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COMMISSIONER FOR HUMAN RIGHTS OF THE COUNCIL OF EUROPE

DUNJA MIJATOVIĆ

REPORT FOLLOWING HER VISIT TO TURKEY FROM 1 TO 5 JULY 2019

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SUMMARY

Commissioner Dunja Mijatović and her team visited Turkey from 1 to 5 July 2019. During the visit, the Commissioner held discussions with the Turkish authorities, members of the judiciary, national human rights structures and civil society. This report focuses on two main issues raised during the visit: the administration of justice and the protection of human rights in the justice system, and human rights defenders and civil society.

Administration of justice and the protection of human rights in the justice system

While the administration of justice and judicial independence have been long-standing concerns for the Commissioner's Office, the Commissioner observes that the situation has deteriorated significantly in recent years, in particular in the aftermath of the state of emergency effective from July 2016 to July 2018. In addition to the erosion of constitutional and structural guarantees to uphold the independence of judges, and measures which have directly impacted this independence, such as summary dismissals and recruitments, the Commissioner takes note of evidence pointing to an increased partiality of the judiciary to political interests, as recognised in recent judgments of the European Court of Human Rights.

The effect of this situation on the criminal justice system is particularly noteworthy, with numerous long-standing problems such as the misuse of detentions on remand having worsened, and the addition of new concerns. Especially for terrorism-related and organised crime cases, the Commissioner finds that the disregard by the Turkish judiciary of basic fair-trial guarantees and the very loose application of criminal laws to lawful acts result in a level of legal uncertainty and arbitrariness which endangers the very essence of the rule of law. While the Commissioner is fully aware of the extraordinary challenges faced by Turkey in fighting many terrorist organisations at the same time, she stresses that failing to respect human rights in this process would only discredit and undermine this fight in the long run. In the context of criminal proceedings, she also raises particular concerns about the role of the criminal judgeships of the peace and the lasting changes to the criminal procedure made during the state of emergency.

Other specific concerns relate to the exercise of the right to an effective remedy. As regards measures taken through emergency decrees, the Commissioner separates the issue of terminations of employment of civil servants from ensuing automatic consequences which amount to disguised criminal sanctions, as well as from measures affecting moral persons. While she has concerns in general about the effectiveness of the remedies put in place by the Turkish authorities in connection with emergency decrees, she considers that these remedies are inappropriate for these criminal-law consequences and for moral persons. She also raises concerns about recent developments jeopardising the effectiveness of individual applications to the Constitutional Court as a domestic remedy for human rights violations, mainly because of a systematic resistance by prosecutors and lower courts to comply with the spirit of the judgments and the clear case-law of the Constitutional Court.

Stressing the seriousness of the situation the Turkish judiciary is in and the urgency to act, the Commissioner calls on the Turkish authorities, as a first step, to revert to the situation before the state of emergency, in terms of constitutional and structural guarantees for the independence of judges, as well as procedural fair-trial guarantees, and then to reinforce them progressively. She also recommends a complete review of criminal legislation in the light of the clear guidance already provided to Turkey by Council of Europe bodies over the years. Considering that the prevailing attitude within the judiciary represents one of the main problems concerning the administration of justice today, she urges the Turkish authorities to change course and start respecting the independence of the judiciary both in their discourse and their actions, in particular when imperatives of human rights

require judicial actions against the authorities' expressed or perceived interests. While welcoming the authorities' Judicial Reform Strategy, the Commissioner considers that the measures taken so far do not correspond to current and future needs, which require a more comprehensive and resolute response.

Human rights defenders and civil society

Stressing the importance of civil society organisations and human rights defenders in a democratic society, the Commissioner observes that a series of negative developments, and in particular measures taken during and after the state of emergency, have created a chilling effect and contributed to an increasingly hostile environment for human rights defenders in Turkey. The Commissioner identifies a number of legislative, regulatory, administrative and procedural obstacles affecting civil society organisations, which should be addressed. She also points to the absence of transparent and objective criteria and procedures regarding public funding, consultation of and collaboration with civil society organisations, as well as for inspections and audits.

The Commissioner is concerned about an increasingly virulent and negative political discourse targeting and labelling human rights defenders as terrorists, which frequently leads to biased actions being taken by administrative authorities and by the judiciary. In particular with regard to the latter, the Commissioner notes a widespread pattern of judicial actions targeting human rights defenders, which amount to a misuse of criminal proceedings to silence them and to discourage civil society engagement.

The Commissioner raises specific concerns regarding lawyers, who have been affected by these negative developments both as human rights defenders, and as an integral part of the judicial process guaranteeing the right to a fair trial. In addition to restrictions hampering them in the exercise of their duties, a large number of judicial actions target them directly. The Commissioner urges the authorities to acknowledge the danger posed by this state of affairs and address the underlying problems.

INTRODUCTION

1. The Commissioner for Human Rights of the Council of Europe, Dunja Mijatović (the Commissioner), carried out a visit to Turkey from 1 to 5 July 2019. The visit focused on the administration of justice and the protection of human rights in the justice system (chapter 1 of this report) and human rights defenders and civil society (chapter 2).

2. During her visit, the Commissioner met with the Minister of Foreign Affairs, Mevlüt Çavuşoğlu; the Minister of Justice, Abdülhamit Gül; the Vice-President of the Constitutional Court, Engin Yıldırım; the Deputy Minister of the Interior, Muhterem İnce; the Vice-President of the Council of Judges and Prosecutors, Mehmet Yılmaz; and the Chief Ombudsman, Şeref Malkoç. She also met with representatives of bar associations and lawyers, civil society representatives and human rights defenders, journalists and academics, as well as representatives of political parties in Ankara and in Istanbul. The Commissioner also visited the penitentiary campus in Silivri, where she met with Osman Kavala, Ahmet Altan and Selçuk Kozağaçlı.

3. The Commissioner wishes to thank the Turkish authorities in Strasbourg and Ankara for their assistance in organising and facilitating the visit and for providing her with additional information following the visit. She expresses her gratitude to all her interlocutors in Turkey for sharing with her their positions, knowledge and insights.1

1 THE ADMINISTRATION OF JUSTICE AND THE PROTECTION OF HUMAN RIGHTS IN THE JUSTICE SYSTEM

4. The functioning of the justice system has been a major area of focus of the work of the Commissioner's Office in Turkey. As the case-law of the European Court of Human Rights ("ECtHR" or "the Court") shows, the Turkish judiciary has been at the heart of most human rights violations in Turkey for a very long time, either by failing to rectify violations committed by the Turkish authorities or by causing these violations directly. The Commissioner notes in particular that at the end of 2018, the ECtHR had delivered 3 148 judgments concerning Turkey finding at least one violation of the European Convention on Human Rights ("ECHR" or "the Convention"). Of these, 919 specifically concerned violations of the right to a fair trial, 755 related to the right to personal liberty and security, 603 concerned length of proceedings, and 279 the right to an effective remedy.[2] The Commissioner observes that the Turkish justice system has not managed to date to effectively tackle and prevent such violations, even though some of the dysfunctional aspects of the judicial system which are at the origin of these violations have been explicitly identified by the ECtHR in many cases.

5. The Turkish judicial system has undergone profound transformations in the last decades, with some reforms addressing long-standing human rights concerns. These included, for example, the abolition of so-called state security courts in 2004, several reforms of the Turkish Criminal Code (TCC) and the Turkish Code of Criminal Procedure (TCCP), which included the abolition of prosecutors and assize courts with special powers, or the introduction of an individual application procedure to the Turkish Constitutional Court in 2012.

6. However, the Commissioner notes that these reforms invariably failed to provide long-term solutions to prevent human rights violations. At best, their effects were short-lived, and the judiciary ultimately reverted to its old patterns. For example, when a provision in the criminal code was abolished for its excessive, non-human rights compliant use, prosecutors started using other

1 This report was finalised on 16 January 2020.
2 European Court of Human Rights, statistics of violations by Article and by State.

provisions in the statutes or other procedures to punish the same kinds of acts and expressions, in violation of the ECHR. This approach has been largely fuelled by an entrenched tendency in the Turkish judiciary to put the supposed protection of the state and security above human rights. Several root causes of this state of affairs were examined at length in a report devoted to the administration of justice in Turkey by the Commissioner's predecessor in 2012.3

7. The Commissioner notes that since the publication of that report, the Turkish judiciary has undergone major upheavals, notably following the attempted coup d'état of 15 July 2016, for which the Turkish authorities hold as responsible a network linked to Fethullah Gülen, designated as FETÖ/PDY ("Fethullahist Terrorist Organisation/Parallel State Structure"). This period was also accompanied by a general deterioration in the situation regarding human rights and increasingly acute concerns regarding the erosion of the independence of the Turkish judiciary, expressed by numerous bodies of the Council of Europe, including the Commissioner's Office, the Venice Commission and the Group of States against Corruption (GRECO).

8. The following sections contain the Commissioner's observations on three main areas of concern in connection with the administration of justice and respect of human rights by the judiciary, namely the independence of the judiciary, specific problems in the context of the criminal justice system, and issues relating to access to justice and the right to an effective remedy, followed by the Commissioner's preliminary assessment regarding the Judicial Reform Strategy recently adopted by the Turkish authorities. The final section contains the Commissioner's conclusions and recommendations.

1.1 INDEPENDENCE OF THE JUDICIARY

9. The independence of the judiciary underpins the rule of law and is essential to the functioning of a democracy and the observance of human rights. The separation of powers is the foundation of the rule of law and ensures that the executive, the legislature or the judiciary cannot individually exercise absolute authority over the state. An independent and impartial justice system not only guarantees the implementation of the right to a fair trial but also acts as a fundamental check and balance against executive and legislative powers. The effectiveness of the judiciary requires that it enjoy public confidence. Judicial independence and impartiality must exist in fact and be secured by law.

10. The ECHR (Article 6) requires a fair hearing by an independent and impartial tribunal in the determination of civil rights and obligations and of criminal charges. According to the ECtHR, independence of the judiciary refers to the necessary individual and institutional independence that are required for impartial decision making. The former relates to the judge's impartiality and the latter to defining relations with other bodies, in particular other state powers.4 Judges should not only be free from undue influences outside the judiciary, but also from instructions or pressures from fellow judges and their superiors.

11. In accordance with the case-law of the ECtHR, in order to establish whether a tribunal can be considered independent regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence, given the confidence which the courts in a democratic society must inspire in the public.5 Specific Council of Europe standards in this area include the Committee of Ministers' 2010 Recommendation (CM/Rec(2010) 12) on judges:

3 Report by Thomas Hammarberg, Commissioner for Human Rights, following his visit to Turkey from 10 to 14 October 2011: administration of justice, CommDH(2012)2, 10 January 2012.
4 See, for example, *Findlay v. the United Kingdom*, no. 22107/93, Judgment, 25 February 1997.
5 See *Çiraklar v. Turkey*, judgment of 28 October 1998, paragraph 38, *Fey v. Austria*, judgment of 24 February 1993, paragraph 30. See also Recommendation Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities, adopted on 17 November 2010.

independence, efficiency and responsibilities; the 2001 Consultative Council of European Judges Opinion no. 1 concerning the independence of the judiciary and the irremovability of judges and its 2007 Opinion no. 10 on the Council of the Judiciary at the service of society; and numerous opinions issued by the Venice Commission on the question.6

1.1.1 CONSTITUTIONAL ISSUES REGARDING THE INDEPENDENCE OF THE JUDICIARY

12. In his aforementioned report published in 2012, the Commissioner's predecessor examined in detail questions relating to the independence of the judiciary in Turkey, focusing in particular on the functioning of the then High Council of Judges and Prosecutors (HSYK), which is the main organ tasked with ensuring the integrity of the Turkish judiciary by taking decisions concerning the careers of judges and prosecutors, including appointments, promotions, transfers, and disciplinary proceedings. The crucial role of this body, which was replaced by the Council of Judges and Prosecutors (HSK) in 2017 (see below), comes from the fact that, as observed by the Venice Commission, "the powers of the Turkish HSYK to supervise and control the judges and prosecutors are not only greater than in most other European countries, but they have also been traditionally interpreted and applied in such a manner as to exert great influence on core judicial and prosecutorial powers, in a politicised manner that has been quite controversial". According to the Venice Commission, "this explains why the issue of the composition and competences of the HSYK is of such paramount importance not only to the Turkish judiciary itself, but also to political and public life in general"7.

13. Even though a previous constitutional referendum in 2010 represented an institutional improvement, in that it allowed for most members of the HSYK to be elected by judges and prosecutors among their peers, the Commissioner's predecessor identified various problems in 2012, such as the facts that the Minister of Justice nominally presided over the body, that the Minister's Undersecretary was a natural member, and that there had been strong indications that the executive power had sought to exert influence in the election process and had succeeded.

14. However, the Commissioner considers that these concerns have been largely overshadowed by far more serious ones as a result of new constitutional changes introduced in 2017. The Commissioner observes that the new composition of the HSK allows for all the members of the HSK to be appointed either by the President of the Republic or the Parliament, without a procedure guaranteeing the involvement of all political parties and interests. This means that no member of the HSK is elected by their peers, in clear contradiction with European standards which foresee that at least half of the members of judicial councils that are in charge of overseeing the professional conduct of judges and prosecutors (including appointments, promotions, transfers, disciplinary measures and dismissals of judges and public prosecutors) should be elected by judges among their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.8

15. As a result, the Commissioner's predecessor,9 the Venice Commission10, the Group of States against Corruption (GRECO)11 and the Parliamentary Assembly12 criticised this change. Before the

6 See Venice Commission Report on the independence of the judicial system, Part I: the independence of judges, CDL-AD(2010)004, 16 March 2010. The Venice Commission also identified benchmarks for assessing the independence and impartiality of the judiciary and individual judges in its Rule of Law Checklist, CDL-AD (2016)007, 18 March 2016.
7 See Venice Commission Interim Opinion on the Draft Law on the High Council for Judges and Prosecutors, CDL-AD(2010)42), 17-18 December 2010.
8 Recommendation (CM/Rec(2010) 12) on judges, para. 27.
9 Statement by Nils Muižnieks, Commissioner for Human Rights, 7 June 2017.
10 Venice Commission Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, CDL-AD(2017)005, 10-11 March 2017.
11 Compliance Report by the Group of States against Corruption, Fourth Evaluation Round: Corruption preve(ntion in respect of members of parliament, judges and prosecutors, GrecoRC4(2017)16, 18 October 2017.
12 Resolution 2156(2017) of the PACE on the functioning of democratic institutions in Turkey reopening the monitoring procedure in respect of Turkey, 25 April 2017.

entry into force of these constitutional amendments, the Venice Commission had warned that "the enhanced executive control over the judiciary and prosecutors which the constitutional amendments would bring about would be even more problematic, in the context in which there have already been longstanding concerns regarding the lack of independence of the Turkish judiciary. The amendments would weaken an already inadequate system of judicial oversight of the executive"13.

16. The Commissioner notes that these changes also need to be seen against the backdrop of the general approach of the new constitutional system: In particular, the new constitutional setup gives the President of the Republic very extensive powers, drastically limits checks on these powers by the legislative and the judiciary, and no longer requires the President to be a neutral figure above party politics. On the contrary, the Constitution explicitly allows for the President to remain also the leader of a political party. For these and many other reasons, the Venice Commission had declared in its opinion on these amendments to the Constitution, before they were submitted to a referendum, that it was "of the view that the substance of the proposed constitutional amendments represents a dangerous step backwards in the constitutional democratic tradition of Turkey". It stressed "the dangers of degeneration of the proposed system towards an authoritarian and personal regime. In addition, the timing is most unfortunate and is itself cause of concern: the current state of emergency does not provide for the due democratic setting for a constitutional referendum."14

1.1.2 THE INDEPENDENCE OF JUDGES AND PROSECUTORS

17. According to the case-law of the ECtHR, the four elements underpinning judicial independence are the manner of appointment, term of office, the existence of guarantees against outside pressure and whether the judiciary appears as independent and impartial.15

18. The Commissioner observes that the constitutional changes examined above were introduced in an environment where many other factors contributed to a deterioration of the independence of the judiciary, in particular as regards the safety and security of tenure of judges. In a memorandum on freedom of expression published in February 2017, the Commissioner's predecessor listed a number of developments since 2013, which led to higher numbers of forced relocations of members of the judiciary, as well as investigations, suspensions and dismissals. He noted that, while these measures were ostensibly aimed at Fethullah Gülen sympathisers within the judiciary, many interlocutors were of the view that they had produced an atmosphere of apprehension and fear within the judiciary in general, exacerbating or reviving state-centrist attitudes and a reluctance to draw attention to oneself, for example by taking controversial decisions upholding freedom of expression.16

19. The Commissioner notes that this already worrying situation changed considerably for the worse during the state of emergency declared after the coup attempt of July 2016: almost one third of the judiciary, around 4 000 judges and prosecutors, were dismissed in this period, based on extraordinary powers granted to the HSYK and high courts. This occurred despite the warnings of the Commissioner's predecessor that the decisions of the HSYK did not meet the standards that should be applicable to the dismissal of the members of the judiciary.17 The Commissioner notes,

13 CDL-AD(2017)005, *op.cit.*, para. 129.
14 CDL-AD(2017)005, *op.cit.*, para. 133.
15 *Campbell and Fell v. the United Kingdom*, judgment of 28 June 2014.
16 Memorandum on freedom of expression and media freedom in Turkey, by Nils Muižnieks, Commissioner for Human Rights, CommDH(2017)5, 15 February 2017.
17 Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, CommDH(2016)35, 7 October 2016, paragraph 29.

in particular, that the operative part of these decisions only contained a universal, stereotypical and non-individualised reasoning to which lists of 2 845 and 543 names were simply appended.

20. In this period, the Constitutional Court also dismissed two of its judges, based on "information from the social environment" (*sosyal çevre bilgisi*) and the "common opinion emerging over time" (*zaman içinde oluşan ortak kanaatler*) among members of the Constitutional Court "which suggested that the applicant had links to the organisation in question". The majority of the judges dismissed, including the judges of the Constitutional Court, were subsequently detained in connection with criminal proceedings for membership in a terrorist organisation. In this connection, the Commissioner notes in particular a judgment delivered by the ECtHR in April 2019, finding that the dismissal and pre-trial detention of one of the two Constitutional Court judges in question had not only disregarded the procedural safeguards afforded to the members of the Constitutional Court (and therefore could not be considered to be "in accordance with a procedure prescribed by law"), but that the initial detention had not been based on any factual evidence.18 The Commissioner also notes that the UN Working Group on Arbitrary Detention held that the detention of two other judges had been arbitrary.19

21. Despite all these considerations and the lifting of the state of emergency, the Commissioner observes that the Turkish authorities opted to extend the emergency powers underpinning these dismissals for a further three years by adopting Law No. 7145 in July 2018. This means that one of the most basic guarantees of judicial independence is effectively suspended until July 2021.

22. The Commissioner's attention was also drawn to the fact that in July 2016 the Turkish authorities closed and liquidated YARSAV, an association of judges and prosecutors founded in 2006 with over a thousand members, by means of an emergency decree. This association had been vocal in defending the independence of the judiciary, as the only Turkish member organisation of the International Association of Judges, including by denouncing the organisation of Fethullah Gülen sympathisers within the judiciary when this was being officially denied by the authorities. Its president was subsequently detained and finally sentenced to 10 years in prison, in what was considered a severe and gross attack on the independence of the judiciary and a violation of due process by the UN Special Rapporteur for the independence of judges and lawyers.20

23. The Commissioner also notes that, according to the figures provided by the HSK during her visit, 9 914 judges and prosecutors had been recruited after the declaration of the state of emergency. Already in 2012, the Commissioner's predecessor identified several problems regarding the recruitment of judges, including the fact that the majority of members of the board conducting the interviews for the candidate judges were representatives of the executive. According to the information provided to the Commissioner, the recruitment procedure was further accelerated during the state of emergency, becoming even more opaque and exclusively controlled by the Ministry of Justice. She notes with concern consistent reports that loyalty to the ruling coalition appears to have become a key criterion for selection in this context. It is also noteworthy that induction ceremonies for new judges and prosecutors and the opening of the judicial year are now held in the Presidential Palace, which reinforces the public's perception of politicisation of the judiciary and of the control exerted on it by the executive.

24. The Commissioner also notes that recruitment criteria were substantially relaxed during the state of emergency in order to fill the gap left by dismissed judges and prosecutors. However, although this increased in principle the need for pre-service and in-house training, Turkey also abolished the Justice Academy (a judicial, semi-autonomous body responsible for this training since 2003) in the

18 *Alparslan Altan v. Turkey*, judgment of 16 April 2019.
19 Human Rights Council, Working Group on Arbitrary Detention, Opinion No. 53/2019 concerning Melike Göksan and Mehmet Fatih Göksan (Turkey), 18 September 2019.
20 Statement by the UN Special Rapporteur on the independence of judges and lawyers of 6 February 2019.

same period and gave this task directly to the Ministry of Justice. The Commissioner observes that the Justice Academy was re-established in May 2019 as a nominally autonomous body, while noting that not only is it organically attached to the Ministry of Justice, but its new legal basis is a presidential decree, which means that the President of the Republic can unilaterally revoke it.

25. The Commissioner further notes that, in its interim report adopted in March 2019, the Council of Europe's Group of States against Corruption (GRECO) concluded that its recommendations regarding judges and prosecutors had not been implemented. In addition to the concerns relating to the composition of the HSK, it noted that "the executive has kept a strong influence on a number of key matters regarding the running of the judiciary: the process of selecting and recruiting candidate judges and prosecutors; reassignments of judicial officeholders against their will; disciplinary procedures; strong organisational links with the Turkish Judicial Academy"21.

26. During her visit, the Commissioner's interlocutors referred to many examples of judges being arbitrarily moved after delivering controversial judgments upholding the human rights of accused persons, of judges with known biases being appointed to ongoing politically sensitive cases, or of such cases being allocated to courts more likely to deliver a certain kind of judgment, which lend further credibility to allegations of partiality of the judiciary, and HSK in particular, to political interests.

1.1.3 SIGNS OF PARTIALITY OF THE JUDICIARY TO POLITICAL INTERESTS

27. Members of the executive and the legislature have a duty to avoid criticism of the courts, judges and judgments that would undermine the independence of or public confidence in the judiciary and actions which may call into question their willingness to abide by judges' decisions22. However, the Commissioner observes that members of the Turkish executive and legislature have criticised courts in the past and continue to make public comments on ongoing judicial cases, disregarding the presumption of innocence of the suspects and casting doubt on the respect for due process. In fact, as further detailed in the next section, members of the executive are often the initiators of criminal proceedings with their complaints.

28. In a context where various safeguards concerning the independence and security of tenure of judges and prosecutors were eroded both *de jure* and *de facto*, such statements appear to have a strong impact on the way the judiciary deals with such cases, including in the form of a disregard of international human rights standards and even the established case-law of higher domestic courts. The Commissioner notes, in this connection, that the ECtHR held in a recent case that speeches made by the highest-ranking official in Turkey regarding the applicant who was in pre-trial detention and the correlation between these speeches and the bill of indictment concerning him, corroborated the argument that his detention pursued the ulterior purpose of reducing him to silence.23

29. Another concern often expressed by the Commissioner's interlocutors were smear campaigns in pro-government media, which many perceive to be a strong influence on the attitude of prosecutors and the outcome of legal proceedings. In this connection, a particularly worrying issue that the Commissioner raised previously is the fact that confidential information from case files

21 Interim Compliance Report by the Group of States against Corruption, Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors, GrecoRC4(2019)7, 22 March 2019.
22 Recommendation (CM/Rec(2010) 12) on judges.
23 *Kavala v. Turkey*, judgment of 10 December 2019 (not yet final), paras. 229 and 230; in the same sense, also see *Selahattin Demirtaş v. Turkey (No. 2)*, judgment of 20 November 2018 (referred to the Grand Chamber on 18 March 2019).

appears to be deliberately leaked to such media, even where the accused have no access to their file themselves.24

30. The Commissioner also notes numerous signs that the Turkish judiciary is influenced by the political conjuncture. In addition to many examples illustrating this problem in the context of detentions (see below), her attention was drawn to a number of criminal cases which stand out in that they specifically target opposition politicians, such as members of parliament and elected mayors of HDP, or the President of the Istanbul branch of CHP, and which exhibit clear signs of political motives in their timing, co-ordination in prosecutorial actions, affectation to specific judges, as well as defiance of legal precedents. In this connection, the ECtHR held notably, in finding a violation of Article 18 of the Convention, that concordant factors supported "the argument that the judicial authorities reacted harshly to the [conduct of the applicant, Co-President of HDP], bearing in mind his position as one of the leaders of the opposition, and to the conduct of other HDP members of parliament and elected mayors, as well as to dissenting voices more generally".25

31. However, the concerns of the Commissioner are not limited to criminal proceedings. A striking recent example which highlighted the severity of the problem was a number of highly controversial decisions taken by the High Electoral Council (YSK), following the municipal elections of 31 March, which were criticised by the Council of Europe's Congress of Local and Regional Authorities26 and by the Secretary General of the Organisation at the time27. YSK, which is a judicial body composed of judges appointed from the highest courts in Turkey, went against long-established legal precedents, under pressure from the Turkish government according to the Congress, notably by (i) annulling the victory of a number of HDP elected officials in South-Eastern Turkey, on the ground that they had been dismissed with emergency decrees, despite the fact that it had allowed them to run in the first place. Even more controversially, it declared as winners the candidates with the second highest number of votes, all members of the ruling political party; (ii) annulling the Istanbul mayoral elections, mainly on the ground that the ballot box committees had not been constituted legally, despite the fact that local electoral councils had used the YSK's own instructions and existing precedent to do so. Furthermore, it cancelled only one out of the four concomitant local elections in Istanbul, which all used the same envelope, same ballot boxes, and the same committees.

32. In summary, the Commissioner observes that the practice since the entry into force of the 2017 constitutional amendments and the effects of the various measures disregarding the independence of the judiciary confirmed the validity of the concerns expressed by various Council of Europe bodies, in that the judiciary appears to be giving increasingly uniform and partisan judgments strongly implying a political motivation.

1.2 ISSUES RELATING TO THE CRIMINAL JUSTICE SYSTEM

1.2.1 GENERAL OBSERVATIONS ON TURKISH CRIMINAL LAW AND ITS APPLICATION

33. The functioning of the criminal justice system in Turkey has been a long-standing concern for the Commissioner's Office and a cause of many violations of the ECHR as attested in the extensive case-law of the Court. Part of the problem stems from laws which allow for a wide margin of appreciation, in particular a very broad definition of acts considered to be terrorist offences.

24 Third Party Intervention of 20 December 2018, *Mehmet Osman Kavala v. Turkey*, by Dunja Mijatović, Commissioner for Human Rights, CommDH(2018)30, para. 32.
25 *Selahattin Demirtaş v. Turkey (No. 2)*, judgment of 20 November 2018 (referred to the Grand Chamber on 18 March 2019).
26 Report of the Congress of Local and Regional Authorities on local elections in Turkey and Mayoral re-run in Istanbul (31 March and 23 June 2019), CG37(2019)14final, 31 October 2019.
27 Statement by Thorbjørn Jagland, Secretary General of the Council of Europe, of 6 May 2019.

34. The Commissioner observes that, despite a number of reforms in the intervening period, serious problems and shortcomings continue to affect the Turkish Criminal Code (TCC), the Anti-Terrorism Law, and the Code of Criminal Procedure (TCCP).

35. For example, the Venice Commission examined in 2016 several articles of the TCC (Article 216 on criminalising public incitement to hatred or hostility and degrading sections of the public; Article 220 on armed criminal organisations; Article 299 on insulting the President of the Republic; Article 301 on degrading the Turkish Nation, the state or its institutions; Article 314 on membership of an armed criminal organisation). In its opinion, the Venice Commission came to the conclusion that, despite some positive changes in the wording of these articles and attempts by the Court of Cassation to limit their application, progress had been clearly insufficient and that all these articles continued to allow for excessive sanctions and had been applied too widely, penalising conduct protected under the ECHR and the International Covenant on Civil and Political Rights. The Venice Commission underlined, in particular, that "prosecution of individuals and convictions in particular by lower-courts, which have a chilling effect on the freedom of expression, must cease. This is not sufficient if individuals are in some cases finally acquitted by the Court of Cassation after having been subject of criminal prosecution for several years."28

36. However, the Commissioner notes that the problem is not limited to the mere wording of the laws and is determined to a large extent by the entrenched practice in the Turkish judiciary, as the extensive work of her Office, the case-law of the ECtHR and the opinions of the Venice Commission clearly show. This is also confirmed by the fact that numerous improvements in the wording of laws in recent years were offset by the judiciary, which kept using other criminal law provisions with exactly the same effects. In particular, the work of the Commissioner's Office on Turkey has consistently pointed to an overbroad interpretation by the Turkish judiciary of what constitutes terrorism or membership of an armed criminal organisation despite all the changes over the years.

37. In this connection, the Commissioner wishes to recall the guarantee enshrined in Article 7 of the ECHR (no punishment without law), which is an essential element of the rule of law from which no derogation is permissible under Article 15 of the ECHR. This provision prohibits, *inter alia*, extending the scope of existing offences to acts which previously were not criminal offences, and lays down the principle that criminal law must not be extensively construed to an accused's detriment, for instance by analogy. When it comes to terrorism-related offences, the ECtHR recently clarified in the context of the overwide application of the Turkish Anti-Terrorism legislation, that the legitimacy of the fight against terrorism "does not mean that the fundamental safeguards enshrined in Article 7 of the Convention, which include reasonable limits on novel or expansive judicial interpretations in the area of criminal law, stop applying when it comes to prosecution and punishment of terrorist offences. The domestic courts must exercise special diligence to clarify the elements of an offence in terms that make it foreseeable and compatible with its essence".29

38. As mentioned above, a core reason for the problem of the overbroad interpretation of laws in Turkey is the prevailing attitude within the Turkish judiciary to give precedence to the protection of perceived interests of the state over individuals' human rights.30 One manifestation of this attitude is the long-standing problem of impunity and lack of effective investigations into alleged violations of human rights by security forces, a problem which has been highlighted time and time again by the Commissioner's Office31 and has given rise to numerous findings of human rights violations by the ECtHR with respect to Turkey. Another manifestation is the use of the Turkish

28 Venice Commission Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002, 11-12 March 2016, paras. 123 and 124.
29 *Parmak and Bakır v. Turkey*, ECtHR judgment of 3 December 2019.
30 Third Party Intervention of 20 December 2018, *Mehmet Osman Kavala v. Turkey*, by Dunja Mijatović Commissioner for Human Rights, CommDH(2018)30, para. 35.
31 See, for example, CommDH(2012)2, *op.cit.* or CommDH(2016)35, *op.cit.*

Criminal Code and Anti-Terrorism legislation to punish acts or statements which are deemed by judicial authorities merely to coincide with the aims of, or supposed instructions given by, a terrorist organisation, where there is no material evidence to prove membership of the said organisation.

39. As examined in the previous section, the erosion of the independence of the judiciary in recent years fostered a climate of fear within the Turkish judiciary, boosting conformism and exacerbating the already existing tendency to punish persons who are perceived to be against the government. This is often based on the prevailing discourse at the highest political level, for example portraying human rights defenders as enemies of the state or terrorist sympathisers, targeting them both personally and as a group.32 The Commissioner notes that the executive continues to actively contribute to this process in other ways, for example by denouncing what they consider to be criminal action, and frequently intervening in criminal cases as third parties. This can be seen in the criminal case concerning the Gezi events, for instance, where the members of the government in office in 2013, including the then Prime Minister, are included as third parties in the proceedings as victims. The Commissioner was also informed that many criminal proceedings under Article 299 of the TCC, concerning the offence of insulting the President of the Republic, were initiated as a direct result of complaints by the President.

40. As a result of these developments, the Commissioner observes that, in particular since the beginning of the state of emergency, prosecutors, and increasingly also the courts, cast the net ever more widely against those whom they consider as terrorists and members of a criminal organisation. Thus criminal proceedings have been initiated in the last years which were not foreseeable even for those who were familiar with the Turkish justice system. As an indication of the scale of the issue, the Commissioner observes for example that according to official statistics there have been 43 553 convictions to prison sentences under Article 314 of the TCC concerning membership of armed criminal organisations and 2 280 under the Anti-Terrorism Law in 2018.33 The Commissioner also notes that this period was accompanied by the introduction into the Turkish legal order of new, poorly defined concepts such as acting in union or junction with a criminal organisation ("*iltisak*") or having contacts with such an organisation ("*irtibat*"), which appear to have further blurred the lines between lawful and criminal actions.

41. The prosecutions that were initiated against Academics for Peace and the convictions of members of the executive board of the Turkish Medical Association, whose calls for peace were interpreted as propaganda for terrorism, provide a good illustration of this development. The Commissioner notes that over 700 academics faced criminal proceedings in this connection and that around 170 were sentenced to prison terms of between 15 and 30 months. While welcoming the fact that the Constitutional Court appears to have rectified this situation in July 2019, she considers that this does not alter the fact that these proceedings and the accompanying administrative measures ended the careers of hundreds of academics and created a strong chilling effect which will be very difficult to reverse.

42. However, the Commissioner observes that this approach is not limited to the catch-all use made of the crime of propaganda for a terrorist organisation. Prosecutors and courts have also significantly expanded the limits of the offence of membership of a criminal organisation, in the sense that increasingly harmless acts are being considered as evidence of such membership. In the case of the Cumhuriyet newspaper, for instance, the courts went as far as considering a perceived deviation from the newspaper's original editorial line as evidence for links with both FETÖ/PDY and Kurdistan Workers' Party (PKK).

32 CommDH(2018)30, *op.cit.*, para. 37.

33 Statistics accessed on the website of the Ministry of Justice on 26 November 2019.

43. The increase in legal uncertainty is also not limited to the realm of freedom of expression. The state of emergency and the criminal proceedings concerning membership of FETÖ/PDY appear to have had a particularly negative legacy in this respect: in most cases, membership of FETÖ/PDY was primarily determined by such acts as the use of a smartphone application called "Bylock", deposits in Bank Asya, and links with or using the services of schools or hospitals associated with Fethullah Gülen. This approach overlooks the fact that these institutions were operating under licenses delivered by the relevant state bodies until the coup attempt in July 2016 and is based on the assumption that the persons concerned should have known not to trust these licenses and severed their ties with these institutions. The Commissioner notes in this respect a view adopted on 26 March 2019 on an individual communication under the Optional Protocol to the ICCPR, where the UN Human Rights Committee considered that detention, the evidence for which was solely based on Bylock use and deposits in Bank Asya, amounted to a violation of the International Covenant on Civil and Political Rights.34

44. The Commissioner considers that the implications of this approach are worrying for the principles of legal certainty, foreseeability of criminal offences and the rule of law in general, as anyone can retroactively be considered a member of a criminal organisation long after the events in question. In the opinion of the Commissioner, this is also the core issue in the ongoing case concerning the Gezi events.

45. The indictment in this case, which is particularly remarkable by the absence of objective indicators of criminal activity, is symptomatic of more general problems concerning the actions of prosecutors. The Commissioner's predecessor had already pointed out in 2012 that indictments could become overly long, sometimes running into thousands of pages, especially in cases relating to terrorism and organised crime, owing to the fact that they are often limited to "a compilation of pieces of evidence, such as long, indiscriminate transcripts of many wire-tapped telephone conversations, some of which reportedly bear little relevance to the offence in question". He recommended that the prosecutors should have the qualifications and resources needed in order to appropriately filter and assess evidence and "prepare indictments of a high quality, containing sound legal analysis which connects essential pieces of evidence to the accusation".35

46. These concerns continue to fully apply at present. For example, the 657-page indictment presented in the Gezi events case exhibits the problem of an indiscriminate listing of various, lawful acts, including contacts with the Commissioner's predecessor, without any attempt to establish how they can be interpreted as proof of a specific criminal activity or to balance supposed security concerns against human rights. This suggests that prosecutors can use perfectly lawful acts to justify the prosecution and detention of a person, if they wish to do so, without being corrected by courts. On the other hand, the Commissioner notes that the courts and prosecutors dismissed the very serious concerns that the evidence collected against the defendants, particularly the wiretaps ordered by prosecutors who were subsequently dismissed or convicted for membership of a terrorist organisation, was obtained illegally. The Commissioner also notes that some of the defendants had been previously tried and acquitted in connection with their involvement in the Gezi events, raising serious concerns about the respect of the right not to be tried or punished twice for the same offence as protected under Article 4 of Protocol No. 7 to the ECHR.

47. The ECtHR confirmed these concerns by stating that this indictment was "essentially a compilation of evidence" some of which had limited bearing on the offence in question, contained no succinct statement of the facts establishing criminal liability, and referred to "multiple and completely lawful acts that were related to the exercise of a Convention right and were carried out in

34 CCPR/C/125/D/2980/2017, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2980/2017, 26 March 2019
35 CommDH(2012)2, *op. cit.*

cooperation with Council of Europe bodies". According to the Court, the inclusion of these elements undermined the credibility of the prosecution's arguments.36

48. In her third party intervention concerning this application before the ECtHR, the Commissioner also made more general observations on the state of criminal justice in Turkey, pointing out that in this and similar cases, the prosecutors and courts impugn a criminal motive or presumed intention on the suspect first, before collecting or examining the available evidence, rather than going from evidence towards guilt. This approach manifests itself at every stage of the criminal proceedings, including investigations, arrests and detentions, but also increasingly when it comes to trials, convictions and sentencing. This contributes to a situation where actions which should be considered lawful in a democratic society, including statements and acts protected under the ECHR, are re-interpreted as circumstantial evidence used to prove criminal intent to commit very serious offences, thus undermining legal certainty and reinforcing the serious chilling effect on all sectors of Turkish society. For the Commissioner, this entails a clear risk of resulting in judgments of intentions ("*procès d'intention*"), where no amount of material evidence can prove the person's innocence. 37

49. While the Commissioner notes that higher courts, such as the Court of Cassation and the Constitutional Court, occasionally correct the most obvious excesses of prosecutors and lower courts, these do not appear to lead to a general course correction by the latter, who treat them as individual cases. In any event, these higher court judgments arrive too late to mitigate the chilling effect caused by the criminal proceedings.

50. In summary, while many of the long-standing concerns regarding the application of criminal law provisions continue to apply, the situation significantly deteriorated in recent years. As a result, the Commissioner observes that unlawful interferences with rights and freedoms enshrined in the ECHR expanded both in scale and scope. Disregard within the judiciary of the most basic principles of law necessary to have a system of rule of law, such as presumption of innocence, non-retroactivity of offences, not being judged for the same facts twice, as well as legal certainty and foreseeability of criminal acts, has reached such a level that it has become virtually impossible to assess objectively and in good faith whether a legitimate act of dissent or criticism of political authority will be re-interpreted as criminal activity by Turkish prosecutors and courts.

1.2.2 SPECIFIC CONSIDERATIONS REGARDING DETENTIONS IN CRIMINAL PROCEEDINGS

51. The use of detention in criminal proceedings and its effects on the enjoyment of human rights in Turkey has been a serious long-standing concern of the Commissioner's Office. The findings of successive Commissioners show a consistent pattern in the practice of the Turkish judiciary deviating from international and European human rights standards, including premature arrests, insufficiently motivated initial pre-trial detention decisions, serious deficiencies in the review procedures concerning the continuation of detention, as well as the length of detention.

52. In this connection, the Commissioner wishes to highlight several problematic practices which continue to raise concerns despite several legislative amendments regarding the criminal procedure. These include (i) the lack of restraint by prosecutors in initiating proceedings, including in unmeritorious cases; (ii) arrests of suspects occurring at a very early stage of the investigations, leading to long detentions before even their indictment; (iii) a long-established practice among Turkish prosecutors of going from arrest of suspected persons towards evidence, rather than collecting evidence to establish well-founded suspicions in the first place; (iv) defective reasoning of detention decisions, and particularly the automaticity of those extending detention; (v) failure

36 *Kavala v. Turkey*, judgment of 10 December 2019 (not yet final), paras. 149 and 223.
37 CommDH(2018)30, *op. cit.*

to resort to alternatives to detention; (vi) long periods spent in detention amounting to "internment by remand".

53. The Commissioner regrets that, although the initial period after the introduction of the individual application procedure before the Turkish Constitutional Court and progressive judgments of the latter provided some prospects for improvement, the current situation is characterised by more and more lower courts resisting the more Convention-compliant case-law of the Constitutional Court in the matter of detentions.

54. A large number of cases from Turkey regarding detentions is pending before the ECtHR, including many to which the Commissioner's Office is a third party. Some of the most pressing concerns regarding arrests and pre-trial detentions highlighted in these third-party interventions concern in particular:

- a high number of cases where the suspects' arrest, initial and continued pre-trial detention were based on spurious charges with no *prima facie* evidence, and thus the failure to establish reasonable suspicion within the meaning of the Court's case-law (for example, the lack of any reference to material evidence other than purely journalistic activities);
- even where reasonable suspicion may exist, failure to demonstrate other relevant and sufficient grounds to justify deprivation of liberty (such as necessity and proportionality);
- the stereotypical, formulaic and abstract nature of the detention orders of criminal judges of the peace and other courts, lacking any detailed analysis and reasoning regarding the specifics of the case;
- the problems of the so-called "catalogue crimes", still part of the Turkish legal order, which create a legal presumption in favour of detention, purely based on the offence under which the prosecutor happens to bring charges, and leads to the quasi-automaticity of detention.

55. Regarding the question of initial and continued detention decisions taken by criminal judgeships of the peace, in addition to her more general observations on these formations in the next section, the Commissioner notes that the closed-circuit appeals system of these courts render the denial of requests for release virtually automatic. The problem of insufficient reasoning based on stereotypical formulations seems to have become generalised for all lower criminal courts. Particularly in cases attracting political interest – or where the executive gives a clear signal as to the presumed guilt of the persons concerned – the Turkish courts appear to offer little resistance, even in cases where the material evidence available is clearly insufficient within the meaning of Article 5 of the ECHR. As a result of this situation, the Commissioner notes that in November 2018 the ECtHR found for the first time in a case against Turkey that continued detention had been used primarily with the ulterior purpose of stifling pluralism and limiting freedom of political debate, in violation of Article 18 of the Convention,38 an assessment later confirmed in the aforementioned *Kavala v. Turkey* judgment of 10 December 2019.

56. The possibility for prosecutors to challenge decisions by courts to release detainees, a new power introduced during the state of emergency (TCCP Article 104), is reported to have severely exacerbated the problem. This power appears to have been inappropriately used by prosecutors in many prominent cases, including one in which the release decision of a court regarding a number of detained lawyers was immediately reversed and the judges subjected to disciplinary proceedings (see below under the section on lawyers). The Commissioner, who publicly stated on 13 November 2019 that she was appalled by the re-detention of Ahmet Altan, after he was released under judicial control the previous week, notes that this re-detention was again the result of the exercise of this new power.

38 *Selahattin Demirtaş v. Turkey (No. 2)*, judgment of 20 November 2018 (referred to the Grand Chamber on 18 March 2019).

57. A further issue in connection with the use of detention in the Turkish criminal justice system is the question of the effectiveness of the Constitutional Court as a remedy in detention cases, which the Commissioner will examine separately under the relevant section below.

1.2.3 ISSUES CONCERNING ADVERSARIAL PROCEEDINGS, EQUALITY OF ARMS AND RIGHT TO A LAWYER

58. In the case-law of the ECtHR, adversarial proceedings and equality of arms are essential components of the right to a fair trial guaranteed under Article 6 § 1 of the ECHR. According to the ECtHR the right to adversarial proceedings implies the right for the parties "to have knowledge of and comment on all evidence adduced or observations filed. […] What is particularly at stake here is litigants' confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file".39

59. Criminal proceedings in Turkey raise a number of concerns as regards adversarial proceedings and the principle of equality of arms, including certain restrictions to the right to defence. The aforementioned 2012 report on the administration of justice in Turkey by the Commissioner's predecessor identified many problems in this respect, which concerned every stage of criminal proceedings and many of which are still of relevance. The following is a non-exhaustive list of the most prominent issues that need to be addressed by the Turkish authorities in the Commissioner's opinion.

60. As regards pre-trial investigations, one of the main issues raised by the Commissioner, for example in a third party intervention to the Court,40 concerns the restriction of access to the case file by the defence lawyer, a problem which has become more acute and generalised in recent years. The Commissioner reiterates that the principle of equality of arms is routinely undermined in Turkey by such restrictions which seriously curtail the ability to challenge detentions, especially where there is no objective reason justifying such an access restriction. She notes in particular that decisions to restrict access to the investigation file, including for example very crucial witness testimonies, the credibility of which can therefore not be challenged, are currently being taken almost as a matter of course based on highly stereotypical formulas, with no explicit reasoning balancing the human rights of the suspect against the need to protect the integrity of the criminal proceeding. While during the state of emergency, the power to restrict access to the investigation file was given directly to the prosecutor (without court control), the Commissioner understands that this provision was later abrogated.

61. A new development in this regard, already referred to by the Commissioner above, is that highly confidential information from the investigation file seems to be used frequently in smear campaigns against suspects in pro-government media, despite the fact that the same information is unavailable to the suspect.41 This fact lends further credibility to the view that the motivation behind these decisions is the restriction of defence rights of the suspects, rather than the protection of the integrity of the investigation.

62. As concerns the use of protective measures (which in the context of Turkish criminal procedure denote measures designed to ensure the smooth functioning of the criminal proceedings or enforcement of a judgment, including arrest, detention and other restrictions of personal freedom, searches and seizures, interception of communications and secret investigation techniques), in addition to the issues relating to detention examined in the previous section, the 2012 report raised notably the fact that there was very little judicial control on measures such as wiretaps, and that requests by prosecutors for interception of communications was quasi-automatic. The main

39 *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, paragraphs 24 and 29.
40 CommDH(2018)30, *op. cit.*
41 *Ibid.*, para. 32.

development since that time is the fact that most of these protective measures are now enforced by criminal judgeships of the peace, and the numerous concerns the Commissioner will detail in the next section on these judicial formations are therefore applicable.

63. Regarding the indictment process, the 2012 report found that the courts did not make a thorough assessment of indictments presented by prosecutors before accepting them, and that the defence lawyers were not included in this process. In the light of the Commissioner's observations above, this continues to be a major concern. The Commissioner understands that the first legislative package under the new Judicial Reform Strategy (see below) includes provisions which expand the possibility of rejecting indictments. It is too early, however, to assess the practical impact of these measures.

64. As for the trial phase, in 2012, the Commissioner's predecessor raised the issues of the limitations on the defence to cross-examine witnesses and experts, and summon their own witnesses, as well as an over-reliance on experts. The question of "secret witnesses" was also a major issue, and remains so, in particular after the state of emergency and a number of criminal proceedings that relied essentially on the denunciations of repentant former members of FETÖ/PDY who became informants for the prosecution and whose identities were kept secret.

The legacy of the state of emergency

65. During the state of emergency, many changes were made to the relevant laws, and in particular dozens of changes to the Turkish Code of Criminal Procedure (TCCP), through emergency decrees adopted by the executive, bypassing the ordinary legislative process. The Commissioner observes that many of these changes severely restricted the rights of suspects and defendants at all stages of criminal proceedings, and eliminated ordinary safeguards to ensure fair and adversarial proceedings.

66. The Commissioner notes that some of these changes were eventually rolled back at the end of the state of emergency, such as the one extending the period of incommunicado detention from 24 hours to 14 days. The Commissioner regrets to note, however, that by virtue of a provisional Article added to the Anti-Terrorism Law by Law No. 7145 adopted at the end of the state of emergency, the period of incommunicado detention for terror-related offences was extended to four days, renewable two times by criminal judges of the peace, bringing the maximum total to 12 days. This provision will remain valid until July 2021.

67. Many other emergency measures have been subsequently converted into law on a permanent basis and remain applicable today, compounding existing problems. The Commissioner would particularly like to draw attention to:

- the possibility for prosecutors to challenge decisions by courts to release detainees (TCCP Article 104) which, as mentioned above, is used by prosecutors frequently and inappropriately;
- extension of the maximum detention period for terrorism cases from five to seven years (TCCP Article 102);
- various limitations to the right to cross-examine secret investigators and witnesses;
- possibility for courts to refuse hearing a defence witness, when it considers that the request has been made to "extend the proceedings" (TCCP Article 178);
- restriction on the right of the defendant to be present in the courtroom, if the court decides to hear them through videoconference (TCCP Article 196).

68. One of the most problematic aspects of these changes is a series of limitations imposed on the right to a defence counsel, as well as very severe restrictions to the client-lawyer privilege. The most important change in this respect is that meetings between lawyers and clients, both detainees and convicts, can now be strictly limited in duration, monitored by a prison official (including for documents exchanged between lawyer and client) and recorded in full. Human Rights Watch reports that this possibility, rather than being an exception, is in practice widely applied and "has

become the rule for FETÖ detainees".42 Lawyers consistently reported to the Commissioner that this makes it virtually impossible to prepare a defence.

69. There are other remnants of emergency measures which impose strict limits on the right to retain a lawyer, such as:

- widened powers for courts to bar certain lawyers from acting as defence counsel for a particular client (for up to two years) (TCCP Article 151);
- limiting lawyers, who are under criminal investigation, from accessing their clients;
- limitation of the maximum number of lawyers during court proceedings to three in organised crime cases (TCCP Article 149);
- possibility for courts to hear defendants and pronounce sentences, even in the absence of a lawyer (TCCP Articles 188 and 216).

70. The Commissioner considers that, in addition to needlessly obstructing lawyers' work, these measures worsened an already worrying situation regarding the right to a fair trial. This is a major concern for organised crime and terrorism-related cases where, as described above, a particularly loose application of criminal law provisions continues to affect tens of thousands of defendants.

1.2.4 CONCERNS REGARDING CRIMINAL JUDGESHIPS OF THE PEACE

71. The Commissioner raised on several occasions her particular concerns about the functioning and decisions of criminal judgeships of the peace, also referred to as magistrates' courts, which are judicial formations established in June 2014.43 Although the criminal judgeships of the peace were intended to improve the protection of human rights in criminal proceedings by centralising expertise and knowledge of ECHR standards, the Commissioner observes that the practical effect has been the opposite, as the decisions of these judges have been at the origin of some of the most obvious violations of human rights, in particular the rights to liberty and security and to freedom of expression.

72. In 2017, the Commissioner's predecessor examined these judicial formations, concluding that, in terms of the right to freedom of expression, they were "at the nexus of some of the most problematic decisions, including detentions, media bans, appointment of trustees for the takeover of media companies and internet blocking".44 He observed that one of the reasons for this negative outcome had been the fact that these courts worked as a closed circuit, since the decisions of one magistrate can only be appealed to another. This system of horizontal appeals, which was also criticised by the Venice Commission,45 creates a closed system where objections to initial decisions are dismissed virtually automatically,46 and where it is easier for these judges to ignore or resist the positive developments in the case-law of higher courts, including the Constitutional Court.

73. The Commissioner considers that these factors, combined with their workload, contributed to a situation where the decisions of these formations are particularly defective, despite the fact that they have a disproportionately strong impact on the enjoyment of human rights guaranteed under the Convention, in particular under Articles 5 and 10. As the Venice Commission stated, "there are numerous instances where peace judges did not sufficiently reason decisions which have a drastic impact on human rights of individuals".47

42 Human Rights Watch, "Turkey: Mass Prosecution of Lawyers", 10 April 2019
43 Third Party Intervention of 20 December 2018, *Wikimedia Foundation, Inc. v. Turkey*, by Dunja Mijatović, Commissioner for Human Rights, CommDH(2019)28, paras. 24 to 29; see also CommDH(2018)30, *op.cit.*, para. 31.
44 CommDH(2017)5, *op.cit.*, para. 69.
45 Venice Commission Opinion No. 852/2016 on the duties, competences and functioning of the criminal peace judgeships, CDL-AD(2017)004, 13 March 2017.
46 CommDH(2018)30, *op.cit.*
47 CDL-AD(2017)004, *op. cit.*, para. 105.

74. The Commissioner considers that the decisions of criminal judgeships of the peace she examined in cases of particular interest to her, such as initial and continued detention decisions, as well as decisions on internet blocking, are characterised by the absence of any individualised arguments and reasoning that takes account of standards established in the Court's case-law regarding Articles 5 and 10. Instead, these decisions often consist of stereotypical formulas limited to the enumeration of statutory provisions and the final conclusions of the judge, making them fully interchangeable from one case to another.

75. Specifically in cases of internet blocking, for example, the Commissioner argued in written observations to the ECtHR that the judicial review established under the Internet Law had remained only nominal, and the scrutiny performed by these formations had been limited to a formal, procedural review of compatibility with the legislation, without any in-depth, reasoned, contextual and human-rights based assessment, including of proportionality. This led the Commissioner to conclude that the judicial review procedures concerning the blocking of internet sites, in so far as they rely exclusively on these courts, are manifestly insufficient to provide a check on the extensive powers granted to administrative authorities and the Turkish government, avoid arbitrariness and abuse, and ensure compliance with Article 10 standards. The Commissioner therefore echoed the view of the Venice Commission that the power of criminal judgeships of the peace to order the blocking of websites or to validate the authorities' requests to that effect deviates from the core purpose for which these courts were established in the first place, and that they "should no longer have any jurisdiction on the merits and real appeals should be introduced in these matters, including the blocking of Internet sites".[48]

76. The Commissioner is of the opinion that, for all matters falling under their purview, the general pattern of defective reasoning and the closed circuit system characterising criminal judgeships of the peace raises serious questions of compatibility with ECHR standards regarding the rights to a fair trial and an effective remedy, which are two main guarantees of protection of human rights in domestic systems and cornerstones of the rule of law.

1.3 ACCESS TO JUSTICE, RIGHT TO AN EFFECTIVE REMEDY

77. Access to justice concerns each individual's right to go to court (or an alternative dispute resolution body) to obtain a remedy if it is found that the individual's rights have been violated. It is thus an enabling right that helps individuals enforce other rights. Access to justice encompasses the right to a fair trial under Article 6 and the right to an effective remedy under Article 13 of the ECHR.

78. The Commissioner considers that questions relating to access to justice became more pressing in Turkey in recent years, for several reasons. Firstly, the emergency decrees adopted by the Turkish government during the state of emergency explicitly excluded the measures they contained from the scope of any judicial scrutiny. Turkish courts, including the Constitutional Court, accordingly declared themselves not competent to assess the legality of any of these measures, despite the fact that they constituted severe interferences with the human rights of a very large number of persons, both physical and moral. Secondly, a number of recent developments raise questions concerning the effectiveness of the Turkish Constitutional Court as a remedy to obtain redress for human rights violations.

1.3.1 ACCESS TO JUSTICE IN THE CONTEXT OF EMERGENCY DECREES

79. The Turkish Government enacted a large number of measures during the state of emergency, which was declared in July 2016 and remained in force for two years, using a series of emergency decrees (officially, "decrees with the force of law"). These decrees, adopted by the executive, amended many laws, including criminal law provisions, and introduced sweeping measures affecting, among

48 *Ibid.*, para. 106.

others, civil society, municipalities, private schools, universities and medical establishments, legal professionals, media, business and finance, as well as family members of suspected Fethullah Gülen sympathisers. Among the most visible measures was the outright dismissal of a large number of civil servants, as well as the dissolution and seizure of assets of non-governmental organisations or other private entities (media, schools, hospitals, etc.), either by adding their names to lists appended to such decrees or by empowering administrative authorities to do so through simplified procedures. The Commissioner observes that by virtue of Law No. 7145 of July 2018, these procedures remain by and large in effect until July 2021.

80. As examined by the Commissioner's predecessor at the time of adoption of the first such decrees in 2016, these measures apply to anyone "assessed to be" a member of or belonging to a terrorist organisation, but also for acting in junction ("*iltisak"*) or having contacts ("*irtibat"*) with such an organisation, two legal concepts which were introduced into the Turkish legal order for the first time by these decrees. According to official information, 125 678 persons were dismissed from public office in the framework of these decrees, and 2 761 entities were closed down.

81. In addition, the emergency decrees afforded full legal, administrative, criminal and financial immunity to administrative authorities acting within their framework, and precluded administrative courts from issuing stays of execution regarding these measures. The legal vacuum that this situation inevitably produced led the Commissioner's predecessor to state that, instead of this approach, "at a minimum, persons should be able to have access to evidence against them and make their case before a decision is taken. Any such decision should be subject to effective remedies, including adversarial proceedings before courts of law".49 When the Constitutional Court started rejecting the cases brought by the concerned persons for lack of competence, this vacuum became even more evident.

82. In order to improve this situation, the Turkish authorities established an *ad hoc* remedy in the form of an Inquiry Commission on the State of Emergency Measures, which became operational in May 2017. This was considered by the ECtHR as a domestic remedy that applicants had to exhaust before bringing a case before it, in particular considering that the decisions of the Commission would be open to judicial control.50

83. The Commissioner notes that the composition and the functioning of the Inquiry Commission is subject to criticism, notably due to its lack of independence (all of its members are appointed by the government) and the fact that it takes its decisions on the basis of files and information provided by public authorities, in a non-adversarial procedure. The Commissioner understands that in many cases, persons concerned were not even aware of what they were accused of or the evidence against them, while making their application. As explained to the Commissioner by the members of the Inquiry Commission, the main criteria the latter uses to reach its decisions include notably the use of Bylock, certain deposits to Bank Asya, membership of NGOs and trade unions considered to be affiliated with FETÖ/PDY and support to such NGOs.

84. As of October 2019, 126 200 applications had been filed before the Inquiry Commission, 94 200 of which had been concluded. Out of these, 8 100 were concluded in favour of the applicant (a success rate of 8.5%). Certain commentators described the decisions of the Inquiry Commission as "a rubber stamp for the government's arbitrary dismissals finding innocuous activities as evidence of 'links' with proscribed groups. […] Furthermore, in the absence of full details of the allegations and evidence against them even after a decision by the Commission, it is difficult for public sector

49 CommDH(2016)35, *op. cit.*
50 *Köksal v. Turkey*, inadmissibility decision of 6 June 2017.

workers whose appeals had been refused, subsequently to mount an effective appeal before the administrative courts".51

85. The Commissioner does not have a comprehensive overview about the appeals against the Inquiry Commission's decisions before the competent administrative courts in Ankara, but she was informed that in the vast majority of cases the administrative courts followed the approach and reasoning of the Inquiry Commission. While the question was raised whether an acquittal in parallel criminal proceedings should result in the reinstatement of a civil servant, the Commissioner understands that a regional administrative appeal court clarified that such reinstatement cannot be automatic, since administrative courts have to examine, in addition to the offence of membership of a criminal organisation, also "junction" and "contact" (see above) with such organisations. According to the information available to the Commissioner, the Council of State, the supreme court in administrative matters, has not yet issued judgments on these questions.

86. While fully taking account of the considerable margin of appreciation enjoyed by states regarding the employment of civil servants, the Commissioner considers that the current situation raises serious questions about core requirement concerning the rule of law. These include, *inter alia*, the principle of legal certainty and foreseeability (in so far as evidence used by the Inquiry Commission and administrative courts to decide appears to be limited to activities which were considered lawful until July 2016 and that decisions are based on legal concepts which were not in existence in the Turkish legal order until then), as well as the lack of adversarial proceedings and an extreme redistribution of the burden of proof which favours arbitrary measures by the administration.

87. However, the Commissioner has more fundamental concerns regarding certain automatic consequences of dismissals that go considerably beyond the scope of employment in the public sector and for which states cannot expect to enjoy the same margin of appreciation under the Convention system. From the beginning of the state of emergency, the Commissioner's predecessor drew attention to the fact that some of the consequences of dismissals could be considered additional, automatic sanctions: these included a life-long ban from working in the public sector (which includes the practice of law) and private security companies, annulment of passports, eviction from staff housing and the annulment of rental agreements between these persons and public or semi-public bodies. He also drew attention to the stigma imposed on the persons and their families of having been assessed as having links with a terrorist organisation by the Turkish government itself, heavily compromising their potential of finding employment elsewhere.52 Many interlocutors have subsequently argued that these dismissals amounted to a sanction of "civil death". It was reported to the Commissioner that persons in this situation have difficulties sometimes even to open private businesses, as the authorities refuse to deliver them the necessary licenses on the grounds that they were dismissed through an emergency decree.

88. The Commissioner reiterates that these secondary, indirect sanctions display a clearly criminal character, due to the severity of the punishments imposed, which blur the distinction between administrative and criminal proceedings. The upholding of the principles of presumption of innocence, legal certainty, no punishment without law, individuality of crimes and punishments and due process are therefore all the more crucial with regard to these ancillary effects. The authorities, however, have so far mostly ignored the call to remove or neutralise these effects.

89. The Commissioner considers that the criminal character of the sanctions became all the more undeniable following a series of decisions of the High Elections Council (YSK) after the recent local elections on 31 March 2019. In its numerous challenges to the election results, the ruling party contested both the right to vote and the eligibility of persons who were dismissed with emergency

51 Amnesty International, "Turkey: Purged beyond return? No remedy for Turkey's dismissed public sector workers", 25 October 2018.
52 CommDH(2016)35, *op. cit.*

decrees. While rejecting the challenge for the right to vote, the YSK unexpectedly upheld the ineligibility challenge against a number of elected officials *ex post facto*, despite the fact that it had knowingly allowed them to run in the first place by dismissing similar challenges during the candidacy procedure. In essence, this decision amounts to an automatic ineligibility decision concerning around 125 000 persons.

90. Questions also remain regarding the automatic cancellation of passports, not only of dismissed civil servants, but also of their family members. Although the government had lifted around 155 000 such cancellation decisions, at least 70 000 persons were estimated to still have a restriction on obtaining a passport by the time of the Commissioner's visit, which amounts to an arbitrary travel ban in essence. Persons affected by this situation clearly had no access to an effective remedy for an extended period of time, as the courts declared themselves incompetent to separate this issue from the existing legal framework regarding emergency decrees. The Commissioner observes that a provision concerning this issue was included in the first judicial reform package adopted in October 2019 (see below). She notes, however, that this provision is worded in such a way as to still provide for administrative discretion to refuse to deliver passports to the persons concerned and therefore does not fully allay her concerns.

91. The Commissioner considers that punishments such as ineligibility and travel bans should be considered criminal sanctions and should only be possible as a result of a judicial decision following criminal proceedings. Therefore, the Inquiry Commission cannot be considered as an effective remedy for these measures, which can thus be considered human rights violations *a priori*.

92. As regards legal entities which were closed down during the state of emergency, the Commissioner echoes the assessment of her predecessor that applying the same logic to them as for the civil servants was entirely inappropriate (see also under the section on Human Rights Defenders). Their closure through an administrative decree could also be considered *a priori* as a human rights violation, in particular of the right to freedom of association protected under Article 11 of the ECHR, regardless of the question of effectiveness of the Inquiry Commission which is also competent in these cases. The Commissioner could not obtain a satisfactory answer from the authorities to her questions as to how restitution and compensation would function for these entities, even if the Inquiry Commission decides in their favour.

1.3.2 THE EFFECTIVENESS OF THE TURKISH CONSTITUTIONAL COURT AS A REMEDY

93. The possibility of individual petitions before the Constitutional Court, introduced in September 2012, was recognised by the ECtHR as a domestic remedy to be exhausted before making an application to the Strasbourg Court.53 Indeed, the Commissioner observes that the Turkish Constitutional Court delivered ground-breaking judgments, closely following the case-law of the ECtHR in many cases, for example regarding detentions on remand.

94. Serious questions began to be raised regarding the effectiveness of the Constitutional Court for certain, highly sensitive cases. For example, concerning the curfews imposed during security operations in South-Eastern Turkey starting from 2015, regarding which the Commissioner's Office made a third-party intervention before the ECtHR,54 the Commissioner observes that the Constitutional Court has still not rendered a judgment assessing the legal basis and proportionality of these measures more than 4 years after the first curfews.

95. The Commissioner thinks that there are currently four interconnected issues casting doubt on the effectiveness of the individual application procedure to the Constitutional Court as a remedy for human rights violations in Turkey. These concern the tardiness of the Constitutional Court in

53 *Uzun v. Turkey,* decision of 30 April 2013.

54 Third Party Intervention of 25 April 2017, *Abdullah Kaplan v. Turkey* and others, by Nils Muižnieks, Commissioner for Human Rights, CommDH(2017)13.

remedying serious human rights violations, the lower courts' highly problematic attitude vis-à-vis the case-law of the Constitutional Court, the extraordinary burden that this state of affairs put on the Constitutional Court, and finally recent judgments of the Constitutional Court in which it appears to be departing from its previous, Convention-compliant approach.

96. As regards the issue of speediness, the Commissioner notes that after the state of emergency, the Constitutional Court received tens of thousands of applications and it has been slow in rendering judgments, particularly in politically sensitive cases. In the context of detentions, this has prompted the Commissioner to raise serious concerns about the "speediness" of the remedy before the Constitutional Court in a third-party intervention before the ECtHR.55 She notably drew attention to the long delays by the Constitutional Court in examining the applications of a number of journalists and MPs despite the urgency of the situation and the numerous human rights at stake, arguing that in the applicant's case a delay of almost one year could also not be seen as "speedy" given the specific circumstances of the case, in particular "the manifest disconnect between the seriousness of the alleged crimes and the non-violent nature of the acts in question, and the profound chilling effect this case continues to exert on Turkish civil society".56

97. The ECtHR subsequently confirmed this assessment, finding that the Constitutional Court's delay in reaching its decision on the detention of Osman Kavala (of 16 months and 24 days) was extremely long and could not be described as "speedy", thereby amounting to a violation of Article 5§4 of the Convention, for the first time with respect to the Turkish Constitutional Court.57 In her third-party intervention, the Commissioner had also brought to the attention of the ECtHR that the statistics of the Constitutional Court indicated that it had received 15 976 applications concerning the right to liberty and security of the person between September 2012 and December 2018, while only rendering 107 judgments finding a violation of this right in the same period.58

98. Similarly, in the field of freedom of expression, the Commissioner brought to the attention of the ECtHR the manifest disconnect between the very large number of abusive Internet blocking measures by the Turkish authorities and the small number of violation judgments issued by the Constitutional Court, as well as the extremely long delays that applicants can expect to face in obtaining redress from the Constitutional Court. In the Commissioner's opinion, such delays, for example of four years and two months, were so long as to void the right to freedom of expression entirely of its substance, even where the Constitutional Court finds in favour of the applicant.59

99. The Commissioner also expressed her serious concerns about non-implementation of judgments of the Constitutional Court. For example, the Commissioner notes that Mehmet Altan was only released more than five months after the judgment of the Constitutional Court, because of the failure of lower courts to comply with that judgment, whilst openly challenging the authority of the Constitutional Court. In its aforementioned judgments dealing with the cases of Şahin Alpay and Mehmet Altan, the ECtHR considered that this raised serious doubts about the effectiveness of the Constitutional Court as a remedy in detention cases. Moreover, Mehmet Altan was convicted to an aggravated life sentence on the basis of the evidence considered not even sufficient for his initial pre-trial detention by the Constitutional Court and by the ECtHR, and this conviction was later upheld on appeal (but finally quashed by the Court of Cassation).

100. The Commissioner is particularly troubled by the fact that prosecutors and lower court judges continue to deliberately ignore and resist the spirit of the judgments and the clear case-law of the Constitutional Court in detention cases. She also observes that prosecutors and lower court judges

55 CommDH(2018)30, *op.cit.*
56 *Ibid.*, para. 39.
57 *Kavala v. Turkey*, judgment of 10 December 2019 (not yet final).
58 CommDH(2018)30, *op.cit.*
59 CommDH(2019)28, *op.cit.*, para. 34.

do not appear to face any consequences for doing so, which constitutes a serious blow to the Turkish constitutional order and the rule of law, where lower courts should be strictly bound by the decisions of higher courts.

101. The result of this situation is that individuals are obliged to make a separate individual application in every case and that the Constitutional Court is constrained to act as an appeal court for detention decisions, a role that it cannot be expected to fulfil. Similarly, in cases of internet blocking, the Commissioner argued that, as the only judicial body capable of scrutinising blocking orders in a Convention-compliant manner, the Constitutional Court did not have the capacity even to mitigate, let alone systematically check, the manifest excesses deriving from the Internet Law and its application by judges. She stated that this situation went against the spirit of the individual application procedure and jeopardised the effectiveness of the Constitutional Court as a domestic remedy as a whole.60 The Commissioner nonetheless recognises and welcomes the ECHR-compliant judgments of the Constitutional Court in internet-blocking cases, noting that it found a violation of the right to freedom of expression in December 2019 as a result of the blocking of Wikipedia in Turkey.

102. The Commissioner considers that the caseload of the Constitutional Court cannot be expected to diminish given the systemic nature of these problems, making unreasonable delays inevitable in the absence of far-reaching general measures to ensure a much better compliance with the Constitutional Court's case-law by prosecutors and lower courts. The Commissioner notes that this is a major concern in the supervision of the execution of the Court's judgments concerning Turkey as well, where the Committee of Ministers "invited the authorities to implement further, extensive, training measures to ensure that prosecutors and lower instance courts consistently apply the case law of the Constitutional Court, which follows the reasoning of the European Court and which is binding on them".61

103. The final set of concerns that the Commissioner wishes to highlight is an apparent departure by the Constitutional Court from its past, more human rights compliant case-law in a number of recent judgments concerning politically sensitive cases. The Commissioner notes, for example, the rejection of the applications regarding a number of journalists, including Ahmet Altan, on 3 May 2019. This rejection is noteworthy for several reasons: while the applications by Mehmet and Ahmet Altan were made at the same time and for the same motives (the supposed evidence against them was limited to their journalistic statements), the case of the latter lasted 17 months longer than the former and came to the exact opposite conclusion that there had been no violation of his right to liberty in connection with his right to freedom of expression. For the Commissioner, this difference in treatment is difficult to explain in legal terms.

104. The Commissioner was also surprised at the Constitutional Court's rejection of the application for release from pre-trial detention by Osman Kavala, despite the vacuous nature of the charges brought against him and the clearly disproportionate use of detention made in his case, as subsequently established by the ECtHR. The Commissioner also notes the Constitutional Court's judgment in the case of the Academics for Peace which, while favourable in its outcome, is significant in that it appears to expose a growing division within the Constitutional Court (the judgment was adopted with eight judges in favour and eight judges against). These developments appear to substantiate a growing perception among the Commissioner's interlocutors that the Constitutional Court is evolving towards a more security-oriented approach, to the detriment of human rights. The Commissioner also finds that a pattern of delays in adjudicating cases which are more sensitive or controversial in nature, lends credibility to the argument made by many of her

60 CommDH(2018)30, *op.cit.;* CommDH(2019)28, *op.cit.*

61 Decision of the Minister's Deputies at their 1324th Meeting, 18-20 September 2018 (DH).

interlocutors that the Constitutional Court may not be immune from considerations that are strategic or conjunctural, rather than purely legal, in nature.

105. In summary, the Commissioner considers that there are many developments which taken together jeopardise the future of the individual application procedure before the Constitutional Court as an effective remedy for human rights violations. This requires decided action by the authorities to safeguard arguably the most significant contribution of recent years to the protection of human rights in the Turkish legal order.

1.4 JUDICIAL REFORM STRATEGY

106. On 30 May 2019, the President of the Republic announced the publication of a Judicial Reform Strategy.62 The Commissioner notes that the Turkish authorities had previously held meetings to inform Council of Europe bodies, including the Commissioner's Office, about the draft in preparation by the Ministry of Justice.

107. The Strategy contains chapters on nine different aims pursued, with several sub-headings and lines of action. These include the "protection and improvement of rights and freedoms", "improvement of the independence, impartiality and transparency of the judiciary", "ensuring efficient use of the right to defence" and "enhancing the efficiency of the criminal justice system". The Commissioner welcomes the fact that this document appears to acknowledge some of the problems outlined above, such as the need to extend the space for freedom of expression, including on the internet; to review the legal framework for detentions to reduce their use and limit their length; to reform the criminal justice system, by reviewing the balance between offences and punishments and expanding the discretion of prosecutors not to pursue; to improve the execution of Constitutional Court judgments; to have better-reasoned court decisions, especially on detentions; to reinforce guarantees for judges against arbitrary disciplinary proceedings; and to improve co-operation with civil society.

108. However, the Commissioner also notes that the strategy does not address some of the fundamental problems affecting the Turkish judiciary which were examined above, including the constitutional framework guaranteeing its independence which is manifestly contrary to the relevant Council of Europe standards. Nor does it seek to tackle some of the key shortcomings regarding fair trial, equality of arms, legal certainty and judicial self-governance, some of which have been detailed in the present report.

109. The Commissioner nevertheless considers that, if implemented well, the Judicial Reform Strategy could provide improvements regarding the protection of human rights within the judiciary. This will however depend on the willingness of the authorities to fundamentally overhaul a number of crucial laws, starting with the Turkish Criminal Code, Code of Criminal Procedure and Anti-Terrorism Law. In this respect, the Commissioner bears in mind that this is the third Judicial Reform Strategy that the Turkish authorities have adopted and brought to the attention of her Office, and that the first Judicial Reform Strategy published in 2009, which also aimed at strengthening the independence and impartiality of the judiciary, enhancing its efficiency, facilitating access to justice and enhancing confidence in the judiciary, had no significant effect on the main problems outlined above in the long term.

110. Having examined the first package of reforms adopted by the Turkish Parliament in the framework of this Strategy in October 2019, the Commissioner regrets that these measures fall short of the decisive and far-reaching reforms urgently needed in Turkey. The Commissioner would like to illustrate this assessment by reference to the following non-exhaustive list of examples:

62 Available at www.yargireformu.com

- the exclusion from the scope of Article 7 of the Anti-Terrorism Law (propaganda for terrorist organisations) of expressions that do not exceed the limits of reporting or criticism: the Commissioner considers that this amendment is unlikely to have a significant impact on the excessive use of this provision by the Turkish judiciary, unless other measures are taken to improve its compliance with the principles already clearly enshrined in the Turkish Constitution and the ECHR. The Commissioner notes in particular that Turkish courts often retain a very narrow definition of both journalistic reporting and criticism. This is easy to ascertain, as an identical addition to the TCC (Article 218) in 2005 did not lead to any noticeable improvement;
- the introduction of time limits for detentions during the investigation stage: the Commissioner considers that time limits that can go up to two years for certain offences are still excessive;
- possibility to block specific content instead of websites under Article 8 of the Turkish Internet Law (Law No. 5651): this possibility which was previously introduced for other articles of the same law did not lead to the desired result, as it still allows for blocking of the relevant website when it is technically not possible to block a single URL (the Turkish authorities did not have URL filtering technology for foreign-based websites, for example);63
- the restructuring of the interview committee for the admission of judges: the new setup is an improvement in the sense that it would in principle allow for the inclusion of a judge in the panel for the first time, but this concerns only one out of seven members;
- the redefinition of matters to be included in entrance exams of the judicial provision: knowledge of international and European human rights law continues to be excluded from this list.

111. The Commissioner welcomes, however, the opening of the possibility of appealing to the Court of Cassation for a number of offences as a positive step which rectifies a problem that was created at the time of the establishment of regional appellate courts. The Commissioner notes that this package also introduces new accelerated procedures in criminal matters which would allow for sentencing without a hearing in certain cases. The concrete effects of this measure, including its potential negative impact on fair trial guarantees, will have to be assessed on the basis of future judicial practice.

112. In summary, the Commissioner finds that the Judicial Reform Strategy is a positive, if not comprehensive, document, which acknowledges several problems affecting the justice system in Turkey. She considers, however, that it is unlikely to lead to the desired results, unless the Turkish authorities change course by adopting far more decisive, far-reaching and comprehensive measures, unlike for previous iterations of this document.

1.5 CONCLUSIONS AND RECOMMENDATIONS

113. The Commissioner underlines that the independence of the judiciary and the right to a fair trial, including access to justice and the presumption of innocence, are core components of the rule of law which, together with individual freedom and political liberty, is one of the three "principles which form the basis of all genuine democracy" according to the Preamble of the Statute of the Council of Europe. They are also the absolute precondition for the enjoyment of human rights.

114. Administration of justice and judicial independence in Turkey have been very long-standing concerns for the Commissioner's Office. However, the situation has become more pressing in the aftermath of the attempted coup d'état of 15 July 2016. While condemning in the strongest possible terms this attempt to overthrow a democratically elected government and acknowledging the right and duty of the Turkish authorities to shed light on the persons or groups behind it, including within the judiciary, the Commissioner considers that the measures taken by the Turkish authorities went far beyond what was strictly necessary for that imperative and had devastating consequences regarding all four of the elements guaranteeing judicial independence, namely the

63 CommDH(2019)28, *op.cit.*, para. 9.

manner of appointment and term of office of judges, the existence of guarantees against outside pressure and the appearance of the judiciary as independent and impartial.

115. The Commissioner considers that the situation regarding the independence and impartiality of the judiciary examined in the body of this report represents an existential risk to the rule of law in Turkey and, by extension, to the respect for all human rights guaranteed under the European Convention on Human Rights. The European Court of Human Rights confirmed the seriousness of this situation through its first findings of violations of Article 18 of the Convention in Turkey's history within the Convention system, owing to the misuse of judicial processes with ulterior purposes.

116. In the Commissioner's opinion, the appropriate first response to this state of affairs should be the re-establishment of the situation prevailing before the state of emergency. This must include, as a minimum, constitutional changes to ensure the structural independence of the Council of Judges and Prosecutors in accordance with the clear standards of the Council of Europe and opening its decisions to judicial review (including individual applications to the Constitutional Court), as well as the revocation of the emergency powers concerning judges and prosecutors which are still in effect by virtue of Law No. 7145. In the Commissioner's opinion, without these measures, no reform can lead to any significant improvement in the administration of justice and the protection of human rights by the judiciary. The authorities should also change the legislation to fully ensure that judges are recruited, appointed, transferred, promoted, investigated, disciplined or dismissed according to clear, public and foreseeable criteria, while using transparent procedures in which the executive's role is drastically and fundamentally reduced.

117. The Commissioner is particularly concerned by the impact of recent developments on the criminal justice system, where numerous long-standing problems, such as the misuse of detentions on remand, have been exacerbated and compounded by new issues. As a result, the criminal process frequently appears to be reduced to a formality, especially in terrorism-related cases. The Commissioner is fully aware of the extraordinary challenges faced by Turkey, a country which has to fight many terrorist organisations on many fronts. While Turkey has the right and duty to fight against terrorism, disregarding human rights in the process would only discredit and undermine this fight in the long run, while eroding the rule of law and trust in the justice system at the same time.

118. Laws with an overly broad definition of terrorism and membership of a criminal organisation and the judiciary's tendency to stretch them even further are not new problems in Turkey. However, the Turkish judiciary currently displays, in a large number of cases, unprecedented levels of disregard for the most basic principles of law, such as presumption of innocence, no punishment without crime and non-retroactivity of offences, or not being judged for the same facts again. According to the Commissioner, this situation results in a level of legal uncertainty and arbitrariness which threatens the very essence of the rule of law. The criminal judgeships of the peace, owing to the lack of reasoning in their decisions, particularly contribute to this state of affairs. At the same time, procedural guarantees such as adversarial proceedings, equality of arms and the right to a lawyer, were significantly and permanently eroded during the state of emergency.

119. The Commissioner reiterates her predecessors' calls for an urgent and complete overhaul of the Turkish Criminal Code and Anti-Terrorism Law. In doing so, Turkey should make full use of the clear case-law of the ECtHR as well as the existing, precise recommendations of the Venice Commission and the Commissioner's Office on specific provisions of these laws. The Commissioner also points to the need for a profound reform of the Turkish Code of Criminal Procedure, with a view to addressing a large number of concerns highlighted in the present report, starting with the repeal of all the limitations introduced during the state of emergency.

120. The Commissioner would like to stress, however, that the constitutional and legislative measures recommended above, while necessary, would not be sufficient to resolve the problems highlighted in this report. In the Commissioner's view, the main problem affecting the Turkish criminal justice system today is the prevailing attitude within the judiciary, in particular their reluctance to distinguish lawful acts from criminal ones and their resistance to the more human rights compliant judgments of higher domestic courts and the ECtHR. In this connection, the Commissioner appreciates the real and very positive efforts of the Turkish authorities to provide training to judges and prosecutors on Convention standards, including through numerous co-operation activities with the Council of Europe, which should be maintained. However, training too, while necessary, has not proved enough to resolve these issues.

121. For the Commissioner, the current problems clearly stem from sweeping issues of lack of independence of the judiciary and its partiality to political interests referred to above. The Commissioner bears in mind, in particular, that Turkish judges and prosecutors witnessed the dismissal, without any procedural safeguard, of 4 000 of their colleagues; that half of the judiciary is composed of judges and prosecutors recruited in this period through highly opaque procedures essentially controlled by the executive; that they operate in an environment where there is a strong perception, supported by objective evidence, that removals and transfers are being used with a view to discouraging certain decisions and affecting the outcome of legal proceedings, for which public officials do not hesitate to make their preferences known in a clear and intimidating manner.

122. Under these circumstances, it would not be reasonable to expect the Turkish judiciary to act truly independently from the political power and uphold the rule of law and human rights as it should, unless the Turkish executive urgently changes course and starts scrupulously respecting the independence of the judiciary both in words and deeds. The executive should consistently demonstrate its attachment to the principle of a judiciary upholding human rights and holding the administration accountable, and unfailingly respect the decisions of courts even in situations where they go against its own interests. This must be accompanied by a regulatory framework regarding judges and prosecutors which not only guarantees freedom from direct or indirect reprisals for taking decisions which go against the expressed or perceived interests of the government when the protection of human rights demands it, but encourages such decisions through all means available, for example acknowledging their value in the system of promotions.

123. The Commissioner is troubled by the legacy of the emergency decrees in terms of access to justice and to an effective remedy, legal certainty and foreseeability. She considers that the system currently set up, including the Inquiry Commission, is unlikely to satisfy the criteria enshrined in the ECHR, unless the administrative courts change course to display a much higher level of respect for the individuals' human rights, whereas a lot of time has already been lost in fully re-establishing the rule of law. The Commissioner stresses that emergency decrees, in addition to the question of employment in the public sector for which the state admittedly enjoys a wide margin of appreciation, caused a number of ancillary effects which are in essence disguised criminal sanctions. The Turkish authorities must urgently take measures to neutralise these effects immediately and unconditionally, unless there is a specific decision to the contrary taken by a criminal court in an individual case. The Commissioner reiterates, in particular, that the closure of moral persons, such as NGOs, through an executive decision without judicial control, notably by using concepts such as "junction" or "contact" with terrorist organisations previously unknown in the Turkish legal system, is unacceptable and that the authorities should not wait for the outcome of the ongoing proceedings to undo the effects of emergency decrees for these entities.

124. The individual application procedure to the Constitutional Court is one of the greatest achievements of the Turkish authorities in recent years to improve compliance with ECHR standards in the Turkish legal order. The Commissioner is therefore all the more concerned about indications that lower courts, while globally complying with individual measures ordered by the

Constitutional Court, appear to resist the spirit of its judgments and its case-law, leading to an unsustainable situation for the latter. The authorities should take urgent measures to implement the goal included in their recently adopted Judicial Reform Strategy to improve compliance with this case-law, not only for individual measures but also more generally.

125. This Judicial Reform Strategy is significant in that it shows good will by the Turkish authorities to acknowledge some of the problems detailed above, including regarding the independence of the judiciary, and should be warmly welcomed in that respect, despite the Commissioner's reservations regarding the scope and ambition of this document. However, when read in the light of the first reform package adopted under this strategy, the Commissioner has the impression that the extent of the critical situation the Turkish judiciary is in at the moment and the need for more urgent and decisive action are yet to be grasped fully. The Commissioner calls on the Turkish authorities to demonstrate a strong political will, resolution and courage to tackle deep-rooted problems affecting the Turkish justice system, in a more comprehensive manner. The Commissioner stresses, in particular, that the success of any future reform depends on the adoption of the more structural measures described above.

2 HUMAN RIGHTS DEFENDERS AND CIVIL SOCIETY

126. Human rights defenders and NGOs play a critical role in a democratic society in making national authorities accountable for the implementation of human rights. Defenders assist victims of human rights violations and help them gain access to means of redress and remedies. They are an essential resource for improving people's lives and the peaceful functioning of society. According to the case-law of the European Court of Human Rights on the role of NGOs in a democratic society, when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press.64 Civil society organisations must therefore be able to pursue this function in an environment conducive to their work, without undue interference in their internal functioning.

127. The specific international and European standards in this area include the Committee of Ministers Recommendation (CM/Rec(2018)11) on the need to strengthen the protection and promotion of civil society space in Europe, the 2008 Committee of Ministers Declaration on Council of Europe action to improve the protection of human rights defenders and promote their activities, the Council of Europe Committee of Ministers Recommendation (CM/Rec(2007)14) on the legal status of non-governmental organisations in Europe, and the 1998 UN Declaration on human rights defenders.

128. The 2008 Declaration of the Committee Ministers is also significant in that it attributes a special role to the Commissioner, inviting her to strengthen the role and capacity of her Office for the protection of human rights defenders, notably by continuing to meet with a broad range of defenders during her country visits and to report publicly on the situation of human rights defenders. It also invites her to intervene with the competent authorities, in order to assist them in resolving the problems which human rights defenders may face, especially in serious situations where there is a need for urgent action.

129. Already for several years, the Commissioner's Office, as well as international human rights monitors, have been raising concerns about the increasingly challenging situation faced by Turkish civil society and human rights defenders in carrying out their legitimate activities. The Commissioner observes that this situation has steadily deteriorated in recent years, in particular

64 See, for example, *Vides Aizsardzības Klubs v. Latvia*, judgment of 27 May 2004.

following the declaration of a state of emergency in Turkey in July 2016, and has not improved since the state of emergency was lifted in July 2018.

130. In the following sections, the Commissioner will review the regulatory framework affecting civil society, including lack of transparent and institutionalised government funding and consultations. This is followed by the Commissioner's observations regarding attacks targeting human rights defenders, ranging from the intimidation and stigmatisation of human rights defenders in political discourse to judicial actions targeting them. The Commissioner will examine separately the situation of lawyers, given their specific role as both human rights defenders and a fundamental component of the judicial system. These are followed by the Commissioner's conclusions and recommendations.

2.1 LEGAL AND REGULATORY FRAMEWORK

2.1.1 THE LEGAL STATUS AND FUNDING OF NGOS

131. The Turkish regulatory framework regarding NGOs was liberalised significantly in the early 2000s, a circumstance which led to a significant increase in the numbers of associations and foundations in Turkey, as well as an in civil society activity in general. The Commissioner observes that the current legal framework is nevertheless strict, complex and scattered through many laws, and raises a number of questions of compatibility with the relevant European standards, in particular the Joint ODIHR/Venice Commission Guidelines on Freedom of Association.65 For example, the Commissioner notes that the Turkish legislation only recognises as moral persons associations and foundations, sets high thresholds for the required minimum number of founders and members of governing bodies, and that the Turkish Civil Code contains vague references to morality which have on occasion allowed for excessive administrative discretion at the time of registration. The Commissioner's interlocutors also consistently point out that the procedures concerning NGOs are very cumbersome and lengthy, especially for international NGOs, as well as for receiving foreign funds and issues such as tax-exempt status. She also notes many regulatory obstacles when it comes to fundraising, including the necessity to obtain prior authorisation for each fundraising activity and long authorisation processes based on non-objective criteria.

132. A recent development in this respect is the modification of the regulatory framework concerning civil society through unilateral decisions by the President of the Republic, using presidential decrees. For example, a Presidential Decree of September 2018 established a Directorate-General for Relations with Civil Society within the Ministry of the Interior, replacing the previous Department of Associations. The mandate and priorities of this new entity were still unclear by the time of the Commissioner's visit. The Commissioner also notes that the recently modified Article 27 of the Law on Associations leaves it entirely to the discretion of the President to declare which organisations are to be considered of public benefit.

133. The Commissioner understands that a regulation issued in October 2018 makes it compulsory for all associations to register all their members (not only their board members) in a centralised information system of the Ministry of the Interior. Not only is this a very cumbersome procedure for the NGOs, but it clearly goes against the right to privacy emphasised in the abovementioned Joint OSCE/Council of Europe Guidelines. In this connection, many civil society representatives referred to the current hostile environment, including ongoing legal proceedings against many human rights defenders, and the fact that many people were subjected to sanctions during the state of emergency, *inter alia*, on account of their membership of NGOs and trade unions (see below). Against this background, they expressed the view that the main purpose of this regulation was to tighten control on civil society by using the chilling effect caused by this measure. NGOs

65 Venice Commission and OSCE Office for Democratic Institutions and Human Rights, Joint Guidelines on Freedom of Association, CDL-AD(2014)046, 17 December 2014.

active in the field of human rights consistently report that they had to contend with significant drops in their membership as a result, with many former members specifically referring to this new mandatory registration requirement as a reason for their withdrawal from civil society activities.

134. On the other hand, the Commissioner's attention was drawn to numerous factors strongly suggesting that the Turkish government and the ruling party have been active over the years to foster associations and foundations which espouse the same values as the government and which do not criticise official policy. The Commissioner observes that significant public funds, including of local authorities, are regularly allocated to these NGOs, in a non-transparent way that excludes rights-based civil society organisations more critical of government policies. The Commissioner heard, in particular, that assets seized by the authorities as a result of emergency decrees have been redistributed in a discretionary manner to organisations close to the government. By contrast human rights-based NGOs, many of which are long-standing partners of the Council of Europe, not only do not have access to public funding opportunities but must face significant bureaucratic hurdles when it comes to fundraising, or receiving EU or foreign funds.

135. It is a common claim from rights-based NGOs, for example active in the field of women's and children's rights, that they are being increasingly side-lined in favour of organisations favourable to the government. In this connection, the Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) expressed "its alarm over the increasingly restrictive conditions experienced by civil society organisations, in particular independent women's organisations, under what has been termed by those working on the ground and by international institutions as a 'shrinking space for human rights organisations'. In meeting with NGOs, GREVIO witnessed first-hand the difficulties faced by these organisations and the courage and determination of their members, a number of whom face the risk of arrest and/or imprisonment for their overt criticism of government policies. Sadly, the independent women's organisations who played a historic role in advocating the Istanbul Convention feel they are being denied the authorities' recognition and support, to the exclusive advantage of more recently established women's groups."66

2.1.2 LACK OF CONSULTATION AND INVOLVEMENT

136. In a report examining, among other topics, the domestic human rights architecture, the Commissioner's predecessor had argued in 2013 that "an overarching problem for the development of the national human rights framework is the insufficient involvement of Turkish civil society organisations, and in particular of human rights NGOs, which appears to be connected with an administrative culture which does not give sufficient attention to consultation of and partnership with civil society".67

137. The Commissioner was made aware of the difficulty of human rights NGOs to have their voices heard and taken into account when it comes to policy and legislation. The Commissioner notes in this connection that the Group of States against corruption (GRECO), when examining the issue of prevention of corruption in respect of members of parliament, had recommended in 2015 that the transparency of the legislative process in Turkey be enhanced by further developing the rules on public consultations in respect of civil society groups and citizens. It notably found that there was no mechanism to ensure public consultations on a more structural basis, other than the possibility of inviting civil society to hearings at the discretion of presidents of parliamentary committees. GRECO found in 2017 that this recommendation had not been implemented.68

66 Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), Baseline evaluation report concerning Turkey, 15 October 2018.
67 Report by Nils Muižnieks, Commissioner for Human rights, following his visit to Turkey from 1 to 5 July 2013, CommDH(2013)24, 26 November 2013.
68 GrecoRC4(2017)16, *op. cit.*

138. The Commissioner was informed that this situation was further aggravated in October 2018 when the Turkish Parliament amended its rules of procedure to exclude civil society organisations from the legislative consultation process at parliamentary committees. This led international observers to conclude that independent, rights-based civil society organisations were mostly excluded from the consultations that are part of law-making and policymaking processes and monitoring.69

139. The Commissioner welcomes, in this respect, that a number of independent human rights NGOs appear to have been consulted in the preparation of a Human Rights Action Plan co-ordinated by the Turkish Ministry of Justice. While this is a positive step, the Commissioner considers that such consultations need to be more institutional and systematic. Similarly, the Commissioner notes that the recent Judicial Reform Strategy foresees co-operation with national and international NGOs for its implementation. It does not provide, however, for a specific framework in which this co-operation will take place.

140. Co-operation with civil society is particularly crucial for national human rights structures. The Commissioner is concerned, in this respect, that the good working relations that the Turkish Human Rights Institutions had fostered with human rights NGOs in connection with its prison monitoring task were abandoned when this body was replaced in 2016 by the Turkish Human Rights and Equality Institution. In any event, the Commissioner has misgivings both as regards the independence of this institution (the Chair and all members of which are appointed by the Turkish government or the President of the Republic), as well as the activities of the institution which display a certain disregard for Council of Europe standards. She thinks that this institution is in need of urgent reform if it is to contribute to the national human rights protection system.

2.1.3 IMPACT OF THE STATE OF EMERGENCY

141. As mentioned above, a particular legacy of the state of emergency was the outright closure, with the liquidation of their assets, of a large number of NGOs, by using emergency decrees, that is through a simple decision of the executive without any judicial decision or control. Despite the urgent call of the Commissioner's predecessor at the very beginning of the state of emergency to put an immediate end to this practice,70 the Turkish authorities closed down in this way 1 410 associations, 109 foundations and 19 trade unions, according to the information available to the Commissioner. She further notes that no explanation or reasoning was provided for these closures, other than that they were "assessed" by the executive as belonging to, acting in junction with ("*iltisak*") or having had contacts with ("*irtibat*") a terrorist organisation. She observes that these included associations active in many different human rights areas, including the well-known children's rights NGO Gündem Çocuk.

142. Neither this practice of administrative closures with no reasoning, nor the legal concepts used in this connection have a precedent in the Turkish legal order, which in the Commissioner's opinion makes the argument that the closures were arbitrary all the more difficult to refute. In any event, the Commissioner observed that these measures created an unprecedented degree of legal uncertainty and, combined with the other emergency measures affecting individuals, caused a clearly palpable chilling effect for the entire civil society sector in Turkey. As already stated above, while the Inquiry Commission on the State of Emergency Measures is assumed to be a domestic remedy for these closures, it is not clear to the Commissioner what kinds of remedies and compensations will be available to these NGOs even if their applications are considered favourably.

143. The Commissioner further notes that membership of NGOs and trade unions closed in this manner is being considered as evidence of links with terrorist organisations, justifying the dismissal of individuals from public service, by the administration and by the Inquiry Commission, despite the

69 See, for example, European Commission Staff Working Document Turkey 2019 report, SWD(2019) 220 final.
70 CommDH(2016)35, *op.cit.,* paras. 35-39.

fact that these entities had been constituted and were operating lawfully until the state of emergency. The Commissioner cannot stress enough the chilling effect of this approach concerning participation in civil society activities, as this practice amounts to a retroactive punishment based on a future requalification of an NGO as illegal, which goes against the principle of legal certainty.

144. The Commissioner was also informed that in recent years the Turkish authorities significantly expanded the use of regular government inspections and audits of NGOs, in a selective way that hampers civil society organisations active in the field of human rights. While this practice was already flagged by the Commissioner's predecessor in his report following the Gezi events,71 the Commissioner understands that it intensified during the state of emergency, including through the use of specially empowered state auditors of the Ministry of the Interior. These inspections and audits are reported to take months, during which the inspectors occupy office space and have access to all the records of NGOs. It was reported to the Commissioner that certain associations were inspected repeatedly, even yearly. The Commissioner was also informed of government inspections concerning some of the oldest civil society organisations working in the field of human rights, such as the Turkish Human Rights Association and the Turkish Human Rights Foundation, which have resulted in pending court cases.

145. The Commissioner notes that the abovementioned Joint OSCE/Council of Europe Guidelines provide that inspections of NGOs "should not take place unless there is suspicion of a serious contravention of the legislation, and should only serve the purpose of confirming or discarding the suspicion" and that "an audit should not be tantamount to an inspection or the reconciliation of accounts. Under no circumstances should the audit process result in the harassment of an association".72

146. The Commissioner also observes severe restrictions imposed on the day-to-day functioning of NGOs, including, for example, an indiscriminate and indefinite ban declared in Ankara during the state of emergency on all public events focusing on the human rights of LGBTI persons. This, in addition to being an inacceptable interference with the right to freedom of peaceful assembly guaranteed under the ECHR, severely restricts the possibility of LGBTI organisations to carry out their legitimate activities. The Commissioner understands that, after the state of emergency, the initial ban was replaced by an equivalent one under new, far-reaching powers granted to provincial governors by Law No. 7145. Despite administrative court decisions declaring the first ban unlawful, it is currently maintained and strictly enforced. For example, in May 2019 following an attempted pride parade at the Middle East Technical University, over 20 students and one academic were arrested, the majority of whom are currently facing trial. Similarly, police stopped members of the Ankara Bar Association from having a press conference on LGBTI issues on 17 May 2019. Governors in others cities, including Istanbul, Izmir, Antalya and Mersin have also enforced similar bans for pride events.

147. When the Commissioner raised this issue with officials from the Ministry of the Interior, they justified these bans by reference to the safety of participants in such events against terror threats. While not disputing the veracity of such threats, the Commissioner underlines that the authorities have a positive obligation to guarantee that LGBTI persons can enjoy their rights to freedom of association and assembly as equal members of society, and if necessary are entitled to the authorities' protection of their security to do so.

71 CommDH(2013)24, *op. cit.*
72 CDL-AD(2014)046, *op. cit.*, paras. 231 and 233.

2.2 INTIMIDATION AND REPRESSION OF CIVIL SOCIETY AND HUMAN RIGHTS DEFENDERS

2.2.1 POLITICAL DISCOURSE AND SMEAR CAMPAIGNS

148. The Commissioner is deeply concerned that Turkish officials, including at the highest level, regularly target human rights defenders and rights-based NGOs, frequently labelling them as terrorists and public enemies. There have been many such attacks targeting civil society activists and their legitimate activities, in particular by suggesting that reporting on human rights violations allegedly perpetrated by the authorities furthers the aims of terrorist organisations and is by extension an attack on the Turkish state.

149. Increasingly, government representatives and pro-government media seem to be targeting certain human rights defenders in a concerted and virulent manner, in what could be described as smear campaigns and considered defamatory, occasionally amounting to hate speech. One of the most noteworthy of these smear campaigns concerned the human rights defender Osman Kavala, and started in pro-government media immediately after his arrest in 2017. The arguments used in this campaign, mainly based on information leaked from a secret investigation file (see above), were subsequently taken over by officials in public statements.

150. The Commissioner's attention was also drawn to numerous statements by the Turkish Minister of the Interior, publicly labelling persons as terrorists before any judicial decision establishing guilt in disregard of the principle of presumption of innocence, which is particularly worrying coming from the hierarchical superior of law enforcement forces. The Commissioner regrets to note that statements from the same Minister have frequently targeted civil society organisations, including for example the bar association and medical association of Diyarbakir, openly qualifying them as auxiliaries of terrorist organisations.

151. In this connection, the Commissioner recalls that, in the aftermath of the Gezi events, her predecessor had already pointed to the problem of police reports targeting professional associations, such as the Union of Chambers of Turkish Engineers and Architects, Turkish Medical Association and bar associations as "anti-governmental civil society organisations". He had also noted that the Turkish authorities had also proceeded to legislative changes to deprive the Union of Chambers of Turkish Engineers and Architects of their income in what could be considered a reprisal for their peaceful and lawful involvement in the Gezi events.73 This shows that the official statements referred to above do not remain only at the level of discourse, but lead to concrete repressive actions by the authorities, sometimes immediately. As another example, the Commissioner referred to the fact that the police and local authorities started to prevent NGOs, including Amnesty International, from visiting certain areas of the country following a statement of the President of the Republic in April 2016 whereby NGOs publishing reports on the human rights situation needed to be "countered".74

152. As will be examined below, the judiciary also seems to be increasingly influenced by this kind of discourse, by launching proceedings against NGOs and human rights defenders immediately after statements by politicians or defamatory articles published in pro-government newspapers. The Commissioner observes that this assessment was recently confirmed by the ECtHR. In its judgment concerning Osman Kavala, the Court notably quoted public statements by the President of the Republic that "someone financed terrorists in the context of the Gezi events. This man is now behind bars. And who is behind him? The famous Hungarian Jew [George Soros] […] His representative in Turkey is the man of whom I am speaking, who inherited wealth from his father and who then used his financial resources to destroy this country". The Court also referred to

73 CommDH(2013)24, *op. cit.*, paras. 122-124.
74 CommDH(2016)39, *op.cit.*, paras. 69-70; CommDH(2018)30, *op.cit.*, para. 9.

another statement in which the President said that George Soros was the external and Mr Kavala the national pillar behind Gezi.75

153. The Commissioner notes in particular that the ECtHR found that these speeches were given when Mr Kavala had not even been officially charged with any offence, and that there was a correlation between the speeches and the wording of the bill of indictment filed three months later. This, for the Court, corroborated the argument that Mr Kavala's detention pursued the ulterior purpose of reducing him to silence as a human rights defender.

154. Incidentally, the Commissioner also notes that such smear campaigns and the aforementioned statements led to a decision by the Open Society Foundation to cease its operations in Turkey, due to "an increasingly hostile political environment and a number of baseless accusations"76, further depriving Turkish civil society of funding opportunities.

2.2.2 JUDICIAL ACTIONS TARGETING HUMAN RIGHTS DEFENDERS

155. The Commissioner considers that the most acute problem facing human rights defenders in Turkey is a widespread pattern of judicial actions and criminal proceedings targeting them for their lawful and legitimate activities. Turkish prosecutors do not hesitate to bring spurious charges against human rights defenders for conducting such legitimate activities and are the driving force behind this pattern. In the opinion of the Commissioner, this state of affairs should be seen against the background of the various problems affecting the Turkish judiciary and criminal proceedings she examined in the previous chapter, and is a perfect illustration of those problems.

156. In a written submission to the Court in April 2017, the Commissioner's predecessor had already cited many examples of serious interferences with NGOs, including by the judiciary, concluding that "there are clear indications that human rights defenders working on the human rights situation in South-Eastern Turkey […] have been subjected to various forms of reprisals and intimidation in retaliation for their legitimate activities".77 Among numerous examples of similar actions taken by the Turkish judiciary since that submission, the Commissioner notes the fact that a criminal investigation for aiding and abetting a terrorist organisation was initiated in 2018 against a number of prominent human rights defenders in connection with the publication of a report in 2016 on alleged human rights violations during the curfews in Cizre.

157. The Commissioner also refers to numerous statements published by her Office on the situation of human rights defenders in Turkey in 2017 and 2018, for example concerning the sentencing of a human rights defender;78 the detention of the former Chair of Amnesty International Turkey;79 the unjustified arrest and criminal proceedings against eight human rights defenders in July 2017;80 the arrest of thirteen prominent academics, civil society activists and human rights defenders in November 2018;81 and the bill of indictment regarding the Gezi trial on 20 February 2019.82

158. The Commissioner is alarmed by the extreme levels this situation has reached, where the majority of the long-time civil society partners of her Office in Turkey, who are internationally recognised, prominent human rights defenders, are facing serious charges and the risk of lengthy prison sentences in the country. The Commissioner stresses that she is not isolated in this assessment.

75 *Kavala v. Turkey*, judgment of 10 December 2019 (not yet final), para. 229.
76 Statement by the Open Society Foundation in Turkey, 26 November 2018.
77 Third Party Intervention of 25 April 2017, *Abdullah Kaplan v. Turkey* and others, by Nils Muižnieks, Commissioner for Human Rights, CommDH(2017)13, para. 37ff., conclusions.
78 Statement by Nils Muižnieks, Commissioner for Human Rights of 18 May 2017.
79 Statement by Nils Muižnieks, Commissioner for Human Rights of 10 June 2017.
80 Statement by Nils Muižnieks, Commissioner for Human Rights of 18 October 2017.
81 Statement by Dunja Mijatović, Commissioner for Human Rights of 20 November 2018.
82 Statement by Dunja Mijatović, Commissioner for Human Rights of 20 February 2019.

She notes, for example, that the Parliamentary Assembly of the Council of Europe found that the extensive interpretation of the Anti-Terror Law led "to the criminalisation and prosecution of human rights defenders and lawyers" and called on the Turkish authorities for their release.83

159. The Commissioner also refers to a joint statement by UN Special Rapporteurs on the rights to freedom of peaceful assembly and of association, on the situation of human rights defenders, on the promotion and protection of the right to freedom of opinion and expression, on the promotion and protection of human rights while countering terrorism, and the Chair-Rapporteur of the Working Group on Arbitrary Detention of November 2017, in which the UN experts affirmed that cases concerning human rights defenders demonstrated "a worrying pattern of silencing people whose work legitimately calls into question the views and policies of the Government. Most of these accusations of terrorism are based solely on actions such as downloading data protection software, publishing opinions disagreeing with the Government's anti-terrorism policies, organizing demonstrations, or providing legal representation for other activists".84

160. The Commissioner has been closely following criminal proceedings targeting human rights defenders, which are too numerous to enumerate in this report. She notes, for example, the cases against the President of the Turkish Human Rights Foundation, Şebnem Korur Fincancı, who was sentenced to two years and six months for having signed the Academics for Peace petition referred to above,85 whereas the fact that she had made statements following a fact-finding visit to Cizre in March 2016 was added to her file as evidence. While she was acquitted in July 2016 in a trial concerning her having acted as a symbolic co-editor of the *Özgür Gündem* newspaper, the prosecutor appealed this decision. Eren Keskin, another well-known lawyer and human rights defender, co-chair of the Turkish Human Rights Association, was sentenced to 17 years in prison and fines amounting to 460 000 lira (around 70 000 Euros) and is facing the prospect of further sentences in more than 100 cases concerning her. Many other members of the Turkish Human Rights Association, as well as its other co-chair Öztürk Türkdoğan, are also facing numerous investigations and ongoing trials.

161. Other noteworthy cases include the harsh sentences handed down to the members of the Turkish Medical Association for their statement calling war a public health problem. The Commissioner also noted the ongoing "Büyükada case" which concerns the former chair of Amnesty Turkey, Taner Kılıç, who spent 15 months in pre-trial detention before being released, and 10 human rights defenders who participated in a cyber-security workshop in July 2017. She notes that the prosecutor asked the trial court for a sentence of up to 15 years for six of the defendants in November 2019.

162. As noted above, the ECtHR recognised for the first time that criminal proceedings against a human rights defender pursued ulterior purposes in its aforementioned judgment concerning Osman Kavala. In this judgment, the Court considered that this ulterior purpose was not only to silence the applicant as a human rights defender, but also to have a dissuasive effect on the work of human rights defenders in general. In this respect, the Court took into account that the prosecution documents referred to multiple and completely lawful acts, many of which were carried out in co-operation with Council of Europe bodies, as well as "to ordinary and legitimate activities on the part of a human-rights defender and the leader of an NGO, such as conducting a campaign to prohibit the sale of tear gas to Turkey or supporting individual applications".86

83 Resolution 2156(2017) of the PACE on the functioning of democratic institutions in Turkey reopening the monitoring procedure in respect of Turkey, 25 April 2017.
84 Turkey: UN experts call for dropping of terror charges against leading human rights defenders, 13 November 2017.
85 See para. 41 above.
86 *Kavala v. Turkey*, judgment of 10 December 2019 (not yet final), para. 223.

163. The Commissioner considers that the same considerations apply to the co-defendants of Osman Kavala in the Gezi trial (some of whom had already been tried and acquitted in connection with the Gezi events), as well as 13 prominent human rights defenders and academics who were arrested in connection with this case in November 2018. As regards the latter, the Commissioner also views the form of these arrests and the questions put to these persons as a clear sign of a will to intimidate and silence human rights defenders in Turkey. She notes in particular that, instead of summoning them for questioning, the prosecutor ordered their arrest with raids to their houses before sunrise. She understands that their lengthy interrogations included, for example, many questions concerning their travels abroad, meetings they attended and the decisions taken at these meetings, all part of their legitimate human rights work.

164. In a written submission to the ECtHR, the Commissioner observed that a press note distributed by the Istanbul Directorate of Security in this connection already posited as an established fact that Osman Kavala was the head of a criminal organisation, while only citing lawful activities specifically protected under the ECHR and forming part of the work of human rights defenders. One such legitimate activity was used as a basis to detain an academic working on civil society issues, Yiğit Aksakoğlu, who was later released by the trial court. The Commissioner considered that this event indicated, on the one hand, ignorance of or deliberate disregard for Convention standards and the case-law of the Court, and on the other hand, an unduly biased and hostile attitude towards civil society actors by the prosecuting authorities.87

165. Another prominent issue in the work of the Commissioner's Office regarding human rights defenders in Turkey is impunity regarding murders of human rights defenders. The two main cases which received a great deal of attention in this respect were the assassination of Hrant Dink, journalist and human rights defender, in 2007 and of Tahir Elçi, head of the Diyarbakir Bar Association and human rights defender, in 2016. The trials in both cases are still ongoing. Despite clear indications that the Turkish security forces might have been involved in both cases, either through complicity, wilful inaction or negligence, the trials have been marred with serious shortcomings and have failed to fully elucidate these murders so far.

166. In conclusion, the Commissioner considers that the judicial actions targeting Turkish civil society and human rights defenders constitute the most worrying component of a continuous and concerted pressure exerted on human rights defenders, in a deliberate attempt to silence them and to prevent them from reporting on ongoing human rights violations in Turkey. The chilling effect caused by these actions is very palpable in Turkey. The Commissioner further observes that the lifting of the state of emergency in July 2018 has so far not resulted in any noticeable easing of this pressure.

2.3 THE SITUATION OF LAWYERS

167. On numerous occasions, the Commissioner and her predecessors have stressed the important role lawyers play in serving the cause of justice. Defence lawyers play a particularly crucial role for the protection of human rights in the criminal justice system, including by bringing human rights violations to light. In accordance with the well-established case-law of the Court, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial.88

168. The Commissioner examined in the previous chapter numerous measures taken during the state of emergency which restrict access to lawyers, and undermine client-lawyer privilege and the exercise of the profession of defence counsellor. In addition to these measures, which severely hamper defence lawyers in representing their clients in criminal proceedings, the Commissioner is alarmed

87 CommDH(2018)30, *op.cit.*, para. 17.
88 *Krombach v. France*, judgment of 13 February 2001, § 89.

by a series of criminal proceedings directly targeting defence lawyers. In a report devoted to this issue, Human Rights Watch reported on the prosecution of 1 546 lawyers, 274 convictions in first instance criminal courts and the detention of 598 lawyers for varying periods from the beginning of the state of emergency until April 2019.89

169. As detailed extensively in that report, and corroborated by many lawyers and the bar associations of Istanbul and Ankara the Commissioner met during her visit, it appears that prosecutors and courts increasingly overlook the professional relationship between lawyers and their clients, and consider lawyers to be tainted by the terrorist organisation their clients are accused of being a member of. This assumption of "guilt by association" results in a severely diminished capacity to defend accused persons, since the courts are reportedly very dismissive of the lawyers' requests and arguments during criminal proceedings. In addition, the Commissioner's attention was drawn to many criminal proceedings initiated against lawyers as another consequence of the same assumption.

170. Human Rights Watch reports that the majority of lawyers who were prosecuted and convicted through such an alleged misuse of terrorism charges, had been grouped together with FETÖ/PDY, while a smaller number had been considered as linked to far-left terrorist organisations or the PKK. Lawyers confirmed that this has led to a situation where their colleagues are very reluctant to take up cases concerning terrorism charges, in particular in FETÖ/PDY cases. While the cases reported to the Commissioner are too numerous for the scope of this report, she would like to draw attention to the following cases as illustrations of various problems brought to her attention.

171. In his 2016 memorandum on anti-terrorism operations in South-Eastern Turkey, the Commissioner's predecessor had raised his concerns about the arrest and detention in April 2016 of Ramazan Demir, a lawyer who had brought many requests for interim measures to the ECtHR and to the Constitutional Court during the curfews.90 Mr Demir's lawyers claimed that his detention was linked to his having brought these cases to the ECtHR. While the ECtHR considered that it had insufficient elements in this case to conclude that this had effectively hindered the applicants' right to individual application,91 the Commissioner is concerned that certain questions directed by the prosecutor to Mr Demir indicate that the act of informing international delegations about ongoing cases was considered as incriminating. The Commissioner understands that there are several ongoing criminal proceedings against Ramazan Demir, allegedly in connection with his work defending human rights. The Commissioner also received reports that, following Mr Demir's appearance before the ECtHR in November 2018, and based on information sent by the Ministry of Justice in writing to the public prosecutor and the Istanbul Bar Association, the latter initiated disciplinary proceedings which might result in Mr Demir's disbarment.

172. The abovementioned report by Human Rights Watch also documents many cases where lawyers were subjected to prosecution as a form of reprisal for legal actions they took against the police and security forces on behalf of their clients. One noteworthy case is the situation of Kazım Bayraktar, lawyer of the family of Ethem Sarısülük, who was killed during the Gezi protests in Ankara by a police bullet and whose case was examined closely by the Commissioner's predecessor. The Commissioner notes that Mr Bayraktar's name is also mentioned in the indictment regarding the Gezi events case, which specifically refers to him meeting the Commissioner's predecessor in Strasbourg. The Commissioner further notes that Kazım Bayraktar currently faces a jail sentence of 7.5 to 15 years for membership of a terrorist organisation, while the prison sentence of the police officer who shot Ethem Sarısülük was finally converted only to a fine.

89 Human Rights Watch, Lawyers on Trial: Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey, April 2019.
90 CommDH(2016)39, *op.cit.*, paras. 104-105.
91 *Tunç and Yerbasan v. Turkey*, inadmissibility decision of 7 February 2019.

173. A prominent case brought to the attention of the Commissioner concerned lawyers who were members of the former Progressive Lawyers Association, which was closed down with an executive decree at the beginning of the state of emergency. Criminal proceedings were initiated against 20 lawyers of this group in September 2017 and they were quickly placed in pre-trial detention, except for three whose whereabouts were not known. Many interlocutors of the Commissioner drew attention to the fact that during this trial the court's initial decision to release the detainees was surprisingly overturned by the same panel of judges following the prosecutor's appeal, and that the judges were immediately transferred to other courts afterwards.

174. The lawyers were subsequently convicted either for aiding and abetting, or being a member of, a terrorist organisation. 39 regional bar associations in Turkey and the Paris Bar Association issued statements, arguing that the courts had repeatedly violated criminal procedure during this trial and called for the release of the lawyers. The President of the Association, Selçuk Kozağaçlı, who received the heaviest sentence (11 years and 3 months), claimed that the trial court rejected all requests for defence witnesses, as well as over 100 separate investigation requests in favour of the defence, without any reasoning for these rejections, and that it announced its verdict in absentia. The Commissioner also notes that the reasoning in the decision convicting these lawyers referred, among others, to the persons the lawyers represented as supposed evidence of membership of a terrorist organisation, as well as their participation in different lawful events (including some which were not raised during the trial) and that the commission of the offences through the exercise of the profession of lawyer was considered an aggravating circumstance. Regardless of the particular circumstances of the case, the Commissioner is concerned that these elements corroborate the allegation that the legitimate professional activities of a defence lawyer can be considered as incriminating evidence.

175. As a final example, Veysel Ok, a lawyer who is active defending journalists and media workers was subjected to criminal proceedings for insulting the judiciary, after he claimed in a newspaper interview in December 2015 that the Turkish judiciary was "uniformly coloured" and spoke "with one voice". The Commissioner understands that he was sentenced to a suspended five-month sentence for breaching Article 301 of the Turkish Criminal Code (degrading the Turkish Nation, the state or its institutions).

176. The Commissioner was also made aware of a number of practical obstacles to practicing as a lawyer. As mentioned above, persons who are dismissed under emergency decrees are automatically barred from exercising as lawyers. She understands that appeals against specific administrative acts to that effect are routinely rejected by administrative courts. The Commissioner was also informed that trainee lawyers are prevented from registering with bar associations and exercising as a lawyer if there are criminal investigations against them even in the absence of any conviction, contrary to the principle of presumption of innocence.

177. In conclusion, the Commissioner is concerned by many indicators that the Turkish authorities and judiciary have adopted an increasingly suspicious and hostile attitude towards lawyers who play an active role as human rights defenders by initiating proceedings to seek redress for alleged human rights violations or defending the human rights of suspected terrorists. Combined with many procedural and practical impediments to the exercise of their profession, this results in a situation where lawyers are severely hampered in their ability to fulfil their crucial role as a pillar in criminal proceedings, which is essential for ensuring the right to a fair trial. The numerous judicial actions specifically targeting lawyers, and even more worryingly their professional activities, create a clear chilling effect for the entire profession.

2.4 CONCLUSIONS AND RECOMMENDATIONS

178. The Commissioner once again stresses the essential role civil society and human rights defenders play in a democratic society in preventing human rights violations, drawing the public's attention

to them when they occur, obtaining remedies and redress for victims and promoting human rights in general. They are also natural partners of the Commissioner's Office, a healthy civil society allowing her to fulfil her mandate more effectively.

179. The Commissioner is seriously concerned by the increasingly challenging and hostile atmosphere in which human rights defenders and NGOs have to operate in Turkey. Rather than seeing them as allies in addressing and rectifying human rights challenges facing the country, the prevailing attitude among the authorities is a predominantly negative one, ranging from seeing them as trouble-makers, to targeting and prosecuting them as criminals and terrorists. The Commissioner emphasises that it is the job of human rights defenders to be vocal and critical of official policy or actions: their criticism is a symptom of underlying human rights issues. Rather than attempting to silence human rights defenders, which is a human rights violation in itself, the Turkish authorities must respect them and pay attention to the underlying causes they point to.

180. The Commissioner considers that the regulatory framework regarding NGOs could be improved to render it less rigid, more transparent, and less conducive to excessive administrative discretion. The Commissioner recommends, in particular, that the Turkish authorities simplify a number of cumbersome and lengthy procedures that NGOs face. Government support and public funding of NGOs, which currently appear to be partisan and arbitrary, must be based on transparent, objective criteria and procedures which take account, among others, of the contribution of human rights NGOs. The Commissioner notes a clear deficiency regarding the opportunities for consultation and involvement of a broad range of civil society actors in policy-making and legislation, and calls on the Turkish authorities to urgently address this long-standing structural problem by designing a transparent framework within which consultations with human rights NGOs take place systematically and on an institutional basis.

181. The Commissioner considers that some of the measures taken during the state of emergency had a devastating impact on Turkish civil society, including on civil society organisations working on human rights issues. She urges the Turkish authorities to neutralise the effects of emergency decrees regarding NGOs without waiting for the outcome of ongoing appeal procedures and reassure Turkish society by all means necessary that they will no longer have recourse to such measures. In this fragile context, the Commissioner is particularly concerned about the obligation to register all members of NGOs in a centralised database of the Ministry of the Interior, and recommends that the Turkish authorities revoke this measure. She is further concerned about consistent reports of inspections and audits being misused to frustrate and intimidate certain NGOs and calls on the authorities to bring their practice in line with applicable international standards with a view to avoiding arbitrariness. Open-ended and indiscriminate bans, such as the ban on LGBTI-related activities in Ankara, which clearly contradict the right to freedom of assembly and association enshrined in the European Convention on Human Rights, are unacceptable and must be immediately discontinued.

182. The Commissioner is deeply worried about an escalating negative political discourse targeting human rights defenders, as well as smear campaigns in pro-government media that frequently amount to defamation and hate speech against them. Noting that the Turkish administrative authorities, and increasingly also the judiciary, are heavily influenced by such discourse and act with a negative bias against human rights defenders, the Commissioner urges Turkish officials at all levels to strictly refrain from publicly targeting human rights defenders and labelling them as criminals and terrorists.

183. The Commissioner considers that criminal proceedings targeting human rights defenders are currently the most acute symptom of the mounting pressure they are facing in Turkey. Criminal investigations, proceedings, detentions, and sentences faced by Turkish human rights defenders are too numerous and systematic to be considered individual occurrences and point to a

widespread pattern of misusing the judicial process to silence human rights defenders and discourage civil society activism, as recognised explicitly by the European Court of Human Rights in a recent case. It is clear for the Commissioner that prosecutors and judges ignore or deliberately disregard international standards in this context, notably by re-interpreting legitimate and lawful activities human rights defenders ordinarily undertake in a democratic society as evidence of criminal activity, often with the encouragement of public officials at the highest level to that effect.

184. The Commissioner considers that Turkish lawyers have borne the brunt of these negative developments in their double capacity as human rights defenders and as a fundamental component of an increasingly hostile judicial system. Turkey must urgently roll back restrictions to procedural defence rights adopted during the state of emergency, including severe limitations to client-lawyer privilege, and address the increasingly apparent attitude within the Turkish judiciary of considering lawyers guilty by association with their clients, which led to a significant increase in judicial actions targeting lawyers, including by admitting as evidence acts that form part and parcel of their profession. The danger that this situation poses, including by undermining a major component of the right to a fair trial enshrined in the European Convention on Human Rights, cannot be overestimated.

185. The Commissioner considers that these concerns are intimately tied to the problems currently affecting the judiciary in Turkey and refers to her recommendations in the previous chapter of this report. She urges the Turkish authorities, including the Council of Judges and Prosecutors, to acknowledge the dire situation faced by human rights defenders and lawyers and rectify it as an absolute priority through all available means.