigants with adequate redress, for example by obtaining compensation for the delays or having access to an authority which can exercise its supervisory jurisdiction over the trial court to expedite proceedings. In a 2009 quasi-pilot judgment,²⁰ the ECtHR considered that the most appropriate form of redress would be to ensure the conformity of Turkish national legislation with Article 13 of the Convention by establishing such a domestic remedy. The Commissioner therefore urges the Turkish authorities to guarantee an effective domestic remedy for excessive lengths of proceedings, which can be engaged before the conclusion of the principal trial, through legislation and/or case-law.

I b. Excessive resort to and length of remands in custody

27. The Commissioner recalls Recommendation Rec(2006)13 of the Committee of Ministers on the use of remand in custody,²¹ which 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. In any event, detention must be as short as possible and only continue for as long as it is justified.²²
28. As of September 2011, there were 144 judgments of the ECtHR under supervision of execution by the Committee of Ministers, primarily concerning the excessive resort to and length of detention on remand (and excessive length of criminal proceedings), in violation of Article 5, paragraph 3 ECHR.²³ The ECtHR has noted that such cases originated 'in widespread and systemic problems

¹⁷ *Tendik and others v. Turkey*, judgment of 22 December 2005.

¹⁸ *Ebru and Tayfun Engin Çolak v. Turkey*, judgment of 30 May 2006.

¹⁹ *Ayık v. Turkey*, judgment of 21 October 2008.

²⁰ *Daneshpayeh v. Turkey*, judgment of 16 July 2009. This kind of 'soft instructions' form part of the quasi-pilot judgments rendered by the ECtHR, after the first pilot judgment rendered in 2004 in the case of *Broniowski v. Poland*. Unlike the quasi-pilot judgments, in the pilot judgments the ECtHR indicates in the operative provisions of its judgments general measures that the respondent state is obliged to take, under the Committee of Ministers supervision, in order to execute the judgment in question (and avoid recurrence of the violation).

²¹ Recommendation [Rec\(2006\)13](#) of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

²² See also the Commissioner's Human Rights Comment entitled '[Excessive use of pre-trial detention runs against human rights](#)', 18 August 2011.

²³ The leading case is *Demirel v. Turkey*, judgment of 28 January 2003.

arising out of the malfunctioning of the Turkish criminal justice system and the state of the Turkish legislation, respectively'. The ECtHR has further found that general measures at national level must be taken in order to remedy the situation, in the light of more than 140 similar cases pending before it.²⁴

29. The Commissioner observes that the TCCP which entered into force in June 2005, provides some safeguards designed to prevent similar violations, by specifying that decisions to detain or extend detention must be duly reasoned and communicated to the accused or suspect (Articles 100 and 101), that the continuation of the conditions for detention must be re-examined every 30 days (Article 108) and that the maximum length shall not exceed specified periods, depending on the gravity of the offence (Article 102). The TCCP also introduced a right to compensation for unlawful detention, comprising both pecuniary and non-pecuniary damages (Articles 141 to 144).
30. The latest TCCP has not been sufficient to resolve this problem, due to the way in which it is being applied by the Turkish prosecutors and courts, who continue to rely very heavily on remands in custody to the detriment of existing non-custodial supervision measures. A telling sign of the extent of the problem is the proportion in the total prison population of persons remanded in custody or whose sentence was not final, which was 43% as of April 2011.²⁵ When he visited the D-type prison in Diyarbakir in October 2011, the Commissioner was informed by the prison authorities that 540 out of the 740 inmates were detained on remand.
31. The Commissioner considers that overreliance on remands in custody before or during trial, as well as procedural and practical shortcomings in ensuring that these be limited to the strict minimum foreseen in the relevant Council of Europe standards, has created a negative perception of the functioning of the judicial system and has had a chilling effect in Turkish society. This problem has come to the forefront of public attention particularly following the arrests in March 2011 of the journalists Nedim Şener and Ahmet Şık and the decision of domestic courts to keep nine elected members of parliament from three different political parties remanded in custody following the June 2011 general elections.
32. The major specific issues identified by the Commissioner as requiring the authorities' particular attention are the following:

Defective reasoning in decisions concerning detention in custody
33. Following the 2004 amendment of the TCCP, Turkish courts have a legal obligation to provide an explicit reasoning justifying a detention on remand, as well as each extension. Article 100, paragraph 3 TCCP provides a list of offences (the so-called 'catalogue crimes') for which the judge may authorise detention, provided that there are strong grounds to believe that they have been committed by the suspect. However, 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.
34. The large body of case-law of the European Court of Human Rights in this matter confirms this. The ECtHR found repeatedly that Turkish courts had failed to sufficiently reason their decisions to extend detention in custody, 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',²⁶ which constitutes a violation of Article 5, paragraph 3 ECHR.
35. The Commissioner found that the problem identified by the ECtHR continues in practice, and 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 TCCP'. It appears that in most cases, judges do not state the

²⁴ *Cahit Demirel v. Turkey*, judgment of 7 July 2009, see paragraphs 46 and 48.

²⁵ See statistics available on the website of the Directorate General for Prisons and Detention Centres, <http://www.cte.adalet.gov.tr>.

²⁶ *Cahit Demirel v. Turkey*, judgment of 7 July 2009, paragraph 45.

exact grounds for suspicion in their decision, fail to evaluate specific evidence regarding the risk of absconding or interfering with the course of justice, and rarely accept any dissenting grounds the defence may bring to their attention. According to information provided to the Commissioner, including by members of the Turkish judiciary, particularly the decisions to extend detention seem to be almost automatic, judges approving most requests without a detailed examination of the case file.

36. The Commissioner was informed 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 constitute 'comments reflecting bias' (which can be invoked for proceedings to dismiss a judge from a case). This interpretation is however not compatible with the case-law of the ECtHR and the authorities should take precautions to combat this attitude.

Failure to resort to existing alternatives to detention

37. The European Court of Human Rights found in several cases that domestic courts had failed to take into account alternative, non-custodial restrictions on personal freedom, such as bans on leaving the country, release on bail or judicial controls, despite the fact that such measures are provided for by the TCCP. Specifically, Article 101, paragraph 1 of the TCCP requires decisions on detention to include legal and factual reasons indicating why the alternative of judicial control would be inadequate in each case. However, these alternative mechanisms are still not implemented widely in practice. In particular, the Commissioner was informed that bail is almost never accepted by courts.

Long time limits for detention

38. While the new TCCP introduced upper limits beyond which detentions on remand may not be extended, the Commissioner considers that these limits are still very long, especially for crimes against state security. For example, the upper time limit defined in Article 102 TCCP is two years for offences within the jurisdiction of assize courts, extensible for three more years. These time limits are doubled for certain crimes relating to state security under Article 252, which brings the maximum legal detention period to ten years. The Commissioner considers that these time limits are excessively long.
39. Furthermore, while these time limits were part of the reform of the TCCP in 2004, their entry into force had been postponed until the end of 2010. The Commissioner was informed that, the letter of the law being vague, the Court of Cassation has interpreted these provisions in a restrictive way: in practice, in cases where persons are accused of different offences at different times they may be detained for each of their charges independently, adding the periods indefinitely. Time limits also do not appear to apply while the case is pending before the Court of Cassation.

Lack of an effective domestic remedy and compensation

40. The Commissioner appreciates that the Turkish authorities sought to create an appropriate domestic remedy by providing in the new TCCP for the re-examination by a judge of the need for continued detention on remand, both periodically (every thirty days) and spontaneously at the request of the suspect or the accused person.
41. However, the practice of the domestic courts and prosecutors continue to confirm the established case-law of the European Court of Human Rights that the Turkish legal system lacks an effective domestic remedy whereby the applicants could challenge the lawfulness of their pre-trial detention, which is genuinely adversarial or offers reasonable prospects of success (in violation of Article 5, paragraph 4 ECHR). It is noted that the latest changes to the TCCP were not considered sufficient by the ECtHR to change its case-law on this issue: in 2010, in the case of *Kürüm v. Turkey*, while noting the entry into force of the new TCCP, the ECtHR considered that there still was no adequate domestic remedy for challenging the lawfulness of detention. It therefore

concluded that there had been a violation of Article 5, paragraph 4 of the ECHR, 'not having detected anything that could lead to a different conclusion'.²⁷

42. In this connection, the Commissioner recalls Article 5, paragraph 5 of the ECHR, which provides that everyone detained in contravention of the provisions of Article 5 shall have an enforceable right to compensation. While Articles 141 and 142 TCCP introduced the possibility of compensation for unlawful detention, including in cases where the detained person has not been judged in a reasonable period or acquitted, the European Court of Human Rights considered in the aforementioned *Kürüm v. Turkey* judgment that the applicant had no possibility, even under these new provisions, to demand compensation before the conclusion of the trial and the delivery of a final judgment. It therefore concluded that the TCCP does not satisfy the requirements of the ECHR concerning compensation for irregular detention.
43. Finally, the Commissioner considers that the Turkish authorities should pay special attention to cases where the ECtHR found violations of Article 3 ECHR by Turkey owing to the detention or re-imprisonment of persons whose health conditions were incompatible with detention, and where the overly restrictive practices of judges played a significant role.²⁸

II. The role of courts in combating impunity for serious human rights violations

44. The Commissioner notes that ineffectiveness of domestic proceedings relating to serious human rights violations by members of security forces has been a major concern in Turkey for a long time. In a large number of judgments, from 1996 onwards, the ECtHR found violations of Articles 2 and 3 ECHR resulting from actions of Turkish security forces, where the subsequent lack of effective investigations or domestic proceedings was also a crucial issue (see the *Aksoy* group of 200 cases²⁹ and the *Batı* group of more than 60 cases).³⁰ In the latter group of cases in particular, the ECtHR considered that 'the shortcomings of the investigation, coupled with the lack of due promptness and diligence [...] resulted in virtual impunity for the suspected perpetrators of acts of violence'. Applicants in these cases were furthermore unable to obtain compensation for the alleged violations, as civil courts considered themselves bound by the findings of the criminal courts.
45. The Commissioner recalls the 2011 Guidelines of the Committee of Ministers on eradicating impunity for serious human rights violations,³¹ which provide that 'States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system'. The Committee of Ministers observed that, when impunity occurs, faults might be observed, among others, at each stage of the judicial or administrative proceedings. These guidelines include several minimum standards, notably as regards prosecutions (Section VIII), court proceedings (Section IX), as well as the involvement of the victims in the investigations (Section VII).
46. The Commissioner welcomes the significant steps taken by Turkey in recent years to tackle some of the issues highlighted in the judgments of the ECtHR concerning impunity, leading to an improvement of the human rights situation, in particular regarding torture and ill-treatment. He welcomes the amendment of Article 145 of the Constitution, which significantly restricted the competence of military courts and may have a positive impact on the prosecution of crimes committed by Turkish armed forces. As regards statutory changes affecting judicial proceedings,

²⁷ *Kürüm v. Turkey*, judgment of 26 January 2010, see paragraph 17.

²⁸ Notably, a group of four cases (the leading case being *Gürbüz v. Turkey*, judgment of 10 November 2005), as well as the cases of *Tekin Yıldız v. Turkey*, judgment of 10 November 2005 (concerning the practice of judges to use warrants rather than summonses or invitations) and *Hüseyin Yıldırım v. Turkey*, judgment of 3 May 2007. The execution of these judgments is pending before the Committee of Ministers.

²⁹ The leading case being *Aksoy v. Turkey*, judgment of 26 November 1996.

³⁰ The leading case being *Batı and others v. Turkey*, judgment of 3 June 2004.

³¹ [CM\(2011\)13](#), Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted by the Committee of Ministers on 30 March 2011.

the new TCC significantly increased the maximum penalties for torture and ill-treatment (Articles 94 to 96) and removed the requirement for prosecutors to obtain prior administrative authorisation for investigating or prosecuting civil servants in connection with these crimes. The Turkish efforts were recognised by the Committee of Ministers in its Resolution ResDH(2008)69 dealing with the *Aksoy* group of cases, welcoming the reforms and expressing satisfaction with the results obtained so far. In 2011 the European Committee on the Prevention of Torture (CPT) also considered that there was a continuing downward trend in both the incidence and the severity of ill-treatment by law enforcement officials.³²

47. In addition, there have been sporadic convictions by domestic courts for torture, ill-treatment and extrajudicial killings by security forces, such as the sentences received in June 2010 by prison guards, gendarmes, police officers, and a doctor in connection with the death of the political activist Engin Çeber, as a result of torture perpetrated at the police centre and in prison following his arrest in 2008. This case also involved the torture by police and prison staff of three other activists apprehended at the same time. The Commissioner welcomes this domestic judgment and notes the principled stance of the Turkish authorities in this case, including the fact that the Minister of Justice of the time apologised to the family of Engin Çeber. The Commissioner is also following with interest the ongoing trials concerning the so-called *Temizöz* and *JİTEM* cases,³³ which he considers as a unique opportunity to shed light on a period of systematic human rights abuses in south-east Turkey, which feature prominently in the case-law of the ECtHR.
48. However, the Commissioner considers that there are many outstanding issues of concern, in particular as regards the role of the courts in conducting effective domestic proceedings concerning alleged abuses. Some of these issues were directly assessed by the ECtHR and the execution of a number of its judgments requires that these problems be effectively tackled by the Turkish authorities. These include the following:
- lack of coherent, reliable statistical information on the number of investigations, prosecutions and convictions concerning serious human rights violations by security forces. This prevents a clear picture from emerging as regards the role the Turkish judiciary plays in relation to impunity;
 - statutes of limitations concerning serious human rights violations: while time limits have been increased by law in recent years, given the general problem of excessive length of proceedings in Turkey, as well as the fact that execution of many judgments of the European Court of Human Rights would require the reopening of very old files, they are still an obstacle to justice. For example, the trial in the aforementioned *JİTEM* case, concerning murders committed at the beginning of the 1990s, could only start in 2009, 17 years after the events, due to the time it took to prepare the indictment and lengthy proceedings to determine the competent court;
 - the need for prior administrative authorisation to investigate and prosecute serious human rights violations by state actors in cases other than torture and ill-treatment: Act. No. 4483 on judicial proceedings concerning civil servants, which requires administrative authorisation for such proceedings, continues to apply to offences other than torture and ill-treatment, and seems to be one of the major sources of impunity. The Commissioner is therefore concerned that the improvements made regarding Article 3 ECHR (prohibition of torture) in recent years are not transposable to Article 2 ECHR (right to life). Furthermore, the Commissioner notes that even for torture cases, there have been examples where prosecutors preferred to bring charges under other Articles of the TCC, such as 'misconduct in public office', which carry relatively lighter sentences and an obligation to obtain prior administrative authorisation.³⁴
49. Recent findings by the ECtHR seem to confirm the structural nature of the problem of impunity in Turkey, including after the entry into force of the new TCCP in 2005. Notably, in 2011 in the case

³² See the [report](#) on the CPT's fifth periodic visit to Turkey, published on 31 March 2011.

³³ These two cases concern the alleged murders, torture and other unlawful conduct committed respectively by a gendarmierie colonel (Cemal Temizöz) and six other persons, and by the alleged 'Intelligence and Anti-Terrorism Unit of the Gendarmerie' in eastern and south-eastern Turkey in the early 1990s.

³⁴ For example, in the initial indictment of the *Engin Çeber* case, see the study by Mehmet Atılğan and Serap Işık commissioned by the Turkish Economic and Social Studies Foundation (TESEV), "Cezasızlık Zırhını Aşmak", 2011.

of *Serdar Güzel v. Turkey*,³⁵ the ECtHR found that the criminal proceedings brought against the police officers concerned had been inadequate (charges of torture had been dropped in December 2006 due to lapse of time). The ECtHR found that there had been no effective remedy (Article 13 ECHR), even under the latest TCCP. Contrary to the government's argument, the ECtHR observed notably that Article 141 TCCP provided for a remedy for unlawful arrest or detention, but not for damage sustained by the applicant as a result of the ill-treatment he suffered at the hands of the police officers. Civil remedies remained also inoperative which, as mentioned before, is a typical feature of such cases.

50. Specifically concerning effective proceedings in cases of violations of Article 2 ECHR, the case of the writer and journalist Hrant Dink, murdered on 19 January 2007, has particularly demonstrated the shortcomings of the way in which the Turkish judicial system had tackled issues concerning impunity. In its 2010 judgment,³⁶ the ECtHR found that Turkey had failed to protect Dink's life and to conduct effective investigations into his murder in breach of Article 2 ECHR. In doing so, the ECtHR pointed to numerous shortcomings in the investigations and observed that all proceedings in which the authorities were implicated had been discontinued. It also found a violation of Article 13, combined with Article 2 ECHR, in that the applicants did not have an effective remedy which could lead to the identification and conviction of those responsible for failing to fulfil their duty to protect Dink's life.
51. While the murderer of Dink was sentenced to 22 years and 10 months of imprisonment in July 2011 and the trial of other principal suspects is ongoing, the only investigation to date that led to the conviction of security forces was conducted against members of the Trabzon gendarmerie. However, the ECtHR referred in its judgment to the fact that credible allegations (including by prosecutors and inspectors) of misconduct by other public officials, including members of police forces, were not properly investigated. The reasons for the failure of several investigations, which were started in parallel, included prosecutors deciding not to bring proceedings in Trabzon (the Rize Assize Court confirming this decision) and Samsun, and administrative courts overturning the administrative authorisation to investigate. Administrative investigations were conducted by civil servants under the same hierarchical structure as the suspects, and the family of Hrant Dink were not associated to any of these investigations.
52. It is noted that the prosecutors with special powers investigating the murder of Hrant Dink obtained a restriction on access to the prosecution file, pursuant to Article 153, paragraph 2 of the TCCP, from the outset. Lawyers of the Dink family have denounced that, contrary to the aim foreseen in the TCCP and rather than serving the interests of justice by preserving the integrity of the evidence, this restriction had made it easier to filter, tamper with or destroy evidence against security forces.
53. Another example raising the issue of impunity which was brought to the attention of the Commissioner concerns the death in police custody of the Nigerian asylum seeker Festus Okey on 20 August 2007. The requests by NGOs and human rights defenders to intervene as a third-party in the trial of the police officer who allegedly shot Okey with a racist motivation have been rejected repeatedly by the competent courts. These NGOs denounced, in particular, the collusion within the police force not to produce the evidence against the suspect and the fact that, as of September 2011, it had not been possible for the competent court to start examining the merits of the case due to procedural delays. According to information provided by court observers present, in April 2011, the 4th Beyoğlu Assize Court considered that the persons having submitted third-party intervention requests were seeking to unduly influence the judiciary and denounced them to the prosecutor's office. The Commissioner would like to receive from the authorities more information on these issues and on the progress of this case.
54. One of the problems highlighted in connection with torture/ill-treatment cases in particular is the fact that independent medical evidence is very rarely admitted by courts: the national Forensic Medical Institute ('the Institute') has retained a quasi-monopoly, as the only body whose reports are consistently recognised by courts. During his visit the Commissioner was made aware of

³⁵ *Serdar Güzel v. Turkey*, judgment of 15 March 2011.

³⁶ *Dink v. Turkey*, judgment of 14 September 2010.

concerns about the central role played by the Institute, not only because of its heavy workload which considerably delays proceedings, but also because of allegations of partiality.

55. This issue was raised particularly in the case of two teenage girls who were tortured by police officers in Iskenderun in 1999. This case was brought to the European Court of Human Rights, and the ECtHR in 2009 reached the opposite conclusion to the one reached by the Institute, i.e. that the applicants had suffered post-traumatic stress disorder as a result of their ill-treatment in custody.³⁷ As regards medical examinations of persons in custody, the Commissioner also noted with particular concern the 2011 findings of the CPT, which described the situation as 'disturbing' and encourages the Turkish authorities to implement the relevant recommendations of the CPT, including those relating to the electronic audio and video recording of interviews conducted by law enforcement authorities.³⁸
56. Another concern relating to impunity is the alleged practice of police officers accused of misconduct to bring counter-charges against the plaintiffs, mainly under Article 265 of the TCC concerning resistance to prevent public officials from carrying out their duties. The Commissioner is concerned about reports indicating that such counter-charges are dealt with more rapidly by the criminal justice system than the original complaints, and at times have been seen to undermine their credibility.³⁹
57. In this connection, the Commissioner notes with concern the conviction in October 2011 under Article 265 TCC of three transgender human rights defenders, some of whom had previously filed complaints against the police (the first set of counter-charges had been dismissed by the competent court in October 2010). The Commissioner sees this incident against the backdrop of a general pattern of impunity in a significant number of cases of violence against LGBT, and especially transgender, persons in Turkey. The Commissioner recalls that public authorities in Turkey counted seven murdered transgender persons in 2008 and 2009 and that Transgender Europe recorded 13 hate killings in Turkey in the period 2008 to 2010.⁴⁰ The Commissioner has received numerous reports of police violence and harassment against LGBT persons, as well as information that many complaints by transgender women against the police were not properly investigated by prosecutors.⁴¹
58. In order to prevent the recurrence of such cases, the Commissioner considers that it is essential that Turkey set up an effective police complaints mechanism, which would operate in accordance with the five principles established in the case-law of the ECtHR concerning effective investigations, i.e. independence, adequacy, promptness, public scrutiny and victim involvement. He draws the attention of the Turkish authorities on his Opinion on this subject.⁴²
59. Finally, the Commissioner would like to reiterate his concerns about the village guard system in the context of impunity. Already in his 2009 Report issued following his visit to Turkey,⁴³ as well as in a subsequent letter to the Turkish Minister of the Interior,⁴⁴ the Commissioner referred to persistent reports of human rights violations committed by village guards in the south-east of Turkey, as well as of inadequate investigations into such violations or attempts by the village guards to obstruct justice and intimidate victims.

³⁷ *Salmanoğlu and Polattaş v. Turkey*, judgment of 17 March 2009.

³⁸ See the [report](#) on the CPT's fifth periodic visit to Turkey, published on 31 March 2011, paragraph 23.

³⁹ See the aforementioned study by Mehmet Atılğan and Serap Işık, as well as the 2007 report by Amnesty International entitled "[Turkey: the entrenched culture of impunity must end](#)".

⁴⁰ See the Report on Discrimination on grounds of sexual orientation and gender identity in Europe and thematic studies on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in Turkey, published by the Office of the Commissioner in 2011, http://www.coe.int/t/commissioner/activities/themes/LGBT/Default_en.asp, pp. 59 and 60.

⁴¹ *Ibid.*, as well as the 2011 report by Amnesty International entitled '[Not an illness, nor a crime](#)'.

⁴² Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police, [CommDH\(2009\)4](#), 12 March 2009.

⁴³ Report by the Commissioner for Human Rights following his visit to Turkey on 28 June-3 July 2009, Issue reviewed: Human rights of minorities, [CommDH\(2009\)30](#).

⁴⁴ [Letter](#) from the Council of Europe Commissioner for Human Rights to Mr Beşir Atalay, Minister of Interior of the Republic of Turkey, 8 June 2010.

60. In this respect, the Commissioner notes that the European Court of Human Rights in 2009 expressed its 'misgivings as regards the use of civilian volunteers such as village guards in a quasi-police function', adding that, as the village guards operated 'outside the normal structure of discipline and training applicable to gendarmes and police officers, it was thus not apparent what safeguards there were against wilful or unintentional abuses of position carried out by the village guards either on their own initiative or under the instructions of security officers'.⁴⁵ It is particularly worrying that in the case in question, the ECtHR stated that 'as established by the Denizli Assize Court, [the village guards] were assisted by a number of soldiers in trying to cover their tracks and in hindering the prosecutor's investigation'.⁴⁶
61. Outside the context of the actions of the security forces, the Commissioner is also concerned about reports that the established case-law of courts, including of high courts, lead to disproportionately lenient sentences for perpetrators of serious human rights violations. The Commissioner notes, for example, that there has been a constant practice for courts to use 'undue provocation' as an extenuating circumstance in cases of violence against LGBT persons in general. The Commissioner also received disturbing information about the case of *N.Ç.*, where the courts, including the Court of Cassation in 2011, have accepted the 'consent' of a 13 year-old victim of rape by more than 20 persons as an extenuating circumstance. While the Commissioner understands that the rulings of the domestic courts were rendered within the framework of the old TCC, he nonetheless notes with concern that these judgments have seriously shaken the confidence of the Turkish public in the proper administration of justice.
62. The Commissioner acknowledges the efforts made in recent years to tackle the problems relating to the role of law enforcement, prosecutors and courts in cases of domestic violence and violence against women, and welcomes the fact that the authorities have recognised the seriousness of these problems. He considers that such efforts could provide inspiration for dealing with other problem areas, where serious human rights violations are at stake.

III. Other major aspects of criminal proceedings

III.a. Courts' practice relating to terrorism and criminal organisations

63. In his 2009 report on Turkey, the Commissioner expressed his concerns about the interpretation and application of the Turkish Anti-Terrorism Act (Act No. 3713) and certain provisions of the TCC, notably Article 220 dealing with criminal organisations.⁴⁷ The Commissioner was particularly preoccupied by the wide interpretation of the courts concerning the definition of offences and their constitutive acts under the above provisions.
64. Pursuant to Article 220 TCC, a person shall be punished as a member of a criminal organisation, even if they are not a member of that organisation or part of its hierarchical structure, if they commit an offence on behalf of that organisation (paragraph 6), or help it knowingly and willingly (paragraph 7). The Commissioner had 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, in accordance with a ruling of the Court of Cassation in March 2008.⁴⁸
65. Paragraph 8 of Article 220 TCC provides for imprisonment ranging from one to three years for a person who makes propaganda in favour of a criminal organisation *or its aims*, which is often used in conjunction with Article 7 of the Anti-Terrorism Act. In practice, Turkish prosecutors and courts apply paragraph 8 to cover non-violent statements, when they are seen to overlap with any one of

⁴⁵ *Seyfettin Acar and others v. Turkey*, judgment of 6 October 2009, paragraph 34.

⁴⁶ *Ibid.*, paragraph 35.

⁴⁷ Report by the Commissioner for Human Rights following his visit to Turkey on 28 June-3 July 2009, Issue reviewed: Human rights of minorities, [CommDH\(2009\)30](#).

⁴⁸ Report by the Commissioner for Human Rights following his visit to Turkey on 28 June-3 July 2009, Issue reviewed: Human rights of minorities, [CommDH\(2009\)30](#), paragraph 36.

the aims of a terrorist organisation. It has been reported that acts such as requesting mother-tongue education in Kurdish, or displaying a banner requesting free education, have been subject to criminal proceedings, as they were seen to coincide with the positions of terrorist organisations.

66. In his Report on freedom of expression in Turkey, the Commissioner also expressed his concerns about Article 6, paragraph 2 of the Anti-Terrorism Act, which provides for prison sentences ranging from one to three years for publishing declarations and statements of a terrorist organisation. The ECtHR considered that this provision did not require judges to carry out a textual or contextual examination of the statements in question, in violation of Article 10 ECHR.⁴⁹ 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.
67. The Commissioner observes that the application of Article 220 TCC, as well as of Articles 6 and 7 of the Anti-Terrorism Act, continues to raise serious concerns. During his visit, the Commissioner was informed that the journalists Nedim Şener and Ahmet Şık, detained in the Silivri prison, had been charged under paragraph 7 of Article 220 TCC, on the suspicion that they had carried out research or written their books under the instructions of the Ergenekon organisation, with a view to helping that organisation. The Commissioner was also informed that in the ongoing KCK group of cases, many non-violent and otherwise lawful acts have been included in the indictments as acts carried out under the instructions and furthering the aims of an illegal organisation.
68. The Commissioner is fully aware of the severe threat posed to Turkish society by terrorism and terrorist organisations, as well as of the obligation of the Turkish state to combat it with effective measures, including effective investigations and fair proceedings. He wishes to underline, however, that a major lesson learned in the fight against terrorism in Europe has been the importance of public confidence in the justice system.⁵⁰ This means that any allegation of terrorist activity must be established with convincing evidence and beyond any reasonable doubt. Experience has shown time and time again that any deviation from established human rights principles in the fight against terrorism, including in the functioning of the judiciary, ultimately serves the interests of terrorist organisations.
69. In this connection, it is crucial to bear in mind that violence or the threat to use violence is an essential component of an act of terrorism,⁵¹ 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'.⁵²
70. The Commissioner considers that the provisions contained in the Turkish anti-terror legislation and Article 220 TCC allow for a very wide margin of appreciation, in particular in cases where membership in a terrorist organisation has not been proven and when an act or statement may be deemed to coincide with the aims or instructions of a terrorist organisation. The Commissioner encourages the Turkish authorities to reflect on and address these concerns through legislative measures and/or case-law.

III.b. Issues concerning adversarial proceedings and equality of arms

71. In the case-law of the ECtHR, adversarial proceedings and equality of arms are essential components of the right to a fair trial guaranteed under Article 6, paragraph 1 of the ECHR. According to the ECtHR the right to adversarial proceedings implies the right for the parties 'to

⁴⁹ *Gözel and Özer v. Turkey*, judgment of 6 July 2010. In a non-operative part of its judgment, the ECtHR observed that bringing Article 6 of the Anti-Terrorism Act into compliance with Article 10 ECHR would constitute an appropriate form of redress by which to put an end to the violation in question.

⁵⁰ See the viewpoint of the Commissioner entitled '[Fighting terrorism – learn the lessons from Northern Ireland](#)', 11 July 2008.

⁵¹ 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.

⁵² 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.

have knowledge of and comment on all evidence adduced or observations filed. [...] What is particularly at stake here is litigants' confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file'.⁵³

72. As regards equality of arms, the ECtHR stated that this concept implies that 'each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.⁵⁴ In this context, importance is to be attached to, *inter alia*, the appearance of the fair administration of justice.⁵⁵
73. In the context of criminal proceedings, the ECtHR has held that 'it is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition Article 6 § 1 requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused'.⁵⁶
74. Criminal proceedings in Turkey raise a number of concerns as regards adversarial proceedings and the principle of equality of arms and include several elements which could be seen as major restrictions to the right to defence. Some of these concerns are detailed below depending on the stage of criminal proceedings at which they are likely to occur.

During pre-trial investigations

75. According to Article 153 TCCP, the right of the suspect and the defence lawyer to access the case file can be restricted, if such access may endanger the purpose of the initial investigation, except for certain types of documents (such as the statement of the suspect, experts' opinions, etc.). In addition, pursuant to Article 10 of the Anti-Terrorism Act, a judge may order a partial or total restriction of access to the prosecution file by the defence lawyer.
76. The Commissioner reiterates his concerns about the use made of the possibility of not disclosing evidence before the beginning of the trial. The Commissioner recognises the case-law of the ECtHR,⁵⁷ according to which it might sometimes be necessary to withhold certain pieces of evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest, even though the principle should be the disclosure of all material evidence in the possession of the prosecution. However, 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 effectively to challenge the basis of the allegations against him.
77. It is therefore essential that as much information as possible about the allegations and evidence against a suspect is disclosed, without compromising national security or the safety of others. Where full disclosure is not possible, Article 5, paragraph 4 ECHR requires that the difficulties this causes are counterbalanced in such a way that the persons concerned still have the possibility effectively to challenge the allegations against them.⁵⁸
78. The Commissioner has concerns as to whether the application of Article 153 TCCP and Article 10 of the Anti-Terrorism Act by prosecutors and courts meets the standards set by the ECtHR. The

⁵³ *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, paragraphs 24 and 29.

⁵⁴ See, *inter alia*, *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, paragraph 33.

⁵⁵ *Edwards and Lewis v. the United Kingdom*, judgment of 22 July 2003, paragraph 55. The Grand Chamber of the ECtHR subsequently endorsed the findings of the Chamber in this case on 27 October 2004.

⁵⁶ *Ibid.*, paragraph 52.

⁵⁷ See, *inter alia*, *Jasper v. United Kingdom*, judgment of 16 February 2000, paragraph 52.

⁵⁸ See *A. and others v. the United Kingdom*, judgment of 19 February 2009.

Commissioner noted in his 2011 Report on freedom of expression that such restrictions were routinely applied and that they had been used, for example, in 2011 in the case of the aforementioned journalists Nedim Şener and Ahmet Şık. According to the information provided by their lawyers, no evidence whatsoever was disclosed to Şener and Şık before the indictment was accepted by the competent court 6 months after their arrest, effectively depriving them of the possibility of challenging the lawfulness of their detention.

*Use of 'protective measures'*⁵⁹

79. The Commissioner observes that most 'protective measures', such as lawful interception of communications and pre-trial detention, are subject to judicial approval. According to law, the defence attorney must be present during the detention hearing. However, as noted above under the section concerning remands in custody, in practice the judicial approval appears to be almost an automatic process in many cases. In connection with remands in custody, the Commissioner also notes a ruling of the ECtHR concerning Turkey, according to which the failure to provide detainees with a copy of the prosecutor's opinion during the examination of an objection to their continued detention constituted a violation of Article 5, paragraph 4 of the ECHR, as this practice did not respect the principle of equality of arms.⁶⁰
80. During his visit, the Commissioner also heard complaints from lawyers and NGOs that there is very little judicial control over other 'protective measures' and virtually no known cases where a judge refused requests from prosecutors for such measures, such as interception of communications. A further problem in this respect is that wiretap records presented to the courts do not systematically exclude private communications, including with persons who can legally refuse testimony against the accused, leading to concerns under Article 8 ECHR.

During the indictment process

81. According to Articles 174-175 TCCP, the indictment is presented by the prosecutor to the court that has jurisdiction on the case. The court shall review the indictment as to control whether it adheres to the standards indicated in the TCCP. However, the Commissioner was informed that the defence lawyers do not take part in this procedure, since the court only examines the file provided by the prosecutor. According to the information provided to the Commissioner, the defence counsel only receives a copy of the indictment after the approval by the judge, together with the announcement of the date set for the first hearing.
82. In addition, an indictment that has not been rejected by a judge within 15 days of its presentation is considered to be approved (Article 174 TCCP). Considering that in some major cases, the total volume of the indictments exceeded several thousands of pages, the Commissioner has concerns as to whether judges are in a position to assess the indictment within the designated time, thus leading to an automatic approval.

During the trial

83. The Commissioner understands that Article 201 of the latest TCCP introduced for the first time into the Turkish legal order the possibility for the defence counsel to ask direct questions to witnesses or experts during trial. However, the Commissioner has been informed that, despite six years since the entry into force of the TCCP, the possibility of cross-examination has been rarely implemented in practice, reportedly due to the lack of experience of courts, prosecutors, as well as the defence lawyers.
84. The Commissioner also understands that it is possible for witnesses and experts not to be present in the hearing, unless the only evidence against the accused is statements of the witness in

⁵⁹ The concept of 'protective measures' in the context of Turkish criminal procedure denotes measures designed to ensure the smooth functioning of the criminal proceedings or enforcement of a judgment, not the protection of persons (e.g. victims or witnesses). They include arrest, detention and other restrictions of personal freedom, searches and seizures, interception of communications and secret investigation techniques.

⁶⁰ See *Altınok v. Turkey*, judgment of 29 November 2011, paragraph 60.

question. This leads to the testimonies being read in court, which compromises the capacity of the defendant to challenge the facts or to cross-examine. In this connection, the Commissioner is concerned about reports that Turkish courts heavily rely on experts, including sometimes on judicial matters which should be in their own discretion.

85. The problem of so-called 'secret witnesses', i.e. protected witnesses with undisclosed identities, was also brought to the attention of the Commissioner. The Commissioner recalls some cases where the European Court of Human Rights found a violation by Turkey on account of the fact that the applicants were convicted to lengthy prison sentences on the basis of testimonies taken on commission.⁶¹
86. Although the Turkish legal system is also lacking in standards regarding its witness-protection programmes (witness protection is very restricted, and limited to a small number of offences), the Commissioner received information according to which Turkish courts have accepted testimonies by secret witnesses without direct links to substantial points of the indictment, or providing hearsay testimonies, resulting in a weakening of the position of defence. The Commissioner considers that the Turkish courts must take all precautions in order to ensure that recourse to secret witnesses does not jeopardise the principles of adversarial proceedings and equality of arms.
87. Another problem reported to the Commissioner is difficulties for the defence to summon witnesses, despite the relevant provisions of the TCCP. Although the law provides the possibility for the defendant to 'bring any witness or expert to the court in order to be heard', the Commissioner understands that in practice courts often do not allow this procedure, stating simply that 'there has been no need to examine further witnesses or experts', and treating the insistence of defence counsels as contempt of court in some cases.
88. Another issue concerning adversarial proceedings and equality of arms, which is also reflected in the case-law of the ECtHR, is the access to the written opinion of the public prosecutor before High Courts. The Commissioner understands that Turkey has taken general measures to remedy this problem with respect to the Court of Cassation.⁶² However, the same problem applies to the Council of State. The Commissioner notes that the execution of ten relevant ECtHR judgments⁶³ is pending before the Committee of Ministers.
89. Finally, a provisional Article of the new Act on the acceleration of judicial services (Act No. 6217 of 31 March 2011) removed the prosecutor from ordinary criminal courts until 2014, while allowing them to challenge decisions on detention and release, as well as the rulings of the court. While acknowledging the fact that this Act sought to address the very serious problem of length of proceedings and contains many provisions affecting different areas, the Commissioner nonetheless noted concerns by some interlocutors that this may raise problems regarding the rights of defence and the principle of adversarial proceedings.

III.c. The status of assize courts with special powers

90. Assize courts with special powers have been established under Article 250 of the TCCP, with the entry into force of the latest TCCP in 2005, which coincided with the abolition of the former state security courts. The Commissioner notes that assize courts with special powers deal with similar cases to those treated by the former state security courts, i.e. organised crime, crimes against the security of the state, constitutional order, national defence or state secrets, as well as offences within the scope of the Anti-Terrorism Act.
91. Where the offence falls under the jurisdiction of assize courts with special powers in accordance with Article 250 TCCP, a number of special provisions apply which have a significant effect on the rights of defence. Article 10 of the Anti-Terrorism Act contains a number of additional provisions

⁶¹ See, in particular, *Hulki Güneş v. Turkey*, judgment of 19 June 2006, currently under enhanced supervision before the Committee of Ministers.

⁶² See the case of *Göç v. Turkey*, judgment of 11 July 2002.

⁶³ The leading case is *Meral v. Turkey*, judgment of 27 November 2007.

which further restrict the procedural rights of the suspect or accused. Furthermore, prosecutors appointed by the HSYK to deal with these cases also have special powers conferred to them under Article 251 TCCP.

92. Some of the derogations from ordinary criminal procedures are the following:
- Longer custody and detention periods: according to Article 252, paragraph 2 TCCP upper limits for detention on remand become twice as long for crimes against the state;
 - Incommunicado custody: in accordance with Article 10.b of the Anti-Terrorism Act a judge may restrict, upon the prosecutor's request, the right of the suspect to confer with their defence counsel for up to 24 hours. However, no interrogation may take place during this period. The Commissioner received allegations that the incommunicado custody provision is applied regularly, without taking into account its strict preconditions;
 - Restriction of the number of defence lawyers to one during custody (Article 10.b of the Anti-Terrorism Act);
 - Possibility of restricting access to the prosecution file (Article 10.d of the Anti-Terrorism Act);
 - Possibility of judicial control on the oral and written correspondence between the defendant and their defence lawyer: in accordance with Article 10.e, if there is a suspicion that the defence lawyer is passing communications to a terrorist organisation, the judge may decide to filter written communication or to allow an official to be present during oral communication between the defendant and their defence counsel;
 - Restriction of the number of persons who can be informed of the custody: if the prosecutor considers that there is a risk of jeopardising the aim of the investigation, only one relative can be informed of the suspect being taken into custody, in accordance with Article 10.a;
 - Immediate forced summoning of suspects, witnesses, victims and experts, without the need for previous invitation (in accordance with Article 251 TCCP);
 - Trials in absentia, especially in cases with multiple accused persons or in cases of repeated contempt of court (Article 252 TCCP);
 - Possibility of relocating the trial due to security reasons (Article 252 TCCP);
 - Non-application of certain exceptions to the interception of communications and surveillance measures (Article 10.f of the Anti-Terrorism Act).
93. The Commissioner received reports according to which the existing legislation creates an incentive for prosecutors with special powers to include criminal charges alleging the existence of a criminal organisation even for simple cases of complicity, since increased powers under Article 251 TCCP and the restrictions to the right of defence make it easier to investigate, for example by facilitating the interception of communications, and to bring proceedings. In such cases, even if the court eventually dismisses the charges concerning the existence of a criminal organisation, the 'protective measures' authorised by judges in this fashion are considered legal, and any material thus obtained is therefore admissible before courts.
94. Following his meetings with several prosecutors and judges concerned, the Commissioner understands that within the specific context of the Turkish judicial system and by virtue of their extended geographic scope, the assize courts with special powers have allowed the prosecution of some very complex organised crime cases affecting several provinces. The Commissioner acknowledges that such extended geographic jurisdictions may indeed be necessary for courts to be able to tackle modern forms of organised crime. Prosecutors also informed the Commissioner that the special powers allow investigations against civil servants, without obtaining prior administrative authorisation (although this seems to have little bearing on questions of impunity, due to the nature of the cases tried before assize courts with special powers).
95. By contrast, restrictions to the right of defence before these courts are a major concern for the Commissioner. He takes note of the concerns raised by Bar Associations, as well as by the Turkish Union of Bar Associations, that such restrictions constitute a severe handicap for defence lawyers in exercising their profession. He remains deeply concerned about the restrictions to the rights of defence mentioned above, and the potential creation of a two-track justice system when it comes to assize courts. The Commissioner is also concerned about reports indicating that there has been an increase in the number of cases investigated and proceedings brought under Articles 250-252 TCCP in recent years. Any departure from procedural guarantees provided in law must

be highly exceptional, and the generalisation of such exceptions would be against the spirit of justice and fair trial.

IV. Issues relating to the independence and impartiality of judges and prosecutors

96. Independence and impartiality are two fundamental principles in which justice should be grounded, being inherent elements of the rule of law.
97. In accordance with the case-law of the ECtHR, in order to establish whether a tribunal can be considered independent, for the purposes of Article 6, paragraph 1 ECHR, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence, given the confidence which the courts in a democratic society must inspire in the public.⁶⁴
98. As regards impartiality, the ECtHR has specified that it has a subjective and objective component. There are two tests to be applied in that respect: firstly a subjective test that consists in seeking to determine the personal conviction of a particular judge in a given case; and secondly an objective test that consists in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. In the words of the ECtHR, '[w]hen applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality'.⁶⁵

IV.a. Concerns relating to the independence of the judiciary

99. The High Council of Judges and Prosecutors (*Hâkimler ve Savcılar Yüksek Kurulu*, hereinafter 'HSYK') is the main organ tasked with ensuring the integrity of the Turkish judiciary. It takes decisions concerning the careers of judges and prosecutors, including appointments, promotions, transfers, and disciplinary proceedings. The Commissioner notes that this institution has been substantially reformed following the constitutional referendum of 12 September 2010.
100. Before the constitutional changes of September 2010, the competences to supervise the judiciary and prosecution service were divided between the Ministry of Justice and the HSYK, and the Ministry fulfilled many supervisory functions directly and provided the Secretariat of the HSYK. After the reform, the number of members of the HSYK was increased from 7 to 22, with a broader and more pluralistic composition, the majority of members being elected directly by judges and prosecutors at different levels, rather than being appointed by the High Courts. The HSYK was given the status of a separate and independent public legal entity, with its own budget, administrative staff and premises. Many competences, including inspection powers that formerly belonged to the Ministry of Justice, were transferred to the HSYK as an independent institution. The new HSYK has been established as a strong, autonomous institution with its own Secretariat, not only in legal, but also in actual terms.
101. On 20 December 2010, the Venice Commission adopted an Interim Opinion on the HSYK Bill following the constitutional referendum (which became the HSYK Act, No. 6087 of 11 December 2010). The Venice Commission also examined the revised Turkish legislation on judges and prosecutors and addressed a number of recommendations to the Turkish authorities.⁶⁶ The Commissioner encourages the Turkish authorities to pay close attention to the findings of the Venice Commission and implement its recommendations through appropriate measures.

⁶⁴ See *Çıraklar v. Turkey*, judgment of 28 October 1998, paragraph 38, *Fey v. Austria*, judgment of 24 February 1993, paragraph 30. See also Recommendation [Rec\(2010\)12](#) of the Committee of Ministers on judges: independence, efficiency and responsibilities, adopted on 17 November 2010.

⁶⁵ See *Çıraklar v. Turkey*, judgment of 28 October 1998, paragraph 38, *Fey v. Austria*, judgment of 24 February 1993, paragraph 30.

⁶⁶ See Venice Commission, Interim Opinion on the on the Draft Law on the High Council for Judges and Prosecutors ([CDL-AD \(2010\) 42](#)), and Opinion on the Draft Law on Judges and Prosecutors of Turkey, [CDL-AD\(2011\)004](#).

102. The Commissioner considers that the constitutional referendum of 2010 and the subsequent changes, in particular the fact that the HSYK was reformed in order to render the election of its members more democratic, represent an overall improvement in the institutional framework established to guarantee the independence of judges and prosecutors.
103. However, the Commissioner observes that the composition and actions of the HSYK, as well as the independence of judges and prosecutors in practice, remains a major concern. This is linked to the fact that, as pointed out by the Venice Commission, 'in comparison with most European countries, the system for the organisation of the judiciary in Turkey is highly centralised, rather strict, provides for wide powers of supervision and inspection [...]. Combined with a certain tradition for politicising the administration and controlling the judiciary, this explains why the issue of the composition and competences of the HSYK is of such paramount importance not only to the Turkish judiciary itself, but also to political and public life in general'.⁶⁷
104. The Commissioner notes that the Minister of Justice continues to preside over the HSYK, that the Undersecretary of the Ministry continues to be a natural member, and that four members are appointed directly by the President of the Republic. It is noted that according to the opinion of the Venice Commission appointment of members, who are not representatives of the Turkish judiciary, should be entrusted to the Parliament, rather than the executive.⁶⁸
105. The Commissioner also noted with concern allegations voiced by several interlocutors that the executive sought to exert some influence during the election process of the new HSYK after the constitutional referendum in 2010, and that the candidates favoured by the Ministry of Justice were elected in the majority of cases. He was also informed that former staff members from the Ministry of Justice hold key positions within the new HSYK. The uniform voting patterns of judges newly appointed by the HSYK to high courts was seen by some as evidence of an increasing influence of the executive on the judiciary.
106. While the Commissioner is not in a position to comment on the veracity of such allegations, he nonetheless considers that the Turkish authorities should take them seriously into account and seek to address such concerns in future reforms. A particular issue identified by the Venice Commission in this respect is the fact that, rather than voting for one representative, judges and prosecutors have to vote for as many candidates as the total number of positions to be filled, which is reported to have led to electors voting for unofficial lists of candidates as a block, to the detriment of a more pluralistic representation within the HSYK. The Commissioner understands that this practice is the result of a 2010 judgment of the Constitutional Court, which also applies to the elections of the Constitutional Court itself.
107. As regards the recruitment of judges and prosecutors, the Commissioner notes that the appointment of a judge or a prosecutor takes place following a two-year pre-service training, written examinations and an interview. He takes note of concerns relating to the composition of the board conducting the interview, which is composed of seven members, five of which are officials from the Ministry of Justice, whereas two are appointed by the Justice Academy.
108. As regards the inspection and supervision of judges and prosecutors, some of the inspection powers formerly held by the Ministry of Justice have been transferred to the HSYK. However, the Commissioner understands that investigations require prior authorisation by the Minister of Justice according to Article 159 of the Constitution. Furthermore, there is no appeal or review before a court of law for disciplinary sanctions and other decisions of the HSYK, except for dismissals from office.
109. As regards inspection and disciplinary proceedings, the Commissioner notes the concern expressed by the Venice Commission that 'the powers of the Turkish HSYK to supervise and control the judges and prosecutors are not only greater than in most other European countries,

⁶⁷ See Venice Commission, Interim Opinion on the on the Draft Law on the High Council for Judges and Prosecutors ([CDL-AD \(2010\) 42](#)), paragraph 18.

⁶⁸ *Ibid.*, paragraphs 34-35.

but they have also been traditionally interpreted and applied in such a manner as to exert great influence on core judicial and prosecutorial powers, in a politicised manner that has been quite controversial'.⁶⁹ In this connection, the Commissioner notes that prompt disciplinary actions against judges and prosecutors involved in some major cases, such as *Ergenekon*, *Sledgehammer* and *Deniz Feneri*, were subject to significant media attention and affected the public perception of judicial independence.

110. The Commissioner welcomes the information provided by representatives of the HSYK, that the new body has overturned some former decisions dismissing prosecutors and judges on various grounds, such as private life,⁷⁰ or sexual orientation.⁷¹ The Commissioner underlines the need to ensure the highest degree of transparency towards the judiciary and Turkish society in disciplinary proceedings conducted by the HSYK, by developing pre-established procedures and reasoned decisions.⁷²
111. Lastly the Commissioner observes that Turkish legislation does not distinguish between judges and prosecutors fulfilling an administrative function, notably within the Ministry of Justice, and those serving as prosecutors or members of the judiciary, whereas transfers between the two types of function are possible and frequent. The Commissioner takes note of the opinion of the Venice Commission that this 'tends to blur the distinction between the judiciary or the prosecutors and the executive branch of government. Furthermore, the possibility of judges and prosecutors being assigned to such tasks runs the risk of inculcating a statist attitude among judges and prosecutors and possibly causing them to seek favour from the executive'.⁷³ This also raises concerns regarding the impartiality of judges and prosecutors, given that state-centred attitudes significantly affect Turkish courts and prosecutors, as indicated below.

IV.b. Issues concerning the impartiality of the judiciary

112. As the Commissioner observed in his 2011 Report on freedom of expression in Turkey, most violations of Article 10 ECHR by Turkey result from a lack of proportionality in the interpretation of the legal provisions relating to freedom of expression by both judges and prosecutors, who often perceive notably the expression of minority identities as a threat to the interests and integrity of the state. Similar conclusions can be drawn from cases concerning other human rights and fundamental freedoms enshrined in the ECHR, such as freedom of association and assembly. The Commissioner is aware that there is a widespread perception, backed up by academic studies,⁷⁴ that members of the judiciary in Turkey have a tendency to see as their primary role the protection of the interests of the state, as opposed to upholding the human rights of individuals. This was a view shared by most interlocutors that the Commissioner met in Turkey, including representatives of the high judiciary.
113. The Commissioner considers that this state-centred attitude is one of the major causes of the systemic dysfunctions detailed in the present Report, seriously hampering efforts to fully align the Turkish legislation and practice with European human rights standards. For example, prosecutors and courts in Turkey have failed to tackle in a satisfactory manner violations of the ECHR by state authorities, leading to concerns about impunity. The treatment of suspects by the criminal justice system differs depending on whether they claim to have acted in what the courts consider to be

⁶⁹ Ibid., paragraph 50.

⁷⁰ See the judgment of the European Court of Human Rights in the case *Özpınar v. Turkey* of 19 October 2010, where the ECtHR found that the decision to dismiss the applicant, a judge, included many irrelevant aspects relating to her private life and did not include sufficient safeguards against arbitrariness, in violation of Articles 8 and 13 of the ECHR.

⁷¹ The Commissioner also notes the 2011 decision of the HSYK to reinstate the prosecutor Ferhat Sarıkaya who, in a widely publicised case, was dismissed in 2006 after citing the name of the then Commander of the Turkish Land Forces in an indictment, in the framework of the so-called 'Şemdinli' investigations.

⁷² See also the Recommendation [Rec\(2010\)12](#) of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted on 17 November 2010, paragraph 28.

⁷³ See Venice Commission Opinion on the Draft Law on Judges and Prosecutors of Turkey, [CDL-AD\(2011\)004](#), paragraph 29.

⁷⁴ See, *inter alia*, the study by Mithat Sancar and Eylem Ümit Atılğan commissioned by the Turkish Economic and Social Studies Foundation (TESEV), "[Justice can be Bypassed Sometimes: Judges and Prosecutors in the Democratization Process](#)", 2009.

- the interests of the state. Similarly, when there is suspicion of the commission of offences against the integrity of the state and its institutions (a concept interpreted widely), the courts easily authorise severe restrictions of personal freedom, such as long detentions which are considered the rule rather than the exception, sometimes to the detriment of the principle of the presumption of innocence.
114. The Commissioner reiterates that one of the most important factors in shaping and influencing these statist attitudes has been the letter and spirit of the 1982 Constitution.
 115. However, many other, more practical reasons have been invoked by various interlocutors to explain the persistence of these attitudes among judges and prosecutors. These include, for example, the inexperience of new judges and prosecutors and the insufficiency of their pre-service training, the fact that they are often initially posted in small towns and that their working conditions naturally lead to socialisation exclusively with other civil servants, or that they have to learn their profession mainly 'on the job' and are not encouraged to specialise. As regards the pre-service training, in particular, the Commissioner notes that, despite being very detailed, Act No. 283 on Judges and Prosecutors does not include human rights and the case-law of the ECtHR, as well as the protection of suspects, victims and witnesses, among the subjects included in the pre-appointment examination of judges and prosecutors.⁷⁵
 116. Already in his previous reports concerning Turkey, the Commissioner emphasised the need for the systematic training of judges and prosecutors. He recalls the Committee of Ministers Recommendation Rec(2004)4 on the European Convention on Human Rights in university education and professional training,⁷⁶ as well as the 2011 *Izmir Declaration* calling on member states to 'ensure that the programmes for professional training of judges, prosecutors and other law-enforcement officials as well as members of security forces contain adequate information regarding the well-established case-law of the ECtHR concerning their respective professional fields'.⁷⁷
 117. For this purpose, the Commissioner welcomes the establishment in 2003 of the Turkish Justice Academy, which provides pre- and in-service training to judges and prosecutors. The Commissioner also understands that the HSYK was recently given the task of providing in-service training. The Commissioner encourages both bodies to ensure that the relevant European human rights standards are effectively integrated in the training services that they provide. The Commissioner also reiterates his encouragement to the Turkish authorities to continue and reinforce legal and human rights capacity building programmes which are already being carried out in co-operation with the Council of Europe.
 118. The Commissioner was informed that the functioning of the very elaborate system of grades, inspections, appraisals, promotions and mandatory transfers⁷⁸ encouraged a high degree of conformism among the members of the judiciary and prosecutors, for example due to the big say given to high courts for the said appraisals or the threat of being involuntarily transferred. As regards prosecutors, the inspection system seems to have also discouraged them from performing their gate-keeping function, as a prosecutor was more likely to be inspected for not having brought a case than vice versa. This would notably explain many cases brought by prosecutors in which they request an acquittal decision at the last hearing before the court.
 119. The Commissioner was pleased to note that there was an acute awareness of this problem within the HSYK, which has already led to some measures being taken, such as the elimination of notation of first-instance judges by higher courts or 'certificates of good behaviour' given by the Ministry of Justice. The Commissioner has also been informed that there are ongoing discussions with a view to making the performance criteria more objective and targeted to improving the

⁷⁵ See also the Opinion of the Venice Commission on the relevant Bill, paragraph 35.

⁷⁶ Committee of Ministers Recommendation, [Rec\(2004\)4](#), on the European Convention on Human Rights in university education and professional training.

⁷⁷ High Level Conference on the Future of the European Court of Human Rights, [Izmir Declaration](#), 27 April 2011, paragraph B.1.c of the Follow-up Plan.

⁷⁸ See Venice Commission, Opinion on the Draft Law on Judges and Prosecutors of Turkey, [CDL-AD\(2011\)004](#).

quality of decisions. This would include assessments of the use of alternative measures to remands in custody, the knowledge of the ECHR and adequate references to the relevant case-law of the ECtHR, or whether the relevant decisions give rise to a finding of violation in Strasbourg. The Commissioner fully supports this process, and hopes that it will lead to objective criteria which will provide a natural encouragement for judges and prosecutors to internalise the relevant human rights standards.

120. A further important issue affecting the impartiality of judges and prosecutors, as well as the necessary appearance of their impartiality, concerns the relations between judges and prosecutors. The Commissioner recalls the 2000 Recommendation of the Committee of Ministers to member states to ensure that 'the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges'.⁷⁹
121. The Commissioner observes that, there is nothing that separates the training of a judge from that of a prosecutor in the Turkish judicial system. The selection procedure being identical for both professions, it is up to the HSYK to appoint a successful candidate either as a judge or a prosecutor. The statute of the HSYK itself does not distinguish between judges and prosecutors, who can vote in and stand for HSYK elections in the same way.⁸⁰ Judges and prosecutors are still regarded as members of the same community, live in the same staff housing compounds, often have close personal social relations, and work in the same offices in court buildings. According to some observers, this makes it more unlikely that judges will closely scrutinise the requests of prosecutors for restrictive measures. Another concern that was raised is the fact that the chief prosecutor is formally the responsible authority for the day-to-day management and the organisation of the courthouse (the facilities) and fulfils many administrative duties, which has implications not only for the workload of prosecutors, but also for the appearance of impartiality.
122. As regards the appearance within the criminal courtrooms, judges and prosecutors enter and leave the courtroom together and through the same door, sit at the same elevated level, in many courtrooms even adjacent to one another, and wear similar robes. By contrast, the defence lawyer enters through the public entrance, wears different robes and sits at a lower level. The Commissioner is concerned about reports that the physical proximity between the prosecutor and the judges results in private discussions during the hearing, undisclosed to the defence or the audience, which has implications for equality of arms. He also observed that the layout of some courtrooms makes it difficult for defendants to communicate with their defence counsels during hearings.
123. Lastly, the Commissioner understands that in the Turkish judicial system, prosecutors have the obligation to collect evidence both against and in favour of the suspect or defendant. He takes note of many reports, however, that in practice the prosecutors often fail to take account of evidence or witness statements in favour of the defendant. In any event, the Commissioner is of the view that the prosecutors' symbolically privileged standing in criminal proceedings, as the guardian of state interests, could reinforce the perception according to which the Turkish judicial system has a strong in-built bias for the interests of the state and project an appearance of partiality to defendants and to the public.

Conclusions and recommendations

124. The Commissioner underlines that a strong and efficient judicial system, fully respecting human rights, is an indispensable component of the rule of law, which in turn constitutes the basis of a genuine democracy. The right to a fair trial, including adversarial proceedings and equality of arms, the presumption of innocence, as well as independence and impartiality of courts, are well established principles in the case-law of the European Court of Human Rights.

⁷⁹ Committee of Ministers Recommendation, [Rec\(2000\)19](#) on the role of public prosecution in the criminal justice system, paragraph 17.

⁸⁰ Venice Commission, Interim Opinion on the on the Draft Law on the High Council for Judges and Prosecutors ([CDL-AD \(2010\) 42](#)), paragraphs 70-73.

125. As detailed in this Report, there are some long-standing, systemic dysfunctions in the domestic justice system adversely affecting the enjoyment of human rights and fundamental freedoms in Turkey, as well as the public's perception of the system's effectiveness, independence, and impartiality. The Commissioner stresses that the success of the mission entrusted to courts and prosecutors depends to a large extent on the public trust in the judiciary.
126. The Commissioner welcomes the remarkable efforts undertaken by the Turkish authorities in order to reform the Turkish justice system in recent years, notably the adoption of a judicial reform strategy, legislative changes, as well as the amendment of some key provisions of the Turkish Constitution. He particularly appreciates the genuine constructive dialogue he has with the Turkish authorities, the latter having shown clear determination and goodwill in tackling some of the concerns highlighted in the Commissioner's reports. The establishment in 2011 within the Ministry of Justice of a Department of Human Rights, whose sole task will be the prevention of human rights violations, notably through the full and effective execution by Turkey of the judgments of the ECtHR, is a welcome example.
127. Nevertheless, further efforts are necessary. The Commissioner considers that the main factor hampering progress in practice has been the entrenched culture within the Turkish judiciary, and the fact that the protection of the state often takes precedence over the protection of human rights.
128. The Commissioner is concerned about the high number of judgments delivered by the ECtHR against Turkey, where the Turkish judiciary has been seen to have either failed to tackle human rights violations or to have directly caused them. He considers that the effective implementation of these judgments requires amendments of the letter and spirit of the Turkish Constitution, statutory legislation and regulations, institutional changes, awareness-raising and capacity-building within the judicial system, as well as measures to improve public trust in the judiciary.

Constitution and the role of the Constitutional Court

129. One of the main obstacles to the effective internalisation of ECHR standards by the Turkish judiciary has been the letter and spirit of the present Turkish Constitution, approved in the aftermath of the *coup d'état* of 12 September 1980, enshrining a state-centred approach which tolerates too many exceptions to the enjoyment of human rights and fundamental freedoms. The Commissioner notes a great degree of consensus currently in Turkish government and society for the need to change the 1982 Constitution.
130. In this respect, the Commissioner welcomes the establishment of a 'Constitutional Conciliation Commission' within the Turkish Parliament, with the participation of all four political parties represented in the Parliament. He notes with particular appreciation that the terms of reference of this Commission indicate that the Turkish public and civil society will be closely associated to the drafting process, and hopes that this transparent process will lead to a more democratic Constitution, firmly placing respect for and protection of human rights at the very centre of Turkish law and practice.
131. In the meantime, the Commissioner considers that the constitutional amendments approved in the referendum of 12 September 2010 could have a potentially positive impact. He also considers that giving real effect to Article 90 of the present Constitution, which gives precedence to international treaties on human rights, including the ECHR, over national laws in cases of conflict between the two, should remain high on the agenda of the Turkish authorities.
132. The right to individual application to the Constitutional Court, which will become effective in 2012, is an important development in this respect. The Commissioner considers that, for this right to fulfil its potential, it is crucial that the case-law of the European Court of Human Rights is fully and effectively abided by domestic courts. In this respect, the Commissioner is concerned that the Constitutional Court has failed in the past to give full consideration to that case-law.⁸¹

⁸¹ See footnote 7 above.

133. The Commissioner encourages the Turkish authorities and the Constitutional Court to take full account of the Opinion of the Venice Commission on the law on the establishment and rules of procedure of the Constitutional Court.⁸² He also encourages further co-operation between the Constitutional Court and the Council of Europe with a view to fine-tuning the relevant legislation and practice and ensuring that the new right to individual petition leads to the best possible impact in terms of embedding ECHR standards in the Turkish judicial system.

Excessive length of proceedings and resort to remands in custody

134. The Commissioner encourages the Turkish authorities to continue their efforts to increase the numbers of judges and prosecutors, and to give consideration to increasing professional staffing in courts, for example by hiring court clerks, para-legal assistants, or administrators.
135. In order to reduce the burden on the criminal justice system, the Commissioner encourages the Turkish authorities to provide the necessary framework to encourage prosecutors to exercise more caution in their decisions to bring proceedings. They should also be discouraged from ordering arrests or requesting remands when the accusation file is not ready. It is important to ensure, however, that this has no detrimental effect as regards the impunity of state actors.
136. In order to enhance the quality of prosecutors' work, the Commissioner considers that more needs to be done to implement the by-law on judicial police, with a view to ensuring that investigations are better co-ordinated by prosecutors who should provide clear directives to police forces, including better collection of evidence and avoiding leaks in investigation. The prosecutors should be given the necessary resources to conduct investigations properly and to assess the evidence transmitted by police officers. Police dealing with judicial matters should have the necessary expertise and sufficient clarity should be provided as to the authority which oversees their actions.
137. The Commissioner encourages the Turkish authorities to introduce reasonable time limits for gathering evidence and for presenting indictments to courts, especially if there are suspects already in pre-trial detention. The quality of indictments and their length is another concern. These documents should be as concise as possible, strongly linking essential pieces of evidence to the accusation. The Commissioner finds that further measures could be considered to expedite trials, for example by ensuring that they continue with fewer or no interruptions, with defendants, witnesses and experts appearing before the court during trial. He encourages the Turkish authorities to draw on the expertise of the relevant Council of Europe bodies concerning judicial time management.⁸³
138. As regards remands in custody, the Commissioner urges the authorities to address the root causes of the excessive resort to detentions on remand. The letter and spirit of the law should be amended in order to clarify the *exceptional nature* of remands in custody, and the need to provide clear legal reasoning in cases where they are necessary. In particular, it should be clarified to judges, possibly through a circular and training, that the mere existence of a 'catalogue crime' in the TCCP is not sufficient to warrant detention, and that a duly reasoned decision concerning detention is not prejudicial to the eventual outcome of the case and is to be taken separately from the merits. In any event, the Commissioner considers that the upper limits for remands in custody must be substantially reduced.
139. The existing legal framework for the use of alternative measures to detention should be clarified through appropriate means. Judges and prosecutors should receive special training on the use of such non-custodial measures. Incentives should be provided to encourage a more frequent use of these measures.

⁸² Opinion [CDL-AD\(2011\)040](#) of the Venice Commission on the law on the establishment and rules of procedure of the Constitutional Court, 18 October 2011.

⁸³ In particular, the work of the Centre for judicial time management, set up by the European Commission for the Efficiency of Justice (CEPEJ), http://www.coe.int/t/dghl/cooperation/cepej/Delais/default_en.asp.

140. The Commissioner urges the authorities to introduce, in accordance with the case-law of the ECtHR, effective domestic remedies, both for excessive lengths of proceedings and unjustified remands in custody, which can be engaged before the conclusion of the principal trial. These remedies should make it possible to accelerate the proceedings or challenge the lawfulness of detention with reasonable prospects of success, as well as to obtain adequate compensation for unreasonably long proceedings and unlawful detentions.

The role of courts in combating impunity for serious human rights violations

141. The Commissioner welcomes the determination displayed by the Turkish authorities and the improvements achieved in combating torture and ill-treatment by state actors. The Commissioner considers, however, that further resolute action is necessary to fully eradicate impunity and implement the 2011 Guidelines of the Committee of Ministers *on eradicating impunity for serious human rights violations*, including with respect to the role of the Turkish prosecutors and courts. The Commissioner has closely followed the case of the murdered journalist Hrant Dink, where the European Court of Human Rights has pointed to severe shortcomings in this connection, which Turkish authorities are urged to address.
142. In particular, while not denying the value of administrative investigations by independent inspectors, the Commissioner considers that the requirement for prior administrative authorisation for judicial investigations should be lifted for all allegations of serious human rights violations, not only those concerning torture and ill-treatment. The authorities should further ensure that serious human rights violations committed by state security forces falling under Articles 2 and 3 ECHR should not become statute-barred for domestic proceedings and investigations.
143. The Commissioner encourages the authorities to collect reliable statistics regarding investigations, prosecutions and convictions of security forces and communicate them to the Council of Europe, including his Office.
144. The Commissioner considers that legislative and practical measures are needed to reinforce the standing of victims and/or their families in criminal investigations and proceedings in accordance with the case-law of the ECtHR and the aforementioned Guidelines of the Committee of Ministers, in particular their Section VII.1 and 2. He also encourages the Turkish authorities to improve the standing of third parties, including expert NGOs, in cases concerning serious violations of human rights.
145. The Commissioner encourages the Turkish authorities to ensure the admissibility of reliable independent medical evidence before courts. He urges the authorities to implement the 2011 Recommendations of the European Committee for the Prevention of Torture to Turkey, including those relating to medical examinations of persons in custody and electronic recording of interviews conducted by law enforcement authorities.
146. The Commissioner expresses his serious concern about the allegations that police officers bring counter-charges under Article 265 of the Turkish Code of Criminal Procedure following complaints against them. The role of public prosecutors is crucial in this respect, in accordance with Section VIII of the Committee of Ministers Guidelines on impunity. The Commissioner considers that, in order to effectively address issues relating to police violence, Turkey should establish a police complaints mechanism, which satisfies the principles of independence, adequacy, promptness, public scrutiny and victim involvement.
147. The Commissioner shares the misgivings of the European Court of Human Rights regarding the village guard system and the lack of safeguards against potential abuses committed by village guards, be they wilful or unintentional. He therefore reiterates his call on the authorities to examine the possibility of abolishing the system of village guards.
148. The Commissioner observes that there are certain areas where the established case-law of Turkish courts has led to disproportionately lenient sentences for perpetrators of serious human rights violations. The Commissioner commends the recent Turkish efforts to tackle this problem in

connection with cases involving violence against women. He encourages the authorities to pursue these efforts, which should provide inspiration for other problem areas highlighted in this report, such as violence against LGBT persons.

Other major aspects of criminal proceedings

149. The Commissioner is fully aware that many Turkish judges and prosecutors fulfil their duties in the very difficult context created by terrorism and terrorist acts, and acknowledges the serious challenges posed by the complicated task of fighting terrorism. Experience shows, however, that for this fight to be effective, the conduct of the judiciary in particular must be beyond reproach. The Commissioner considers that full respect for human rights standards, rather than being an impediment in that fight, is the essential factor ensuring its ultimate success.
150. The Commissioner expresses his concerns about the wide margin of interpretation and application allowed by provisions of the Turkish Anti-Terrorism Act and Article 220 of the Turkish Criminal Code, in particular in cases where membership in a terrorist organisation has not been proven and when an act or statement is deemed to coincide with the aims or instructions of a terrorist organisation. The Commissioner considers, in particular, that more efforts are needed to refine this legislation and train prosecutors and judges as to the frontier between the offences of terrorism and membership of a criminal organisation on the one hand, and acts falling under the protection of the rights to freedom thought, expression, association and assembly on the other hand, in accordance with the case-law of the European Court of Human Rights.
151. As regards the principles concerning adversarial proceedings and equality of arms, key components of the right to a fair trial under Article 6, paragraph 1 of the ECHR, the Commissioner encourages the Turkish authorities to amend the relevant legislation, and in particular the Turkish Code of Criminal Procedure, in the light of the concerns highlighted in the present Report.
152. In particular, the Commissioner urges the Turkish authorities to curb the excessive use of restrictions to the disclosure of evidence before trial, based on Article 153 of the Turkish Code of Criminal Procedure and Article 10 of the Anti-Terrorism Act. The Commissioner considers that the right of defence should be reinforced in order to affirm the adversarial nature of proceedings as regards the ordering of 'protective measures', where possible, as well as in relation to the acceptance of the indictment and decisions on the admissibility of pieces of evidence.
153. During the trial, practical difficulties hampering the full use of the right to cross-examination or summon witnesses for the defence should be removed, through the training of judges, prosecutors and defence lawyers. More efforts are also needed to limit the recourse to secret witnesses and to counterbalance the effects this has on the principles of adversarial proceedings and equality of arms.
154. The Commissioner remains seriously concerned about the operation of the assize courts and prosecutors with special powers, in particular as regards numerous restrictions to the right of defence, which have been detailed in this report. Any derogation from ordinary procedural guarantees must be highly exceptional. The Commissioner encourages the Turkish authorities to review the need for the system of assize courts and prosecutors with special powers, and to consider having all serious criminal cases tried in ordinary, well-resourced assize courts.
155. While the Commissioner understands that these special courts offer other advantages facilitating the fight against organised crime, such as an extended geographic scope and the possibility of investigating civil servants without prior administrative authorisation, he considers that these could be implemented by ordinary, well-resourced assize courts without necessarily restricting the rights of defence.

Issues relating to the independence and impartiality of judges and prosecutors

156. The Commissioner recalls that the independence and impartiality of judges and prosecutors, as well as the appearance of their independence and impartiality, are constituent elements of the rule of law.

157. Judicial organisation in Turkey remains highly centralised with very wide powers of supervision and inspection of judges and prosecutors. As regards the independence of the judiciary, the Commissioner considers that the recent constitutional and legislative reforms affecting the HSYK constitute an improvement over the previous situation, where the control of the executive and the high courts over judges and prosecutors was stronger.
158. Nevertheless, the Commissioner considers that there is a need to build upon the existing reforms of the HSYK in order to further affirm the independence of the judiciary and address remaining concerns. In particular, the Commissioner encourages the Turkish authorities to implement the 2011 recommendations of the Venice Commission, concerning both the HSYK and the status of judges and prosecutors. These recommendations address, *inter alia*, the mode of elections to the HSYK which discourages pluralism, the role of the Minister of Justice within the body, as well as the mode of appointment of judges and prosecutors and the lack of distinction between judges and prosecutors fulfilling administrative and judicial functions.
159. The Commissioner is concerned about recent disciplinary actions in some particularly high-profile cases which have had a significant impact on public trust in the justice system. The Commissioner advises a high degree of caution and restraint in such cases, as well as more transparency and reasoned decisions, in order to dispel any elements of mistrust on the part of the public. Making all decisions affecting the position of judges and prosecutors subject to independent judicial review would also be a welcome development in this respect.
160. As regards impartiality of judges, the Commissioner considers that state-centred attitudes, shaped in part by the background, letter and spirit of the 1982 Constitution but also many practical factors highlighted in this Report, have been a major impediment preventing recent constitutional, legislative and institutional reforms from reaching their full and desired potential.
161. In this respect, in addition to continuing efforts relating to pre- and in-service training of judges and prosecutors, the Commissioner encourages the authorities to pursue the ongoing discussions relating to a review of the criteria for inspection and performance appraisals of judges and prosecutors, hoping that these criteria will lead to natural incentives for judges and prosecutors towards effectively embedding the ECHR and the case-law of the ECtHR into their daily work.
162. The Commissioner also considers that internal democracy within the judicial profession has a key role to play in breaking the mould of statist attitudes, and welcomes recent initiatives such as meetings on the analysis of the situation of justice organised by the HSYK, with a wide participation of judicial professionals of different levels.
163. The Commissioner is concerned about the fact that there is little that distinguishes the status of judges and prosecutors from one another, including in the courtroom or within the HSYK, and about the institutional and practical framework favouring frequent professional and social contacts between them, especially due to the effect that this has on the appearance of impartiality and equality of arms. The layout of the courtrooms is a connected problem, which should also be addressed by the authorities.
164. The Commissioner believes that the above challenges with which Turkey is faced can only be effectively tackled if judges and prosecutors at all levels take account of ECHR standards and fully embed them in their decisions. He believes that reflecting on and addressing the issues highlighted in the present Report would contribute to the redress of long-standing systemic dysfunctions and to the increase of the public trust in the justice system, necessary in a democratic society.
165. The Commissioner wishes to stress his willingness to pursue his constructive dialogue with the Turkish authorities and to offer his assistance and support to their efforts to improve the protection and promotion of human rights in Turkey.

APPENDIX
Comments of the government of Turkey on the report of Commissioner Hammarberg

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TO THE COUNCIL OF EUROPE
Ambassador*

5 January 2012

Dear Mr. Commissioner,

We welcome the acknowledgment of the efforts undertaken and the progress achieved by Turkey, in particular the reference made to the substantial constitutional, legislative, institutional and practical reforms in your report dated 1 December 2011 on administration of justice and protection of human rights in Turkey.

Meanwhile, the report as a whole does not reflect a balanced approach vis-à-vis the Turkish justice system and brings up criticism which might not be considered to be encouraging in terms of the ongoing reform process in the country. The wording of the report implies that the improvement is rather theoretical, than practical. The publication of Judicial Reform Strategy has been recognized as a crucial step in addressing structural problems, but concrete projects and institutional capacity building activities which have become operational within the scope of this new strategy have not been included in the report. For example, joint projects launched and running concurrently in cooperation with the Council of Europe, aimed at eliminating some of the problems identified in the report, are not even mentioned. "Enhancing the Role of the Supreme Judicial Authorities in respect of European Standards" and "Strengthening the Court Management System" are just the two to name.

Many criticisms in your report seem to be related to recent high-profile cases, which happen to be based on concrete investigations and proceedings that are categorized in EU Progress Reports as windows of opportunities in Turkey's democratization process.

Some criticisms, on the other hand, are based on unconfirmed information provided by unknown sources and subjective evaluations such as allegations on lack of ordinance on interception of communication or witness protection standards.

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There are also factual errors. Concerns regarding excessive resort to detentions on remand (paragraph 8) which are based on the case-law of the European Court of Human Rights (ECtHR) are misleading. There is no ECtHR judgment against Turkey which identifies such a problem as excessive resort to detentions on remand. The Court, within the context of Article 5 (right to liberty and security), actually assess the reasonableness of the length of detention in the light of the circumstances of the case. On the other hand, the ECtHR, in some cases, stated that Turkish judicial authorities resort less to alternative measures to detention.

In addition to these general comments, we would also like to highlight some specific points:

1. In paragraph 22, it is argued that going from arrest of suspected persons towards evidence is a long-established practice. This has been an issue in 1990s as it was alleged that ill-treatment was used as a method of evidence gathering during detention on remand. Today, such allegations have disappeared. Eventually, collecting evidence to establish well-founded suspicions in the first place has become the general practice.

It is true that the preparation of indictment takes long particularly in investigations against organized crime syndicates, taking into account the number of suspects, evaluation of all evidence and the nature of such crimes. Due attention is given to shortening the length of preparation of indictment.

Regarding the length of detention, the case-law of the ECtHR identifies 2- year period as being reasonable based on justifiable grounds. This period is extended up to two years and eight months in cases of organized crime. In order to eliminate implementation problems, in-service training is provided to judges and prosecutors related to liberty and security of individuals in coordination with the High Council of Judges and Prosecutors (HSYK). Most recently, a symposium was organized on "problems stemming from arrest and detention: increasing the effectiveness and efficiency of prosecution and

expediting the proceedings" on 12-14 September 2011. Such in-service training activities aimed at raising awareness will continue. The HSYK issued Circular No.4 on 1 July 2011 to better inform judges and prosecutors about the case-law of the ECtHR, and in particular Article 5 of the European Convention on Human Rights (ECHR), regarding the right to liberty and security.

2. Criticism regarding the excessive length of proceedings is true for some cases. Serious measures have been taken in recent years to eliminate this problem. Thanks to these measures, for the first time this year, finalized files outnumbered new case files before the

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Court of Cassation. In previous years, the number of new files was 100,000 more than the number of finalized files. In this respect, all of the pending cases before the Court of Cassation are expected to be finalized in two to three years time.

3. According to the ECHR, persons sentenced as per the judgments of First Instance Courts and not yet exhausted the appealing process are considered convicts. Taking into account this criterion, the revised figures of the Directorate General for Prisons and Detention Centers show that the proportion of persons remanded in custody in the total prison population is 28.4% as of April 2011.
4. The allegation that indictments often take a very long time to prepare is based on inadequate information. Circular No.10 on Methods and Principles of Investigation as well as Circular No.11 on Methods of Special Investigation issued by the HSYK serve as a guideline to carry out an efficient, prompt and appropriate investigation, to collect all the evidence in due time, to prepare an indictment based on substantial legal analysis within the designated time and to ensure uniformity of practice. These Circulars shed light on issues that the police force may have doubts about and recommend to make good use of pre-trial detention period, to give precedence to matters concerning detainees, to avoid the violation of principle of fair trial and to refrain from limiting the right to defence as well as to provide legal assistance to suspects. They highlight the rights of victims.
5. It is recommended in the report that the defence counsel should be given the opportunity to comment on the allegations against him/her before indictment is accepted by the competent court. Yet, it is not clear on which principle of the ECHR this recommendation is based and to which purpose it serves. It is not realistic to expect the defence to comment in favour of the indictment.

Turkish courts are asked in the report to take all precautions in order to ensure that recourse to secret witnesses does not jeopardize the principles of adversarial proceedings and equality of arms. Yet, Turkish courts do not adjudicate on the basis of testimonies of secret witnesses only.

Recourse to secret witnesses is possible only within the context of the aggravated life sentence, life imprisonment or minimum 10-year long sentence envisaged in the Turkish penal code. In accordance with Article 210 of the Criminal Procedure Law, secret witnesses are definitely given the floor at the trial.

6. Regarding the status of assize courts with special powers (paragraph 90-95 and 154), it is important to acknowledge the fact that specialized courts are very common in democratic

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countries. Due to the nature of organized crime and terrorism, courts specialized in these issues are an appropriate means to tackle with these problems. The proceedings of terrorist and criminal organizations are complex and long lasting. They have an extended geographic scope and involve large number of suspects and grave criminal charges. The length of proceedings of such cases may last much longer in ordinary courts. They may overlook the activities of terrorist organizations and organized crime syndicates which operate concurrently in a wide area affecting several provinces. Ordinary assize courts also lack the expertise in collecting the widespread pieces of evidence and analyzing them, finding out the connection among suspects as well as the structure of and the hierarchical relations within the organisation. Judges and prosecutors appointed to these courts should have technical, sociological and political expertise for a fair and prompt trial. Even within the supreme judiciary organs there are specialized units which cover special crimes.

According to the ECtHR, the independence and impartiality of a court should be assessed on its own circumstances, taking into consideration the mode of appointment of judges, their assurances, and the appearance of their impartiality...etc. In the ECtHR judgments, the independence or impartiality of former State Security Courts (DGM) with special powers had not been questioned, but identified a violation of the right to fair trial due to the presence of a military judge within those courts. Following the legal amendment regarding the composition of DGM, there have been no violation judgments with respect to courts with special powers delivered by the Court.

The new assize courts with special powers have been established in 2005 by the Turkish Penal Code and the Criminal Procedural Law. They are not ad-hoc courts to try specific persons or groups but to investigate and prosecute offences related to narcotic or organized economic crimes committed by use of force or threat, crimes of terrorism, crimes committed against the integrity of the state, unity of the country or constitutional order by use of force...etc.

7. The Strategic Draft Plan of the HSYK envisages taking necessary measures to increase the effectiveness and efficiency of the justice police. The HSYK, in cooperation with the General Directorate of Security and General Command of Gendarmerie, is expected to carry out activities in this respect. The HSYK has issued Circular no.7 on the mandate and

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responsibilities of the justice police in order to eliminate different types of practice with respect to relations between the public prosecutors and justice police. This is an issue which has been also raised in the EU Progress Report and the visit reports of independent experts. Further coordination between the Ministries of the Interior and Justice will be ensured.

8. The case-law of supreme judiciary shows that the convict does not receive lighter sentences in case of violation of human rights. On the contrary, examples show that the Court of Cassation corrects the judgments of First Instance Courts whenever the verdicts contain lighter sentences.
9. Regarding the violation judgments of the ECtHR against Turkey on the right to freedom of expression, it can be stated that the Court of Cassation gives full consideration to the element of violence/use of force in order to adjudicate recent freedom of expression cases. However, in some cases, activities carried out within a terrorist organization do not enjoy the right to freedom of expression (see Sadak and others v. Turkey judgment of the ECtHR, 17 July 2001). Therefore, activities aimed at achieving the goals of terrorist organization cannot be considered peaceful expressions of thought.

In cooperation with the CoE, Ministry of Justice is working on a project to remove the obstacles before the freedom of expression in Turkey. This project aims at the identification of legal provisions which restrict freedom of expression and aligning these with the ECtHR standards.

10. Criticisms regarding the independence of the judiciary do not reflect the actual situation and contain undue allegations related to the HSYK. The Constitutional amendments adopted with the referendum of 12 September 2010 and secondary legal changes implemented as a result of the Constitutional amendments also reformed the structure and practice of the HSYK. This was done as a part of the wider strategy to reform the judiciary in an effort to substantially reform the system in line with international standards and to also eliminate criticism directed against the HSYK. It is the culmination of the discussions held with standard-setting and monitoring bodies of international organisations.

As per guidance provided from these international bodies, the changes have helped build a structure that enables the protection of individual freedoms through accentuating independence from the judiciary and executive pillars with a wider based representation and diversification of the HSYK's members. Provision of a separate budget and secretariat, the HSYK's dependence on the resources of the Ministry of Justice has been eliminated.

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Although the Minister of Justice and the Under-Secretary of the Ministry of Justice remain as natural members of the HSYK, Minister is not able to participate in chamber meetings and the Under-Secretary is only a member of the First Chamber. The participation of the Minister and the Under-Secretary is not required for the adoption of decisions.

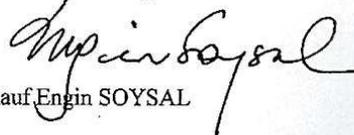
Criticism directed against the process of election of the members of the HSYK is unfortunate and does not take into consideration the fact that the voting took place in secret and determination of who voted for whom is not possible. It should be noted that the Ministry of Justice has taken all necessary measures exercising extreme caution with regard to preserving the independence and impartiality of the HSYK and has even cancelled all inspection missions of the Inspection Board to remove possible perception of a pressure directed to the judges and prosecutors in the voting process for the HSYK.

11. Pre-service and in-service training of judges and prosecutors (paragraph 115-117) are organized by the HSYK in coordination with the Justice Academy and are available for the whole of judiciary. Annual planning on the basis of bilateral or multilateral projects is done according to the needs of judiciary and available budgetary means. Training activities continue particularly on raising awareness of human rights. Most recently, a group of 24 judges and prosecutors visited the ECtHR and were briefed on the cases against Turkey. Another group of 40 judges and prosecutors covering media freedom cases also visited the ECtHR and were informed on the case-law of the Court on freedom of expression and media.

In this respect, I would like to once more reiterate my Government's resolve to continue with the ongoing transformation and reform process. We are ready to consider your constructive recommendations and proposals with a view to remedying legal deficiencies and implementation problems.

We look forward to enhancing our cooperation in the future.

Yours sincerely,


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