TÜRK CEZA ADALET SİSTEMİ İHTİYAÇ DEĞERLENDİRME RAPORU VE EYLEM İÇİN TAVSİYELER

NEEDS ASSESSMENT REPORT AND RECOMMENDATIONS OF ACTION FOR TURKISH CRIMINAL JUSTICE SYSTEM

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TÜRK CEZA ADALET SİSTEMİNİN ETKİNLİĞİNİN GELİŞTİRİLMESİ

AVRUPA BİRLİĞİ VE AVRUPA KONSEYİ ORTAK PROJESİ

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IMPROVING THE EFFICIENCY OF THE TURKISH CRIMINAL JUSTICE SYSTEM

EUROPEAN UNION / COUNCIL of EUROPE JOINT PROGRAMME

THIS IS THE FINAL VERSION OF THE REPORT* INCLUDING THE PARTNERS' FINAL COMMENTS

**This report covers the legislation and practice regarding the Turkish Criminal Justice system until December 2013. Following the completion of this report, extensive legislative changes were adopted. These are not reflected in the text of this publication. This report should not necessarily be seen as a form of endorsement by the EU.*

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The author is the long-term consultant of the project.

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EXECUTIVE SUMMARY

This needs assessment report is based mainly on fact-finding visits to pilot courthouses conducted between October 2012 and February 2013.
It contains 50 recommendations for action, comprising legislative amendments and various other measures.
It is certainly not exhaustive: a range of other issues could have been raised and other solutions could have been envisaged, but the LTC has chosen to confine himself to the most important aspects.

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Turkey remains among the leading countries in terms of number of violation judgments pronounced by the European Court. Of course, most of the applications were filed with the ECtHR prior to the substantial reforms introduced in the recent legislative and institutional 'packages'. However, these reforms have not solved all the problems.

These problems relate both to the pre-trial phase of criminal proceedings and to the trial itself. They are mainly due to the entrenched attitudes and practices followed by judges, prosecutors, lawyers and law enforcement officers, but also result, more fundamentally, from the situation of Turkish criminal justice within society.

GENERAL REMARKS

It is recommended to introduce citizen participation in the operation of Turkish criminal justice (except in some very specific matters, such as cases of terrorism, organised crime or international drug trafficking).

Furthermore, the recruitment process for judges and prosecutors should be broadened by opening access to the judiciary more generously to outsiders. In addition, judges and prosecutors should be encouraged to expand their experience during their careers, through secondments, sabbatical years or internships outside the judiciary or abroad. In the same spirit, secondary schoolchildren could be invited into courtrooms to attend trials, and "open days" could be organised in courthouses.

In order to better safeguard the impartiality of judges, prosecutors should be clearly differentiated from judges, while judges / prosecutors should have closer personal social relations with lawyers.
It would be useful to lay down the basic principles of criminal procedure in the first article of the CCP, so that judges can refer to the spirit of the law, rather than applying mere technical rules.

It appears desirable to:

- adopt the principle of prosecutorial discretion;
- allow judges to dismiss a case when certain conditions are met;
- encourage the use of mediation without any restrictions, allowing the prosecutor to determine whether this procedure is adapted to the case;
- limit the requirement for a full trial to those cases which deserve it, by introducing written proceedings for minor cases.

The administrative work of courthouses could be delegated to professionals in this area and assistants recruited to assist magistrates. Furthermore, prosecutors should be more available for their main responsibilities (supervision of police work, drafting indictments, presence at trial…) rather than for ancillary tasks (autopsies or re-interview of defendants).
It is recommended to implement Law No. 5235 of 26 September 2004 on regional courts of appeal as soon as possible.
Finally, the current system of appraisal and inspection applicable to judges and prosecutors is sometimes inhibiting, based as it is on quantity and not on quality, which has perverse effects.

THE PRE-TRIAL STAGE

In order to organise veritable supervision of police work by prosecutors, it is recommended that judicial police units be specialised and work in close cooperation with prosecution units.

Forensic expertise also needs to improve.
Contrary to clear legal provisions, telephone-tapping is not used as a last resort. In order to tackle this issue, it would be useful to consider solutions which exist abroad and to envisage a more adversarial procedure for telephone-tapping.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
On the basis of the comments in Annex 4:
"*Contrary to clear legal provisions, telephone-tapping is not used as a last resort. In order to tackle this issue, it would be useful to organise advanced in-service training programmes and consider solutions by studying examples of comparative law which comply with the realities of the country. To intercept communication, a legislative arrangement should be enacted which authorises the Telecommunications Authority to raise objection against requests*".

It is desirable that restrictions on access to the case file for the defence really be exceptional and that the conditions be stricter than those provided by Article 153 of the CCP.

The defendant could be allowed to choose counsel freely among those lawyers who accept the financial conditions of the legal aid system and this system could be improved in several aspects.

It is recommended that the exclusionary rule be introduced and any piece of evidence obtained in breach of the law (such as "unofficial preliminary reports") be removed from the case file.

Even though the situation seems to have recently improved, it still appears that pre-trial detention is not a measure of last resort. The problem is not a legislative one, except in one aspect: the LTC recommends repealing the special regime applicable to "catalogue crimes" (CPC Art. 100/3). Furthermore, it would be useful to establish specialised "liberty judges" in all criminal courts and develop judicial control by giving probation centres a greater role (with increased resources).

THE TRIAL PHASE

Cases frequently come to trial without having been fully investigated (which leads judges to act as prosecutors). The postponement of trials is quasi-systematic.

This situation results from regrettable practices but also from questionable legal provisions. It seems desirable that a clear division be made between the part of the trial at which guilt or innocence is determined, and the later part at which, following a conviction, the court decides on sentence; the procedure could be simplified when guilt is not in dispute, by establishing a form of guilty plea.

So that the postponement of trials may become really exceptional, it is recommended that cases be handled differently: try one case at a time, stop investigating cases at the trial stage, make up for the non-appearance of witnesses through videoconferences, stop dictating every statement and instead record hearings audio-visually, and abandon the practice of "mass trials".

Prosecutors should always be present at trials to support the charges (or abandon them). And it is recommended that, in the courtroom, the role of each actor be clarified. The judicial ritual must be strictly respected. It is recommended that the chief prosecutor no longer be the authority responsible for the day-to-day management and organization of the courthouse, that judges and prosecutors no longer enter the courtroom by the same door, that prosecutors sit at the same level as defence lawyers, and that the latter can freely communicate with the accused.

SOME SPECIFIC ISSUES

Like any democratic country, Turkey is under the obligation to combat terror effectively, but also to respect human rights in the enforcement of anti-terrorism measures.

It is recommended that the interpretation of the definition of terrorism and organised crime be narrowed and clarified. This has been partly done through the latest legislative reform, but in part only.

To fight terrorism and organised crime efficiently while preserving the impartiality of judges in charge of terror crime cases, it is important to have highly specialised police officers and prosecutors, but preferable to allocate such cases to non-specialised judges. This would not exclude geographical grouping of trials on a regional basis.

In order to fight against impunity more effectively, it is recommended to repeal the remaining forms of prior authorisation for any investigation against civil servants and to establish an independent Police Complaints Authority.

TRAINING

It is desirable that the Justice Academy have permanent, specially trained staff, that a new pre-service curriculum be drafted, and new methodology be used. It is recommended that pre-service training last at least 2 years and that in-service training be made compulsory.

It seems highly desirable that an entrance exam be established for admission to the Bar and a more comprehensive, consolidated pre-service training be organised for lawyers.

Some form of common in-service training for magistrates and advocates is essential.

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Finally, the annual public budget allocated to all courts, legal aid and public prosecution per inhabitant is indisputably low. It is highly desirable that the means allocated to the judiciary be increased.

METHODOLOGY

1. This needs assessment report is mainly based on the analysis of the short-term consultants[1] who conducted a series of fact-finding visits to courthouses in Ankara (from 8 to 11 October and 10-17 December 2012), Izmir (05-08/11/2012), Malatya (26-29 November 2012) and Istanbul (8 - 13 February 2013).

2. It also relies on data published in previous reports elaborated in the framework of projects, missions and studies supported by the European Commission and Council of Europe. Among others, the following documents have been taken into account :

- the reports by Judge Luca Perilli, independent expert for the European Union Commission, drafted in 2008 ("*The Criminal Justice System"*) and 2011 ("*Effectiveness of the judiciary and Criminal Justice System"*)
- the 2012 progress report issued by the European Commission
- the 2012 Report by the Commissioner for Human Rights of the Council of Europe (*Administration of justice and protection of Human Rights in Turkey*)
- the 2012 report by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe.

3. It is also based on documents provided by the Turkish authorities and on numerous meetings with judges, prosecutors, representatives from the Ministry of Justice, lawyers, police and gendarmerie officers, academics or representatives from NGOs, from September 2012 to February 2013. In particular, it takes into account the remarks forwarded by the group of trainers of Turkish judges and prosecutors, on problems encountered in practice.[2]

4. Finally, several important studies were consulted in the drafting of this report, in particular :

- The collective book *European criminal procedures,* Dir. Mireille Delmas-Marty & John Spencer (Cambridge University press 2002);
- The monograph *Turkey*, in *Criminal Law – International Encyclopaedia of Laws*, by Feridun Yenisey (Wolters Kluwer 2011);
- The *« Commission justice pénale et droits de l'homme »* Report (La Documentation française 1991).

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5. The situation of the Turkish criminal justice system has been analysed in light of the case law of the European Court of Human Rights (ECtHR) and other member states' best practices (or shortcomings).

6. More precisely, the legislation, case law and practices have been studied in comparison with the European standards derived not only from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the case law of the Strasbourg Court, but also from the International Covenant on Civil and Political Rights (ICCPR) and the 2012 "concluding observations" on Turkey by the Human Rights Committee of the United Nations, and from secondary sources such as the different Recommendations adopted by the Committee of Ministers of the Council of Europe, the remarks of the Venice Commission, etc.

7. Before mentioning the problems in the Turkish criminal justice system, the LTC would like to say that there are also positive aspects that should not be forgotten. Judges and Prosecutors in Turkey are serious and hardworking and have a desire to be fair, honest, independent and impartial, and have a deep feeling of

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

[2] Overview by the group of sitting judges/prosecutors complied and summarised by the MoJ DG Criminal Affairs.

responsibility to uphold law and order and protect the constitutional order. They try to innovate, for example by taking initiatives of mediation in criminal cases.

8. In this regard, the present report may sometimes appear to be too negative. The LTC would like to emphasise that he certainly does not intend to "lecture" the Turkish Authorities. He is in no position to do so: no judicial system is perfect and every member state of the Council of Europe has been condemned by the European Court – and often on the same grounds as Turkey... The respect of Human rights is a permanent combat, an ideal which, by definition, can never be totally achieved.

9. The LTC is not here to lecture the Turkish Authorities but nor is he here to please them. He is here to help them improve the situation. It means that sometimes he may raise unpleasant questions. Or, more precisely, he must raise unpleasant questions. This is the reason for his presence in the country and it has to be accepted. The LTC hopes this will be understood, though of course, the burden is on him to make sure that he raises these matters in a constructive and respectful way.

10. The report sometimes goes further than the strict stipulations of ECtHR case law. Indeed, the LTC considered it was his duty to recommend improvements whenever possible, that is, whenever the current situation was unsatisfactory, even if it was not in violation of the ECHR.

11. Finally, it must be stressed that this report was drafted by a foreigner, which is a handicap of course, but has also some advantages: an external observer, not closely involved in Turkish affairs, can have a more relaxed or ingenuous approach… In this respect, some of the proposals may seem strange to Turkish nationals. In such cases, the report must be read simply as a tool providing food for thought.

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12. A first draft of the report was submitted to the Turkish authorities in April 2013. Comments were made by a number of partners, notably the Court of Cassation, the Ministry of Justice, the High Council of Judges and Prosecutors, the Union of Turkish Bar Associations (TBB) and the Security Forces. The critical remarks expressed by these partners have been very helpful to the LTC in sharpening the focus of his conclusions. They have been taken into account whenever possible in fine tuning the final version of the report. The remaining reservations by the partners are attached to this report. Some of the comments permitted the LTC to rectify legal errors, some allowed him to clarify what had led to a couple of misunderstandings, while others revealed a few disagreements on substance.

13. For instance, the Union of Turkish Bar Associations mentioned that the failure of the report to highlight problems faced by lawyers and the right to defence is "a significant shortcoming". In contrast, the law enforcement officers stressed that it was vital not to weaken the police (which, in their opinion, the report tends to do) and expressed the wish that the investigators be given greater powers in a number of areas[3], based on several foreign examples.

14. The LTC wishes to emphasise that, in his view, the main problem currently faced by criminal justice in Turkey is not a weakness in crime control but quite the opposite, an insufficient role for the defence. Moreover, it must be stressed that a number of countries with well-established democratic traditions are now experiencing worrying evolutions, particularly in the field of derogatory anti-terrorism laws. Thus, their legislation is not necessarily a model. Finally, it must be recalled that the joint project *Improving the efficiency of the Turkish criminal justice system* aims at reducing the number of ECtHR judgments against Turkey and, thus, the report has been drafted in this spirit.

15. The LTC hopes that the publication of this report will trigger public debate between the key actors of the criminal justice system as well as between and with representatives of civil society on these issues, which are of crucial importance for the future of this country.

[3] See, for example, comments on special investigation techniques, infra § 196.

CONTEXT

16. As a member state of the Council of Europe (CoE) since 1949, and a candidate for full membership of the European Union (EU) since 1999, the Republic of Turkey attaches significant importance to democratic principles based on human rights and the rule of law.

17. In the course of progress towards accession to the EU and in response to the obligations of the Acquis of the EU and its member states, the Turkish Government has been actively following the National Programmes for the Adoption of the Acquis. This process of "institution building" to enhance administrative capacity is crucial in ensuring the successful transition for Turkish institutions to the standards, norms and achievements of similar EU member states' administrations.

18. In this respect, generally speaking, a lot has been done in Turkey, in the recent past, to improve the functioning of the criminal justice system: new legislation has been passed by the Parliament, new institutions have been put in place, the resources of the judiciary have been increased.

19. A number of important decisions have been made in the international field :
- Turkey signed the International Covenant on Civil and Political Rights (ICCPR) on 15th August 2000 and ratified it on 23rd September 2003 ;
- the death penalty was abolished[4] ;
- Article 90 of the Constitution was amended in 2004, in order to give full effect to international treaties, including of course the European Convention on Human Rights ;
- the Optional Protocol to the Convention Against Torture (OPCAT)[5] was ratified on 27 September 2011.

20. A new Code of Criminal Procedure (CCP) and a new Criminal Code (CP) came into force in 2005, in an effort to align the Turkish legal system with European standards, to address many procedural shortcomings identified by the case-law of the ECtHR and to ensure the proper functioning of criminal justice.

21. Following the referendum of 12 September 2010, several reforms concerned the judicial field, one of the most prominent being the modification of the composition and functioning of the High Council of Judges and Prosecutors.

22. Several "Judicial reform packages" have been adopted (the third one on 2 July 2012). The 4th one was submitted to the Turkish National Assembly on 7 March 2013 and the Law N° 6459 on *Amendments in certain Laws on Human Rights and Freedom of Expression* was then adopted and put into force upon its publication in the Official Gazette on 11/4/2013. It contains amendments relating, in particular, to the execution of judgments of the European Court of Human Rights, a narrowed definition of terrorist propaganda and decriminalisation of non-violent acts and expressions.

23. And so, definitely, the efforts undertaken by the Turkish authorities to address the structural dysfunctions of the justice system must be recognised.

24. However, in spite of all these efforts, a lot remains to be done. In his 2012 report, the Council of Europe Commissioner for Human Rights expressed his concern at what he called *"a number of long-standing, systemic problems concerning the administration of justice in Turkey, which have adversely affected the enjoyment of*

[4] After Law N° 4771 was passed on 3 August 2002, Protocol N° 6 to the ECHR prohibiting the death penalty in peace time was signed on 15 January 2003 and ratified on 12 November 2003; Protocol N° 13 to the ECHR prohibiting the death penalty in all circumstances was signed on 09 January 2004 and ratified on 20 February 2006.

[5] The OPCAT, an international agreement aimed at preventing torture and cruel, inhuman or degrading treatment or punishment, was adopted in 2002 and entered into force in 2006. It builds on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and helps States meet their obligations under CAT. Under the OPCAT, states parties agree to international inspections of places of detention by the United Nations Subcommittee on the Prevention of Torture (SPT). States parties are also are required to establish an independent National Preventive Mechanism (NPM) to conduct inspections of all places of detention. This would include prisons, juvenile detention centres, local and offshore immigration detention facilities and other places where people are deprived of their liberty.

human rights, as well as the Turkish public's perception about the effectiveness, independence and impartiality of the justice system".[6]

25. It is sad to say that Turkey remains among the first countries in terms of number of violation judgments pronounced by the European Court. At the end of 2012, the ECtHR had delivered 2870 judgments concerning Turkey, of which 2521 found at least one violation of the ECHR, primarily of Article 6 (right to a fair trial within a reasonable time). Only 60 found no violation.[7] In 2012, the country was condemned 117 times.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 25: The figures referred in this paragraph concern the period before the criminal reform process. ECtHR proceedings are also lengthy. Therefore the main aim of the project is to reveal the outcomes of criminal reform after 2005. Most of the violations for which Turkey was condemned by the ECtHR are related to incidents before the year 2005. Taking this into consideration, such statements should be verifiable with good statistical analysis. The statement "Turkey remains among the first countries in terms of number of violation judgments" does not indicate the violations in recent years. *Statistics of the European Court of Human Rights concerning the number of pending adjudication as of 31 December 2013 (http://www.inhak.adalet.gov.tr/istatistikler/2013_ist/2.pdf) indicate that Turkey ranks 2nd, previously the 5th , thanks to recent judicial reforms; there is a dramatic decrease in the proportion of yearly applications against Turkey per 10.000 persons (http://www.inhak.adalet.gov.tr/istatistikler/2013_ist/7.pdf) and Turkey ranks very low concerning the number of applications per 10.000 persons in 2013 http://www.inhak.adalet.gov.tr/istatistikler/2013_ist/6.pdf), (the number of applications is perceived very high due to high population, however the ratings according to population reveals the fact that Turkey comes after Poland, Luxemburg, Finland, Switzerland and Italy. Therefore it becomes obvious that any assessment based on the number of applications only is not very rational (http://www.inhak.adalet.gov.tr/istatistikler/2013_ist/8.pdf).*

26. Many applications against Turkey still concern systemic problems with the functioning of criminal justice, which will be addressed in the following pages of this report. Of course, it is well known that most of the applications were brought to the ECtHR prior to the improvements resulting from the recent substantial legislative and institutional reforms. However, it can be said that those reforms did not solve all the problems, the remaining ones relating mainly to established attitudes and practices followed by judges, prosecutors or law enforcement officers at different levels.

27. In this respect, it may seem paradoxical for the LTC to recommend new legislative reforms while everybody agrees that, in the course of the past years, numerous laws relevant to criminal procedure have already undergone considerable amendments, and that neither judges nor prosecutors nor lawyers have been capable of absorbing and implementing the fundamental reforms already made and that they need time, encouragement, training and resources to do so.

28. The LTC is perfectly aware that any further amendments should be selective and be handled with care, and that the main efforts should be towards making the existing system work. However, it is not possible to conceal that some shortcomings do invite certain changes in legislation. Some of the amendments suggested actually simplify the procedure and would not be difficult to implement. Others are more ambitious and would probably need more time and due reflection.

[6] Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey from 10 to 14 October 2011, *Administration of justice and protection of Human Rights in Turkey*, Strasbourg, 10 January 2012, § 125.
[7] See the statistics of the ECtHR, http://www.echr.coe.int/NR/rdonlyres/596C7B5C-3FFB-4874-85D8-F12E8F67C136/0/TABLEAU_VIOLATIONS_2010_EN.pdf

I. NEEDS ASSESSMENT

29. The main problems of Turkish criminal justice are well known and have been highlighted by many experts, in the framework of previous studies: excessive length of proceedings and resort to pre-trial detention, lack of an adversarial process, insufficient equality of arms, trouble with the appearance of impartiality and independence of judges, etc. These problems will be addressed here in turn, through examining the pre-trial phase of criminal procedure, the trial itself, and also some specific issues like anti-terrorism and fight against impunity. But, before that, some general comments about the situation of the criminal justice system in Turkey must be made.

A. GENERAL REMARKS

1. LACK OF PUBLIC CONFIDENCE IN CRIMINAL JUSTICE

30. The international experts were told during the fact-finding visits that Turkey is not a unified society but a grouping of different communities, some of them secularly oriented, some religiously oriented, with big minorities. These groups do not appear to interact extensively with each other.

31. In such a context, Turkish judiciary suffers from its isolation: it gives the impression of being cut off from the population. Many observers have mentioned that there is a lack of public confidence towards criminal justice. As an example among many others, the ECtHR Turkish judge, Prof. Isil Karakas, recently explained in a press interview that her colleagues in Turkey *"wear "ideological glasses" as a majority of them believe that protecting the state is their fundamental job"*[8]. Similarly, the Turkish Economic and Social Studies Foundation (Türkiye Ekonomik ve Sosyal Etüdler Vakfı: TESEV) explained in one of its studies: *"The judicial branch is perceived by most of the interviewees with a holistic state concept rather than an awareness of the principle of separation of powers (...) as an external power or structure aiming to control and discipline the society rather than an organisation that provides service to citizens"*.[9] This is unfortunate: *"Oderint dum metuant[10]"* is not a good motto for judges.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 31: The excerpts cited here are subjective and not based on general observations and findings of pilot courthouse visits as mentioned under general remarks of the Report. Thus using as a basis for this report personal as well as other opinions and thoughts which could be cited in publications and articles does not comply with the objective and nature of the report. In addition to the criticism that recent legislative amendments in Turkish law are not reflected in practice in full terms, there are also other opinions which say that such amendments have brought out very positive outcomes (see: 2013 EU Progress report which refers to positive implications of third and fourth judicial reform packages). Efforts should be consolidated in order to overcome this problem through interpreting laws in respect of personal rights and freedoms; and it is also obvious that there is a notable change in entrenched attitudes and practices of judges, prosecutors and law enforcement officers.

32. Of course, it will take time to for this situation to change. As Montesquieu said: *"When manners and customs are to be changed, it ought not to be done by laws; (...) it would be better to change them by introducing other manners and other customs"*[11], which cannot be done overnight. However, no effort should be spared to bring justice closer to the people.

33. In this respect, training will play a key role obviously. But, opening criminal justice to society can also be achieved through various other means. In this respect, the LTC wishes to mention, as food for thought, some innovative solutions experienced abroad. At first glance, these solutions may sometimes seem surprising to Turkish people, compared to national "manners and customs", but they are probably not that difficult to implement and, in our opinion, they could significantly improve the image of criminal justice in the general public.

Lay participation

34. Nearly two centuries ago, Tocqueville described the advantages of the participation of lay judges in criminal justice in the following terms[12]:

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[8] Hürriyet Daily News, 29 July 2013 : http://www.hurriyetdailynews.com/turkish-judges-wear-political-glasses-euro-court-judge.aspx?pageID=238&nID=51653&NewsCatID=351

[9] *Just expectations : a compilation of TESEV research studies on the judiciary in Turkey*, TESEV Publications, February 2011, p.89.

[10] *"Let them hate me, so long as they fear me"* attributed to Caligula.

[11] *The spirit of laws*, Book XIX, Chapter 14.

[12] Alexis de Tocqueville, *Democracy in America*, Vol. I, Chapter XVI.

"It would be a very narrow view to look upon the jury as a mere judicial institution; for however great its influence may be upon the decisions of the courts, it is still greater on the destinies of society at large. The jury is, above all, a political institution (...) It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties. (...) I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them; and I look upon it as one of the most efficacious means for the education of the people which society can employ. (...) The jury, then, which seems to restrict the rights of the judiciary, does in reality consolidate its power; and in no country are the judges so powerful as where the people share their privileges".

35. Of course, it would be unrealistic to introduce overnight in the Turkish criminal justice system a kind of American style jury. The LTC is aware that, given the characteristics of Turkish society, such a reform is particularly difficult to implement and can only be envisaged in a long term perspective. Furthermore, lay participation would probably need an amendment to article 140 of the Constitution. Having said that, Turkey could build on solutions existing in other countries, such as Germany or France, whose legal traditions are closer to hers. In these countries, ordinary citizens sit alongside professional judges as lay assessors in mixed courts (except in some very specific matters, such as cases of terrorism or international drug trafficking), apparently to everybody's satisfaction.[13]

Comments by the Union of Turkish Bar Associations
Paragraph 35: The jury system was recommended for Turkey; but we have hesitations in terms of its adaptability to Turkish criminal justice system.

36. Japan adopted a similar reform recently: on May 28, 2004, the National Diet passed a law requiring selected citizens to participate as judges in trials for certain severe crimes; the new law came into force in 2009, as a part of a larger judicial reform project, and citizen participation has been introduced in this country.[14] The new system seems to work, in spite of the lack of real tradition of lay judges in the past.[15]

"Opening the doors" of courthouses

37. The experts have been told that one of the problems of Turkish justice is that judges and prosecutors begin their career extremely young, with no real experience of life, living together in their own world, without outside contact.

38. In order to get the judiciary out of its isolation, the first recipe is probably to broaden the recruitment process: it would be good to open up the magistrature to other professions. It seems that such an evolution has begun to take place in Turkey over the last few years and this is a positive development, but probably insufficient. Having more lawyers, academics, social workers, or any other experienced professionals becoming judges and prosecutors, would bring some "fresh air" into courthouses.

39. Some years ago, the situation was very similar in France and criticism towards the composition of the judiciary was the same as in Turkey. With several successive reforms, the entrance exam to the *Ecole Nationale de la Magistrature* has been opened to new categories of candidates and, as time goes by, nobody regrets this development.

40. Additionally it would be good, as a long term investment, to encourage judges and prosecutors to undergo different experiences during their careers: doing a different job for a while - for example, being on secondment in universities or in other administrations (what the French call *"mobilité"*) has proved abroad to be a very interesting way of improving mutual knowledge of the judiciary and the outside world. Similarly, a system of periodic sabbatical years for magistrates could be organised: this is regular practice in Common Law countries.

[13] See M. Lemonde, *Specificities of the Court of Assizes*, Saint Louis Warsaw transatlantic law journal, Vol.2001-2002, p.43 & ss.
[14] For an outline of the discussions prior to the reform, see *Recommendations of the justice system reform council – For a justice system to support Japan in the 21st Century*-, Saint Louis Warsaw transatlantic law journal, Vol.2001-2002, p.119 & ss.
[15] See *« De la difficulté d'être juré au Japon »,* SLATE.FR, 16 April 2011 : http://www.slate.fr/story/36857/jures-populaires-japon-saiban

41. Less ambitiously, another way of enriching judges' and prosecutors' minds through external experience is to include, in the in-service training programme, placements outside the judiciary for a couple of weeks, for instance in private companies, foreign courthouses, international institutions, etc.

42. Lastly, the LTC would recommend that some other simple solutions be considered to bring the judiciary closer to the general public, in a kind of "practical teaching of civic education": in some countries, it has become very common for schoolchildren to be invited into courtrooms to attend a trial, with a debriefing session allowing judges, prosecutors and lawyers to answer questions from the pupils and their teacher. Similarly, "open days" organised once a year in courthouses are most appreciated: people are generally interested in judicial issues and willing to learn.

Impartiality of judges

43. The relationship between judges and prosecutors in Turkey is generally considered to be too close. In his 2012 report, the Commissioner for Human Rights of the Council of Europe observed that, *"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"*.[16]

44. At the same time, relations between judges/prosecutors and lawyers are very distant. They don't know each other and are very distrustful. It seems that magistrates do not consider the defence as a vital partner for criminal justice but just put up with lawyers. Representatives of the Bar complained that, frequently, the lawyer making a statement is interrupted by the judge. Sometimes, in terror cases, the lawyer is treated as a suspect. Of course, a lawyer should not be granted any exemption if he/she commits a crime. But generally speaking, the role, place and legitimacy of lawyers is not at the desired level in Turkey, as observed during the fact-finding visits and expressed by numerous foreign observers[17]. It must be recalled that, according to the Recommendation[18] of the CoE on the freedom of exercise of the profession of lawyer, "*the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats, or interference, direct or indirect, from any quarter or for any reason"* should be regarded as a need for serving justice. The resolution states that governments *"should respect the right of bar associations or other professional lawyers' associations to protect their members against inappropriate restrictions or unjustifiable violations and to defend their independence."* These provisions must be carefully respected.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy

Paragraph 44: Five-year experience as a lawyer has become an asset in the recruitment of judges and prosecutors in recent years, which consolidates the position and legitimacy of lawyers and contributes to the communication between judges, prosecutors and lawyers.

Comments by the Union of Turkish Bar Associations

Paragraph 44: President and members of the Board of Directors of Istanbul Bar Association have been prosecuted on the basis of the accusation of "attempt to influence the proceedings". Professional associations of lawyers should take necessary steps in case a lawyer is detained or imprisoned in order to protect and defend interests of that lawyer. **Please see ANNEX 14 for detailed comments.**

45. Some other aspects of impartiality of judges and respect for the rights of the defence (place in the courtroom, role during the trial, etc.) will be addressed later (see below §§ 118-151). At this stage, the LTC will only recommend, generally speaking, that the relations between the different actors be clarified: prosecutors could have their offices clearly separated from those of judges, preferably outside the courthouse[19]; the chief

[16] Op. Cit. § 121.

[17] For example, see Communiqué dated 23/07/2012, by 28 national or international organisations of lawyers from 9 different countries, following the arrest of their Turkish colleagues, available at : http://cnb.avocat.fr/Turquie-suites-du-proces-de-46-avocats-a-Istanbul-la-mobilisation-des-barreaux-francais-doit-continuer_a1403.html

[18] Rec (2000) 21E dated 25 October 2000

[19] It must be noted that, according to its Strategy plan 2012-2016, the High Council of Judges and Prosecutors commits itself to restructuring the physical location of prosecutors' offices and courthouses, in cooperation with the Ministry of Justice, which is an encouraging first step.

prosecutor should not be the responsible authority for the day-to-day management and the organisation of the courthouse; judges/prosecutors should have closer personal social relations with lawyers (for example: lawyers could have access to the courthouse restaurant as prosecutors do; the creation of professional organisations and networks where judges, prosecutors, defence lawyers and academics can discuss criminal law and judicial issues, and thus accept the positions, role and attitude of each other, could be promoted; common training activities could be organised; broader access to the judiciary could be offered to lawyers, etc.).

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 45- Recommendation 38: As mentioned in the footnote under this paragraph, with its Strategy plan for 2012-2016, the High Council of Judges and Prosecutors commits itself to restructuring the physical location of prosecutors' offices and courthouses. This objective is not toward separating judges and prosecutors but rather related to the restructuring of their physical locations. On the other hand with its Strategy Plan for 2010-2014, the Ministry of Justice has identified the criteria to be observed in the construction of courthouses. According to the plan, these buildings will be constructed in order to meet the needs of justice sector and in line with the said criteria. This issue has been underlined in several parts of the report with details and reasoning. Furthermore there is criticism about the physical position of judges and prosecutors in the courtroom. In comparative law, judges and prosecutors work in the same building in many countries and sit on the same platform in the courtroom. In Dirioz-Turkey case, the ECTHR decided that judges and prosecutors sitting at the same platform was not a violation of article 6; and found similar French-Belgian applications inadmissible. In some other reports, there has been criticism about judges and prosecutors sharing the same building, sit on the same platform in the courtroom, work on the same floors or even close places. It requires a long effort, planning and project to separate the buildings. Moreover this may cause serious economic cost as well as problems of staff, security, transportation etc. The planning and construction of courthouses within the last decade does not foresee any separation of buildings, even in the largest courthouse in Europe judges and prosecutors work in the same building. All these factors show that it would not be practical but very costly to strictly implement such recommendations mentioned in certain EU reports and strategy documents signed by Turkey. Finally, it would be more practical and applicable to keep prosecutors and judges in the same building but work in separate sections and to re-design court rooms in order to allow prosecutors use a different door to enter/exit other than the door used by judges.

2. ABSENCE OF GENERAL PRINCIPLES

46. Basic principles of law are not much used in Turkish criminal law and this is regrettable. This is even truer in procedural law: they are rarely invoked in this area, probably due to a very legalistic tradition attached to the formalism of criminal law. This is not unusual: in many countries, practitioners are inclined to refer exclusively to technical rules, with which they are more familiar. Nearly 40 years ago, a French jurist, reputed to be a competent practitioner, used this unfortunate expression upon ratification of the European Convention on Human Rights by his Country: *"France will never be condemned by the Strasbourg Court, as the Code of Criminal Procedure is much more precise and therefore more protective than the European Convention"*. Time would unfortunately prove him wrong very soon and on many occasions.

47. However, under the influence of the jurisprudence of the European Court, practices have evolved in many countries in the recent past: there is now a tendency for criminal courts to base their decisions on general principles.[20] Such an evolution is not absent from Turkish case law: for instance, in a decision dated 22 May 2012, the Court of cassation referred both to the Turkish Constitution and the ECHR to overturn a ruling by the Ankara court about freedom of speech[21].

48. Sometimes the legislature has taken this evolution into account. For example, a preliminary article was introduced into the French Code of criminal procedure in 2000[22] and this was broadly considered an improvement of the legislation and, subsequently, of the national jurisprudence. This preliminary article is drafted as follows: *Criminal procedure should be fair and adversarial and preserve a balance between the rights of the parties.*

It should guarantee a separation between those authorities responsible for prosecuting and those responsible for judging.
Persons who find themselves in a similar situation and prosecuted for the same offences should be judged according to the same rules.

[20] A brief description of the advantages of such a development (« *Quels principes pour la mise en état des affaires pénales? »*) can be found in the Report of the *« Commission justice pénale et droits de l'homme » p.69*. The entire report is available (in French) at: http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/914059500/0000.pdf
[21] See : http://www.hurriyetdailynews.com/4th-judicial-package-to-see-critical-steps.aspx?pageID=238&nID=28237&NewsCatID=338

[22] Law no. 2000-516 of 15 June 2000.

The judicial authority ensures that victims are informed and that their rights are respected throughout any criminal process.
Every person suspected or prosecuted is presumed innocent as long as his guilt has not been established. Attacks on his presumption of innocence are proscribed, compensated and punished in the circumstances laid down by statute.
He has the right to be informed of charges brought against him and to be legally defended.
The coercive measures to which such a person may be subjected are taken by or under the effective control of judicial authority. They should be strictly limited to the needs of the process, proportionate to the gravity of the offence charged and not such as to infringe human dignity.
The accusation to which such a person is subjected should be brought to final judgment within a reasonable time.
Every convicted person has the right to have his conviction examined by a second tribunal.

49. Such an evolution is to be encouraged since it allows judges to refer, in their decisions, to the spirit of the law and to the general conception of the rule of law as defined in the ECHR, rather than to mere technical rules which are nothing but the reflection of this spirit.

50. The preparatory work on the Turkish CCP show that the Legislative Commission which worked on the draft Code had envisaged including such an article at the beginning of the Code, in the following terms[23]:
"While applying this code, principles of fair trial, adversarial proceedings and equality of arms between the parties will be respected. The functions of investigation, prosecution and adjudication will be strictly distinguished. Individuals prosecuted for similar facts will be treated equally under the same rules and principles (principle of equality). The rights of victims will be observed at all stages of proceedings by investigators and judicial authorities. Individuals who are under suspicion of having committed a crime or who are prosecuted will be presumed innocent until their guilt has been proven. Any action against the presumption of innocence will be prevented and damages suffered will be repaired."

51. However, during the legislative process, this suggestion was abandoned, apparently because it was considered sufficient that the principle of fair trial was already mentioned in the Constitution (Art. 36/1). Thus, Article 1 of the CCP simply states: *"This Code regulates rules about how to conduct criminal proceedings as well as the rights, powers and obligations of individuals who take part in this procedure"*.

52. This is unfortunate and, for the abovementioned reasons, the Long-Term Consultant recommends that Article 1 of the Turkish CCP be amended and include a recall of the basic principles of criminal procedure as they emerge from the international legal instruments (mainly the ECHR and the ICCPR, but also the statutes and/or rules of procedure of various international criminal courts: ICTY, ICTR, ICC or ECCC).[24]

3. A RIGID SYSTEM

53. In the LTC's opinion, in many aspects Turkish criminal justice suffers from a lack of flexibility. This situation impacts both on the length of proceedings and on the right to fair trial. It partly explains the enormous workload of prosecutors and judges.

54. Prosecutors spend a lot of time on activities for which they should not be responsible (fulfilling administrative functions, re-interviewing people who have already been interrogated by the police, attending autopsies, etc) and are not sufficiently available for their core tasks (ensuring legality; supervising the investigation of serious, complicated or high-profile criminal cases; making good indictments; appearing in Court...).
55. Similarly, judges deal with many cases that should not be prosecuted or at least should not be subject to an ordinary trial. They investigate cases that are not ready for trial, acting as prosecutors. They spend time re-reading case files before the next hearing because of undue postponements of the trials. They waste a lot of time reformulating and dictating what is being said by every person heard in court, etc. As a result, they are

[23] Feridun Yenisey, *Turkey*, in *Criminal Law – International Encyclopedia of Laws*, Wolters Kluwer 2011, § 43, p.45.
[24] In this respect, it seems useful to refer to the rules of procedure of the Khmers rouges Tribunal and the Special Tribunal for Lebanon, the procedures of which are closer to Turkish law than those of the other international tribunals. As an example, an extract of the relevant provisions of the ECCC Internal rules is attached in Annex 1. The entire document is available at: http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20(Rev.8)%20English.pdf
The TSL rules of procedure are available at: http://www.stl-tsl.org/images/RPE/RPE_EN_February_2012.pdf

unable to concentrate on their main responsibility, which is to ensure that fundamental principles of a fair trial are fully respected.

56. The LTC would recommend exploring the following avenues, which in his opinion could lead to an improvement of the situation.

Prosecutorial discretion

57. Turkish criminal procedure has historically followed the "mandatory prosecution" principle (*kamu davasının mecburiligi ilkesi* Article 170/2, CCP): subject to some exceptions (Articles 171 and 172, CCP), the public prosecutors have a duty to prosecute criminal cases as soon as they learn an offence has been committed. This necessarily leads to many useless proceedings, burdening courts with a heavy workload.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 57- Article 170/2 of CPC stipulates that in cases where, at the end of the investigation phase, collected evidence constitutes sufficient suspicion that a crime has been committed, then the public prosecutor shall prepare the indictment. Accordingly, in case the suspicion is not sufficient, then the prosecutor may render the decision not to prosecute. Therefore each investigation does not automatically end up with filing public prosecution.

58. Nowadays, no realistic legal system would establish a strict principle of mandatory prosecution. In Europe, even the countries most attached to this principle (Germany and Italy, for example) have adopted numerous exceptions, such that their systems are now more or less comparable to systems traditionally attached to prosecutorial discretion (France and the UK, in particular).

59. Turkey has followed this evolution, but in a very timid way. The prosecutor may now suspend the prosecution under certain conditions specified in Art 171 CCP (where the claim of the victim is a pre-condition, where the crime is punished with a maximum of one year imprisonment, or falls under the mediation procedure; furthermore, the suspect must not have been previously sentenced to imprisonment).

60. This legislation appears to be too restrictive. It seems desirable to allow the public prosecutor, when initiating the prosecution, to evaluate not only the legal basis of the case, but also the appropriateness of prosecution, without any restriction.

61. Similarly, at the trial stage, more flexibility should be envisaged: the prosecutor could be allowed to drop the charges and the judge could dismiss the case when certain conditions are met (for instance, the facts are not in dispute, the accused has repaired the prejudice caused by the offence, the trouble caused by the crime has disappeared…). Such a possibility exists, for example, in the German Code of Criminal Procedure[25] and it does not seem to be controversial.

Mediation

62. The Code of Criminal Procedure (Article 253) regulates mediation in criminal matters in a very restrictive way: this procedure is limited to the field of "complaint-crimes" (*sorusturulması ve kovusturulması sikayete baglı olan suçlar*) and a few other crimes that can be *ex officio* prosecuted (e.g. intentional wounding, negligent wounding, violation of domicile, kidnapping of a child by mother or father who lost his/her parental rights…). Except for crimes that are investigated and prosecuted upon a complaint, there must be a special provision in the text to apply mediation. As a result, mediation is rarely used in practice[26].

Comments by the Union of Turkish Bar Associations
Paragraph 62: Mediation process should be handled by lawyers only.

63. Such a restriction is unfortunate. It seems more appropriate to encourage the use of mediation and let the prosecutor appreciate whether this procedure is adapted to the case.

[25] §§ 153 and 154 of the German code of criminal procedure (*Strafprozessordnung*) enumerate a series of cases where the court has power to allow all or part of an accusation to be dropped. In all these cases, the public prosecutor must either consent to this or request it.
[26] Except in some specific regions (for example in Izmir), where prosecutors took the initiative in developing it.

Written proceedings for minor cases

64. In Turkey, the trial often gives the impression of being hasty, summary and non-adversarial. The absence (or the passiveness) of the prosecutor, the omnipresence of the judge, the minor role of the defence are hardly compatible with the basic characteristics of a fair trial.

65. In order to improve the standing of the ordinary criminal trial and to completely respect its adversarial nature, it is crucial to limit the full trial requirements to those cases which deserve it and to avoid a cumbersome procedure when it is not necessary, so that the limited resources available are used in the best way. In this respect, a written procedure for minor cases would allow the evacuation of a large number of cases which do not deserve the demanding formalities of the ordinary trial.

Comments by the Union of Turkish Bar Associations
Paragraph 65: We cannot support the recommendation that "written procedure should be used for minor cases", since material facts could only be discovered if pieces of evidence are discussed in the sequence stipulated in article 216 of the Criminal Procedure Code (CPC). Excluding minor cases from this practice would conflict with the general principles of the criminal law.

66. In Germany, for example, such a procedure (*Strafbefehlsverfahren*) is widely used.[27] It is available to the public prosecutor at any point from the end of the preparatory phase onwards, even after the start of the trial phase, concerning offences punishable by a fine or imprisonment of up to one year. This procedure can only be used against an adult perpetrator, when the prosecutor deems that the ordinary procedure is not necessary. If judges find the prosecutor's request is justified, they pronounce the proposed sentence. If not, they may seek to reach an agreement with the public prosecutor to modify the contents of the request or to transfer the case to an ordinary trial hearing. This written procedure results in a judgment without the parties to the case being heard, and the sentenced persons may challenge this. The result, if they do, is that the ordinary procedure is then set in motion. In the absence of an objection, or when the objection is improperly made, the judgment becomes executor and final. However, a request to reopen the case may be lodged based on new fact or new evidence.

67. Formerly, in Turkey, a similar procedure existed ("Penal Order of the Justice of the Peace", *sulh hakiminin ceza kararnamesi,* Article 386 repealed CMUK) but its scope was more limited. The new Penal Procedure Code does not include this legal concept. A written procedure, broader than the previous *sulh hakiminin ceza kararnamesi* would be beneficial to Turkish justice. It would reduce the workload of the courts and allow more time for important trials.

Human resources and equipment

68. An important part of the work of judges and prosecutors could be delegated to assistants. In this regard, experience from foreign countries could help. In the Netherlands for example, around 80-90 % of the writing work of judges is done by legal clerks, after instructions from the judge, who of course remains responsible for the decision. This makes it possible to spend more time on preparing other decisions and on conducting more trials. The same applies to prosecutors: the majority of indictments are drafted by legal staff. The staff members make use of phrasings that are IT-standardised and they also draft in more complex cases. Some legal clerks are specialised in certain areas of the law. This is good for cooperation between magistrates and also with universities and forensic institutes, such as in DNA matters. The recruitment of competent staff is facilitated due to increased career perspectives both within the staff department and outside (for instance becoming a magistrate). This could be a model for the Turkish judiciary.

69. The administrative work of courthouses must be given to professionals in this area, not to judges or prosecutors.

70. Judges have told the experts that they cannot cope with the exponential increase in information. There should be a support system for the judiciary, some sort of central data-base providing information about important developments (legislative reforms, landmark decisions, etc).

[27] §§ 407 to 412 of German code of criminal procedure, an English version of which can be found here: http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p2338

4. AN UNCLEAR PROCEDURE

71. As pointed out by one of the short term consultants, *"Criminal justice demands precision and rigour, whereas approximation seems to predominate in Turkish criminal procedure: incomplete separation of the two main procedural phases, incomplete investigation of cases, approximation of key legal concepts, etc"*.

72. Cases frequently come to trial when they have been only incompletely investigated (which leads to judges acting as prosecutors), files are frequently sent to courts that do not have jurisdiction to try the case (which is one of the main reasons criminal procedure is so slow, particularly when the prosecutor challenges the court's decision), the postponement of trials is practically systematic, etc.

Comments by the Union of Turkish Bar Associations
Paragraph 72: Indictments related to cases with incomplete investigation should be returned by the judge; however "return of indictment" mechanism is almost never used. The underlying reason is clause 1 and 3 of article 174 of the CPC: Indictments not returned within 15 days are deemed to be accepted. This duration is too short considering the workload of judges. The "return of indictment" mechanism should become functional; otherwise it would not be possible to prevent the de facto practice of judges "to complete investigations".

73. This unsatisfactory situation results from regrettable practices, but also from some legal provisions that could be amended. Some of them, such as return of the indictment or delayed announcement of the judgment, are analysed below (See §§ 130-142). Furthermore, new provisions could be envisaged, that would, in our opinion, have a positive effect on the general functioning of the system.

74. And of course, the very first basic rule is that a clear distinction must be made between conviction and sentencing.

Distinguish decision on guilt from sentencing

75. Taking account of the need for clarification in Turkish criminal procedure, the LTC would highly recommend introducing in Turkish law what French jurists call *"césure du procès pénal"* (division of criminal proceedings)[28], a solution which ironically is not very developed in French law but is systematic in English law: the existence of a clear division between that part of the trial at which guilt or innocence is determined, and the later part at which, following conviction, the court decides on sentence.

Comments by the Union of Turkish Bar Associations
Paragraph 75: The recommendation to make a "division between that part of the trial at which guilt or innocence is determined, and the later part at which the court decides on sentence" is applicable generally in criminal systems that have jury mechanism. Please refer to our comment regarding paragraph 35.

76. Such a distinction allows for better respect of the presumption of innocence since, when deciding whether the defendant committed the offence or not, the court hears only such evidence as is relevant to guilt or innocence. In this system, the investigations on character (for example, a psychiatric report describing the defendant as dangerous), only relevant to sentence, take place after conviction, not before, and can be more thorough.

77. With such a solution, it becomes logical to differentiate between situations where the accused pleads guilty or does not.

Guilty plea

78. Turkish criminal procedure does not differentiate between the accused who plead guilty and those who dispute the facts they are accused of. This has several disadvantages :

- treating in the same way those who claim they are innocent and those who do not deny they are guilty does not facilitate compliance with the presumption of innocence;
- the effective participation of the accused in the judicial process is not promoted, although it is desirable because it is a condition for a more effective justice, accepted by people who come under

[28] For a complete presentation of this institution, see M.ANCEL, *La césure du procès pénal* in *Problèmes contemporains de procédure pénale (Mélanges Hugueney)*, Ed. Sirey 1964, p.205.

jurisdiction of the courts;
- it imposes cumbersome formalities and unnecessary investigations, to the detriment of a more rational allocation of the limited resources available.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 78- As known, the court can apply discretionary mitigation under article 62 of CPC considering the behaviours of the offender during proceedings such as plea of guilty. In this case the offender is sentenced to life imprisonment instead of heavy life imprisonment; or twenty-five years imprisonment instead of life imprisonment or one sixth mitigation for other punishments.

79. For these reasons, it seems desirable to take into account the choice of the accused to plead guilty. But, in the LTC's opinion, it must be done in a prudent manner: the interest of justice requires that such a procedure be carried out under the supervision of the judge who must ensure that the process does not deviate towards some form of "plea bargaining" (the LTC would not be in favour of introducing such a practice in Turkish law) and that any confession is obtained under acceptable conditions, i.e. in the presence of a lawyer and after suspects has been clearly informed of their rights.

80. The rights of the defence also require that the accused keep control of their defence system throughout the procedure and may, at any time and until the judgment, choose to change their mind and withdraw their guilty plea, in which case the judge should be able to take any necessary measures for the preservation of evidence.

81. Subject to these precautions, it seems desirable to simplify the procedure when guilt is not in dispute: at the pre-trial phase, in particular, it would be possible to limit the investigations and to focus on the personality of the accused; at the trial stage, a form of guilty plea could be organised, as provided for example in French law (Article 495-7 of the French CCP).

B. THE PRE-TRIAL STAGE

1. CONTROL OF POLICE

82. During the visits, the experts were repeatedly told that one of the most important sources of difficulty for criminal justice in Turkey is the absence of real control of the work of the police. This is not a problem of legislation: according to articles 160[29] and 161[30] of the CCP, prosecutors are supposed to be the effective leaders of the investigation as, in the present system; the police have no authority to conduct an investigation unless they have received a specific order from the public prosecutor. However, that is not a true picture of what is happening: in real life, the investigation is directed rather independently by the police.

83. The prosecutors' workload partially explains such a situation. Sometimes, prosecutors working in complaints offices handle 400/500 telephone calls and 30/40 complaints a day. This is obviously an obstacle to the effective conducting of any investigation: visiting the crime scene, meeting investigators etc. According to the prosecutors, their workload could be reduced by 30 % if they did not have to deal with ordinary traffic cases, minor accidents that do not require investigation and the like. The police handle thousands of these cases and good police officers know by routine what to do. Therefore, instead of tackling too many minor cases at once, prosecutors should concentrate on important matters and then exercise effective control over the activities of the police.

Comments by the Union of Turkish Bar Associations
Paragraph 83: We do not agree with the recommendation that minor cases can be investigated by enforcement officers rather than the prosecutor since the prosecutor is the sole authority in criminal investigations as per article 160-161 of the CPC.

84. In addition, it must be noted that the police have limited powers of interrogation. They can interrogate a suspect only once, the second interrogation must be done by the public prosecutor (Art. 148/5 CCP). This regulation has been introduced to prevent torture, and it has indeed resulted in a real improvement in this regard, but it is now an obstacle for effective investigation and for rational use of resources. It could be amended, allowing the police to re-interview suspects in the presence of their lawyers. In addition, in accordance with

[29] *"The judicial security forces are under [the prosecutor's] command".*
[30] *"The members of the judicial security forces are obliged to notify immediately the incidents they have started to handle, (...) and to execute all orders of the public prosecutor related to the administration of justice without any delay".*

Article 15 of Law No. 5395 on the Protection of Children, the police cannot take the statement of a child who is involved in a crime, and these procedures are handled directly by the public prosecutor. As a result, statement-taking from these children is delayed, which is against the interest of the child. It could be envisaged to empower the police to take statements from children, in the presence of a lawyer.

Comments by the Union of Turkish Bar Associations:
Paragraph 84: We do not agree with the recommendation that article 148/5 of the CPC should be amendedbecause of the possibility that second and subsequent interrogation to be conducted by the police would not be sound and legally reliable. Furthermore, it is confirmed by the LTC under paragraph 201 of the report that the presence of a prosecutor during an interrogation would be conducive to reduce complaints of torture. On the other hand, we are not in favour of the recommendation to empower the police to take statements in the presence of a lawyer from children involved in a crime as it would contradict with the interests of the child.v

Judicial police

85. Another reason why it is difficult for prosecutors to lead investigations is linked to the organisational structure of Turkish law enforcement. While police officers operate under the orders of the prosecution when it concerns judicial investigations, this work is administrated by the chief of police, who is responsible for their career and deciding priorities in their work. This may lead, in practice, to conflicting orders between prosecutors and police-chiefs, or to judicial tasks being sacrificed to administrative duties. This is not a problem specific to Turkey and the same issue is at stake in many European countries (in France, for example, there have been lengthy discussions for the last 40 years on how to improve the situation: frequently, the control of police work by the prosecutor appears to be more theoretical than effective[31]). Lack of unity of command is a serious problem in any organisation and needs to be addressed.

Comments by the National Police Directorate
Paragraph 85: Article 161 of Criminal Procedural Code stipulates that judicial police officers are obliged to execute all orders of the public prosecutor related to the administration of justice without any delay; article 5 of Regulation on Judicial Police prescribes that judicial police officers shall not be ordered or instructed by their non-judicial superiors related to an ongoing investigation; additional article 6 of the Police Act states that both the judicial police and other law enforcement officers assigned in a judicial investigation shall operate under the orders of public prosecutor. In line with these provisions, judicial tasks have precedence over administrative tasks and the relevant comment in paragraph 85 does not reflect the reality.

86. However, if there is general agreement on the fact that the relationship between prosecution and police should be strengthened so that the prosecutor can effectively supervise the work of the police, there is no such agreement on the way this can be achieved: should it be through the creation of a new structure attached to the Ministry of Justice instead of the Ministry of Interior, like in Belgium (*"Police judiciaire des parquets"*), through the secondment of investigators in the prosecutor's office, like in Italy (*"Sezioni di polizia giudiziaria"*), or via another solution? The question is controversial and the LTC will not take a stand on the administrative aspects, which involve a lot of issues that would require lengthy developments. But, whatever the administrative solution may be, it is vital that real supervision of police work by prosecutors is effective, and this requires that judicial police units be specialised, allowing for close, professional co-operation and sharing of functions and expertise with prosecution units. It must be emphasised that the most important thing is the tightening of the links between prosecution and police, not the reforming of structures.

87. In this respect, the experience from other countries shows that close, daily co-operation between police and prosecutors influences and teaches both parties: the police to an understanding and respect for fundamental rule-of-law principles and the prosecutors to a realistic insight into the conditions under which investigation

takes place. Some statements during the fact-finding visit left the impression that there was room for improvement in both respects. The solution is not to weaken the police but to increase its respect for law and human rights.

88. Consequently, the LTC would recommend:

- the creation of specialised judicial police units, practically close to the public prosecutor´s office;
- the removal of prosecutors from the court house and, ideally,
- their housing together with the judicial police.

[31] See : « Le contrôle de la police par la magistrature est souvent plus théorique que réel », *Le Monde* dated 29 October 1996

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 85 and 88- Judicial police is new structure and regulated under the new criminal reform. Legislative provisions could be more effective if relevant authorities and practitioners put them into practice. More awareness-raising and training activities are needed. Additionally, relevant chapters of the Criminal Procedure Code no 5271 on judicial police as well as the Regulation on Judicial Police should be amended. In this regard the terms such as "the most senior police chief", "responsible judicial police" or "evaluation report" should be defined clearly. Besides, selection of qualified judicial police officers, their training, specialisation as well as establishment of specialised prosecution offices is also important. In order to make judicial police more efficient and functional, the basic solution would be to restructure the judicial police under the order, instruction and control of prosecution office. However this proposal does not mean that judicial police should be merged under the roof of prosecution office.

Unofficial reports

89. It seems to be common practice, especially in terror cases, that the police ask questions to an arrested suspect before he can talk to his lawyer and get legal advice, in spite of legal provisions which openly regulate the right to silence and to consult a lawyer. One of the national short term consultants even pointed out: *"One of the most important problems of interrogation is police asking questions to an arrested suspect before he has talked to his lawyer and get legal advice (ön mülakat)"*.

Comments by the National Police Directorate
Paragraph 89: Judicial investigations are being conducted by police officers in accordance with the provisions prescribed by the legislation and under the orders of public prosecutor. Preliminary interview which aims to identify the suspects immediately after the crime is committed or to avoid the continuance of crime and obtain information regarding potential crimes which are likely to be committed is lawful and of vital importance for the prevention of crime. **Please see ANNEX 10 for detailed comments.**

Comments by the Union of Turkish Bar Associations
Paragraph 89: Inserting an "unofficial preliminary report" in the case file drawn up in accordance with this "preliminary interview" conducted by Anti-Terrorism Units would have a negative impact on the judge's decision and thus conflict with general principles of criminal law.

90. In the recent *Titarenko v. Ukraine* judgment[32], the ECtHR reaffirmed the right to legal assistance at the outset of criminal proceedings and found a violation of Article 6 §§ 1 and 3 in a similar situation: any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterised as "informal questioning".

91. This problem is foreseen in the CCP. The "unofficial preliminary report" made by the police which summarises the exchanges between a suspect and police officers before the official opening of an inquiry is the result of an illegal practice. Defence attorneys may request that it be removed from the file pursuant to articles 206(*a*) and 148 of the CCP. But to the extent this element is included in the file, the judge necessarily take cognizance of it before ordering its suppression. Consequently, this little summary can unduly influence the evaluation of guilt and sway the judge: even though the judge is not allowed to use this statement in his reasoning, it seems impossible for him to ignore a confession when making his decision. Such statements should not be included in the case file and neither the judge nor the lawyer should be informed of their existence.

Telephone tapping

92. Art. 135 allows for phone-tapping in specific cases, if there is strong suspicion and no other possibility of obtaining evidence. In reality, telephone-tapping is not used as a last resort. On the contrary it is used routinely as the easiest way to investigate crime.

93. During the fact-finding visits, the experts were told that prosecutors and judges tend to follow the demands of the police in order to avoid complaints and opposition, and due to lack of time for reading the case files. In order to tackle this issue, serious in-service training programmes should be organised and solutions congruent with the country's realities should be devised after examining some examples of comparative law.

94. In this respect, it is interesting to note that some innovative solutions have been experimented abroad[33]. Of course, it would not be realistic to transpose directly a foreign system into Turkey, but the fact remains that this country could draw inspiration from other systems and find its own solutions to establishing some form of more adversarial proceedings for phone-tapping.

[32] *Titarenko v. Ukraine*, N° 31720/02, 20 September 2012, §§ 86 & 87.

[33] In Denmark, for example, a lawyer represents the interests of the user of the phone and makes opposition to a higher court, if he thinks the conditions are not met. The lawyer is of course not allowed to contact the user and would be severely disciplined and lose his right to practice law if he did so.

Comments by the National Police Directorate
Paragraph 92-93-94: The comment that telephone tapping is routinely used as the first resort is not based on any statistics or comparative research, and does not involve a scientific approach either. The information obtained by the LTC may be misleading. As known, the measure of interception of communication cannot be exercised for all crimes but only for certain crimes specified in article 135 of CPC. It can be observed after the analysis of relevant data that this measure is not resorted as a usual practice in all investigations of catalogue crimes. **Please see ANNEX 11 for detailed comments.**

Comments by the Union of Turkish Bar Associations
Paragraph 94: We are in the opinion that the Danish system according to which "a lawyer represents the interests of the user of the phone" is applicable to Turkish justice system.

95. Finally, as explained below (infra § 189 bis), particular attention should be given to the recent development of special investigation techniques that raise a number of sensitive issues in terms of protection of human rights, namely the right to privacy.

2. ACCESS TO THE CASE FILE

96. According to the ECtHR case law, it is sometimes necessary - thus acceptable - 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 Court emphasised the exceptional nature of restriction of access to the case file[34], particularly when the accused is detained (since the committing of an offence is a pre-condition for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him).

97. In contrast, the Turkish system admits a much broader conception, with very vague limits. According to Article 153 of the CCP, access to the case file can be restricted if such access may "endanger the purpose of the investigation" (except for certain types of documents, such as the statement of the suspect, experts' opinions, etc.).

Comments by the Union of Turkish Bar Associations
Paragraph 97: Regarding the "power of defence to review case file" regulated under article 153 of CPC, restriction of the file on the basis of "hindering the aim of the ongoing investigation" is interpreted very broadly and cause arbitrary practices.

98. Until July 2012, pursuant to Article 10 of the Anti-Terror Law, it was even possible for the judge, upon the request of the public prosecutor, to deny access to the entire case file by the defence counsel. It is true that the situation has improved since the adoption of the 3rd judicial package: now this is no longer possible and the general principles of the Criminal Procedure Code apply. It remains that these general principles are not entirely satisfactory: the fact that the access to the case file by the defence counsel may "endanger the purpose of the investigation" seems to be interpreted very broadly, particularly in organised crime cases, whereas the restriction of access to the case-file should be limited to exceptional circumstances. This issue should be addressed within the framework of the in-service training of judges.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 97-98: According to the amendment in article 10 of Anti-terror law, access to investigation file in terror and organised crimes is subject to general terms and conditions. With this amendment concerning provisions comply with comparative law and become even more advanced than those of some countries. The findings of LTC are based on legal provisions but do neither indicate the exact problem nor bring forward any proposal for solution. Restrictions related to the access of defence lawyer to case file should be exercised in accordance with the spirit of the Law; and concerning the interpretation of this legal provision, more in-service training should be organised including practical exercises.

99. The Commissioner for Human Rights noted in his 2012 Report that such restrictions were routinely applied and that they had been used, for example, in 2011 in the case of two defendants, to whom *"no evidence whatsoever was disclosed 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[35]"*.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 99: This is a subjective assessment and does not reflect the general picture of the Turkish Criminal Justice System. The example is not related to journalists but to organised crime. For terror and organised crimes, if a decision is taken to restrict access to case-file, apart from exceptional provisions, it is not allowed to make copies of documents within case-file. Furthermore pre-trial detention can be challenged anytime within time prescribed by law and should be controlled.

[34] See *Jasper v. United Kingdom*, N° 27052/952, 16 February 2000, §§ 51 & 52.
[35] Above-mentioned report, § 78.

100. Furthermore, if the suspect agrees on a lawyer being his counsel, this lawyer shall obtain legal status. However, according to information received by the LTC, in daily practice, lawyers who have not been appointed by the Bar Association are sometimes asked for power of attorney. In such cases, lawyers should be allowed to examine the file and obtain copies as long as there is no restriction order following their application.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy

Paragraph 100: Regarding to access to case file, it was underlined in the report that public prosecutors ask lawyers for a power of attorney during investigation phase and that this creates an unjustified obstacle for defence. According to Turkish law (article 153 of CPC and relevant article of the regulation), the defence lawyer, defendant, victim or any other person harmed by the crime or his/her representative may review the file during investigation phase. The lawyer who has a request to review the file should submit the power of attorney or the assignment letter which shows that he/she is assigned by the Bar Association; or the defendant should declare that the lawyer is his/her defence lawyer or legal representative. The High Council of Judges and Prosecutors issued a letter on 9/12/2013 no 87742275-659-0289-2012/658/57864 on "Review of content of case-file by lawyers during investigation phase" which defines the rules to be observed and abided by chief public prosecution offices in order to facilitate the process for lawyers to have power of attorney or legal representation for suspects, victims or other persons harmed by the crime and to facilitate this relationship of representation. This letter was published within justice organisation. (See; http://www.hsyk.gov.tr/Mevzuat/Duyurular/sorusturma-asamasinda-avukat-dosya-incl.pdf)

Comments by the Union of Turkish Bar Associations

Paragraph 100: Findings related to "access to case-file" constitute one of the major problems of Turkish criminal justice system, particularly of the defence side. Any impediment before the lawyer to access case file during investigation conducted by the prosecutor contradicts with the principle of equality of arms, right to defence as well as the general principles of criminal law.

101. Yet, an important improvement relating to equality of arms must be mentioned: indeed, in the recent past, many ECtHR judgments found the practice of non-communication to the defence of the public prosecutor's opinion in violation of the ECHR, for example in the review of the applicant's continued detention[36]. It must be noted that this problem has now been resolved by the enactment of the 4th judicial package: according to a new paragraph added to article 270 of law no 5271, it is now a legal obligation to notify defendants or their lawyers of the opinions obtained from the public prosecutor regarding the decisions on detention or continuation of detention.

102. A remark must be made about the indictment process. Indeed, according to Articles 174-175 TCCP, the indictment is presented by the prosecutor to the judge, who shall review the indictment in order to control whether it adheres to the standards indicated in the CCP. The defence lawyers do not take part in this procedure and the court only examines the file provided by the prosecutor. The defence counsel only receives a copy of the indictment after its approval by the judge. This non-adversarial procedure is not satisfactory. Furthermore, as explained below (see §§ 130-134), it has side effects as regards the judge's impartiality. In the LTC's opinion, the simplest solution to address this issue would be to repeal CCP article 174, so that the judge no longer approves the indictment. If not, defendants or their lawyers should at least be notified as soon as the indictment is submitted to the court and they should be given the right to make comments on the indictment and request its return.

Comments by the Union of Turkish Bar Associations

Paragraph 102: For instance, article 174 of CPC stipulates that in cases where the indictment is not returned the latest within 15 days, it shall be considered as accepted. This time limitation is too short taking into account the workload of courts. Prolongation of this time limit will contribute to the well-functioning of the system. Furthermore, the accused or his legal representative or lawyer should be notified as soon as the indictment is submitted to the court and they should be given the right to request the return of the indictment. This will consolidate the effectiveness of investigation on one hand, and the defence will be given the opportunity to get prepared for the defence on the other hand.

103. About equality of arms, a final remark must be made. It relates to the current legal aid scheme: in order to fully respect defence rights, the defendant should be allowed to choose counsel freely among those lawyers who accept the financial conditions of the legal aid system and this system should be improved in several aspects; in particular, the fee paid to the public defender should be increased and it should no longer be paid back to the State by the convicted person.

3. PRE-TRIAL DETENTION

104. As of June 2013, there were 178 ECtHR judgments against Turkey under supervision of execution by the Committee of Ministers, primarily concerning the excessive resort to and length of pre-trial detention, in violation of Article 5, paragraph 3 ECHR (The leading case is *Demirel v. Turkey*, judgment of 28 January 2003). A large number of cases are still pending: approximately 250 cases for unlawful detention (Article 5 §

[36] See, for example *Çatal v. Turkey*, N° 26808/08, 17 April 2012. See also *Altınok v. Turkey*, N° 31610/08, 29 November 2011.

1); about 700 cases concerning the excessive length of pre-trial detention, i.e. more than two years (some 250 of this sort of application also concern the length of proceedings). The ECtHR has noted that such cases reveal "widespread and systemic problems".

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 104: The principal aim of the needs assessment report is to identify the necessities to improve the efficiency of criminal justice system after the criminal reform in 2005. As obvious in the paragraph, the figures are related to the situation before 2005. Turkey has recently taken general measures at the level of Committee of Ministers of the Council of Europe to repair the consequences of violations in ECtHR judgments. Pre-trial detention is a primary issue. It is not a correct approach on the basis of the figures in this paragraph to assert that pre-trial detention is a widespread and systemic problem. On the other hand, the info sheet concerning the meeting of Mr Sadullah Ergin, Minister of Justice, with Turkish Division chiefs in Strasbourg on 12-15 November 2013 states that 441 applications against Turkey are related to "complaints about pre-trial detention". Therefore the statement in the report "700 cases concerning the excessive length of pre-trial detention, i.e. more than two years" is not true.

105. The recent CCP has been designed to tackle this problem :
- Articles 100 and 101 of the CCP provide that decisions to detain or extend detention must be duly reasoned and communicated to the accused;
- according to Article 100(4), detention can be ordered only for crimes liable to two years imprisonment at least (before the limit was one year);
- Art 108 specifies that the continuation of the conditions for detention must be re-examined every 30 days;
- Article 102 determines the maximum length of pre-trial detention, depending on the gravity of the offence;
- Articles 141 to 144 have introduced a right to compensation for unlawful detention, comprising both pecuniary and non-pecuniary damages.

106. Following the new legislation, the situation has apparently improved: according to the latest statistics available, the pre-trial detention rate in Turkey (23.3%) is lower than in a number of European countries (France, Denmark, Belgium, Italy, Holland, for example). However, these statistics should be interpreted with caution as they seem to be controversial: the LTC has been told that they could be misleading (as they are in other countries, depending on the way sentenced persons are counted out and non-final convictions are taken into account). Anyway, it must be stressed that statistics do not necessarily cover every aspect of the abuse of pre-trial detention. The reasoning of judges is still problematic. An amendment introduced in the 3rd judicial package has brought in an additional condition in order to ensure that sufficient reasons are given in decisions on pre-trial detention. And yet, during the fact-finding visits, it was clearly explained that pre-trial detention sometimes appears to be utilised as a tool for punishing the suspect immediately after his arrest by the police, i.e. before conviction.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 106: According to ECtHR case law, calculation of the length of pre-trial detention is based on the time passed until the conviction by the court of first instances. The statistics about pre-trial detention is compiled according to this calculation. The statistics submitted to the LTC is based on official documents of the state. Detention rate in Turkey has diminished thanks to the recent legislative amendments. Therefore assessment of the LTC under this paragraph is self-contradictory. On the other hand, the report states that pre-trial detention appears to be utilised as a tool for punishing the suspect before conviction. Such conclusions, which are also emphasized in the general remarks section of the report, should be based on serious scientific data and research. **(Please see ANNEX 6 for information on the positive impact of 3rd and 4th Judicial Reform packages with a focus on detention and judicial control (contrary to LTC's remarks)– Relevant sections of the 2013 EU Progress Report).** Individual applications can be lodged to the Constitutional Court, which allows the review of long pre-trial detention periods. Accordingly the Constitutional Court can rule that rights of individuals are violated.
Comments by the Union of Turkish Bar Associations
Paragraph 106: Lengthy detention periods and pre-trial detention are one of the major problems of criminal justice system, and this measure is applied systematically in well-known cases involving too many accused. Even though the legislation prescribes certain conditions for the application of pre-trial detention, it has been frequently observed that the practitioners push the limits of such conditions and apply pre-trial detention with motives such as *"to satisfy feeling of justice among the public" or "the alleged crimes fall in the scope of article 100/3 of CPC"*. As a consequence, pre-trial detention is perceived as an advance punishment on the account of a probable punishment/conviction.

107. Once pre-trial detention is ordered, the detention period is in many cases extended routinely and without fresh examination of evidence or renewed consideration of the necessity of detention. The extension orders tend to repeat the reasons given in the first order, using identical, stereotyped terms. Judges and prosecutors fail in many cases to appreciate the obligation to speed up proceedings in cases of pre-trial detention and do not acknowledge the need to provide an additional justification when pre-trial detention is extended.

108. As regards the length of pre-trial detention, it must be noted that an important decision has recently been issued by the Constitutional Court concerning terror cases[37]: indeed, following the 3rd judicial package, Turkish legislation would have allowed an extension of pre-trial detention to up to 10 years in crimes against the security of the state, constitutional order, national defence or state secrets. The Constitutional Court considered such a period violates Articles 2 (*respect of human rights*), 13 (*exceptionality of restrictions on freedom, principle of proportionality*) and 19 (*right to liberty and security*) of the Constitution, and annulled the text, referring the matter to the Parliament for it to amend the law or enact a new one in the coming year. This decision has received much praise and applause from the public and must indeed be approved. Some commentators, however, rightly criticised the fact that the execution of the Court's decision has been postponed for one year on the grounds of keeping public order.

109. Yet, as already mentioned, the important question remains the reasoning of decisions. The Commissioner for Human Rights pointed out in his 2012 Report: *"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"*. (…) "*It appears that, in most cases, judges do not state the 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"*. [38] The situation does not seem to have changed in this respect and it is crucial that this issue be carefully addressed. In particular, the planned training on preventive measures will have to focus on it.

110. As already mentioned, a number of problems used to characterise the review of continued detention, especially as regards adversarial proceedings and equality of arms (non-communication of the public prosecutor's written opinion to the defendant[39]).

111. The 4th judicial reform package tackles this issue and provides that an oral hearing shall be held in review proceedings of continued detention. This is a very positive evolution and the number of violation judgments should decrease in this respect.

112. As for the remedy open to those whose rights under Article 5 §§ 1, 2 and 3 of the Convention have been violated, the recently introduced Code of Criminal Procedure has improved the situation by creating a request for compensation (Articles 141 and 142). The ECtHR had found this recourse ineffective as the compensation claim could only be lodged once the criminal proceedings had come to an end. However, the 12th Criminal Chamber of the Court of Cassation rendered several decisions in 2012 stipulating that there is no need to wait for the end of proceedings to lodge a compensation claim, for the persons who argue that they were kept under custody for a period longer than legally authorised[40]. Thus, this problem will likely be solved once the decisions of the Court of Cassation mentioned above are reflected in the practices of the courts of first instance. Moreover, it should be noted that, given that the Code would not foresee any recourse for breach of Article 5 § 4, a subparagraph (k) has been added to article 141 § 1 of CCP in the framework of the 4th judicial reform package, which appears to correct the deficiency.

113. In addition, the "third package", dated 2 July 2012, introduced a number of new rules related to pre-trial detention:

- the new law created, in specialised heavy penal courts, a judge of liberty, competent for decisions on preventive measures (search, seizure, detention, interception of communication). These liberty judges will not play any role after the investigation phase (in the former system these decisions were made by judges of the trial courts);
- Article 109 of the Criminal Procedure Code was amended to extend the practice of judicial control measures to all offences (in the former legislation, judicial control was possible only for crimes punished with a maximum of 3 years imprisonment);
- Additionally, new measures have been introduced in the form of house arrest and prohibition to appear in determined places.

[37] Decision No : 2013/84 dated 04.07.2013, Official Gazette: 02.08.2013-28726

[38] Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey from 10 to 14 October 2011, *Administration of justice and protection of Human Rights in Turkey*, Strasbourg, 10 January 2012, § 35.

[39] See *Sayık and Others v. Turkey*, N° 1966/07, *Altınok v. Turkey*, N° 31610/08 and *Çatal v. Turkey* N°26808/08.

[40] Decisions No 2012/12183 dated 15/05/2012 (Registration No: 2011/20114); No: 2012/18818 dated 17/09/2012 (Registration No : 2012/20227); No: 2013/1 dated 03/01/2013 (Registration No : 2012/24083)

114. These new provisions are welcome but it is too early to say whether they are efficient or not.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy

Paragraph 113-114: It was mentioned in the report that new provisions in 3rd judicial reform package are welcome but it is too early to say whether they are efficient or not. However, the increased application of judicial control measures is a positive indication. While the number of persons under judicial control was 13.310 in January-July 2012, this number has increased to 25.911 in July-December 2012. Furthermore efforts are being made to raise awareness about the reasoning of decisions on pre-trial detention which was introduced with the third reform package. **(Please see Annex 6 for information on the positive impact of 3rd and 4th Judicial Reform packages with a focus on detention and judicial control (contrary to LTC's remarks) – Relevant sections of the 2013 EU Progress Report).**

115. The LTC would recommend some additional measures :

- It has been frequently mentioned that, where so-called "catalogue crimes" are concerned, judges frequently assume that detention is mandatory or is at least the rule, not the exception: they simply state that *"it is determined that the alleged crimes fall under the list provided by Article 100, paragraph 3 TCCP"*. As there is no convincing justification for a specific regime applicable to "catalogue crimes", the simplest way to correct this wrong practice would be to abolish Article 100, paragraph 3 of the CCP.
- In order to improve the appearance of impartiality of trial judges and to make decisions on preventive measures more efficient, it is recommended that the institution of liberty judges be generalised and established in all criminal courts.
- So far, judicial control seems to consist simply of reporting periodically to a police station. This measure should be developed by giving probation centres a more important role (a pre-condition is of course that their resources are increased).

Comments by the Union of Turkish Bar Associations

Paragraph 115: Despite the fact that the legislation stipulates mandatory rules concerning the application of pre-trial detention, the prevailing understanding for the application of this measure is that it is not selective but compulsory; we therefore agree with the LTC's recommendation to abolish article 100/3 of CPC regulating catalogue crimes.

4. FORENSIC ISSUES

116. Healthy scientific expertise is of crucial importance for the courts to deliver fair decisions. Shortcomings in this area have a very negative impact on public trust in the justice system. In this respect, there is room for improvement in Turkey: the selection and responsibility of experts, as well as the quality of their reports need to be reconsidered.

117. The Turkish Forensic Institute has been criticised for its insufficient independence (being under the authority of the Ministry of Justice) and for delaying trials and causing extended pre-trial detention by delivering its reports very slowly.

118. Although its central capacity has been increased and groups and branch offices have been established in various locations, it seems the group and branch office directorates cannot work efficiently in the existing system. Many case files are sent to the Istanbul Institute of Forensic Medicine whereas they could be sent to universities and group directorates.

119. General practitioners working in hospitals are not forensic experts. They do not have adequate knowledge. The reports prepared by such physicians are not complete, influence the core of the investigation and lengthen the process. Training of experts should improve and be carried out according to a national model.

120. The number of forensic experts should be increased and forensic specialisation should be encouraged. The UYAP Portal on Expertise should be used whenever the service of an expert is required and the amount of work of each expert should be investigated in the UYAP environment.

121. Autopsies are performed only in the IFM. However, other analyses are also carried out in the Criminal Police Laboratory (CPL) and in the Gendarmerie Criminal Laboratory (GCL). Although their operations and work principles are the same, they have independent budgets and structural models. The fact of having the same type of laboratories in different institutions leads to the danger of waste of resources in terms of labour,

utilisation of resources and management, and of a slowing down the process. A single centre would be more efficient[41]. At least, good case management in this field is of vital importance.

Comments by the National Police Directorate
Paragraph 121: Impartiality and credibility of criminal analysis results is of crucial importance. While the current global trend is to use different criminal laboratories as arbitrators among each other, the recommendation to establish a single-centred structure does not seem rational. Since the aim of criminal analyses is to "reveal the material fact that will ensure justice, assessment of use of resources becomes a secondary matter of concern". **Please see ANNEX 12 for detailed comments.**

122. The workload of public prosecutors must be reduced by excluding unnecessary tasks. According to Art. 87 of the CCP, all autopsies shall be conducted in the presence of a prosecutor, whether there is any suspicion of a crime or not. Thus, a Prosecutor is permanently on duty in the Institute. Forensic doctors informed the experts that prosecutors are completely passive during the autopsies and it is the common opinion of the prosecutors that their presence is useless, except in very few homicide cases. It has been argued that they should be present due to their responsibility to secure evidence but, since they are not present during DNA analysis and other highly technical investigations performed by forensic experts, since autopsies are well documented on photo and video, this seems an evident post to save.

123. Finally, it appears to be difficult for the defence to have a counter-check (second opinion) with regards to the Forensic Medicine Institute reports. This is a serious handicap, taking into consideration that more and more cases depend on forensic expertise. According to information received by the LTC, some universities have good laboratories that could be helpful in this respect.

Comments by the Union of Turkish Bar Associations
Paragraph 123: We are in the opinion that forensic issues could be resolved when the "Forensic Institute" ceases to be the sole authority on expertise issues. In Turkey, 41 universities have forensics departments which could be used for forensic purposes. Ultimately as universities are a good reference for institutional independence and autonomy, people's trust in justice will be upheld as well.

C. THE TRIAL STAGE

1. IMPARTIALITY OF JUDGES

124. It has already been mentioned that the relationship between judges and prosecutors should be clarified (see §§ 39-41). This is particularly necessary at the trial stage: to everyone, the role of each actor in court must be perfectly clear and, in this regard, several problems must be mentioned.

125. Firstly, as regards appearances, the fact that the prosecutor and judges enter the courtroom by the same door, whereas the lawyer has to use the door for the public, heightens of course the impression of lack of impartiality. This regrettable habit should disappear.

126. More fundamentally, it is not acceptable that, in most cases, the public prosecutor is completely absent at the trial stage. Indeed, according to Art 188/2 of the CCP, there shall be no public prosecutor present during a main hearing conducted at the Court of the Peace in criminal matters.[42]
127. As for the Court of General Jurisdiction[43], "in order to speed up the procedure" there shall be no public prosecutor present for two years (beginning from May 2011). Prosecutors have been invited to act mainly in the investigation phase to collect evidence, "so that the trial may be conducted in a speedy way".

128. This situation is problematic in view of the ECtHR case law. In the *Ozerov v. Russia* judgment[44], the ECtHR concluded unanimously that there had been a violation of Art 6 § 1 of the ECHR because of the absence

[41] This issue, however, appears to be controversial (the LTC received contradictory comments from the Gendarmerie, Forensic Medicine Institute and High Council of Judges and Prosecutors, about it).
[42] *Sulh ceza mahkemesi*; It must be remembered that Article 10 of the Code on Courts has widened the jurisdiction of this court to cases that deal with crimes carrying imprisonment of up to two years. Previously, the jurisdiction of the Court of Peace in Criminal Matters was limited to cases of misdemeanours and some petty offences listed by the repealed Code of Application of the Penal Procedure Code (Art. 29).
[43] *Asliye ceza mahkemesi*, competent to hear cases that do not fall under the jurisdiction of other criminal courts, meaning cases that deal with crimes carrying imprisonment of up to ten years.
[44] *Ozerov v. Russia*, N° 64962/01, 18 May 2010.

of the prosecutor. It is more than likely, in these conditions, that the ECtHR would find the present Turkish legislation in violation of the Convention. It should be abolished and prosecutors should … prosecute, which implies they are always present at trial to sustain the charges (or abandon them).

129. Finally, one of the main problems of Turkish criminal justice is that it is not unusual that a case cannot be tried properly because it has not been completely investigated: the indictment is often issued despite the fact that all relevant evidence has not been collected and that the prosecutor is aware that the evidence is insufficient. Hence, the investigative phase continues at trial and it is conducted by the judges instead of the prosecutors, which blurs the perception of each other's role. This should be corrected. According to the CoE Recommendation on the Role of Public Prosecution in the Criminal Justice System[45], a main task of Prosecution is to function as a gate-keeper and to filter cases which, due to legal problems or insufficient evidence, should not be forwarded and should not burden the courts. In this regard, the procedure of "return of the indictment" is problematic and should be reconsidered.

Return of the indictment

130. According to Article 174 CCP, when receiving the indictment from the prosecutor's office, the court shall examine the whole case file within 15 days and can return the indictment if there are missing parts and errors (in violation of the provisions of Article 170), if the indictment was produced *"without collecting evidence that would prove the crime with certainty"*, or if the indictment was produced in crimes that are clearly falling under the provisions of the settlement of the case on the payment of the fine, or mediation. If the indictment has not been returned at the latest at the end of the time limit of 15 days, it shall be deemed accepted.

131. After the indictment has been returned, the public prosecutor shall complete the missing points and correct the errors as shown in the decision and (unless there is a situation that requires a decision to not prosecute) he shall issue a new indictment and send it to the court. The public prosecutor may also file a motion of opposition against the decision to return the indictment.

132. By creating this procedure, the intention has probably been to prevent the courts from wasting time on cases which have not been sufficiently investigated, but it has not had that effect. Apparently, following the case law of the Court of Cassation, the judges prefer to remedy the missing investigation themselves during the trial rather than returning the indictment. This extends the length of the trial, costs resources and endangers the appearance of impartiality of the judges: when they conduct the investigations themselves, they play the role of prosecutors and, when they don't return the indictment, they must be seen by the defendant as having already decided that there is no missing *"evidence that would prove the crime with certainty",* delivering a kind of pre-judgment.

133. A judge should not be involved in the indictment process at all, but should only base his decisions on the evidence as it is presented to him by the prosecutor. If the prosecution is not able to provide convincing proof of guilt, the judge shall acquit the accused.

134. For this reason, rather than reactivating Article 174 of the CCP, as suggested by several partners, the LTC would recommend simply abolishing it. But of course, this would only make sense if judges broke their habit of ordering further investigations and adopted a less inquisitorial approach. In addition, it would be useful to forbid any indictment without the suspect having been interviewed. Under German Law there is a "must regulation" in this respect. Turkish Law could be improved in this way.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 130-134: The LTC recommended the repeal of "return of indictment" system regulated under article 174 of CPC. It is true that this provision has become partly dysfunctional with the case law of the Court of Cassation; however the positive effect of this system cannot be denied in terms of the effectiveness of investigation after the law is put into force on 1 June 2005. Despite its current state, return of indictment is still an important development in Turkish Law. Efforts should be continued to increase the effectiveness of this system rather than repealing it.

Comments by the Union of Turkish Bar Associations
Paragraph 134: We are not in favour of the recommendation to repeal the "return of indictment" mechanism. This system should be consolidated in order to prevent the judge to assume the role of prosecutor during trial phase. For further explanation, please refer to comment no 102.

[45] Council of Europe Committee of Ministers´ Recommendation Rec (2000)19.

Delayed announcement of the judgment

135. In cases where the accused is liable to a maximum of two years imprisonment or a fine, the court may decide to "delay the pronouncement of the judgment" (Article 231/5-14, CCP).

136. The following requirements must be fulfilled :
- the accused must not have been convicted for an intended crime previously;
- in view of the personality of the accused and their behaviour during the main trial, the court believes that they will not commit further crimes;
- the prejudice to the victim or the public resulting from the committed crime has been repaired by giving back the same object, restoring the circumstances as they were before the crime, or by paying damages;
- the accused must consent.

137. When the pronouncement of the judgment has been delayed, the accused shall be subject to a probation term. The court may decide that they shall take part in an education programme in order for them to obtain a profession or a skill, work for a fee in a public institution or in a private place under the supervision of other persons, be prohibited from going to certain places, or fulfil another obligation determined at the discretion of the court. The court may decide as well that the pronouncement of the judgment shall be delayed under the requirement that the accused repays the prejudice of the public or the victim in monthly instalments.

138. In cases where there has been no intentional crime committed during the period of probation and the obligations related to the measures of probation have been respected, the case will be dismissed. Conversely, if the accused commits a new intentional crime during the period of probation or violates the obligations related to the probation, the court shall pronounce the judgment (with a possibility of suspending the imprisonment or converting the punishments into alternative sanctions).

139. This specific procedure appears to be a mixture of different measures existing in foreign countries. For example, it can be compared with the following, in French law : *ajournement du prononcé de la peine* (adjournment of the pronouncement of the sentence, Art 132-63 of the French penal Code), *dispense de peine* (exemption of sanction, Art 132-59) *sursis simple* (suspended sentence, Art 132-29 & ss), *sursis avec mise à l'épreuve* (probation, Art 132-40 & ss), *travail d'intérêt général* (community service order, Art 131-8), *sanction-réparation* (compensation sentence, Art 131-8-1), etc.

140. The problem is that grouping these different measures makes the situation unclear. And the risk exists that the procedure may be abused in practice, as the following example shows: during one of the fact-finding visits, an accused was asked at the very beginning of the hearing whether he would agree on the pronouncement of the judgment being delayed, that is even before he could explain his defence (he pleaded not guilty). Evidently, he did not want to annoy the judge and he gave his consent without understanding the question.

141. The experts have been told that judges tend to consider this procedure as a way of reducing their workload by getting rid of case files in the least complicated way, especially as, for their promotion, quantity is considered more important than quality.

142. It would be good to clarify the procedure by distinguishing between the different abovementioned situations. In particular, while of course it is necessary that the accused consent to a community work, there is no reason why they should agree to the other aspects of the decision and why they should necessarily "plead guilty" and waive their right to dispute the evidence produced against him.

2. ORDERLY CONDUCT OF PROCEEDINGS

143. *« Que chacun soit à sa place et que chaque chose vienne en son temps : voilà l'ordre du rituel judiciaire »*[46]. The fact-finding visits revealed that there was room for improvement in this field: during several hearings, the general impression was one of confusion. Actually, it seemed that there was no precise order for each actor to speak: the sequence of appearance for witnesses was not always logical; the defence lawyer sometimes requested

[46] "Let everybody be in the right place and let everything occur at the right time: here is the order of judicial ritual". A. Garapon, *L'âne portant des reliques,* 1985. By the same author, see also: *Bien juger, essai sur le rituel judiciaire,* 1997.

the acquittal and release of his client while witnesses were being heard; the prosecution then responded and the defence did not have the last say; once, as already mentioned, an accused was even asked whether he would agree on the pronouncement of judgment being delayed, before he had a chance to explain his defence.

144. This impression of confusion is increased by the fact that cases are examined in a very disjointed manner: the postponement of trials seems to be the rule, not the exception, making it difficult for the judge (and for the audience) to have a global view of the case as a whole. Every time the hearing is postponed, to be taken up again two or three months later, the judge must review the case file, which is a waste of time and energy. Continuity contributes to the judge's mental processes and leads to the forming of a firm conviction. The Turkish method of presenting evidence "in small doses" (that is, as it is gathered) impairs judges' reasoning processes.

145. This situation is very disturbing and some training of judges, prosecutors and lawyers on the judicial ritual would definitely be needed: how to prepare for trials, ensure the presence of witnesses, question them, obtain expert statements in a timely fashion, finalise trials without major interruptions, in short organise the hearing in good order - these topics should be addressed in pre-service and in-service training.

146. During the hearings attended by the fact-finding team, it was observed that the indictment was not read in full to the defendants at the beginning of the trial: the judge only mentioned matter-of-factly that *"the Defendants knew the Indictment"* (which they confirmed), without it being clear what they actually knew and understood. This practice does not comply with the standards of an adversarial hearing. Furthermore, it does not take into account the need for information of the audience. In other terms, it does not allow for real publicity, which is part of a fair trial: as Bentham put it *"Publicity is the very soul of justice, it is the keenest spur to exertion and the surest of all guards against impropriety. It keeps the judge himself whilst trying under trial"*.[47]

147. Lastly, a remark must be made as regards organised crime or terror crime cases. In these matters, the number of accused is impressive (dozens of defendant are not unusual and, in some cases, the number has risen up to two hundred or even three hundred). Whatever the reason, it seems impossible for a judge, even an excellent one, to make such mass verdicts comply with the guarantees of a fair trial based on individual justice. These cases should be handled differently, as they are in other countries. Obviously, this is linked to the very broad interpretation of the definition of criminal organisation and terrorism (see infra § 191): generally speaking, too many people are deemed to be members of a criminal organisation. Furthermore, whenever possible, people should be tried individually and in any case those accused of minor participation should be tried separately from those most responsible.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 147: Mass trials are a consequence of personal, physical and legal actions prescribed in the Law and discretion of judicial authorities. The number of mass trials with two or even three hundred suspects in Turkey is very few. It is not a proper approach to make general arguments through implying a well-known case among the public. Besides in Turkish law, investigation and prosecution of especially terror and organised crimes involve many suspects. In order to accelerate investigations and to speed up prosecution process in an accurate manner, appropriate measures should be taken to improve human resources, technical and physical facilities **(See ANNEX 5 for detailed comments).**

3. EQUALITY OF ARMS

148. The Criminal Justice System in Turkey today functions as if it were completely inquisitorial, with the prosecutor being absent - or passive - and the defence being very timid. However, there is no reason for this situation to be immutable: nothing in the law prevents a more adversarial process from being developed, which is a condition for a real fair trial.

149. One of the essential components of the right to a fair trial guaranteed under Article 6, paragraph 1 of the ECHR is equality of arms, as the case-law of the ECtHR clearly shows. The Court insists that this concept implies that each party must be afforded a reasonable opportunity to present its case under conditions that do not place it at a "substantial disadvantage" vis-à-vis its opponent.[48] And so, importance is to be attached *inter*

[47] Jeremy Bentham, *Draught for the organisation of judicial establishments, compared with that of the National Assembly, with a comment on the same* in his *Works* (Edinburgh 1843), Vol. IV, 305-316.
[48] See, *inter alia*, *Dombo Beheer B.V. v. the Netherlands*, N° 14448/88, 27 October 1993.

alia to the appearance of fair administration of justice.[49] Unfortunately, in this respect, the current situation in Turkey is not satisfactory. Some aspects have already been mentioned (see impartiality of judges, §§ 124-129). The following problems also need to be addressed.

Place in the courtroom

150. A major subject of concern is the question of the physical positions of the prosecutor and the defence lawyer in the courtroom. The prosecutors stand on a raised platform, whereas the accused and the lawyers are placed at a lower level in the courtroom. This could be considered a breach of the principle of equality of arms. It is true that in the *Diriöz v. Turkey* judgment[50], the ECtHR declared inadmissible as manifestly ill-founded under Article 35 §§ 3 and 4 the complaint concerning the seating arrangements in the courtroom.

151. However, this decision must be analysed carefully and should not be considered irrevocable. The problem is not simply a formal one but a substantial one. It lies not only in the physical position of the prosecutor but in the fact that the accused is, in effect, *"in a disadvantageous position regarding the defence of his or her interests*".

152. And this is particularly true as the defence counsel stands far away from their clients and can in no way communicate confidentially with them. In this respect, an objective observer in Turkish courtrooms is necessarily struck by the distance separating the accused from their lawyers, particularly when the defendants are detained and surrounded by numerous armed guards. This in no way allows a proper communication between the counsel and the client.

Comments by the Union of Turkish Bar Associations
Paragraph 152: It is physically not feasible to make a sound defence with the current sitting order in the court room for accused persons and defence lawyers; and this contradicts with the principle of equality of arms as well as the right to fair trial. It was observed during study visits abroad (ex. France and the Netherlands) that the courtrooms are structured as to allow accused or detainees to have special communication with the defence lawyer. Similar arrangements should be brought into the Turkish criminal justice system.

153. Additionally, the fact that the prosecutors and the judges enter the courtroom by the same door, whereas the lawyers have to use the door for the public, heightens the impression of a breach of equality of arms.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 153: The criticism concerning the use of the same door or the structure of stand in the court room exists in most part of the report whereas Turkish Criminal Justice System has more critical and serious problems. Special gates are spared for lawyers and they are using entrance badges in courthouses which have been constructed recently.

154. In the spirit of the third judicial reform package, which puts the emphasis on the rights of the defence, a change in these established practices would be particularly welcome: prosecutors and judges should no longer enter the courtroom by the same door.

Illegal evidence

155. According to Art. 38/6 of the Constitution of Republic of Turkey, *"Findings obtained through illegal methods shall not be considered evidence."* Furthermore, Art.206/2 of the CCP states that *"If the evidence is unlawfully obtained, it shall be denied."* and following CCP Art. 217/2, *"The charged crime may be proven by using all kinds of legally obtained evidence."* Finally, CCP Art 289/1.i considers the judgment based on evidence obtained by illegal methods an *"absolute violation of the law"*.

156. In spite of these strict rules, in practice, this type of evidence is not removed from the case files. As a matter of fact, Art.230/1-b of the CCP regulates the way evidence obtained unlawfully must be handled: *"The reasons for the judgment on the conviction of the accused shall contain the following issues*: *(...) b) The*

[49] *Edwards and Lewis v. the United Kingdom*, N° 39647/98, 40461/98, judgment of 22 July 2003, and Grand Chamber judgment of 27 October 2004.
[50] *Diriöz v. Turkey*, N° 38560/04, 31 May 2012, § 26. See some criticisms of this judgment by F. Koning, "L'erreur de menuiserie". Quand l'utilitarisme s'invite à la Cour européenne des droits de l'homme", *Journal des tribunaux*, 2012, no. 6488, pp. 577 ss.; C. Matray, "Observations (Cour européenne des droits de l'homme, 31 mai 2012)", *Revue de jurisprudence de Liège, Mons et Bruxelles*, 2012, no. 28, pp. 1319 ss.

discussion and evaluation of evidence; the description of the evidence on which the judgment is based, and those that have been rejected; in this sense, evidence obtained by illegal methods that are included in the file shall be indicated separately and clearly…".

157. It is obvious that evidence obtained unlawfully, if not extracted from the case file, will influence the judge who reads the file. Art. 230/1-b should be amended, the exclusionary rule be clearly introduced and the annulled documents be withdrawn from the case-file and placed in a separate folder (see, for example, the procedure described in article 174 of the French CCP).

4. LENGTH OF PROCEEDINGS

158. The excessive length of proceedings has been a chronic dysfunction in Turkish justice which has caused the delivery by the ECtHR of repetitive judgments. Some cases have even lasted for more than 10 or even 15 years. This problem has major human rights implications, both as regards lengthy detention periods and the fight against impunity.

159. Over 3000 cases are pending in Strasbourg.[51] In 2012, the Court started a "Pilot" procedure in the *Kaplan v. Turkey* judgment[52] as regards length of proceedings cases against Turkey. Moreover, the ECtHR has repeatedly found that the Turkish legal system currently lacks an effective domestic remedy, in the sense of Article 13 ECHR, allowing applicants to challenge the length of proceedings before the outcome of an ongoing trial.

160. As already mentioned, it is frequently said that the main cause for the difficulties faced by Turkish criminal justice is the enormous workload of prosecutors and judges. It is certainly true that judges and prosecutors are overwhelmed with work. Yet, the workload is probably not the only explanation.

161. Particularly worrying is the workload of the Court of Cassation, which deals with all appeals in the absence of functioning appeal courts. Law No. 5235 of 26 September 2004 (in force since June 2005) was supposed to introduce regional courts of appeal in the Turkish judicial system. It provided that they become operational two years after the entry into force of the Act. However, the courts of appeal are not as yet operational, more than four years after the deadline foreseen in the legislation. This is unfortunate.

162. However, the workload is not sufficient to explain the excessive length of proceedings. Of course, it is difficult to compare the situation in various countries: as pointed out in the CEPEJ report for 2012, *"the comparison of quantitative figures from different countries revealing varied geographical, economic and legal situations is a delicate job. (...) In order to compare the various states and their various systems, the particularities of the systems, which might explain differences from one country to another one (different judicial structures, organisation of courts and the use of statistical tools to evaluate the systems, etc.), must be borne in mind"*.[53]

163. Having said that, the figures seem to indicate that the situation in Turkey is not really worse than in some other countries, as regards human resources *stricto sensu*. It is true that, in this country, the annual public budget allocated to all courts, legal aid and public prosecution per inhabitant is indisputably low[54], but the number of judges and prosecutors is similar to countries such as France, Spain, Italy or Germany.[55] Thus, lack of manpower is probably not the only obstacle to a more efficient justice system.

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[51] Including, however, not only criminal but also civil and administrative proceedings.

[52] *Kaplan v. Turkey*, N° 24240/07, 20 March 2012 (available in French only): § 63 « *La répétition des violations de l'article 6 § 1 de la Convention relevée en Turquie perdure depuis plusieurs années et constitue donc un problème structurel et systémique de l'ordre juridique interne incompatible avec les articles 6 § 1 et 13 de la Convention (paragraphes 50 et 58 ci-dessus). Elle note que plusieurs centaines d'autres requêtes similaires sont pendantes devant elle. Eu égard au nombre croissant de personnes potentiellement concernées en Turquie et aux arrêts de violation qu'elle pourrait être amenée à prononcer au sujet des requêtes en question (Maria Atanasiu et autres c. Roumanie, précité, §§ 217-218), la Cour décide d'appliquer la procédure de l'arrêt pilote en l'espèce ».*

[53] *European judicial systems*, Report of the European Commission for the efficiency of justice (CEPEJ), available at: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf

[54] 17 € per capita, which ranks Turkey 35th out of 40 countries, the average amount of resources spent on the judicial system in Europe being 57.4 € per capita (the "median value for the budgetary commitment" is 44.1 € per capita). CEPEJ, *ibid*.

[55] Turkey has 5.8 prosecutors (Germany 6.4, Spain 5.2, Italy 3.3 and France 3) and 10.6 judges per 100,000 inhabitants, approximately the same number as France, Spain and Italy. CEPEJ, *ibid*.

164. As already explained, the lack of flexibility of the system and the absence of a speedy procedure for simple cases, among other factors, play an important part. And of course, the fact that the indictment is incomplete is definitely a source of delay: judges told the foreign experts that they have to use 90% of their time to make up for the shortcomings of the investigation. This not only transfers the prosecutor's work onto the judge's shoulders but also makes things much slower and is one of the main reasons for the excessive length of trials.

165. More fundamentally, the way cases are handled is a deciding factor: in nearly every case, there is a postponement of the trial for various reasons, because of the absence of those who must be present (accused, witnesses, victim…), because an expert report has not been received, or just because the judges deal with different cases at the same time. The result is that the trial will resume some weeks, or even a few months later.

166. As far as possible, courts should try one case at a time and postponement of trials should be the exception, not the rule. It is current practice abroad and there is no reason why it should not be possible in Turkey. It is the LTC's opinion that the situation could be improved through the different reforms proposed here which are aimed at giving more flexibility to the system and clarifying procedures.

167. Delays are also considered to be the result of many procedures related to non-jurisdictional matters. In particular, when there is a dispute as to whether the crime is an organised one or not, the file is sent to the Supreme Court where it stays for months, without the detainee's status even being examined. Local courts do not take decisions due to the alleged lack of jurisdiction and send release requests to the Supreme Court. In spite of the mandatory provision for *ex officio* examination of the situation of detainees at least once a month, this examination is not conducted until the decision of the Supreme Court is delivered. This does not seem in compliance with Art 5 § 4 of the ECHR regulating the right of an individual to request release at all stages. In many countries, these delays are avoided thanks to clear laws concerning the competences of the various courts. It might be interesting for the Turkish judiciary to re-examine the laws on jurisdiction.

168. A further important problem relates to the implementation of Art. 201 of the CCP: lawyers mentioned that they experience serious difficulties in posing direct questions during hearings. This was confirmed during the fact-finding visits. Some common training for judges and lawyers would be required on this issue. Furthermore, instead of having the presiding judge reformulating and dictating every statement taken in court (which not only slows down the proceedings but prevents any real cross-examination), court sessions should be recorded audio-visually. Videoconferences should also be encouraged, given the long distances and travel times in Turkey (while respecting the ECtHR case law in this field[56]).

Comments by the Union of Turkish Bar Associations
Paragraph 168: Even though it is not recommended in the report that judge reformulates and dictates every statement taken in court, it is of crucial importance for the defence to have full court records including all statements since the case files are reviewed by the Court of Cassation through written procedure. Video-conference system or audio-visual recording of court sessions is currently causing very serious problems in Turkey. Such means should be used in compliance with the principles of equality of arms and right to fair trial as well as in line with the procedure prescribed in Book 3, part I, Chapter 4 of the CPC entitled "Presentation and Discussion of Evidence".

D. SOME SPECIFIC ISSUES

1. ANTI-TERRORISM and ORGANISED CRIME

169. Turkey faces a difficult situation as regards terrorism and it must first be said that this country has a duty to fight this scourge efficiently and protect the population from terror crimes. In this respect, it is worth recalling that the ECtHR has pointed out that terrorist activities *"are in clear disregard of human rights"*.[57]

170. It must also be said that the combat against terrorism is liable to erode a significant number of individual rights and freedoms, as the Court has recalled in the *Saadi v. Italy* judgment.[58]

171. It follows that States are confronted with a *dual responsibility* under the European Convention: on the one hand, they are under the obligation to combat terrorism effectively; on the other hand, they are under the obligation to respect human rights in the enforcement of anti-terrorism measures.

[56] See, in particular, *Marcello Viola V. Italy,* 5 January 2007, §§ 23-25
[57] ECtHR, *Ireland v. the United Kingdom*, N° 5310/71, 18 January 1978, § 149.
[58] ECtHR (GC), *Saadi v. Italy,* N° 37201/06, 28 February 2008.

172. Finally, while the obligation to fight against terrorism may justify or require special measures of prevention and prosecution, it is essential that such action is implemented in a manner that is entirely consistent with the principles of human rights law.

173. Thus, it is not surprising that the combat against terrorism occupies a central place in Turkey and raises many questions as regards the functionning of criminal justice. Some well known cases have been highly criticised and have given a negative image of Turkish criminal justice. The legal definition of terror crimes, the existence of special courts and derogatory procedures and the impact of anti-terrorism on freedom of expression are the main issues at stake in this regard.

174. In a resolution adopted on 21 March 2013, the Foreign Affairs Committee of the European Parliament insisted that *"a fourth package is needed to narrow excessively broad, definitions of criminal offences, particularly of the act of terrorism, shorten excessively long pre-trial detention periods and circumscribe the powers of special courts"*. This 4th judicial package was submitted to the Parliament and, subsequently, Law N° 6459 on *Amendments in certain Laws on Human Rights and Freedom of Expression* was adopted in April. It aims at narrowing the definition of terrorism but the reform does not solve all the problems, as explained below.

Legal definition

175. The legal definition of terrorism seems to be the subject of some uncertainties and there are many discussions about its content and scope as defined by articles 1, 2, 3 and 4 of the anti-terror Law N°3713. Law enforcement officers complain that the current legislation is inadequate to cover the different circles of people involved in terrorism: the perpetrators, those aiding and abetting, the supporters. On the other hand, to many observers, the definition is too broad and allows for the danger of criminalisation in many directions: to these observers, terrorism and related activities tend to invade the entire field of action, many offences are likely to fall under the definition of terrorism and everyone is at risk of becoming a suspect; there is a disturbing tendency to stretch the limits of the definition of terrorism and organised crime to encompass offences subject to ordinary law[59].

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraphs 173-175: Definition of terrorism varies since each country has its own characteristics and legal systems. As there is no definition of terrorism admissible in international arena and agreed by every country, it is not proper to assert that definition of terrorism is too broad in Turkey. On the other hand the footnote inserted into the report after the consultation meeting on 5 July 2013 during which the draft report was discussed among project partners is not directly relevant to the needs assessment. During pilot courthouse visits the LTC obtained a lot of concrete information regarding terrorism in Turkey; however it is seen that he adopted a different approach and his thesis and assessments are not fully in compliance with the realities of the country (**See Annex 7 for detailed comments).**

Comments by the Union of Turkish Bar Associations
Paragraph 175: The finding that legal definition of terrorism is ambiguous and too broad is true. In order to carry out a systematic reform on freedom of expression and human rights, the Anti-terror Law should be abolished.

176. The question must be taken seriously and, while examining it, the personal attitude of judges and prosecutors is of paramount importance. In this respect, the interpretation of the legal definition of terrorism appears to be very broad.

177. Law N° 6459 on *Amendments in certain Laws on Human Rights and Freedom of Expression* (4th judicial package) adopted in April 2013 has narrowed the definition of terrorism. This is an important improvement, although probably insufficient, as explained below (see § 191).

Comments by the National Police Directorate
Paragraph 175-177: Definition of terrorism varies from one country to another since every country has different characteristics and legal systems. The comment that definition of terrorism is too broad in Turkey is not appropriate as there is no definition of terrorism internationally accepted and agreed by every country.

[59] In this respect, it is interesting to note that, according to a survey published by *Associated Press* in 2011, out of 35 117 convictions pronounced for terrorism worldwide since September 2001, 12 897 were pronounced by Turkish courts, which makes this country rank number one, ahead of China (7000 convictions). See « *BILAN D'UNE ANNÉE INQUIÉTANTE POUR LA JUSTICE TURQUE* », Institut de Relations Internationales et Stratégiques (IRIS), April 2012 : www.iris-france.org

Special courts?

178. The question of whether there are more advantages than disadvantages in having separate courts for special cases has been discussed over the years in Turkey and recently in the CoE Human Rights Commissioner´s report for 2012.[60]

179. Before trying to answer this question, it must be recalled that the whole organisation of criminal justice in terror cases is in a transitional period, following the adoption of the 3rd judicial package (Law N° 6352 and Anti-Terror Law N° 3713, dated 2 July 2012, which came into force on 5 July 2012 upon publication in the *Official Gazette*). The so-called "specially authorised courts" have been abolished and new (regional) heavy criminal courts have been established.

Comments by the Union of Turkish Bar Associations
Paragraph 179: It was publicly declared that the "specially authorised courts" were abolished with the Law no 6352 under the 3rd judicial reform package; however they still exist in essence as these courts "will be functional until the cases they have been trying are finalised".

180. However, the specially authorised courts will continue to function until the pending cases reach final verdicts. They will also apply the new procedural provisions in their trials. Therefore these courts will exist for a period of time and their abolishment will be entirely effective only for future cases: in the transition period, there will be a dualistic system depending on the date of filing of the case.

181. As for prosecution offices, their removal became effective without any transition period. The investigations underway in the prosecution offices of the specially authorised courts are transferred with immediate effect to newly-established heavy criminal courts' prosecution offices. Therefore new cases will be filed to the new regional heavy criminal courts by the newly-appointed prosecutors.

182. In the new system, liberty judges are introduced to handle decisions on preventive measures in the investigation phase. The procedural rights of the suspect or accused have been strengthened by abolishing or amending some of the provisions applicable to the former specially authorised courts.

183. It is a bit early, of course, to draw definitive conclusions from this reform. During the visits, the international experts were told by some of those involved that the new legislation had not changed anything in practice while, to some others, the situation is better than it used to be.

184. However that may be, the main justification for special courts is the necessity of having highly specialised and trained judges/prosecutors to properly handle these important and delicate cases.

185. More precisely, everybody seems to agree that these cases are difficult to investigate and require special expertise from police and prosecution. But many people also think that, for judges, the problem is different: assessing and concluding on guilt based on the evidence presented in court by the prosecutor requires no specialist knowledge from the judge. Rather the opposite: the judge is not supposed to have a prior inside knowledge, which may blur his independence and impartiality (and a precondition is of course that the judge does not become responsible for the investigation and prosecution of the case as is presently seen to be the case).

186. It is possible to assert that there is a risk of judges from specialised courts developing a special mentality where, on a daily basis, they only cooperate closely with a limited number of professionals dealing with a few types of very serious crimes. Such a situation can encourage a "besieged fortress" mentality, illustrated by the "criminal law of the enemy"[61] doctrine: according to this theory, efficient defence of national security implies that the state, in order to survive, agrees to abandon the traditional guarantees of criminal procedure and substantive law. This kind of analysis can endanger the functioning of dispassionate justice.

187. The LTC has been told that, in order to preclude such a drift, the HCJP makes sure that judges rotate and

[60] Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey from 10 to 14 October 2011, *Administration of justice and protection of Human Rights in Turkey*, Strasbourg, 10 January 2012, §§ 90-95.
[61] Inspired by the ideas of the Nazi legal theorist Carl Schmitt on the distinction between "friend and foe" in the Total State (Carl Schmitt, *Politische Theologie* 1922, et *Der Begriff des Politischen* 1932), the doctrine of "criminal law of the enemy" (*Feindstrafrecht*) was developed in the late 1990s by another German jurist. See Günther Jakobs, *Eser/Hassemer/Burkhard, Die deutsche Strafrechtswissenschaft in der Jahrtausendwende*, 2002.

do not stay too long in the specialised courts. This is good practice but, in view of what was mentioned during the fact-finding visits, it is probably not enough. For this reason, the LTC is of the opinion that specialisation should be limited to prosecutors and police dealing with terror-crime or narcotics cases or organised crime. This would not prevent trials from being grouped in regional courts where it seems preferable to take the case away from the crime scene (which is frequent in these matters, of course): the only difference with the present situation would be that judges would not be specialised, and would continue to deal with ordinary cases[62].

Comments by the National Police Directorate
Paragraph 178-187: In Turkey terror cases are tried by regional assize courts which have jurisdiction over more than one province. These courts are not exceptional but specialised courts. In many European countries including France and Germany, crimes committed against national security and constitutional order of the state as well as terror cases are tried by specialised courts.

Freedom of expression

188. The European Court has an extremely abundant case-law on the compliance with Article 10 ECHR by Turkey in terrorism-related issues.

189. Several reports complained about press freedom in Turkey. This is a serious problem[63]. Of course, any individuals who have committed an offence should under no circumstances be subjected to favourable treatment simply because they are journalists. But, conversely, the activity of journalists should in no way be hampered by any form of judicial reaction that could be interpreted as a criminalisation of their profession. In this regard, the number of Turkish journalists in prison is worrying. As the Secretary General of the CoE pointed out recently in Ankara[64], it has to be accepted that: *"Freedom of expression may offend, it may even shock"*. He added: *"These are not my words. They are taken from a judgment of the [European] Court"*. These principles should be reflected in judicial practices. In this respect, the situation can of course still be improved, but it must be stressed that there have recently been some encouraging developments.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 189: It was stated in the report that the reports drafted by the International Press Institute (IPI) and the Committee to Protect Journalists (CPJ) criticised the freedom of press in Turkey particularly on the basis of the number of imprisoned journalists. It has been explained to the LTC several times that the journalists were not imprisoned because of their occupancy as journalists or because of expressing ideas and opinions, and examples were provided concerning some cases which were already finalised. As expressed by Mr Sadullah Ergin, Minister of Justice, on several occasions, most of the imprisoned journalists have been under detention or convicted due to actions which constitute ordinary that have no relevance with journalism. Therefore it is not an accurate approach to merely assert that journalists are imprisoned because of expressing their thoughts and ideas.

190. Indeed, on 22 May 2012, the Court of Cassation overturned a ruling sentencing two Kurdish politicians to prison terms for referring to Öcalan as "esteemed".[65] The Court referred both to the Turkish Constitution and the ECHR to justify its decision, arguing the act in question fell within the boundaries of the freedom of speech and thus repudiating the Ankara court that had sentenced the suspects to six months imprisonment each.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 190: The assessment under this paragraph is true but incomplete. As known, the 8th and 9th Criminal Chambers of the Court of Cassation quashed the court decision regarding the expression "esteemed". The 4th Civil Chamber and 8th and 9th Criminal Chambers of the Court of Cassation have made several other decisions on freedom of expression with a libertarian perspective. ECtHR judgments were referred to in these decisions and standards set by ECtHR case law have been adopted as principles.

191. The 4th judicial reform package adopted in April 2013 contains amendments concerning freedom of expression, such as a narrowed definition of terrorist propaganda and decriminalisation of non-violent acts and expressions. However, the law does not cover the full range of legal provisions that restrict freedom of expression. Reporting on and publishing statements by illegal groups are now criminalised as terrorist offenses only if they *"legitimise or praise methods of force, violence or threats by terrorist organisations, or encourage these methods"* (an amendment to article 6/2 of the Anti-Terror Law). A similar amendment restricts the scope

[62] In this regard, it must be stressed that there is no "specialised trial judge" in terror cases in France: the only specialised magistrates are Paris prosecutors and investigating judges. Trial judges are professional (as opposed to jurors in ordinary cases) but they are not "specialised" in terrorism.
[63] According to the 2012 annual survey by *Reporters without borders*, Turkey ranks N° 154 out of 179 countries on freedom of press. The country is ranked number one worldwide in terms of number of journalists in prison.
[64] Speech dated 5 February 2013.
[65] http://www.hurriyetdailynews.com/4th-judicial-package-to-see-critical-steps.aspx?pageID=238&nID=28237&NewsCatID=338

of laws criminalising activities counted as *"terrorist propaganda"* (article 7/2, Anti-Terror Law, and 220/8, Turkish Penal Code). A related reform to the Turkish Penal Code permits a conviction for *"praising criminal activities and criminals"* only if the circumstances constitute a *"clear and imminent danger to public order."* However, the reforms leave unchanged article 314 of the Turkish Penal Code, *"membership of an armed organisation"*. According to observers, many political activists, but also journalists, trade unionists, and human rights activists, are charged with this offence rather than terrorist propaganda. Furthermore, the new law did not change Art. 220/6 of the Penal Code, which stipulates that *"any person who has committed a crime on behalf of an organisation, although he or she was not a member of it, shall also be punished for being a member of the organisation"*. In this respect, the mere participation in a demonstration may result in charges being brought for membership of a terrorist organisation. As a result, there is a permanent risk that acts of civil disobedience and leaderless protests be analysed as part of a conspiracy to destabilise the country.

Please see Annex 8 for detailed joint comments by the Ministry of Justice, HCJP and the Turkish Justice Academy.

Rights of defence

192. In terror and organised crime cases, the rights of defence are limited in several aspects:
- access to a lawyer is delayed for 24 hours (Art. 10-b of the anti-terror Law N°3713) ;
- telephone tapping is made easier: in case of urgency, it can be ordered by the police without prior decision of a judge, whose review is only subsequent; the judge may decide to prolong the measure indefinitely (Art. 135/3 CCP);
- access to the case file can be restricted, etc.

Comments by the Union of Turkish Bar Associations
Paragraph 192: We agree with the finding that the rights of defence are limited in several aspects in terror and organised crime cases, but such limitations are not peculiar to these types of cases only and have turned into a de facto practice. The most frequent problem encountered by defense side in practice is the difficulty to take the floor and interruptions during the hearing.

193. It is not shocking in itself that certain criminal cases are subject to exceptions. According to the ECtHR case law, it is acceptable, for example, to deny a party access to certain items in the case file to protect the fundamental rights of another party to the proceeding. However, the European Court has emphasised the exceptional nature of such a restriction.

194. The problem, in the Turkish system, is that there is a disturbing tendency to stretch the limits of the definition of terrorism and organised crime, to encompass offences normally subject to the ordinary law.

195. It is true that the situation has improved after the adoption of the 3rd judicial package. For example, the previous provision which allowed, in terror cases, access to the entire case file to be denied to defence counsel upon request of the public prosecutor, confirmed by a judge, has been abolished: now, the general principles foreseen in articles 203-204 of the Criminal Procedure Code apply. It remains that those general principles are not totally satisfactory (See §§ 96-97).

Special investigation techniques

196. The fight against terrorism and organised crime has led to an important increase in the use of special investigation techniques such as controlled deliveries, electronic surveillance (wire-tapping, clandestine filming etc), infiltration of an undercover operative, online searches, clandestine analysis of computer hard drives, tracking devices on vehicles, anonymous witnesses, etc. Furthermore, law enforcement officers complain that the current legislation gives them too limited powers in this regard: for example, the General Directorate of Security suggested, in the comments they forwarded to the LTC about his draft report, that such techniques (in particular monitoring of communications, undercover investigation and surveillance with technical devices) should be more broadly authorised[66]. The LTC is of the opinion that any such an extension should be envisaged with caution and, in any case, with due consideration to the ECtHR case law in this field[67].

[66] Notably through amendments to Art. 135 of CCP, 139 and 140 of PC.
[67] See in particular: on anonymous witnesses, *Doorson v. The Netherlands,* 26 March 1996, *Van Mechelen & al v. The Netherlands,* 23 April 1997, *Lüdi V. Switzerland,* 15 June 1992 ; on electronic surveillance, *Leander v. Sweden,* 26 March 1987, *Messina v. Italy,*

Comments by the Union of Turkish Bar Associations
Paragraph 196: We do not support the suggestion by the National Police to extend authorization for the use of investigation techniques. However if such an extension is decided, then limits of such authorisation should be set with due consideration to fundamental rights and freedoms, particularly personal data, presumption of innocence and right to defence.

197. Similarly, there seems to be a problem with the way "protected" (or secret) witnesses are used. The experts have been told by defence lawyers that this was a new matter for concern: it is too early to have a clear vision of the situation in case law but, although the legislation states clearly that secret witnesses cannot be the sole basis for conviction, it seems that judges interpret this in a very lax way. This requires careful consideration: secret witnesses cannot be cross-examined properly. Moreover, the implementation of Article 47/2 of the CCP[68] seems to be highly problematic. The system of "protected witnesses" should be used in line with the ECtHR case law and the rights of the defence should be respected.

Joint comments by the Ministry of Justice, HCJP and the Turkish Justice Academy.
Paragraph 197: The practice of secret witness should be exercised with due care and in consideration of ECtHR case law. Defence rights should be observed, cross examination should be made properly and legal provisions should be interpreted carefully. Using expressions like "matter of concern" not based on concrete information and statistics is not in compliance with the ultimate aim of the Needs Assessment Report.

Comments by the Union of Turkish Bar Associations
Paragraph 197: The secret witness mechanism, a practice which leads to severe violations of right to fair trial and defense should be abolished. Since the defense is not allowed to ask every type of question to a secret witness in order not to reveal his/her identity, it becomes impossible to verify the accuracy of information provided by the witness. Secret witnesses can only be beneficial provided that the witness protection programme is applied effectively and without breaching the right to fair trial and defense. On the other hand, it is also possible to avoid any violation of right to fair trial through hearing the witness face to face in the hearing and provide him/her with necessary protection afterwards.

198. In this regard, the EU "Witness protection" project[69] may be helpful: its main activities include the development of best practice manuals and the implementation of a training of trainers programme. Moreover, a training based on the Recommendation Rec(2005)10 of the CoE Committee of Ministers and on the results of the "International conference on the use of special investigation techniques to combat terrorism and other forms of serious crime" (Strasbourg, 14 – 15 May 2013) is particularly recommended. Some guidelines for training on this subject matter are presented below (see Annex 2, Guidelines for training).

2. FIGHT AGAINST IMPUNITY

199. Over the last 15 years, the ECtHR has found numerous violations of Articles 2 and 3 ECHR resulting from actions of the Turkish security forces, and has pointed out the subsequent lack of effective investigations resulting in virtual impunity (nearly 300 cases, the leading ones being *Aksoy*[70] on the one hand and *Batı*[71] on the other).

Comments by the Union of Turkish Bar Associations
Paragraph 199: The recent judgment of the ECtHR in the case of Subaşi and Çoban v. Turkey dated 9.7.2013 (application no: 20129/7) held that article 3 of the Convention has been violated on the basis of the reasoning that the violence against the applicants had constituted inhuman treatment and that the prosecutor had not conducted effective investigation. Similarly in the judgment of Abdullah Yaşa v. Turkey dated 16.7.2013 (application no: 44827/08), the ECtHR held that article 3 of the Convention has been violated on the basis of the reasoning that in order to dispel a non-peaceful meeting, the police threw a tear gas shell not up in the air but straightforwardly/horizontally which eventually hit the face of the applicant and injured him and that the prosecutor had not conducted effective investigation.

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28 Sept. 2000, *Uzun v. Germany,* 2 Sept. 2010 ; on undercover investigator, *Veselov & al v. Russia,* 2 Oct 2012

[68] Article 47/2 : *"In cases where the knowledge of the witness is related to a state secret, only the trial judge or the court panel hears the witness in camera, without even the court recorder being present. Later, the judge or the president of the court shall dictate to the court records only the relevant information that would be clarifying the charged crime"*

[69] TR2010/0136.11 Strengthening witness protection capacities (Beneficiary and partners : Turkish National Police Witness Protection Department, Gendarmerie General Command, Ministry of Justice)

[70] *Aksoy v. Turkey*, N° 21987/93, 18 December 1996, §§ 98 & ss: "*where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a "prompt and impartial" investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court's view, such a requirement is implicit in the notion of an "effective remedy" under Article 13 (art. 13) (see, mutatis mutandis, the Soering judgment cited at paragraph 62 above, pp. 34-35, para. 88). Indeed, under Turkish law the prosecutor was under a duty to carry out an investigation. However, and whether or not Mr Aksoy made an explicit complaint to him, he ignored the visible evidence before him that the latter had been tortured (see paragraph 56 above) and no investigation took place.*

[71] *Batı and others v. Turkey*, judgment of 3 June 2004, in particular §§ 133-137, where the Court reiterates its reasoning.

200. In 2011, the Committee of Ministers of the CoE issued guidelines[72] on the fight against impunity, which 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). In a Resolution[73] dealing with the *Aksoy* group of cases, the Committee recognised the efforts made by the Turkish authorities and expressed satisfaction with the results obtained.

201. Furthermore, it is a positive observation that there are now many less complaints about torture during interrogation. The presence of public defender has been very effective in curing this past behaviour. However, a remaining problem seems to be the use by police of excessive force before questioning the suspect.

Comments by the National Police Directorate
Paragraph 201: The claim that police uses excessive force before questioning the suspect is based only on a few individual misconducts and does not reflect the reality, and such a claim brings under suspicion those police officers who respect human rights and law. Individual misconducts are subject to judicial and administrative proceedings.

202. Similarly, the European Committee on the Prevention of Torture (CPT) considered that there was a positive evolution[74]: "*The CPT is pleased to note that the downward trend seen in recent years in both the incidence and the severity of ill-treatment by law enforcement officials appears to be continuing. In the course of the visit, more than 250 persons who were or had recently been detained by the police or gendarmerie were interviewed. The great majority of them indicated that they had been treated correctly whilst in custody. Several persons who had been detained before stated that the situation today was much improved compared with the past. That said, the delegation received a number of allegations of excessive use of force at the time of apprehension (such as kicks or blows after the person concerned had been brought under control), as well as of threats or verbal abuse during police questioning. The situation still appears to be problematic in the Diyarbakır area, where most of the above-mentioned allegations of ill-treatment were received".*

203. Furthermore, in several recent judgments[75], the ECtHR seems to confirm the structural nature of the problem of impunity in Turkey, including after the entry into force of the new CCP in 2005.

204. In his 2012 report[76], the Commissioner for Human Rights of the CoE pointed out that there are many outstanding issues of concern :

- the lack of coherent, reliable statistical information on the number of investigations, prosecutions and convictions concerning serious human rights violations by security forces;
- the statutes of limitation concerning serious human rights violations;
- 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.

205. However, several important improvements must be noted in this field, with the 4th judicial package adopted by the Parliament in April 2013. In particular, an amendment provides that, if the ECtHR finds "an effective investigation was not conducted," the case will be reopened at the domestic level. Also, the reforms include the positive measure of lifting the statute of limitations on investigations into torture. But the statute of limitations still applies to investigations of unlawful killings by state agents. Moreover, the Government removed from the package the amendment relating to the remaining requirements of prior authorisation for investigations of crimes committed by civil servants.

206. Some guidelines for training on effective investigations are presented below (see Annex 2, Guidelines for training modules)

[72] CM(2011)13, Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, 30 March 2011.
[73] Resolution CM/ResDH(2008)69 *Progress achieved and outstanding issues,* adopted by the Committee of Ministers on 18 September 2008, at the 1035th meeting of the Ministers' Deputies.
[74] Report on the CPT's fifth periodic visit (4-17 June 2009) to Turkey, published 31 March 2011, § 14.
[75] See *Serdar Güzel v. Turkey*, N° 39414/06, 15 March 2011, § 44 ; *Dink v. Turkey*, N° 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010, § 86 & ss ; *Salmanoğlu and Polattas v. Turkey*, N° 15828/03, 17 March 2009, § 101 ; *Acar and Others v. Turkey*, N° 36088/97 and 38417/97, 24 May 2005 ; *Seyfettin Acar and others v. Turkey*, N° 30742/03, 6 October 2009, §§ 31 & ss.
[76] Report by Thomas Hammarberg, aforementioned, § 48.

Police Complaints Mechanism

207. It is of paramount importance that the public has confidence in the police and is convinced that any wrongdoings are examined by an impartial authority. This is a challenge for most democratic countries and a perfect system has yet to be found.

208. However, some interesting experiments have been carried out abroad. For instance, after trying several different models, Denmark introduced an "Independent Police Complaints Authority" as of 1 January 2012. The authority investigates criminal cases against police officers and considers and rules on complaints of police misconduct. It is led by a Council and a Director. The Council consists of an appeal court judge as chairman, a defence lawyer, a law professor and two representatives of the public. A number of non-police investigators and lawyers are attached to the Director. It is yet too early to estimate how well this new authority functions, but in order to be completely transparent it issues news and annual reports accessible to the public on the Internet in Danish as well as English.[77]

209. A similar "Independent Police Complaints Commission" exists in the United Kingdom but it has been criticised: a parliamentary inquiry set up in the wake of a suspect death concluded in January 2013 that the Commission *"has neither the powers nor the resources that it needs to get to the truth when the integrity of the police is in doubt"*.

210. The same remarks can be made for Turkey. In the recent past, special units were created to investigate complaints against law enforcement officers, within the Inspection Board of the Ministry of the Interior, the Inspection Board of the Gendarmerie and the General Directorate of Security. This was progress. However, as these bodies were not independent, the situation has remained unsatisfactory and it was deemed necessary to prepare a bill (B.02.0.KKG/101-30/1054, dated 05/03/2012) proposing the creation of a Police Surveillance Commission that will centrally record and monitor the measures to be taken by administrative authorities as regards offences committed by police officers, or other attitudes requiring disciplinary measures. This is of course a good evolution but, although Article 3-5 of the bill states that the Commission will act in full independence, the composition, the authority and the means of this prospective institution are matters for concern. In view of 1) the way its members would be appointed, 2) the important potential influence of the executive on its functioning, and 3) the vague nature of the real powers of the Commission and its resources, it is difficult to determine, in the present state of the project, whether it will really be helpful. And, of course, to fight impunity effectively, the very first decision to be made would be to abolish the remaining forms of prior authorisation for any investigation against civil servants.

Comments by the National Police Directorate:
Paragraph 210: The Law no 4483 on the Trial of Civil Servants and other Public Officials regulates the crimes allegedly committed by civil servants for the performance of their official duties. However it should be underlined that it is not obligatory to take prior permission for every crime committed by law enforcement officers for the performance of their duties, and public prosecutor is authorised to conduct direct investigation against the law enforcement officers for the crimes stated in the law and crimes mentioned-below**. Please see ANNEX 13 for detailed comments.**

Comments by the Union of Turkish Bar Associations
Paragraph 210: The draft law debated in the Parliament on " the Establishment of a Police Surveillance Commission" should be examined with due consideration; members of this commission should not be among from administrative staff but be composed of representatives from universities, non-governmental organisations and other institutions who could render their decisions independently.

Fight against Corruption

211. It appears that the situation in Turkey as regards corruption has improved over the recent years. The Group of States against Corruption (GRECO), of which Turkey is a member since 2004, had mentioned in its Evaluation Report on Turkey (dated 2006) that corruption was *"widespread in the public sector, at central as well as local level"*. This is less true now. In February 2012 Turkey adopted a National Strategy for Increasing Transparency and Strengthening the Struggle against Corruption. Administrative coordination and technical support are provided by an Inspection Board, also tasked with coordinating, leading and initiating investigations conducted by other institutions involved as side beneficiaries.

[77] http://politiklagemyndigheden.dk/media/6447/1._korr_pm_pjece_uk.pdf

212. According to Transparency International, the Corruption Perception Index (CPI) for TURKEY puts the country in 54th place out of 176 in 2012 (in 2011, it was in 61st place). However, in its report dated January 2012, this NGO stated: *"In spite of progress made, the country also continues to be confronted to major challenges of rampant corruption, with both petty and grand forms of corruption permeating many sectors of the society, including the public sector, the private sector, political parties and the military."* The research by Transparency International also indicates that last year in Turkey, 21% of those who received services from institutions and organisations paid a bribe.

213. Furthermore, the adoption of a last-minute amendment to Article 235 of the Criminal Code, in April 2013, is a matter for concern: this amendment brought reduced prison sentences (3 to 7 years imprisonment, instead of 5 to 12 years) for individuals convicted of rigging public procurement tenders. This is not a good message to send to potential corrupt people.

214. In this context, it must be noted that a new *Joint Project on strengthening the coordination of anti-corruption policies and practices in Turkey* (TYSAP), implemented by the Council of Europe, was launched on 12 June 2013 in Ankara. This project will complement past EU-funded projects that focused on preventing corruption through raising awareness of professional ethics. It is aimed to allowing a sustained improvement of the skills and capacity to design, coordinate and implement strategies in this field.

215. Some guidelines for training on corruption issues are presented below (see Annex 2, Guidelines for training modules)

3. TRAINING

216. It will not be possible to change entrenched habits without good professional training oriented to best practices, proficiency and ethics. This is possible only if the Turkish Justice Academy can rely on a network of specially-trained, permanent staff (mainly judges and prosecutors on secondment), comprising a faculty in the Academy itself, and correspondents in courts.

Pre-service training

217. Turkish judges and prosecutors are mainly recruited among university graduates and are very young, without any previous experience. This is problematic and, as already mentioned, it would be preferable to broaden their recruitment.

218. Yet, the current system of recruitment becomes really unsatisfactory when the rudimentary nature of the pre-service training is considered. In this respect, pre-training appears to be currently very short (Decree Law no. 650 dated 26/08/2011 reduced the training period from two years to one year). It is based essentially on academic lectures and law conferences. Furthermore, it is not organised in the same way for each candidate (depending on the availability of trainers and premises, some trainee judges begin with an induction phase in the Academy, others have an internship in court first). Such methodology cannot meet the needs.

219. What is needed is practical training, allowing the students to develop and enhance their skills, so that when they take up their first position, they do so in good conditions. It implies not only that they learn basic professional techniques but also that they gain a broader awareness of the institutional, human and social environment of the judiciary. They must also question themselves, develop an ethical reflection and gain a clear vision of the role and place of justice in society.

220. The training should be as interactive as possible, alternating between work in small groups in the Academy, mock-trials, role plays, internships in court and outside the judiciary, etc. For example, Turkey could draw its inspiration from the French model where trainee judges and prosecutors spend 6 months at a lawyer's office during their initial training. This practice ensures that they have a better understanding of the defence's role and obligations and helps strengthen relations between judges, prosecutors and lawyers.

In-service training

221. Probably because of heavy workload, judges and prosecutors in Turkey sometimes appear to be unable to keep up with the standards of professionalism. This is not surprising, as they cannot undergo systematic training.

222. A modern magistrate must be able to keep up with legislative reforms, master new technologies, adapt to a change of position, be aware of the economic, social and cultural environment, enhance knowledge of human rights and international law, etc. This needs continuing education.

223. . Pursuant to Article 119 of Act No. 2802 on Judges and Public Prosecutors, in-service training is a right and obligation for judges and prosecutors. Yet, there is no prescription of a minimum amount of hours per year to attend courses. In some foreign countries, for example the Netherlands or France, judges and prosecutors are obliged to follow courses for a minimum number of days per year. Such a formula should be considered in Turkey.

224. This can be achieved through various means: seminars, workshops, internships, etc. The schooling can be organised at a central level, in the Justice Academy, but also within the court buildings. But again, this is not possible if the Academy cannot rely on a network of permanent staff and correspondents in courts.

225. The possibility of more synergy between the judiciary and universities can also be considered: in The Netherlands, there are so called "knowledge centres", where judges, professors and specialised legal staff work together on specific themes, like cybercrime, environmental law, health and economic crimes.

226. In France, regional training coordinators act as correspondents in courts of the School for the Judiciary (ENM).

227. Finally, it must be mentioned that the current system of appraisal, inspection, promotion and sanctions applicable to judges and prosecutors is sometimes inhibiting, based on quantity and not on quality, and has perverse effects on the proceedings. It should be reconsidered.

228. Furthermore, it must be emphasised that in order to improve the functioning of criminal justice, it is not possible to ignore the behaviour of the different parties: the poor participation of the defence in proceedings is at least partially due to some lawyers' lack of professionalism; similarly, a good education for law enforcement officers is of paramount importance.

229. An entrance exam should be established in order to be admitted to the Bar and a more comprehensive, consolidated pre-service training should be organised for lawyers[78]. Some form of common in-service training should be established for magistrates and lawyers.

230. It must be noted that several other projects relating to training issues are currently implemented in Turkey. The Project *Towards an effective and professional Justice Academy* was launched in December 2012. It is implemented by the German Foundation of International Legal Cooperation, supported by the German Federal Ministry of Justice and the Hungarian School of Judges. In several aspects, this project appears to overlap with *Improving the efficiency of the criminal justice system*, since in both projects the Academy is supposed to review all its curricula, consider training methods and in particular establish a pool of trainers. Therefore, coordination between both projects is crucial to avoid any duplication or discrepancy.

231. Another project named *"Judicial and Fundamental Rights for Lawyers Training Project"* is also in place. It is supported by the British Embassy in Turkey and carried out by the Ministry for EU Affairs, in cooperation with the Ministry of Justice and the Union of Turkish Bar Associations. Again, it is of paramount importance for there to be good coordination between these different projects.

232. In the framework of the second component of the joint project *Improving the efficiency of the Turkish criminal justice system*, several training of trainers modules are being prepared on different topics: corruption,

[78] It must be noted that an entrance exam is to be introduced by the TBB and relevant measures are being taken to enforce such an exam as soon as possible.

cybercrime, preventive measures (including search and seizure, arrest and custody, pre-trial detention and judicial control, interception of communications and undercover investigation), effective investigations (including use of experts reports and autopsy), terrorism and organised crime (including special investigation techniques), right to fair trial. A first round of meetings of international and national experts took place this summer for the preparation of these modules. They will be finalised before the end of this year. The training of trainers will then take place during the first quarter of 2014 and will be followed by cascade seminars for all judges and prosecutors. Guidelines for training on these subject matters are presented below (see Annex 2).

233. Finally, a 4th component has just been added to the joint project *Improving the efficiency of the Turkish criminal justice system,* in the framework of which pedagogical material will be designed for lawyers. This is an encouraging first step.

CONCLUSIONS

234. The recommendations listed in this report are numerous. Some of them are more important than others. Some are easy to implement, some may seem revolutionary and too ambitious.

235. In the end, of course, it will be up to the Turkish people to decide what to do. International experts cannot claim they know how Turkey should solve the problems they point out. In the practice of criminal justice, cultural aspects may be a major factor of resistance to change.

236. No real improvement in the functioning of the criminal justice system will be possible without strong political will. Should the authorities be reluctant to realise any of these changes, it will not be possible to improve the situation. This also applies to those playing a concrete role in the system: the judges and prosecutors.

237. Once again, it must be stressed that Turkey has implemented many new and modern laws, and this is encouraging. On the other hand, some entrenched attitudes are still unsatisfactory. Several recent judgments in high profile media-staged cases have been strongly criticised, apparently for good reason.

Joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy
Paragraph 237: Several reforms have been made in criminal justice sector. It is of crucial importance to put these reforms into practice. The main objective with these reforms is to protect individual rights and freedoms. The principal consideration is freedom not prohibitions. Protection of fundamental rights and freedoms in investigations and prosecutions is quite essential to perform the rules concerning state of law and for the establishment and functioning of a contemporary democracy with its rules and institutions. In this regard some of the assessments in this section are considered subjective.

238. Similarly, some proposals are worrying, in particular, the reform proposed by a political party as regards the High Council of Judges and Prosecutors (which would not be 'High' any more, although, through the inspection system, it has a stronger and more direct influence on the work of judges than exists in most other countries): a large majority of members of the HCJP would be elected by the President of the Republic and the parliamentary majority (i.e. by the political power) and no longer by judges and prosecutors.

239. This is not compatible with European standards. The Venice Commission's report on 'Judicial Appointments' (Paragraph No: 29) states: *"A substantial element or a majority of the members of the Judiciary Council should be elected by the judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualifications."*

240. Similarly, according to the same proposal, the judiciary would be completely excluded from the process of electing members to the Constitutional Court. Nine members would be elected by the Parliament (the majority) and eight members appointed by the President, a political figure.

241. If Turkey wants the general public to trust the independence of its judges, this is not the right approach.

Paragraph 238-241: Please see Annex 9 for detailed comments by the Ministry of Justice.

242. Finally, another remark must be made. In Turkey, the annual public budget allocated to all courts, legal aid and public prosecution per inhabitant is indisputably low : €17 per capita, which ranks Turkey 35th out of 40 countries, the average amount of resources spent on the judicial system in Europe being €57.4 per capita (the "median value for the budgetary commitment" is €44.1 per capita)[79]. This situation is not satisfactory. The report did not take into account the budgetary implications of the proposed recommendations, but it is obvious that, in order to implement them, the means of the judiciary should be increased.

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[79] *European judicial systems*, Report of the European Commission for the efficiency of justice (CEPEJ), available at: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf

243. Once again, the LTC has no legitimacy and no will to lecture the Turkish authorities. He has tried, with this needs assessment report, to help them have a clear vision of the current situation, so that they can make the appropriate decisions, capable of improving this situation.

244. The LTC wishes to acknowledge the constant, open and warm cooperation by all his partners in this project. He thanks all of his interlocutors for their willingness to share their knowledge and insights.

II. FIFTY RECOMMENDATIONS

A. LEGISLATIVE AMENDMENTS

1. OPEN CRIMINAL JUSTICE UP TO SOCIETY

In order to bring justice closer to the people and remedy the lack of confidence from which the judiciary suffers, it is recommended to introduce citizen participation in Turkish criminal justice and have ordinary citizens sitting alongside professional judges as lay assessors in mixed courts (except in some very specific matters, such as cases of terrorism, organised crime and international drug trafficking).

Similarly, the recruitment process for judges and prosecutors could be broadened by opening access to the judiciary more generously to outsiders (lawyers, academics, and people with previous professional experience…).

* RECOMMENDATION N° 1: ESTABLISH LAY PARTICIPATION

* RECOMMENDATION N° 2: GIVE OUTSIDERS BROADER ACCESS TO THE JUDICIARY

2. MAKE THE SYSTEM MORE FLEXIBLE

In order to make the workload of courts lighter and to avoid unnecessary proceedings, it is recommended that the principle of discretionary prosecution be adopted.

Similarly, at the trial stage, it is recommended to allow the prosecutor to drop the charges, and the judge to dismiss the case, where certain conditions are met (guilt is not in dispute, the prejudice caused by the offence has been repaired, the social disturbance caused by the crime has disappeared…).

To reduce the workload of the courts, allow more time for trials and fully respect their adversarial nature, it is recommended to adopt written proceedings for minor cases.

In order to reduce the workload of the courts and allow more time for trials, it is recommended to encourage the use of mediation and to allow the prosecutor to determine whether this procedure is adapted to the case, without any restrictions.

In order to clarify the decision making process, better respect the presumption of innocence, improve character investigations, save time and allow a more rational allocation of available resources, it is recommended to establish a separation (known in French law as “césure”) between conviction and sentencing, to amend CCP Article 231 and to simplify the proceedings by organising a form of guilty plea.

To avoid cases going back and forth between different courts, it is recommended to re-consider the law on jurisdiction (for example, in sexual assault cases, aggravated fraud, etc).

In order to make better use of resources and facilitate effective investigations, it is recommended to increase police interrogation powers and to limit the prosecutors’ obligation to re-interview defendants that have already been interviewed by the police to when it is absolutely necessary. Art. 148/5 of the CCP and Art 15 of Law N° 155395 should thus be amended accordingly.

Similarly, it is recommended that prosecutors no longer attend autopsies. Art 87/1 of the CCP should be amended accordingly.

* RECOMMENDATION N° 3: ESTABLISH DISCRETIONARY PROSECUTION

* RECOMMENDATION N° 4: ALLOW THE JUDGE TO DISMISS THE CASE WHEN CERTAIN CONDITIONS ARE MET

* RECOMMENDATION N° 5: ESTABLISH WRITTEN PROCEEDINGS FOR MINOR CASES

* RECOMMENDATION N° 6: EXPAND THE SCOPE OF MEDIATION AND ENCOURAGE ITS USE

* RECOMMENDATION N° 7: CLEARLY DISTINGUISH DECISIONS ON GUILT FROM SENTENCING

* RECOMMENDATION N° 8: SIMPLIFY THE PROCEEDINGS WHEN GUILT IS NOT IN DISPUTE

* RECOMMENDATION N° 9: RE-CONSIDER THE LAW ON JURISDICTION

* RECOMMENDATION N° 10: AMEND CCP ARTICLE 148/5 AND ARTICLE 15 OF LAW NO. 5395

* RECOMMENDATION N° 11: AMEND CCP ARTICLE 87/1

3. MAKE TRIALS FAIRER

In order for judges to refer to the spirit of the law and adopt a "human rights first" approach in their decisions, rather than merely applying technical rules, it is recommended to amend Article 1 of the CCP and include a reiteration of the basic principles of criminal procedure as they derive from international legal instruments.

To put an end to the current lack of separation existing between the investigation and trial stages, improve the appearance of judicial impartiality and fully respect the adversarial nature of trials, it is recommended to repeal the legal provisions which allow the judge to return the indictment. If not, it is recommended to amend them so that the defence be involved in the process.

In order to put an end to the current lack of clarity existing between the roles of prosecutors and judges, improve the appearance of judicial impartiality and fully respect the adversarial nature of trials, it is recommended to repeal the legal provisions that allow the public prosecutor to be absent during hearings conducted in criminal matters.

In order to improve the appearance of impartiality of trial judges and make decisions on preventive measures more effective, it is recommended that the institution of liberty judges be generalised in all criminal courts.

So that the judge is not influenced by illegal evidence, it is recommended that the exclusionary rule be introduced, any piece of evidence obtained in breach of the law (such as "unofficial preliminary reports") being removed from the case file and placed in a separate file. Articles 148 and 230/1(b) of the CCP would be amended accordingly.

To make sure telephone tapping is used as a last resort, it is recommended to envisage some form of more adversarial proceedings in this area. Articles 135 of the CCP would be amended accordingly.
In order to fully respect defence rights, it is recommended that the defendant be allowed to choose counsel freely among lawyers who accept the financial conditions of the legal aid system. Furthermore, it is desirable that the fee paid to the public defender be increased and that it is no longer paid back to the State by the convicted person.

* RECOMMENDATION N° 12: SET OUT THE BASIC PRINCIPLES OF CRIMINAL PROCEDURE IN ARTICLE 1 OF THE CCP

* RECOMMENDATION N° 13: REPEAL OR AMEND ARTICLE 174 OF THE CCP (RETURN OF INDICTMENT)

* RECOMMENDATION N° 14: ALWAYS HAVE A PUBLIC PROSECUTOR PRESENT AT TRIAL (REPEAL CCP ART 188-2 AND RELEVANT TEMPORARY PROVISIONS)

* RECOMMENDATION N° 15: ESTABLISH LIBERTY JUDGES IN ALL COURTS

* RECOMMENDATION N° 16: REMOVE INADMISSIBLE EVIDENCE FROM THE CASE FILE

* RECOMMENDATION N° 17: ORGANISE SOME FORM OF MORE ADVERSARIAL PROCEEDINGS FOR PHONE-TAPPING AND AMEND CCP ARTICLE 135

* RECOMMENDATION N° 18: IMPROVE THE LEGAL AID SCHEME

4. FIGHT TERROR AND ORGANISED CRIME IN A DEMOCRATIC WAY

To limit the scope of derogatory rules applicable to anti-terrorism and organised crime, and to make sure that those provisions do not regulate ordinary trials, it is recommended that the interpretation of the definition of terrorism and organised crime be narrowed and clarified, particularly as regards membership of a criminal organisation.

To fight terrorism and organised crime efficiently, it is important to have highly specialised police officers and prosecutors. But specialisation can be limited to them and it is recommended to allocate such cases to non-specialised judges so that their independence and impartiality is beyond suspicion at the trial stage. Article 10 of the Anti-terror Law would be amended accordingly. This would not exclude geographical grouping of the trials on a regional basis.

In order to limit pre-trial detention and make sure that judges do not assume that detention is the rule rather than the exception, or even mandatory, where so-called “catalogue crimes” are concerned, it is recommended to repeal CCP Article 100, paragraph 3.

In order to restore the exceptional nature of restricted access to the case file, it is recommended to adopt more precise rules than those defined by Article 153/2 of the CCP.

* RECOMMENDATION N° 19: NARROW THE INTERPRETATION OF THE LEGAL DEFINITION OF TERRORISM AND ORGANISED CRIME

* RECOMMENDATION N° 20: ALLOCATE TERROR CRIME CASES TO NON-SPECIALIST JUDGES

* RECOMMENDATION N° 21: REPEAL ARTICLE 100-3 OF THE CCP

* RECOMMENDATION N° 22: LIMIT RESTRICTED ACCESS TO THE CASE FILE TO EXCEPTIONAL CIRCUMSTANCES

5. FIGHT IMPUNITY IN A MORE EFFECTIVE WAY

In order to complete recent improvements in this field, it is recommended to repeal the remaining requirements for prior authorisation in the investigation of crimes committed by civil servants.

So that the public feels more confidence in the police and is convinced that any wrongdoing will be examined in an impartial way, it is recommended to establish an independent Police Complaints Authority in charge of investigating these cases.

* RECOMMENDATION N° 23: DO AWAY WITH ANY PRIOR AUTHORISATION FOR INVESTIGATIONS INTO CRIMES COMMITTED BY CIVIL SERVANTS

* RECOMMENDATION N° 24: ESTABLISH AN INDEPENDENT POLICE COMPLAINTS AUTHORITY

B. ADDITIONAL MEASURES

1. OPEN CRIMINAL JUSTICE UP TO SOCIETY

In order to bring the judiciary closer to the population, it is recommended to encourage judges and prosecutors to have varied experience during their professional life, through secondments, sabbatical years, internships, etc.

In addition, in order to improve the knowledge of the general public on judicial matters and to give a better image of criminal justice, it is recommended to organise "open days" in courthouses, where judges and prosecutors could explain their work and answer questions.

Similarly, it is recommended to welcome secondary schoolchildren into courtrooms to attend trials, with debriefing sessions allowing judges, prosecutors and lawyers to answer questions from the pupils and their teacher.

* RECOMMENDATION N° 25: ENCOURAGE JUDGES AND PROSECUTORS TO HAVE VARIED PROFESSIONAL EXPERIENCE

* RECOMMENDATION N° 26: ORGANISE YEARLY OPEN DAYS IN COURTHOUSES

* RECOMMENDATION N° 27: ORGANISE SCHOOL VISITS TO TRIALS FOR PUPILS FROM THE AGE OF 16 YEARS

2. MAKE THE SYSTEM MORE EFFECTIVE

In order to shorten proceedings and better respect defence rights, it is recommended to implement Law No. 5235 of 26 September 2004 on regional courts of appeal as soon as possible.

It is recommended to recruit staff to assist judges and prosecutors in preparing decisions, conducting preliminary legal research, dealing with administrative matters, etc.

It is recommended that forensic expertise be developed: the number of forensic experts could be increased, and their selection and training improved. A single unified centre could replace the Institute of Forensic Medicine, the Criminal Police Laboratory and the Gendarmerie Criminal Laboratory. It is also desirable that the possibility for the defence to have an expert second opinion should be facilitated.

To improve the quality of the proceedings and save time, it is important that the postponement of trials become exceptional. With this end in view, it is recommended that cases are handled differently: try one case at a time and, among other measures, stop investigating cases at the trial stage, make up for non-appearance of witnesses with video-conferences (while respecting the ECtHR case law), stop dictating every statement and instead record hearings audio-visually, and organise special training on trial management.

In order to make the prosecutors available for their main responsibilities (supervision of police work, drafting indictments, presence at trial etc), it is recommended that they be unburdened from non-judicial tasks.

* RECOMMENDATION N° 28: IMPLEMENT THE LAW ON COURTS OF APPEAL

* RECOMMENDATION N° 29: RECRUIT ASSISTANTS FOR JUDGES AND PROSECUTORS

* RECOMMENDATION N° 30: IMPROVE FORENSIC EXPERTISE

* RECOMMENDATION N° 31: TRY ONE CASE AT A TIME

* RECOMMENDATION N° 32: STOP INVESTIGATING CASES AT THE TRIAL STAGE

* RECOMMENDATION N° 33: DEVELOP THE USE OF VIDEOCONFERENCING

* RECOMMENDATION N° 34: RECORD COURT SESSIONS AUDIO-VISUALLY

* RECOMMENDATION N° 35: UNBURDEN PROSECUTORS FROM UNDUE ADMINISTRATIVE MATTERS

3. MAKE TRIALS FAIRER

In order to effectively implement Articles 160 and 161 of the CCP, improve the quality of investigations, guarantee the independence of prosecutors and, more generally, strengthen the relationship between Prosecution and Police so that the Police can effectively investigate and the Prosecutor can effectively supervise, it is recommended that Judicial Police units be specialised and work in close professional co-operation with prosecution units.

In order to limit pre-trial detention, it is recommended to develop judicial control (in particular its socio-educational form) and to increase the resources of probation centres.

In order to improve the appearance of independence and impartiality of judges and to better respect defence rights, it is recommended to clarify the relations between all actors: prosecutors could have their offices clearly separated from those of judges, preferably outside the courthouse; the chief prosecutor would not be the authority responsible for the day-to-day management and organisation of the courthouse; judges and prosecutors would not enter the courtroom by the same door; prosecutors would sit at the same level as defence lawyers; judges and prosecutors could have closer personal, social relations with lawyers (for example: common training could be organised, lawyers would have access to the courthouse restaurant like prosecutors; the creation of professional organisations and networks where judges, prosecutors, defence lawyers and academics can discuss criminal law and judicial issues, and thus accept each other's position, role and attitudes, could be promoted).

The practice of "mass trials" is not compatible with the guarantees of a fair trial tailored for individual justice.

* RECOMMENDATION N° 36: DEVELOP COOPERATION BETWEEN A SPECIALISED JUDICIAL POLICE FORCE AND THE PROSECUTION

* RECOMMENDATION N° 37: DEVELOP JUDICIAL CONTROL

* RECOMMENDATION N° 38: SEPARATE PROSECUTORS FROM JUDGES AND BRING MAGISTRATES CLOSER TO LAWYERS

* RECOMMENDATION N° 39: CHANGE COURTROOM LAY-OUT SO THAT THE DEFENCE LAWYER CAN COMMUNICATE WITH THE ACCUSED AND THE PROSECUTOR IS AT THE SAME LEVEL AS THE DEFENCE

* RECOMMENDATION N° 40: MAKE SURE THE PROSECUTOR DOES NOT ENTER THE COURTROOM BY THE SAME DOOR AS THE JUDGES

* RECOMMENDATION N° 41: ENTRUST THE MANAGEMENT OF THE COURT TO AN ADMINISTRATOR, NOT THE CHIEF PROSECUTOR

* RECOMMENDATION N° 42: PUT AN END TO THE PRACTICE OF "MASS TRIALS" WITH A MORE SELECTIVE PROSECUTION POLICY AND SEPARATE TRIALS FOR THOSE MOST RESPONSIBLE AND MINOR PARTICIPANTS

C. IMPROVE TRAINING

In order to be fully enabled to design real professional training oriented to best practices, proficiency and ethics, the Justice Academy needs specially trained, permanent staff.

It is recommended that a new pre-service curriculum be drafted and new methodology be used, that Decree Law no. 650 dated 26/08/2011, reducing the training period from two years to one year, be repealed. In-service training is a right and a duty for magistrates. It should be made compulsory for a minimum period each year.

The current system of appraisal, inspection, promotion and sanctions applicable to judges and prosecutors is sometimes inhibiting, based on quantity and not on quality, and has perverse effects on proceedings. It is recommended that it be reconsidered.

It is desirable that an entrance exam is established for admission to the Bar and more comprehensive, consolidated pre-service training be organised for lawyers.

Some form of common in-service training for magistrates and lawyers is necessary.

* RECOMMENDATION N° 43: RECRUIT PERMANENT STAFF FOR THE JUSTICE ACADEMY

* RECOMMENDATION N° 44: RESTORE A TWO-YEAR INITIAL TRAINING PERIOD FOR JUDGES AND PROSECUTORS

* RECOMMENDATION N° 45: DRAFT A NEW CURRICULUM FOR PRE-SERVICE TRAINING

* RECOMMENDATION N° 46: ESTABLISH A MINIMUM PERIOD OF IN-SERVICE TRAINING FOR MAGISTRATES

* RECOMMENDATION N° 47: RECONSIDER THE METHODOLOGY OF INITIAL AND IN-SERVICE TRAINING

* RECOMMENDATION N° 48: RECONSIDER THE SYSTEM OF APPRAISAL, INSPECTION, PROMOTION AND SANCTIONS APPLICABLE TO JUDGES AND PROSECUTORS

* RECOMMENDATION N° 49: ESTABLISH AN EXAMINATION BEFORE ADMISSION TO THE BAR AND ORGANISE A CONSOLIDATED PRE-SERVICE TRAINING FOR LAWYERS

* RECOMMENDATION N° 50: ESTABLISH COMMON IN-SERVICE TRAINING FOR JUDGES, PROSECUTORS AND LAWYERS

ANNEX 1

Extraordinary Chambers in the Courts of Cambodia - Internal Rules, see:

http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20(Rev.8)%20English.pdf

ANNEX 2

Guidelines for Training

The problems identified in this needs assessment report show that, in addition to the abstract legal education they so far receive, what judges and prosecutors need is practical training, not the mere theoretical, academic one, consisting only of conferences with questions and answers, which appears to be currently the case.

Training should be as interactive as possible, incorporating into the programme exercises, role-plays, mock trials and other teaching methods such as small tutorial groups, cycles of consecutive study-days spread out through the year, individual or collective study visits and internships abroad, discussions and simulations, case studies focusing on the most frequent errors and failures made by practitioners based on real national cases, etc.

The second component of the joint project *Improving the efficiency of the Turkish criminal justice system* provides for the training of 300 trainers (who have already been selected), followed by cascade seminars intended for all judges and prosecutors, within the scope of their initial and in-service training.

In this framework, modules are being prepared with national and international experts, on the following topics:

- right to fair trial (including rights of defence, equality of arms, statement taking, cross-examination)
- preventive measures (including relations between police and prosecutors, crime scene investigation, search and seizure, arrest and police custody, pre-trial detention and judicial control, interception of communications)
- effective investigations (including the use of experts' reports, autopsies, special requirements for civil servants)
- terror and organised crime (including special investigation techniques, freedom of expression)
- fight against corruption
- cybercrime

Each ToT seminar is designed as a 4-days programme, an additional first day being dedicated for training the trainers in teaching skills. It will provide legal as well as practical information about the subject matters and concentrate on how these issues impact on the day-to-day work of judges/prosecutors and in terms of their relationship with their partners (lawyers, law enforcement officers, forensic experts, etc).

National experts and trainers-to-be are currently drafting different textbooks dealing with the subject matters. This pedagogical material will be used in the framework of the training modules and will be later disseminated among judges and prosecutors.

The courses are supposed to be delivered in classrooms but there is no reason why the materials could not be converted into distance learning or e-learning modules if required. The use of material from other projects (IPA, HELP etc) will also be most useful. Of course, good coordination between the different modules is of utmost importance, particularly for pre-service training.

In the following pages, guidelines for training on these topics are briefly presented, including a summary of the background, the current situation in terms of initial and in-service training, and a list of the issues that need to be addressed in each course.

*

1) RIGHT TO A FAIR TRIAL

BACKGROUND

This issue is of course very broad and encompasses nearly all the other ones.

In an ideal judicial world, all parties to proceedings (police, prosecutors, lawyers, judges) understand their roles as part of a system of checks and balances, and avoid any failure that would inevitably lead to unfair results. As already mentioned, this is currently not the case in Turkey: the role of each actor needs to be clarified, the relationships between judges/prosecutors and lawyers must change, cases should be handled in a different way, etc.

In this respect, there is a need that, in addition to keeping up with legislative reform and new professional techniques, judges, prosecutors, police officers and defence attorneys initiate a process of ethical reflection and gain deeper understanding of what fair administration of justice requires, so as to build their own personal, stable professional identity.

Nothing in the law prevents a more adversarial process from being developed.

CURRENT TRAINING

In pre-service training, apart from general conferences about ECHR or criminal law and procedure, the syllabus includes only a few courses on criminal justice, entitled:

- *In the framework of Turkish penal code, the principles of adjudication and its practice* (8 hours)
- *Trial management at criminal trials and its practice* (12 hours)
- *Interrogation techniques* (8 hours)
- *Judicial ethics and professional identity* (8 hours)

As for the in-service training, the 2013 programme comprises a couple of seminars on the subject matters, entitled:

- *"Right to a fair trial with regard to the ECHR and the ECtHR case law"* (3 days, 100 participants)
- *"Cross-examination"* (2 days, 60 participants)

15 000 copies of a book about the case law of ECtHR were recently printed and distributed to all judges and prosecutors in Turkey. A new book focusing on the fundamental rights in the Constitution from the perspective of the ECHR is also being prepared.

GUIDELINES

The training should be more oriented to best practices, proficiency and ethics, particularly as regards the relationships between the various actors. In this respect, common sessions for judges, prosecutors and lawyers must be organised.

The training must not be limited to legal aspects, but also involve a psychological approach, in particular for statement taking. The use of mock-trials or role play should be increased. Equality or arms and impartiality of judges need to be strengthened: students must be made aware of how to conduct a hearing, prepare for trial, ensure the presence of witnesses, question them, obtain expert statements in a timely fashion, finalise trials without major interruptions, and conduct proper cross-examination.

The first objective is to improve knowledge of ECHR and ECtHR case law by judges and prosecutors and make them better understand how the ECHR interacts with national law and practice. For this purpose, the course will notably cover the following substantive topics:

- The various facets of the right to a fair trial under article 6 ECHR (adversarial nature of the procedure and equality of arms; prohibition to self-incriminate and right to remain silent; presumption of innocence; right to physical and effective participation in the trial; reasonable length of proceedings; right to be informed of the accusation; right to have adequate time and facilities to prepare one's defence; right to examine and counter-examine witnesses);

- Roles and functions of police (during investigations), judges, prosecutors and defence lawyers as guarantors of human rights;
- Compliance of national legislation and practice with international standards.

Additionally, the existing material from other projects, for example from the HELP programme self-training document *"Fair trial"*, will be used.

2) PREVENTIVE MEASURES

BACKGROUND

As already mentioned, Turkish legislation in the field of criminal procedure is on a par with other democratic legal systems. Likewise, the relations and the repartition of competences and responsibilities between legal enforcement bodies, prosecutors and judges appear well defined. Everyday practice, though, does not in each and every case seem to reflect the legal guidelines.

Generally speaking, control of the work of the police by prosecutors appears to be more theoretical than effective, which impacts on every action in the proceedings (crime scene investigation, search and seizure, arrest, custody, etc).

As regards pre-trial detention, even though, according to the latest statistics, the situation seems to have recently improved after several legislative reforms, there are still problems regarding notably the reasoning of decisions, particularly when so-called "catalogue crimes" are concerned.

Although judicial control may now be ordered without any restriction, it still does not play an important role and consists simply in reporting periodically to a police station.

CURRENT TRAINING

In pre-service training, the syllabus includes mainly general conferences about criminal law and procedure. Additionally, there are a couple of courses relate to the subject matters, entitled:

- *"Investigation procedure and its practice*" (8 hours)
- *"Interrogation technique"* (8 hours)

As regards in-service training, the 2013 programme comprises a couple of seminars on the subject matters, entitled:

- *"Protective measures"* (3 days, 100 participants)
- "*Effective investigation methods*", (4 times 2 days, 4x100 participants)

GUIDELINES

Real supervision of police work by prosecutors should be developed and close professional co-operation and sharing of functions and expertise be strengthened. For this purpose, common training sessions for judges, prosecutors, police officers and defence lawyers are necessary.

The training should provide the different actors with a good level of knowledge and help them ensure that effective use of investigation techniques is made while sticking to the rule of law and the exigencies of the European Convention of Human Rights: all of these actors must keep in mind that preventive measures encroach on the rights of a presumably and possibly definitely innocent person and it is vital to respect and maintain the balance between the needs of effective prosecution on the one hand, and of safeguarding the presumption of innocence under the ECHR on the other.

Coordination with the other modules is particularly needed here, since a number of issues related to preventive measures are common with other modules (fair trial, effective investigations, terror and organised crime, cybercrime, etc).

Furthermore, the training should not only focus on legal issues but also be more oriented to best practices, proficiency and ethics.

The same approach should be adopted for legal and practical issues relating to investigation of the crime scene.

As regards the monitoring of police work by prosecutors, the trainers will consider introducing a number of exercises/discussions based on real cases where errors and failures were made, with particular focus on European human right standards and procedural law in domestic legislation. The following topics will be covered:

- relationship between the judicial police and public prosecution in terms of efficiency of investigation, problems of communication, flow of information;
- rules on preparation of files by the judicial police;
- rules of instruction given by the public prosecutor and the judicial police (overlap of competences);
- relationship with military units;
- training, supervision, communication, correspondence between units of judicial police;
- presentation of the UYAP system;
- disciplinary proceedings;
- role of police in a democratic society.

As for search and seizure, the training will aim at:

- identifying the legal principles applicable (integrity, proportionality, human dignity, privacy, search for material facts);
- studying the different national and international legal instruments, including national case law and ECHR case law; UN instruments and minor legislation (regulations, circulars etc);
- developing ability to identify "unreasonable petitions" by law enforcement authorities and to protect citizens against them;
- examining the practical conditions of implementation of search and seizure (place and time, body search, search of vehicles, of houses, on computers, in public places, in airports, in prisons, in military zones; persons subject to special conditions, such as lawyers, military personnel, diplomats etc)
- explaining legal control and results of unlawful search (admissibility of evidence, disciplinary control, articles 120 and 257 of Turkish Penal Code, responsibility for compensation).

Similarly, as regards arrest and custody, the training will familiarise participants with the most important international legal standards concerning the treatment of persons deprived of their liberty**,** and identify the different national and international legal instruments, including case law (Turkish courts and ECHR, UN instruments), and minor legislation (Regulations, circulars…). The course will notably cover the following substantive topics:

- Arrest without warrant
- Execution of arrest warrant
- custody (conditions, duration, rights of persons under custody…)

As for pre-trial detention and judicial control, the training will focus on the grounds for pre-trial detention and on alternative measures, with special emphasis on review of practice in other European countries. Existing material from other projects, for example the HELP programme distance learning course *"Alternative measures to detention"*, will definitely be useful in this regard.

3) EFFECTIVE INVESTIGATIONS

BACKGROUND

As already mentioned, over the last 15 years the ECtHR has found numerous violations of Articles 2 and 3 ECHR resulting from actions of the Turkish security forces, and has pointed out the subsequent lack of effective investigations resulting in a virtual impunity.

Even though several important improvements in this field must be noted, in particular with the 4th judicial package adopted this year by Parliament, there is still room for improvement, particularly as regards forensic issues and the remaining requirements of prior authorisation for investigations of crimes committed by civil servants.

CURRENT TRAINING

In pre-service training, the JA syllabus includes mainly general conferences about criminal law and procedure. Additionally, a couple of courses relate to the subject matters, entitled:

- *"Forensic medicine and its practice*" (8 hours)
- *"Forensic science"* (8 hours)

As regards in-service training, the 2013 programme comprises a seminar on the subject matters, entitled:

- "*Effective investigation methods*", (4 times 2 days, 4x100 participants)

GUIDELINES

The training should provide legal as well as practical information about the subject matter and concentrate on how these issues impact on the day-to-day work of judges and prosecutors, in terms of their relationship both with judicial police and forensic experts.

The course will cover the following subjects:

- principles of investigation: prohibition of torture and ill-treatment, national and international legal instruments including case law (Turkish courts and ECHR, UN instruments e.g. Istanbul and Minnesota Protocols), *ex-officio* initialisation of investigation by the public prosecutor, independent and impartial investigation, transparency and participation of victims in investigation, most common examples of impunity;
- different types of incidents: violent death, torture and injuries in custody, excessive use of force by the law enforcement organs during public demonstrations, etc;
- forensic medicine: different types of post mortem examination, rules concerning the performance of autopsy, preparation and assessment methodology of forensic reports, difficulties related to practice;
- procedural law/investigative measures in domestic legislation.

It will be designed mainly for prosecutors and judges, however it can be used also for forensics and law enforcement officers during their initial and in-service training periods.

Common sessions for the various actors are of course essential.

Coordination with the other modules is particularly needed in this field since a number of issues related to effective investigations of ill-treatment by law enforcement officials are common with other modules (preventive measures, fair trial, terror and organised crime…).

Some pedagogical material from other projects, for example the HELP programme self-training document *"Searching and gathering evidence"*, could definitely be useful.

4) TERROR and ORGANISED CRIME

BACKGROUND

Turkey faces a difficult situation as regards terrorism and it is not surprising that this issue occupies a central place and raises many questions related to the functioning of criminal justice. It is crucial that judges and prosecutors be enabled to fight terrorism efficiently while strictly respecting the rule of law and the exigencies of the European Convention of Human Rights. In this respect, it is important that any training on this subject include a human rights dimension (freedom of expression, respect of private life, etc).

Judge and prosecutors can from their very first day be exposed to dealing with cases of organised crime and aspects of cases of terrorism, especially if they work in the south-eastern parts of Turkey. On the other hand, judges and prosecutors will normally have at least 5 years practical experience before they are allocated to serve in a specialised court and not all of them will ever serve in such courts. Training should be organised accordingly, with a basic course for candidate judges and prosecutors, and an advanced one for specialised magistrates.

A specific need for training has been identified as regards the use of special investigation techniques such as controlled deliveries, electronic surveillance (wire-tapping, clandestine filming etc), infiltration of an undercover operative, online searches, clandestine analysis of computer hard drives, tracking devices on vehicles, anonymous witnesses, etc.

In this field, the Recommendation Rec(2005)10 of the CoE Committee of Ministers and the results of the "International Conference on the Use of Special Investigation Techniques to Combat Terrorism and Other Forms of Serious Crime" (Strasbourg, 14 – 15 May 2013) constitute a good starting point..

CURRENT TRAINING

In pre-service training, apart from general conferences about criminal law and procedure, the syllabus includes only a course on the subject matters, entitled:

- "*Terror crime and its practice*" (8 hours).

As for in-service training, the 2013 programme comprises a number of seminars on the subject matter, entitled:

- *"Application of the law on compensation of damages caused by terrorism and fight against terrorism"* (1 day, 30 participants)
- *"Investigation of organised crimes" (special investigation techniques, ECHR, terrorist organisations…)* (2 days, 100 participants)
- "*Effective investigation methods*", (4 times 2 days, 4x100 participants)

GUIDELINES

The basic course for initial training of judges and prosecutors aims at giving the students a general knowledge of terrorism in Turkey and abroad, of terrorist and other organised criminal organisations and their functions, relevant Turkish legislation , relevant international law and case law, international legal cooperation and legal and practical challenges special to these cases.

The advanced module will focus on specific issues, such as:

- Investigation of organised and terror crime (special investigation techniques, difficulties connected to their practical application; arrest and custody including ECHR and relevant ECtHR case law; international police and legal co-operation; legal control during the investigation by the judge; rights of the defence during investigation, rights of victims and claimants in the investigation phase; preparation of the indictment)
- Prosecution and trial of organised and terror crime (jurisdiction, handling of the hearing, secret witnesses, undercover investigators during the trial, assessment of unlawful evidence; rights of the defence in the prosecution phase, cross examination, discipline of the hearing, ECtHR case law)
- Turkish terrorist legislation (Anti-terror law No. 3713; Turkish Penal Code Art 220, 221, 302, 307,

309, 312, 313, 314 etc; Law on Meetings and Demonstrations No. 2911; Law on the compensation of damages caused by terror and fight against terrorism No. 5233; Law on the prevention of financing of terrorism No. 6415; CCP No. 5271; ECHR and relevant case law of the ECtHR on terrorist legislation of Turkey).

Coordination with the other modules is particularly needed, since a number of issues related to terror and organised crime are common to different modules (preventive measures, fair trial, effective investigations, cybercrime etc).

The training should not only be legal but also oriented to best practices, proficiency and ethics. It is desirable that most of it be common for judges, prosecutors, defence lawyers and law enforcement officers.

The use of material from other projects, for example the HELP programme self-training document *"Terrorism and organised crime"*, could definitely be helpful.

5) CORRUPTION

BACKGROUND

Even though corruption within the judiciary does not seem to be a real problem in Turkey, it seems that implementation of the legislation remains weak. An independent and strong judiciary is a key instrument in the fight against corruption and it is of utmost importance that practitioners are trained in the specificities of investigating, prosecuting and adjudicating on corruption crimes. In this regard, the present situation, in terms of initial and in-service training, appears to be perfectible.

CURRENT TRAINING

In pre-service training, apart from general conferences about criminal law and procedure, the syllabus includes a couple of courses on the subject matters, entitled:

- *"Public morality and its practice"* (4 hours)
- *"Abuse of power and its practice"* (4 hours)
- *"Embezzlement, corruption, extortion and their practice"* (8 hours)
- *" Convention on combating bribery of public agents"* (? hours)

As for in-service training, the 2013 programme comprises a four-day seminar on "*Crimes of corruption*", for 60 participants.

GUIDELINES

The training should start with an introduction explaining the cost of corruption to society, and the situation in Turkey (statistics, comparison with other countries). Then it will describe the different types of corruption (passive & active bribery, bribery of national public officials, in the private sector, domestic/international, etc).

It could continue with discussions on corruption criminal offences defined internationally (UN Convention on Corruption, Council of Europe Convention on Corruption, work of Transparency International etc) and in Turkish legislation.

It should also put emphasis on personal and institutional integrity, on the ethical aspects (Bangalore principles & UK Seven principles for public life, conflict of interests, etc).

The training should also tackle different specificities of the investigation of corruption crimes (Money-laundering, International Co-operation : UNOCD, International Anti-Corruption Academy, Interpol, Europol, Eurojust, European Judicial Network…).

It could be enriched with work on case studies on ethical dilemmas. An interactive approach with a mix of presentations, discussions and group work exercises, will be singled out.

6) CYBERCRIME

BACKGROUND

The increased number of incidents with an element of cybercrime increases the need for judges and prosecutors to be properly trained to understand the nature of these crimes and to also be aware of the legislation and the instruments for international cooperation available to handle cases of cybercrime, which often require a swift and very efficient international or regional cooperation.

However, in Turkey (like in many other countries), training of judges and prosecutors in IT and cybercrime is still to be developed.

Some of the practitioners need an introductory course (aimed at explaining the basics of how networks function, the concepts of cybercrime, listing the component parts of a computer system, describing the principles of best practice relating to the seizure and handling of electronic evidence, etc). Others are probably ready for an advanced training aimed at providing effective knowledge and skills to allow judges and prosecutors to fulfil their roles relating to cybercrime investigations and adjudication.

CURRENT TRAINING / OTHER PROJECTS

In pre-service training, apart from general conferences about criminal law and procedure, the Justice Academy syllabus includes only a couple of courses on the subject matters, entitled:

- *"Cybercrime and its practice"* (4 hours)
- "*Use of IT in criminal investigation*" (12 hours)

As for in-service training, the 2013 programme comprises 4 two-day seminars on "*Effective investigation methods*", for 120 participants each.

Several other international projects deal with cybercrime, for example:

- the Twinning project *"Strengthening Capacity against Cybercrime"* (main beneficiaries Police and Gendarmerie) and
- the European Union/Council of Europe Joint Project Regional Cooperation in Criminal Justice *Strengthening capacities in the fight against cybercrime* (CyberCrime@IPA).

In the framework of the latter, a number of training activities have already taken place. These include:

- A 5-day Training of Trainers course for judges and prosecutors, which incorporated a 3-day introductory course on cybercrime and electronic evidence, along with an element providing training skills for the delegates, who would then take the introductory course back to their country, make local and national amendments to the content and then deliver the course in that country. The in-country training courses were attended by experts on behalf of the Council of Europe to monitor the delivery of the course.
- An "advanced" 2-day course for judges and prosecutors based on a case study and, in accordance with the wishes of delegates on previous courses, which included more information about digital forensics. The delegates worked in small groups and the course was a mixture of presentations, paper feed exercises and practical exercises. This course was held in four countries of the region (including Turkey).
- A 5-day electronic evidence train-the-trainer first responder course for law enforcement that was delivered in February this year to delegates from both pre-accession (IPA) and Eastern partnership (EAP) regions. This course was designed around the CoE electronic evidence guide that was also a product of the IPA project. The delegates were charged with taking the 3-day first responder element back to their country and introducing it into their training programme.

2 courses for judges and prosecutors were planned to be introduced into the national programmes at the levels of initial and in service training. Many documents were produced as a result of these activities, including:

- Training packs for the courses with all course materials, lesson plans and supporting materials;
- Reports on the courses prepared for the IPA project;
- The electronic evidence guide.

The introductory course was delivered at the Justice Academy in Ankara by 2 trainers from Turkey and they translated the course materials into Turkish.

GUIDELINES

A Basic Training Module will be built that would enable any judge or prosecutor to have basic knowledge of the nature of cybercrime, the terms and the technology. In addition this module will provide basic information about international cooperation, electronic evidence, procedural law and investigative measures etc.

There will be an advanced training module that will be an extension and build-up of the Basic Module and will provide more detailed information and knowledge about the topics and will use case studies to reinforce the learning in the sessions that are presented in the basic module. The advanced module will be created with the goal of providing the judges and prosecutors with the advanced knowledge that can be applied in practice on the functioning of computers and networks: what is cybercrime; cybercrime legislation, jurisdiction, investigative means and electronic evidence, and international cooperation.

The training will begin with a definition of cybercrime and a presentation of its different forms (technology as a target of crime, as an aid to crime, as a communications tool for criminals, as a storage medium, as a witness to crime). The course will cover procedural and substantive criminal law provisions, at the national and international level, with focus on the need and the advantage of harmonisation between national legislation and international instruments, in particular the Convention of Budapest. Finally, the training will include a human rights dimension, with a part dedicated to the need for respect of freedom of expression and of private life.

The use of material from other projects (in particular the above-mentioned IPA one) will definitely be helpful.

ANNEX 3

Detailed joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy:

GENERAL REMARKS

The needs assessment report concerning the efficiency of Turkish criminal justice system is of crucial importance in terms of Turkey's human rights record. The information and assessments presented in this and other similar reports are accepted as sources of reference by several international institutions and researchers.

On the other hand, a significant part of the assessments, findings as well as recommendations made on the basis of such findings will certainly contribute to the well-functioning of Turkish criminal justice system, and following and putting such recommendations into practice would produce fruitful results.

2- Furthermore, the main purpose of this report should be to analyse and present the information and findings of pilot courthouse visits as well as other documents, statistics and findings submitted by partners and beneficiaries of the Project.

The report contains several remarks which lack analytical or statistical grounds and are proposed as to lead to a final assertion. Making such general assertions which are not based on concrete observations, findings and analysis of pilot courthouse visits and are of personal and subjective nature, and making recommendations accordingly contradicts with the aim and nature of this Report, and thus may risk the credibility of other important recommendations and remarks in the report. Furthermore, quotes from some other reports or subjective remarks of individuals or representatives of different organizations should not be used as grounds for the recommendations in this report (see paragraph 4 under Section "Pre-Trial Phase", and paragraphs 31, 44, 99, 104, 147, 173, 175, 189, 197, 201 and 237)

It would have been more beneficial and coherent with the title and aims of the Project if the report had presented systemic problems and key solutions rather than such subjective remarks.

ANNEX 4

Detailed joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy:

Paragraph 3 of the pre-trial section- Recommendation no 17:

Recommendation no 17 recommends organisation of more adversarial proceedings for phone-tapping and amendment of CPC Article 135 *(the LTC refers to Denmark as an example in footnote 35).*

The recommended system is not implemented even in countries such as Germany, Italy and Spain which struggle against organised crime and have similarities with Turkey in terms of comparative law.

The above-mentioned system is the opinion of the Danish expert and presents specialities peculiar to that country.

Turkey has been fighting organised crime. The Telecommunications Authority is the sole authority which can allow telephone tapping.

In case an adversarial procedure is adopted, entrusting the right to the lawyer who represents the interests of the user of the phone to make opposition to a higher court may endanger the credibility of the decision and might lead to consequences contrary to the objectives of the decision. Furthermore it is practically not feasible to follow and to prevent any contact or communication between the lawyer and the user.

ANNEX 5

Detailed joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy:

Paragraph 3 of the section "Trial phase"- Paragraph 147 – Recommendation no 42:

The relevant paragraphs present findings and comments which do not make any proposal for solution regarding the trial method for such cases. Furthermore the issue has not been considered in terms of domestic law.
Investigating authorities and courts empowered by law can resort, within their capacity, to such practices for suspects who have personal, actual and legal connections.

Moreover, an anonymous reference was made to cases with two even three hundred suspects. There exist mass investigations and prosecutions in Turkish law especially for terror and organised crime cases. However this reference seems to be made to a well-known case about which the Court of Cassation rendered the final verdict.

To make general assertions on the basis of the said case that there are many cases with hundreds of suspects does not comply with the spirit of this report.
It will be more useful to elaborate on this matter in the framework of the provisions prescribed by the European Convention on Human Rights and the principle of the independence of courts observed in ECtHR case law.

Investigations and trials are being conducted by courts and prosecution offices whose independence and impartiality are secured under the Constitution and other relevant laws.
Mass trial practice is not a continuous and stable mechanism in Turkish law. Trials are being held in accordance with concrete facts and discretion of judicial authorities, and court decisions are subject to the review of the Supreme Court.

Therefore making such an abstract recommendation, i.e. "put an end to mass trials" is considered as an intervention to the discretionary powers of judicial authorities and contradicts with domestic regulations. The recommendation does not bring out any concrete solution for the trial of cases with several suspects who have personal, de facto and legal connections amongst themselves. The statement "cases with hundreds of suspects" does not reflect a general practice but is an exclusive practice for certain well-known cases.

Mass trials are peculiar only to these cases which are partly related to the military coup attempts which is an issue criticised by the public including the EU. Furthermore measures have been introduced in order to conduct proceedings of such cases in a prompt and effective manner.

Taking into consideration the interests of suspects, their relatives as well as the media, necessary technical and physical conditions were set by the State, a court room was specially built within the prison campus where the detainees were kept which facilitated the transfer of suspects from detention facility to the court room; necessary security measures as well as other measures were taken in order to ensure a speedy and prompt trial process.

ANNEX 6

Detailed joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy: Assessment of 2013 EU Progress Report in respect of provisions related to detention and judicial control introduced by judicial reform packages

The **Third Judicial Reform Package** adopted in July 2012 has started to produce results particularly in terms of **pre-trial detention** (including its length). The Fourth Judicial Reform Package covers judicial solutions to a series of issues for which Turkey has been condemned by the ECtHR. The package narrows the **scope of terror crimes** by eliminating the connection between declaring thoughts and opinions through publications, statements, speech etc. and using or the threat of using force or violence.

Putting these amendments into practice in line with European standards will have **positive impact on freedom of expression and thought**.

Implementation of the Third Package enacted in July 2012 led to a 50% increase in **judicial control practice (as an alternative to pre-trial detention)** between the end of 2011 and 30 April 2013. This increase was a result of the new judicial control measures introduced by the Third Package such as banning persons from going out of the house or a specific location or go to specific a place or location.

The Third Judicial Reform Package also **led to the release of a great number of detainees**; however the ratio of release for juveniles was reported to be lower due to the lack of a proper monitoring system. Less than 1% of judgments on the confiscation and banning of publications and prevention of their distribution and sales rendered until 31 December 2011 remain applicable even after the enactment of the Third Package. Judges of liberties were trained who are appointed to heavy penal courts established under article 10 of Anti-terror Law and render decisions on preventive measures during investigation phase.

As of 10 June 2013, the number of detainees consists almost one fifth of overall prison population (in comparison with the "half of the prison population" at the end of 2006), and most of them have been imprisoned for maximum one year and very few of them for three years at least. Compared to the figures of 2011 and 2012, there is a considerable decrease in the number of detainees under article 100 of the Criminal Procedure Code. This article covers the catalogue crimes alleged to be committed in the scope of well-known KCK and Ergenekon cases. Shortly, in general terms and under article 100 of the Criminal Procedure Code, there has been a **decrease in pre-trial detention periods and increase in the use of preventive measures as an alternative to detention.** However, the maximum limit set for the length of pre-trial detention regulated by law and interpreted by courts is still too long.

Following the enactment of the Fourth Judicial Reform Package, the Court of Cassation has been reviewing the decisions of the courts of first instance on the basis of new regulations. The Committee of Ministers of the Council of Europe declared its satisfaction as regards to the developments on the reopen criminal proceedings and decided that the judgments supervised under the Hulki Güneş v. Turkey group of cases be revisited according to standard procedure rather than reinforced procedure. With regard to the group of cases supervised under Demirel v. Turkey judgment, the Committee welcomed the efforts of Turkish authorities to harmonize domestic legislation and its practice with the requirements of the ECHR in the framework of the Third and Fourth Judicial Reform Packages, as well as the **statistics indicating considerable decrease in the length of pre-trial detention and increased use of judicial control measures as an alternative to detention.** The Committee also called upon Turkish authorities to continue providing information as regards to the improvements in judicial practices.

Human Rights Compensation Commission started to receive applications as of February 2013 after the enactment of relevant legislation in January. This mechanism is considered as a **domestic remedy to excessive length of proceedings and non- or delayed implementation of judicial decisions**, which should be obeyed by Turkey under a pilot judgment of ECtHR and approved by the following judgment of Strasbourg Court. The number of cases lodged at the ECtHR against Turkey is expected to reduce almost by 4.000.

The Third Judicial Reform Package has started to produce results particularly **in terms of pre-trial detention and use of preventive measures as an alternative to detention**. Adoption of the Fourth Package is another important step towards improvement.

ANNEX 7

Detailed joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy:

Paragraph 173 and 175 and additional comments on terrorism:

In Turkey tens of thousands of people have been killed, injured or disabled by **terrorism,** which also has inflicted grave harm upon economy.

Terrorism is a real disease which can be encountered sometimes in metropolitan cities or highly populated regions. It is the biggest threat against stability of the state, democracy, economic and social development.

Turkey is located in a geography where terrorist organisations are very active, particularly in the eastern and south-eastern regions of Turkey; and they commit terror crimes especially in critical processes and periods.

Besides drug trafficking and smuggling has become widespread in border zones, criminal gangs and mafias have become threatening for the inhabitants of metropolitan cities.
It is obvious that Turkey has been exposed to continuous threat of terrorism and criminal organisations.

Therefore, in order to make a sound strategic assessment of current threats, it seems essential to take into consideration the threat of terrorism and organised crime together with its history.

Turkey is a state of law, and both Turkish Constitution and documents adopted concerning the EU acquisition underline democracy and rule of law.

Therefore it is an obligation to secure lives and property of people and to establish state order in order to arrest and punish the criminals.

Security forces as well as judiciary of Turkey have an important role in fight against terrorism in order to convince the society that subversive and separatist terrorist organisations and other criminal organisations are punished and to reinforce public confidence and trust in justice.

It is publicly known fact that in Turkey's recent history, before the year 2000, the country suffered from military coups, active criminal organisations, widespread unidentified murders, unsolved organised crimes, and ineffective investigations.

On the other hand, the stable process in the last decade shows that important steps have been taken in the struggle against such crimes with the contribution of law enforcement bodies and judicial authorities.
In light of these facts, it is inconsistent with the aim and content of the Report to present Turkey as a country taking unfair decisions in counter terrorism and to compare it with countries like China. This also indicates that the official data and information submitted to the LTC was not presented in the report in a careful and objective manner.

ANNEX 8

Detailed joint comments by the Ministry of Justice, the HCJP and the Turkish Justice Academy: Paragraph 191:

It was mentioned in the report that the reforms in the 4th judicial reform package submitted to the Parliament on 7 March 2013 leave unchanged Article 314 of the Turkish Criminal Code, "membership to an armed organisation"; and many political activists, journalists, trade unionists, and human rights activists, are charged with this offence rather than terrorist propaganda; and that an additional amendment in article 314 is required for harmonisation with the ECtHR case law.

The law no 6459 known as fourth judicial reform package regulates the elements of crime in the second clause of article 7 of the law no 3713 (Anti-terror Law). Accordingly making propaganda on behalf of a terrorist organization that legitimizes or praises methods of force, violence, or threats, or which encourages the adoption of these methods is considered as crime. Moreover, fines for broadcasting executives not involved in the commitment of crime are reduced by half. The aim of these amendments is to concretise elements of crime and to create harmonisation with ECtHR standards in the field of freedom of expression.

Furthermore, persons who publish or broadcast declarations of terrorist organisations defined in article 6/2 of Anti-terror law, who make propaganda of terrorism defined in article 7/2 of the same law and who take part in illegal meetings or demonstrations defined under article 28/1 of the law no 2911 cannot be punished because of being a member of a terrorist organisation.

To punish a person who is not a member of a terrorist organisation as per article 220/6 of Criminal Code must commit "a crime on behalf of the organisation". As the nature or type of crime mentioned in the said article is not clear, commitment of any crime on behalf of the organisation constitutes a crime as per 220/6 of Criminal Code. Accordingly persons who publish or broadcast declarations of terrorist organisation under article 6 of anti-terror law or to make propaganda under article 7/2 of the said law are punished also for being a member of terrorist organisation. Similarly, if a suspect who is not a member of a terrorist organisation takes part in a demonstration organised upon the call or instruction of terrorist organisation is deemed to have committed a crime and is punished due to committing crime on behalf of the organisation plus other crimes committed.

Briefly, even though no amendment was made in article 314 of the TPC, the amendments in article 7 of Anti-terror law outlined above will have positive impact on freedom of expression.

On the other hand, amendments related to the scope of terror crimes and amendments thereof were welcome in the EU Progress Report in 2013: "The 4th Judicial Reform Package provides judicial remedies for a number of issues on which Turkey had been condemned by the European Court of Human Rights. It narrowed the scope of terror-related crimes by removing the link between the imparting of ideas through publications, statements, speeches, etc., and the use or threat of use of coercion or violence. If implemented in line with European standards, these changes should have a positive impact on freedom of expression".

ANNEX 9

Detailed Comments by the Ministry of Justice:

Paragraph 238-241:

The principal aim of the needs assessment report is to analyse the outcomes of the concrete observations on the basis of visits to pilot courthouses, as well as research results and information, documents and findings submitted by beneficiaries and partners of the project. However the current report, which is trying to address the structural shortcomings, should rather be based on statistics and concrete information and should not contain as much as possible subjective findings and assessments. This is also referred in the project fiche.

Regarding the assessment on the selection of some HCJP members by the Parliament mentioned in the report, only a draft law proposed by a political party is at stake, which has not been submitted to the Parliament yet.

However, despite the fact that this issue is only discussed during the works of the Constitution Conciliation Commission in the Parliament, the analysis in the report presents a general assertion. Moreover, works of the Constitution Commission were not presented to the Parliament, and ended without reaching any conclusion to that end. It contradicts with the nature and aim of the needs assessment report to convey such personal and subjective statements not based on a good analysis of observations and findings reached at the end of pilot courthouse visits.

The report referred to paragraph 29 of the Report of Venice Commission on 'Judicial Appointments.
Besides, paragraph 30 of the same Report suggests the following:

"Judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors".

Approach of the Venice Commission is clearer in following paragraphs:

"44. In Europe, a variety of different systems for judicial appointments exist and that there is not a single model that would apply to all countries.

45. In older democracies, the executive power has sometimes a decisive influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because these powers are restrained by legal culture and traditions, which have grown over a long time."

According to Turkish Constitution, President of the Republic shall be elected by the public. If the President-elect is a member of a party, his/her relationship with his party shall be severed and his/her membership of the Grand National Assembly of Turkey shall cease.

In light of this explanation, remarks suggested by the LTC including definitive assertions are deemed to be hypothetical, not based on legislation in force but brought forward on the basis of a work discussed in the Constitution Conciliation Commission in the Parliament, which ceased its works without producing any result, and are not in compliance with the aim, scope and principles of the needs assessment report.

ANNEX 10

Detailed Comments by the National Police Directorate:
Paragraph 89:

Article 160/2 of CPC on the "Duty of public prosecutor who is informed of an offense" stipulates the following provision: "In order to investigate the factual truth and to secure a fair trial, the public prosecutor is obliged, through the judicial police under his command, to collect and secure evidence in favour and in disfavour of the suspect, and to protect the rights of the suspect".

Article 6/2 of the Regulation on Judicial Police dated 01.06.2005 titled "Duties and Powers" prescribes the following provision: "Judicial police shall be obliged to notify the public prosecutor about any notice or complaint received related to a crime, incidents taken over, persons arrested and measures applied and to commence the investigation in compliance with the judicial orders of the public prosecutor". Therefore the police are not allowed to conduct any investigative procedure without information and instruction of the public prosecutor.

Besides, it is not logically and legally useful not to pose any question to the suspect in terms of both protected rights and conditions of daily life. This might bring out serious challenges for the prevention of unforeseen threats. For instance, through questioning the suspects arrested in the course of a bombed/armed attack committed by terrorist organisations, it may be possible to prevent other bombed/armed attacks or to identify the other persons without delay who are in the preparation of such attacks. If no question is posed to the suspect arrested in the crime scene, it may not be possible to prevent such threats. Furthermore, if an arrested person who has fled a house is not questioned, then you cannot identify why that person has fled and the degree of threat in that house.

Additionally, testimonies of individuals taken in the absence of his/her lawyer is not considered as evidence before the court, and such a questioning does not prejudice the fundamental rights of the suspect. Also public order and fundamental rights of other members of the society are protected. Therefore posing no question to the suspect arrested in crime scene may cause irreparable losses/damages. Termination of such a practice is not realistic not only for our country where terror and criminal organisations are very active but also for other countries.

ANNEX 11

Detailed Comments by the National Police Directorate:

Paragraph 92-93-94:

The finding that interception of communication is used as the first resort in Turkey varies according to the incident and the person who makes such a finding. Therefore the best assessment on such a practice can be made by the police and prosecutor. In this context, our experiences reveal the fact that interception of communication is used as the last resort in Turkey.

Interception of communication is exercised particularly in the investigation of organised crime and drug trafficking, immigrant trafficking and human trafficking, counterfeit money and laundering of criminal proceeds. The rate of notices and complaints about these crimes is less than that of other simple offenses. Moreover, classical detective measures are not very applicable in the identification, surveillance and investigation of criminal activities which are continuously mobile such as trafficking; and connections of perpetrators, actions of suspects and gathering evidence both in favour and disfavour of suspect require measures like interception of communication.

Turkey is a transit country in heroin trafficking from Asia to Europe. As seen in international reports, the amount of heroin caught solely by Turkish authorities is more than that of other European countries as a whole. Turkey is a sort of strong shield against drug trafficking which threatens Europe and occupies the agenda of European governments.

Turkey could prevent the transit of drugs before it enters into Europe through international information network and by applying measures such as interception of communication. Interception of communication is used as the last resort also in crimes such as smuggling cigarette, documents and immigrants in which Turkey is both a transit and a target country. All these crimes are committed in continuously mobile activities which require such measures in order to collect evidence. It is obvious that investigation of organised crimes by applying classical investigation methods is ineffective due to the challenges mentioned above. When the number of investigation of these crimes and the number of suspects who are subject to criminal proceedings are compared in countries struggling against organised crime, it will be seen that measures such as interception of communication are not used as the first resort. There is no scientific research which puts forward sophisticated and detailed information measuring the effectiveness and efficiency of investigation methods involving different factors such as measures used to collect evidence and allows comparison with other EU countries. In this regard it would not be a good approach to measure the application of measures like interception of communication through simple numerical and proportional comparisons.

On the other hand, 2012 Report of National Control Commission of Security Taps in France states that every year 40.000-60.000 judicial tapping is exercised in France; there is a %60 increase in taps in the last 4 years; in 2012 35.000 phones were tapped for judicial purposes. When these figures revealed by the Commission are compared by those in Turkey, the number of judicial phone tapping in France appears to be very high. Therefore an in-depth research should have been made before asserting such a serious finding i.e. phone tapping being used as the first or the last resort. Increase or decrease in judicial taps depends on the conjuncture of that period; for instance, according to the above-mentioned Report, it can be conferred that there is a 60% increase in judicial taps in France.

ANNEX 12

Detailed Comments by the National Police Directorate:

Paragraph 121:

The report takes waste of labour force and resources as accepted parameters to make a recommendation to merge three institutions under one roof. In this context the basis of recommending such a structural change was waste of labour force and resources, which is arguable and put forward without making any analysis on effectiveness, efficiency and cost.

However, functional and structural changes in Turkey during the EU harmonization process should focus on democratisation. In light of this fundamental reference, the recommended structural change has no similarities with forensic services in contemporary democratic countries but seems to be the same with the structures in under-developed and iron curtain countries. Namely, in countries where forensic science is developed, forensic institutions are not merged under a single roof but remain as separate institutions; and universities, as recommended in the Report, carry out multidisciplinary examinations on the evidence. In addition, certified private laboratories carry out such examinations, which is yet not debatable in Turkey. Finally, the desired structure is not a single-centred but a multi-centred one where the lawyer would be able to have the evidence examined as prosecutor does and allows both parties to arbitrate on each other's expert reports.

ANNEX 13

Detailed Comments by the National Police Directorate:

Paragraph 210:

Examples for crimes committed by civil servants investigation of which does not require prior permission of the administration:

"Crimes listed in the Law no 3628 on Declaration of Property, Anti-bribe and Anti-corruption Law: a-Mispresentation, b-Misdeclaration c-Unlawful benefit d-Smuggling or hiding properties (article 11, 12, 13, and 17 of the Law no 3628); Other crimes listed in Crimes listed in the Law no 3628 on Declaration of Property, Anti-bribe and Anti-corruption Law. a-Crimes stated in Banking Law no 5411, b-Bribery by force , c-Bribery, d-Embezzlement, e-Smuggling in the performance of duty or because of performing that duty f-Rigging official bids and procurements, g- Declaration of state secrets or allowing such declaration or act as an accomplice in such crimes (article 17 of the Law no 3628), Election offenses (article 174 of the law no 298), offense committed duty to judicial duty (article 611 of the Law no 5271, article 2 of the Law no 4483), being caught red-handed which require heavy penalty (article 2 of the Law no 4483), Disciplinary offenses (article 2 of the Law no 4483), Crimes not committed due to the duty of public servant or other public officials (article 2 of the Law no 4483), crimes of torture and ill-treatment (article 2 of the Law no 4483), Crimes due to non-fulfilment of written or verbal orders of public prosecutor (article 161 of the Law no 5271), Crimes committed due to tasks in the scope of Child Protection Law (article 44 of the Law no 5395), Breaching the principle of confidentiality in preserving and protecting the information and records obtained in the scope of preventive tapping, and using such information and records for other purposes (additional article 7 of the Law no 2559.

ANNEX 14

Detailed Comments by the Union of Turkish Bar Associations:

Paragraph 44:

Despite the principles of international and domestic laws, in practice, protective measures are applied to lawyers in respect of investigations, particularly investigations and prosecution based on special authorization, or cases they are involved in because of performing their professional duties, which do not comply with special legislation (Lawyers' Act, 58). The offices and homes of lawyers are searched in the absence of the representatives of bar associations in breach of the provisions of special laws related to lawyers (CCP 130) and they are detained and interrogated without fulfilling legal prerequisites (CCP 145) and lawyers are arrested.

In fact, arrest warrants issued against lawyers practicing their profession should be handled with due consideration above general prerequisites. Such practices are contrary to "the independence and tenure of lawyers" as part of "basic principles concerning the free practice of advocacy," attorney-client confidentiality, the need "for the court to show equal respect for all lawyers in the same case," as well as the principles of "equality of arms" and the "presumption of innocence".

Arrest warrants are issued based on abstract statements based on "possibility of escape or obfuscating evidence" which could not be a reason for arrest in spite of the fact that there is no fact that could justify the arrest of a lawyer. Considering the status and professions of lawyers, the risk of "escape" should be treated as the most distant possibility. Furthermore, as mentioned above, there is no explanation as to why other alternative measures are not applied. Similarly, reasons cited for "suspicion that a lawyer could obfuscate evidence" are extremely superficial given lengthy investigations and the current situation. Investigation authorities with special powers use "organized crime" in respect of lawyers as is the case for other professions enjoying guarantees in order to benefit from the provisions of article 250 of the CCP, which permits arbitrary actions and depriving accused of specific guarantees and the offence is described as a "personal crime" totally based on a very broad interpretation of the law in an attempt to overcome special legal arrangements constituting "guarantees" concerning the profession of accused.

The last example was the detention of lawyers from the Contemporary Lawyers' Association (ÇHD):

The Case of Contemporary Lawyers' Association - More than 60 people, including lawyers from the Contemporary Lawyers' Association were detained during "operations" conducted in 7 provinces, including Izmir, Istanbul, and Ankara on 18.01.2013 and 9 out of 16 lawyers, all members of the ÇHD, were remanded in custody. According to a statement issued by the Istanbul Bar Association, the process involved clear violations of law from the very beginning. Searches at the offices and homes of lawyers and the Association's premises were conducted based on an abstract accusation (being a member of an 'organization') in breach of legal requirements. Lawyers were taken into custody in violation of the principles of proportionality and necessity rather than issuing summons; the doors of some offices were broken in the absence of the prosecutor and the Bar Association's representative entirely in breach of the special provisions of the CCP and the Lawyers Act; and documents related to clients and professional relationships were examined. The president of the Bar Association and lawyers observed signs of battery on some lawyers when they were brought to the Courthouse. A statement entitled "Press Release", which was posted on the web site of the Istanbul Police Department on 18.01.2013, our colleagues were alleged to be among the "lawyers of a left-wing terrorist organization" and the presumption of innocence was totally ignored by claiming that "... they had reported the country's top-secret information to the leaders of the organization living abroad by sending encrypted texts and they established secret communication centres in order to conduct espionage for other countries." Those events was a part of systematic attempts to discredit and intimidate bar associations which was also proven by offensive attitude taken toward our colleagues who had gathered in front of Çağlayan Courthouse in order to draw attention to violations of law during recent Gezi protests (TTB Human Rights Report, April 2013, p. 200-203).

50 TAVSİYE

N° 1: HÂKİM YARDIMCILIĞI MÜESSESESİ OLUŞTURULMALIDIR.
N° 2: YARGI SEKTÖRÜ DIŞARIDAN KİŞİLERİN ERİŞİMİNE DAHA AÇIK HALE GETİRİLMELİDİR.
N° 3: SAVCIYA TAKDİR YETKİSİ VERİLMELİDİR.
N° 4: BELİRLİ KOŞULLARDA HÂKİME DAVAYI REDDETME YETKİSİ VERİLMELİDİR.
N° 5: BASİT DAVALAR DOSYA ÜZERİNDEN GÖRÜLMELİDİR.
N° 6: UZLAŞMANIN KAPSAMI GENİŞLETİLMELİ VE KULLANIMI TEŞVİK EDİLMELİDİR.
N° 7: SUÇLULUĞUN DEĞERLENDİRİLDİĞİ BÖLÜM ILE HÜKÜM VERİLEN BÖLÜM AYRIŞTIRILMALIDIR.
N° 8: SUÇUN TARTIŞMA KONUSU OLMADIĞI DAVA İŞLEMLERİ BASİTLEŞTİRİLMELİDİR.
N° 9: YARGILAMA YETKİSİ İLE İLGİLİ KANUN YENİDEN DÜZENLENMELİDİR.
N° 10: CMK MADDE 148/5 ve 5395 SAYILI KANUNUN 15. MADDESİ DEĞİŞTİRİLMELİDİR.
N° 11: CMK MADDE 87/1 DEĞİŞTİRİLMELİDİR.
N° 12: CMK'NIN İLK MADDESİNDE CEZA USULÜNÜN TEMEL İLKELERİ YER ALMALIDIR.
N° 13: CMK MADDE 174 İPTAL EDİLMELİ VEYA DEĞİŞTİRİLMELİDİR. (İDDİANAMENİN İADESİ)
N° 14: DURUŞMALARDA SAVCI HER ZAMAN HAZIR BULUNMALIDIR. (CMK MADDE 188-2 VE İLGİLİ GEÇİCİ HÜKÜMLER İPTAL EDİLMELİDİR)
N° 15: ÖZGÜRLÜK HÂKİMİ TÜM CEZA MAHKEMELERİNDE OLMALIDIR.
N° 16: KABUL EDİLEMEZ DELİLLER DAVA DOSYASINDAN ÇIKARILMALIDIR.
N° 17: TELEFON DİNLEME İÇİN DAHA ÇEKIŞMELI BİR USULE BAŞVURULMALIDIR VE CMK MADDE 135 DEĞİŞTİRİLMELİDİR.
N° 18: ADLİ YARDIM PROGRAMI GELIŞTIRILMELIDIR.
N° 19: TERÖR SUÇLARI VE ÖRGÜTLÜ SUÇLARIN YASAL TANIMININ YORUMU DARALTILMALIDIR.
N° 20: TERÖR SUÇLARIYLA İLGİLİ DAVALAR BU ALANDA UZMANLIĞI OLMAYAN HÂKİMLERE VERİLMELİDİR.
N° 21: CMK MADDE 100-3 İPTAL EDİLMELİDİR.
N° 22: DAVA DOSYASINA ERİŞİM ANCAK İSTİSNAİ HALLERDE SINIRLANDIRILABİLİR OLMALIDIR.
N° 23: DEVLET MEMURLARI TARAFINDAN IŞLENEN SUÇLARIN SORUŞTURULMASI IÇIN ÖNCEDEN IZIN ALINMASI ILE ILGILI KURALLAR İPTAL EDİLMELİDİR.
N° 24: BAĞIMSIZ BIR POLIS ŞIKAYET KURUMU KURULMALIDIR.
N° 25: HÂKİM VE SAVICLARIN MESLEKİ DENEYİMLERİNİ ÇEŞİTLENDİRMELERİ TEŞVİK EDİLMELİDİR.
N° 26: ADLİYELERDE YILLIK OLARAK BİLGİLENDİRME GÜNLERİ DÜZENLENMELİDİR.
N° 27: DURUŞMALAR 16 YAŞ VE ÜSTÜ ÖĞRENCİLERİN ZİYARETİNE AÇILABİLİR.
N° 28: İSTİNAF MAHKEMELERİ KANUNU YÜRÜRLÜĞE GİRMELİDİR.
N° 29: HÂKİM VE SAVCILAR İÇİN YARDIMCILAR ALINMALIDIR.
N° 30: ADLİ TIP UZMANLIĞI GELİŞTİRİLMELİDİR.
N° 31: BİR SEFERDE BİR DAVANIN YARGILAMASI YAPILMALIDIR.
N° 32: YARGILAMASI DEVAM EDEN DAVANIN SORUŞTURMASINA SON VERİLMELİDİR.
N° 33: VİDEO KONFERANS KULLANIMI GELİŞTİRİLMELİDİR.
N° 34: DURUŞMALAR GÖRSEL VE İŞİTSEL OLARAK KAYDEDİLMELİDİR.
N° 35: SAVCILAR GEREKSIZ IDARI GÖREVLERDEN ARINDIRILMALIDIR.
N° 36: UZMANLAŞMIŞ ADLİ KOLLUK İLE SAVCILIK ARASINDAKİ İŞBİRLİĞİ GELİŞTİRİLMELİDİR.
N° 37: ADLİ KONTROL GELİŞTİRİLMELİDİR.
N° 38: SAVCILAR HÂKİMLERDEN AYRILMALI VE HÂKİM-SAVCI- AVUKAT YAKINLAŞMALIDIR.
N° 39: DURUŞMA SALONUNUN OTURMA DÜZENİ SAVUNMA AVUKATININ SANIKLA İLETİŞİME GEÇEBİLECEĞİ ŞEKİLDE DEĞİŞTİRİLMELİ VE SAVCI İLE SAVUNMA AVUKATI AYNI SEVİYEDE OLMALIDIR.
N° 40: SAVCI DURUŞMA SALONUNA HÂKİMİN GİRDİĞİ KAPIDAN GİRMEMELİDİR
N° 41: ADLİYE YÖNETİMİ BAŞSAVCIYA DEĞIL BİR İDARECİYE VERİLMELİDİR
N° 42: DAHA SEÇİCİ BİR SORUŞTURMA POLİTİKASI İZLENMELİ VE HAFİF SUÇLARLA SUÇLANAN KİŞİLER İLE SORUMLULUĞU DAHA FAZLA OLDUĞU İDDİA EDİLEN KİŞİLERİN YARGILAMALARI AYRI AYRI YAPILARAK "KİTLESEL YARGILAMALARA" SON VERİLMELİDİR.
N° 43: ADALET AKADEMİSİNE KADROLU PERSONEL ALINMALIDIR.
N° 44: HÂKİMLER VE SAVCILARIN İKİ YILLIK MESLEK ÖNCESİ EĞİTİMİ TEKRAR GEÇERLİ KILINMALIDIR.
N° 45: MESLEK ÖNCESİ EĞİTİM İÇİN YENİ BİR MÜFREDAT HAZIRLANMALIDIR.
N° 46: HÂKİM VE SAVCILARA YÖNELİK MESLEK İÇİ EĞİTİM İÇİN ASGARİ SÜRE BELİRLENMELİDİR.
N° 47: MESLEK ÖNCESİ VE MESLEK İÇİ EĞİTİM METODOLOJİSİ TEKRAR ELE ALINMALIDIR.
N° 48: HÂKİM VE SAVCILAR İÇİN GEÇERLİ OLAN SİCİL DEĞERLENDİRME, TEFTİŞ, TERFİ VE DİSİPLİN SİSTEMİ TEKRAR ELE ALINMALIDIR.
N° 49: AVUKATLARIN BAROYA KABULÜ İÇİN BIR GİRİŞ SINAVI YAPILMALI VE MESLEK ÖNCESI EĞITIM VERILMELIDIR.
N° 50: HÂKİM, SAVCI VE AVUKATLAR İÇİN ORTAK BIR MESLEK İÇİ EĞİTİM DÜZENLENMELİDİR.

50 RECOMMENDATIONS

N° 1: ESTABLISH LAY PARTICIPATION
N° 2: GIVE OUTSIDERS BROADER ACCESS TO THE JUDICIARY
N° 3: ESTABLISH DISCRETIONARY PROSECUTION
N° 4: ALLOW THE JUDGE TO DISMISS THE CASE WHEN CERTAIN CONDITIONS ARE MET
N° 5: ESTABLISH WRITTEN PROCEEDINGS FOR MINOR CASES
N° 6: EXPAND THE SCOPE OF MEDIATION AND ENCOURAGE ITS USE
N° 7: CLEARLY DISTINGUISH DECISIONS ON GUILT FROM SENTENCING
N° 8: SIMPLIFY THE PROCEEDINGS WHEN GUILT IS NOT IN DISPUTE
N° 9: RE-CONSIDER THE LAW ON JURISDICTION
N° 10: AMEND CCP ARTICLE 148/5 AND ARTICLE 15 OF LAW NO. 5395
N° 11: AMEND CCP ARTICLE 87/1
N° 12: SET OUT THE BASIC PRINCIPLES OF CRIMINAL PROCEDURE IN ARTICLE 1 OF THE CCP
N° 13: REPEAL OR AMEND ARTICLE 174 OF THE CCP (RETURN OF INDICTMENT)
N° 14: ALWAYS HAVE A PUBLIC PROSECUTOR PRESENT AT TRIAL (REPEAL CCP ART 188-2 AND RELEVANT TEMPORARY PROVISIONS)
N° 15: ESTABLISH LIBERTY JUDGES IN ALL COURTS
N° 16: REMOVE INADMISSIBLE EVIDENCE FROM THE CASE FILE
N° 17: ORGANISE SOME FORM OF MORE ADVERSARIAL PROCEEDINGS FOR PHONE-TAPPING AND AMEND CCP ARTICLE 135
N° 18: IMPROVE THE LEGAL AID SCHEME
N° 19: NARROW THE INTERPRETATION OF THE LEGAL DEFINITION OF TERRORISM AND ORGANISED CRIME
N° 20: ALLOCATE TERROR CRIME CASES TO NON-SPECIALIST JUDGES
N° 21: REPEAL ARTICLE 100-3 OF THE CCP
N° 22: LIMIT RESTRICTED ACCESS TO THE CASE FILE TO EXCEPTIONAL CIRCUMSTANCES
N° 23: DO AWAY WITH ANY PRIOR AUTHORISATION FOR INVESTIGATIONS INTO CRIMES COMMITTED BY CIVIL SERVANTS
N° 24: ESTABLISH AN INDEPENDENT POLICE COMPLAINTS AUTHORITY
N° 25: ENCOURAGE JUDGES AND PROSECUTORS TO HAVE VARIED PROFESSIONAL EXPERIENCE
N° 26: ORGANISE YEARLY OPEN DAYS IN COURTHOUSES
N° 27: ORGANISE SCHOOL VISITS TO TRIALS FOR PUPILS FROM THE AGE OF 16 YEARS
N° 28: IMPLEMENT THE LAW ON COURTS OF APPEAL
N° 29: RECRUIT ASSISTANTS FOR JUDGES AND PROSECUTORS
N° 30: IMPROVE FORENSIC EXPERTISE
N° 31: TRY ONE CASE AT A TIME
N° 32: STOP INVESTIGATING CASES AT THE TRIAL STAGE
N° 33: DEVELOP THE USE OF VIDEOCONFERENCING
N° 34: RECORD COURT SESSIONS AUDIO-VISUALLY
N° 35: UNBURDEN PROSECUTORS FROM UNDUE ADMINISTRATIVE MATTERS
N° 36: DEVELOP COOPERATION BETWEEN A SPECIALISED JUDICIAL POLICE FORCE AND THE PROSECUTION
N° 37: DEVELOP JUDICIAL CONTROL
N° 38: SEPARATE PROSECUTORS FROM JUDGES AND BRING MAGISTRATES CLOSER TO LAWYERS
N° 39: CHANGE COURTROOM LAY-OUT SO THAT THE DEFENCE LAWYER CAN COMMUNICATE WITH THE ACCUSED AND THE PROSECUTOR IS AT THE SAME LEVEL AS THE DEFENCE
N° 40: MAKE SURE THE PROSECUTOR DOES NOT ENTER THE COURTROOM BY THE SAME DOOR AS THE JUDGES
N° 41: ENTRUST THE MANAGEMENT OF THE COURT TO AN ADMINISTRATOR, NOT THE CHIEF PROSECUTOR
N° 42: PUT AN END TO THE PRACTICE OF "MASS TRIALS" WITH A MORE SELECTIVE PROSECUTION POLICY AND SEPARATE TRIALS FOR THOSE MOST RESPONSIBLE AND MINOR PARTICIPANTS RECOMMENDATION
N° 43: RECRUIT PERMANENT STAFF FOR THE JUSTICE ACADEMY
N° 44: RESTORE A TWO-YEAR INITIAL TRAINING PERIOD FOR JUDGES AND PROSECUTORS
N° 45: DRAFT A NEW CURRICULUM FOR PRE-SERVICE TRAINING
N° 46: ESTABLISH A MINIMUM PERIOD OF IN-SERVICE TRAINING FOR MAGISTRATES
N° 47: RECONSIDER THE METHODOLOGY OF INITIAL AND IN-SERVICE TRAINING
N° 48: RECONSIDER THE SYSTEM OF APPRAISAL, INSPECTION, PROMOTION AND SANCTIONS APPLICABLE TO JUDGES AND PROSECUTORS
N° 49: ESTABLISH AN EXAMINATION BEFORE ADMISSION TO THE BAR AND ORGANISE A CONSOLIDATED PRE-SERVICE TRAINING FOR LAWYERS
N° 50: ESTABLISH COMMON IN-SERVICE TRAINING FOR JUDGES, PROSECUTORS AND LAWYERS

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IMPROVING THE EFFICIENCY OF THE TURKISH CRIMINAL JUSTICE SYSTEM

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