The Functioning of the Judicial System in the Republic of Turkey

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Report of an Advisory Visit

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by

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Glossary of Abbreviations

ATL	Anti-Terror Law
CCP	Code of Criminal Procedure
EC	European Commission
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
HRA	Human Rights Association of Turkey
HRFT	Human Rights Foundation of Turkey
NGO	Non Governmental Organisation
SHPC	Specialised Heavy Penal Court
SSC	State Security Court
TGNA	Turkish Grand National Assembly
TPC	Turkish Penal Code

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Executive Summary

In the period since the first Advisory Visit in October 2003, significant progress has been made towards strengthening the functioning of the judicial system in Turkey. Whilst our assessment of the legal reform process in Turkey must necessarily be limited by the scope of the recommendations advanced in the report of our first Advisory Visit, we nevertheless report that, with few exceptions, the Turkish state authorities have demonstrated a genuine commitment to aligning their legal system further with the values and standards of the European Union. In many instances steps have been taken towards realising this commitment through the introduction of actual or proposed legislative and administrative reforms.

Without providing an exhaustive list of the positive initiatives that have been undertaken in an effort to modernise the judicial system in Turkey, the following developments are particularly noteworthy. The State Security Courts have been abolished and replaced by specialised Heavy Penal Courts. A draft law to enable judges and public prosecutors to organise and form professional associations is currently being prepared. Draft legislation on the establishment of a judicial police force has been proposed in an effort to enhance the role of public prosecutors in the criminal investigation process. In an effort to increase access to lawyers, the Ministry of Interior has agreed to permit Bar Associations to display posters advocating the rights of detainees in both police and gendarme stations. Complaints from lawyers alleging intimidation and harassment when attempting to enter prisons have ceased completely. The Ministry of Justice has undertaken to construct consultation rooms within the secure facilities of all courthouses in Turkey. The Ministry of Justice has agreed in principle that the position of the prosecutor in the courtroom should be moved so as to equate his location with that of the defence lawyer.

In an effort to increase the quality and efficiency of the justice system, 136 courts with an inadequate caseload have been closed and 511 judges and public prosecutors transferred to work in other courthouses. A specialised commission has been established to commence work on necessary measures to abolish the distinction between Civil Courts and General Civil Courts of First Instance. A draft law to introduce the possibility of Alternative Dispute Resolution is under consideration at the Prime Ministry and the Draft Code of Criminal Procedure will, when enacted, empower courts to reject indictments brought on insufficient evidence. Beyond this, the National Judicial Network Project is progressing according to schedule and will soon be operational. All judges and public prosecutors have been equipped with personal computers and over 9,000 judges and public prosecutors and 23,000 administrative court staff have received training in computer use. The Draft Law on the Establishment of Regional Courts of Appeal has now been approved by the TGNA and the project to establish the new appeal courts is progressing according to schedule, with training programmes for judges, public prosecutors and other staff of the new courts being prepared. A total of 21 juvenile courts and 143 family courts are now operational.

Forensic medical examination facilities will in future be established within hospitals and health centres rather than in facilities within court buildings. A total of 11 new facilities are presently ready to begin work and the remaining courthouse facilities will be transferred shortly. Regional training of judges, public prosecutors and lawyers in the effective forensic examination of detainees is ongoing. Initiatives have also been undertaken to ensure that law enforcement officers who bring detainees to medical examinations are not the same as those involved in the detention or interrogation of the detainee, that all forensic examinations of detainees are conducted out of the sight and hearing of law enforcement officials and that forensic examination reports are no longer handed to the law enforcement authorities. Finally, in the period since the first Advisory Visit the Ministry of Justice has successfully completed a comprehensive human rights training programme involving all judges and public prosecutors in Turkey. The Ministry now collects decisions of judges and public prosecutors that refer to the ECHR and is committed to organising ongoing human rights training initiatives in the future.

As previously stated, the aforementioned list of reforms are but a selection of the activities that have been undertaken in an effort to align the functioning of the Turkish legal system with the values and standards of the European Union Member States. Nevertheless, this report also notes that it is too early to assess to what extent many of the measures that have been introduced to date have in fact brought about any significant positive improvement in the functioning of the Turkish legal system and accordingly there is a need for further monitoring. The report also concludes that the Turkish state authorities have in fact been unwilling to engage several of the recommendations advanced following the first Advisory Visit. Again, without providing an exhaustive list, the following are examples of areas where question marks remain over the adequacy of the reform process.

There is a widespread perception amongst lawyers and human rights associations that rather than bringing about any real improvement in terms of the fairness of proceedings in political and serious criminal cases, the newly established specialised Heavy Penal Courts will in fact function as the State Security Courts did before them, albeit under a different name. Continued monitoring of the specialised Heavy Penal Courts is required in order to assess to what extent, in practice, the new courts function independently, impartially and afford applicable judicial guarantees so as to ensure that the proceedings before them are fair.

There has been no significant change in the degree of independence enjoyed by the judiciary in Turkey. Whilst, in an important positive development, the body responsible for the professional careers of all judges in Turkey, the High Council of Judges and Public Prosecutors, has expressed a desire to free both itself, and the Turkish judiciary as a whole, from the guardianship of the Ministry of Justice, with the exception of permitting judges to form professional associations, the Ministry of Justice has avoided committing itself to any of the recommendations on judicial independence advanced within the report of the first Advisory Visit. Therefore, whilst there does now appear to exist a most apparent judicial will to remove the influence of the executive in the functioning of the judiciary in Turkey, it remains at best unclear as to whether the

Ministry of Justice yet possesses the necessary political will to legislate for reforms that will effectively surrender its guardianship over the judiciary in practice.

On the related question of the most apparent union between judges and public prosecutors in Turkey and the impact of this relationship upon the objective impartiality of the judiciary, there has been no official initiative to establish a clearer separation of the tasks, responsibilities and powers of judges and public prosecutors since the first Advisory Visit. Indeed, the perception that judges and public prosecutors are to be regarded as equals appears somewhat entrenched.

Insufficient measures have been taken to address the lack of prosecutorial supervision over the determination as to which criminal investigations ought properly to result in court proceedings. In order to avoid inviting unmeritorious proceedings to enter the court system, further measures are required to encourage public prosecutors to actively waive prosecutions, discontinue proceedings conditionally or unconditionally, or divert cases from the formal justice system in circumstances where there is no realistic prospect of conviction.

Further reform is needed in order to strengthen the right of defence. Although there has been a slight improvement in the position regarding implementation of the right of detainees to access free legal counsel immediately upon being deprived of their liberty in south-east Turkey, significant problems remain. A combination of widespread lack of public awareness and persistently high levels of official obstruction continue to present obstacles in the path of detainees throughout the region accessing legal advice and representation upon arrest or detention. At the same time, the reality of court proceedings throughout Turkey is that many judges and public prosecutors continue to look unfavourably upon requests from lawyers to speak to their clients during the course of court proceedings and a most apparent lack of equality of arms persists as between prosecution and defence counsel. There continue to be instances of lawyers being both threatened with and exposed to prolonged and repeated criminal prosecutions for activities carried out in the exercise of their professional duties and the Ministry of Justice remains reluctant to relinquish its role in the functioning of the Bar Associations.

In terms of the overall quality and efficiency of the justice system, there has been no significant improvement in the financial resources of the judiciary. Judicial services continue to be allocated just 0.8% of the overall budget. In order to reduce the considerable backlog of cases in the courts and to speed up proceedings, there remains a need to appoint more judges and public prosecutors. At present there are 560 vacancies (a figure which is estimated to rise to 900 by the end of 2004) and an estimated 1,800 more judges and public prosecutors are required in order to begin reducing the existing heavy caseload. Laws introducing measures designed to facilitate the settlement of private law disputes without the need for timely and costly litigation before the courts, to simplify the rules relating to jurisdiction in order to reduce the number of artificial suits, and to introduce a system of plea bargaining for criminal cases are still being negotiated. Once adopted, the impact of the new legislation will need to be carefully monitored. There appears to be only very limited interest within the judiciary for the creation of a

written Code of Conduct establishing formal standards for the ethical conduct and discipline of judges and public prosecutors.

Primary responsibility for the documentation of ill-treatment of detainees at the hands of agents of the state continues to lie with physicians who are themselves attached to an agency of the state. We consider that a more thorough reform of the administration of forensic medicine services in Turkey is required so as to secure the independence of physicians engaged in the role of documenting ill-treatment by state officials. At the same time, forensic medical examinations continue to be carried out otherwise than in accordance with the requirements of the Istanbul Protocol.

An analysis of statistical data relating to the number of cases filed and rendered in 2001 and 2003 under Article 159, 169 and 312 of the Turkish Penal Code and Articles 7 and 8 of the Anti-Terror Law suggests that a practice of alternative charging persists. At the same time, the right to freedom of expression continues to be undermined in so far as despite the decriminalisation of certain publications as a result of the abolition of Article 8 of the Anti-Terror Law and the amendment of various other related provisions, some courts in Turkey remain reluctant to quash confiscation decisions made in relation to these publications even though the act of possessing/publishing the articles in question no longer constitutes an offence as originally charged.

We also note that the number of complaints brought before the Prime Ministry's Human Rights Presidency is low, despite various initiatives that have been undertaken to increase public awareness of the institution. This suggests a continuing lack of public awareness and/or lack of public confidence in the ability and willingness of the Human Rights Presidency to provide effective redress for alleged human rights violations.

Thus, the functioning of the judicial system in Turkey remains far from perfect. However, despite the continued existence of various shortcomings, many significant positive developments have taken place since the first Advisory Visit. The Turkish legal system is going through a rapid period of transformation and, for the most part, both the legislature and the executive appear resolved to carry out this transformation. During the course of the second Advisory Visit all the judges, prosecutors, lawyers, state representatives and human rights defenders that we interviewed repeatedly reminded us that change is a process and that this process is now gaining momentum in Turkey. Whilst noting the scope for improvement, our interviewees universally observed that the momentum generated by the reform process to date is itself now acting as a catalyst for further reform initiatives. Accordingly, to allow Turkey to proceed with its application for membership of the European Union is most likely to provide the necessary motivation to advance the process of reforming the judicial system in Turkey still further. Conversely, to rebuff Turkey is likely to set back substantially the progress that has already been made.

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I – INTRODUCTION

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

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

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

The Mission followed a similar Advisory Visit conducted between 28 September and 10 October 2003. At the conclusion of the first Advisory Visit a report was prepared reflecting the concerns that had been expressed by numerous judges, prosecutors and lawyers throughout Turkey regarding the functioning of the Turkish judicial system. The report advanced recommendations as to how the Turkish state authorities might further align the functioning of the judicial system with EU standards. The second Advisory Visit set out to assess the degree of progress in implementing the recommended measures.

The Ministry of Justice welcomed the report of the first Advisory Visit, considering it to be an important contribution to the ongoing efforts to strengthen the Turkish judicial system, and commenced a careful study of the recommendations immediately upon receipt. The report was translated into Turkish by the Directorate General for EU Affairs of the Ministry of Justice and widely disseminated to relevant authorities, including judges of the high courts, offices of chief public prosecutors and the Union of Turkish Bar Associations, with a view to taking comments upon it. A copy of the report was also posted on the web-site of the Ministry of Justice. In April and May 2004, judges and chief public prosecutors from throughout Turkey convened in Antalya in order to discuss the report.

Following completion of the first evaluation stage a commission was established under the presidency of Minister of Justice, Cemil Cicek, to undertake a detailed analysis of the recommendations. The commission determined precise strategies to be followed and definite measures to be undertaken with regard to each recommendation. Where appropriate, a calendar for implementation was also established.

On 11 May 2004, the Ministry of Justice produced a comprehensive written response to the recommendations of the first Advisory Visit in a 45-page evaluation report. The Ministry of Justice accepted fully fifty-eight out of eighty-two recommendations and noted that work had already begun on implementation. On a further nine, the Ministry of Justice awaited the response of the High Council of Judge and Public Prosecutors. The Ministry of Justice declined to accept eight recommendations, considered that three were based on inaccurate information and advised that four lay within the competence of other Ministries.

On the occasion of the second Advisory Visit, the European Commission appointed two experts from European Union Member States to conduct the assessment, Kjell Björnberg (Sweden), Judge, Chamber President of the Court of Appeal for Western Sweden, and Paul Richmond (United Kingdom), Barrister of England and Wales. The experts were advised by Florence Schmidt-Pariset (France), *magistrat*, currently serving as a Detached National Expert at the EC Directorate General for Justice and Home Affairs. The experts were accompanied by Tobias King, Desk Officer, External Relations and Enlargement Unit, EC Directorate General for Justice and Home Affairs; Marie-Sofie Sveidqvist, Desk Officer, EC Directorate General for Enlargement; and Sedef Koray-Tippkamper, Sector Manager for Justice and Home Affairs, EC Delegation, Ankara and Didem Bulutlar Ulusoy, Political Officer for Human Rights and Judiciary, EC Delegation, Ankara.

The Mission arrived in Turkey on Sunday 11 July 2004 and left on Monday 19 July 2004. During this time we held a total of 45 meetings with judges, public prosecutors, lawyers, physicians, human rights advocates and government officials in Ankara, Istanbul and Diyarbakir. Time constraints precluded us from visiting Izmir. A list of those whom we met is attached as an appendix to the Report in Annex A. The Mission received full co-operation from the Government of Turkey and we observed a willingness on the part of all of the interviewees to maintain and develop further the dialogue between the European Commission and themselves.

Chapter II of the Report examines the abolition of the State Security Courts ("SSCs") and assesses to what extent the newly established specialised Heavy Penal Courts may be said to have resolved the criticisms levelled at the former SSCs. In Chapter III we report on the progress that has been made since the last Advisory Visit towards strengthening the independence and impartiality of the judiciary in Turkey. Chapter IV examines the extent of developments regarding the role and effectiveness of public prosecutors and in Chapter V we review our opinion on the ability of lawyers to perform their role within the Turkish legal system. In Chapter VI we assess the present position regarding the degree of quality and efficiency within the Turkish legal system

before examining the extent to which progress has been made in implementing reforms designed to further improve its functioning. Finally, our conclusions and recommendations are set forth in Chapter VII

This report does not repeat the contents of the explanatory paragraphs within the report of the first Advisory Visit. We have however endeavoured to summarise the findings of our first report in order to provide a context for our most recent appraisal.

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

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

We would like to express our gratitude to all those agencies, organisations and individuals that contributed to the information presented in this report. We are particularly grateful to Dr. Saadat Arikan, General Director of the Director General for European Union Affairs of the Ministry of Justice, who must be acknowledged for her courage, energy and genuine commitment to strengthening the judicial system in Turkey. We are also grateful to Mr. Celalettin Donmez and Mr. Alper Akgulen of the Ministry of Justice Directorate General for EU Affairs for facilitating our meetings with judges, public prosecutors and representatives of the Turkish government. We thank Ms. Natali Medina, Ms. Sera Onal, Ms. Nur Camat, Ms. Zeynep Ener and Ms. Gulseren Albatros for their stamina, diplomacy and technical excellence whilst acting as the Mission's interpreters.

II – STATE SECURITY COURTS

A. Introduction

In the report of the first Advisory Visit we observed that notwithstanding the removal of military judges from State Security Courts ("SSCs"), the reduction in the number of offences within the jurisdiction of the courts and the improvement in procedural safeguards for SSC detainees, the extraordinary jurisdiction, responsibilities and functioning of the SSCs continued to represent an obstacle to the development of the rule of law in Turkey. Our concern centred on the relationship between the SSCs and the 1982 Constitution, the underlying tone and explicit provisions of which, as originally drafted, favoured national security and the indivisible integrity of the Turkish State at the expense of the rights and liberties of its citizens. We observed that the SSCs were not merely established by the 1982 Constitution; ultimately they had worked in accordance with the Constitution for a little under 20 years. In practice this meant that the authoritarian language of the 1982 Constitution had permeated to the core of the SSCs to the point where they adopted objectives that were wholly inconsistent with the principle of the rule of law and the protection of fundamental rights and liberties. The emphasis within the 1982 Constitution, prior to 17 October 2001, on the promotion of the interests of the Turkish state over the rights and freedoms of the individual had led to an ethos or culture within the SSCs that that they existed, as their name implied, to vindicate "state security", rather than to adjudicate impartially as between state and citizens.

B. Abolition of the SSCs

We recommended that:

- **(i) the Constitution be amended so as to abolish the State Security Courts;**
- **(ii) the existing functions of the State Security Courts be transferred to the Heavy Penal Courts;**
- **(iii) cases previously within the jurisdiction of the State Security Courts be assigned to judges and prosecutors within the Heavy Penal Courts who possess the necessary competence to conduct such cases;**
- **(iv) public prosecutors within the Heavy Penal Courts appointed to investigate cases formerly within the jurisdiction of the State Security Courts be vested with power to undertake nationwide rather than provincial investigations as and when required.**

On 16 June 2004 the Turkish Grand National Assembly adopted Law No. 5190 amending the Code of Criminal Procedure and abolishing the Law on Establishment and

Trial Methods of State Security Courts.[1] The adoption of this law abolished the State Security Courts in Turkey.

In the place of the SSCs has been established a number of Heavy Penal Courts specialising in criminal prosecutions involving predominantly terrorism and narcotics offences. Provisional Article 5 of Law No. 5190 provides that the term "State Security Court" shall be changed to "Heavy Penal Court to be assigned by the High Council of Judges and Public Prosecutors in accordance with article 394/a of the law number 1412". Article 394/a of the Code of Criminal Procedure provides that these Heavy Penal Courts shall be assigned in provinces determined by the High Council of Judges and Public Prosecutors upon the recommendation of the Ministry of Justice. New specialised Heavy Penal Courts have to date been established in Ankara (1), Istanbul (6), Diyarbakir (4), Malatya (1), Erzurum (1), Van (2), Adana (2) and Izmir (1).

Article 394/a of the Code of Criminal Procedure defines the offences falling within the jurisdiction of the newly established Heavy Penal Courts as follows:

1. Articles 125 to 139, 146 to 157, 168, 169, 171 and 172 of the Turkish Penal Code, together with crimes committed collectively or by establishing organisations as provided for in Article 403;
2. In the regions where a state of emergency was declared in accordance with Article 120 of the Constitution, offences related with the incidents that had caused the declaration of state of emergency;
3. Offences within the Anti-Terror Law (Law No. 3713);
4. Offences within the context of the Law on the Fight against Criminal Organisations Established with the Aim of Gaining Benefit (Law No. 4422).

Article 394/a of the Code of Criminal Procedure also provides that the jurisdiction of the new Heavy Penal Courts shall cover more than one province. The new courts therefore have a wider competence than the existing Heavy Penal Courts. According to a judge of the Ankara specialised Heavy Penal Court, the 18 specialised Heavy Penal Courts are located in 8 different provinces. The specialised Heavy Penal Court in Ankara has jurisdiction over 21 provinces.

When one compares the former SSCs with the newly established Heavy Penal Courts some differences are apparent. Beyond the obvious change in name, the scope of the crimes under the jurisdiction of the new Heavy Penal Courts has been narrowed slightly in comparison with the former SSCs. Of particular note, whereas Article 312 of the Turkish Penal Code ("incitement to hatred on the basis of differences of social class, race, religion, sect or region") was within the jurisdiction of the SSCs, it is no longer within the jurisdiction of the new specialised Heavy Penal Courts. According to the Ankara branch of the Human Rights Association this amendment represents a return to the position three years ago when Article 312 of the Turkish Penal Code was within the

[1] Law No. 5190 adds a section entitled "Trial Methods Regarding Some Crimes" to the text of the Code of Criminal Procedure following Article 394 of the said Code.

competence of the ordinary Heavy Penal Courts rather than the SSCs. We welcome this as a positive development.

The authorities and duties of the State Security Court Chief Public Prosecutors have also ended. The former Istanbul State Security Court Chief Public Prosecutor informed the delegation that he no longer retains his title and is in fact now subordinate to the Istanbul Chief Public Prosecutor. Further, whereas judges and public prosecutors of the SSCs were appointed for a term of four years, Provisional Article 1 of Law No.5190 provides that judges and public prosecutors of the new Heavy Penal Courts shall be appointed to a renewable three year term of office.

Regarding custody periods, Law 5190 adopts provisions in conformity with the reform packages. Article 394/d of the Code of Criminal Procedure in fact extends the rights of the defence. The Code of Criminal Procedure now provides that the time to be given to the public prosecutor, intervening party or their lawyer to notify their claim about the merits of the case; and to the defendant or his lawyer to make their defence against claims shall be a reasonable period. In cases where this period means limitation of the right of defence in real terms, it can be extended ex-officio. Previously, the Code of Criminal Procedure allowed the defence 15 days for the preparation of the defence case with the option to extend this period to one month in cases where there were at least 15 defendants.

Regarding the interval between detention and presentation before a judge, Article 128 (as amended by Law No. 3842)[2]of the Code of Criminal Procedure provides that a person who has been detained on suspicion of an ordinary crime is entitled to the protection of being brought before a competent judge within a maximum period of 24 hours.[3] On 10 July 2003, the sixth reform package (Law No. 4928) entered into force and this harmonized the position of SSC detainees with those accused of ordinary crimes. This enabled persons detained on suspicion of SSC offences to benefit from Article 128 of the Code of Criminal Procedure. In October 2003 we reported therefore that all detained persons, whether suspected of ordinary crimes or SSC crimes, were entitled to be brought before a judge no later than 24 hours after their initial detention. Article 394/b of the Code of Criminal Procedure, as introduced by Law No. 5190, however now provides "For those who were apprehended and arrested in relation to the crimes that fall under Article 394/a, the 24-hour period mentioned in paragraph one of article 128 of the law shall be implemented as 48 hours." This appears to extend the period of detention before presentation of a judge in cases falling within the jurisdiction of the new specialised Heavy Penal Courts.[4]

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

[3] Submission to the UN Committee against Torture concerning Turkey, 22 July 2002, para. 27.

[4] Article 394/b of the Code of Criminal Procedure further provides that where persons are apprehended and arrested in places where a state of emergency is declared as a requirement of article 120 of the Constitution, the time set as 4 days in paragraph 2 of article 128 of the Code of Criminal Procedure may be extended up

Whilst recording these changes however, it must also be noted that there is a widespread perception amongst lawyers associations and human rights associations that the abolition of the SSCs has not brought about any real improvement in terms of the fairness of proceedings in political and serious criminal cases deemed threatening to the security of the Turkish state. It is generally considered that the new specialised Heavy Penal Courts are functioning simply as SSCs under a different name. The President of the Diyarbakir branch of the Human Rights Association commented that the only aspect of the former SSCs that has actually changed are the name-plates at the entrances to the courthouses. He remarked that the prosecutor at the Diyarbakir specialised Heavy Penal Court this week is the same as the prosecutor who was at the Diyarbakir SSC last week. He commented that it is not reasonable to expect the mentality of the prosecutor to change in one week and therefore all the problems of the former SSCs continue in practice. The Istanbul branch of the Contemporary Lawyers Association similarly remarked that the SSCs may have changed their name but the judges in the new courts remain the same. The Ankara branch of the Human Rights Association commented that there was nothing new about the specialised Heavy Penal Courts and they were open to criticism for all the same reasons as the SSCs had been criticised before them. The Human Rights Association pointed out that the new specialised Heavy Penal Court in Ankara is operating in exactly the same courtroom as No. 1 State Security Court operated previously. We are given to understand that the same is true of the new specialised Heavy Penal Court in Istanbul. The Ankara branch of the Contemporary Lawyers Association stated that in their view only the name and name plates of the courts had changed. The judges were the same and they were carrying out the same function. The President of the Union of Turkish Bar Associations informed us that in his opinion the new Heavy Penal Courts did not differ from the former SSCs in any material respect.

For our part we observed that the new specialised Heavy Penal Courts are operating in exactly the same courtrooms as the former SSCs. The only visible difference is that wherever they previously existed, the sign "*Devlet Guvenlik Mahkemesi*" ("State Security Court") has been removed from the entrance to the courthouses. We did note however that, on the occasion of our visit, a plaque engraved with the initials "*DGM*" still adorned the wall adjacent to the door through which the judges and public prosecutor had to pass in order to enter the specialised Heavy Penal Court in Ankara (former No. 1 SSC). This plaque is visible only to the judges and the public prosecutor and not to the public.

Regarding the personnel of the new specialised Heavy Penal Courts, according to official figures from the Ministry of Justice, prior to the introduction of Law No. 5190, 189 judges and public prosecutors were appointed to the SSCs. On 1 July 2004, following the abolition of the SSCs, the High Council of Judges and Public Prosecutors assigned 125 of these judges and public prosecutors to new duties outside the scope of the newly established specialised Heavy Penal Courts, whilst 64 remained within the newly established specialised Heavy Penal Courts. It may therefore be concluded that the High Council of Judges and Public Prosecutors has re-assigned two-thirds of the former

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to seven days upon the request of the public prosecutor and decision of the judge upon hearing the apprehended or arrested person.

SSC judges and public prosecutors to positions unrelated with the newly established specialised Heavy Penal Courts whilst one-third of the judges and public prosecutors within the newly established specialised Heavy Penal Courts are former SSC judges and public prosecutors.

The Chief Public Prosecutor of Diyarbakir informed the delegation that of the 12 public prosecutors previously working within the SSC, 8 have been appointed elsewhere. A former judge of the Diyarbakir State Security Court now sitting in the new Heavy Penal Court informed the delegation that there were 16 judges in the SSCs, 8 have been appointed to other courts, leaving 8 continuing to serve in the new Heavy Penal Court. In addition, 2 new appointments have been made. The public prosecutor of the Istanbul specialised Heavy Penal Court informed the delegation that whereas previously 19 public prosecutors were assigned to the SSCs, 7 of these have now been appointed elsewhere and half of the SSC judges have been replaced. A former judge of the Ankara State Security Court informed the delegation that of the two SSCs previously operating in Ankara, one has been closed completely and 2 judges have been replaced in the other newly established court.

Whilst it is clear that two-thirds of the former SSC judges and public prosecutors have been re-assigned to positions unrelated with the newly established specialised Heavy Penal Courts, it is also clear that a significant proportion of the personnel of the new courts remain the same as were appointed to the SSCs. The Ministry of Justice explains this situation by reference to the professional requirement that judges and public prosecutors serve a designated term of office within any given geographical duty area before becoming eligible for re-appointment. On the date when the SSCs were abolished, a significant proportion of the judges and public prosecutors appointed to the SSCs had not yet completed their minimum term of office within their geographical duty area and hence were required to remain within the same geographical duty area even though their court had been abolished. Upon being considered for re-appointment, they remained liable to be appointed to any court within their geographical duty area, including the courts established under Law No. 5910. Given the significant number of re-appointments that had to be made within certain geographical duty areas and the limited number of vacancies outside the newly established Heavy Penal Courts within those areas, appointment to the newly established Heavy Penal Courts was the only option for many judges and public prosecutors who had not yet completed their minimum term of office within their geographical duty area. In contrast, those SSC judges and public prosecutors who had completed their minimum term of office within their geographical duty area could be appointed to a new geographical duty area. With this, a wider range of appointments was available. In addition to the restriction imposed by the professional requirement that judges and public prosecutors serve a designated term of office within any given geographical duty area before becoming eligible for re-appointment, an argument was also advanced to the delegation that some judges of the former SSCs might be permitted to sit in the specialised Heavy Penal Courts in order to ensure a degree of continuity and maintenance of institutional memory.

During the course of the second Advisory Visit we observed a lack of uniformity of practice regarding the treatment of cases that were before the SSCs on the day of abolition. Whilst in all courts the trial and investigation files that were pending at the SSCs on the day of abolition have been transferred to the authorised competent Heavy Penal Courts, there is a lack of consistency regarding the approach to cases where the trial was part-heard on the day of abolition. In Ankara a judge of the specialised Heavy Penal Court informed the delegation that such cases are assigned a new hearing number and the proceedings are re-heard from the beginning. Yet, according to the Chief Public Prosecutor of Istanbul and a judge of the specialised Heavy Penal Court in Diyarbakir, cases that were before the SSCs in Istanbul and Diyarbakir on the date of abolition have continued to be heard in the new specialised Heavy Penal Courts without interruption. Thus, in a case where three hearings were held in the SSC, rather than re-hearing the case from the beginning, the fourth and subsequent hearings are being conducted in the specialised Heavy Penal Courts. That no uniformity of practice has been established regarding the treatment of cases that were before the SSC on the day of abolition is surprising. However, more importantly, the practice in Istanbul, Diyarbakir and presumably elsewhere, raises an obvious fair trial concern. As a result of the changes in judicial personnel within the new specialised Heavy Penal Courts as compared with the former SSCs, there are cases presently before the newly established specialised Heavy Penal Courts where at least one of the three judges currently hearing the proceedings is different from the judges that commenced hearing the proceedings. A judge of the Diyarbakir specialised Heavy Penal Court accepted that this situation does presently exist and explained that it is addressed by the judge or judges who have heard the case from the outset trying to ensure that the new judge or judges read all of the case file. The judge of the Diyarbakir specialised Heavy Penal Court accepted however that it was a valid criticism that the newly appointed judge or judges would have had no opportunity to assess first hand the oral evidence of the defendant(s) or witnesses. We consider that in circumstances where the panel of judges has changed, the right to a fair trial demands that cases that were before the SSCs on the date of abolition should be re-heard from the beginning.

C. Conclusion

For our part, we warmly welcome the abolition of the SSCs in line with the recommendation made following the first Advisory Visit. We understand the concerns of lawyers and human rights defenders that given their location and composition, the new specialised Heavy Penal Courts may in reality function as the SSCs did before them, albeit under a different name. That said, we also recognise the difficulties presented by a lack of alternative physical facilities for the courtrooms and the existence of a limited number of judicial personnel with sufficient specialist knowledge and experience to undertake appointments within the new specialised Heavy Penal Courts.

We consider that it is neither appropriate nor possible to express any final view regarding the functioning of the new specialised Heavy Penal Courts. On the occasion of the second Advisory Visit, the Law amending the Code of Criminal Procedure and abolishing the SSCs had only been in force for a matter of days. Whilst we were able to

note the structure, location and composition of the courts set up to replace the SSCs, it was too early to assess the extent to which, in practice, the new courts may be said to be independent, impartial and afford applicable judicial guarantees so as to ensure that the proceedings before them are fair. Whilst recognising the legitimate concerns that have been raised regarding the functioning of the new courts, we believe that it is only once the courts have been operational for a period of at least several months that any meaningful assessment of their functioning may be undertaken. We would however express the hope that, in order to allay the concerns of observers, consideration will be given to appointing a greater proportion of the former SSC judges and public prosecutors serving within the courts established under Law No. 5910 to other courts as soon as it is possible to do so.

For these reasons we consider that there is a need for continued monitoring of the functioning of the specialised Heavy Penal Courts.

We also express our concern in relation to the lack of consistency regarding the treatment of cases that were on-going before the SSCs at the date of abolition and the fact that the panels of judges in such cases have been changed after the oral hearings have commenced and evidence has been heard.

III – INDEPENDENCE OF THE JUDICIARY

A. Introduction

In the report of our first Advisory Visit we concluded that despite the existence of various constitutional guarantees of judicial independence, when measured against the core standards of the UN Basic Principles on the Independence of the Judiciary[5] and Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe,[6] true institutional and functional judicial independence was not yet a feature of the Turkish justice system. We concluded that the administration of the Turkish judiciary remained, to an unacceptable degree, subject to the potential influence of the political will of the Ministry of Justice. This conclusion was based upon the following factors:

- paragraph 6 of Article 140 of the Turkish Constitution expressly attached the administrative functions of the judiciary to the Ministry of Justice;

- the practise of requiring prospective members of the judicial profession to attend for an oral interview with personnel from the Ministry of Justice created the potential for the Ministry of Justice to have a profound influence over the decision as to who would, and who would not, be selected as a candidate judge;

- both the content of the pre-service training of candidate judges and the administration of the School for Candidate Judges and Public Prosecutors were strongly dependent upon the Ministry of Justice;

- the in-service training of judges was administered, not by members of the judiciary themselves, but by the Education Department of the Ministry of Justice;

- the presence of the Minister of Justice and his Under-Secretary on the High Council for Judges and Public Prosecutors created the potential for executive influence in all decisions relating to the professional future of judges in Turkey;

- with the exception of the Minister of Justice and Under-Secretary, all members of the High Council were appointed by the President of the Republic;

- the High Council did not have its own secretariat that it could rely upon for its administrative tasks. Instead, the High Council was entirely dependent upon a personnel directorate of the Ministry of Justice for administrative support;

[5] UN Basic Principles on the Independence of the Judiciary, 29 November 1985, A/RES/40/32.
[6] The Committee of Ministers adopted the Recommendation on Judges on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

- the professional careers of judges were determined on the basis of performance appraisals prepared by judicial inspectors who were themselves civil servants working within the central organisation of the Ministry of Justice;

- the High Council did not have its own independent budget, instead it was reliant upon the discretion of the Ministry of Justice for its financial resources;

- under paragraph 4 of Article 159 of the Turkish Constitution there could be no appeal to any judicial body against a decision of the High Council;

- the Ministry of Justice regularly issued circulars to public prosecutors throughout Turkey instructing them on how, in the opinion of the Ministry, particular laws should be interpreted and these might influence the judiciary; and

- judges in Turkey were prohibited from organising and forming professional associations.

Following transmission of the first Advisory Visit report to the Ministry of Justice, in June 2004 the High Council of Judges and Public Prosecutors, together with a delegation from the Ministry, undertook a study visit to Sweden, the United Kingdom and France in order to assess measures adopted by EU Member States in order to promote the role of judges and strengthen judicial independence. Upon returning to Turkey, the members of the High Council engaged in a series of meetings with the Ministry of Justice in order to evaluate the recommendations advanced following the October 2003 Advisory Visit regarding the independence of the judiciary. Following the conclusion of these meetings, the Ministry of Justice prepared an evaluation report. On 26 July 2004, the Ministry of Justice forwarded its evaluation report to the European Commission.

In the remainder of this section we assess the progress that has been made since the last Advisory Visit towards strengthening judicial independence in Turkey. The assessment is based upon the written evaluation report prepared by the Ministry of Justice, the answers of the High Council to questions from the experts during the course of an official meeting and the opinions of Ministry of Justice officials, judges, public prosecutors, lawyers and human rights defenders throughout Turkey.

B. Judicial Independence and the Role of the Ministry of Justice

1. Constitutional impediment to judicial independence

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

Article 140/6 of the Turkish Constitution continues to provide that, "Judges and public prosecutors shall be attached to the Ministry of Justice insofar as their administrative functions are concerned."

The Ministry of Justice has rejected the recommendation to remove Article 140/6 of the Turkish Constitution. In its report dated 26 July 2004, the Ministry of Justice states that apart from undertaking judicial tasks, judges discharge administrative duties such as preparing court budgets and selecting auxiliary personnel to work within the courts. However, submission of the proposed budget to the TGNA and allocation of vacant staff positions is within the responsibility of the Ministry of Justice. In consequence, it is necessary to maintain a link between judges and the Ministry of Justice. The Ministry of Justice emphasises that Article 140/6 does not facilitate the giving of instructions to the judiciary.

The President of the High Court of Appeals shared the view of the experts that Article 140/6 directly undermines the independence of the judiciary in Turkey and should be removed. Without referring directly to Article 140/6 of the Turkish Constitution, the Chief Public Prosecutor of the High Court of Appeals also noted that certain provisions of the Constitution continue to pose obstacles to judicial independence in Turkey and should be removed. The President of the Constitutional Court considered that Article 140/6 did not pose a significant obstacle to judicial independence.

At present then there appears to be an absence of agreement within the senior ranks of the judiciary as to the necessity of amending or removing Article 140/6 of the Turkish Constitution, although there is pressure from certain influential quarters for such a measure to be introduced. That said, the Ministry of Justice is opposed to removing or amending Article 140/6 in line with our recommendation.

In our opinion, Article 140/6 does continue to undermine the guarantees of judicial independence set forth in Articles 9, 138, 139 and 140 of the Turkish Constitution.

In Opinion No.2 (2001) of the Consultative Council of European Judges ("CCJE") on the funding and management of courts (23 November 2001), the CCJE recognised that the funding and management of courts is closely linked to the issue of the independence of judges in that it determines the conditions in which the courts perform their functions. The CCJE concluded that although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting the budget. Decisions on the allocation of funds to and management of the courts must be taken with the strictest respect for judicial independence.[7] To this end, Article 34 of the Draft

[7] Opinion No.2 (2001) of the Consultative Council of European Judges (CCJE) on the funding and management of courts (23 November 2001) at page 2.

Universal Declaration on the Independence of Judges ("Singhvi Declaration")[8] is also relevant insofar as it provides:

> "The budget of the courts shall be prepared by the competent authority in collaboration with the judiciary having regard to the needs and requirements of judicial administration."

Article 32 is also relevant in so far as it provides:

> "The main responsibility for court administration including supervision and disciplinary control of administration personnel and support staff shall vest in the judiciary, or in a body in which the judiciary is represented and has an effective role."

In principle then we agree with the assertion of the Ministry of Justice that it must maintain a link with the judiciary regarding administration of the budget for the justice system. Indeed, in Opinion No.2 (2001) of the Consultative Council of European Judges on the funding and management of courts (23 November 2001) the CCJE agreed that it is important that the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.

Nevertheless, we continue to question the propriety of a constitutional provision that goes beyond facilitating the consideration of judicial views and expressly attaches the administrative functions of the judiciary to the executive. Whilst we agree that in a country where the Ministry of Justice is involved in presenting the court budget to, and negotiating with, the Ministry of Finance, prior judicial input should take place in the form of proposals made either directly or indirectly by the courts to the Ministry of Justice, at the same time, in a system based on the separation of powers, care must be taken to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting the budget. We are concerned that by going beyond ensuring judicial input in the form of proposals to the Ministry of Justice and expressly attaching the administrative functions of the judiciary to the Ministry of Justice, Article 140/6 of the Turkish Constitution may foster a tendency for the interests of the judiciary to become both subsumed within and subordinated to the wider political interests of the administration. As a consequence there remains scope for the executive, should it so desire, to exert pressure on the judiciary in so far as its administrative matters are concerned.

We consider that, as an ideal, the High Council of Judges and Public Prosecutors, as the independent authority for managing the Turkish judiciary, would not only retain its present co-ordinating role in preparing requests for court funding, but would be made Parliament's direct contact for evaluating the needs of the courts. The High Council, as a body representing all the courts, would ideally be responsible for submitting budget

[8] At its forty-fifth session, by resolution 1989/32, the UN Commission on Human Rights invited governments to take into account the principles set forth in the draft declaration in implementing the United Nations' Basic Principles on the Independence of the Judiciary, which had been approved in 1985.

requests directly to Parliament.[9] However, in so far as it remains the position in Turkey that the Ministry of Justice is involved in presenting the court budget to, and negotiating with, the Ministry of Finance, we consider that, whilst retaining the status quo regarding the possibility for judicial input in the administration of the courts, the independence of the judiciary in Turkey would be strengthened by amending Article 140/6 so as to ensure a separation of powers between the judiciary and the executive.

The recommendation is maintained and repeated.

2. Entry into the profession

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

Graduates seeking entry to the judicial profession in Turkey continue to be required to attend for an oral interview with personnel from the Ministry of Justice prior to successful admission onto the course of pre-service judicial training. The Ministry of Justice Directorate General for Personnel confirmed that all applicants who achieve over 70% in the written examination administered by the School Selection and Placement Centre are invited for an oral interview. The Directorate General for Personnel further confirmed that the interview panel is comprised of the Deputy Under-Secretary of the Minster of Justice, the General Director of the Ministry's Directorate General of Inspection, the General Director of the Ministry's Directorate General for Personnel, the General Director of the Ministry's Directorate General for Criminal Affairs and the General Director of the Ministry's Directorate General for Civil Affairs. The High Council of Judges and Public Prosecutors is not represented on the interview panel. Given the composition of the interview panel, it is most apparent that the gateway into the judicial profession in Turkey continues to be guarded by an authority that is not independent of the government and administration.

In its official written response of 11 May 2004, the Ministry of Justice formally rejected the recommendation that the influence of the Ministry of Justice in the process of selecting candidate judges should be removed on the basis that, in its opinion, the guarantee of judicial independence is not applicable to candidate judges since they are not actually practising. It was further argued that although officials from within the Ministry of Justice perform the interviews, the officials themselves were once practising judges and therefore the procedure is acceptable.

[9] In Denmark, there is a system for allocating money to the courts that works partly in this way.

The experts do not agree with the Ministry's assertion that the guarantee of judicial independence is not applicable when considering the selection of candidate judges. Principle 10 of the UN Basic Principles on the Independence of the Judiciary expressly provides: "*Any method of judicial selection shall safeguard against judicial appointments for improper motives.* In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory" (emphasis added). Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges similarly states: "*All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit*, having regard to qualifications, integrity, ability and efficiency. *The authority taking the decision on the selection and career of judges should be independent of the government and the administration*" (emphasis added). In the opinion of the experts, these two core standards provide that any method of judicial selection must guarantee against the influence of the executive power. Accordingly, it is considered that the assertion of the Ministry is misplaced. Further, in the opinion of the experts the fact that the interviews are conducted by officials who were once practising judges themselves does not save the procedure. The fact remains that at the time of the interview the responsible officials are employed by the Ministry of Justice and therefore dependent upon the government and the administration.

We therefore remain firmly of the view that the procedure for determining entry into the judicial profession in Turkey significantly undermines the independence of the judiciary in so far as the Ministry of Justice, a political entity, has an absolute influence over all decisions as to who will, and who will not, be selected as a candidate judge.

In its second written evaluation report prepared following consultation with the High Council of Judges and Public Prosecutors in July 2004, the Ministry of Justice appears to accept that there may be a need for reform of the process of selecting candidate judges in so far as it states that it is still evaluating the practice in the 25 EU Member States with a view to finding the most appropriate model for selection of candidate judges and implementing the same in Turkey. However, there is no indication within the report as to the role that the Ministry of Justice envisages the High Council having in the selection of candidate judges, if any. The Ministry of Justice states that there is no unified practice among EU Member States regarding the necessity for the High Council to supervise the selection of candidate judges and therefore its assessment of the situation is ongoing.

We note that the position of the Ministry of Justice on this issue differs materially from the position of the High Council as stated at our official meeting on 14 July 2004. During the course of our meeting with the High Council, the High Council informed the delegation that it considered it unfortunate that it was not represented on the oral interview panel. The members of the High Council agreed with the experts' criticism and supported a recommendation that they should be responsible for conducting the oral

selection interview rather than personnel from the Ministry of Justice. We consider that it is unfortunate that the evaluation report issued by the Ministry of Justice does not in fact reflect the sentiments expressed by the High Council to the delegation.

The recommendation is maintained and repeated.

During the course of the meeting with the Directorate General for Personnel it also became apparent that the Ministry of Justice has no publicly available objective criteria by which applicant candidate judges are assessed when attending for oral interview. Yet, objective standards serve to minimise political influence and reduce the risk of favouritism, conservatism and cronyism, all of which exist if appointments are made in an unstructured way.

The experts recommend that, in line with Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) on Standards Concerning the Independence of the Judiciary (23 November 2001) the authorities responsible for making and advising on appointments of candidate judges should introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection of candidate judges is "based on merit, having regard to qualifications, integrity, ability and efficiency."[10]

Once such standards are introduced, the responsible body will be obliged to act accordingly, and it will then at least be possible to scrutinise the content of the criteria adopted and their practical effect.

3. Pre-service and in-service training of judges

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

In its first official response to the October 2003 report, the Ministry of Justice considered that the recommendation had been met by the establishment of the Justice Academy as an independent institution. In its second written evaluation report prepared in July 2004, the Ministry of Justice again concluded that the establishment of the Justice Academy as an independent body has now removed the influence of the Ministry of Justice in the pre-service and in-service training of judges. In the opinion of the experts this assertion ignores the fact that the Justice Academy is not yet fully functioning and that the composition of its Board of Directors and General Assembly is widely regarded as leaving open the potential for the Ministry of Justice to exercise undue influence over the functioning of the Academy. In our opinion it is therefore not yet possible to

[10] Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges.

conclude that the influence of the Ministry of Justice in the pre-service and in-service training of judges has been removed.

On the occasion of the first Advisory Visit, the Turkish Parliament had adopted the long awaited Law on the Establishment of the Justice Academy and it was anticipated that the Justice Academy would become operational in April 2004. In July 2004 it appeared that the Justice Academy was functioning but that its functioning was largely limited to the pre-service training of candidate judges in the same building as had previously been used by the School for Candidate Judges and Public Prosecutors.

The Deputy President of the Justice Academy informed the delegation that the faculty members had been selected by the Board of Directors and that he expected that the President of the Academy would be appointed by the Ministry of Justice within approximately two months. The former School for Candidate Judges and Public Prosecutors was being renovated and was being used for pre-service training. The Ministry of Justice had recently procured a second building and from September 2004 this would be used to provide in-service training. According to the General Director of Personnel at the Ministry of Justice, the curriculum for the in-service training was currently being prepared and jurists were being invited to lecture at the Academy.

According to the Deputy President of the Justice Academy, in 2004 the Academy has provided pre-service training to 210 candidate judges and public prosecutors. Between September and December 2004 it will provide pre-service training to a further 239 candidate judges and public prosecutors and will also provide in-service training for a total of 660 judges and public prosecutors, each judge and prosecutor receiving 25 hours of training over the course of one week between 20 September and 17 December. Thereafter, the Academy plans to train 2,100 judges and public prosecutors in 2005, 2,100 judges and public prosecutors in 2006 and 3,800 judges and public prosecutors in 2007. As of 2005 the Academy also intends to provide training to lawyers and in the same year judges of the soon to be established Intermediate Court of Appeals will also be exposed to in-service training at the Academy. Although their curriculum has not yet been prepared, the Academy plans to train 300 judges and public prosecutors of the Intermediate Court of Appeals in 2005, a further 300 in 2006 and a total of 360 appeal court judges and public prosecutors in 2007.

We regard the establishment of the Justice Academy as a positive step towards removing the influence of the Ministry of Justice in the pre-service and in-service training of the judiciary. Prior to its establishment, the curriculum of the School for Candidate Judges and Public Prosecutors was under the direct control of the Education Department of the Ministry of Justice and the School as a whole was a subordinated institution of the Ministry of Justice. Therefore, both the content of the training and the administration of the School remained strongly dependent on the executive power. Similarly, the in-service training of judges was administered, not by members of the judiciary themselves, but by the Education Department of the Ministry of Justice. The establishment of the Justice Academy provides an opportunity for the training of the members of the judiciary to be arranged in an independent way by an independent body.

However, perhaps as is to be expected, the Ministry of Justice continues to play a key role in defining the operations of the Justice Academy during its infancy. The General Director of the Directorate General for Education and Training at the Ministry of Justice informed the delegation that the Ministry of Justice is presently overseeing the establishment of the Justice Academy in terms of defining its projects and plans, although implementation is a matter for the Justice Academy as an autonomous body. The General Director did express the hope however that in 2-3 years the Justice Academy will be fully established and able to function entirely independently of the Ministry.

Such sentiments are to be welcomed, however, it would appear that the aspirations of the General Director are unlikely to be realised without significant reform of the Law on the Establishment of the Justice Academy. This law, which establishes the organisational structure of the Justice Academy, continues to serve to undermine the independence of the Academy by rendering it dependent upon the Ministry of Justice. The President of the Justice Academy will, when appointed, be appointed by the Ministry of Justice from among three candidates proposed by the Board of Directors. The Board of Directors presently consists of a President, the General Director for Personnel from the Ministry of Justice and five members elected by the General Assembly. The General Assembly is a body composed of 27 members of whom 11 depend on the executive power. Of the remainder, 5 are members of the judiciary, 5 are academics from the universities, 4 are representatives of the Academy staff and 2 represent the other legal professions. Therefore, members of the executive have a relative majority in the General Assembly. In addition, three members appointed by the Ministry of Justice constitute the Board of Auditors. Given this constitution, it may be concluded that the Justice Academy remains strongly linked to the Ministry of Justice. To compound matters, we also note that concerning pre-service judicial training in particular, the Presidency of the Centre for the Training of Candidate Judges and Public Prosecutors, which has now been incorporated within the Academy, is appointed by the Ministry of Justice on proposal of the President of the Academy who, in turn, is appointed by the Ministry.[11]

During the course of our meetings, the President of the High Court of Appeals recognised that there were some problems in the foundation law of the Justice Academy that rendered it potentially dependent upon the Ministry of Justice. The President expressed a wish to see the Justice Academy as a fully independent institution rather than one operating under the guardianship of the Ministry of Justice. The Chief Public Prosecutor of the High Court of Appeals considered that once the Justice Academy becomes fully operational it should be separated from the Ministry of Justice. The President of the Union of Turkish Bar Associations and the Chairman of the Istanbul Bar Association both felt that the Justice Academy was not presently independent and on that basis opposed the compulsory training of lawyers within the Academy. Despite these widely held sentiments however, the Ministry of Justice continues to assert that the Justice Academy is an independent institution.

[11] Comments on the Draft Law on the Organisation and Duties of the Justice Academy of Turkey (19/4/2002) by Carlos Martinez for the Council of Europe, p.4.

One positive development in the scope of training is that, on the initiative of a judge in Istanbul, Yeditepe University in Istanbul has agreed to create, and cover the costs for, an 8 month full time training programme in English for 30 judges and prosecutors. The Ministry of Justice has agreed that the participants will receive their normal salary during the course.

For our part, we note that it has not been possible to assess the actual functioning of the Justice Academy in practice since it is not yet fully operational, however, on the basis of its organisational structure, as provided for in the Law on the Establishment of the Justice Academy, there does appear to be a continuing potential for the Ministry of Justice to unduly influence the pre-service and in-service training of judges.

On the above-mentioned basis we maintain and repeat our recommendation.

4. Appointment and promotion of judges

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

Pursuant to Article 159 of the Turkish Constitution, both the Minister of Justice and his Under-Secretary continue to occupy two seats on the seven member High Council of Judges and Public Prosecutors. There remains therefore, at the very least, a potential for the executive to influence decisions relating to the professional future of all judges in Turkey.

In its second written evaluation report prepared following consultation with the High Council of Judges and Public Prosecutors in July 2004, the Ministry of Justice appears to accept that there may be a need for reform of the membership of the High Council in so far as it states that it is still evaluating the practice in the 25 EU Member States with a view to finding the most appropriate model for the Turkish system. However, the Ministry of Justice has made no commitment to removing either the Minster of Justice or his Under-Secretary from the High Council.

We note that the position of the Ministry of Justice on this issue differs materially from the position of the High Council. During the course of our official meeting with the High Council, the High Council formally proposed that the Under-Secretary should no longer be a member of the High Council and that the Minister of Justice should, whilst retaining his seat on the High Council, no longer retain his right to vote. The High Council considered that the Minster of Justice should retain his seat on the basis that he is the representative of the High Council before the National Assembly. We regarded the proposal of the High Council as a significant step forwards towards strengthening the independence of the judiciary in Turkey. We therefore consider that it is particularly

unfortunate that the evaluation report prepared by the Ministry of Justice after having consulted with the High Council does not in fact reflect the sentiments that were expressed to the delegation by the High Council.

We observed that there is strong support within the Turkish judiciary for amending the Turkish Constitution so as to reform the involvement of the Minister of Justice and his Under-Secretary in the High Council of Judges and Public Prosecutors. The President of the High Court of Appeals commented that the Under-Secretary should be removed from the High Council on the basis that it is unacceptable that a bureaucrat attached to the Ministry of Justice should be involved in the appointment of judges. The President of the High Court of Appeals considered that if the Under-Secretary is removed from the High Council and various other structural reforms relating to the functioning of the High Council are implemented in line with the recommendations made following the first Advisory Visit then the continued presence of the Minister of Justice on the High Council would not undermine the independence of the judiciary. The Chief Public Prosecutor of the High Court of Appeals considered that the presence of the Minister of Justice and his Under-Secretary cast a shadow over the independence of the judiciary and noted that their removal had been discussed for 15 years. The President of the Constitutional Court observed that there was some hesitation within the judiciary regarding the presence of the Minster of Justice in the High Council and considered that the presence of the Under-Secretary had a negative effect. He believed that both the Minister of Justice and his Under-Secretary should be removed from the High Council. The President of the Constitutional Court also expressed the opinion that it is problematic that decisions of the High Council are not under the competence of the Constitutional Court

We consider that provided various other reforms are implemented in line with the recommendations made following the first Advisory Visit, the continued presence of the Minister of Justice on the High Council, without any voting rights, would not undermine the independence of the judiciary in Turkey. We therefore consider that the recommendation could be amended accordingly. However, given that the Ministry of Justice has yet to make any commitment to either removing the voting rights of the Minster of Justice or removing the Under-Secretary from the High Council, the recommendation is maintained and repeated.

5. The power to transfer judges

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

Given that pursuant to Article 159 of the Turkish Constitution, both the Minister of Justice and his Under-Secretary continue to retain seats on the High Council of Judges and Public Prosecutors, both the Minister of Justice and his Under-Secretary presently also retain the power to transfer judges.

In its second written evaluation report prepared following consultation with the High Council of Judges and Public Prosecutors in July 2004, the Ministry of Justice appears to accept that there may be a need for reform in so far as it states that it is still evaluating the practice in the 25 EU Member States with a view to finding the most appropriate model for the Turkish system. However, the Ministry of Justice makes no commitment to either removing the Under-Secretary from the High Council or withdrawing the voting rights of the Minister of Justice.

We note that the position of the Ministry of Justice on this issue differs materially from the position of the High Council. During the course of our official meeting with the High Council, the High Council formally proposed that the Under-Secretary should no longer be a member of the High Council and that the Minister of Justice should, whilst retaining his seat on the High Council, no longer retain his right to vote. The High Council considered that the Minster of Justice should retain his seat on the basis that he is the representative of the High Council before the National Assembly. We regarded the proposal of the High Council as a significant step forwards towards strengthening the independence of the judiciary in Turkey. We therefore consider that it is particularly unfortunate that the evaluation report prepared by the Ministry of Justice after having sought the opinion of the High Council does not in fact reflect the sentiments that were expressed to the delegation by the High Council.

Given that the Ministry of Justice has yet to make any commitment to either removing the voting rights of the Minster of Justice or removing the Under-Secretary from the High Council in order to absolve the Ministry of Justice of its power to transfer judges, the recommendation is maintained and repeated.

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

i. Presidential power to appoint members of the High Council

We recommended that in accordance with Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges, the President be absolved of his power to appoint members of the High Council and Judges and Public Prosecutors themselves should be empowered to elect their representatives on the High Council.

According to Article 159 of the Turkish Constitution, the appointment of all members of the High Council of Judges and Public Prosecutors other than the Minister of Justice and his Under-Secretary continues to be undertaken by the President of the Republic.

Prior to the second Advisory Visit we were given to understand that the High Council was considering whether, as is the practice in France, judges and prosecutors

should be afforded the right to elect their own representatives to the High Council. However, in its second written evaluation report prepared following consultation with the High Council of Judges and Public Prosecutors in July 2004, the Ministry of Justice has responded by stating that it considers it most appropriate to reach a final decision on the recommendation after having engaged in further discussions with all relevant parties.

We note that any process of judicial appointment might be said to have two main elements. First, proposed candidates for judicial office are selected. Second, a formal decision of appointment is made from amongst the pool of selected candidates. We do not raise any objection to the formal decision of appointment remaining in the hands of the President of the Republic.[12] However, we consider that the selection and nomination process should take place outside the office of the President. We therefore consider that the recommendation could be amended accordingly.

On the basis that there have been no significant developments in this respect, the recommendation is maintained and repeated

ii. Reliance upon the Ministry of Justice for administrative support

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

The High Council of Judges and Public Prosecutors presently does not have its own secretariat that it can rely upon for its administrative tasks. Instead, the High Council continues to be entirely dependent upon a personnel directorate of the Ministry of Justice for administrative support. In this way, the Ministry of Justice carries out all the Secretariat functions of the High Council.

In its second written evaluation report prepared following consultation with the High Council of Judges and Public Prosecutors in July 2004, the Ministry of Justice appears to accept that there may be a need for reform in so far as it states that it is still evaluating the practice in the 25 EU Member States with a view to finding the most appropriate model for the Turkish system. However, the Ministry of Justice has yet to make any commitment to providing the High Council with its own secretariat and premises.

We note that the position of the Ministry of Justice on this issue differs materially from the position of the High Council. During the course of our official meeting with the High Council, the High Council proposed that in order to strengthen the independence of the judiciary it should have its own Secretariat and premises. We regarded the proposal of the High Council as a significant step forwards towards strengthening the independence of the judiciary in Turkey. We therefore consider that it is particularly unfortunate that

[12] In Austria, High Officials are formally appointed by the President of the Republic, while the nomination process takes place outside his office.

the evaluation report prepared by the Ministry of Justice after having sought the opinion of the High Council does not in fact reflect the sentiments that were expressed to the delegation by the High Council.

We observed that there is strong support within the judiciary for the High Council to be granted its own secretariat and premises. The President of the High Court of Appeals noted that the High Council does not presently have its own secretariat and commented that it should be able to perform its own administrative tasks. He commented that the High Council is regarded as a branch of the Government. The Chief Public Prosecutor of the High Court of Appeals similarly commented that judges in Turkey are administratively linked to the Ministry of Justice and this raises the possibility of administrative pressure on the judiciary. The President of the Constitutional Court also observed that the High Council does not yet have its own secretariat. He too considered that this should be remedied.

Given that the Ministry of Justice has yet to make any commitment to providing the High Council with its own adequately funded secretariat and premises, the recommendation is maintained and repeated

iii. Reliance upon the Ministry of Justice for judicial inspectors

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

In order to monitor judicial behaviour, judges in Turkey continue to be regularly evaluated. Article 144 of the Constitution continues to entrust the supervision of judges to judiciary inspectors.[13] The Law on Judges and Prosecutors No. 2802 continues to provide that judicial inspectors shall be civil servants appointed by the Ministry of Justice

[13] Article 144 of the Turkish Constitution provides: "Supervision of judges and public prosecutors with regard to the performance of their duties in accordance with laws, regulations, by-laws and circulars (administrative circulars, in the case of judges), investigation into whether they have committed offences in connection with, or in the course of their duties, whether their behaviour and attitude are in conformity with their status and duties and if necessary, inquiry and investigations concerning them shall be made by judiciary inspectors with the permission of the Ministry of Justice. The Minister of Justice may request the investigation or inquiry to be conducted by a judge or public prosecutor who is senior to the judge or public prosecutor to be investigated."

to work within the central organisation of the Ministry of Justice in the inspection unit known as the Head of Inspection Board.[14]

In its second written evaluation report prepared following consultation with the High Council of Judges and Public Prosecutors in July 2004, the Ministry of Justice appears to accept that there may be a need for reform in so far as it states that it is still evaluating the practice in the 25 EU Member States with a view to finding the most appropriate model for the Turkish system. However, the Ministry of Justice makes no commitment to removing judicial inspectors from within the central organisation of the Ministry of Justice and awarding the High Council sole authority to appoint its own judicial inspectors.

We note that the position of the Ministry of Justice on this issue differs materially from the position of the High Council. During the course of our official meeting with the High Council, the High Council formally proposed that in order to strengthen the independence of the judiciary, judicial inspectors should be removed from within the central organisation of the Ministry of Justice and the High Council should have sole authority to appoint its own judicial inspectors. We regarded the proposal of the High Council as a significant step forwards towards strengthening the independence of the judiciary in Turkey. We therefore consider that it is particularly unfortunate that the evaluation report prepared by the Ministry of Justice after having sought the opinion of the High Council does not in fact reflect the sentiments that were expressed by the High Council to the delegation.

We observed that there is strong support within the judiciary for the judicial inspectors to be re-assigned to work under the authority of the High Council rather than the Ministry of Justice. The President of the High Court of Appeals considered that judicial inspectors should be attached to the High Council and not the Ministry of Justice. The Chief Public Prosecutor of the High Court of Appeals commented that judges are presently investigated by inspection board members who are personally appointed by the Ministry of Justice and this body should be incorporated into the High Council by way of a constitutional amendment. The President of the Constitutional Court also shared the same view, remarking that the judicial inspection board should be placed under the control of the High Council rather than the Ministry of Justice. We also observed overwhelming support for such a development from more junior members of the judiciary and from lawyers. One judge that we met expressed the view shared by many when he said that he would like to see judicial inspectors separated from the Ministry of Justice and brought under the competence of the High Council as they had been prior to

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

the introduction of the 1982 Constitution. The Istanbul Bar Association also adopted the same stance.

On the basis that the Ministry of Justice has yet to make any commitment to re-assigning judicial inspectors to work directly under the authority of the High Council, the recommendation is maintained and repeated.

We also note at this juncture that the Ministry of Justice continues to hold confidential files containing performance appraisals prepared by inspectors of the Ministry of Justice and that the High Council defended the existence of such confidential appraisal files on the basis of a need to protect the identity of informants. In our opinion, the fact that confidential files are held by any body that is responsible for the professional careers of judges is incompatible with the principles of equality, impartiality and transparency that should lie at the heart of any modern liberal democracy.

We recommend that judges and public prosecutors be permitted to access all appraisal files held in respect of themselves.

iv. Reliance upon the Ministry of Justice for financial resources

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

The High Council still does not have its own independent budget. Instead it continues to be reliant upon the discretion of the Ministry of Justice for its financial resources. In practice this means that even its building is allocated by the Ministry.

In its second written evaluation report prepared following consultation with the High Council of Judges and Public Prosecutors in July 2004, the Ministry of Justice appears to accept that there may be a need for reform in so far as it states that it is still evaluating the practice in the 25 EU Member States with a view to finding the most appropriate model for the Turkish system. However, the Ministry of Justice makes no commitment towards awarding the High Council its own separate budget and ensuring that the High Council is responsible for that budget's internal allocation and administration.

We note that the position of the Ministry of Justice on this issue differs materially from the position of the High Council. During the course of our official meeting with the High Council, the High Council formally proposed that in order to strengthen the independence of the judiciary, it should be awarded its own separate budget and be responsible for that budget's internal allocation and administration. We regarded the proposal of the High Council as a significant step forwards towards strengthening the independence of the judiciary in Turkey. We therefore consider that it is particularly

unfortunate that the evaluation report prepared by the Ministry of Justice after having sought the opinion of the High Council does not in fact reflect the sentiments that were expressed to the delegation by the High Council.

On the basis that the Ministry of Justice has yet to make any commitment to granting the High Council its own budget, the recommendation is maintained and repeated.

v. Absence of availability of judicial review

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

According to the Turkish Constitution, it is still not possible to appeal to any judicial body against a decision of the High Council. Paragraph 4 of Article 159 of the Turkish Constitution continues to expressly provide that: "There shall be no appeal to any judicial instance against the decisions of the Council." During the course of the second Advisory Visit the President of the Constitutional Court confirmed that decisions of the High Council are not within the competence of the Constitutional Court.

In its second written evaluation report prepared following consultation with the High Council of Judges and Public Prosecutors in July 2004, the Ministry of Justice has formally rejected the proposal that decisions of the High Council should be capable of being appealed to an independent judicial body. The report states as follows:

> "In the current situation, the High Council of Judges and Prosecutors sits under the presidency of the Minister of Justice and with the participation of the Undersecretary of the Ministry of Justice, an ex-officio member of the Council, three regular and three substitute members from the Court of Cassation and two regular and two substitute members from the Council of State.
>
> According to the Law on the High Council of Judges and Prosecutors, numbered 2461, the decisions of the High Council originating from that Law shall be taken by the Council with the participation of seven members under the presidency of the deputy-chair where the Minister does not participate to the Council. Upon request, re-evaluation of those decisions is made by the Council consisting in the above-mentioned format and further objections to these re-evaluated decisions, are finalised by the Council, this time, consisting of twelve members.

> Therefore, the system allows to benefit from the legal remedies such as re-evaluation and further objections against the decision of the Council consisting mainly of members from the high courts. In case of any objection, the High Council sits with the participation of five new members who do not take place in the previous decision mechanism which the objection is based on.
>
> Accordingly, when it is taken into account the following facts all the decisions of the High Council are taken with the participation of members from the Court of Cassation and the Council of State, the situation that these members discharge their duties in accordance with the principles of the independence and security of tenure, and at the objection stage, five new members participate to the High Council, it is thought that there is no need to make it possible to appeal against the decisions of the High Council."

Whilst we recognise that any objection to a decision of the High Council may be raised before a twelve-person panel comprised of the seven original Council members plus five additional members, given the composition of this panel it is apparent that in any case where the original panel reaches a unanimous decision, review of a High Council decision is futile.

Principle 6(3) of the Council of Europe Recommendation on the Independence of Judges provides that the competent body tasked to apply disciplinary sanctions and measures should be controlled by a superior judicial organ. Principle 20 of the UN Basic Principles on the Independence of the Judiciary provides: "Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review". Yet, not only are decisions of the High Council not susceptible to review by a superior judicial organ, in cases where the original panel reaches a unanimous decision there is, in practice, no effective independent review whatsoever.

We note that the position of the Ministry of Justice differs materially from the position of the High Council. During the course of our official meeting with the High Council, the High Council formally proposed that in order to strengthen the independence of the judiciary, Article 159 of the Turkish Constitution should be amended so as to permit decisions of the High Council adverse to a judge to be appealed to the Council of State.[15] We regarded the proposal of the High Council as a significant step forwards

[15] According to Article 155 of the Constitution, the Council of State is the final instance for reviewing decisions and judgments given by lower administrative courts. In other words it acts as an appellate court in respect of judgments of first and second instance administrative courts. The Council of State also has jurisdiction to consider original administrative disputes in cases specified in law, and, if requested, give its opinions on draft legislation submitted by the Prime Minister and Council of Ministers, examine draft regulations and the conditions and contracts under which concessions are granted (Article 155). The Council of State therefore has both a judicial and an administrative function. The Council of State is composed of twelve chambers, ten of which function as judicial chambers and two of which function as administrative chambers. Each chamber convenes with five justices and renders its judgments by a majority. The personnel of the Council of State also include prosecutors, similar to the French "Commissaire de Gouvernement," and reporter judges. Three-fourths of the judges of the Council of State are appointed by the High Council of Judges and Public Prosecutors from among first grade administrative judges and public prosecutors. The remaining one-fourth of the member judges are appointed by the

towards strengthening the independence of the judiciary in Turkey. We therefore consider that it is particularly unfortunate that the evaluation report prepared by the Ministry of Justice after having sought the opinion of the High Council does not in fact reflect the sentiments that were expressed by the High Council to the delegation.

On the basis that the Ministry of Justice has formally rejected the recommendation that adverse decisions of the High Council related to civil rights should be capable of being appealed to an independent judicial body comprised of members of the judiciary other than those responsible for the taking of the original decision, the recommendation is maintained and repeated.

7. Issuing of circulars

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

During the first Advisory Visit, the General Director of the Directorate General for Penal Affairs of the Ministry of Justice informed the delegation that the Ministry regularly issued circulars to public prosecutors throughout Turkey. It was understood that these circulars were effectively instructions to public prosecutors as to how, in the opinion of the Ministry, particular laws should be interpreted. The experts feared that because of the influence of the Ministry in the functioning of the judiciary, the use of such circulars could result in the judiciary deferring to the arguments of public prosecutors in relation to the correct interpretation of legal provisions.

In its response to the October 2003 report, the Ministry of Justice has strongly rejected the concerns of the experts. We are reminded that according to Article 138(2) of the Turkish Constitution no circular may be issued to a judge regarding the exercise of judicial power and according to Article 144 of the Turkish Constitution only administrative circulars may be transmitted to judges (i.e. to clarify daily working hours or national festival days). Administrative circulars are issued to judges under Law No. 2992 and this also expressly states that circulars must not be used within the context of the employment of judicial power.

The Ministry accepts that circulars are sent to Chief Public Prosecutors regarding the application of laws but insists that their purpose is to ensure a uniform implementation of practice throughout the country, which in turn contributes to an efficient justice service. Such circulars are in any event not binding. By way of example, we have been informed that a circular has been issued regarding the rules to be followed by prosecutors during interrogation and a circular has been issued in response to a query

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President of the Republic from among qualified bureaucrats or academicians. The President, Chief Public Prosecutor, deputy president, and heads of division of the Council of State are elected by a Plenary Assembly of the Council of State from among its own members for a term of four years. They may be re-elected at the end of their term of office (Article 155).

sent to the Ministry of Justice regarding the implementation of Law 4959 on the Integration of Some Inmates Within Society. Further circulars have apparently been issued in order to align practices with the rulings of the European Court of Human Rights. The Ministry stresses that such circulars are not used to influence the interpretation of legislation by public prosecutors, they simply concern specific administrative matters. We were also informed that the Ministry has recently reviewed and updated all circulars that it has issued in the past.

On the basis of the interviews that we have conducted, there does appear to be support amongst practising judges and public prosecutors for the position of the Ministry. A judge of the Diyarbakir Heavy Penal Court confirmed that he does receive circulars from the Ministry regarding administrative matters but he never receives circulars regarding the exercise of his judicial power, be it guidance as to how to interpret a particular legislative provision or a direction to determine a particular case or class of cases in a particular manner. The President of the Constitutional Court did not consider that the use of circulars undermined the independence of the judiciary. In consequence, we are minded to accept that our initial concerns regarding the practice of the Ministry of Justice sending circulars to public prosecutors may not have been well founded.

That said, given the importance of this issue to the question of judicial independence in Turkey, we consider that this is a matter that needs to be followed up and further clarified. On that limited basis alone the recommendation is maintained.

8. Ability to form professional associations

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

Although, in a welcome development, the Law on Associations has now been adopted by the National Assembly and this has removed the ban on judges forming professional organisations to safeguard their independence, protect their interests, improve professional ethics, enable them to express their opinions and take positions on matters pertaining to their functions and to the administration of justice, a further law is required in order to actually establish a judicial association.

The Ministry of Justice supports reform in favour of enabling judges to organise and form professional associations. To this end, the Directorate General for Legislative Affairs of the Ministry of Justice is currently working on a draft law that will, if enacted, provide for the same. According to the General Director of the Directorate General for Laws and Legislation of the Ministry of Justice, this item is scheduled to be on the agenda in 2005.

Difficulty has arisen however following a recent negative opinion from the Council of State on the legality of the proposed law. Further, the High Council of Judges and Public Prosecutors appears reluctant to support the proposal to allow judges to organise and form professional associations. We note that during the preparation of the Ministry of Justice's second written evaluation report in July 2004, the opinion of the High Council of Judges and Public Prosecutors on this issue was not sought and the Ministry of Justice has also not addressed this issue within the report. However, during the course of our official meeting with the High Council it was apparent that the High Council held reservations in relation to the establishment of professional associations for judges. The High Council explained that the problem centred on the fact that there is not yet a unanimous view as to what is meant by a professional judicial association. This sentiment was reflected during the course of our interviews with members of the judiciary throughout Turkey. Certain judges, such as the President of the High Court of Appeals and a judge of the Diyarbakir Juvenile Court, strongly supported the possibility of establishing professional associations whilst others, such as a judge of the Istanbul General Criminal Court, remained unclear as to the role and purpose of professional judicial associations.

In an attempt to further the reform process, the Ministry of Justice has organised an international symposium to be held on 26 September 2004. The symposium will provide an opportunity for interested parties to convene, study the practise in other EU countries regarding professional judicial associations, form an opinion and assess the most appropriate way forward for Turkey.

For our part we strongly commend the lead that has been taken by the Ministry of Justice in relation to this issue. We can see no justification for the continued restriction on the establishment of professional judicial associations with a commitment to defending the independence and the interests of the profession. Such organisations would, we consider, serve to significantly assist in strengthening judicial independence in Turkey. We urge the Ministry of Justice to continue its positive efforts in this regard.

Whilst welcoming the efforts of the Ministry of Justice in line with the recommendation, given that judges in Turkey continue to be unable to organise and form professional associations the recommendation is maintained and repeated.

C. Impartiality and the relationship between judges and public prosecutors

We recommended that:

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

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

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

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

(v) Measures be taken to ensure an equality of arms between prosecution and defence counsel during the course of criminal proceedings.

(i) In our October 2003 report we noted that unlike in most other EU Member States there is a most apparent union between judges and public prosecutors in Turkey. Both in law and in practice, judges and public prosecutors are regarded as equals. After examining the evident constitutional connection between judges and public prosecutors in Turkey, as well as various aspects of their everyday functioning that served to reinforce the notion that there exists an organic relationship between the two professions, we expressed our concern that this relationship was such that there remained the potential for legitimate doubt as to the objective impartiality of the judiciary in Turkey. We concluded that for both the public and parties to proceedings to be able to have confidence in the impartiality of the judiciary, a clearer separation of tasks, responsibilities and powers of judges and public prosecutors was needed in order to create, or secure the existence of, a system with the appearance and reality of two equal parties acting before an independent and impartial court.

In the 8 months since the first Advisory Visit there has been little official initiative to establish a clearer separation of the tasks, responsibilities and powers of judges and public prosecutors in Turkey.

Regarding the recommendation that the Constitution be amended so as to provide for an institutional and functional separation of the professional rights and duties of judges and public prosecutors, the Ministry of Justice considers that a constitutional amendment is not necessary as the Turkish Constitution already provides for the independence of the judiciary. We would observe that the recommendation was based upon concerns relating to the objective impartiality of the judiciary, rather than concerns relating to judicial independence. We consider that notwithstanding the fact that the Constitution offers guarantees of judicial independence, the fact that the Constitution also envisages judges and public prosecutors as equals is a matter that continues to serve to undermine the impartiality of the judiciary from an objective viewpoint in so far as it fails to offer a guarantee to exclude any legitimate doubt in this respect.

(ii) Regarding the recommendation that administrative duties currently undertaken by public prosecutors should be transferred to administrative staff of the Ministry of Justice in order to reduce the influence of public prosecutors in the day-to-day

functioning of the courthouses, the Ministry of Justice maintains that the existing administrative staff are not competent to undertake administrative tasks without the supervision of public prosecutors. The Ministry suggests that the recommendation should be reformulated so as to recommend the need over time to improve both the training and salaries of court administrative staff with a view to transferring greater responsibilities to them.

During the course of the second Advisory Visit, the Chief Public Prosecutor of Diyarbakir considered that his administrative staff were competent and expressed a desire to be able to devote his time to judicial tasks, with Ministry of Justice employees undertaking administrative duties. Nevertheless, the Chief Public Prosecutor of Ankara considered that court administrative staffs are generally not competent to undertake administrative duties without prosecutorial oversight. He considered that only graduates of a faculty of law could be entrusted with court administrative duties.

Whilst we recognise that a lack of competence within existing administrative staff may present a real obstacle to implementation of the recommendation, we consider that there is nevertheless a continuing need for reform. The fact that, for example, even though public prosecutors have no right to determine the salaries of judges, public prosecutors calculate the salaries of judges and then prepare the judicial payroll each month, is unlikely to inspire confidence in the public and parties to proceedings regarding the objective impartiality of the judiciary. We strongly support the proposal of the Ministry of Justice to improve training and salaries of court administrative staff with a view to transferring greater responsibilities to them over time, also creating an administrative career within the court system in order to make the administrative positions more desirable. We must now wait to see how and when this proposal will be implemented in practice.

(iii) Regarding the recommendation that public prosecutors be re-assigned to different courtrooms on a regular basis, the Ministry of Justice has responded by citing the existence of an insufficient number of public prosecutors as a practical obstacle to implementation. Also, we are given to understand that in some courthouses there is only a single judge and a single public prosecutor and so accordingly rotation between panels would not be possible. For our part we would also observe that the current high incidence of adjournments is likely to present a significant obstacle to implementation. Whilst we recognise the practical difficulties associated with implementing the recommendation at the present time, we do nevertheless consider that there is a need for reform. To put the issue in some context, a judge of the Heavy Penal Court in Diyarbakir informed the delegation that the public prosecutor currently working in his courtroom on a day-to-day basis was the same public prosecutor that we had observed working alongside him during the course of the first Advisory Visit nine months earlier. We were also told by a judge in one of the regular penal courts in Istanbul that public prosecutors are changed after an interval of two years. Given this close working relationship, it is difficult to imagine that an organic relationship would not have been established between judge and prosecutor during such a long time. Such relationships are unlikely to inspire confidence in the public and parties to the proceedings regarding the objective impartiality of the judiciary.

(iv) Regarding the recommendation that public prosecutors either be required to have their offices outside of the courthouse or, if this is not practicable, then public prosecutors have their offices located in a completely separate part of the courthouse from that occupied by judges, the Ministry of Justice considers that this recommendation is too expensive to implement in view of the current limited budget for judicial services. On a positive note however, we were informed that the recommendation will be implemented in the new Intermediate Courts of Appeal once they are established. The offices of the public prosecutors in the Intermediate Courts of Appeal will be located in a different part of the building from the judges.

(v) Regarding the recommendation that measures be taken to ensure an equality of arms between prosecution and defence counsel during the course of criminal proceedings, this matter is addressed fully in Chapter V.

On the basis of the foregoing we have little option but to conclude that the observations that we made regarding the objective impartiality of the judiciary in October 2003 apply equally in July 2004. The only real positive development is that several of the judges that we spoke to in fact shared our concern that the organic relationship between themselves and public prosecutors called into question their objective impartiality. Public prosecutors on the other hand resolutely insisted that they are part of the same profession as the judiciary and therefore are entitled to be regarded as attached to, and therefore equal, to the office of judge. Their position does appear rather entrenched.

We consider that in order to inspire the parties to proceedings and the public that members of the judiciary are in fact able to decide matters before them impartially without any restriction, improper influence, inducement, pressure, threat or interference, direct or indirect, from the office of the public prosecutor, there remains a need for reform.

D. Conclusion

In our October 2003 report we concluded that despite various domestic guarantees of judicial independence, when measured against the core standards of the UN Basic Principles on the Independence of the Judiciary and the Council of Europe Recommendation on the Independence of Judges, true institutional and functional independence was not yet a feature of the Turkish judicial system. We concluded that there remained the potential for an unacceptable degree of executive influence in the process of selecting, training, appointing, promoting, transferring and disciplining of judges in Turkey.

In July 2004 there has been no significant change in the degree of independence enjoyed by the judiciary in Turkey. The Constitution continues to attach the administrative functions of the judiciary to the Ministry of Justice, prospective members of the judicial profession are still required to attend for an oral interview with personnel from the Ministry of Justice, the Ministry of Justice still oversees the provision of pre-

service and in-service training of judges, the Minister of Justice and his Under-Secretary still sit on the High Council of Judges and Public Prosecutors, the remaining members of the High Council are still appointed by the President, the High Council still does not have its own secretariat, its own judicial inspectors, or its own budget, decisions of the High Council are not yet open to independent judicial review and judges are still prohibited from organising and forming professional associations, although there is a proposal for reform in this latter regard. As such, the judiciary in Turkey remains dependent upon the executive power.

We acknowledge and welcome the fact that the body responsible for the professional careers of all judges in Turkey, the High Council of Judges and Public Prosecutors, at our official meeting, expressed a desire to free both itself, and the Turkish judiciary as a whole, from the guardianship of the Ministry of Justice. This is a positive step forwards. However, we consider that it is particularly unfortunate that the evaluation report prepared by the Ministry of Justice after having sought the opinion of the High Council does not in fact reflect the sentiments that were expressed to the delegation by the High Council.

Although the High Council is not yet persuaded as to the need to establish a professional organisation for judges, the High Council has expressed a wish that the Minster of Justice be absolved of his voting rights on the High Council and that the Under-Secretary be removed from the High Council altogether. The High Council has expressed a wish for its own secretariat, its own inspectors and its own budget. The High Council now seems to accept that judges should be entitled to seek judicial review of its decisions before the Council of State and that the responsibility for the interviewing of prospective candidate judges should be transferred to within its competence. We warmly welcome the position taken by the High Council at our meeting, as the representative body of all judges in Turkey, to support the enactment of reforms designed to strengthen the independence of the judiciary in Turkey. We express the hope that it will in due course review its position regarding the establishment of professional judicial associations.

Notwithstanding the views thus expressed to us in our meeting with the High Council however, the necessary constitutional and legislative amendments will only be enacted on the initiative of the Ministry of Justice. Although the Ministry has demonstrated that it is prepared to engage in dialogue with the High Council regarding potential reforms to improve judicial independence, with the exception of the recommendation regarding the ability of judges to form professional associations, it is most apparent that the Ministry has avoided committing itself to any of the recommendations on judicial independence advanced within the report of the first Advisory Visit. The Ministry has formally rejected the proposed amendment to Article 140/6 of the Constitution, it continues to assert that the Judicial Academy is an independent institution and it is opposed to permitting decisions of the High Council to be appealed to an independent judicial body. Beyond this, on matters such as the possibility of the High Council having its own secretariat, inspectors and budget, or the role of the Ministry in the selection of candidate judges, the position of the Ministry of

Justice remains that it is still evaluating the practice in the 25 EU Member States with a view to finding the most appropriate model for the Turkish system. No indication has been given however as to when this evaluation process might be completed.

The experts are both in agreement that true institutional and functional judicial independence is still not yet a feature of the Turkish justice system. Whilst the fact that the Ministry of Justice is evaluating practices in the 25 EU Member State is to be welcomed, we cannot help but observe that, with the exception of the recommendation regarding the possibility of judges forming professional associations, at no point in its evaluation report of July 2004 has the Ministry of Justice expressed even principled support for or commitment to the recommendations on judicial independence advanced following the first Advisory Visit. We also observe that this is so despite the fact that during our official meeting the High Council endorsed the majority of the recommendations. Whilst we are pleased to report therefore that there does now appear to exist a most apparent judicial will to remove the influence of the executive in the functioning of the judiciary in Turkey, we also find ourselves bound to conclude that it remains at best unclear as to whether the Ministry of Justice yet possesses the necessary political will to legislate for reforms that will effectively surrender its guardianship over the judiciary in practice.

The recommendations are, with the aforementioned amendments, maintained and repeated.

IV – ROLE AND EFFECTIVENESS OF PUBLIC PROSECUTORS

A. Introduction

In the report of our First Advisory Visit we concluded that there was a need for reform in order to ensure that the Turkish legal system is able to benefit from strong, independent and impartial prosecutors who are willing and able to resolutely investigate and prosecute suspected criminal offences. In particular, we recommended that the Turkish government should take measures directed at ensuring that public prosecutors may be viewed as being separate from and subordinate to the office of judge. We also invited the administration to take measures aimed at increasing the role of public prosecutors in the criminal investigation process. We suggested that this might be achieved by establishing a judicial police force. We considered that there was a need for public prosecutors to be encouraged to exercise their power to take decisions of non-prosecution in circumstances where an impartial investigation reveals an insufficiency of evidence. We also called on the Turkish government to relieve public prosecutors of their administrative functions.

B. Role and functioning of public prosecutors

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

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

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

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

During the course of the second Advisory Visit one of the most frequently recurring issues impressed upon us by our interviewees was the extent to which the overall quality and efficiency of the Turkish justice system depends upon the ability and willingness of public prosecutors to fulfil their role within the justice system.

An objective assessment of the functioning of the Turkish judicial system, such as that carried out in the report of the first Advisory Visit, reveals that the average duration of trials is unduly lengthy. The excessive length of trials stems, in large measure, from the fact that proceedings are repeatedly adjourned. Proceedings are repeatedly adjourned because judges are routinely presented with incomplete files at the start of trials and therefore further investigations are required to be undertaken. Incomplete files are presented to judges because, despite the law envisaging public prosecutors having ultimate responsibility for conducting investigations into alleged criminal offences, public prosecutors fail to conduct adequate investigations. Public prosecutors experience difficulties in conducting adequate investigations because they exercise little or no supervision over the police during the pre-trial investigation period. Instead, the collection of evidence is left largely to the police themselves, the file only being brought to the attention of the public prosecutors when it becomes necessary to decide on whether to prepare an indictment or not. Public prosecutors experience difficulties in exercising effective control over the police because there is no specialisation within the police force, individual officers are required to undertake crime prevention and administrative duties as well as criminal investigations, and also the police depend upon the Ministry of Interior rather than the Ministry of Justice.

It may be concluded therefore that if public prosecutors could be empowered to exercise effective control over the police during the pre-trial investigation period, then this would result in an increase in the quality of investigations into alleged offences. More effective investigations would in turn enable public prosecutors on the one hand to avoid unfounded indictments and on the other hand to present complete files to the courts. The presentation of complete files would prevent the need for adjournments. Avoiding the need for adjournments would result in a significant reduction in the overall length of trials. As an added benefit, the active involvement of the public prosecutor in the investigation process would serve to protect the rights of the accused, including the right not to be subjected to any form of torture, inhuman or degrading treatment.

In the report of the first Advisory Visit we recommended that in view of the overall importance of empowering public prosecutors to fulfil their role in the collection

of evidence during the investigation period, the Ministry of Justice should consider the advantages of creating a specialised judicial police force with officers affiliated directly to individual public prosecution offices and the force as a whole placed under the overall control of the Ministry of Justice.

We are pleased to report that the Ministry of Justice has accepted the recommendation. The General Director of the Directorate General for Laws and Legislation informed the delegation that the Ministry views the establishment of a judicial police force as being at the cornerstone of its judicial reform process. A co-operation project has been launched with France in order to develop the law and it is envisaged that a judicial police force will be established in 2005. The content of any future legislation on this issue remains to be seen.

As in October 2003, we observed strong support for the creation of a judicial police force amongst almost all of our interviewees. The Chief Public Prosecutor of Ankara commented that he would like to see public prosecutors better enabled to control the work of members of the police force. The Chief Public Prosecutor of Istanbul and the President of the Union of Turkish Bar Associations both observed that the early involvement of the public prosecutor in the investigation process would serve to prevent ill-treatment of accused persons. A judge of the Istanbul Heavy Penal Court, a judge of the Istanbul General Criminal Court and a judge of the Istanbul Juvenile Court all supported the establishment of a judicial police force on the basis that it would enable investigation files to be completed before being presented to the court and therefore avoid the need for the court to become involved in the process of collecting evidence. The Chairman of the Istanbul Bar Association noted that at present public prosecutors hand incomplete files to the courts. He saw the creation of a judicial police force as a practical measure to avoid the need for the court to complete the file by collecting further evidence. Furthermore, he commented that there is a need for more prosecutors in order to secure better investigations and speed up the criminal procedure. The President of the Istanbul Contemporary Lawyers Assoctions also commented generally that he supported reforms directed to increasing the role of public prosecutors in the criminal investigation process. The Chief Public Prosecutor of Diyarbakir and a judge of the newly established specialised Heavy Penal Court in Diyarbakir both supported the creation of a judicial police force. The Chairman of the Diyarbakir Bar Association commented that such a police force might better enable public prosecutors to fulfil their role in collecting evidence for an accused, as well as against, as envisaged by Article 153 of the Code of Criminal Procedure. The President of the Diyarbakir branch of the Human Rights Association remarked that placing a police force under the overall control of the Ministry of Justice rather than the Ministry of Interior would be beneficial in terms of facilitating an overall increase in the role of the public prosecutor in the conduct of criminal investigations.

The only voices of dissent that we witnessed regarding the proposal to establish a judicial police force in Turkey were from the Ministry of Interior and from the Deputy Chief Public Prosecutor at the specialised Heavy Penal Court in Istanbul. The Ministry of Interior opposed the draft law on the establishment of a judicial police force, in particular

because it would transfer disciplinary powers over the police to the public prosecutors. In an attempt to further the reform process, the Ministry of Justice intends to hold a symposium on the issue shortly. The Ministry of Interior will be invited to attend. The Deputy Chief Public Prosecutor said that he prefers specialisation within the existing police force rather than the creation of a judicial police force.

We warmly welcome the initiative of the Ministry of Justice to propose draft legislation on the establishment of a judicial police force in line with the recommendation made following the first Advisory Visit. It is of course too early to say when the judicial police force will be operational and, once operational, the functioning of the force will need to be monitored in order to assess to what extent its creation has served to increase the role of the public prosecutor in the criminal investigation process in practice. Nevertheless, as an initial step, we regard the fact that there exists both a judicial and political will to enhance the role of the public prosecutor in criminal investigations as a positive development.

The recommendation is maintained and repeated.

2. Power of public prosecutors to discontinue proceedings

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

Whilst the proposal to establish a judicial police force so as to enable public prosecutors to fulfil their role in the investigation of alleged criminal offences is to be welcomed as a positive step towards improving the quality and efficiency of the justice system, we consider that as a complementary measure it is necessary to encourage public prosecutors to actively waive prosecutions, discontinue proceedings conditionally or unconditionally, or divert criminal cases from the formal justice system in circumstances where there is no realistic prospect of securing a conviction.

An objective assessment of the functioning of the Turkish judicial system reveals that the courts are burdened with an excessive case-load and that a large proportion of criminal trials ultimately conclude in decisions of acquittal, not infrequently upon the invitation of the public prosecutor. This high acquittal rate suggests that there are a large number of unmeritorious cases within the court system. The fact that so many unmeritorious cases are before the courts suggests that, in addition to conducting inadequate pre-trial investigations into alleged criminal offences, public prosecutors are failing to take decisions of non-prosecution in cases where there is no realistic prospect of conviction. Our interviews reveal that the fact that unmeritorious prosecutions are rarely waived or discontinued stems partly from the low standard of review demanded by the Code of Criminal Procedure, partly from the perception, widely held amongst public

prosecutors, that evaluation of evidence is a matter solely for the judiciary, and partly from the fact that inspectors from the Ministry of Justice exert pressure on public prosecutors to continue unmeritorious criminal proceedings.

Article 164 of the Code of Criminal Procedure formally empowers public prosecutors to take decisions of non-prosecution in circumstances where there exists "insufficient evidence". Therefore, public prosecutors prepare an indictment whenever there exists "sufficient evidence". We have been unable to ascertain any clear legal definition as to what amounts to "sufficient evidence" for the purposes of a decision on whether or not to initiate a prosecution. What we have been able to ascertain however is that in practice the question of whether or not there exists "sufficient evidence" for the preparation of an indictment appears to be one that is rather easily answered in the affirmative. On the basis of our interviews it appears that public prosecutors give themselves little or no authority to evaluate the evidence obtained at the investigation stage in order to assess whether, on the balance of the evidence, there is any reasonable prospect of a conviction being secured if the matter is taken to trial. The overwhelming perception is that evaluation of evidence is a matter for the judiciary. In practice then, if an investigation reveals even a single item of inculpatory evidence against an identifiable individual then a public action is normally deemed necessary and an indictment is instituted before a competent court.

The High Council of Judges and Public Prosecutors commented that, "assessment of evidence is a task for the judge" and "even if there is the slightest evidence then the judge will have to evaluate the case". A judge of the newly established specialised Heavy Penal Court in Istanbul confirmed that under present legislation public prosecutors have no power to assess evidence. The Chief Public Prosecutor of Diyarbakir informed the delegation that public prosecutors have no right to evaluate evidence. A judge of the General Criminal Court in Diyarbakir confirmed that public prosecutors do not have power to assess evidence, although he considered that they should have more authority in this regard. A judge of the Diyarbakir Juvenile Court remarked that 40-50 % of cases in his court result in acquittal. He explained that public prosecutors bring cases to court even when they have extremely limited evidence because they have no right to evaluate the evidence. A judge of an Istanbul Regular Penal Court stated that at least 10 % of all cases should never be brought to court at all, many cases should have been completed before the indictment was filed and that the role of the court in collecting evidence under the present system should be removed. All judges that we met and who touched upon the subject shared these last views.

This lack of prosecutorial supervision over the determination as to which criminal investigations ought properly to result in court proceedings invites unmeritorious proceedings to enter the court system. The widespread perception that evaluation of evidence is solely a matter for a judge is also contrary to the role of prosecutors as envisaged in international law. Guideline 14 of the Guidelines on Prosecutors provides: "Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded." Principle 18 provides: "In accordance with national law, prosecutors shall give due

consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s)."

Moreover, the limited role of Turkish public prosecutors in the assessment of the sufficiency of evidence in favour of a conviction appears inconsistent with practice in other EU Member States. In the United Kingdom for example, in order to prevent unmeritorious prosecutions from entering the court system, a far more active review of investigation files is undertaken by Crown Prosecutors prior to any decision to prepare an indictment. The Code for Crown Prosecutors (4th Edition, October 2000) provides in relevant part that when deciding whether or not to initiate a prosecution in the United Kingdom:

> "Crown Prosecutors must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction' against each defendant on each charge. They must consider what the defence case may be and how that is likely to affect the prosecution case.
>
> A realistic prospect of conviction is an objective test. It means that a jury or a bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged."

Therefore, before initiating a prosecution, Crown Prosecutors in the United Kingdom are expressly required to assess the strength of the evidence before them in any given case. Further, they may only initiate a prosecution if they are satisfied on the basis of their evidential assessment that it is more likely than not that a court will convict.

The Code expressly provides that when deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable. The Code provides that in undertaking this assessment Crown Prosecutors should consider the following sorts of questions: Is it likely that the evidence will be excluded by the court? Is the evidence reliable? Is there evidence which might support or detract from the reliability of a confession? Is the reliability affected by factors such as the defendant's age, intelligence or level of understanding? What explanation has the defendant given? Is a court likely to find it credible in the light of the evidence as a whole? Does it support an innocent explanation? If the identity of the defendant is likely to be questioned, is the evidence about this strong enough? Is the witness's background likely to weaken the prosecution case? For example, does the witness have any motive that may affect his or her attitude to the case, or a relevant previous conviction? Are there concerns over the accuracy or credibility of a witness? Are these concerns based on evidence or simply information with nothing to support it? Is there further evidence which the police should be asked to seek out which may support or detract from the account of the witness?

Whilst no system can prevent all unmeritorious cases from proceeding to court, this active review of the strength of the evidence at least endeavours to ensure that only

those cases with a realistic prospect of conviction actually proceed further into the justice system.

In Sweden, under the Swedish Code of Procedure, a criminal investigation is to be conducted directly by a public prosecutor at latest when there are good reasons for suspicion against anyone for committing the crime. During the criminal investigation the case should be prepared in a way that makes it possible continuously to present all evidence in the court. From the code it is apparent that there should be sufficient grounds before an indictment is filed. According to solid praxis, and elaborated in commentaries, the prosecutor shall have reasonable grounds to foresee a conviction before filing an indictment. Thus, the prosecutor shall assess if the act committed is a crime under the relevant legislation and take a stand in the question if one, on basis on the evidence, on reasonable (objective) grounds can foresee a conviction.[16] One should note that there is a clear distinction in between "reasonable grounds for suspicion" and "reasonable grounds to foresee a conviction" as the latter has considerably higher demands on the strength of the evidence.

In France, during the pre-trial investigation phase, the police seek out the perpetrators, collect evidence and refer to the Prosecutor. The Prosecutor oversees the work carried out by the judicial police: he makes sure that the necessary steps have been taken as the direct supervisor of judicial police officers[17]. At any point during investigation, the Prosecutor may decide to drop the case, either because the prosecution is time-barred by statute, or by exercise of the discretion to prosecute (the decision to dismiss a case is revocable); if it is a serious offence, the investigating judge will get a formal request from the Prosecutor asking him to investigate the alleged fact. If the evidence is sufficient to refer the case directly to the court, the usual method is to issue a direct summons to the suspect to appear in court.

The aim of the investigation is to gather evidence that an offence has been committed, to discover the perpetrator in some cases or to verify the ground of the accusation against a suspect. The Prosecutor has to prove the guilt of the defendant using all available evidence[18]. He may request the search of some evidence and may challenge the decisions made by the investigating judge by lodging an appeal with the *Chambre de l'instruction*. One of the core principles of criminal procedure in France is that the investigating judge investigates both in order to support the accusation and in favour of the defence of fundamental liberties. The powers of investigation are exercised by the judge either in person or thanks to a police officer who acts as his agent under a letter rogatory. When the investigation is completed, the file is handed over to the Prosecutor who issues an order to drop the case if the perpetrator remains unknown, or there are not enough charges against the person to be examined, or the facts do not amount to an offence; or an order to transfer the case to the relevant court (police court, criminal court or court of assises) according to the seriousness of the offence.

[16] The Swedish Code of Procedure "Rättegångsbalken", Chapter 23 Articles 2-3; Commentary to the Code of Procedure - Fitger, Rättegångsbalken II 20:12-15 and 23:12-14;. Welamson Rättegång II p. 147-149.
[17] CPP (Code de Procédure pénale) Article 41.
[18] CPP Article 458.

In Germany, the prosecution abides by the principle of legality enshrined in the federal Code of 1887; it is not expressly stated in the German Constitution but derives from the principle of equality of citizens before the law and the rule of law. The code of criminal procedure states that *the public prosecutor must intervene concerning all offences capable of being prosecuted, save those treated otherwise by the law, as soon as the facts are sufficiently established*[19]. Indeed the Prosecutor can close a case without obtaining permission because the facts alleged disclose no criminal offence or because of procedural obstacles to prosecution.[20] A complainant (alleged victim) is to be informed of the reasons for his decision. The tendency has been to move gradually from limiting the legality principle to the notion of discretion to prosecute: the 1975 reform of criminal procedure allowed the prosecutor in the case of petty offences to drop a case by means of mere discretion provided the judge had given agreement and there was no public interest at stake. It is also possible to drop charges when the consequences of the offence are slight[21] even without the consent of the court. Another possibility for conditional dropping of less severe charges is when the accused agrees to conditions which are suitable to dispose of the public interest in prosecution[22]. Such conditions can be community service or labour, a financial compensation to the victim or payment to a charity or public body. The Prosecutor can also end proceedings provided the competent judge agrees, if it appears that no sanction would be given if the case were to be tried[23]. In addition, the Federal Code provides for further possibilities of discontinuing proceedings, e.g. where the expected penalty would be rather low compared to a penalty to be imposed for another offence.[24] Circulars have been laid down by the Ministry of justice for the *Länder* on how to use discretion in closing a case so as to avoid discrepancies in prosecution policies.

During the first Advisory Visit the delegation also received complaints that a further reason for the high number of unmeritorious proceedings before the courts in Turkey is that public prosecutors are placed under pressure from inspectors attached to the Ministry of Justice to continue unmeritorious prosecutions in circumstances where they might otherwise have entered a decision of non-prosecution. This introduced the possibility for political considerations to override evidential requirements in any decision to prosecute. On the occasion of the second Advisory Visit such complaints continued to be received.

A positive development occurred in this regard in May 2004 when the Ministry of Justice amended Article 20 of the By-Law on the Inspection Board so as to stipulate that inspectors should allow prosecutors greater discretion when taking decisions on non-prosecution. We observed during the course of the Advisory Visit that the High Council of Judges and Public Prosecutors, as well as the Chief Public Prosecutors of Istanbul, Ankara and Diyarbakir were all aware of the amendment. It is of course too early to

[19] Paragraph 152 II, StPO *(Strafprozessordnung).*
[20] Paragraph 170 II, StPO.
[21] Paragraph 153, StPO.
[22] Paragraph 153a I, StPO.
[23] Paragraph 153b I, StPO.
[24] Paragraph 154 StPO.

assess what effect, if any, this amendment will have in practice, however we welcome the initiative in principle. We do however consider that a more fundamental reform might be instituted in this regard. We would encourage the Ministry of Justice to adopt our recommendation regarding the re-assignment of judicial inspectors to work directly under the control of the High Council. Implementation of this recommendation would not only serve to strengthen the independence of the judiciary, it would also serve to dispel the continuing suspicions that their might be political influence in decisions relating to the commencement of certain criminal prosecutions in Turkey.

Another positive development is underway in so far as the draft Code of Criminal Procedure, currently before the National Assembly, contains a provision that will provide courts with the power to reject unfounded indictments.

In summary, we consider that the fact that public prosecutors are either unwilling or unable to take decisions of non-prosecution in circumstances where, although there might be some evidence against a suspect, there is clearly no realistic prospect of conviction, can only be contributing to a large number of unmeritorious cases featuring among the workload of the criminal courts - and may be also for public prosecutors - in Turkey.

We therefore recommend that before initiating a prosecution, public prosecutors in Turkey should be expressly required to assess the strength of the evidence before them in any given case.

In this regard the Code of Criminal Procedure should be amended so as to ensure that public prosecutors only transfer a case to court once they are satisfied, on the basis of their evidential assessment, that there are substantial grounds to foresee a conviction, meaning that it is more likely than not that a court will convict. Further, public prosecutors should, through pre-service and in-service training, be encouraged to perceive their role as including the diversion of cases with no realistic prospect of conviction from the justice system. Finally, the influence of Ministry of Justice inspectors in decisions on whether or not to initiate a prosecution should be removed completely. We believe that such reforms would lead to a significant reduction in the number of unmeritorious cases before the courts. In consequence, an overall increase in the efficiency of the justice system would be achieved. Balancing such a reform, if new evidence against the suspect is found, the public prosecutor should have the right to re-open the case. And, if deemed necessary, a decision by a prosecutor to discontinue a prosecution should be open to judicial review by the victim of the crime.

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

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

In our October 2003 report we observed that according to Article 148 of the Code of Criminal Procedure, the Minister of Justice had competence to, by order, direct a prosecutor to commence a prosecution before the criminal courts if he saw fit.[25] We considered that for a political entity to have the power to effectively overrule the decision of a prosecutor regarding non-institution of proceedings and thereafter compel him to prepare an indictment and commence a prosecution, not only directly undermined the role of the prosecutor in criminal proceedings but also served to introduce the possibility for political considerations to override evidential requirements in any decision to prosecute.

We are pleased to report that the Ministry of Justice has formally accepted the recommendation.

A provision lifting the competence of the Minister is included in the draft Code of Criminal Procedure currently before the National Assembly. The measure is scheduled for implementation in 2004.

The recommendation is maintained and repeated.

4. Administrative functions of public prosecutors

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

In the report of the first Advisory Visit we suggested that removing the responsibility of public prosecutors for administrative tasks might ease their workload and better enable them to concentrate on their judicial functions of investigating cases and presenting prosecutions. This in turn would both strengthen the role of the public prosecutor in criminal proceedings and lead to an increase in efficiency and quality. We suggested that the day-to-day administration and support work of the courts and the prisons could more effectively be carried out by a dedicated agency that is funded by central government and staffed by civil servants.

The Ministry of Justice maintains that the existing administrative staff are not competent to undertake administrative tasks without the supervision of public prosecutors. The Ministry suggests that the recommendation should be reformulated so as to recommend the need over time to improve both the training and salaries of court administrative staff with a view to transferring greater responsibilities to them.

During the course of the second Advisory Visit, the Chief Public Prosecutor of Diyarbakir considered that his administrative staff were competent and expressed a desire to be able to devote his time to judicial tasks, with Ministry of Justice employees

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

undertaking administrative duties. Nevertheless, the Chief Public Prosecutor of Ankara considered that court administrative staff are generally not competent to undertake administrative duties without prosecutorial oversight. He considered that only graduates of a faculty of law could be entrusted with court administrative duties.

Whilst we recognise that a lack of competence within existing administrative staff may present a real obstacle to implementation of the recommendation, we consider that reform may nevertheless be beneficial. We support the proposal of the Ministry of Justice to improve training and salaries of court administrative staff with a view to transferring greater responsibilities to them over time. We must now wait to see how and when this proposal will be implemented in practice.

The recommendation is maintained and repeated. We suggest that the European Commission give consideration to supporting a project to train court administrative staff.

C. Conclusion

In the report of the first Advisory Visit we concluded that there was a need for reform in order to ensure that the Turkish legal system is able to benefit from strong, independent and impartial public prosecutors who are willing and able to resolutely investigate and prosecute suspected criminal offences. In addition to urging the Ministry of Justice to take measures directed at ensuring that public prosecutors can be viewed as being separate from and subordinate to the office of judge, we invited the competent authorities to take measures aimed at increasing the role of public prosecutors in the criminal investigation process and empowering public prosecutors to exercise their power to take decisions of non-prosecution in circumstances where an impartial investigation reveals an insufficiency of evidence. We recommended that the power of the Ministry of Justice to override a decision of a public prosecutor not to initiate a criminal prosecution in circumstances where an impartial investigation has shown a charge to be unfounded should be removed and finally we called on the Ministry to relieve public prosecutors of their administrative functions.

In July 2004 we have observed that there now exists both a judicial and political will to enhance the role of the public prosecutor in the criminal investigation process. To this end, the Ministry of Justice is committed to establishing a judicial police force. Although the Ministry of Interior retains reservations, a co-operation project has been launched with France in order to develop the necessary legislation and it is envisaged that a judicial police force will be established in 2005. Once operational, the functioning of the force will need to be monitored in order to assess to what extent its creation has served to increase the role of the public prosecutor in the criminal investigation process in practice. Nevertheless, we regard the commitment of the Ministry of Justice to the establishment of such a force as a positive development.

The unwillingness or inability of public prosecutors to take decisions of non-prosecution in circumstances where, although there might be some evidence against a

suspect, there is clearly no realistic prospect of conviction, remains a matter that urgently needs to be addressed. Although the Ministry of Justice has amended Article 20 of the By-Law on the Inspection Board so as to stipulate that inspectors should allow prosecutors greater discretion when taking decisions on non-prosecution, we consider that a more thorough reform of the role of judicial inspectors is required in order to ensure that the influence of inspectors in decisions on whether or not to initiate a prosecution is removed completely. Further, there is a pressing need for the draft Code of Criminal Procedure to be amended so as to require that before initiating a prosecution, public prosecutors must assess the strength of the evidence before them in any given case and should only transfer a case to court once they are satisfied, on the basis of their evidential assessment, that it is more likely than not that a court will convict. Finally, there is a need for further pre-service and in-service training of public prosecutors with a view to encouraging them to perceive their role, in line with international standards, as including the diversion of cases with no realistic prospect of conviction from the justice system.

We are pleased to report that the Ministry of Justice is adding a provision to the Draft Code of Criminal Procedure that will, if enacted, remove the power of the Ministry of Justice to override a decision of a public prosecutor not to initiate a criminal prosecution in circumstances where an impartial investigation has shown the charge to be unfounded. There has however been no initiative to remove the responsibility of public prosecutors for administrative tasks in an effort to better enable them to concentrate on their judicial functions.

V – ROLE AND EFFECTIVENESS OF LAWYERS

A. Introduction

Following the first Advisory Visit we urged the Turkish government to take urgent measures to ensure that accused persons are afforded their right of access to a lawyer immediately upon being detained, that accused persons are able to effectively consult and communicate with a lawyer in confidence, that the organisation of the courtrooms and procedures adopted within them guarantees an equality of arms between the prosecution and defence, that lawyers are not harassed or intimidated in the exercise of their professional duties and that the influence of the Ministry of Justice in the functioning of lawyers is removed.

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

1. Access to lawyers

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

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

In October 2003 we reported that notwithstanding the existence of legal guarantees providing for detained persons to be both immediately informed of their right to access a lawyer and to in fact access a lawyer upon deprivation of liberty,[26] our interviews revealed a significant regional variation in the extent to which the guarantees were being applied in practice. We concluded that for many detainees outside Ankara the right of immediate access to free legal counsel remained illusory. Apparently, large numbers of detainees remained ignorant of their right to free legal counsel because they were routinely not informed that they possessed such a right. Others still were lulled into unwittingly signing forms that waived their right to counsel. Those who were aware of their right to counsel were, on occasion, subjected to measures intended to dissuade them

[26] Articles 135 and 136 of the Criminal Procedure Code.

from exercising this right. There were also reports of instances where even those who made a formal request for a lawyer were nevertheless interrogated in the absence of a lawyer or else their lawyer was obstructed in gaining access to them. In short, there seemed to remain a significant disparity between law and practice in most of Turkey regarding respect for the right of access to free legal counsel upon deprivation of liberty. It was against this background that we recommended that Bar Associations should be permitted to place posters advocating the rights of detainees within police stations and other detention facilities and that once a week police stations and gendarme stations should be required to submit to the local Bar Association a list of all persons detained during the previous week.

The Ministry of Justice responded to the recommendation by transmitting the relevant section of the report to the Ministry of Interior and the Bar Associations on the basis that these were the competent authorities regarding implementation. At the commencement of the second Advisory Visit, the Bar Association had not yet been permitted to place posters advocating the rights of detainees within police stations. Further, police stations and gendarme stations had not yet been required to submit to the local Bar Association a list of all persons detained during the previous week.

On the occasion of the second Advisory Visit we again observed that none of our interviewees in Ankara raised any concerns regarding implementation of the right of detainees to access free legal counsel immediately upon being deprived of their liberty. In Istanbul we similarly received no complaint from the Bar Association, although the Contemporary Lawyers Association stated that lawyers are only in attendance at 10-15% of cases at the police station.

The Diyarbakir Bar Association informed the delegation that there has been a positive development in so far as over the course of the last 8 months they have witnessed a greater demand for legal representation from suspects, however, they remained of the opinion that detainees are still not being reminded of their rights strongly enough. The Association reminded us that in the south-east of Turkey there is limited public awareness of the right of access to a lawyer upon deprivation of liberty and therefore it is particularly important that detainees should be both expressly informed of their right to access a lawyer and actively encouraged to exercise this right. The Association spoke however of the continued unwillingness on the part of gendarmes and police officers to take the testimony of suspects in the presence of lawyers. They described police and gendarmes as being opposed to suspects exercising their right to access a lawyer. For example, we were informed that if the detainee asks for a lawyer without being reminded of his rights then the law enforcement authorities are likely to perceive the suspect as being guilty. Even where a lawyer is appointed, the Bar Association stated that it observes reluctance on the part of the law enforcement authorities to co-operate with the appointed lawyer. We were informed that there continue to be incidents where, despite a detainee requesting a lawyer, the Bar Association is not notified immediately and the police and gendarmes continue to elicit information from the detainee without a lawyer being present. Even when the Bar Association is notified and a lawyer is despatched in good time, lawyers are reportedly sometimes informed that their client is unable to meet

them and they are required to wait for half-an-hour before gaining access to their client. Notwithstanding these problems however, the Association concluded that it has nevertheless seen a greater demand for lawyers over the course of the last 8 months, although, other than in cases involving minors where legal representation is compulsory, it remains the case that only about 20% of defendants in Diyarbakir are represented by a lawyer at trial.[27] During the course of our visit to the Diyarbakir courthouse we observed a positive development in so far as posters informing defendants of their right to access a lawyer from the Bar Association at no cost to themselves are now displayed in the corridors outside the courtrooms. The Diyarbakir Bar Association confirmed that they were still not permitted to display such posters within police and gendarme stations.

The President of the Diyarbakir branch of the Human Rights Association, who is himself a practising lawyer, informed the delegation that although the law grants all suspects the right to access a lawyer upon deprivation of liberty, this law is not applied in a consistent and regular fashion throughout south-east Turkey. He commented that the police continue to create difficulties for detainees to access lawyers in politically sensitive cases. By way of example he cited an incident in Edil on 14 June 2004 when three persons had been taken into custody and demanded access to their lawyer. Despite the efforts of the lawyer to meet with his clients, the lawyer was allegedly denied access to them until the following day. The Diyarbakir Branch of the Human Rights Association also commented that the strength of the Diyarbakir Bar Association has facilitated an increase in the exercise of the right of access to a lawyer in the provincial capital of Diyarbakir but persons taken into custody in other parts of the region, for example in Sirnak, are still not able to access a lawyer.

The Diyarbakir branch of the Contemporary Lawyers Association informed the delegation that individuals taken into custody in their region do not know that they have a right to ask for a lawyer and the police prefer not to remind people in custody of their rights. They commented that on occasion the police do now inform detainees of their rights but at the same time they cause detainees to feel that if they ask for a lawyer then they will be presumed to be guilty. The result is that even those individuals who are aware of their right to access a lawyer are dissuaded from exercising this right. The Association spoke of the number of applications for lawyers from persons over 18 as remaining negligible. The Association remarked that there had however been a partial development in the ability of detained persons to access lawyers due to pressure exerted by the Bar Association and the Contemporary Lawyers Association. The Association considered however that the law enforcement authorities continue to remain reluctant to permit detainees to access lawyers, especially whilst the testimony of the detainee is being taken. Echoing the comments of the Bar Association, the Contemporary Lawyers Association remarked that when lawyers attend to consult with their clients they are told that their clients do not wish to meet with them. They also complained that detainees were often interviewed in the early hours of the morning and suggested that this practice

[27] Upon being asked as to how this represented an improvement when the same figure was provided to the delegation in October 2003, the President of the Diyarbakir Bar Association explained that although the Association has assigned more lawyers in the last eight months, the number of offenders has also increased.

was adopted in order to make it difficult for lawyers to attend during the interview process.

On the basis of the foregoing it is apparent that there has been a slight improvement in the position regarding implementation of the right of detainees to access free legal counsel immediately upon being deprived of their liberty in south-east Turkey, however, significant problems remain. It appears that the untiring efforts of, in particular, the Diyarbakir Bar Association, have led to a slight increase in the number of detainees claiming their right to access a lawyer when deprived of their liberty. However, a combination of widespread lack of public awareness and persistently high levels of official obstruction continue to present obstacles in the path of detainees throughout the region accessing legal advice and representation upon arrest or detention.

Given the persistence of allegations of ill-treatment of detainees during the initial stages of detention in this region, we consider that effective implementation of the right of access to a lawyer throughout south-east Turkey is essential. The President of the Union of Turkish Bar Associations informed the delegation that of the 81 provinces in Turkey, the majority of continuing torture allegations emanate from the south-eastern part of the country, mainly from Diyarbakir. He added that he believed that the majority of complaints on this issue were true, although he did also note there have been certain improvements. The Istanbul branch of the Human Rights Foundation of Turkey also singled out the province of Diyarbakir as continuing to give rise to a significant number of complaints of torture. The Foundation also expressed concern about continuing incidents of people being detained, severely beaten by the police, and then released without ever being formally arrested. We were informed by different sources that in contrast to other parts of Turkey where more sophisticated and invisible methods of torture are used, the methods used in Diyarbakir are more physical and violent and therefore easier to detect. The Istanbul Contemporary Lawyers Association furthermore pointed out Adana and the Ismala police station in Izmir as places where torture and ill treatment regularly takes place. One reason for the persistence of torture and ill-treatment in detention is the failure of law enforcement officials to follow prescribed procedures, including the duty to inform detainees of their rights and to allow access to legal counsel. Effective implementation of the right of detainees to access legal counsel immediately upon deprivation of liberty is therefore critical.

Despite the generally unfavourable position regarding implementation of the right of access to a lawyer in south-east Turkey at the present time however, it does appear that there is some hope for the future. The Ministry of Interior has issued 200,000 police officers with pocket-sized cards that list the rights of detainees. The police officers have been instructed to read the list of rights to detainees and they have been warned that they will be held personally liable for any award of compensation that arises out of their failure to read a detainee his rights. We were informed that this card has been enlarged and displayed in police stations. We were not able to undertake any meaningful assessment of the extent to which the cards have in fact brought about any change in police practice. The Chairman of the Diyarbakir Bar Association considered that it was too early to say one way or the other. He informed the delegation that the police incident

reports always state that the card has been read to the accused but unless one is actually detained oneself then such statements are impossible to verify.

During the course of the Advisory Visit, the Ministry of Interior formally agreed to permit the Bar Associations to display posters advocating the rights of detainees in both police and gendarme stations. Although this agreement is conditional upon both the form and content of the posters being agreed between the Ministry of Interior and the Bar Associations, the Ministry agreed in principle that the posters should set out the rights of the accused and provide the telephone number and address of the local Bar Association so as to enable detainees to apply for legal representation and/or complain about any human rights violations. On the occasion of our meeting, the Ministry of Interior had not yet notified the Bar Associations of its proposal. The Ministry of Interior proposed that the Ministry of Justice should contact the Bar Associations officially so that work on the design of the posters might commence. We warmly welcome the position of the Ministry of Interior which is in line with our recommendation. We urge the Ministry of Justice to commence work on the posters at the earliest opportunity.

The Ministry of Interior also agreed that the concept of forwarding lists of detained persons to the Bar Associations on a weekly basis might be a useful way in which to increase access to legal representation and prevent ill-treatment of detainees. The Ministry of Interior considered that the responsibility for the forwarding of such lists ought more properly to lie with the office of the public prosecutor rather than law enforcement personnel however. The Ministry of Interior pointed out that public prosecutors are already tasked to visit police and gendarme stations on a regular basis and therefore they already have access to lists of detainees. It would appear therefore that if this recommendation is to be implemented in practice then the Ministry of Justice will need to take the initiative. Again, we welcome the position of the Ministry of Interior and urge the Ministry of Justice to take the necessary measures to implement the recommendation in practice.

In conclusion therefore we report that notwithstanding the existence of legal guarantees providing for detained persons throughout Turkey to be both immediately informed of their right to access a lawyer and to in fact access a lawyer upon deprivation of liberty, the second Advisory Visit revealed that implementation remains limited throughout south-east Turkey. The position of the Ministry of Interior in line with the recommendation does however offer hope for the future and is to be welcomed. The Ministry of Justice is to be encouraged to take the necessary measures to implement the recommendation in practice. Thereafter, continued monitoring of police practice will be required.

The recommendation is maintained and repeated.

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

- Intimidation and harassment of lawyers visiting detained clients

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

In October 2003 we reported that lawyers from Ankara, Istanbul, Diyarbakir and Izmir all complained that they faced obstructions when attempting to enter detention centres, particularly F-Type Prisons, for the purpose of visiting their clients. The lawyers characterised these obstructions as a form of official harassment or intimidation aimed at dissuading them from visiting their clients. The most common complaint that we received related to the application of intimidatory searches upon entry to detention facilities.

The Ministry of Justice immediately acted upon the recommendation made following the first Advisory Visit by notifying all relevant authorities that the controls at the entrances to detention centres should be administered more sensitively. Subsequently, on 1 June 2004 the Ministry of Justice issued a circular specifically addressing the application of body searches after a metal detector has been activated. The circular reads as follows:

> "According to Law No. 4806 dated 10/2/02 which amends Art 6 of Law No 1721, hand searching for lawyers during the entrance to prisons and detention houses are limited to being caught red-handed for heavy punishment situations and continuing signal of the sensitive security doors. For this reason, during the hand searching of lawyers, the officers, who would preferably be selected from university graduates, will act in a respectful way. These officers will also be subject to special training in hand searching. The lawyers will be provided to fulfil their tasks without any pressure, prevention and unjust intervention."

During the course of the second Advisory Visit neither the Ankara, Istanbul or Diyarbakir Bar Associations raised any complaint regarding the application of intimidatory searches upon entry to detention facilities. The President of the Union of Turkish Bar Associations confirmed that he had not received any complaints from lawyers based upon allegations of having been harassed or intimidated at the entrances to detention houses. The General Director of the Directorate General for Prisons and Detention Houses of the Ministry of Justice referred to the circular that had been issued directing the prison and detention house authorities to conduct searches more sensitively and stated that he had not received any complaints from lawyers regarding the application of intimidatory searches.

Following the first Advisory Visit we were extremely concerned at the high number of complaints that we had received regarding the treatment of defence lawyers at the entrances of detention centres throughout Turkey. That such complaints have now ceased entirely is a significant positive development. We were informed by the General

Directorate of Prisons and Detention Houses that the sensitivity of metal detectors has been reduced to the same level as in airports

We strongly commend both the speed with which the Ministry of Justice acted upon the recommendation and the evident effectiveness of the measures introduced.

The only complaints that we did receive were from the Diyarbakir Contemporary Lawyers Association who objected to having to remove their jacket, belt and shoes when the metal detector is activated and the Istanbul Contemporary Lawyers Association who objected to the searching of pens that they handed to their clients. We do not accept these objections as legitimate grounds for complaint. All detention centres have a duty to maintain adequate security and that may legitimately require lawyers to pass through metal detectors and subject their personal belongings to examination. The interference occasioned to lawyers by requiring them to remove their jacket, belt and shoes in situations where a metal detector sounds is a proportionate response to the needs of the state authorities to maintain prison security. We would further add that such practice is common throughout all EU Member States. Accordingly, we consider that there is nothing objectionable in the practices complained of. It should also be mentioned that, according to the Ministry of Justice, 314 lawyers have in the past been caught trying to enter prisons and detention houses whilst in possession of contraband material.

We conclude that the recommendation has been met.

- *Consultation facilities enabling lawyers to communicate with clients in full confidence*

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

In October 2003 we reported that we had received some complaints, although not universally, regarding the availability of facilities within the detention centres for lawyers to consult and communicate with their clients in full confidentiality. The complaints focussed on the absence of facilities for confidential consultation in certain institutions rather than the absence of consultation facilities per se.

The Ministry of Justice responded to the recommendation by transmitting the relevant section of the report to the Ministry of Interior on the basis that it was the competent authority regarding implementation.

During the course of the second Advisory Visit, the Ministry of Interior informed the delegation that it accepted the recommendation in principle but went on to observe

that it would take time to implement. The Ministry stated that all new police stations will be built with facilities for lawyers and detainees to consult in confidence and where such facilities are not found in existing police stations, lawyers and the detainees are afforded the use of a spare room.

The delegation did not receive any complaints from lawyers in either Ankara or Istanbul regarding the absence of facilities for consultation with their clients in full confidence. In Diyarbakir the Bar Association reported that its lawyers are able to access an allocated private space in which to have confidential consultations with their clients in both police stations, gendarme stations and prisons. The Diyarbakir Contemporary Lawyers Association confirmed that consultation rooms are available in police stations and lawyers are able to consult with their clients outside of the hearing of police officers and gendarmes. Despite the absence of complaints from lawyers that we spoke to, however, the Ministry of Interior's acceptance of the recommendation in principle suggests that there are police and gendarme stations in Turkey where adequate facilities do not presently exist. On this basis we urge the Ministry of Interior to take all necessary measures to implement the recommendation at the earliest opportunity.

The recommendation is maintained and repeated.

A related issue that was brought to the attention of the delegation was the absence of adequate time for consultations between lawyers and their clients in certain institutions. The Diyarbakir Bar Association explained that, particularly in the D-Type prisons, visiting hours are extremely restricted, often lasting no more than 1 hour during any given day. The Bar Association explained that it can take up to 30 minutes to pass through the security measures at the entrance to the detention houses and prisons, thereby leaving only 30 minutes for the purposes of consultation. The Istanbul Contemporary Lawyers Association complained that prison officers sometimes keep lawyers waiting for several hours before allowing them access to their clients.

In addition to repeating our recommendation concerning the provision of adequate facilities for confidential consultation between lawyers and clients therefore, we would also urge the Ministry of Justice and/or Ministry of Interior to take measures to ensure that lawyers are afforded adequate time to consult effectively with their detained clients.

- *The possibility for detainees to access documents and other evidence and to prepare and hand to their lawyers confidential instructions*

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

In the report of our first Advisory Visit we noted that we had received complaints from some lawyers to the effect that they were forbidden from exchanging any documents with their clients during the course of consultations in prisons.

The Ministry of Justice responded by stating that it had not received any complaints from lawyers to this effect and that in general there is no legal restriction on lawyers exchanging documents with their clients in prison. The Ministry of Justice nevertheless undertook to issue a circular to remind prison governors of the correct legal procedure in this regard.

During the course of the second Advisory Visit the General Director of the Directorate General of Prisons and Detention Houses of the Ministry of Justice informed the delegation that no restriction exists in relation to the exchange of documents between lawyer and client in either theory or practice. Indeed, Article 6 of Law No. 4806 expressly provides that legal documents related to the defence of a detainee cannot be examined. However, the Diyarbakir Bar Association informed the delegation that if a lawyer wishes to pass a written document to his client in detention then he is required to hand the document to a clerk who in turn passes the document to the prison governor for inspection. The document may only be passed to the detained client if the prison governor so authorises. The Bar Association clarified that this procedure applies to both non-legal and legal documents and it also applies to documents passed from the detained client to his lawyer.

It would appear therefore that whilst the law may provide for legal documents to be freely exchanged between lawyers and their detained clients without inspection, the practice in certain detention centres is not in accordance with the law. We consider that any restriction upon the ability of lawyers and detainees to freely exchange legal documents related to pending criminal proceedings constitutes an unjustified interference with the right to defence.

We welcome the initiative of the Ministry of Justice to issue a circular to remind prison governors of the correct legal procedure in this regard. Further monitoring will be required in order to assess implementation. The recommendation is maintained and repeated.

- *Provision of writing material to detainees when meeting their legal representatives*

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

Following the first Advisory Visit we reported that lawyers from the Istanbul Contemporary Lawyers Association stated that in addition to not being able to exchange any documents with their clients, their clients were also not allowed to have any pens or paper in the interview room. We concluded that this practice was contrary to Rule 93 of the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners.

The Ministry of Justice responded by formally accepting the recommendation that all persons held in detention should be supplied with writing material prior to and during consultations with their legal representatives if such material is requested. The Ministry informed the Directorate General for Legislative Affairs who in turn responded indicating that a proposed amendment to Article 154 of the Draft Criminal Procedure Code and Article 20 of the By-Law on Apprehension, Detention and Statement Taking will be taken into account by the Justice Sub-Committee of the Turkish Grand National Assembly. Consideration of the proposed amendment is scheduled for 2004.

During the course of the second Advisory Visit, the complaints of the Istanbul Contemporary Lawyers Association regarding the possibility for detainees to use pens and paper in the interview room were not repeated. However, they claimed that in F-type prisons they were not allowed freely to give their clients pens (see above in the section on security control) or paper. The Diyarbakir Bar Association informed the delegation that lawyers in its region are able to take stationery into prisons. Nevertheless, the legislative amendment proposed by the Ministry of Justice does indicate a deficiency in the existing provisions of both the Criminal Procedure Code and the By-Law on Apprehension, Detention and Statement Taking. On that basis alone we cannot exclude the possibility that certain persons held in detention centres in Turkey may continue to be denied access to writing materials prior to and during consultations with their legal representatives.

We warmly welcome the initiative of the Ministry of Justice in proposing legislative amendments in line with the recommendation. Pending adoption of these amendments the recommendation is maintained and repeated.

iii. Ability of lawyers to communicate with clients during trial

- *The possibility for detainees in court to communicate with their lawyers in confidence*

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

In the report of the first Advisory Visit we observed that in criminal courts in Turkey, lawyers whose clients are produced from a detention facility and who therefore,

apart from during their court appearance, are held in the cells of the court, are not able to consult with their clients in the cells either prior to the hearing, during any adjournment of the hearing or after the hearing. We considered that this represented an unjustified interference with the right to defence.

During the course of the Second Advisory Visit we observed that there has been no change in practice. It remains the case that in criminal courthouses in Turkey, lawyers are not able to consult with their clients whilst their clients are held in the cells of the court.

We are pleased to be able to report however that the Ministry of Justice has accepted the recommendation, observing that it is in line with the right of accused persons to consult with a lawyer in confidence as provided for by Article 144 of the Criminal Procedure Code. The Ministry of Justice has, in the first instance, undertaken to implement the recommendation in the construction of the new Intermediate Courts of Appeal. Thereafter, consultation rooms will be constructed within the secure facilities of all courthouses throughout Turkey. Construction is scheduled to take place over the period 2004-2006. The Ministry has further agreed to reflect upon whether any interim measures might be adopted in the short term so as to enable lawyers to communicate with their clients in the detention facilities of criminal courthouses whilst construction of designated consultation facilities is underway.

We warmly welcome the decision of the Ministry of Justice to accept the recommendation and commence work on implementing the same. Pending completion of the proposed construction project, the recommendation is maintained and repeated.

- *The possibility for accused to consult with their lawyer during trial*

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

In October 2003 we reported that as a general rule, no communication is permitted to take place between lawyers and their clients during the course of court proceedings in Turkey. Exceptionally, a defence lawyer might ask a judge for permission to consult with his client during the course of a court hearing but such requests are, so we were given to understand, dealt with extremely reluctantly.

The Ministry of Justice responded to the comments in the report by stating that the law provides for lawyers to consult with their clients during the course of court proceedings as and when required and the incidents upon which the recommendation was based were exceptional. The Ministry did however agree to address the issue in pre-service and in-service training of judges and public prosecutors so as to ensure that lawyer-client communication during court proceedings is permitted in practice.

The second Advisory Visit presented an opportunity to investigate this matter further. The President of the Diyarbakir Bar Association explained that lawyers have to request the permission of the judge if they wish to speak with their client in the courtroom. He explained that judges and public prosecutors do not look favourably upon such requests and instead perceive them as an obstruction to the court proceedings. The Diyarbakir branch of the Contemporary Lawyers Association remarked that it is very difficult for a lawyer to speak to his client during the course of court proceedings. If the lawyer really insists then he might be able to speak to his client in a narrow hallway next to a gendarme officer but this only occurs in exceptional cases. The Chief Public Prosecutor of Istanbul agreed that lawyers are not permitted to engage in conversation with their client during the course of court proceedings, except for during a break in the session, and maintained that this was justified as the lawyers are able to access their clients at police stations and in prison. Questioned as to the possibility of communication between a lawyer and his client in the courtroom, a judge of the Heavy Penal Court in Diyarbakir informed the delegation that if a defendant is brought to trial by a gendarme officer and the lawyer complains that he has not been able to talk to his client prior to the hearing then the court makes it possible for the lawyer to meet the defendant in the presence of the gendarme in a room next to the court. The judge explained that he was not able to order the gendarme to leave the defendant's side. The judge did not expressly state that lawyer-client communication within the courtroom was possible.

On the basis of the foregoing we conclude that although the law may provide for lawyers to consult with their clients during the course of court proceedings in Turkey, the incidents upon which the October 2003 recommendation were based were in fact far from exceptional. We consider that the reality of court proceedings in Turkey is that many judges and public prosecutors do not look favourably upon requests from lawyers to speak to their clients during the course of court proceedings and instead regard such requests as an obstruction to the court proceedings. This attitude only serves to undermine the right to defence. It hinders lawyers from explaining the nature and content of proceedings to clients who may otherwise not understand the processes of the court. It impedes defendants from giving instructions to their lawyers as to how they wish their case to be presented to the court. It obstructs lawyers from seeking relevant information from their clients on novel points that arise during the course of court proceedings.

We consider that there is a continuing need to ensure that lawyer-client communication during the course of court proceedings is permitted in practice. We welcome and encourage the initiative of the Ministry of Justice to address this issue in pre-service and in-service training of judges and public prosecutors. We would further urge the Ministry of Justice to consider whether an administrative circular might be promulgated on this issue and/or the Criminal Procedure Code strengthened with a view to ensuring effective implementation of the existing law in practice. The recommendation is maintained and repeated.

iv. Ability of lawyers to access convicted persons in prison

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

In the report of our first Advisory Visit we expressed concern that the right of convicted persons to submit an application to the European Court of Human Rights may have been being unduly threatened by difficulties experienced by lawyers in visiting their convicted clients in prison. In short, we understood the practice to be that where a convicted person had exhausted his domestic appeal rights and was serving a sentence of greater than 1 year in prison, he could not receive visits from the lawyer who conducted his criminal proceedings, which were deemed to be finalised, or indeed any other lawyer. Instead, if the convicted person required the services of a lawyer, a public prosecutor would have to appoint a legal guardian and the legal guardian would then be responsible for the administration of the legal affairs of the convicted person whilst he was in prison. Although we were informed that it was possible for the convicted person to transfer power of attorney from his legal guardian to his trial lawyer, we received complaints that any delay in the appointment of a legal guardian might result in the 6 month time limit for submission of an application to the European Court of Human Rights elapsing and hence any such application becoming procedurally barred.

In response to our concerns the Ministry of Justice has explained that Article 144 of the Criminal Procedure Code and Article 155 of the Regulations on the Administration of the Penal Institutions, Detention Houses and Execution of Punishment do provide that convicts serving sentences of greater than one year imprisonment who wish to instruct a lawyer must be represented by a legal guardian. However, an exception is expressly provided for convicts who wish to pursue an appeal to the European Court of Human Rights. The law expressly provides that convicts who wish to pursue an appeal to the European Court of Human Rights retain the right to instruct counsel of their own choosing without the intervention of a legal guardian. Further, a circular from mid-2003 requiring lawyers to provide reasons for wanting to visit their clients in prison was intended to ensure that lawyers conducting ECHR appeals were granted access to their convicted clients while others were not. The Ministry has undertaken to issue a circular to remind prison governors of these points.

In light of the helpful clarification provided by the Ministry of Justice, we consider that the recommendation made in the October 2003 report was based on misinformation.

The recommendation is withdrawn.

2. Equality of arms

i. Entry into the courtroom and exit from the courtroom

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

It remains the case that at the start of every court hearing, prosecutors and judges continue to simultaneously enter the courtroom through the same door whilst defence lawyers are required to enter the courtroom from a side door along with the public. Whenever the judges rise, the prosecutor also retires with the judges through the same door, leaving the defence lawyers to exit along with members of the public.

The Ministry of Justice considers that the fact that the judges and public prosecutor enter and leave the courtroom through the same door does not hamper judicial activities. The Ministry of Justice does however recognise that public prosecutors must not consult with judges when they retire and to address this specific issue the Ministry of Justice has agreed to put in place training that will emphasise that public prosecutors must not retire with judges when judges retire to consider their verdicts.

We welcome the Ministry of Justice's training initiative. However we further consider that although the entry and exit of public prosecutors and judges into and out of the courtroom together may or may not hamper judicial activities in practice, the procedure certainly undermines the appearance of there being proceedings where two equal parties are acting before an independent and impartial tribunal. Justice must not only be done, it must also be seen to be done. Yet, the appearance created by this procedure is that the position of the prosecutor is elevated vis-à-vis the defence lawyer, thereby undermining the principle of equality of arms.

During the course of the second Advisory Visit we noted that several members of the judiciary supported our recommendation that public prosecutors should be required to enter and leave the courtroom through a door other than that used by themselves. We would also observe that the recommendation would be relatively straightforward to implement.

Under the circumstances mentioned, the recommendation is maintained and repeated.

ii. Layout of the courtroom

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

During court hearings in Turkey, the prosecutor continues to sit on an elevated platform, on the same level as the judges and directly adjacent to them. In some courtrooms, notably the Ankara Heavy Penal Court, this platform continues to raise the prosecutor and the judges some 2-3 metres off the ground. Meanwhile, the defence lawyers continue to sit at a table at ground floor level, the same level as the public and the defendants.

Since the first Advisory Visit, the Ministry of Justice has agreed in principle that the position of the prosecutor should be moved so as to equate his location with that of the defence lawyer. The Ministry of Justice maintains however that implementation of the recommendation will take time and financial resources. The Ministry of Justice also expresses concern that any change will not be welcomed by public prosecutors. Nevertheless, the Ministry of Justice has agreed that the new Intermediate Courts of Appeal will be designed in such a way that the public prosecutor will be required to sit at a table at ground floor level, either next to or opposite the defence lawyer, and has agreed that the recommendation will be taken into consideration during the building of any new courthouses in 2005 and beyond. The Ministry of Justice has also agreed to introduce the concept of the public prosecutor being physically removed from the judge in the courtroom into training.

We warmly welcome the Ministry of Justice's acceptance of the recommendation in principle, the initiative regarding the location of the public prosecutor in both the new Intermediate Courts of Appeal and other newly built courthouses and the commitment to undertake training with a view to addressing potential opposition to the reform from public prosecutors. During the course of the second Advisory Visit we observed considerable support for the proposed reform amongst judges throughout Turkey.

Whilst noting the comments of the Ministry of Justice regarding the need for both time and financial resources in order to effectively implement the recommendation we would encourage measures to be taken to require public prosecutors to sit adjacent to or opposite the defence lawyer as a matter of priority. The layout of courtrooms and the proximity of the judges and the prosecutor, who are all physically removed from the defence lawyer, is problematic. The fact that the prosecutor sits so close to the judges and on the same level as them does continue to create the impression that the prosecutor is given more importance and is held in higher esteem than the defence lawyer.

To conclude, the layout of the courtroom does continue to directly undermine the appearance of an equality of arms. In these circumstances the position of the Ministry of Justice is welcome but the recommendation is maintained and repeated.

iii. Availability of information technology within the courtroom

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

In July 2004 it remains the case that in some courtrooms in Turkey, the prosecutor, like the judges, is provided with a computer and a terminal that enables him to see the record of the proceedings as it is being entered by the court stenographer. Where such facilities exist, however, defence lawyers are still not provided with any similar technology. Instead, they are required to listen and take notes if they wish to have a record of proceedings during the course of the hearing.

The Ministry of Justice informed the delegation that the National Judicial Network Project will enable both parties to monitor the trial proceedings. Test operations of the Network commenced in 34 pilot areas in June 2004. It is intended that the National Judicial Network Project will be extended to the whole country from 2005.

We can see no justification for the prosecutor being able to have a record of the court proceedings appear on a screen in front of him in circumstances where the defence lawyer cannot have access to the same facility. Such a state of affairs is contrary to the notion of there being a fair balance between the prosecution and defence. We are pleased to note that the Ministry of Justice intends to remedy this state of affairs in the foreseeable future. Whilst the National Judicial Network remains under construction however, the recommendation is maintained and repeated.

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

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

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

The Ministry of Justice informed the delegation that Articles 381 and 382 of the Criminal Procedure Code provide that only judges may consult before delivery of a ruling. Accordingly, it is not possible for public prosecutors to participate in judicial consultations. The Ministry of Justice has agreed however that both judges and public prosecutors should receive further training that emphasises that public prosecutors should not accompany judges when they retire to consider their verdict. In order to implement this measure, the Ministry of Justice has transmitted a formal proposal to the Justice Academy.

The President of the Diyarbakir branch of the Human Rights Association, himself a lawyer, commented that public prosecutors continue to deliberate with judges at the end of trials. A judge of the Ankara specialised Heavy Penal Court confirmed that when he retires to his ante-chamber the public prosecutor does retire with him but he maintained that the public prosecutor has to leave the ante-chamber. The judge recognised that this practice will be reformed. A judge of the Istanbul specialised Heavy Penal Court accepted that consultation between judges and public prosecutors does not instil public confidence regarding the impartiality of the judiciary.

We consider that the practice of the prosecutor and the judges retiring to the same antechamber whenever there is a need to consider a defence application is particularly concerning. Such a practice affords the prosecutor access to, and the opportunity to communicate with, the panel of judges outside the courtroom to the absolute exclusion of the defence lawyers. Even if this might not be the case, the mere suspicion thereof infringes the apprehension of the court being impartial and independent. We consider this practice to be contrary to the principle of equality of arms between the prosecution and the defence in so far as it places the latter at a substantial disadvantage. We welcome the initiative of the Ministry of Justice to recommend that the Justice Academy institute training that emphasises that public prosecutors should not accompany judges when they retire to consider their verdict. We urge the Justice Academy to implement such training at the earliest available opportunity. Whilst implementation of the recommendation remains outstanding, the recommendation is maintained and repeated.

v. Procedure for the calling of witnesses

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

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

The Ministry of Justice responded by explaining that there is no inequality in law between the rights given to the defence and the prosecution to have witnesses summoned to court. Article 212 of the Criminal Procedure Code provides an accused with the right and obligation to notify the witnesses that he wishes to call in support of the defence case 5 days before the scheduled hearing. However, Article 213 of the Criminal Procedure

Code further provides that an accused retains the right to summon all witnesses directly and without petition if the court refuses his petition. As a consequence of these two provisions, an accused may call any witness that he wishes to give evidence.

In light of the helpful clarification provided by the Ministry of Justice, we consider that the recommendation made in the October 2003 report was based on misinformation. The recommendation is therefore withdrawn.

vi. Examination of witnesses

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

Following the first Advisory Visit we noted that normal procedures in criminal trials in Turkey preclude the defence from examining witnesses directly. Instead, defence lawyers suggest questions to the Presiding Judge who then decides both whether to ask the questions suggested and if so, how the questions should be phrased. In this manner, the defence are restricted as to both the form and content of the questions that they may ask witnesses. However, when the public prosecutor examines a witness, although he too has to direct his questions through the Presiding Judge, the Presiding Judge asks every question that the public prosecutor seeks an answer to. There is no restriction as to the form or content of the questions that the prosecutor may ask of witnesses.

This procedure for the examination of witnesses continues to be applied in Turkey today. However, the Ministry of Justice informed the delegation that the Draft Criminal Procedure Code will introduce "cross-examination" into the Turkish legal system. This will enable both prosecution and defence counsel to ask questions to witnesses directly. We are given to understand that the Draft Criminal Procedure Code is currently on the agenda of the Justice Sub-Commission of the TGNA. It is scheduled to be adopted in 2004.

We welcome the introduction of "cross-examination" as a practical measure to ensure that the defence is placed in a procedurally equal position vis-à-vis the prosecution when examining witnesses. We urge the TGNA to adopt the Draft Criminal Procedure Code at the earliest opportunity.

vii. Recording of witness evidence and submissions of counsel

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

Turkish courts still have no mechanism for recording verbatim the evidence of witnesses or the submissions of counsel. The only facility available is a court stenographer who, using a computer, generates an account of what is said in the courtroom. Different procedures also continue to be adopted for recording the evidence, argument and submissions of the defence and prosecution respectively. Defence lawyers are barred from dictating their submissions directly into the court record. Instead, they must rely upon the judge to summarise the testimony of witnesses, the statements of their clients and their own arguments and submissions. The court stenographer only records the summary that the judge dictates to her. In contrast, the court stenographer enters evidence and submissions on behalf of the prosecution directly into the court record, verbatim, without waiting for a summary from the judge.

The Ministry of Justice has agreed to take the recommendation regarding the sound recording of court proceedings into account during work on the amendment of the Criminal Procedure Code. We are given to understand that the required technical infrastructure will be established within the framework of the EU supported project entitled "Access to Justice". The Ministry of Justice estimates that the necessary measures will be introduced in 2006.

We welcome the initiative of the Ministry of Justice in line with the recommendation. Pending the introduction of sound recording of court proceedings in practice, the recommendation is maintained and repeated.

3. Criminal proceedings against lawyers

We recommended that:

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

(ii) Wherever possible, state authorities resort to civil or administrative proceedings in respect of alleged professional misconduct rather than criminal proceedings;

(iii) Where resort to civil or administrative proceedings in respect of alleged professional misconduct would not provide an adequate remedy, the criminal prosecution of lawyers in respect of their professional activities should only occur where (a) there is evidence that is both clear and credible; and (b) where the alleged wrongdoing involves some serious impediment to the administration of justice.

In the report of our first Advisory Visit we noted that not only was the right to defence undermined by a most apparent inequality of arms in criminal proceedings in Turkey, but it was further jeopardised by the fact that lawyers who repeatedly conducted defences in cases of a political nature or who commented on the human rights practices of Turkey, found themselves subject to criminal prosecution. A summary of the criminal proceedings against lawyers that were brought to our attention was included in Annex B to the report.

The Ministry of Justice responded by noting that the cases cited in Annex B were initiated mostly by police and/or gendarme officers and they reflected, not an absence of sufficient legal regulation, but the fact that police, gendarmes and public prosecutors were failing to properly evaluate the UN Basic Principles on the Role of Lawyers and the European Convention on Human Rights. The Ministry of Justice stressed that since the last Advisory Visit it has organised human rights training for judges and public prosecutors and the Ministry of Interior has organised human rights training for police and gendarmes. We are given to understand that a continuous programme of human rights training will now be conducted and it is expected that this will bring an end to intimidatory prosecutions of lawyers.

Our second Advisory Visit to Turkey revealed that there continue to be instances of lawyers who represent clients charged with or convicted of political offences, or who comment on their country's human rights practices, being both threatened with and exposed to prolonged and repeated criminal prosecutions for activities carried out in the exercise of their professional duties. A summary of the criminal proceedings against lawyers that were brought to our attention is included in Annex B.

We remain extremely concerned at the fact that, as the cases cited in Annex B demonstrate, lawyers in Turkey continue to be prosecuted for offences arising out of the exercise of their legitimate professional duties and the exercise of their legitimate right to freedom of expression. We again urge the relevant state authorities to take necessary measures to ensure that police officers, gendarme officers and public prosecutors refrain from identifying lawyers with their clients' causes and allow lawyers to perform their professional functions without intimidation, hindrance, harassment or prosecution in line with international standards. The recommendation is maintained and repeated.

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

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

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

In our previous report we noted that in disciplinary actions against lawyers there is a requirement that all decisions of the Union of Turkish Bar Associations be forwarded to the Ministry of Justice. If the Ministry of Justice agrees with the decision of the Union of Turkish Bar Associations then its decision stands. If the Ministry of Justice disagrees with the decision of the Union of Turkish Bar Associations then it sends the case back to the Union for reconsideration. If, upon reconsideration, two-thirds of the Board of Directors of the Union of Turkish Bar Associations vote to maintain their original decision then their decision stands. If less than two-thirds of the Board vote to maintain the decision then the decision of the Ministry of Justice would stand.

We could see no justification for the decisions of the Union of Turkish Bar Associations on disciplinary action to be sent to the Ministry of Justice for review. We concluded that in so far as the Ministry of Justice still had a role in the regulation of decisions taken by the Bar Associations relating to the procedures for performing their profession, this procedure represented an obstacle to the independence of lawyers in Turkey.

In its response to the report of the first Advisory Visit the Ministry of Justice declined to accept the recommendation and instead defended the maintenance of its role in the functioning of the Bar Associations. The Ministry of Justice noted that in accordance with Article 142 of the Law on Lawyers (Law No. 1136) as amended by Law No 4664 (2/5/01), only decisions made by the Union of Turkish Bar Associations in which it refuses an appeal against the decision of a Bar Association finding no ground for an investigation are passed to the Ministry of Justice. If the Ministry of Justice finds the decision of the Union improper then it sends it back for reconsideration with reasons. If two-thirds of the members of the Union accept the decision then it is approved. Union decisions can be appealed to the Administrative Courts. The Ministry of Justice also asserted that it does not send back decisions on matters related to the substance of a case, it concerns itself only with procedural deficiencies. The Ministry of Justice stated that according to official statistics in 2003 only 10% of decisions sent to the Ministry of Justice by the Union were sent back for reconsideration and 90% were approved.

During the course of the second Advisory Visit the General Director of the Directorate General for Civil Law Affairs of the Ministry of Justice commented that he considered that the involvement of the Ministry of Justice in the functioning of the Bar Association benefited lawyers. He remarked that if exclusive control over the functioning of lawyers is granted to the Bar Associations then lawyers would be able to

make mistakes and thus make unjust gains. He characterised the involvement of the Ministry of Justice as a safeguard for lawyers and remarked that it prevented decisions from being taken from an ideological point of view. The General Director of the Directorate General for EU Affairs of the Ministry of Justice also described the authority of the Ministry of Justice as a protective procedure for lawyers.

The General Director of the Directorate General for Civil Law Affairs informed us that in 2003, 394 decisions from the Union of Turkish Bars were forwarded to the Ministry of Justice. Of these, 37 were sent back to the Union of Turkish Bars for reconsideration. Of these 37, the Union of Turkish Bars agreed with the decision of the Ministry of Justice in 13 cases and resisted the decision of the Ministry of Justice in 24 cases. Regarding proceedings against lawyers, in 2003 a total of 115 decisions of the disciplinary board of the Union of Turkish Bars were forwarded to the Ministry of Justice. Of these, 102 were approved and 13 were sent back to the Union of Turkish Bars for reconsideration. Of these 13, the Union of Turkish Bars agreed with the decision of the Ministry of Justice in 6 cases and resisted the decision of the Ministry of Justice in 7 cases.

The General Director of the Directorate General for Civil Law Affairs further informed us that in 2004 to date, 209 decisions from the Union of Turkish Bars were forwarded to the Ministry of Justice. Of these, 111 had been approved by the Ministry of Justice, 57 were still being considered and 51 had been sent back to the Union of Turkish Bars for reconsideration. Of these 51, the Union of Turkish Bars agreed with the decision of the Ministry of Justice in 10 cases and resisted the decision of the Ministry of Justice in 41 cases. Regarding disciplinary proceedings against lawyers, in 2004 to date a total of 92 decisions of the disciplinary board of the Union of Turkish Bars were forwarded to the Ministry of Justice. Of these, 54 were approved and 22 were sent back to the Union of Turkish Bars for reconsideration. Of these 22, the Union of Turkish Bars rejected the decision of the Ministry of Justice in 4 cases. The remaining 18 are still in progress or accepted.

The General Director of the Directorate General for Civil Law Affairs informed the delegation that the majority of cases returned to the Union are based on the substance of the Union decision and only sometimes are they based on procedural errors.

The Diyarbakir Bar Association considered that it was contrary to notion of the independence of lawyers that the Bar Associations should be under the supervision of the Ministry of Justice and characterised the present system as a form of executive guardianship. The Bar Association recognised that it was evident that the Bar might err but pointed out that all of its decision were subject to the control of the judicial process via the Administrative Courts. The Bar supported the recommendation and considered that a Bar controlled by the judiciary would strengthen the defence vis-à-vis the public prosecutor. The Union of Turkish Bar Associations informed the delegation that it supported the recommendation that the appeal to the Union of Turkish Bar Associations should be the final appeal to a non-judicial instance in the case of disciplinary actions against lawyers and that the decision of the Union should not be forwarded to the

Ministry of Justice. The Union noted that the Administrative Courts would continue to provide a judicial appeal instance as a protective procedure.

For our part we remind the Ministry of Justice that an independent legal profession has a crucial role to play in upholding the rule of law and the administration of justice. An independent legal profession ensures that lawyers can take an objective view on issues concerning such matters and that the view of lawyers will be given credence and respect by society. Further, we remind the Ministry of Justice that an independent legal profession is a legal profession that owes a duty to the courts and to its clients, not to an arm of the executive. To this end, in order to ensure an independent legal profession in Turkey the work of lawyers must be overseen by an independent body, subject to an appeal to a judicial instance, and not by a body over which the Ministry of Justice has an influence, however limited that influence might be.

We are fortified in our conclusion that the role of the Ministry of Justice in relation to the functioning of the Bar Associations should be removed after receiving strong support for such a reform from Bar Associations in Turkey. The recommendation is maintained and repeated.

We consider it further appropriate to note at this juncture that the Union of Turkish Bar Associations informed the delegation that from 2005 the Higher Education Board will introduce a compulsory central government examination for all aspiring lawyers. This examination will be organised in addition to the examinations already conducted by the Bar Associations. The Union of Turkish Bar Associations opposes this measure as a fresh instance of executive guardianship over the functioning of the legal profession. For our part we have insufficient information to reach any firm conclusion regarding the proposed examination. Everything will depend on how the examination is implemented.

We consider that this is a matter that ought to be investigated further.

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

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

In the report of the first Advisory Visit we observed that Articles 58 and 59 of the Law on Lawyers impose a requirement that, whenever criminal proceedings are commenced against a Turkish lawyer for offences alleged to have been committed during the course of their professional duties, a public prosecutor must obtain the permission of the Ministry of Justice before commencing an investigation and secure the authorisation of the Under-Secretary of the Ministry before preparing an indictment. We concluded

that the influence of the Ministry of Justice in the process of instituting criminal proceedings against lawyers constituted a threat to the right of lawyers to be tried by an independent and impartial tribunal. This was so because, recalling the role of the High Council of Judges and Public Prosecutors in the process of appointing, promoting, transferring and disciplining judges, together with the influence of the Minister of Justice and his Under-Secretary within the High Council, it could be concluded that judges seized of a trial against a lawyer would be left in the invidious position of knowing that individuals capable of exercising a profound influence over their entire judicial career had already found there to be a prima facie case to answer. In such circumstances, there would be the potential for judicial independence to be compromised.

The Ministry of Justice responded to the recommendation by asserting that the special investigation procedure applied in respect of alleged professional crimes of lawyers is to the benefit of lawyers in so far as it acts as a guarantee against the threat of an improper prosecution. Accordingly, there are no proposals to amend Articles 58 and 59 of the Law on Lawyers.

For our part we remain of the opinion that rather than acting as a protective mechanism, the role of the Ministry of Justice in authorising criminal prosecutions against lawyers may in fact serve to unfairly lend extra weight to the indictment in the eyes of the judiciary. Further, during the course of the second Advisory Visit we received complaints from lawyers to the effect that the Ministry of Justice does not in fact act to prevent unmeritorious prosecutions but instead authorises criminal proceedings against lawyers almost as a matter of course. Some support for this viewpoint is found in the list of criminal proceedings against lawyers contained in Annex B to both the first Advisory Visit report and the present report. That so many of the criminal proceedings against lawyers ultimately result in an acquittal suggests that the Ministry of Justice is failing to discharge its self-proclaimed duty to protect practising lawyers against unmeritorious prosecutions.

During the course of the second Advisory Visit we found strong support from the Diyarbakir Bar Association and the Union of Turkish Bar Associations for amending Articles 58 and 59 of the Law on Lawyers so as to remove the influence of the Ministry of Justice in the process of instituting criminal proceedings against lawyers for offences alleged to have been committed during the course of their professional duties.

In these circumstances the recommendation is maintained and repeated.

C. Conclusion

1. Access to Lawyers

As was noted at the outset of this chapter, during the course of the first Advisory Visit we noted the existence of numerous restrictions upon the ability of lawyers to perform their function within the Turkish legal system. We felt is necessary to urge the government to take urgent measures to ensure that accused persons are afforded their

right of access to a lawyer immediately upon being detained, that accused persons are able to effectively consult and communicate with a lawyer in confidence, that the organisation of the courtrooms and procedures adopted within them guarantee an equality of arms between the prosecution and defence, that lawyers are not harassed or intimidated in the exercise of their professional duties and that the influence of the Ministry of Justice in the functioning of lawyers is removed. On the occasion of the second Advisory Visit we have noted some positive developments in relation to the ability of lawyers to perform their function within the Turkish legal system, although several problems remain.

Notwithstanding the existence of legal guarantees providing for detained persons throughout Turkey to be both immediately informed of their right to access a lawyer and to in fact access a lawyer upon deprivation of liberty, the second Advisory Visit revealed that implementation remains limited throughout south-east Turkey. Whilst over the course of the last 8 months there has been a slight increase in demand for legal representation from persons detained in this region, this appears to be the result of measures taken by the Bar Associations rather than any official initiative. Moreover, despite the slight increase in demand, persistently high levels of official obstruction continue to present obstacles in the path of detainees throughout the south-east accessing legal advice and representation upon arrest or detention. The result is that the overall proportion of detainees receiving timely legal advice and representation at police and gendarme stations in south-east Turkey remains unacceptably low.

In a positive development, since the first Advisory Visit the Diyarbakir Bar Association has been permitted to display posters within the Diyarbakir courthouse informing defendants of their right to access a lawyer from the Bar Association at no cost to themselves. Nevertheless, at the commencement of the second Advisory Visit, Bar Associations had still not been granted permission to place posters advocating the rights of detainees within police and gendarme stations. Further, police stations and gendarme stations had not yet been directed to submit lists of persons detained during the previous week to the Bar Associations.

We consider that there is reason to be optimistic regarding the future nevertheless. During the course of the second Advisory Visit we were informed that the Ministry of Interior had issued 200,000 police officers with pocket-sized cards that list the rights to be read to detainees and that this card has been enlarged and displayed in police stations. The Ministry of Interior formally agreed to permit the Bar Associations to display posters advocating the rights of detainees in both police and gendarme stations and the Ministry of Interior also agreed with the concept of forwarding lists of detained persons to the Bar Associations on a weekly basis. Effective implementation of both of these reforms will now depend upon the initiative of the Ministry of Justice. Further monitoring will therefore be required.

Regarding the treatment of lawyers upon entry to detention centres, we are pleased to report that complaints of intimidatory searches have now ceased completely. This is a significant positive development. The Ministry of Justice is to be commended

for both the speed with which it acted upon the concerns expressed following the first Advisory Visit and the evident effectiveness of the measures introduced.

In a further welcome development, the second Advisory Visit received no complaints from the lawyers that it spoke to regarding the availability of facilities within detention centres for lawyers to consult and communicate with their clients in full confidentiality. Nevertheless, the Ministry of Interior's acceptance of the recommendation that, where such facilities do not already exist, visiting rooms in all detention centres in Turkey should be equipped with consultation rooms that enable lawyers to communicate with their clients in full confidence, suggests that there are police and gendarme stations in Turkey where adequate facilities do not presently exist. We welcome the undertaking given by the Ministry of Interior to the effect that all new police stations will be built with facilities for lawyers and detainees to consult in confidence and that where such facilities are not found in existing police stations, lawyers and detainees will continue to be afforded the use of a vacant room. We urge the Ministry of Interior to actively ensure that all detention centres have facilities for lawyers to consult and communicate with their clients in full confidentiality. There would also appear to be a continuing need for the Ministry of Justice and/or Ministry of Interior to amend detention centre and prison visiting hours so as to ensure that lawyers are afforded adequate time to consult effectively with their detained clients. A further assessment of the time limitations imposed on prison visits should be undertaken in due course.

Whilst the law provides for legal documents to be freely exchanged between lawyers and their detained clients without inspection, the practice in certain detention centres is currently not in accordance with the law. Restrictions are imposed upon the ability of lawyers and detainees to freely exchange legal documents related to pending criminal proceedings. This constitutes an unjustified interference with the right to defence. We welcome the initiative of the Ministry of Justice to issue a circular to remind prison governors of the correct legal procedure in this regard. Further monitoring will be required in order to assess implementation in due course.

Regarding the possibility for detainees to use pens and paper in the interview rooms of detention centres we are pleased to report that the complaints received during the first Advisory Visit were not repeated by the lawyers interviewed during the course of the second Advisory Visit. Nevertheless, the legislative amendments proposed by the Ministry of Justice indicate a deficiency in the existing provisions of both the Criminal Procedure Code and the By-Law on Apprehension, Detention and Statement Taking. On that basis alone we cannot exclude the possibility that certain persons held in detention centres in Turkey may continue to be denied access to writing materials prior to and during consultations with their legal representatives. That said, the initiative of the Ministry of Justice in proposing legislative amendments in line with the recommendation of the first Advisory Visit is to be warmly welcomed as a positive development. Further monitoring will be required in order to assess implementation in due course.

Lawyers continue to be denied the possibility of consulting with their clients in the cells of courthouses either prior to a court hearing, during any adjournment of a

hearing or after a hearing. We consider that this situation continues to represent an unjustified restriction upon the right to defence. In a positive development however, the Ministry of Justice has, in the first instance, undertaken to incorporate consultation rooms within the secure facilities of the new Intermediate Courts of Appeal. Once these have been constructed, consultation rooms will be constructed within the secure facilities of all courthouses throughout Turkey. Construction is scheduled to take place over the period 2004-2006. The decision of the Ministry of Justice, which in time will serve to significantly enhance the right to defence, is to be warmly welcomed. Again, however, a further assessment will need to be undertaken regarding implementation of the undertaking.

Although the law provides for lawyers to consult with their clients during the course of court proceedings, we consider that the reality of court proceedings in Turkey is that many judges and public prosecutors continue to look unfavourably upon requests from lawyers to speak to their clients during the course of court proceedings and instead regard such requests as an obstruction to the court proceedings. We consider that there is a continuing need to ensure that lawyer-client communication during the course of court proceedings is permitted in practice. We welcome and encourage the initiative of the Ministry of Justice to address this issue in pre-service and in-service training of judges and public prosecutors. We would further urge the Ministry of Justice to consider whether an administrative circular might be promulgated on this issue and/or the Criminal Procedure Code strengthened with a view to ensuring effective implementation of the existing law in practice. Further monitoring should be undertaken in this regard.

Finally, we have concluded that the recommendation made in the October 2003 report regarding the ability of lawyers to access convicted persons in prison was based on misinformation. The recommendation is therefore withdrawn.

2. Equality of Arms

Public prosecutors and judges continue to simultaneously enter and leave the courtroom through the same door whilst defence lawyers are required to enter the courtroom from a side door along with the public. Despite support from within the judiciary for an initiative that would require public prosecutors to enter and leave the courtroom through a door other than that used by judges, the Ministry of Justice has declined to propose such a measure.

Public prosecutors continue to sit on an elevated platform, on the same level as judges and directly adjacent to them. Meanwhile, defence lawyers continue to sit at a table at ground floor level, the same level as the public and the defendants. In a positive development however, the Ministry of Justice has now expressed its agreement in principle to moving the location of the public prosecutor so as to equate his position with that of the defence lawyer. As an initial step, the Ministry has agreed that the new Intermediate Courts of Appeal will be designed in such a way that the public prosecutor will be required to sit at a table at ground floor level, either next to or opposite the defence lawyer. The Ministry has also agreed that the recommendation regarding the

location of the public prosecutor will be taken into consideration during the building of any new courthouses in 2005 and beyond. The Ministry of Justice has further agreed to introduce the concept of the public prosecutor being physically removed from the judge in the courtroom into training in order to overcome opposition from public prosecutors to their relocation. It is understood that if this training is effective then it might be possible to restructure the seating arrangements in all courts throughout Turkey. At present however, effective implementation of this reform will only be realised with both time and financial resources.

It remains the case that in some courtrooms in Turkey, the prosecutor, like the judges, is provided with a computer and a terminal that enables him to see the record of the proceedings as it is being entered by the court stenographer. Where such facilities exist, however, defence lawyers are still not provided with any similar technology. Instead, they are required to listen and take notes if they wish to have a record of proceedings during the course of the hearing. The Ministry of Justice intends to remedy this state of affairs from 2005 when the National Judicial Network becomes operational.

It continues to be regular practice that whenever judges retire during the course of proceedings, for example to consider the merits of a defence application, the prosecutor also retires with the judges to the same ante-chamber. The defence lawyers meanwhile remain in court. The Ministry of Justice has agreed that both judges and public prosecutors should receive further training that emphasises that, in accordance with the provisions of existing domestic law, public prosecutors should not accompany judges when they retire to consider their verdict.

The recommendation in the October 2003 report regarding the alleged discrepancy between the rights given to the defence and the prosecution to have witnesses summoned to court was based on misinformation. The recommendation is therefore withdrawn.

Normal procedures in criminal trials in Turkey continue to preclude the defence from examining witnesses directly. Instead, defence lawyers suggest questions to the Presiding Judge who then decides both whether to ask the questions suggested and if so, how the questions should be phrased. In this manner, the defence are restricted as to both the form and content of the questions that they may ask witnesses. However, when the public prosecutor examines a witness, although he too has to direct his questions through the Presiding Judge, the Presiding Judge asks every question that the public prosecutor seeks an answer to. There is no restriction as to the form or content of the questions that the prosecutor may ask of witnesses. The Ministry of Justice informed the delegation that the Draft Criminal Procedure Code, scheduled to be adopted in 2004, will introduce "cross-examination" into the Turkish legal system. This will enable both prosecution and defence counsel to ask questions to witnesses directly.

Turkish courts still have no mechanism for accurately recording the evidence of witnesses or the submissions of counsel and different procedures continue to be adopted for recording the evidence, argument and submissions of the defence and prosecution

respectively. The Ministry of Justice has agreed to take the recommendation regarding the sound recording of court proceedings into account during work on the amendment of the Civil Procedure Code. We are given to understand that the required technical infrastructure will be established within the framework of the EU supported project entitled "Access to Justice". The Ministry of Justice estimates that the necessary measures will be introduced in 2006.

3. Criminal proceedings against lawyers

There has been no significant amelioration in the practice of lawyers who represent clients charged with or convicted of political offences, or who comment on their country's human rights practices, being both threatened with and exposed to prolonged and repeated criminal prosecutions for activities carried out in the exercise of their professional duties. We agree with the Ministry of Justice that the continuing incidents of such proceedings reflect, not an absence of sufficient legal regulation, but the fact that police, gendarmes and public prosecutors fail to properly evaluate the role and functioning of lawyers as envisaged by, for example, the UN Basic Principles on the Role of Lawyers and the European Convention on Human Rights. Whilst it must be recognised that the Ministry of Justice has organised human rights training for all judges and public prosecutors and the Ministry of Interior has organised human rights training for police and gendarmes, we consider that there remains an urgent need for further and more specific training to ensure that police officers, gendarme officers and public prosecutors refrain from identifying lawyers with their client's causes and allow lawyers to perform their professional functions without intimidation, hindrance, harassment or prosecution in line with international standards. We urge both the Ministry of Justice and Ministry of Interior to adopt and demonstrate a commitment to zero tolerance of intimidatory prosecutions of lawyers.

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

The Ministry of Justice has declined to relinquish its role in the functioning of the Bar Associations, instead defending its guardianship over the legal profession as a protective procedure for lawyers. Its defence of the existing arrangement appears in reality to be based upon an inherent mistrust of the ability and willingness of lawyers to regulate themselves in accordance with the public interest. Yet, the possibility of recourse to judicial review by way of an application to the Administrative Courts already exists as a means by which a decision of the Bar Association may be challenged. In such circumstances, the oversight of the Ministry of Justice appears at best superfluous and at worsts a direct threat to the independence of the legal profession. We are fortified in our conclusion that the role of the Ministry of Justice in relation to the functioning of the Bar Associations should be removed with a view to establishing professional self-regulation as a step towards securing the independence of lawyers after receiving strong support for such a reform from representatives of the Bar Associations in Turkey.

The Ministry of Justice has also declined to amend Articles 58 and 59 of the Law on Lawyers so as to remove the influence of the Ministry in the process of instituting

criminal proceedings against lawyers for offences alleged to have been committed during the course of their professional duties. The Ministry of Justice asserts that the special investigation procedure applied in respect of alleged professional crimes of lawyers is to the benefit of lawyers in so far as it acts as a guarantee against the threat of an improper prosecution. For our part we remain of the opinion that rather than acting as a protective mechanism, the role of the Ministry of Justice in authorising criminal prosecutions against lawyers may in fact serve to unfairly lend extra weight to the indictment in the eyes of the judiciary. Further, that so many of the criminal proceedings against lawyers ultimately result in an acquittal suggests that the Ministry of Justice is failing to discharge its self-proclaimed duty to protect practising lawyers against unmeritorious prosecutions. We are fortified in our conclusion that Articles 58 and 59 of the Law on Lawyers should be amended so as to remove the influence of the Ministry in the process of instituting criminal proceedings against lawyers after receiving strong support for such a reform from representatives of the Bar Associations in Turkey.

5. The dialogue between the Ministry of Justice and the Bar Associations

Frequently during the course of our visit we received complaints from representatives of the Bar on issues related to their profession, especially in relation to the to the possibility for them to carry out their professional duties without hindrance. The Ministry of Justice, on the other hand, repeatedly stated that they had not received any official complaints or remarks from the Bar.

To us, this indicates that there is a serious lack of communication and open dialogue between the Bar and the Ministry. We therefore urge both the Ministry and the Bar to establish mechanisms by which to create a regular, open and direct dialogue between themselves.

VI – QUALITY AND EFFICIENCY IN THE JUSTICE SYSTEM

A. Introduction

In the report of our First Advisory Visit we concluded that the Turkish judicial system was faced with a large backlog of cases, the workload of judges and public prosecutors was excessive and the average duration of judicial proceedings remained unduly long. We were left in no doubt that there existed a compelling need to improve the efficiency and functioning of the judicial system in Turkey.

B. Quality and Efficiency within the Turkish judicial system

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

1. The number of judges and public prosecutors in Turkey

During the course of the first Advisory Visit we were informed that, according to official figures from the Ministry of Justice, in July 2003 there were 5,941 judges and 3,221[28] public prosecutors employed within Turkey. There were therefore a total of 9,162[29] judges and public prosecutors to meet the demands of a population of approximately 65 million people. In addition, there were 379 candidate judges and public prosecutors.[30]

On 12 July 2004 there were 4,562 judges and 3,028 public prosecutors working within civil and criminal courts in Turkey and a further 476 judges and 144 public prosecutors employed within the High Court of Appeals. 504 persons comprised the administrative judiciary (Regional Courts (84), Administrative Courts (251), Tax Courts (169)), 10 persons were employed in the Constitutional Court, 240 within the Ministry of Justice, 2 within the Justice Academy and 4 at the Prison Staff Training Centre. In total therefore, in July 2004 there were 8,970 judges and public prosecutors in Turkey compared with 9,162 twelve months earlier. According to the Ministry of Justice, the 192 openings that have occurred since 2003 have been occasioned by retirement (138), resignation (31), death (9), disability (1), transfer (4) and dismissal (9). The Ministry of Justice further informed the delegation that there are a total of 659 vacancies at the present time (Civil and Criminal Courts, including High Court of Appeals (459),

[28] By the middle of October 2003, this figure had decreased to 3,115 according to an Addendum to Information Note on the Turkish Justice System, Ministry of Justice, submitted shortly after completion of the Advisory Visit, p.6.
[29] By the end of September 2003 this figured had decreased to 9,080, mainly as a result of seasonal retirements.
[30] Information Note on the Turkish Justice System, Ministry of Justice, 4 July 2003, p.6.

Administrative Courts (96), Constitutional Court (5), Ministry of Justice (92), Justice Academy (1), Prison Staff Training Centre (6)). Further, there are currently 732 candidate judges and public prosecutors, with potential capacity for a further 554.

2. The caseload of judges

i. Criminal Courts:

During the course of the first Advisory Visit in October 2003 we were informed that during 2002, there were a total of 3,116,632 cases entered in the criminal courts of Turkey. Of these 1,864,308 were new cases and 1,252,322 were cases remaining from previous years. Of the 3,116,632 cases within the criminal courts, 1,924,873 reached a final resolution in 2002 (61.8%). Therefore, 1,191,759 cases continued into 2003.[31]

During the course of the second Advisory Visit in July 2004 we were not provided with statistical data for the caseload of judges in criminal courts in the year 2003. Judicial statistics are generally compiled annually in Turkey, with the statistics for any given year becoming available in July of the following year. In July 2004 the judicial statistics for 2003 had not yet been completed. Instead, we were again provided with data for the year 2002, although the data received during the second Advisory Visit was slightly more detailed than the first in so far as it indicated that of the 1,864,308 new cases entered in the criminal courts of Turkey, 1,804,657 were in fact new cases and 59,651 were cases referred back from the High Court of Appeals.

ii. Civil Courts:

During the course of the first Advisory Visit in October 2003 we were informed that during 2002 there were a total of 1,982,920 cases entered in the civil courts of Turkey. Of these, 1,306,614 were new cases, 632,182 were remaining from previous years and 44,124 were cases where the decision at first instance had been reversed on appeal and remitted for re-hearing. Of the 1,982,920 cases within the civil courts, 1,324,068 reached a final resolution in 2002 (66.8%). Therefore, 658,852 cases continued into 2003.[32]

Judicial statistics for the year 2003 had not yet been compiled at the date of the second Advisory Visit in July 2004. Accordingly we were not provided with any statistical data regarding the caseload of judges in civil courts in Turkey in the year 2003.

3. Average trial periods

i. Criminal Courts

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

During the course of the first Advisory Visit in October 2003 we were informed that, according to official figures from the Ministry of Justice, in 2002 the average trial period for all criminal courts in Turkey was 290 days.[33] This represented an increase on the previous year. In 2001 the average trial period for all criminal courts was 242 days and in 2000 the figure stood at 322 days. There was however a clear variation in average trial periods between courts, with the duration being significantly longer than the average in State Security Courts (364 days), Heavy Penal Courts (347 days), Criminal Courts of First Instance (427 days) and Juvenile Courts (557 days).[34]

Judicial statistics for the year 2003 had not yet been compiled at the date of the second Advisory Visit in July 2004. Accordingly we were not provided with any statistical data regarding the average trial periods in criminal courts in Turkey in the year 2003.

ii. Civil Courts

During the course of the first Advisory Visit in October 2003 we were informed that, according to official figures from the Ministry of Justice, in 2002 the average trial period from submission of a case to a court to final determination in the civil courts was 272 days. This figure represented a broadly similar average trial duration as in previous years. In 2001 the average trial period for all civil courts was 272 days and in 2000 the figure stood at 276 days. There was however a clear variation in average trial periods between courts, with the duration being significantly longer than average in Commercial Courts (434 days) and Land Registration Courts (486 days).[35]

Judicial statistics for the year 2003 had not yet been compiled at the date of the second Advisory Visit in July 2004. Accordingly we were not provided with any statistical data regarding the average trial periods in civil courts in Turkey in the year 2003.

4. The caseload of public prosecutors

During the course of the first Advisory Visit in October 2003 we were informed that there were 3,045 public prosecutors in Turkey. Each public prosecutor completed, on average, 669 preliminary investigations each year. In 2002, a total of 2,035,300 preliminary investigation files reached Public Prosecution Offices in Turkey. Of these, 100,236 were investigation files that were transferred from the previous year and 1,935,064 were new investigations. In the same year, 1,761,716 preliminary investigation files were finalised. This left 273,584 investigation files pending at the start

[33] This figure is an average based on, in part, the unusually low duration of trial periods experienced in Traffic Courts. If the statistics for the Traffic Courts were to be removed from the equation, then the average trial period for criminal courts would stand at 335 days.
[34] Addendum to Information Note on the Turkish Justice System, Ministry of Justice, submitted shortly after completion of the Advisory Visit, p.1
[35] *ibid.* p.2.

of 2003. The average period for the investigation of a file at the Public Prosecution Offices in 2002 was 36 days.

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

Judicial statistics for the year 2003 had not yet been compiled at the date of the second Advisory Visit in July 2004. Accordingly we were not provided with any statistical data regarding the caseload of public prosecutors in Turkey in the year 2003.

5. Assessment

In the absence of any judicial statistics for the year 2003 at the date of the second Advisory Visit, we have no basis upon which to depart from our earlier assessment that the judicial system in Turkey is faced with a large backlog, the workload of judges is excessive, public prosecutors are similarly overworked and the average duration of judicial proceedings remains long. In the report of the first Advisory Visit we recommended various reforms that we considered, if implemented, would serve to increase both the quality and efficiency of the justice system in line with international standards. On the basis that there remains a compelling need to improve the efficiency and functioning of the judicial system in Turkey, in the remainder of this chapter we assess the state of implementation of the various reforms that were recommended following the first Advisory Visit.

C. Implementation of measures to improve quality and efficiency within the Turkish judicial system

1. Working Conditions

i. Increase in the financial resources of the judicial system

We recommended that:

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

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

Following the first Advisory Visit we reported that, with the exception of the High Courts (Constitutional Court, High Court of Appeals, Council of State and Audit Court), the judicial organs in Turkey do not have their own budget. Instead, all of their expenditure on personnel, buildings and equipment is financed from the budget of, and therefore at the discretion of, the Ministry of Justice. Moreover, in the last five years judicial services have been allocated just 0.8% of the general budget.

In its response to the report of the first Advisory Visit, the Ministry of Justice stated that although all expenditure on personnel, buildings and equipment within the judicial system is financed from the budget of the Ministry of Justice, the Ministry of Justice submits its annual budget proposal to the Ministry of Finance after consulting with Chief Public Prosecutors and Presidents of Courts throughout Turkey in order to elicit their necessary financial requirements. In this manner, judges are consulted in the preparation of the budget. The Ministry of Justice also informed the delegation that it has made efforts to increase the proportion of the budget allocated to the administration of justice and such efforts are continuing.

Whilst we welcome the fact that members of the judiciary are consulted in the preparation of the budget proposal submitted to the Ministry of Finance, we also note that severe financial shortcomings persist in the judicial system. Judicial services continue to be allocated just 0.8% of the total budget and over 70% of this allocation continues to be spent on salaries and other personal expenditure, with precious little left for investment in buildings and equipment.

Despite the efforts of the Ministry of Justice to increase the proportion of the budget allocated to the administration of justice then, we must conclude that there has been no significant improvement in the financial resources of the judiciary. Unless and until the proportion of the budget allocated to the administration of justice is substantially increased, the problems of the judiciary such as inadequate premises, equipment and insufficient and poorly educated administrative staff are unlikely to be resolved.

The recommendation is maintained and repeated.

ii. Increase in the number of judges and public prosecutors

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

In the report of the first Advisory Visit we concluded that there were an insufficient number of judges and public prosecutors in Turkey. We observed that the number of judges and public prosecutors had actually decreased over the course of the last three years, whilst the workload of the court system had increased. We reported that in July 2003 there were 9,162 judges and public prosecutors in Turkey. On the occasion of the second Advisory Visit in July 2004 there were 8,970 judges and public prosecutors in Turkey, a reduction of 192.

Despite the overall decline in the number of judges and public prosecutors in Turkey over the last 12 months, the Ministry of Justice has not offered any undertaking to increase the quantity of the personnel within the justice system. In its response to the report of the first Advisory Visit, produced in May 2004, the Ministry of Justice has declared that in 2005 it will appoint 1000 judges and public prosecutors to work within the newly established Intermediate Courts of Appeal. However, beyond this, the Ministry considers that it is not necessary to increase the number of judges and public prosecutors in Turkey. Instead, the Ministry considers that three reforms will serve to reduce the workload of the courts and thus diminish the need to recruit more judges and public prosecutors. First, courts with inadequate workload will be closed and the judges and public prosecutors of these courts will be appointed to work within courts with a heavy workload. Second, the division of labour between Civil Courts of Peace and General Courts of First Instance will be lifted in order to reduce the number of artificial suits. Third, a system of Alternative Dispute Resolution in criminal and civil cases will be introduced.

In line with the Ministry's stated commitments, the General Director of the Directorate General for Personnel of the Ministry of Justice informed the delegation that in June 2004 136 criminal and civil courts were closed and as a consequence 511 judges and public prosecutors were transferred to courthouses in cities where the workload was unduly heavy. We also understand that the Ministry of Justice has established a specialised commission to commence work on the necessary measures to abolish the distinction between Civil Courts of Peace and General Courts of First Instance. It is envisaged that this reform will be introduced in 2006[36]. Furthermore, a Draft Law on General Administrative Procedure is under consideration at the Prime Ministry. If enacted, this law will introduce the possibility of Alternative Dispute Resolution. We welcome these pragmatic initiatives as a positive step towards increasing the quality and efficiency of the judicial system in Turkey.

Nevertheless, welcome as these reforms are, we question why the Ministry of Justice has not also committed itself to increasing the number of judges and public prosecutors in Turkey. The answer appears to be twofold. First, the existing capacity of the courts does not allow for a substantial increase in personnel. According to the Ministry of Justice, the existing capacity of the courts means that there are actually only 659 vacancies at the present time. Further, there are currently 732 candidate judges and public prosecutors undergoing pre-service training. Accordingly, the existing facilities of the justice system will soon be filled. Alongside this consideration is the continuing absence of sufficient financial resources for the appointment of further judicial personnel. The General Director of the Directorate General for Personnel of the Ministry of Justice informed the delegation that although the Ministry of Justice has asked for 1,800 new judges and public prosecutors, it will not able to recruit anymore judges and public prosecutors until it receives its new budget on 1 January 2005. We observe that it remains to be seen whether or not the budget award will be sufficient to enable the Ministry of Justice to appoint any further personnel, yet alone the 1,800 envisaged.

[36] See below, section 2 iii

Whilst such considerations explain the problems and difficulties faced by the Ministry of Justice in committing itself to substantially increasing the number of judges and public prosecutors, they do not excuse the fact that the justice system in Turkey remains inefficient. We consider that the limited existing capacity and the absence of sufficient financial resources lie at the heart of the inefficiency. The solution lies in the Turkish government substantially increasing the budget awarded to the Ministry of Justice so as to enable it to increase its capacity by building more courthouses and staffing those courthouses with newly appointed judicial personnel.

During the course of the second Advisory Visit we observed strong support for such a development. The President of the High Court of Appeals commented that the judiciary continues to operate under the burden of a heavy caseload and that Turkey needs to institute legal and structural reforms in order to remedy this situation. He contrasted the situation in Turkey where there are less than 10,000 judges and public prosecutors with the situation in Germany, a country of approximately the same size population, where there are 70,000 judges and public prosecutors and with France, where there are 30-40 000 judges and prosecutors. The President of the Istanbul Bar Association expressed the view that there is a need to increase the number of public prosecutors in order to achieve more effective investigations and generally speed up the delivery of justice. The Chief Public Prosecutor of Ankara commented that there remains an inadequate number of public prosecutors in Turkey before remarking that he would like to see the number of judges and public prosecutors increased. A judge of the Heavy Penal Court in Diyarbakir commented that judges are overburdened with work and more judges and public prosecutors are needed in order to lift the burden of the workload. He regarded this as a priority consideration if judges and public prosecutors are to fulfil their function in the justice system. The judge commented that in his court the workload increases by 10% every year and when he met with other judges from throughout Turkey in Antalya, he realised that his colleagues are experiencing the same difficulties. The Chairman of the Diyarbakir branch of the Contemporary Lawyers Association remarked that there are not enough judges and public prosecutors in Turkey and this serves to hamper the implementation of the legal reforms introduced during recent months.

On the question of the appointment of increased numbers of judges and public prosecutors we recognise that the hands of the Ministry of Justice are largely tied by the financial resources at its disposal and we welcome the positive steps that the Ministry both has taken, and is taking, in order to make the existing capacity of the courts more efficient by closing underused courthouses, reducing the number of jurisdictional disputes in the civil courts and facilitating out-of-court settlements. Nevertheless, we consider that this is unlikely to be sufficient on its own. There remains an urgent need for the Turkish government to substantially increase the budget awarded to the Ministry of Justice so as to enable the Ministry to increase the capacity of the judicial system by building more courthouses that can be administered by newly appointed judicial personnel. Furthermore, there is a need to find even more ways to make the system more efficient.

The recommendation is maintained and repeated.

iii. Increased use of available courtrooms

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

During the course of the first Advisory Visit we were informed that many courtrooms in Turkey were used for just 2 or 3 days each week. For the remainder of the week judges worked in their chambers reviewing case files and drafting judgments. We considered that if this practice was common to all courtrooms in Turkey then there was a large unused capacity to be exploited within the justice system.

In its response to the report of the first Advisory Visit the Ministry of Justice stated that most of the existing courtrooms are in fact used five days out of every week. In addition to daily pre-trial and trial hearings, the courtrooms are used for hearings in relation to 'letter rogatories' from other courts (requests from other courts for witnesses to be examined or suspects to be questioned). The General Director of the Directorate General for Personnel of the Ministry of Justice also informed the delegation that in June 2004 136 underused criminal and civil courts were closed and their functions were transferred to larger courthouses in urban areas. Accordingly the Ministry of Justice considered that the recommendation had been met in practice.

We appreciate the information provided by the Ministry of Justice and recognise that the recommendation may have been based upon instances of an exceptional nature. Alternatively, the closure of the 136 underused courts in June 2004 may now have resolved such instances. We nevertheless urge the Ministry of Justice to continue to regularly review the use of courtrooms throughout Turkey.

The recommendation is withdrawn.

iv. Increased training of judges and public prosecutors

We recommended that:

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

(ii) all judges and public prosecutors receive comprehensive training in international standards relating to the guarantee of an independent and impartial judiciary and the role and functioning of prosecutors and lawyers. Such training should be based upon, but not limited to, the guarantees set forth in the

UN Basic Principles on the Independence of the Judiciary, the UN Guidelines on the Role of Prosecutors and the UN Basic Principles on the Role of Lawyers.

Following the first Advisory Visit we reported that there were little or no opportunities for candidate judges or public prosecutors to learn foreign languages during pre-service or in-service training. Further, although the pre-service curriculum did include a 24-hour course on professional ethics, specific instruction on the guarantee of an independent and impartial judiciary and the principles underlying that guarantee was lacking. Candidates were neither provided with copies of, nor instructed about, for example, the UN Basic Principles on the Independence of the Judiciary[37] or Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges,[38] both of which provide core standards for the independence of the judiciary. Similarly, candidate judges and prosecutors were not informed about the UN Basic Principles on the Role of Lawyers[39] or the UN Guidelines on the Role of Prosecutors.[40]

Regarding the training of judges and public prosecutors in foreign languages, in its response to the report of the first Advisory Visit the Ministry of Justice declared that currently it pays for 60% of the total cost of training for any judge or public prosecutor who wishes to undertake a private foreign language course. The Ministry further said that once the infrastructure and technical equipment are in place, it is envisaged that the Justice Academy will offer foreign language training to all judges and public prosecutors. We understood from this that the intention was to establish a language laboratory within the Justice Academy. However, during the course of the second Advisory Visit the Deputy President of the Justice Academy informed the delegation that although it is intended that the Academy should be responsible for the provision of foreign language training, the Academy has no facilities for such training and so language training will continue to be given outside of the Academy. In a positive development however, on 24 June 2004, the Ministry of Justice agreed a co-operation project with Yeditepe University whereby 30 judges and public prosecutors will attend an 8-month full-time training programme in the English language. The Ministry of Justice will continue to pay the salaries of the judges and public-prosecutors, whilst the cost of the course (Approx. 4,100 Euros per student) is to be met by the university.

[37] UN Basic Principles on the Independence of the Judiciary, 29 November 1985, A/RES/40/32.
[38] Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies.
[39] UN Basic Principles on the Role of Lawyers, 7 September 1990, A/CONF.144/28/Rev.1.
[40] UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

We welcome the initiative in organising the training of a small body of judges and public prosecutors in an EU language. We urge the Ministry to equip the Justice Academy with the necessary infrastructure and technical equipment so as to enable it to provide continuous language training for judges and public prosecutors.

Regarding the training of judges and public prosecutors in international standards relating to the guarantee of an independent and impartial judiciary and the role and functioning of prosecutors and lawyers, in its response to the report of the first Advisory Visit the Ministry of Justice declared that candidate judges and public prosecutors do presently receive some training on independence and impartiality during their internship period. Efforts are being undertaken to develop the curriculum with a view to providing more comprehensive training. The Ministry of Justice has recently collected opinions from related institutions on these issues and has forwarded a proposal to the Justice Academy that such matters should be included in the curriculum for 2005. During the course of the second Advisory Visit the General Director of the Directorate General for Education and Training of the Ministry of Justice informed the delegation that it is proposed that further training on best-practice regarding judicial independence will be undertaken shortly.

During the course of our meeting at the Justice Academy we observed that the Academy has now collated various relevant international standards relating to the guarantee of an independent and impartial judiciary and the role and functioning of prosecutors and lawyers. We were informed that training in relation to these standards has now been integrated into the curriculum. It was not however possible to undertake any real assessment of the sufficiency of the training provided in relation to these standards. That said we were left with the impression that any training that is presently being provided is not particularly thorough. This would be consistent with the Ministry of Justice's comments that more comprehensive training will be introduced in 2005.

We welcome the fact that training of judges and public prosecutors on international standards relating to the guarantee of an independent and impartial judiciary and the role and functioning of prosecutors and lawyers is now on the agenda for the forthcoming academic year. The nature and adequacy of such training remains to be assessed. We urge the Justice Academy to ensure that comprehensive training is provided in relation to, at a minimum, the following international standards: the UN Basic Principles on the Independence of the Judiciary, the UN Guidelines on the Role of Prosecutors, the UN Basic Principles on the Role of Lawyers and the Bangalore Principles of Judicial Conduct.

Whilst we note that progress in line with the recommendation is underway, we consider that this is a matter that needs to be followed up. Accordingly the recommendation is maintained and repeated.

v. Increase in the remuneration of judges and public prosecutors

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

In the report of the first Advisory Visit we concluded that neither judges nor public prosecutors receive adequate financial remuneration. We observed that this situation is likely to both constitute a threat to the independence of the judiciary and also serves to persuade able young able law students to pursue a career at the bar rather than the bench.

In its response to the report of the first Advisory Visit the Ministry of Justice informed that in May 2004 the salaries of all judges and public prosecutors were raised by between 100 and 250 Euros. It is also understood that all civil servants benefited from a further 15% rise in salaries in July 2004. The Ministry further informed that a Draft Law Amending the Law on Judges and Public Prosecutors is currently before the General Assembly of the Turkish Prime Ministry. If adopted, this law will increase the salaries of both judges and public prosecutors. It is anticipated that the draft law will be enacted in 2004-2005, although the mission has not been provided with any details regarding the extent of the proposed salary increase.

Whilst we welcome both the recent salary increases and the draft law to further increase the salaries of both judges and public prosecutors, we have not been provided with sufficient information to enable us to assess the sufficiency of the proposed law. We can therefore only urge the Ministry of Justice to ensure that the additional remuneration afforded to judges and public prosecutors will represent sufficient compensation for their burden of responsibilities.

The President of the High Court of Appeals commented that salaries of judges should be increased, observing that the salary of a senior judge is currently one-third of the salary of a parliamentary deputy. The President of the Constitutional Court informed the delegation that judicial salaries are so low that currently 2,600 judges live below the poverty line in Turkey.

We remain of the view that adequate financial remuneration for judges and public prosecutors is essential. Not only would this serve to strengthen the independence of the judiciary, but it would serve to increase the quality and competence of both judges and public prosecutors.

Whilst we note that progress in line with the recommendation is underway, we consider that this is a matter that needs to be followed up. Accordingly, the recommendation is maintained and repeated.

In the report of the first Advisory Visit we observed that the fact that public prosecutors receive the same salaries as judges throughout their entire career contributes to the understanding in Turkey that rather than being separate from and subordinate to the office of judge, the office of public prosecutor is in fact attached to and equal to the office of judge. In order to ensure the objective impartiality of the judiciary we recommended that the salaries of judges should be increased proportionality more than the salaries of public prosecutors. On the occasion of the second Advisory Visit, the Ministry of Justice informed the delegation that it does not accept the proposal to pay judges and public prosecutors at different rates. It further commented that the proposed differential in salaries is deeply unpopular within Turkey. Judges and public prosecutors are regarded as part of the same profession and therefore it is considered that they should benefit from equal pay. As we have repeated elsewhere in this report, we remain of the view that this understanding that judges and public prosecutors are part of the same profession is something that needs to be changed. We also remain of the view that a difference in salary could have a positive effect upon the objective impartiality of the judiciary, even if the differential is not vast. That said, we have listened to the concerns of the professions and we recognise that in the context of the Turkish judicial system such a measure is not acceptable at the present time. Mindful also of the fact that, as discussed in chapter III, there are in any event more visible ways in which the Ministry of Justice might strengthen the objective impartiality of the judiciary, we do not regard it as necessary to uphold the recommendation.

The recommendation is withdrawn.

vi. Increase in the use of information and communication technology

We recommended that:

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

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

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

Following the first Advisory Visit we reported that Turkey has given prime importance to the modernisation of the judiciary through the improvement of information and communication technology. We noted that the National Judicial Network Project ("NJNP"), started in late 2001 with a budget of 170 million Euros,[41] aims to establish an information system between the courts and all other institutions of the Ministry of Justice, including prisons, with a view to accelerating court proceedings and ensuring uniformity and efficiency. More specifically, it is planned to equip all courts and institutions of the

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

Ministry of Justice with computers and internet connections that will provide them with access, via a Ministry database, to legislation, decisions of the High Court of Appeals, judicial records, judicial data of the General Directorate of Security and General Command of Gendarmerie of the Ministry of Interior, as well as ECHR jurisprudence. We reported that it is also intended that lawyers' offices and citizens should have access to information concerning their individual cases and ultimately it is intended that all bureaucratic procedures and formal writings will be made in an electronic environment, thereby avoiding delays and reducing mistakes, as well as ensuring some degree of transparency.[42] We concluded by welcoming this ambitious project but at the same time noting that there was still some work to be done before it would be fully realised

In its response to the report of the first Advisory Visit the Ministry of Justice informed that in the context of the National Judicial Network Project, judges and public prosecutors have now been supplied with 10,000 desk top computers, 8,000 personal notebook computers, 5000 laser printers, 1500 notebook printers, 250 colour printers, 400 scanners and 5000 uninterrupted power suppliers. It is anticipated that the training of all judges and public prosecutors in effective computer use will be completed by the end of 2004.

Regarding forthcoming initiatives, as part of the ongoing National Judicial Network Project, all courts and public prosecution offices will shortly be connected to a central network. This will enable both courts and public prosecutors to access all necessary required statistical information and personnel data. Once the Network is operational it will be possible to introduce electronic case management systems into the courts and it will also be possible to send case-files and other data between all courts of first instance and the supreme courts. Lawyers will also be able to both file a lawsuit and examine case files from their office. Therefore, upon completion of the National Judicial Network Project in 2005, all necessary technological facilities will have been supplied to the judiciary. To date, the central system room meeting the needs of 30,000 users has been completed and 31 pilot regional area WAN networks have been established.

We warmly welcome the fact that Turkey has given prime importance to the modernisation of the judiciary through the improvement of information and communication technology. It does appear that the National Judicial Network Project will, upon completion, significantly enhance the ability of judges, public prosecutors and lawyers to act efficiently and without undue delay.

The National Judicial Network Project is progressing according to schedule, but pending its completion the recommendation is maintained and repeated.

A related issue that was brought to the attention of the delegation during the course of the second Advisory Visit was the ability of practising lawyers to access the case law of the higher courts. We were given to understand that not all judgments of the higher courts are published in paper law reports and there may be long delays before

[42] Agreement concerning the European Commission funded Judicial Modernisation and Penal Reform programme.

publication. Moreover, the paper copies of law reports are expensive. As a consequence, many practising lawyers are not able to access relevant decisions of the higher courts. We consider that this situation significantly undermines the quality of the justice system in Turkey. Moreover, it is a situation that might easily be resolved if all judgments of the higher courts were to be posted on a central on-line database.

We recommend that in order to improve the quality of justice in Turkey a website containing all the case law of the higher courts should be constructed and this website should be accessible to all judges, public prosecutors and lawyers.

2. Workload

i. Establishment of an Intermediate Court of Appeal

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

On the occasion of the first Advisory Visit we reported that a Draft Law on the Establishment of Regional Courts of Appeal was on the agenda of the present Parliament.

In its response to the report of the first Advisory Visit the Ministry of Justice informed that, with the exception of the article relating to conditions of entry into force, the Draft Law on the Establishment of Regional Courts of Appeal has now been approved by the General Assembly of the Turkish Parliament. Other related draft laws such as the Draft Civil and Criminal Procedural Laws, Draft Labour Law, Draft Bankruptcy Law and Draft Criminal Code are presently before the sub-specialised commission of the Turkish Parliament. After receiving the approval of the commission, all of these laws will be enacted in one package at the General Assembly.

Aside from developments in the legislative field, the Directorate General for EU Affairs of the Ministry of Justice has prepared an EU funded project to construct 3 model Regional Court of Appeal courthouses, train 1,000 judges and prosecutors and 1,200 auxiliary personnel and also provide all necessary hardware and software to approximately 25 Regional Courts of Appeal. Implementation of this project is scheduled for 2005.

We are pleased to note the progress that has been made towards the establishment of Regional Courts of Appeal since our last visit. The establishment of such courts will not only decrease the workload of the High Court of Appeals, but will enable a substantial reduction in the size of the High Court of Appeals in order to make it better suited to fulfilling its main function, which is to ensure a unity of legal practice and to enlighten the interpretation of provisions of legal codes. In our opinion, the introduction of a court of second instance to the judicial system will be an important step forward in both ensuring the right to a fair trial and in increasing the speed and efficiency of the judiciary.

The project to establish an intermediate Court of Appeal is progressing according to schedule, but pending its completion the recommendation is maintained and repeated.

ii. Establishment of mechanisms for Alternative Dispute Resolution

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

During the course of the first Advisory Visit we received several complaints to the effect that a substantial number of the cases presently before the civil courts in Turkey involved very minor disputes between individuals or between individuals and the administration. Examples of such cases included rental disputes and objections of students against marks awarded in university examinations. It appeared that the reason why such cases were taken to court was the absence of any form of alternative dispute resolution mechanism for private law disputes. In the report of the first Advisory Visit we suggested that the establishment of alternative dispute resolution mechanisms might serve to significantly reduce the number of minor disputes before the civil courts and thereby lead to an increase in overall efficiency.

In its response to the report of the first Advisory Visit the Ministry of Justice informed that, in line with the recommendation, it plans to adopt a two-stage remedy for the settlement of disputes involving individuals and public bodies. First, a Draft Law on General Administrative Procedures is under consideration at the Prime Ministry. This law envisages the introduction of Alternative Dispute Resolution mechanisms as a less formal and less complex means of resolving disputes quickly and more cheaply than via court proceedings. Second, the Directorate General for Legislative Affairs of the Ministry of Justice has begun work on preparing a Draft Law on Ombudsman with a view to introducing an Ombudsman system in Turkey. Implementation is scheduled for 2005. Regarding the involvement of lawyers in conciliation proceedings, we were informed that in 2001 the Law on Lawyers was amended so as to provide for lawyers to have authority over the conduct of conciliation proceedings.

We are pleased to observe that the Ministry of Justice is actively pursuing measures designed to facilitate the settlement of private law disputes involving individuals and public bodies without the need for timely and costly litigation before the courts. We believe that the establishment of alternative dispute resolution mechanisms in Turkey could serve to significantly reduce the number of minor disputes before the civil courts and thereby lead to an increase in overall efficiency.

We note that progress in line with the recommendation is underway. However, pending the introduction of effective alternative dispute resolution mechanisms the recommendation is maintained and repeated.

iii. Reduction in artificial suits

We recommended that:

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

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

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

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

In the report of the first Advisory Visit we commented that a significant proportion of the cases within the Turkish judicial system are artificial suits, or lawsuits that do not deal directly with the merits of the case but deal with, for example, challenges to jurisdiction or the joining/separating of cases. Such suits cause significant delays in proceedings.

In its response to the report of the first Advisory Visit the Ministry of Justice stated that it has made efforts to reduce the significant number of lawsuits before the courts involving challenges to jurisdiction rather than the merits of any given case by simplifying the criminal procedure rules. The Ministry of Justice informed that the Draft Criminal Procedure Law is currently before the sub-specialised commission of the Turkish National Assembly and once adopted this will simplify the rules relating to jurisdiction. Implementation is scheduled for 2004. We consider that thereafter a further assessment will need to be undertaken in order to assess the extent to which the revised procedure rules have resulted in a reduction in jurisdictional disputes in practice.

In an effort to improve the role of public prosecutors in criminal investigations in order to concentrate the work of the judiciary in criminal cases to matters with substantial merits, the Ministry of Justice has proposed draft legislation on the establishment of a judicial police force in line with the recommendation made following the first Advisory Visit. The General Director of the Directorate General for Laws and Legislation

informed the delegation that the Ministry views the establishment of a judicial police force as being at the cornerstone of its judicial reform process. A co-operation project has been launched with France in order to develop the law and it is envisaged that a judicial police force will be established in 2005.

We warmly welcome the initiative of the Ministry of Justice in taking steps towards establishing a judicial police force in Turkey. It is of course too early to say when the judicial police force will be operational and, once operational, the functioning of the force will need to be monitored in order to assess to what extent its creation has served to increase the role of the public prosecutor in the criminal investigation process in practice. Nevertheless, as an initial step, we regard the fact that there exists a political will to enhance the role of the public prosecutor in criminal investigations as a positive development.

Regarding the need for improved pre-service and in-service training of public prosecutors on matters of competence and venue, the Ministry of Justice informed the delegation that following the recent introduction of the Law on the Establishment of the Justice Academy, pre-service and in-service training of public prosecutors is now the responsibility of the Justice Academy. Several projects have been prepared to improve the curriculum of the Academy, notably a number of projects financed by either the Ministry of Justice or the EU in the context of the Modernisation of the Judiciary Project. Curriculum development will continue over the period 2005-2007.

Regarding the recommendation that the distinction between the Civil Courts of Peace and General Civil Courts of First Instance be abolished and the division of labour between civil courts be based on specialisation, the Ministry of Justice informed the delegation that it has established a specialised commission and this commission has begun to perform the required measures. Implementation is scheduled for 2006.

We welcome the various initiatives that are being undertaken in an effort to reduce the significant number of artificial disputes within the Turkish judicial system. We note that progress in line with the recommendation appears to be being made. Pending effective implementation of the measures discussed, the recommendation is maintained and repeated.

iv. Introduction of a system of plea-bargaining

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

In the report of the first Advisory Visit we observed that parties to criminal proceedings in Turkey have no possibility of entering into a plea bargain.[43] We suggested that provided written rules set out explicitly how plea bargains could be arranged and accepted by the court, a system of plea-bargaining might successfully be introduced into the Turkish judicial system as a means of increasing efficiency.

In its response to the report of the first Advisory Visit the Ministry of Justice informed that it considers that a plea bargaining system might be beneficial in increasing the efficiency of the criminal justice system. Both the Draft Criminal Code and the Draft Criminal Procedure Code, both of which are currently before the Justice Sub-Committee of the National Assembly, foresee the introduction of a system of plea-bargaining. Article 39 of the Draft Criminal Code and Articles 265, 266 and 267 of the Draft Criminal Procedure Code will provide for the same. Implementation is scheduled for 2004.

We welcome the various initiatives that are being undertaken in an effort to introduce a system of plea-bargaining within the Turkish judicial system. We note that progress in line with the recommendation appears to be underway. Pending effective implementation of the measures discussed, the recommendation is maintained and repeated.

v. Change in practice regarding the presentation of prosecution evidence

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

In the report of the first Advisory Visit we noted that one further reason for the delays that are inherent to criminal proceedings in Turkey appeared to be that in many criminal cases, public prosecutors send case files to court and the case is listed for hearing without important avenues of investigation having been explored. The result is that when the case is listed for hearing, there is not infrequently an application for an adjournment in order for further evidence to be obtained. This might be repeated at consecutive hearings until sufficient evidence is obtained, the total number of hearings in any case therefore being proportionate to how complete the case file was when the case first came to court. We considered that the efficiency of court proceedings in Turkey

[43] A plea bargain is an agreement between the defence and the prosecutor in which a defendant pleads guilty or elects not to contest criminal charges. In exchange, the prosecutor withdraws some charges, reduces a charge or recommends that the judge enter a specific sentence that is acceptable to the defence.

could be significantly enhanced if, on the first day of trial, public prosecutors were to be required to present at least sufficient evidence upon which, if taken at its highest, a judge properly directed in law could convict.

In its response to the report of the first Advisory Visit the Ministry of Justice has informed that Article 179 of the Draft Code of Criminal Procedure will, when enacted, empower courts to reject indictments brought on insufficient evidence. It is envisaged that this power will prevent public prosecutors from opening cases without sufficient evidence, asking for extensions of time and adjourning cases. Implementation is scheduled for 2004.

We have already noted the proposal of the Ministry of Justice to create a judicial police in order to ensure more effective criminal investigations that enable public prosecutors to present complete files to the courts[44]. We have also recommended that the Code of Criminal Procedure should be amended so as to ensure that public prosecutors undertake an active review of the sufficiency of evidence before transferring a case to court and that they should only transfer cases once they are satisfied, on the basis of their evidential assessment, that it is more likely than not that a court will convict[45]. We regard the empowerment of courts to reject indictments brought on insufficient evidence as a necessary complement to these reforms. We warmly welcome the initiative of the Ministry of Justice in this regard. We believe that, taken together, effective implementation of these three reforms will serve to substantially improve the efficiency of the judicial system in Turkey by reducing the number of unmeritorious cases before the courts and enabling cases to be concluded in one hearing, over consecutive days if necessary, without adjournment.

We welcome the initiative that has been undertaken and note that progress in line with the recommendation appears to be underway. Pending adoption of Article 179 of the Draft Code of Criminal Procedure the recommendation is maintained and repeated.

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

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

In the report of the first Advisory Visit we commented that a matter that affected both the quality and efficiency of the judicial system in Turkey was the routine practice

[44] See section 2. ii abowe
[45] See chapter IV B 2

of substituting members of the judicial panel. It appeared to be the case that not infrequently a file would be allocated to a panel of three judges but during the course of the proceedings, which may last several months, one or more of the judges would find himself unable to attend a particular hearing due to, for example, ill-health or because he was on vacation. This situation would be dealt with by substituting a different judge for the one who was unable to attend. We considered that the use of alternative judges was problematic.

In the response of the Ministry of Justice to the report of the first Advisory Visit it was stated that current implementation on this issue was is in line with the recommendation. It was considered that misleading information had been provided to the mission. In subsequent discussions, the General Director of the Directorate General for EU Affairs of the Ministry of Justice helpfully informed the delegation that the Ministry of Justice had misunderstood the meaning of 'substitute judges'. Once clarified, the Ministry of Justice agreed that fairness demands that the same panel of judges should hear an entire case. The Ministry explained however that problems arise in practice in Turkey because proceedings are lengthy. The length of proceedings naturally increases the likelihood of judges being absent due to holidays or because of illness.

We envisage that if a judicial police force is established to ensure more effective criminal investigations and enable public prosecutors to present complete files to the courts, if public prosecutors are required to undertake an active review of the sufficiency of evidence before transferring a case to court and they ensure that they only transfer cases once they are satisfied, on the basis of their evidential assessment, that it is more likely than not that a court will convict, and if courts are empowered to reject indictments brought on insufficient evidence[46], then these three reforms will, together, combine to facilitate the determination of criminal proceedings in one single hearing, over consecutive days if necessary, without the need for repeated adjournments. This might naturally bring an end to the need to utilise the services of substitute judges.

Pending effective implementation of these reforms however, the use of substitute judges remains problematic. It affects the quality of justice in Turkey in so far as it means that the judge who is tasked with making a final ruling on the guilt or innocence of the accused will regularly not have been a party to the entirety of the proceedings. It also affects the efficiency of the justice system as a whole in so far as it requires substitute judges to spend valuable time reviewing case files for proceedings in respect of which they will only attend one hearing and which they will not ultimately be involved in finally determining. Wherever it is not possible to conclude a criminal proceeding in one single hearing, and an adjournment of the proceedings to a subsequent date is required, in circumstances where one or more members of the judicial panel finds themselves unable to attend hearing in the case, the proceedings should be adjourned and re-listed for a date when all members of the original judicial panel are able to attend. The hearing should not proceed in the presence of a substitute judge.

The recommendation is maintained and repeated.

[46] See below section vii

vii. Introduction of judicial power to reject indictments

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

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

During the course of the first Advisory Visit we were informed by the General Director of the Directorate General for Laws and Legislation of the Ministry of Justice that a new Criminal Procedure Law was before the TGNA and, when enacted, this would empower judges to reject indictments brought on insufficient evidence. It was estimated that the new law would be in force by the beginning of 2004.

On the occasion of the second Advisory Visit the Draft Law had not yet been adopted. In its written response to the report of the first Advisory Visit the Ministry of Justice informed the delegation that Article 179 of the Draft Code of Criminal Procedure will, when enacted, empower courts to reject indictments brought on insufficient evidence. It is envisaged that this power will prevent public prosecutors from opening cases without sufficient evidence, asking for extensions of time and adjourning cases. Implementation is now scheduled for sometime in 2004.

We have already noted the proposal of the Ministry of Justice to create a judicial police in order to ensure more effective criminal investigations that enable public prosecutors to present complete files to the courts. We have also recommended that the Code of Criminal Procedure should be amended so as to ensure that public prosecutors undertake an active review of the sufficiency of evidence before transferring a case to court and that they should only transfer cases once they are satisfied, on the basis of their evidential assessment, that it is more likely than not that a court will convict. We regard the empowerment of courts to reject indictments brought on insufficient evidence as a necessary complement to these reforms. We warmly welcome the initiative of the Ministry of Justice in this regard. We believe that, taken together, effective implementation of these three reforms will serve to substantially improve the efficiency of the judicial system in Turkey by reducing the number of unmeritorious cases before the courts and enabling cases to be concluded in one hearing, over consecutive days if necessary, without adjournment.

We welcome the initiative taken and note that progress in line with the recommendation appears to be underway. Pending adoption of Article 179 of the Draft Code of Criminal Procedure the recommendation is maintained and repeated

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

In the report of the first Advisory Visit we advanced various potential reforms that we believed could serve to improve the role and functioning of public prosecutors in Turkey. These ranged from the establishment of a judicial police force so as to enable public prosecutors to pursue a more active role in the criminal investigation process, to encouraging public prosecutors to exercise their power of non-prosecution in circumstances where an impartial investigation reveals an insufficiency of evidence in support of a criminal charge, to removing the administrative functions of public prosecutors. As well as serving to strengthen the functioning of the public prosecutor in the judicial system, we considered that these reforms would be extremely beneficial in terms of increasing quality and efficiency in the justice system. If public prosecutors are better able to fulfil their role in the pre-trial investigation process then when cases go to court there should be less need for them to be constantly adjourned in order for further investigatory work to be undertaken. Further, if public prosecutors exercise their power of non-prosecution in circumstances where an impartial investigation reveals an insufficiency of evidence in support of a criminal charge then there should be fewer unmeritorious cases within the judicial system. We have already assessed the state of implementation of the relevant recommendations in Chapter IV. Our analysis and conclusions set out there are adopted herein.

3. Basic Requirements

i. Reduction in use of expert witnesses

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

During the course of the first Advisory Visit we noted that one factor that contributes to the excessive duration of legal proceedings in Turkey is the over-use of expert witnesses. There appeared to be a tendency in certain proceedings for so-called expert witnesses to be called to provide testimony in relation to matters that required neither specialised experience nor technical knowledge but were matters within the knowledge and experience of the tribunal. We concluded that the use of so-called experts in such circumstances usurped the function of the judge and led to delays in proceedings.

In its response to the report of the First Advisory Visit, the Ministry of Justice candidly accepted that, whilst both the Code of Civil Procedure and the Code of Criminal

Procedure provide for courts to benefit from expert opinion only on matters that require special or technical knowledge, there are problems in implementation. In an attempt to address this defect in the legal system the Ministry of Justice has established a Working Group to analyse the reasons for the problem and identify solutions. The Ministry of Justice has also asked the Justice Academy and its own Education and Training Department to address the proper use of expert witnesses during the in-service training of judges during 2004 and beyond. The Ministry of Justice is hopeful that over time training will eliminate the practice of undue reliance upon expert opinion in matters that do not require specialist or technical knowledge.

We welcome the fact that the Ministry of Justice has recognised that the overuse of expert witnesses presents an obstacle to the efficient functioning of the judicial system. We also welcome the fact that the Ministry of Justice is committed to taking positive steps to address the situation.

Pending a further assessment of the effectiveness of the measures adopted by the Ministry of Justice, the recommendation is maintained and repeated.

ii. Increase in translation and interpretation facilities within the courts

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

During the course of the first Advisory Visit we observed that whilst certified translators and interpreters are available for most languages, provision of translation and interpretation facilities in the Kurdish language is deficient in Turkey. Indeed, there was not a single recognised expert Kurdish interpreter in the whole of the country at the time of the first Advisory Visit. This was despite the fact that the Kurdish population in Turkey was estimated at being in the region of 15 million people (or 20% of the population). We were informed that when a court is faced with a defendant or a witness whose mother tongue is Kurdish and that person has difficulty in understanding or expressing themselves in Turkish, the court uses either a member of court staff such as a secretary or clerk, or a relative or friend of the party concerned, to translate the court proceedings.

In its response to the report of the first Advisory Visit the Ministry of Justice informed that Article 252 of the Code of Criminal Procedure provides for the right to an interpreter. Further, on 12 March 1996, the Court of Cassation ruled, in decision no. 2/33, that interpretation costs shall not be paid by the defendant. Accordingly, the Ministry of Justice considered that the recommendation had already been met.

We do not consider that the recommendation has been met. Notwithstanding the existence of a legal provision guaranteeing the right of accused persons to the facilities of

an interpreter, the fact remains that serious problems persist in implementation. Provision of adequate translation and interpretation facilities in the Kurdish language is still deficient in Turkey. Indeed, there is still not a single recognised expert Kurdish interpreter in the whole of the country.

The second Advisory Visit provided the delegation with an opportunity to discuss this matter further with the Ministry of Justice. The Ministry informed the delegation that the problem of inadequate interpretation facilities is not limited to the Kurdish language but is a problem that encompasses all minority languages, including Arabic. We were also informed that the Ministry of Justice cannot participate in a project to train interpreters as it has no legal power to provide language training. It was agreed however that in its programming for 2005, the European Commission will propose a project to train legal interpreters in minority languages. This programme will be performed in conjunction with language schools and Bar Associations. The Ministry has undertaken to ensure that a change in the relevant by-laws will be introduced so as to require the courts to use trained interpreters in all cases, once a group of trained interpreters has been established.

We warmly welcome the commitment of the Ministry of Justice to guaranteeing the right of defendants and witnesses to access suitably qualified interpreters in circumstances where their mother tongue is not Turkish.

Pending effective implementation of the proposed measures the recommendation is maintained and repeated.

iii. Establishment of a Code of Judicial Conduct

We recommended that a Code of Judicial Conduct be drafted.

In the report of the first Advisory Visit we noted that although the Law on Judges and Public Prosecutors sets forth certain details of behaviour that is deemed to be inappropriate for judges, there is no Code of Judicial Conduct that establishes formal, written standards for the ethical conduct and discipline of judges and others serving in a judicial capacity in Turkey. We considered that the establishment of such a Code would serve to enshrine certain fundamental basic standards and provide guidance to judges and candidate judges to assist them in maintaining high standards of judicial office.

In its response to the report of the first Advisory Visit the Ministry of Justice replied stating that the UN document entitled "Bangalore Principles of Judicial Conduct" ("Bangalore Principles"), adopted by the UN Human Rights Commission on 23 April 2003, has been put on the agenda of the High Council of Judges and Public Prosecutors with a view to adopting it as a written Code of Conduct for the Turkish judiciary. Implementation is scheduled for 2004.

During the course of the second Advisory Visit, the High Council of Judges and Public Prosecutors informed the delegation that it was aware of the Bangalore Principles and that it wished to see the principles set forth in the document applied across the profession. To this end it saw training as important. The High Council informed the delegation that the Directorate General of EU Affairs has organised a conference on judicial ethics in Ankara on 24 September 2004. In the region of 150 judges and public prosecutors will attend the seminar. The proceedings of the seminar will be distributed across judicial organs. The High Council fully supported such educational initiatives.

Upon being questioned further as to whether the Bangalore Principles might be formally adopted as a written Code of Conduct for the Turkish judiciary, the High Council was more hesitant. The High Council explained that it preferred to advance standards of judicial ethics via educational platforms. It believed that once the Bangalore Principles have been explained to the judiciary then there will be no need for a separate written Code of Conduct. The High Council proceeded to explain that it believed that judges should have a written Code of Judicial Conduct but that it was not appropriate to adopt the Bangalore Principles as they diverge from Turkish practice in certain ways. The High Council preferred the option of taking the spirit of the Bangalore Principles and applying them into a separate written standard prepared by the Turkish judiciary for the Turkish judiciary. The view of the members of the High Council on the necessity of written principles was at the same time split.

In a second response to the report of the first Advisory Visit prepared after consultation with the High Council of Judges and Public Prosecutors and transmitted to the European Commission after the conclusion of the second Advisory Visit, the Ministry of Justice stated simply that the Bangalore Principles, many of which repeat ethical norms already existing in various domestic regulations, will be "offered for the use of judges and public prosecutors". It is not clear whether this means that the Bangalore Principles will be adopted and provided to judges as a formal Turkish Code of Judicial Conduct or whether it means that the Bangalore Principles will simply be explained to judges without being formally adopted. If the latter is correct, it is also unclear as to whether the explanation of the Bangalore Principles will be supplemented by the adoption of a separate written standard on judicial conduct prepared by the Turkish judiciary for the Turkish judiciary or whether it is considered that no such written standard is required.

Although the High Council appears to accept that the Principles might be used as a basis for the training of judges in standards of judicial conduct, it is not willing to adopt certain of the Principles as binding obligations. If binding obligations are to be imposed, the High Council favours a separate written standard on judicial conduct prepared by the Turkish judiciary for the Turkish judiciary.

We are not in a position to comment upon the merit or otherwise of adopting the Bangalore Principles as a written Code of Judicial Conduct for Turkey. However, we are in a position to recommend that a written Code of Judicial Conduct of some description should be adopted. A formal Code of Judicial Conduct would provide

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

The recommendation is maintained and repeated.

4. Other

i. Improvements in the quality and efficiency of Juvenile Courts

We recommended that:

(i) the number of juvenile courts be substantially increased throughout Turkey;
(ii) very minor offences involving young persons be determined by single judge courts;
(iii) where they do not already exist, psychologists, psychiatrists and pedagogues be appointed to the juvenile courts.

In October 2003 we reported that juvenile courts in Turkey were facing a considerable backlog of cases, the judges were overburdened with work and the average duration of proceedings was excessive. On the occasion of the first Advisory Visit there were only 8 functioning juvenile courts throughout Turkey. We considered that there was an urgent need to increase the number of juvenile courts throughout the country.

In its response to the report of the first Advisory Visit the Ministry of Justice informed that on 13 January 2004 Article 1 of the Law on the Establishment, Duties and Procedures of Juvenile Courts (Law No. 2253) was amended so as to provide for the establishment of Juvenile Courts in all sub provinces with a population of at least 100,000 persons. Establishment of new courts is scheduled for 2004-2005.

On the occasion of the second Advisory Visit the General Director of the Directorate General for Personnel of the Ministry of Justice informed the delegation that in June 2004 a total of 21 juvenile courts were operating throughout Turkey. This represented a significant increase on the figure from October 2003. According to the Ministry of Justice 40 new courts are scheduled to become operational over the coming months.

We are pleased to observe that the overall number of juvenile courts in Turkey has increased since the first Advisory Visit and we regard the commitment of the Ministry of Justice to the establishment of 40 new juvenile courts in sub provinces as a significant positive development. However, the impact of these new courts on the overall efficiency of the juvenile justice system remains to be seen. In this regard, the problem that is faced should not be underestimated. The situation in Diyarbakir is illustrative. A judge of the Diyarbakir Juvenile Court informed the delegation that there is only one juvenile court in Diyarbakir, a city with a population of 1 ½ - 2 million people, and as far as he is aware there are no plans to open any new juvenile courts in the city. At the start of January 2004 his court had 2,355 case files remaining from the previous year. Between January and July 2004 a further 1,464 cases have been filed. In the same period, the court has been able to finally determine 917 files, leaving 2,900 files outstanding half way through the year. On the basis of these figures, if one assumes that a further 1,464 cases will be filed in the second half of the year and the court will be able to finally determine 917 of the cases before it, then one might anticipate that at the end of 2004/beginning of 2005 the Diyarbakir juvenile court will have a total of 3,447 outstanding files, an overall increase of 19% on the previous year. In short, a single juvenile court in Diyarbakir is not sufficient to meet the demands of the population there.

The judge of the Diyarbakir Juvenile Court informed the delegation that the amendment to Article 6 of the Law on the Establishment, Duties and Trial Procedures of Juvenile Courts, introduced in August 2003 as part of the seventh reform package, which saw the minimum age for proceedings to be commenced in the ordinary criminal courts increased from 15 to 18, resulted in a 100% increase in the workload of his court. Further, both the Diyarbakir Bar Association and the Diyarbakir Contemporary Lawyers Association independently reported that a case filed in the Diyarbakir juvenile court in July 2004 will be listed for a first hearing in May 2005, such is the workload of the court.

Therefore, whilst we welcome the increase in the number of juvenile courts in Turkey since the first Advisory Visit and we regard the commitment of the Ministry of Justice to the establishment of 40 new juvenile courts in sub provinces as a significant positive development, we consider that further reform is likely to be necessary if Turkey is to benefit from an efficient high quality juvenile justice system.

We welcome the progress that has been made in line with the recommendation as a significant positive development. Pending effective further reforms the recommendation is maintained and repeated.

One potential reform proposed in the report of the first Advisory Visit was that very minor offences involving young persons might be determined by single judge courts, rather than the three judge courts that determine such matters at present. During the course of the second Advisory Visit we received support for such a reform from judges of both the Diyarbakir Juvenile Court and the Istanbul Juvenile Court. We are pleased to report that the Ministry of Justice has accepted the recommendation and has formed a special committee to work on the transformation of juvenile courts to single

judge courts in cases involving very minor offences. Implementation is scheduled for 2005.

We welcome the acceptance of our recommendation and the initiatives undertaken so far. Pending effective implementation of the measures to be taken, the recommendation is maintained and repeated.

In an effort to improve the quality and efficiency of the juvenile courts the report of the first Advisory Visit also recommended that where they do not already exist, psychologists, psychiatrists and pedagogues should be appointed to the juvenile courts. In its response to the report of the first Advisory Visit, the Ministry of Justice wrote that Article 30/1 of the Law on the Establishment, Duties and Procedures of Juvenile Courts provides for psychologists, psychiatrists and pedagogues to be appointed to the juvenile courts. However, at the same time, Article 30/3 permits "temporary" experts (or persons who have the quality to carry out the necessary assessments but who are not experts) to be appointed in circumstances where no expert is available. The Ministry of Justice has responded to the recommendation by initiating a study into constricting the scope of Article 30/3 so as to provide for the appointment of permanent expert staff to juvenile courts rather than so-called "temporary" experts. Implementation is scheduled to commence in 2005 and will be ongoing.

We note that our recommendation was intended to address the fact that a significant proportion of juvenile courts have no psychologist, psychiatrist or pedagogue at all, permanent or temporary. Instead, young persons are referred to practitioners within state hospitals when necessary, a procedure that is likely to contribute to delay in the proceedings. We recommended, not that the existing law be amended, but that it be implemented. Nevertheless, in a positive development, during the course of the second Advisory Visit the General Director of the Directorate General for Personnel of the Ministry of Justice informed the delegation that efforts have been made to employ a greater number of expert staff. The Ministry of Justice has assessed that 65 social workers, 65 psychologists and 65 psychiatrists are required for the juvenile and family courts. Examinations have been held for suitable applicants and appointments will be made once the results of the examinations have been obtained. The Ministry has also transferred 8 social workers, 5 psychologists and 2 pedagogues from other institutions to work within the court system.

We welcome the efforts of the Ministry of Justice to increase the number of expert psychologists, psychiatrists and pedagogues employed within the juvenile courts, particularly since our interviews reveal that implementation of the existing law is still lacking. A judge of the Diyarbakir Juvenile Court confirmed that although the law demands that his court should have a psychologist, a psychiatrist and a pedagogue, no appointments have yet been made. A judge of the Istanbul Juvenile Court informed the delegation that his court similarly has no psychologist, psychiatrist or pedagogue, although a social worker has been appointed to the court. It is important that all juvenile courts be provided with such experts as they require in order to prepare specialist reports in an efficient and timely manner. The number and sufficiency of the expert personnel to

be appointed to the juvenile courts remains to be seen but there is at least some hope for the future.

We welcome the initiatives taken so far in line with the recommendation. Pending effective implementation of the measures discussed, the recommendation is maintained and repeated.

ii. Improvements in the quality and efficiency of Family Courts

We recommended that:

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

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

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

In October 2003 we reported that it had been suggested to us that the judges appointed to administer the newly established family courts, although having some experience in family law from their positions in the general civil courts, had not been provided with any specialist training in family law matters.

In its response to the report of the First Advisory Visit the Ministry of Justice explained that since the Law relating to the establishment of the Family Courts (Law No. 4787) had only come into force in 2003 it had not been possible to include family law training for judges of the Family Courts prior to the first Advisory Visit. The Ministry of Justice has however informed that family law training for Family Court judges will be included in the 2005 training curriculum. Both the Justice Academy and the Education and Training Department of the Ministry of Justice have been notified accordingly. The General Director of the Directorate General for Education and Training of the Ministry of Justice confirmed to the delegation during the course of the second Advisory Visit that family court judges will receive training in 2005, although the training programme may be relatively short as the judges have previous experience in family law as a consequence of their previous positions in the general civil courts. We welcome the commitment of the Ministry of Justice to providing specialist family law training to judges of the family courts.

In October 2003 we also reported that although the family courts in Turkey had supposedly been operational since mid-July 2003, certain of the courts were still awaiting the appointment of, for example, social services personnel and child psychologists. This

meant that they had no facilities for mediation or other auxiliary services necessary for the efficient functioning of the courts.

In its response to the report of the First Advisory Visit the Ministry of Justice informed that in May 2004 65 out of 116 family courts established by Law No. 4787 were functioning. During the course of the second Advisory Visit the General Director of the Directorate General for Education and Training of the Ministry of Justice informed that a total of 143 family courts are now operating. Regarding the appointment of experts to the family courts, the Ministry of Justice informed in its response to the first Advisory Visit report that the Directorate General for Personnel of the Ministry of Justice has been notified to immediately appoint all experts provided for in Law No. 4787. Implementation is scheduled for 2005. We welcome the initiative taken by the Ministry of Justice to appointing sufficient numbers of expert personnel.

In October 2003 we also recommended that the law relating to family proceedings be amended so as to enable to family courts to hold closed proceedings when necessary in order to protect family and/or private life.

In its response to the report of the First Advisory Visit the Ministry of Justice informed that Article 7 of Law No. 4787 expressly provides that provisions of the Code of Civil Procedure shall apply where issues do not exist in Law No. 4787 itself. The Code of Civil Procedure provides for judge to hold closed proceedings when necessary. Accordingly there is no need to amend the law relating to family proceedings.

We welcome the initiatives taken so far with regards to the training of judges and prosecutors and the appointment of experts. Pending effective implementation of the proposed measures the recommendations are maintained and repeated.

On the basis that existing legislation does provide for family courts to hold closed proceedings when necessary in order to protect family and/or private life, the recommendation in this regard is withdrawn.

iii. Reduction in number of judges in Commercial Courts

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

During the course of the first Advisory Visit we observed that there was a pressing need to improve the efficiency of the first instance commercial courts in Turkey. Of all cases entered in the commercial courts in 2002, only 41.8% were finalised and the average trial lasted 434 days. We concluded that against the background of such

statistics the assignment of three judges to civil commercial courts could only exceptionally be justified in particularly complex or high value cases. We considered that as a general rule, commercial courts could function under the responsibility of a single judge, thereby effectively significantly increasing the overall number of commercial courts functioning in Turkey.

In its response to the report of the First Advisory Visit the Ministry of Justice informed that it is envisaged that a new Turkish Commercial Law will be enacted in 2005. The Directorate General for Laws and Legislation of the Ministry of Justice has been notified to commence work on amendments to the proposed Commercial Law with a view to ensuring that Commercial Courts deal with some cases in single judge courts.

We welcome the commitment of the Ministry of Justice to the establishment of single judge commercial courts in Turkey. We note that steps are being taken in order to implement the recommendation. Pending adoption of suitable measures within the Turkish Commercial Law, the recommendation is maintained and repeated.

D. Human Rights Related Issues

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

We recommended that all facilities within the general courthouses for the forensic medical examination of detainees and the documentation of torture and other cruel, inhuman or degrading treatment or punishment be transferred to state hospitals and health centres.

In the report of our first Advisory Visit we concluded that the physical conditions of courthouse examination rooms in Turkey appeared wholly unsuitable for the purposes of a proper forensic medical examination. We also considered that the fact that the examination rooms were situated within the precincts of the courthouses, combined with the fact that the forensic physicians only received referrals from the public prosecutors of those courthouses, tended to undermine the objectivity of the assessments that were being undertaken. Our concern was that on the one hand, constantly examining accused persons at the request of the public prosecutor might lead physicians to develop perceptions of criminality that were closely aligned with those of the prosecutor. On the other, the close working relationship between the forensic physician and the public prosecutor might foster a tendency for forensic physicians to develop a perception of their role as being to serve the interests of the public prosecutor. Both scenarios served to undermine the possibility of an impartial assessment being undertaken. In light also of suggestions that the location of the examination rooms within the courthouses served to inhibit some detainees from providing a full account of their ill-treatment, we

recommended that all facilities within the general courthouses for the forensic examination of detainees should be transferred to state hospitals and health centres.

In its response to the report of the first Advisory Visit the Ministry of Justice has accepted the recommendation and undertaken to relocate all forensic physicians currently working within the court buildings of Turkey to either hospitals in the provinces or to buildings of the health directorates in the districts. The Ministry of Justice has informed that it has directed the Forensic Medicine Institute to implement the necessary measures. On 16 June 2004 the Forensic Medicine Institute wrote to the Ministry of Health in order to start the procedure for moving examination rooms from courthouses to hospitals and health directorates. It is understood that one room in the selected hospitals and health directorates will be dedicated to the use of forensic medicine physicians. As a security measure, these examination rooms will be fitted with bars on the windows.

During the course of the second Advisory Visit the President of the Forensic Medicine Institute informed the delegation that the process of transferring forensic medical examination facilities from the courthouses to hospitals and health directorates is underway. We were informed that 19 out of 22 provinces with forensic medical examination facilities within courthouses will have their forensic medicine facilities transferred to state hospitals or health centres. A total of 11 newly established centres are presently ready to begin work and the remainder will be transferred shortly. The President of the Forensic Medicine Institute informed the delegation that, with the exception of Istanbul, there had been no difficulty in identifying suitable hospitals or health centres. In Istanbul a total of 8 hospitals have been identified as possible locations for the transfer of forensic medical examination facilities and negotiations on this subject will commence shortly. It is not clear however when the negotiations are likely to be completed.

We regard the decision of the Ministry of Justice to relocate all forensic medicine facilities currently within the court buildings of Turkey to either hospitals or health directorates as a significant positive development. This reform will, once completed, substantially increase the possibility for an impartial assessment of detainee's allegations of ill-treatment to be undertaken and also serve to encourage detainees to provide a fuller account of their ill-treatment than they might previously have done. We welcome the progress that has been made in implementing the recommendation to date.

We welcome the initiatives that are being undertaken and note that progress in line with the recommendation seems to be underway. Pending completion of the relocation process the recommendation is maintained and repeated.

We recommended that responsibility for the preparation of official court forensic reports be removed from physicians attached to the Institute of Forensic Medicine and assigned to physicians working within the national health service in order to ensure the independence of medical personnel required to carry out forensic examinations.

In the report of the first Advisory Visit we noted that, with the exception of areas where the Forensic Medicine Institute ("FMI") has no branch, sole responsibility for the preparation of official court forensic reports lies with physicians attached to the FMI, a subordinated institution of the Ministry of Justice.[47] Independent bodies such as the Turkish Human Rights Foundation ("HRFT") are authorised to submit alternative forensic reports, but only as a supplementary report in cases where a defendant is not satisfied with the official report of the FMI physician. In practice then, primary responsibility for documenting the ill-treatment of detainees at the hands of agents of the state lies with personnel who are themselves attached to an agency of the state.

In the report of the first Advisory Visit we concluded that whilst relocating FMI specialists from the courthouses to the hospitals and health directorates would be an important step towards securing the independence of physicians engaged in the role of documenting ill-treatment by state officials, this measure would not be sufficient on its own. As a second important step we considered that a change in the structure under which forensic medicine services are carried out would be required. We recommended that responsibility for the preparation of official court forensic reports should be removed from physicians attached to the FMI and assigned to physicians working within the national health service.

In its response to the report of the first Advisory Visit the Ministry of Justice has declined to accept this recommendation. The Ministry of Justice asserts that FMI physicians are experienced medical practitioners who fulfil their duties in accordance with the high standards expected of all members of the medical profession. Accordingly, any concerns regarding the independence of FMI physicians are misplaced. Any concerns regarding the quality of FMI forensic reports stems merely from deficiencies in training rather than a lack of independence. In this regard the FMI is conducting training activities for forensic experts in the application of the UN Manual on Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("the Istanbul Protocol").

Confirming the comments of the Ministry of Justice in its written response to the report of the first Advisory Visit, during the course of the second Advisory Visit the President of the Forensic Medicine Institute informed the delegation that a nationwide training project is underway and that this will provide training to a total of 2,500 physicians in 7 regions in 2005. The project is not limited to FMI physicians but extends to hospital physicians as well. The President of the Forensic Medicine Institute also referred to a congress to be held in Antalya in September/October 2004 at which training will be provided on matters such as continuity of evidence, DNA, criminal liability and high security health centres. He strongly rejected the critical comment within the First Advisory Visit Report regarding the independence of FMI physicians and stated that all forensic staff are fully independent from judges, prosecutors and the Ministry. The President of the Forensic Medicine Institute also commented that a standard form, compliant with the Istanbul Protocol, has been prepared and distributed to physicians in

[47] In areas where the FMI has no branch, hospital doctors under forensic medical examinations for the purposes of preparing official court forensic reports.

order to provide them with guidance as to how to examine detainees for signs of torture. It should be noted however that the former General Secretary of the Turkish Medical Association argued strongly that the FMI form does not comply with the requirements of the Istanbul Protocol in so far as it provides for an examination to be carried out without the detainee being required to remove his clothes. She also commented that training is required in order to understand how to complete the form because some physicians consider it too long and simply place a stamp on it in order to indicate their conclusion.

Whilst noting the comments of the Ministry of Justice regarding the need for further training we have some difficulty with its position. The concerns expressed in the report of the first Advisory Visit under this recommendation were not based upon alleged inadequacies in training; this was dealt with under a separate recommendation. Our concerns were based upon reports from credible non-governmental organisations that FMI physicians continued to be placed under pressure to deny that torture victims had actually been tortured. We consider that for as long as there remains the possibility that a higher authority is capable of exerting pressure on FMI physicians to deny evidence of torture, training of FMI physicians on methods of documentation and investigation of torture will be insufficient on its own.

We welcome the transfer of forensic examination facilities from court houses to hospitals or health centres as a positive step in the right direction, as we consider that in order to safeguard forensic specialists from the undue influence of a higher authority, forensic medicine practices must be conducted in an independent environment. This will, however only be completely achieved once the official forensic examinations are fully regarded as being carried out not by a branch within the judiciary with direct connections to the Ministry, the judges or the public prosecutors, but by medical specialists totally free standing from any connection to the judiciary. This might be achieved if the responsibility for the FMI is removed from the Ministry of Justice and transferred for example to the Ministry of Health; or if the responsibility for official court forensic reports is removed from physicians attached to the FMI and transferred to physicians working within the national health service. We note that the latter view is one that is supported by the Turkish Medical Association, the Society of Forensic Medicine and the Human Rights Foundation of Turkey. We also note that the Istanbul Bar Association stated as its opinion that the FMI should not be under the Ministry of Justice. Accordingly we consider that a more thorough reform of the administration of the forensic medicine services in Turkey is required so as to secure the independence of physicians engaged in the role of documenting ill-treatment by state officials.

We welcome the initiative to transfer forensic examination facilities from courthouses to hospitals and health centres. We do however consider that a more thorough reform of the administration of forensic medicine services in Turkey is required so as to secure the independence of physicians engaged in the role of documenting ill-treatment by state officials. The recommendation is maintained and repeated.

We recommended that the Turkish Medical Association, Society of Forensic Medicine and Human Rights Foundation of Turkey be authorised to implement training programmes for physicians responsible for the preparation of official court forensic reports and such physicians be required to attend these training programmes.

During the course of the first Advisory Visit we were informed that a typical forensic medical examination by an FMI physician for the purposes of an official court report takes just 2-3 minutes. We were told that such examinations are never conducted in accordance with the international guidelines for the assessment of persons who allege torture and ill treatment, for investigating cases of alleged torture, and for reporting such findings to the judiciary or other investigative bodies as set forth in the Istanbul Protocol. As a consequence we concluded that there was a need for physicians responsible for the preparation of official court forensic reports to receive further training in the application of the Istanbul Protocol. We also considered that, given the existence of a pool of highly regarded independent forensic medicine experts within non-governmental organisations such as the Turkish Medical Association, Society of Forensic Medicine and Human Rights Foundation of Turkey, such organisations should be authorised to implement training programmes for physicians attached to the FMI.

In its response to the report of the first Advisory Visit the Ministry of Justice informed that the FMI has agreed that experts of non-governmental organisations may be permitted to participate in training programmes organised by the Institute provided that they are able to establish that they have sufficient expertise in the field of forensic medicine. This is of course something quite different from permitting the experts of non-governmental organisations to conduct their own training programmes and encouraging FMI physicians to attend, nevertheless it is a step forward. That said, we are not aware of any instance to date where the FMI has in fact invited experts of non-governmental organisations to participate as lecturers or teachers in training programmes organised by the Institute. We note, however, that the aforementioned training programme for 2,000 physicians includes physicians outside the FMI.

According to the Society of Forensic Medicine Specialists, only 285 of 80,000 physicians in the country are forensic specialists. Most detainees are examined by general practitioners and specialists not qualified to detect signs of torture. We remain of the view that in order to improve the overall quality of court forensic reports physicians must receive comprehensive training in the application of the Istanbul Protocol and such training must be provided either exclusively by, or in co-operation with, independent forensic medicine experts rather than solely by experts attached to the FMI, a subordinated institution of the Ministry of Justice. We urge the FMI to adopt a pro-active stance in relation to this issue and to actively encourage physicians responsible for the documentation of torture to attend training sessions organised by experienced forensic medicine experts working within non-governmental organisations such as the Turkish Medical Association, Society of Forensic Medicine and Human Rights Foundation of Turkey.

The recommendation is maintained and repeated.

We recommended that judges and public prosecutors receive training on the Istanbul Protocol and the proper procedure for the effective forensic examination of detainees in order to enable them to subject official courts forensic reports to substantive scrutiny.

Article 135(a) of the Code of Criminal Procedure prohibits methods of interrogation that invalidate the will of the person and also establishes that testimony extracted through such methods shall not be admitted as evidence in a court of law.[48] Clearly, before any evidence that is alleged to have been obtained as a result of physical or psychological ill-treatment can be excluded under the foregoing provision, a judge must be satisfied that the evidence in question was in fact obtained as a result of such ill-treatment, since only a judge can rule the evidence inadmissible. The implementation of Article 135(a) of the Code of Criminal Procedure therefore depends entirely upon the attitude of the judiciary towards claims of coerced evidence and the quality of forensic reports submitted in support of such claims. Recognising the need also for judges and public prosecutors to be able to subject official court forensic reports to substantive scrutiny, the report of the first Advisory Visit recommended that judges and public prosecutors should receive training on the Istanbul Protocol and the proper procedure for the effective forensic examination of detainees.

In its response to the report of the first Advisory Visit the Ministry of Justice has informed that 225 judges and public prosecutors attended a 5-day training seminar on the ECHR in Ankara in order to be trained as human rights trainers. The seminars on Articles 2 (right to life) and 3 (freedom from torture, inhuman or degrading treatment or punishment) explained the Istanbul Protocol. These 225 judges and public prosecutors subsequently conducted human rights training for all other judges and public prosecutors throughout Turkey. By the end of June 2004 all judges and public prosecutors had been trained on human rights issues, including Articles 2 and 3.

The experts consider it appropriate to mention that in April/May 2004 one of the authors of this report travelled to Trabzon and Kocaeli in order to observe four of the human rights training programmes for judges and public prosecutors referred to by the Ministry of Justice. It was observed that whilst comprehensive training was provided on Articles 2 and 3 of the ECHR, contrary to the assertion of the Ministry of Justice no training was in fact provided on either the Istanbul Protocol or more generally on how to subject official court forensic reports to substantive scrutiny.

In its response to the report of the first Advisory Visit the Ministry of Justice also informed about a project to train a number of judges and public prosecutors, forensic medicine experts and candidate judges and public prosecutors specifically on issues relating to torture and ill-treatment. The project has been drafted by the Directorate

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

General for EU Affairs of the Ministry of Justice and submitted to the EU Representation in Ankara in January 2004. The project has a budget of 200,000 Euros. In addition, 10,000 manuals containing both the contents of the Istanbul Protocol and reports of the Committee for the Prevention of Torture are due to be distributed to all judges and prosecutors in Turkey. Implementation is scheduled for 2005.

During the course of the second Advisory Visit the President of the Forensic Medicine Institute also spoke of a proposal to conduct educational seminars for judges and public prosecutors on issues surrounding torture and ill-treatment and referred to a congress for judges and public prosecutors scheduled to take place in Antalya in the autumn of 2004. The President of the Forensic Medicine Institute also referred to the fact that all judges and prosecutors will be offered training in 2005. He also mentioned that the curriculum in the law faculties contains forensic courses two hours a week for one academic year.

Whilst noting the absence of any training on the proper procedure for the effective forensic examination of detainees during the ECHR training programme for judges and public prosecutors conducted between April-June 2004, we nevertheless welcome both the fact that the Ministry of Justice has initiated a project to train judges and public prosecutors specifically on issues surrounding torture and ill-treatment and that all judges and public prosecutors will shortly be provided with a copy of the Istanbul Protocol. We urge the Ministry of Justice to ensure that the training that it is to be provided will be sufficient to enable judges and public prosecutors to subject official court forensic reports to substantive scrutiny.

We welcome the initiative on training. Pending completion of the training programme the recommendation is maintained and repeated.

We recommended that measures be taken to strengthen the protection of physicians who report torture from any form of state-sponsored or state-tolerated harassment or intimidation.

During the course of the first Advisory Visit we were informed that many good physicians working for the FMI labour under indirect, but nonetheless real, pressure not to document torture. Representatives of both the Turkish Medical Association and the HRFT informed us that once every 12 or 18 months a criminal investigation is opened against a physician who has written a report documenting torture, the alleged offence usually being "insulting a law enforcement officer". Alternatively, there are instances of physicians being transferred or dismissed for writing reports that document torture. Although these instances do not occur very often, they occur with sufficient regularity to send a clear message to physicians working for the FMI regarding the consequences that may befall them in the event that they document the occurrence of torture. This, of course, has an inevitable impact upon the quality of their reports. Accordingly we recommended that measures should be taken to strengthen the protection of physicians

who report torture from any form of state-sponsored or state-tolerated harassment or intimidation.

In its response to the report of the first Advisory Visit, the Ministry of Justice has replied stating that complaints from physicians who allege that they have been subjected to pressure or threats because they have reported torture are treated with great sensitivity by public prosecutors and are investigated as a matter of priority. The Ministry of Justice has however agreed to issue an administrative circular on this issue.

During the course of the second Advisory Visit we did not record any complaints of FMI physicians having been harassed, charged with a crime, or reassigned for having reported torture. However, since the first Advisory Visit both civil and criminal proceedings have been initiated against the Executive Board Members of the Human Rights Foundation of Turkey. [49] [50] [51] Although the circumstances giving rise to these prosecutions were not directly related to the work of the HRFT in documenting torture

[49] On 12 November 2003, Ankara Civil Court of First Instance No. 15 began hearing a case launched against the Executive Board Members of the Human Rights Foundation of Turkey with the aim of suspending the board members from duty. It was alleged that the foundation attempted to collect contributions via the internet and cooperated with international organisations (including the United nations, European Parliament and Council of Europe) without prior consent of the Council of Ministers and in violation of the Law on Collecting Contributions (Law No. 2860) and its related regulation, the Regulation on Foundations, established in accordance with the Turkish Civil Code. The accusation related to the fact that the HRFT had collected contributions to assist in the treatment and rehabilitation of 563 persons who, after having been released from prison, suffered health problems as a result of taking part in hunger strikes and death fasts in protest against conditions in F-Type prisons. The hearing was adjourned to 20 January 2004. On 20 January 2004 the hearing was adjourned to 9 March 2004. On 9 March 2004 the lawyer representing the General Directorate of Foundations did not attend court. Accordingly the proceedings were discontinued.

[50] In a separate case, Dr. Alp Ayan, psychiatrist and member of the Human Rights Foundation of Turkey, was indicted before the Izmir Heavy Penal Court on a charge of "insulting the Minister of Justice" contrary to Article 159 of the Turkish Penal Code in connection with a press statement issued on 10 February 2001 in which he criticised F-Type prisons and the military intervention against prisoners on 19 December 2000 which resulted in the deaths of 32 people. A hearing held on 10 December 2003 was adjourned to 3 March 2004. A hearing on 3 March 2004 was adjourned to 26 March 2004. A hearing on 26 March 2004 was adjourned to 26 April 2004. On 26 April 2004 the court acquitted Dr Alp Ayan on the ground that the elements of the crime had not been made out.

[51] On 19 December 2003 Aliaga Penal Court continued to hear a case against 68 people, including Mrs Gunseli Kaya and Dr Alp Ayan, staff members of the Human Rights Foundation of Turkey in Izmir. They were prosecuted for having attended the funeral of Nevzat Ciftci that took place on 30 September 1999. Mr. Ciftci was one of the prisoners killed during the military operation in Ankara Closed Prison on 26 September 1999. The defendants were charged with "attacking the gendarmes with stones and bottles" and "resisting and opposing through violent means" pursuant to Articles 32/1 and 32/3 of Law No. 2911 on Meetings and Demonstration. In his summing up the public prosecutor called for 30 defendants, including Gunseli Kaya, Dr Alp Ayan and lawyers Sevgi Binbir, Seray Topal, Zeynel Kaya and Erdal Yagceken, to be sentenced according to Article 32/1 of the Law on Meetings and Demonstrations on charges of "attacking the security forces" and 26 defendants, including the HRFT staff lawyer Berrin Esin Kaya, to be sentenced according to Article 32/3 of the same law. The court adjourned the hearing to 26 January 2004. On 26 January 2004 the hearing was adjourned to 13 February 2004. On 13 February 2004 Aliaga Penal Court convicted and sentenced Dr Alp Ayan to 18 months 1 day imprisonment. Mrs Gunseli Kaya was convicted and sentenced to 18 months imprisonment and a 60 million TL fine. The sentences were not delayed due to the "tendency of the defendants to commit crimes".

and ill-treatment of detainees, we note that various commentators have characterised the proceedings as a form of judicial harassment of human rights defenders.

We welcome the initiative of the Ministry of Justice in undertaking to issue an administrative circular with a view to strengthening the protection of FMI physicians who report torture from any form of state-sponsored or state-tolerated harassment or intimidation. We also note that the allegations of harassment made during our First Advisory Visit have not been repeated.

Although it appears that a positive development is in progress, pending the issue of a circular by the Ministry of Justice and the possibility of a proper assessment of the implementation thereof, the recommendation is maintained and repeated.

We recommended that measures be taken to ensure that the law enforcement officers who bring the detainee to the medical examination are not the same as those involved in the detention or interrogation of the detainee or the investigation of the incident provoking the detention.

During the course of the first Advisory Visit we were informed by several of our interlocutors that the police or gendarme officers who bring a detainee to the medical examination room may be either the same as those involved in the detention or interrogation of the detainee or may be otherwise involved in the investigation of the incident that gave rise to the detention. We considered that the proximity of such persons to the detainee before and after the medical examination, when such persons may themselves have resorted to coercive interrogation techniques, raised obvious concerns regarding the willingness of detainees to disclose torture and ill-treatment during the course of forensic medical examinations.

In its response to the report of the first Advisory Visit the Ministry of Justice informed that since this issue falls within the competence of the Ministry of Interior, the recommendation has been transmitted accordingly. The Ministry of Justice also informed however that the Directorate General of Laws and Legislation of the Ministry of Justice is currently preparing an amendment to Article 10 (Health Control) of the By-Law on Apprehension, Detention and Statement Taking which, if adopted, will read as follows: "the law enforcement officers who bring the detainee to the medical examination and involved in the detention or interrogation of the detainee must be different". Implementation is scheduled for 2004.

During the course of the second Advisory Visit we were informed that the Ministry of Interior intends to issue an administrative decree on this issue at the earliest opportunity.

We welcome the commitment of both the Ministry of Justice and Ministry of Interior to ensuring that the law enforcement officers who bring the detainee to the

medical examination are not the same as those involved in the detention or interrogation of the detainee or the investigation of the incident provoking the detention.

Pending the issue of an administrative decree and the adoption of an amendment to Article 10 of the By-Law on Apprehension, Detention and Statement Taking the recommendation is maintained and repeated.

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

During the course of the first Advisory Visit several of our interviewees informed us that they continued to receive allegations that police and gendarme officers who brought detainees to forensic medical examinations actually remain in the examination room during the course of the examination. The Izmir branch of the HRFT suggested that such a practice occurred in 50% of all cases. We considered that there was a pressing need to take measures to ensure that all forensic examinations of detainees were conducted out of the sight and hearing of law enforcement officials, unless the physician concerned specifically requested otherwise, with written reasons, in a particular case.

In its response to the report of the first Advisory Visit the Ministry of Justice informed that on 3 January 2004, Article 10 of the By-Law on Apprehension, Detention and Statement Taking was amended so as to provide, "It is essential that the physician and the patient be alone and making the examination within the context of doctors and patient relations. However, the doctor may demand the examination to be made under the surveillance of law enforcement officials by claiming self-security issue. This demand shall be executed with written reasons." As an additional measure the Presidency of the Bar Associations, Ministry of Health and Institute of Forensic Medicine have all been notified to take measures promptly on the issue of displaying posters. Implementation is scheduled for 2004 and beyond.

During the course of the second Advisory Visit the Ministry of Interior informed the delegation that it has issued an administrative decree to police and gendarme officers reminding them that they must not be present during the forensic medical examination of a detainee. The President of the Institute of Forensic Medicine also informed the delegation that posters advocating the rights of detainees will soon be displayed in forensic medicine examination rooms.

We welcome the initiatives undertaken by the Ministry of Justice and Ministry of Interior towards ensuring that police and gendarmes are not admitted

into medical examination rooms. We note that progress in line with the recommendation appears to be underway. Pending effective implementation of the measures in question, the recommendation is maintained and repeated.

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

During the course of the first Advisory Visit in October 2003 the Izmir branch of the HRFT informed the delegation that following the completion of every forensic medical examination of a detainee a copy of the forensic medical report is handed to the law enforcement officer responsible for bringing the detainee to the examination. We noted that this practice raised obvious concerns regarding the willingness of detainees to disclose torture and ill-treatment and was also contrary to the provisions of the Istanbul Protocol.

In its response to the report of the first Advisory Visit the Ministry of Justice informed that on 9 October 2003 the Council of State decided (Case No. 2003/96) to annul the phrase "one of the copies shall be taken by the detention unit" in Article 10/5 of the By-Law on Apprehension, Detention and Statement Taking. The judgment of the Council of State will necessitate an amendment to the By-Law. Accordingly the Directorate General for Laws and Legislation of the Ministry of Justice has been notified to exclude the phrase "one of the copies shall be taken by the detention unit" from Article 10/5 of the By-Law on Apprehension, Detention and Statement Taking. Implementation is scheduled for 2004.

During the course of the second Advisory Visit we were given to understand that henceforth physicians who complete forensic medical examinations of detainees will be required to send their report directly to the public prosecutor in charge of conducting the investigation in a sealed envelope. Only the public prosecutor in charge of conducting the investigation will be empowered to open the seal. As complementary measures, Article 10/5 of the By-Law on Apprehension, Detention and Statement Taking continues to provide that one copy of the medical report should be given to the detainee and Article 21 of the same By-Law has been amended by adding "the lawyer has the right to examine any pre-detention document and take a copy of any document in the file without paying any fee" to this provision.

Notwithstanding the foregoing legislative amendments, our interviews reveal that actual practice regarding the transmission of forensic reports on detainees appears to vary somewhat from that provided for in law. The Diyarbakir FMI physician informed the delegation that one copy of his report stays with him and one copy is added to the

detainee's file. The entire file is then sent to the public prosecutor. No mention was made of the use of sealed envelopes to transmit the report to the public prosecutor and no mention was made of the detainee being provided with a copy of the report. The President of the Forensic Medicine Institute meanwhile informed the delegation that one copy of the forensic report is handed to the police or gendarme officer in a sealed envelope and the police or gendarme officer hands the report to the public prosecutor, thus ensuring that the report reaches the prosecutor as soon as possible. We were also told that breaking the seal would be regarded as a criminal offence. Another copy of the report is sent by post to the public prosecutor, thus ensuring that the report reaches the prosecutor. No mention was made of the detainee being provided with a copy of the report and the fact that a copy of the report is still handed to the police or gendarme officer, albeit in a sealed envelope, appears dubious when considered in the light of the decision of the Council of State (Case No. 2003/96) to annul the phrase "one of the copies shall be taken by the detention unit" in Article 10/5 of the By-Law on Apprehension, Detention and Statement Taking. The former Secretary General of the Turkish Medical Association meanwhile informed the delegation that, as he had heard, forensic reports are still handed to law enforcement officers without ever being placed in an envelope or sealed.

We welcome the undertaking of the Ministry of Justice to amend Article 10/5 of the By-Law on Apprehension, Detention and Statement Taking in line with the decision of the Council of State. We note, however, that the mere annulment of the phrase "one of the copies shall be taken by the detention unit" does not lead to the conclusion that it would be prohibited to give a copy to that unit. We consider that further measures are required to ensure a uniformity of practice throughout Turkey based upon effective implementation of the amended provision.

We note that progress in line with the recommendation is underway but consider that this is a matter that needs to be followed up. Accordingly the recommendation is maintained and repeated.

We recommended that measures be taken to afford lawyers the right to attend the forensic medical examination of their clients in circumstances where their client requests their attendance and measures be taken to inform detainees of their right to have their lawyer in attendance at any forensic medical examination.

Regarding the possibility for lawyers to be present during the course of official forensic medical examinations, during the course of the First Advisory Visit we were informed that according to law this is possible but there are two obstacles. First, many detainees do not have lawyers. Second, any lawyer who wishes to be present at a forensic medical examination must have the permission of the Bar Association's Group for the Prevention of Torture and having to obtain this permission can present a bureaucratic obstacle.

In its response to the report of the first Advisory Visit the Ministry of Justice informed that the problem could be overcome by amending the second sentence of the last paragraph of Article 10 of the By-Law on Apprehension, Detention and Statement Taking so as to provide that the lawyer may stay in the examination room at the request of his client. Such an amendment would place an obligation on lawyers to advise their clients of their right to have a lawyer present during any forensic medical examination. The Ministry of Justice informed that the Directorate General for Laws and Legislation of the Ministry of Justice has been notified to introduce the necessary amendment. Implementation is scheduled for 2004.

The Ministry of Justice was puzzled by the suggestion that any lawyer who wishes to be present at a medical examination must have the permission of the Bar Association Group for the Prevention of Torture and agreed to investigate. On the basis of the interviews conducted during the course of our second Advisory Visit we are satisfied that our earlier comments regarding the necessity of lawyers to obtain the permission of such a group in order to be present at a forensic medical examination were based on misinformation. The President of the Diyarbakir Bar Association, for example, was not aware of the existence of a Bar Association Group for the Prevention of Torture.

We welcome the commitment of the Ministry of Justice to amending the second sentence of the last paragraph of Article 10 of the By-Law on Apprehension, Detention and Statement Taking so as to provide that a lawyer may stay in the examination room at the request of their clients.

We note that progress in line with the recommendation is underway but consider that this is a matter that needs to be followed up. Accordingly the recommendation is maintained and repeated.

We recommended that measures be taken to enable lawyers and public prosecutors to request the attendance of physicians responsible for the writing of court forensic medical reports at court for the purposes of giving oral evidence as expert witnesses.

During the course of the first Advisory Visit the delegation was informed that the ability of lawyers to challenge the contents of official court forensic reports prepared by FMI physicians was limited by the fact that the authors of the reports did not attend court to give oral evidence. We therefore recommended that measures should be taken to enable lawyers and public prosecutors to request the attendance of physicians responsible for the writing of court forensic medical reports at court for the purposes of giving oral evidence as expert witnesses.

In its response to the report of the first Advisory Visit the Ministry of Justice has responded by noting that Article 65 of the Draft Code of Criminal Procedure is currently before the Justice Sub-Commission of the TGNA. Under the title "Appointment of Expert" this will, if adopted, provide "experts can either be appointed by the courts own

or can be decided to appoint by the court at the request of prosecutor or parties or lawyers". Further, Article 69 of the Draft Code of Criminal Procedure will, if adopted, provide under the title "Explanation of the Expert at the Trial" that "the expert may be summoned to make explanation at trial by the court's own decision or at a request." Implementation is scheduled for 2004.

In one sense the concerns that we expressed following the first Advisory Visit now appear unfounded. During the course of the second Advisory Visit the FMI physician in Diyarbakir informed the delegation that he attends court as an expert witness approximately 10-15 times a week and that he does so on the request of either the court or the parties to the proceedings. The President of the Diyarbakir branch of the Human Rights Foundation of Turkey confirmed that the FMI physician is called to court as an expert and presents his forensic reports to the court. However, during the second Advisory Visit the President of the Institute of Forensic Medicine informed the delegation that forensic physicians do not participate in court hearings themselves, only their reports are read. He viewed the provisions of the Draft Code of Criminal Procedure on expert evidence as a positive development that would permit specialists to be heard in court.

There appears to be a variation in practice across Turkey regarding the possibility for FMI physicians to attend court for the purposes of giving expert evidence. It is hoped that the adoption of the Draft Code of Criminal Procedure will unify the practice. We welcome the initiative of the Ministry of Justice in amending the Draft Code so as to enable either the court or the parties to proceedings to summon physicians responsible for the writing of court forensic medical reports to court for the purposes of giving oral evidence as expert witnesses.

We note that progress in line with the recommendation is underway. Pending adoption of the Draft Code of Criminal Procedure the recommendation is maintained and repeated.

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

During the course of the first Advisory Visit we received complaints to the affect that, contrary to the provisions of the Istanbul Protocol, detainees were often required to pay for forensic medical examinations. We considered that this was problematic in so far as it might dissuade genuine victims of torture from reporting and documenting the ill-treatment that they have suffered.

In its response to the report of the first Advisory Visit the Ministry of Justice has informed that Article 10/5 of the By-Law on Apprehension, Detention and Statement Taking reads "Medical examination, control and treatment shall be made free of charge

by the doctors of Forensic Medicine Institute or official health institutions or municipalities". Accordingly, it is not possible for physicians to demand the cost of a forensic medical examination from a detainee. The Ministry of Justice has however undertaken to request that the Ministry of Health issue an administrative circular on this issue.

During the course of the second Advisory Visit the Diyarbakir FMI physician informed the delegation that he does not ask for payment from detainees. However, the President of the Diyarbakir branch of the Human Rights Foundation of Turkey appeared to suggest that if a detainee is awaiting trial then the detainee is required to pay the cost of any forensic medical examination.

Whilst we note the comments of the Ministry of Justice regarding the state of existing legal provisions on this issue, we consider that in light of the comments of the Diyarbakir branch of the Human Rights Foundation of Turkey there is a need for further assessment regarding the implementation of the law.

Even though the regulation on costs for examinations seems to be adequate, the implementation thereof needs to be addressed. In this respect, the recommendation is maintained and repeated.

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

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

In the report of our first Advisory Visit in October 2003 we observed that although Article 90 of the Turkish Constitution provided that international treaties ratified by the government and approved by the TGNA had the force of law[52] and therefore not only could the provisions of the ECHR be directly invoked before Turkish courts but they had to be afforded priority over other domestic laws, we had received numerous complaints from lawyers and human rights defenders that judges were insufficiently sensitive to arguments based upon provisions of the ECHR and did not cite the case-law of the ECtHR within their own judgments. We noted that despite various initiatives by the Ministry of Justice to encourage judges to apply the ECHR in their judgments we had not yet seen any concrete examples illustrating the direct effect of the jurisprudence of the European Court within the Turkish court system.

In the period since the first Advisory Visit the Ministry of Justice has successfully completed a comprehensive ECHR training programme involving all judges and public

[52] Article 90 of the Turkish Constitution provides that: "International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements on the ground that they are unconstitutional."

prosecutors in Turkey. The project was divided into three phases. In the first phase, conducted in 2003 with the assistance of the European Union/Council of Europe, 9 five-day seminars were held in different regions of Turkey. These seminars provided 225 judges and public prosecutors with intensive training on the ECHR and the case-law of the ECtHR. In the second phase of the training programme conducted in February 2004, these 225 judges and public prosecutors were invited to Ankara where they received 3 days of methodology training. At the conclusion of the second phase, a pool of 225 human rights trainers had been established. In the third phase, conducted between 11 April 2004-9 July 2004 the 225 trainers conducted a series of seminars on the ECHR and the case-law of the ECtHR for 9,200 judges and public prosecutors at 30 centres throughout Turkey. Each judge and public prosecutor was intensively trained for a period of 25 hours over 2 ½ days. Relevant documentary materials prepared by the Council of Europe supported the training.

We are pleased to report that whereas in October 2003 we did not witness a single example of a judge or public prosecutor applying the provisions of the ECHR in their daily practice, the position in July 2004 is materially different. The ECHR training programme does appear to have yielded positive results in so far as judges and public prosecutors throughout Turkey are, to a far greater degree, now implementing the provisions of the ECHR and the decisions of the ECtHR in their decisions. All judges and public prosecutors that we met during the Second Advisory Visit were quite positive about the Human Rights Training that they had attended. They stated that they were now more aware of the Convention and better equipped to apply it. We regard this as a significant positive development. We note however that some judges and public prosecutors asked for more follow-up training on the subject.

In an effort to encourage local courts to apply the ECHR, on 2 March 2004 the Directorate General for EU Affairs of the Ministry of Justice wrote letters to all participants and requested that they send copies of any decisions that they make on the basis of the ECHR to the Ministry of Justice. The Ministry of Justice has begun collecting rulings of judges and decisions of public prosecutors that refer to the ECHR and the decisions of the ECtHR and now places them on its web-site. On the occasion of the second Advisory Visit approximately 100 judgments had been collected. A summary of 11 of these judgments is included in Annex C of this report.

Of course, it is one thing for judges and public prosecutors to say that they apply the ECHR in their decisions and for them to cite a selection of their judgments by way of example but that does not necessarily reflect the general situation or mean that the predominant mentality of the judiciary has changed. More enlightening therefore perhaps are the views of the lawyers who appear before the courts. In an extremely welcome development, the Diyarbakir Bar Association commented that judges have to a great extent aligned their rulings with those of the ECtHR. The Bar Association noted that all judges and public prosecutors have been trained on human rights and regarded this as an influential factor. The Bar Association observed that ideally public prosecutors should reject charges brought in violation of human rights before they enter the court system but nevertheless they regarded the change in the attitude of the judiciary as very satisfactory.

The Diyarbakir branch of the Human Rights Association informed the delegation that the human rights training organised by the Ministry of Justice has been efficient and it has begun to see the impact of it more and more in the attitude of judges and public prosecutors. The Association confirmed that judges in Diyarbakir do now base their rulings upon decisions of the ECtHR and went on to comment that it had observed an acute sensitivity amongst the judiciary towards investigating alleged violations of human rights. A slightly more cautious stance was adopted by the Diyarbakir branch of the Contemporary Lawyers Association. It did acknowledge that there has been some improvement in the mentality of the judiciary towards human rights but expressed concern that it was not yet sufficiently widespread or deep rooted. The Association did however recognise that this would take time. The representative of the Ankara branch of the Human Rights Association informed the delegation that he had witnessed cases referring to the ECHR and he had heard from branches of the organisation in other cities that courts elsewhere were referring to decisions of the ECtHR in their rulings. He went on to comment that he has personal dealings with several judges and public prosecutors and has observed that they are now applying the ECHR. Only the lone voice of the Istanbul Contemporary Lawyers Association remarked that the human rights training of judges and public prosecutors has had no positive impact.

On the basis of the foregoing we might conclude that, in a significant positive development, the complaints from lawyers and human rights defenders witnessed during the October 2003 Advisory Visit to the effect that judges and pubic prosecutors are insufficiently sensitive to arguments based upon provisions of the ECHR have now effectively ceased. However, we should add one qualification. The Diyarbakir branch of the Human Rights Association informed the delegation that judges are now investigating allegations of torture, however, despite their generally optimistic assessment of the situation in Diyarbakir, both the Diyarbakir Bar Association and the Diyarbakir branch of the Contemporary Lawyers Association independently commented that judges and public prosecutors in the south-east remain unduly tolerant of state agents who resort to torture or inhuman or degrading treatment. The suggestion appeared to be that prosecutors rarely follow up on detainees' allegations of torture and when such allegations are followed up, the detainee's trial often proceeds, and is sometimes completed, before the start of the torture trial. Given that both these organisations were otherwise prepared to be complimentary regarding the change in attitude of judges and public prosecutors towards the ECHR, we consider that their criticisms regarding the attitude of judges and public prosecutors in the south-east towards complaints of torture should be taken seriously. We therefore consider that there is a need for further training in south-east Turkey regarding the application of Article 3.

One further issue that was brought to our attention by a minority of judges and public prosecutors was a degree of concern regarding the attitude of the appellate courts to the ECHR. One of the judges that we met confirmed that all judges in his city had attended a human rights training programme and went on to comment that the programme was very beneficial. The judge remarked that he was able to learn about all the Articles of the ECHR and the training helped him in making his own judgments. He went on however to express some concern about the attitude of the High Court of

Appeals to judgments made on the basis of the ECHR. Upon being asked to elaborate, the judge informed the delegation that although the decisions of the European Court are increasingly being taken into account by the High Court of Appeals, if the local courts are to apply the Convention as a matter of routine then the High Court of Appeals must adopt a more pro-active stance in underscoring the importance of the decisions of the ECtHR. The judge expressed some concern that the High Court of Appeals was too often unwilling to find existing domestic legislation incompatible with the European Convention, preferring instead to wait for months or years in order for the legislation to be amended via the parliamentary process.

The Chief Public Prosecutor of the High Court of Appeals informed the delegation that judges and public prosecutors in Turkey act according to both the letter and spirit of the European Convention. There are no problems regarding implementation of the ECHR in the higher courts and the latest decisions taken by the High Court of Appeals are evidence of this. The President of the Constitutional Court informed the delegation that he and his colleagues follow the decisions of the European Court very closely and refer to them regularly. He said that he has visited the court in Strasbourg every year for the last 3 years and tells new members of the Constitutional Court about the European Court. He reminded us that Article 90 of the Turkish Constitution ensures that decisions of the ECtHR have priority over domestic law.

For our part, our interviews have left us with the impression that until relatively recently the higher courts have been insufficiently sensitive towards decisions of the lower courts made on the basis of provisions of the ECHR and decisions of the ECtHR. This has served to dissuade lower courts from applying the Convention in their decisions. However, as evidenced by the comments of the Chief Public Prosecutor of the High Court of Appeals and the President of the Constitutional Court, such a situation does not prevail today. Indeed, during the course of the second Advisory Visit we witnessed that the High Court of Appeals promulgated two important rulings based upon the ECHR.[53] [54] We are confident that such decisions will, over time, emphasise the importance of the ECHR and serve to encourage the lower courts to apply its provisions.

On the basis of the foregoing we are pleased to report that there does appear to have been a significant change in the predominant mentality of the judiciary towards the ECHR since the first Advisory Visit. This is not to say that problems do not persist in the

[53] On 9 June 2004 the Ninth Criminal Chamber of the High Court of Appeals quashed the decision of No.1 Ankara State Security Court convicting four former DEP deputies, Leyla Zana, Hatip Dicle, Orhan Dogan and Selim Sadak of membership of an illegal organisation in accordance with the Article 168 of the Turkish Penal Code. The decision of High Court of Appeals was based in part upon the fair trial guarantees enshrined within Article 6 of the European Convention on Human Rights. The re-trial is scheduled to start on 22 October 2004.

[54] During the course of the second Advisory Visit the Eighth Criminal Chamber of the High Court of Appeals quashed the decision of No. 3 Istanbul State Security Court convicting Erdal Tas of inciting public hatred and enmity through the press on the basis of differences of race and religion in accordance with Article 312 of the Turkish Penal Code. The decision of the High Court of Appeals was based in part upon the guarantee of freedom of expressions enshrined within Article 10 of the European Convention on Human Rights.

approach of individual judges and public prosecutors. Further, we might observe that the attitude of police and gendarme officers to the ECHR falls outside the scope of our assessment. However, we consider that the Ministry of Justice can at least now begin to direct its efforts towards maintaining and developing further what appears to be a newfound enthusiasm for human rights within the Turkish judiciary.

We note that several projects are ongoing. The European Commission is paying for 3 senior judges to travel to Strasbourg on a study visit. The Ministry of Justice has established an on-line human rights information databank that is accessible to all judges from their personal notebook computers. The databank contains all the rulings of the ECtHR and domestic decisions involving human rights. The 225 trainers continue to train police and gendarme officers, assistant judiciary personnel and lawyers in the areas where they are located. Finally, in 2005-2006 the Ministry of Justice will provide judges and public prosecutors with more focussed human rights training relevant to the courts in which they operate. Thus, for example, a judge working in a Criminal Court of Peace can expect to receive comprehensive training on issues relating to apprehension and detention and the guarantees afforded in this regard by Articles 3 and 5 of the ECHR. Such initiatives are warmly welcomed.

In conclusion, we consider that the Ministry of Justice deserves to be commended for its commitment to ensuring the application of the ECHR in domestic law, for the various initiatives that it has undertaken in furtherance of this goal and for the positive results that such initiatives appear to have yielded. In support of the Ministry of Justice's commitment to undertake further projects in this regard, the recommendation is maintained and repeated.

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

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

In the report of the first Advisory Visit we noted that Articles 159, 169 and 312 of the Turkish Penal Code and Articles 7 and 8 of the Anti-Terror Law had in the past been used to restrict the right to freedom of expression in Turkey in contravention of Article 10 of the European Convention on Human Rights. We reported that the seven reform packages introduced between February 2002 and August 2003 introduced several legislative amendments that restricted the field of application of these articles and, in certain instances, lowered their level of sanctions. We welcomed these legislative amendments but noted that ultimately increased respect for the right to freedom of expression in Turkey would depend upon the manner of their judicial implementation.

We reported that statistics supplied by the Ministry of Justice evidenced a substantial reduction in both the number of prosecutions brought and the number of convictions entered for so-called freedom of thought offences between the years 2001 and 2003. We reported that our interviews also revealed a very good level of implementation of the legislative amendments to Articles 159, 169 and 312 of the Turkish Penal Code and Articles 7 and 8 of the Anti-Terror Law in so far as the competent authorities appeared to be actively reviewing the files of persons who might potentially have been able to benefit from the legislative amendments. However, we also reported that our interviews revealed a widespread practice of alternative charging whereby public prosecutors who found themselves unable to secure a conviction under one amended article simply re-charged the person concerned under an alternative provision. We also observed that, despite the amendments to date, the broad formulation of certain of the provisions still left them open to abuse. Whilst welcoming the efforts of the Turkish government to date then, we also considered that a more thorough reform of law and practice was required in order to fully guarantee the right to freedom of expression in Turkey.

In its reply to the report of the first Advisory Visit the Ministry of Justice has informed that a revised Draft Criminal Code is currently being debated before the Justice Sub-Commission of the TGNA. A parallel opinion on the issue of the compatibility of the existing Penal Code with Article 10 of the ECHR has been prepared within the framework of a Joint European Union and Council of Europe Project. This opinion has been transmitted to the members of the Sub-Commission for consideration during negotiations surrounding the Draft Criminal Code. Implementation is scheduled for 2004.

We warmly welcome the fact that, in line with our recommendation, the provisions of Articles 159, 169 and 312 of the Turkish Penal Code and Article 7 of the Anti-Terror Law are being reviewed by the TGNA for compatibility with the provisions of Article 10 of the ECHR. We recommend that, following the adoption of the revised Criminal Code, a further assessment be undertaken in order to examine the extent to which both the nature of the revised provisions and their manner of implementation afford applicable guarantees for freedom of expression in Turkey.

Pending the adoption of the revised Criminal Code however, an indication of the effect of the reforms introduced between February 2002 and August 2003 upon the degree of freedom of expression enjoyed in Turkey may be gleaned from an analysis of statistical data relating to the number of cases filed and rendered in 2001 and 2003 under Articles 159, 169 and 312 of the Turkish Penal Code and Articles 7 and 8 of the Anti-Terror Law (Table I). The figures in parentheses represent the total number of non-prosecution decisions taken in 2003 in relation to each of the aforementioned articles.

Table I: Cases filed by public prosecutors in 2001 and 2003

	CASES FILED IN 2001	CASES FILED IN 2003
TPC 159	**647**	**402 (84)**
TPC 169	**1461**	**863 (586)**
TPC 312	**352**	**107 (76)**
ANTI-TERROR LAW	**509**[55]	**304**[56] **(121)**[57]

On the basis of the information provided in Table I it may be concluded that between 2001 and 2003 there has been a significant overall decrease in the number of prosecutions filed under Articles 159, 169 and 312 of the Turkish Penal Code and Articles 7 and 8 of the Anti-Terror Law.

It is also possible to undertake a comparison of the final outcome of proceedings brought under Articles 159, 169 and 312 of the Turkish Penal Code and the Articles of the Anti-Terror Law in 2001 and 2003 (Tables II and III).

Table II: Finalised cases in 2001

NUMBER OF FINALISED CASES IN 2001			
CRIME TYPES	**NUMBER OF JUDGMENTS**	**NUMBER OF CONVICTIONS**	**PERCENTAGE OF CONVICTIONS**
TPC 159	**401**	**104**	**25.94%**
TPC 169	**2002**	**352**	**17.58%**
TPC 312	**398**	**129**	**32.41%**
ANTI-TERROR LAW	**463**	**202**	**43.63%**

Table III: Finalised cases in 2003

NUMBER OF FINALISED CASES IN 2003

[55] No statistics are available in relation to how many of the 509 proceedings brought under the Anti-Terror Law were brought under Articles 7 and 8 respectively.
[56] Of the 304 prosecutions brought under the Anti-Terror Law in 2003, 189 cases were brought under Article 7 and 115 cases were brought under Article 8.
[57] Of the 121 decisions of non-prosecution under the Anti-Terror Law in 2003, 46 cases involved decisions under Article 7 and 75 cases involved decisions under Article 8.

CRIME TYPES	NUMBER OF JUDGMENTS	NUMBER OF CONVICTIONS	PERCENTAGE OF CONVICTIONS
TPC 159	**487**	**250**	**51.33 %**
TPC 169	**5240**	**917**	**17.5 %**
TPC 312	**545**	**312**	**57.23 %**
ANTI-TERROR LAW	**718**[58]	**152**[59]	**21.12 %**[60]

On the basis of the information provided in Tables II and III it might be concluded that the number of judgments rendered under Articles 159, 169 and 312 of the Turkish Penal Code and Articles 7 and 8 of the Anti-Terror Law has increased significantly between 2001 and 2003. This may of course have been occasioned by the active review of files necessitated by the introduction of the reform packages. Further however, expressed as a percentage, although the proportion of persons convicted under the Anti-Terror Laws has decreased, the proportion of persons convicted under Articles 159, 169 and 312 of the Turkish Penal Code appears to have either remained the same or increased. This might be said to be consistent with a practice of alternative charging.

We enter a caveat however in so far as any assessment of the implementation of the reforms introduced between February 2002 and August 2003 must bear in mind that the delegation has not been provided with any statistical information relating to the first or second three-month periods of 2004 and none of the figures provided to us offer any indication as to the subject matter of the prosecutions that have been brought.

During the course of the second Advisory Visit we did become aware of one clear instance of what we consider to be an example of inadequate implementation of the reforms introduced between February 2002 and August 2003 however, namely the treatment of publications confiscated pursuant to convictions under Article 8 of the Anti-Terror Law.

The problem is illustrated by the case of the Yurt Publishing House. A total of 64 cases have been filed against Mr Unsal Ozturk, of the Yurt Publishing House, concerning books that he published in violation of Article 8 of the Anti-Terror Law. On 30 July 2003, following the abolition of Article 8, Mr Ozturk's lawyer applied to No. 2 Ankara State Security Court and requested that all confiscation and seizure judgments concerning the books should be lifted. In November and December 2003 No. 2 Ankara State Security Court rejected the requests. The court stated that although Article 8 had been abolished, the content of the books still violated Articles 312 of the Turkish Penal Code

[58] Of the 718 judgments under the Anti-Terror Law in 2003, 358 persons were tried under Article 7 and 360 persons were tried under Article 8.
[59] Of the 152 convictions under the Anti-Terror Law in 2003, 68 persons were convicted under Article 7 and 84 persons were convicted under Article 8.
[60] 18.99 % of cases under Article 7 resulted in a conviction in 2003 and 23.33 % of cases under Article 8 resulted in a conviction in 2003.

and Article 7 of the Anti-Terror Law and therefore the confiscation and seizure decisions could not be lifted.

During the course of the second Advisory Visit the Ankara branch of the Human Rights Association informed the delegation about a case that it was involved with in which a person had been convicted under Article 8 of the Anti-Terror Law for publishing a book, the contents of which were found to constitute propaganda against the indivisible unity of the Turkish state. The Human Rights Association explained that following the abolition of Article 8 it had demanded the return of the book on the ground that publication of the book was no longer a criminal offence. The competent authorities had refused to return the book, stating that such an action was justified because, despite the abolition of Article 8, the book might contravene another article of the Anti-Terror Law or Turkish Penal Code. The Human Rights Association complained that only a court should be able to take such a decision and that in order for such a decision to be taken the book would have to be first republished. The Ankara branch of the Contemporary Lawyers Association similarly referred to a publication that they had produced regarding the alleged torture and extra-judicial killing of prisoners at Ankara Central Closed Prison in 1999. The Association informed the delegation that following the amendment of Article 169 of the Turkish Penal Code, the lawyers responsible for producing the publication had been acquitted, however the publication itself still had not been returned. A judge of the newly established specialised Heavy Penal Court in Ankara confirmed that persons who have been convicted of offences under Article 8 of the Anti-Terror Law on the basis of articles that they have published have not, despite the abolition of Article 8, had their publications returned to them. A public prosecutor of the newly established specialised Heavy Penal Court in Istanbul meanwhile informed the delegation that such material should be returned to the former accused.

On the basis of the foregoing we consider that the right to freedom of expression continues to be undermined in Turkey in so far as despite the decriminalisation of certain publications as a result of the abolition of Article 8 of the Anti-Terror Law and the amendment of various other related provisions, some courts in Turkey remain reluctant to quash confiscation decisions made in relation to these publications even though the act of possessing/publishing the articles in question no longer constitutes an offence as originally charged. Whilst we recognise that such articles may still contravene alternative provisions of the Anti-Terror Law or Turkish Penal Code, we consider that in the first instance the appropriate course of action is for the competent authorities to lift all such confiscation orders and return the publications to the former accused.

Pending the adoption of the revised Criminal Code and a further assessment of the extent to which both the nature of the revised provisions and their manner of implementation afford applicable guarantees for freedom of expression in Turkey, the recommendation is maintained and repeated.

3. Amendments to the role and functioning of prison enforcement judges

We recommended that:

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

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

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

In the report of the first Advisory Visit we noted that on 23 May 2001, Law No. 4675 on the Establishment of Supervisory Judges came into effect. In an effort to strengthen judicial supervision of all practices and activities in prisons, this law established prison enforcement judges as a new judicial function in Turkey. These judges were tasked with responsibility for reviewing complaints made by prisoners concerning matters such as admittance to the penitentiary institutions, accommodation, food, heating, hygiene, health care, work and communication; and the execution of sentences, the authorisation to be transferred to an open penitentiary, decisions on transfers and release and disciplinary precautions and measures.

We welcomed the introduction of prison enforcement judges as a positive measure to strengthen judicial supervision of practices and activities in Turkish prisons and thereby contribute to the advancement of prisoner's rights. However, we noted that information received during the course of our interviews suggested that far from providing an effective mechanism for the advancement of prisoners rights, prison enforcement judges were untrained, had no relevant background experience, regularly undertook merely a paper review of complaints and were only competent to receive complaints from convicted persons in prison rather than pre-trial detainees.

In its response to the report of the first Advisory Visit the Ministry of Justice informed that, regarding the recommendation that prison enforcement judges be provided with training in relation to both relevant domestic legal provisions and international standards relating to the rights of persons under any form of detention or imprisonment, prison enforcement judges have been trained on such matters through an in-service training programme. Relevant publications have been provided to enforcement judges

and they will receive further training within the context of the Judicial Modernisation and Penal Reform Project. The Ministry of Justice has undertaken to ensure that such training initiatives continue.

Regarding the recommendation that the competence of prison enforcement judges be extended so as to enable them to receive complaints from any individual who is deprived of his liberty in any law enforcement facility in Turkey, the Ministry of Justice has rejected the recommendation. The Ministry of Justice has reminded the delegation that pre-trial detention units exist within the administrative structure of the Ministry of Interior and not the Ministry of Justice, persons detained within a police or gendarme station for 24 hours are not subject to any mechanism of enforcement and the legality of their detention is in any event permanently supervised and controlled by public prosecutors who make regular checks.

Regarding the recommendation that measures be taken to ensure that, where the substance of the complaint necessitates, prison enforcement judges undertake site visits to detention facilities in order to assess the merits of a complaint, the response of the Ministry of Justice does not appear to engage the recommendation. The Ministry of Justice states that pursuant to Article 6/2 of the Law on the Establishment of Supervisory Judges (Law No. 4675), where necessary, enforcement judges may commence ex officio proceedings in relation to a complaint. Under Article 6 of Law No. 4675 it is possible to appeal against the decision of an enforcement judges. Complaints lodged with the Ministry of Justice are not considered as commencing a legal remedy. The Ministry of Justice examines complaints and informs the competent authorities. The Ministry of Justice may give necessary instructions to public prosecutors. It is therefore considered that no further measure is necessary.

We welcome the fact that prison enforcement judges continue to be trained in relation to both relevant domestic legal provisions and international standards relating to the rights of persons under any form of detention. We note the comments of the Ministry of Justice regarding the propriety of extending the competence of prison enforcement judges to receive complaints from any individual deprived of his liberty in any law enforcement facility in Turkey. In light of these comments, and recalling concerns expressed to the delegation regarding the limited frequency with which public prosecutors actually visit police and gendarme stations in practice, we consider that the recommendation might more properly be amended so as to recommend that measures be taken to ensure that public prosecutors actually make regular checks at police and gendarme stations. Regarding the recommendation that measures be taken to ensure that, where the substance of the complaint necessitates, prison enforcement judges undertake site visits to detention facilities in order to assess the merits of a complaint, the response of the Ministry of Justice does not appear to engage the recommendation.

We note that the recommendation on training of enforcement judges appears to have been met. We do however consider that this matter should be followed up with continuous training activities.

The recommendation that enforcement judges be required to make site visits to detention facilities under the responsibility of the Ministry of Justice is maintained and repeated.

Amending our previous recommendation, we recommend that measures be taken to ensure that public prosecutors regularly check conditions for detained persons in police and gendarmerie stations.

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

We recommended that:

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

(ii) measures be taken to ensure that the Prime Ministry's Human Rights Presidency is provided with sufficient resources to enable it to fulfil its function.

The Prime Ministry Human Rights Presidency ("Human Rights Presidency"), established in 2001, is designated as a permanent co-ordinating body for all state projects related to human rights. It acts on behalf of the Prime Minister and is responsible for co-ordinating all other ministerial departments, including the Ministry of Interior and Ministry of Justice. It has the authority to both investigate alleged violations of human rights and also recommend changes in the law in favour of increased respect for human rights.

On the occasion of the first Advisory Visit we noted that the Human Rights Presidency had not been particularly functional since its establishment in 2001. However, we formed the strong impression that its new president was genuinely committed to increasing human rights standards within Turkey to a level equal to that enjoyed by those within the European Union. In the absence of any reliable statistics we concluded that it was too early for us to make any proper assessment of the effectiveness of the Human Rights Presidency but we noted that it had the potential to make a real contribution to the improvement of the human rights situation of all persons throughout Turkey.

Organisation

In the period since the first Advisory Visit the organisational structure of the Human Rights Presidency has been reorganised. The Human Rights Presidency is now comprised of a central office in Ankara, 81 provincial Human Rights Committees and 850 sub-provincial Human Rights Committees throughout Turkey. The regional Committees send monthly reports to the central office in Ankara regarding the state of human rights in their area.

The composition of the regional Committees has in the past been criticised as being over-representative of the public sector. In response to this criticism, in November 2003 the Provincial and Sub-provincial Human Rights Committees were restructured so as to allow for greater civil society involvement. Each Committee now consists of at least 16 members, of which only 2 are public officials. The remainder of the membership consists of the local mayor, members of the local media and of representatives of associations or foundations working in the area of human rights, of the Mukhtar, of trade unions, of the medical association, of the bar association, of higher education, of the TGNA, and of the Provincial General Assembly. The Provincial Committees furthermore have a representative of the Chamber of Industry and Trade.

Official and public awareness

In line with the recommendation made following the first Advisory Visit, measures have been taken to increase public awareness regarding the role and function of the Prime Ministry's Human Rights Presidency. During the course of the second Advisory Visit the President of the Human Rights Presidency informed the delegation that since October 2003 round table meetings have been organised with representatives of non-governmental organisations ("NGO's") in 7 cities. Each meeting lasted for 2 days and was attended by 30 NGO representatives. Two meetings have been held with representatives of the media in Istanbul and Ankara. Following these meetings the activities of the Human Rights Presidency were reported on television and in the newspapers. The Human Rights Presidency has produced 200,000 leaflets that explain the concept of human rights and these have been distributed throughout Turkey. In Diyarbakir the leaflets were handed out on the streets and this reportedly attracted media coverage. The Human Rights Presidency has also produced 5 posters addressing 5 different topics (i.e. prohibition on torture, freedom of expression, freedom of association etc.) and 100,000 copies of each poster have been produced. The Human Rights Presidency is in the process of producing two 30-minute television documentaries on human rights, as well as several 30-second spot films on various human rights issues. The Human Rights Presidency has also begun to produce a monthly bulletin in which it describes its activities and presents statistical information relating to the complaints it has received.

Financial resources

Notwithstanding the significant measures that have been taken since the first Advisory Visit to increase public awareness regarding the role and function of the Prime Ministry's Human Rights Presidency, further measures are required to ensure that the Human Rights Presidency is provided with sufficient resources to enable it to fulfil its function. On the occasion of the second Advisory Visit the President of the Human Rights Presidency informed the delegation that the Presidency receives a budget of just 15,000 Euros per year in order to meet all of its expenses. The President complained that this is insufficient and as a consequence the Human Rights Presidency remains heavily dependent upon the financial contributions of donors.

Complaints and investigations

During the course of the first Advisory Visit the delegation was informed that there was a need to increase the quality of the monthly reports sent to the Human Rights Presidency by the provincial and sub-provincial Committees. We also noted that there was an absence of any reliable statistical information by which to assess the effectiveness of the Human Rights Presidency.

Since January 2004, in an effort to produce reliable statistical information and better evaluate alleged human rights violations, the Human Rights Presidency has developed a standardised application form that is completed by all individuals who claim to have suffered a violation of their human rights. The regional Committees send the application forms to the Human Rights Presidency at the end of each month. The information provided in these forms has enabled the Human Rights Presidency to prepare statistical data with a view to assessing to what extent reforms in the area of human rights have been translated into practice. Statistical information relating to both the volume and subject matter of complaints received by the Human Rights Presidency in the period January-May 2004 is presented in Table I:

Table I: Volume and subject matter of complaints received by the Human Rights Presidency (January-May 2004)

RIGHTS CLAIMED TO BE VIOLATED						TOTAL	RATE
	Jan	Feb	Mar	Apr	May	TOTAL	RATE
NUMBER OF PERSONS	76	64	74	66	48	328	%
TOTAL VIOLATIONS	138	118	177	134	139	706	100%
Prohibition torture and maltreatment	23	7	12	14	7	63	9%
Right to liberty and security	20	7	13	12	8	60	8%
Right to life	5	8	10	15	16	54	8%
Health and patient rights	6	9	10	12	12	49	7%
Right to a fair trial	12	12	10	8	5	47	7%
Right to citizenship	3	11	8	8	14	44	6%
Non-discrimination	8	6	10	8	11	43	6%
Right to property	10	6	16	6	2	40	6%
Freedom to work and sign contracts	9	6	6	8	3	32	5%
Social security rights	0	3	7	10	8	28	4%
Right to education	5	3	2	6	10	26	4%
Right to protection of the family	11	4	4	3	3	25	4%
Freedom of expression	4	2	5	2	7	20	3%
Freedom of movement and residence	6	2	6	1	4	19	3%
Freedom of conscience and religion	2	4	3	1	8	18	3%
Right to petition	0	4	8	4	0	16	2%
Right of immunity of residence	5	3	3	2	3	16	2%
Environmental rights	0	1	6	3	6	16	2%
Right to privacy	2	1	7	2	1	13	2%
Freedom of communication	1	4	4	2	2	13	2%

Right of disabled persons	0	3	2	1	2	8	1%
Meeting and demonstration rights	1	1	2	1	0	5	1%
Freedom of association	0	1	3	0	0	4	1%
Freedom of arts and sciences	0	1	2	0	0	3	0%
Prohibition of forced labour	1	0	2	0	0	3	0%
Political activity rights	0	0	2	0	0	2	0%
Other	4	9	14	5	7	39	6%

On the basis of the information provided in Table I it is possible to observe that in January 2004, 76 people throughout Turkey applied to the Human Rights Presidency alleging a total of 138 human rights violations. In February 2004, 64 people applied alleging a total of 118 human rights violations. In March 2004, 74 people applied alleging a total of 177 human rights violations. In April 2004, 66 people applied alleging a total of 134 human rights violations and in May 2004, 48 people applied to the Human Rights Presidency alleging a total of 139 human rights violations. Of the complaints received, the greatest proportion raised alleged violations of the prohibition on torture and maltreatment, right to liberty and security of the person and the right to life. The delegation has been further informed that in May 2004 approximately 45% of all complaints originated from Turkey's three largest cities, Istanbul, Ankara and Izmir. Meanwhile, 90% of complaints originated from men.

The statistical information provided to the delegation relates only to the nature and volume of the complaints received by the Human Rights Presidency. We have not been provided with any basis upon which to assess the adequacy of the measures adopted by the Human Rights Presidency in resolution of the complaints received. This significantly undermines our ability to undertake any proper assessment of the effectiveness of the Human Rights Presidency as a mechanism for the promotion and protection of human rights in Turkey. Nevertheless, on the information we have before us, it is clear that in the period January-May 2004, the 931 provincial and sub-provincial Human Rights Committees received complaints from just 328 people. This means that on average just over 65 people, in a country of just over 65 million people, registered a complaint every month. Expressed another way, in the period January-May 2004, just 1 in every million people in Turkey complained to the Human Rights Presidency each month. If this figure were a reflection of the extremely low level of human rights violations in Turkey then it would of course be welcome. However, we consider that it is more likely to be indicative of the low level of public awareness and/or public confidence in the ability and willingness of the Human Rights Presidency to provide effective redress for alleged human rights violations.

The comments of human rights defenders interviewed by the delegation are enlightening in this regard. The Ankara branch of the Human Rights Association informed the delegation that it had refused an invitation to be represented on a regional Human Rights Committee. The Association justified its position on the ground that the Committees remain under the overall supervision of a Governor and allegedly act in a defensive manner in order to prevent human rights violations from proceeding to the ECtHR. The Association also commented that the individual application procedure adopted by the regional Human Rights Committees has been ineffective. The Diyarbakir

branch of the Human Rights Association confirmed that it too had refused an invitation to be represented on a Human Rights Committee. The Association remarked that it regarded the structure of the Committees as undemocratic. The Association explained that the Governor, who is appointed rather than elected, presides over the Committees, the Headquarters of the Committees are in the office of the Governor, all meetings take place within these offices, all complaints are lodged with the office of the Governor and the secretariat work of the Committees is carried out by staff of the officer of the Governor. The Diyarbakir branch of the Human Rights Association went on to comment that whilst the Human Rights Presidency is sensitive to human rights issues, it does not contribute significantly to the promotion and protection of human rights in Turkey. The Association submitted that this was clear from the number of applications received by the Human Rights Committee in Diyarbakir. The Association informed the delegation that in a one-month period when the Diyarbakir branch of the Human Rights Association received 970 applications, the Diyarbakir Human Rights Committee received just 3 applications, and two of these were merely requests for more coal. The Association suggested that the Human Rights Committees should be re-structured so as to permit NGO's to be more effective. It suggested that this might be achieved by separating the Committees from the Office of the Governor. The Istanbul branch of the Human Rights Foundation of Turkey informed the delegation that the Foundation is currently represented on the Human Rights Committees but it too considered that the Committees are not very effective. The Foundation informed the delegation that it is in fact considering resigning from the Human Rights Committees in the near future.

We remain of the opinion that the President of the Human Rights Presidency is genuinely committed to increasing human rights standards within Turkey to a level equal to that enjoyed by those within the European Union. We also believe that the Human Rights Presidency could potentially make a real contribution to the improvement of the human rights situation of all persons throughout Turkey. We welcome the various public awareness raising activities that have been undertaken since the first Advisory Visit, the restructuring of the regional Human Rights Committees so as to ensure greater civil society involvement and the efforts at producing statistical information in order to better evaluate alleged human rights violations. However, we consider that at present it is too early to regard the Human Rights Presidency as a significant force in the movement to promote and protect human rights. It is most apparent that despite measures taken to increase public awareness regarding the role and functioning of the Human Rights Presidency, the number of individuals who choose to complain to the Presidency remains extremely low. This suggests a need to further raise public awareness and/or further increase public confidence in the role and functioning of the Human Rights Presidency. We are pleased to note that activities are continuing in this regard. We also note however that most complaints originate from men located in major urban areas. This suggests a need to target public awareness activities within rural areas and amongst the female population. We have no means of assessing the adequacy of the measures introduced in response to the complaints that have been received but we note that human rights defenders throughout Turkey do not yet regard the Human Rights Committees as providing an effective avenue of redress. We urge the Human Rights Presidency to

record statistical information in relation to the resolution of complaints rather than merely the volume and subject matter of complaints.

We further recommend that, as a means of instilling both human rights defenders and the population of Turkey as a whole with greater confidence in the functioning of the Human Rights Presidency, consideration be given to separating the Human Rights Committees from the Office of the Governor. In this regard, we invite the Human Rights Presidency to refer to the recommendations on the role of state officials in human rights organisations set forth in the Principles relating to the status and functioning of national institutions for protection and promotion of human rights ("Paris Principles").[61] The Principles envisage that representatives of government may participate in national human rights institutions but that they should participate in an advisory capacity only. With this principle in mind we recommend that the By-Law establishing the Human Rights Presidency be amended so as to provide that governors should no longer automatically chair each committee but that instead each committee should elect its own chairman.

E. Conclusion

In the absence of any judicial statistics for the year 2003 at the date of the second Advisory Visit, we have no basis upon which to depart from our earlier assessment that the judicial system in Turkey is faced with a large backlog, the workload of judges is excessive, public prosecutors are similarly overworked and the average duration of judicial proceedings remains long.

Nevertheless, in the period since the first Advisory Visit various important initiatives have been undertaken in an effort to increase the quality and efficiency of the justice system. Without providing an exhaustive list, a total of 136 courts with an inadequate caseload have been closed and 511 judges and public prosecutors transferred to work in other courthouses. A specialised commission has been established to commence work on necessary measures to abolish the distinction between Civil Courts and General Civil Courts of First Instance. A draft law to introduce the possibility of Alternative Dispute Resolution is under consideration at the Prime Ministry and the Draft Code of Criminal Procedure will, when enacted, empower courts to reject indictments brought on insufficient evidence. Beyond this, the National Judicial Network Project is progressing according to schedule and will soon be operational. All judges and public prosecutors have been equipped with personal computers and over 9,000 judges and public prosecutors and 23,000 administrative court staff have received training in computer use. The Draft Law on the Establishment of Regional Courts of Appeal has now been approved by the TGNA and the project to establish the new appeal courts is progressing according to schedule, with training programmes for judges, public prosecutors and other staff of the new courts being prepared. A total of 21 juvenile courts and 143 family courts are now operational.

[61] United Nations General Assembly Resolution 43/134 of 20 December 1993 entitled 'Principles relating to the status and functioning of national institutions for protection and promotion of human rights'.

Forensic medical examinations of detainees will in future take place in hospitals and health centres rather than in facilities within court buildings. A total of 11 newly established health centres are presently ready to begin work and the remaining courthouse facilities will be transferred shortly. Regional training of judges, public prosecutors and lawyers in the effective forensic examination of detainees is ongoing. Initiatives have also been undertaken to ensure that law enforcement officers who bring detainees to medical examinations are not the same as those involved in the detention or interrogation of the detainee, that all forensic examinations of detainees are conducted out of the sight and hearing of law enforcement officials and that forensic examination reports are no longer handed to the law enforcement authorities. Finally, in the period since the first Advisory Visit the Ministry of Justice has successfully completed a comprehensive human rights training programme involving all judges and public prosecutors in Turkey. The Ministry now collects decisions of judges and public prosecutors that refer to the ECHR and is committed to organising ongoing human rights training initiatives in the future.

Notwithstanding such positive developments however, there remains considerable scope for further reform. There has been no significant improvement in the financial resources of the judiciary, with judicial services continuing to be allocated just 0.8% of the overall budget. In order to reduce the considerable backlog of cases in the courts and to speed up proceedings, there remains a need to appoint more judges and public prosecutors. At present there are 560 vacancies (a figure which is estimated to rise to 900 by the end of 2004) and an estimated 1,800 more judges and public prosecutors are required in order to begin reducing the existing heavy caseload. Laws introducing measures designed to facilitate the settlement of private law disputes without the need for timely and costly litigation before the courts, to simplify the rules relating to jurisdiction in order to reduce the number of artificial suits, and to introduce a system of plea bargaining for criminal cases are still being negotiated. Once adopted, the impact of the new legislation will need to be carefully monitored. There appears to be only very limited interest within the judiciary for the creation of a written Code of Conduct establishing formal standards for the ethical conduct and discipline of judges and public prosecutors.

Primary responsibility for the documentation of ill-treatment of detainees at the hands of agents of the state continues to lie with physicians who are themselves attached to an agency of the state. We consider that a more thorough reform of the administration of forensic medicine services in Turkey is required so as to secure the independence of physicians engaged in the role of documenting ill-treatment by state officials. At the same time, forensic medical examinations continue to be carried out otherwise than in accordance with the requirements of the Istanbul Protocol.

An analysis of statistical data relating to the number of cases filed and rendered in 2001 and 2003 under Article 159, 169 and 312 of the Turkish Penal Code and Articles 7 and 8 of the Anti-Terror Law suggests that a practice of alternative charging persists. At the same time, the right to freedom of expression continues to be undermined in so far as despite the decriminalisation of certain publications as a result of the abolition of Article

8 of the Anti-Terror Law and the amendment of various other related provisions, some courts in Turkey remain reluctant to quash confiscation decisions made in relation to these publications even though the act of possessing/publishing the articles in question no longer constitutes an offence as originally charged.

We also note that the number of complaints brought before the Prime Ministry's Human Rights Presidency is low, despite various initiatives that have been undertaken to increase public awareness of the institution. This suggests a continuing lack of public awareness and/or lack of public confidence in the ability and willingness of the Human Rights Presidency to provide effective redress for alleged human rights violations.

VII – SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The State Security Courts

1. We warmly welcome the abolition of the State Security Courts. There remains however a need for continued monitoring of the functioning of the specialised Heavy Penal Courts. There is also a lack of consistency regarding the treatment of cases that have been transferred from the SSCs to the specialised Heavy Penal Courts and this raises concerns regarding the right to a fair trial.

Independence of the Judiciary

2. Article 140/6 of the Turkish Constitution continues to attach the administrative functions of the judiciary to the Ministry of Justice. We consider that this may foster a tendency for the interests of the judiciary to become both subsumed within and subordinated to the wider political interests of the administration. We recommend that Article 140/6 of the Turkish Constitution be removed and replaced with a provision that emphasises that the administrative functions of the judiciary are the sole responsibility of the judiciary themselves.

3. The Ministry of Justice continues to retain an absolute influence over all decisions relating to the selection of candidate judges. We recommend that responsibility for the conduct of selection interviews for candidate judges be vested solely with the High Council of Judges and Public Prosecutors rather than with personnel from the Ministry of Justice.

4. The Ministry of Justice has no publicly available objective criteria by which applicant candidate judges are assessed when attending for oral interview. We recommend that objective criteria be introduced with the aim of ensuring that the selection of candidate judges is based on merit, having regard to qualifications, integrity, ability and efficiency.

5. Whilst the establishment of the Justice Academy is a positive step forwards, its organisational structure continues to create the potential for the Ministry of Justice to unduly influence the pre-service and in-service training of judges. We recommend that the foundation law of the Justice Academy be amended so as to remove the dependency of the Academy upon the Ministry of Justice.

6. Pursuant to Article 159 of the Turkish Constitution, both the Minister of Justice and his Under-Secretary continue to occupy two seats on the seven member High Council of Judges and Public Prosecutors. The Ministry of Justice has expressed no commitment to either removing the voting rights of the Minster of Justice or removing the Under-Secretary from the High Council. We recommend that Article 159 of the Turkish Constitution be amended accordingly.

7. According to Article 159 of the Turkish Constitution, the appointment of all members of the High Council of Judges and Public Prosecutors other than the Minister of Justice and his Under-Secretary continues to be undertaken by the President of the Republic. There have been no significant developments in this regard. We recommend that the President of the Republic be absolved of his power to appoint members of the High Council of Judges and Prosecutors.

8. The High Council of Judges and Public Prosecutors still does not have its own secretariat that it can rely upon for its administrative tasks. Instead, the High Council continues to be entirely dependent upon a personnel directorate of the Ministry of Justice for administrative support. The Ministry of Justice has expressed no commitment to providing the High Council with its own adequately funded secretariat and premises. We recommend that the High Council be provided with its own adequately funded secretariat and premises.

9. The Law on Judges and Public Prosecutors No. 2802 continues to provide that judicial inspectors shall be civil servants appointed by the Ministry of Justice to work within the central organisation of the Ministry of Justice in the inspection unit known as the Head of Inspection Board. The Ministry of Justice has expressed no commitment to re-assigning judicial inspectors to work directly under the authority of the High Council. We recommend that judicial inspectors from within the central organisation of the Ministry of Justice be re-assigned to work directly under the control of the High Council of Judges and Public Prosecutors.

10. Confidential files on the performance of judges and prosecutors are still held by the Ministry of Justice. We recommend that judges and public prosecutors be permitted to access all appraisal files held in respect of themselves.

11. The High Council still does not have its own independent budget. Instead it continues to be reliant upon the discretion of the Ministry of Justice for its financial resources. The Ministry of Justice has expressed no commitment to granting the High Council its own budget. We recommend that the High Council be granted its own budget, the members of the High Council to be both consulted in the preparation of the budget and be responsible for its internal allocation and administration.

12. According to Article 159/4 of the Turkish Constitution, it is still not possible to appeal to a judicial body against a decision of the High Council. The Ministry of Justice has formally rejected the recommendation that adverse decisions of the

High Council related to civil rights should be capable of being appealed to an independent judicial body. We recommend that Article 159 of the Turkish Constitution be amended so as to permit decisions of the High Council adverse to a judge to be appealed to an independent judicial body comprised of members of the judiciary other than those responsible for the taking of the original decision.

13. Our initial concerns regarding the practice of the Ministry of Justice sending circulars to public prosecutors on the interpretation of Turkish law may not have been well founded. The Ministry has emphasised that such circulars are not used to influence the interpretation of legislation by public prosecutors, they simply concern specific administrative matters. That said, given the importance of this issue to the question of judicial independence in Turkey, we consider that this is a matter that needs to be followed up and further clarified.

14. The Law on Associations has now been adopted by the Turkish Grand National Assembly and this has removed the ban on judges forming professional organisations to safeguard their independence, protect their interests, improve professional ethics, enable them to express their opinions and take positions on matters pertaining to their functions and to the administration of justice. A further law is required in order to actually establish judicial associations. The Ministry of Justice has commenced work on a draft law to establish a professional association for judges and public prosecutors. The Ministry of Justice has also organised an international symposium on the subject.

Impartiality of the Judiciary

15. The Turkish Constitution still envisages judges and public prosecutors as equals. We recommend that the Constitution be amended so as to provide for an institutional and functional separation of the professional rights and duties of judges and public prosecutors.

16. The Ministry of Justice is committed to improving training and salaries of court administrative staff with a view to transferring greater responsibilities to them over time and also to creating an administrative career within the court system. We must now wait to see how and when this commitment will be implemented in practice. We recommend that administrative duties currently undertaken by public prosecutors should be transferred to administrative staff of the Ministry of Justice at the earliest opportunity.

17. There remains a need to ensure that public prosecutors are re-assigned to different courtrooms on a regular basis. The existence of an insufficient number of public prosecutors presents a practical obstacle to implementation of this reform at the present time.

18. The recommendation that public prosecutors either be required to have their offices outside of the courthouse or located in a different part of the building from

the judges will be implemented in the new Intermediate Courts of Appeal once they are established. The Ministry of Justice considers that financial constraints prevent the recommendation from being fully implemented throughout the court system at the present time.

Role and Effectiveness of Public Prosecutors

19. The Ministry of Justice has taken the initiative in drafting legislation on the establishment of a judicial police force in order to ensure more effective criminal investigations that enable public prosecutors to present complete files to the courts. It is too early to say when the judicial police force will be operational and, once operational, the functioning of the force will need to be monitored in order to assess to what extent its creation has served to increase the role of the public prosecutor in the criminal investigation process in practice. Nevertheless, as an initial step, we regard the fact that there exists both a judicial and political will to enhance the role of the public prosecutor in criminal investigations as a positive development.

20. The By-Law on the Judicial Inspection Board has been amended so as to stipulate that inspectors should allow public prosecutors greater discretion when taking decisions on non-prosecution. It is too early to assess what effect, if any, this amendment will have in practice, however we welcome the initiative in principle. We do however consider that a more fundamental reform might be instituted in this regard. We encourage the Ministry of Justice to re-assign judicial inspectors to work directly under the control of the High Council and ensure that the influence of inspectors in decisions on whether or not to initiate a prosecution is removed completely.

21. We recommend that before initiating a prosecution, public prosecutors in Turkey should be expressly required to assess the strength of the evidence before them in any given case. The Code of Criminal Procedure should be amended so as to ensure that public prosecutors only transfer a case to court once they are satisfied, on the basis of their evidential assessment, that there are substantial grounds to foresee a conviction. Further, public prosecutors should, through pre-service and in-service training, be encouraged to perceive their role as including the diversion of cases with no realistic prospect of conviction from the justice system.

22. The Ministry of Justice has formally accepted the recommendation that the power of the Ministry of Justice to override a decision of a public prosecutor not to initiate a criminal prosecution in circumstances where an impartial investigation has shown the charge to be unfounded be removed. A provision lifting the competence of the Minister is included in the draft Code of Criminal Procedure currently before the National Assembly.

23. Whilst we recognise that a lack of competence within existing administrative staff may present a real obstacle to the implementation of the recommendation on

removing the responsibility of public prosecutors for administrative tasks, we consider that reform may nevertheless be beneficial. The Ministry of Justice has agreed to improve training and salaries of court administrative staff with a view to transferring greater responsibilities to them over time.

Role and Effectiveness of Lawyers

24. A slight improvement has been observed regarding implementation of the right of detainees to access free legal counsel immediately upon being deprived of their liberty. In south-east Turkey, however, significant problems remain in this regard. The Ministry of Interior has formally agreed to permit the Bar Associations to display posters advocating the rights of detainees in both police and gendarme stations. We recommend that further steps be taken to monitor and enforce existing requirements that all persons be immediately informed by a competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

25. The Ministry of Justice has issued a circular to all relevant authorities directing that the controls at the entrances to detention centres should be administered more sensitively. In a welcome development, complaints from lawyers alleging intimidation and harassment when visiting detention centres have now, it appears, ceased entirely.

26. Certain police and gendarme stations continue to have inadequate facilities for confidential consultation between lawyers and their clients. According to the Ministry of Justice, new police stations will be built with facilities enabling lawyers to communicate with their clients in full confidence and where such facilities are not found in existing police stations, lawyers and detainees will continue to be afforded the use of a spare room. We urge the Ministry to take all necessary measures to ensure that where such facilities do not already exist, visiting rooms in all police and gendarme stations are equipped with consultation rooms that enable lawyers to communicate with their clients in full confidence.

27. Certain institutions afford inadequate time for consultations between lawyers and their clients. We urge the Ministry of Justice and/or Ministry of Interior to take measures to ensure that lawyers are afforded adequate time to consult effectively with their detained clients.

28. In certain prisons, the practice regarding exchange of documents between lawyers and their detained clients, as well as the practice regarding the ability of detainees to access writing material is not always in accordance with the law. The Ministry of Justice has however taken the initiative to issue a circular to remind prison governors of the correct legal procedure in this regard. Further monitoring will be required in order to assess implementation.

29. The Ministry of Justice has accepted the recommendation that lawyers and their clients be provided with adequate facilities to enable them to communicate in confidence within detention facilities in court houses and has undertaken to start to implement the recommendation in the construction of the new Intermediate Courts of Appeal. The Ministry has further agreed to reflect upon whether any interim measures might be adopted in the short term so as to enable lawyers to communicate with their clients in the detention facilities of criminal courthouses whilst construction of designated consultation facilities is underway.

30. Many judges and public prosecutors continue to look unfavourably upon requests from lawyers to speak to their clients during the course of court proceedings and instead regard such requests as an obstruction. The Ministry of Justice has undertaken to address this issue during the course of pre-service and in-service training of judges and public prosecutors. We consider that there is a continuing need to ensure that lawyer-client communication during the course of court proceedings is permitted in practice. We recommend that the Ministry of Justice consider whether an administrative circular might be promulgated on this issue and/or the Code of Criminal Procedure strengthened.

31. Convicted prisoners who wish to pursue an appeal to the European Court of Human Rights retain the right to instruct counsel of their own choosing without the intervention of a legal guardian. Our recommendation on the ability of lawyers to access convicted persons in prison is accordingly withdrawn.

32. It remains the case that at the start of every court hearing, prosecutors and judges continue to simultaneously enter the courtroom through the same door whilst defence lawyers are required to enter the courtroom from a side door along with the public. Whenever the judges rise, the prosecutor also retires with the judges through the same door, leaving the defence lawyers to exit along with members of the public. The Ministry of Justice has agreed to recommend that the Justice Academy should institute training that emphasises that public prosecutors should not accompany judges when the latter retire to consider their verdict. However, we consider that a more thorough reform is required. We recommend that measures be taken to ensure that public prosecutors are required to enter and leave the courtroom through a door other than that used by judges.

33. During court hearings in Turkey, the public prosecutor continues to sit on an elevated platform, on the same level as the judges and directly adjacent to them. Meanwhile, the defence lawyers continue to sit at a table at ground floor level, the same level as the public and the defendants. The Ministry of Justice has agreed in principle that the position of the public prosecutor in the courtroom should be moved so as to be equated with that of the defence lawyer. The Ministry of Justice has agreed that the new Intermediate Courts of Appeal will be designed in such a way that the public prosecutor will be required to sit at a table at ground floor level, either next to or opposite the defence lawyer, and has agreed that the recommendation will be taken into consideration during the building of any new

courthouses in 2005 and beyond. The Ministry of Justice has also agreed to introduce the concept of the public prosecutor being physically removed from the judge in the courtroom into training. The Ministry of Justice maintains however that implementation of the recommendation will take time and financial resources. We welcome the position of the Ministry of Justice and encourage measures to be taken to require public prosecutors to sit adjacent to or opposite the defence lawyer as a matter of priority.

34. It remains the case that in some courtrooms in Turkey, the prosecutor, like the judges, is provided with a computer and a terminal that enables him to see the record of the proceedings as it is being entered by the court stenographer. Where such facilities exist, however, defence lawyers are still not provided with any similar technology. Instead, they are required to listen and take notes if they wish to have a record of proceedings during the course of the hearing. The National Judicial Network Project will however enable both parties to monitor the trial proceedings. Implementation has commenced in some courts.

35. It continues to be regular practice that whenever judges retire during the course of proceedings, for example to consider the merits of a defence application, the prosecutor also retires with the judges to the same ante-chamber. The defence lawyers meanwhile remain in court. When the judges return to court to deliver their ruling, the prosecutor returns to court alongside them. The Ministry of Justice has agreed that both judges and public prosecutors should receive further training that emphasises that public prosecutors should not accompany judges when they retire to consider their verdict. In order to implement this measure, the Ministry of Justice has transmitted a formal proposal to the Justice Academy. We recommend that the Justice Academy implement such training at the earliest available opportunity.

36. There is no inequality in law between the rights given to the defence and the prosecution to have witnesses summoned to court. Article 212 of the Criminal Procedure Code provides an accused with the right and obligation to notify the witnesses that he wishes to call in support of the defence case 5 days before the scheduled hearing. However, Article 213 of the Criminal Procedure Code further provides that an accused retains the right to summon all witnesses directly and without petition if the court refuses his petition. As a consequence of these two provisions, an accused may call any witness that he wishes to give evidence. Our recommendation on the procedure for the calling of defence witnesses was based on misinformation and is therefore withdrawn.

37. Normal procedures in criminal trials in Turkey preclude the defence from examining witnesses directly. Instead, defence lawyers suggest questions to the Presiding Judge who then decides both whether to ask the questions suggested and if so, how the questions should be phrased. In this manner, the defence are restricted as to both the form and content of the questions that they may ask witnesses. However, when the public prosecutor examines a witness, although he

too has to direct his questions through the Presiding Judge, the Presiding Judge asks every question that the public prosecutor seeks an answer to. There is no restriction as to the form or content of the questions that the prosecutor may ask of witnesses. The Draft Criminal Procedure Code will however introduce "cross-examination" into the Turkish legal system. This will enable both prosecution and defence counsel to ask questions to witnesses directly. We welcome the introduction of "cross-examination" as a practical measure to ensure that the defence is placed in a procedurally equal position vis-à-vis the prosecution when examining witnesses.

38. Turkish courts still have no mechanism for recording verbatim the evidence of witnesses or the submissions of counsel and different procedures continue to be adopted for recording the evidence, argument and submissions of the defence and prosecution respectively. The Ministry of Justice has agreed to take the recommendation regarding the sound recording of court proceedings into account during work on the amendment of the Criminal Procedure Code. We are given to understand that the required technical infrastructure will be established within the framework of the EU supported project entitled "Access to Justice". We welcome the initiative of the Ministry of Justice.

39. There continue to be instances of lawyers being prosecuted for offences arising out of the exercise of their legitimate professional duties and/or the exercise of their legitimate right to freedom of expression. We again urge the relevant state authorities to take necessary measures to ensure that police officers, gendarme officers and public prosecutors refrain from identifying lawyers with their clients' causes and allow lawyers to perform their professional functions without intimidation, hindrance, harassment or prosecution in line with international standards.

40. The Ministry of Justice retains its role in relation to the functioning of the Bar Associations. In disciplinary actions against lawyers there is a requirement that all decisions of the Union of Turkish Bar Associations be forwarded to the Ministry of Justice. Additionally, Articles 58 and 59 of the Law on Lawyers continue to impose a requirement that, whenever criminal proceedings are commenced against a Turkish lawyer for offences alleged to have been committed during the course of their professional duties, a public prosecutor must obtain the permission of the Ministry of Justice before commencing an investigation and secure the authorisation of the Under-Secretary of the Ministry before preparing an indictment. The Ministry of Justice has not expressed any commitment to relinquishing its influence over the functioning of the Bar Associations. We recommend that the appeal to the Union of Turkish Bar Associations be the final appeal to a non-judicial instance in the case of disciplinary action against lawyers and that Articles 58 and 59 of the Law on Lawyers be amended so as to remove the influence of the Ministry of Justice in the process of instituting criminal proceedings against lawyers for offences alleged to have been committed during the course of their professional duties.

41. The proposed introduction of a central government examination for all aspiring lawyers might be said to constitute a negative development in so far as the establishment of an independent legal profession in Turkey is concerned, although in practice everything will depend on how the examination is implemented. A further assessment will be required in this regard.

Quality and Efficiency in the Justice System

42. Whilst we welcome the fact that members of the judiciary are consulted in the preparation of the budget proposal submitted to the Ministry of Finance, we also note that severe financial shortcomings persist in the judicial system. Unless and until the proportion of the budget allocated to the administration of justice is substantially increased, the problems of the judiciary such as inadequate premises, equipment and insufficient and poorly educated administrative staff are unlikely to be resolved. We recommend that the proportion of the budget allocated to the administration of justice be substantially increased.

43. Despite an overall decline in the number of judges and public prosecutors in Turkey over the last 12 months, the Ministry of Justice has not offered any undertaking to increase the quantity of the personnel within the justice system. Instead, the Ministry has proposed making the existing capacity of the courts more efficient by closing underused courthouses, reducing the number of jurisdictional disputes in the civil courts and facilitating out-of-court settlements. Welcome as these reforms are, we consider that they are unlikely to be sufficient on their own. There remains an urgent need for the Turkish government to substantially increase the budget awarded to the Ministry of Justice so as to enable the Ministry to increase the capacity of the judicial system by building more courthouses that can be administered by newly appointed judicial personnel.

44. Most courtrooms are being used five days out of every week. A total of 136 underused courts were closed in June 2004. We welcome this initiative and urge the Ministry of Justice to continue to regularly review the use of courtrooms throughout Turkey.

45. The Ministry of Justice has agreed a co-operation project with Yeditepe University whereby 30 judges and public prosecutors will attend an 8-month full-time training programme in the English language. We welcome this initiative but continue to urge the Ministry to equip the Justice Academy with the necessary infrastructure and technical equipment so as to enable it to provide continuous language training for all judges and public prosecutors. Efforts are being undertaken to develop the curriculum with a view to providing more comprehensive training to judges and public prosecutors in international standards relating to the guarantee of an independent and impartial judiciary and the role and functioning of prosecutors and lawyers. The nature and adequacy of such training remains to be assessed.

46. The salaries of both judges and public prosecutors have recently been increased and a draft law has been prepared to increase them further still. We have not been provided with sufficient information to enable us to assess the sufficiency of the proposed law. We can therefore only urge the Ministry of Justice to ensure that the additional remuneration afforded to judges and public prosecutors will represent sufficient compensation for their burden of responsibilities. Regarding the recommendation that salaries of judges should be increased proportionality more than the salaries of public prosecutors, we have listened to the concerns of the professions and we recognise that in the context of the Turkish judicial system such a measure is not acceptable at the present time. Mindful also of the fact that there are in any event more visible ways in which the Ministry of Justice might strengthen the objective impartiality of the judiciary, we do not regard it as necessary to uphold this recommendation.

47. We warmly welcome the fact that Turkey has given prime importance to the modernisation of the judiciary through the improvement of information and communication technology. The National Judicial Network Project is progressing according to schedule and, upon completion, this will significantly enhance the ability of judges, public prosecutors and lawyers to act efficiently and without undue delay.

48. Not all judgments of the higher courts are published in paper law reports and there may be long delays before publication. Moreover, the paper copies of law reports are expensive. As a consequence, many practising lawyers are not able to access relevant decisions of the higher courts. We recommend that in order to improve the quality of justice in Turkey, a website containing all the case law of the higher courts should be constructed and this website should be accessible to all judges, public prosecutors and lawyers.

49. The project to establish an intermediate Court of Appeal is progressing according to schedule. The Law on the Establishment of Regional Courts of Appeal has been approved by the Turkish Grand National Assembly. The Ministry of Justice has prepared an EU funded project to construct 3 model Regional Court of Appeal courthouses, train 1,000 judges and prosecutors and 1,200 auxiliary personnel and also provide all necessary hardware and software to approximately 25 Regional Courts of Appeal. In our opinion, the introduction of a court of second instance to the judicial system will be an important step forward in both ensuring the right to a fair trial and in increasing the speed and efficiency of the judiciary.

50. The Ministry of Justice is actively pursuing measures designed to facilitate the settlement of private law disputes involving individuals and public bodies without the need for timely and costly litigation before the courts. A Draft Law on General Administrative Procedures is under consideration at the Prime Ministry. This law envisages the introduction of Alternative Dispute Resolution mechanisms as a less formal and less complex means of resolving disputes

quickly and more cheaply than via court proceedings. The Directorate General for Legislative Affairs of the Ministry of Justice has also begun work on preparing a Draft Law on Ombudsman with a view to introducing an Ombudsman system in Turkey. We support the establishment of alternative dispute resolution mechanisms in Turkey as a means of significantly reducing the number of minor disputes before the civil courts.

51. The Ministry of Justice is confident that the Draft Code of Criminal Procedure will simplify the criminal procedure rules relating to jurisdiction and thereby assist in reducing the significant number of lawsuits before the courts involving challenges to jurisdiction rather than the merits of any given case. We welcome this reform but consider that following adoption a further assessment will need to be undertaken in order to assess to what extent the revised procedure rules have resulted in a reduction in jurisdictional disputes in practice.

52. Several projects have been prepared to improve the curriculum of the Justice Academy in relation to the pre-service and in-service training of public prosecutors on matters of competence and venue. We welcome this initiative but consider that in due course a further assessment will need to be undertaken in order to assess to what extent the improved curriculum has resulted in a reduction in jurisdictional disputes in practice.

53. A specialised commission has been established to perform the required measures to abolish the distinction between the Civil Courts of Peace and General Civil Courts. We welcome this initiative as a practical measure that will reduce the significant number of artificial disputes within the Turkish judicial system.

54. Both the Draft Criminal Code and the Draft Criminal Procedure Code foresee the introduction of a system of plea-bargaining. We welcome this initiative.

55. The Draft Code of Criminal Procedure will empower courts to reject indictments brought on insufficient evidence. It is envisaged that this power will prevent public prosecutors from opening cases without sufficient evidence, asking for extensions of time and adjourning cases. We warmly welcome the initiative of the Ministry of Justice in this regard.

56. The Ministry of Justice has agreed that fairness demands that the same panel of judges should hear an entire case. The Ministry has explained however that problems arise in practice in Turkey because proceedings are lengthy. The length of proceedings naturally increases the likelihood of judges being absent due to holidays or because of illness. We consider that the use of substitute judges remains problematic. Wherever it is not possible to conclude a criminal proceeding in one single hearing, and an adjournment of the proceedings to a subsequent date is required, in circumstances where one or more members of the judicial panel finds themselves unable to attend a hearing in the case, the proceedings must be adjourned and re-listed for a date when all members of the

original judicial panel are able to attend. The hearing must not proceed in the presence of a substitute judge.

57. The Ministry of Justice has recognised that whilst both the Code of Civil Procedure and the Code of Criminal Procedure provide for courts to benefit from expert opinion only on matters that require special or technical knowledge, there are problems in implementation. Expert witnesses continue to be called to provide evidence in relation to matters that require neither specialised experience nor technical knowledge. In an attempt to address this defect in the legal system the Ministry of Justice has established a Working Group to analyse the reasons for the problem and identify solutions. The Ministry of Justice has also asked the Justice Academy and its own Education and Training Department to address the proper use of expert witnesses during the in-service training of judges during 2004 and beyond. We welcome the fact that the Ministry of Justice has recognised that the overuse of expert witnesses presents an obstacle to the efficient functioning of the judicial system. We also welcome the fact that the Ministry of Justice is committed to taking positive steps to address the situation.

58. The Ministry of Justice supports the establishment of a project to train legal interpreters in minority languages and has expressed a commitment to introducing a change in the relevant by-laws so as to require the courts to use trained interpreters where such facilities are required, once such a training project has been completed. We warmly welcome the commitment of the Ministry of Justice to guaranteeing the right of defendants and witnesses to access suitably qualified interpreters in circumstances where they are unable to understand the Turkish language.

59. The High Council of Judges and Prosecutors has reservations regarding the proposed adoption of the "Bangalore Principles of Judicial Conduct" as a formal written Code of Judicial Conduct for Turkey, favouring instead, if a code is to be written at all, one written by the Turkish judiciary for the Turkish judiciary. We are not in a position to comment upon the merit or otherwise of adopting the Bangalore Principles as a written Code of Judicial Conduct for Turkey. However, we do recommend that a written Code of Judicial Conduct of some description should be adopted.

60. In June 2004 a total of 21 juvenile courts were operating throughout Turkey. This represented a significant increase on the 8 juvenile courts operating in October 2003. According to the Ministry of Justice 40 new courts are scheduled to become operational over the coming months. We are pleased to observe that the overall number of juvenile courts in Turkey has increased since the first Advisory Visit and we regard the commitment of the Ministry of Justice to the establishment of 40 new juvenile courts in sub provinces as a significant positive development. However, the impact of these new courts on the overall efficiency of the juvenile justice system remains to be seen.

61. The Ministry of Justice has accepted the recommendation that very minor offences involving young persons could be handled by a single judge and has formed a special commission to work on this matter. We welcome the commitment of the Ministry of Justice to reform in this regard.

62. Efforts are being undertaken by the Ministry of Justice to increase the number of expert psychologists, psychiatrists and pedagogues employed within the juvenile and family courts. The Ministry of Justice has assessed that 65 social workers, 65 psychologists and 65 psychiatrists are required for the juvenile and family courts. Examinations have been held for suitable applicants and appointments will be made once the results of the examinations have been obtained. The Ministry has also transferred 8 social workers, 5 psychologists and 2 pedagogues from other institutions to work within the court system. We welcome the efforts of the Ministry of Justice in this regard.

63. The Ministry of Justice intends to provide family law training for Family Court judges in 2005. Both the Justice Academy and the Education and Training Department of the Ministry of Justice have been notified accordingly. We welcome the commitment of the Ministry of Justice to providing specialist family law training to judges of the family courts.

64. As the existing legislation does provide for family courts to hold closed proceedings when necessary in order to protect family and/or private life, the recommendation on this subject is withdrawn.

65. The Ministry of Justice is committed to establishing single judge commercial courts. It is envisaged that a new Turkish Commercial Law will be enacted in 2005. The Directorate General for Laws and Legislation of the Ministry of Justice has been notified to commence work on amendments to the proposed Commercial Law with a view to ensuring that Commercial Courts deal with some cases in single judge courts. We welcome the commitment of the Ministry of Justice to the establishment of single judge commercial courts in Turkey.

66. The Ministry of Justice has undertaken to relocate all forensic physicians currently working within the court buildings of Turkey to either hospitals in the provinces or to buildings of the health directorates in the districts. 19 out of 22 provinces with forensic medical examination facilities within courthouses will have their forensic medicine facilities transferred to state hospitals or health centres. A total of 11 newly established centres are presently ready to begin work and the remainder will be transferred shortly. We regard the decision of the Ministry of Justice to relocate all forensic medicine facilities currently within the court buildings of Turkey to either hospitals or health directorates as a significant positive development.

67. A more thorough reform of the administration of forensic medicine services is still required in order to secure the independence of physicians engaged in the role

of documenting ill-treatment by state officials. We recommend that responsibility for the Forensic Medicine Institute be removed from the Ministry of Justice and transferred to the Ministry of Health; or responsibility for official court forensic reports be removed from physicians attached to the Forensic Medicine Institute and transferred to physicians working within the national health service.

68. According to the Society of Forensic Medicine Specialists, only 285 of 80,000 physicians in the country are forensic specialists. Most detainees are examined by general practitioners and specialists not qualified to detect signs of torture. In order to improve the overall quality of court forensic reports, there is a need for more comprehensive training for physicians in the application of the Istanbul Protocol. We urge the Forensic Medicine Institute to actively encourage physicians responsible for the documentation of torture to attend training sessions organised by experienced forensic medicine experts working within non-governmental organisations such as the Turkish Medical Association, Society of Forensic Medicine and Human Rights Foundation of Turkey.

69. A training programme for judges and public prosecutors on the Istanbul Protocol and the proper procedure for the effective forensic examination of detainees is planned. In addition, 10,000 manuals containing both the contents of the Istanbul Protocol and reports of the Committee for the Prevention of Torture are due to be distributed to all judges and prosecutors in Turkey. We welcome both the fact that the Ministry of Justice has initiated a project to train judges and public prosecutors specifically on issues surrounding torture and ill-treatment and that all judges and public prosecutors will shortly be provided with a copy of the Istanbul Protocol. We urge the Ministry of Justice to ensure that the training that it is to be provided will be sufficient to enable judges and public prosecutors to subject official court forensic reports to substantive scrutiny.

70. Allegations of physicians being subjected to pressure or threats because they have reported torture have not been repeated. The Ministry of Justice has stated that complaints in this respect are treated with great sensitivity and investigated as a matter of priority. The Ministry of Justice has also agreed to issue an administrative circular on this issue. We welcome the initiative of the Ministry of Justice in this regard.

71. Both the Ministry of Justice and Ministry of Interior have expressed a commitment to ensuring that the law enforcement officers who bring detainees to medical examinations are not the same as those involved in the detention or interrogation of the detainee or the investigation of the incident provoking the detention. The Ministry of Interior intends to issue an administrative decree on this issue at the earliest opportunity and the Ministry of Justice is currently preparing an amendment to Article 10 (Health Control) of the By-Law on Apprehension, Detention and Statement Taking which, if adopted, will read as follows: “the law enforcement officers who bring the detainee to the medical examination and involved in the detention or interrogation of the detainee must be

different". We welcome the commitment of both the Ministry of Justice and Ministry of Interior on this issue.

72. Both the Ministry of Justice and the Ministry of Interior have expressed a commitment to ensuring that police and gendarmes are not admitted into medical examination rooms unless, exceptionally, a concerned physician requests their attendance for reasons of personal safety. On 3 January 2004, Article 10 of the By-Law on Apprehension, Detention and Statement Taking was amended so as to provide, "It is essential that the physician and the patient be alone and making the examination within the context of doctors and patient relations. However, the doctor may demand the examination to be made under the surveillance of law enforcement officials by claiming self-security issue. This demand shall be executed with written reasons." As an additional measure the Presidency of the Bar Associations, Ministry of Health and Institute of Forensic Medicine have all been notified to take measures promptly on the issue of displaying posters with information to this effect. The Ministry of Interior has issued an administrative decree to police and gendarme officers reminding them that they must not be present during the forensic medical examination of detainees. We welcome the initiatives undertaken by the Ministry of Justice and Ministry of Interior.

73. The Ministry of Justice has expressed a commitment to amending relevant regulations so as to ensure that medical reports are not provided to police or gendarme officers responsible for the bringing of detainees to forensic medical examinations. The Ministry of Justice has agreed to exclude the phrase "one of the copies shall be taken by the detention unit" from Article 10/5 of the By-Law on Apprehension, Detention and Statement Taking. Henceforth physicians who complete forensic medical examinations of detainees will be required to send their report directly to the public prosecutor in charge of conducting the investigation in a sealed envelope. We welcome the undertaking of the Ministry of Justice to amend Article 10/5 of the By-Law on Apprehension, Detention and Statement Taking. We note, however, that the mere annulment of the phrase "one of the copies shall be taken by the detention unit" does not lead to the conclusion that it would be prohibited to give a copy to that unit. We consider that further measures are required to ensure a uniformity of practice throughout Turkey based upon effective implementation of the amended provision.

74. Regarding the right of lawyers to attend forensic medical examinations, the Ministry of Justice has agreed to amend the second sentence of the last paragraph of Article 10 of the By-Law on Apprehension, Detention and Statement Taking so as to provide that a lawyer may stay in the examination room at the request of his client. Such an amendment will place an obligation on lawyers to advise their clients of their right to have a lawyer present during any forensic medical examination. We welcome the initiative of the Ministry of Justice.

75. The Ministry of Justice has taken measures to amend the Draft Code of Criminal Procedure so as to enable either the court or the parties to proceedings to summon

physicians responsible for the writing of court forensic medical reports to court for the purposes of giving oral evidence as expert witnesses. Articles 65 and 69 of the Draft Code of Criminal Procedure will provide for the same. We welcome the progress that has been made by the Ministry of Justice in this regard.

76. Article 10/5 of the By-Law on Apprehension, Detention and Statement Taking reads "Medical examination, control and treatment shall be made free of charge by the doctors of Forensic Medicine Institute or official health institutions or municipalities". Even though the regulation on costs for examinations seems to be adequate, the implementation thereof still needs to be further addressed.

77. The Ministry of Justice has successfully completed a comprehensive ECHR training programme involving all judges and public prosecutors in Turkey. This training programme does appear to have yielded positive results in so far as judges and public prosecutors throughout Turkey are, to a far greater degree, now implementing the provisions of the ECHR and the decisions of the ECtHR in their decisions. We are pleased to report that there does appear to have been a significant change in the predominant mentality of the judiciary towards the ECHR. We consider that the Ministry of Justice can now begin to direct its efforts towards maintaining and developing further what appears to be a newfound enthusiasm for human rights within the Turkish judiciary. The Ministry of Justice deserves to be commended for its commitment to ensuring the application of the ECHR in domestic law, for the various initiatives that it has undertaken in furtherance of this goal and for the positive results that such initiatives appear to have yielded.

78. The provisions of Articles 159, 169 and 312 of the Turkish Penal Code and Article 7 of the Anti-Terror Law are being reviewed by the Turkish Grand National Assembly for compatibility with the provisions of Article 10 of the ECHR. We recommend that following the adoption of the revised Criminal Code a further assessment is undertaken of the extent to which both the nature of the revised provisions and their manner of implementation afford applicable guarantees for freedom of expression in Turkey. We observe that the right to freedom of expression continues to be undermined in so far as despite the decriminalisation of certain publications as a result of the abolition of Article 8 of the Anti-Terror Law and the amendment of various other related provisions, some courts remain reluctant to quash confiscation decisions made in relation to these publications even though the act of possessing/publishing the articles in question no longer constitutes an offence as originally charged.

79. Prison enforcement judges have been provided with training in relation to both relevant domestic legal provisions and international standards relating to the rights of persons under any form of detention or imprisonment through an in-service training programme. Relevant publications have been provided to enforcement judges and they will receive further training within the context of the Judicial Modernisation and Penal Reform Project. The Ministry of Justice has

undertaken to ensure that such training initiatives continue. We welcome the fact that prison enforcement judges continue to be trained in relation to both relevant domestic legal provisions and international standards relating to the rights of persons under any form of detention.

80. The Ministry of Justice has rejected the recommendation that the competence of prison enforcement judges be extended so as to enable them to receive complaints from any individual who is deprived of his liberty in any law enforcement facility in Turkey. The Ministry of Justice has reminded the delegation that pre-trial detention units exist within the administrative structure of the Ministry of Interior and not the Ministry of Justice, persons detained within a police or gendarme station for 24 hours are not subject to any mechanism of enforcement and the legality of their detention is in any event permanently supervised and controlled by public prosecutors who make regular checks. We recommend that measures be taken to ensure that public prosecutors actually make effective checks at police and gendarme stations on a regular basis.

81. The recommendation that enforcement judges be required to make site visits to detention facilities under the responsibility of the Ministry of Justice is maintained and repeated.

82. The President of the Human Rights Presidency is genuinely committed to increasing human rights standards within Turkey to a level equal to that enjoyed by those within the European Union. We welcome various public awareness raising activities that have been undertaken, the restructuring of the regional Human Rights Committees so as to ensure greater civil society involvement and the efforts at producing statistical information in order to better evaluate alleged human rights violations. However, we consider that at present it is too early to regard the Human Rights Presidency as a significant force in the movement to promote and protect human rights. The number of individuals who choose to complain to the Presidency remains extremely low. This suggests a need to further raise public awareness and/or further increase public confidence in the role and functioning of the Human Rights Presidency.

83. We have no means of assessing the adequacy of the measures introduced by the Human Rights Presidency in response to the complaints that have been received. We urge the Human Rights Presidency to record statistical information in relation to the resolution of complaints rather than merely the volume and subject matter of complaints.

84. We recommend that, as a means of instilling both human rights defenders and the population of Turkey as a whole with greater confidence in the functioning of the Human Rights Presidency, consideration be given to separating the Human Rights Committees from the Office of the Governor.

Annex A - List of Interviewees

Ankara

- Mr. Haluk Mahmutoğulları, Head of Education Department
- Mr. Abuzer Duran, DG for Criminal Affairs
- Mr. Niyazi Güney, DG for Laws and Legislation
- Ms. Nesrin Yılmazcan, DG for Personnel Department
- Mr. Kenan İpek, DG of Prisons and Detention Houses
- Mr. Nihat Ömeroğlu, DG for Civil Law Affairs
- Dr. Saadet Arıkan, DG for EU Affairs
- Mr. Hüseyin Boyrazoğlu, Ankara Chief Public Prosecutor
- Mr. Orhan Karadeniz, Presiding Judge, Heavy Penal Court Authorised by Law.5190 (Heavy Penal Court No. 11)
- Mr. Yılmaz Uğurlu, Deputy Director and Ms. Fatma Çamlıbel, Justice Academy
- Mr. Eraslan Özkaya, President of Supreme Court of Appeal
- Mr. Nuri Ok, Chief Public Prosecutor of Supreme Court of Appeal
- Mr. Mustafa Bumin, President of the Constitutional Court
- Mr. Ercan Aslantaş/Ministry of Interior-Head of EU Department + Representatives of Police and Gendarmerie
- Mr. Vahit Bıçak, Prime Ministry Human Rights Presidency- President, and Professor at Bilkent University
- High Council of Judges and Prosecutors; Mr. Celal Altunkaynak, Deputy President, Mr. Ali Güven, Mr. Cengiz Divanlıoğlu, Mr. Yaşar Engin Selimoğlu, Mr. Mahmut Acar, Mr. Nuri Yılmaz: Members
- Mr. Levent Kanat/Member of Board of General Directors Human Rights Association
- Mr. Özdemir Özok, Chairman & Mr. Şahin Mengü, Secretary General/Turkish Bar Association
- Mr. Hüseyin Y. Biçen, Chairman, Contemporary Lawyers Association Ankara

Istanbul

- Mr. Aykut Cengiz Engin, İstanbul Chief Public Prosecutor
- Ms. Melek Kasar, Judge, General Penal Court
- Ms. Ümmühan Aras, Judge, Commercial Court
- Mr. Ertugrul Tokalakoğlu, Presiding Judge, Heavy Penal Court
- Mr. Kemal Eskici, Presiding Judge, Juvenile Court
- Mr. Mustafa Saim Tahmisçioğlu, Judge, General Civil Court
- Mr. Abdülkadir İlhan, Deputy Chief Public Prosecutor, responsible for the new Heavy Penal Courts authorised by Law 5190

- Mr. Metin Çetinbaş, Presiding Judge, Heavy Penal Court No. 14 Istanbul authorised by Law 5190
- Ms. Şükran İrençin, Human Rights Foundation İstanbul Representative
- Dr. Keramettin Kurt, Forensic Medicine Institute, President
- Prof. Dr. Şebnem Korur Fincancı, Former Secretary General of the Turkish Medical Association and Professor at Istanbul University Çapa Faculty of Medicine, Forensic Medicine Department
- Dr.Ümit Biçer, Chairman of Board of Directors of the Society of Forensic Medicine Specialists (Adli Tıp Uzmanları Derneği Yönetim Kurulu Başkanı)
- Mr. Kazım Kolcuoğlu, Chairman, İstanbul Bar Association
- Mr. Hakan Karadağ, Chairman and Mr. Rüştü Sevimli, Ms. Sevim Akat, Contemporary Lawyers Association Istanbul

Diyarbakir

- Mr. Hüseyin Canan, Chief Public Prosecutor
- Mr. Mehmet Öztaş, Presiding Judge, Heavy Penal Court
- Mr. Hamza Yaman, Presiding Judge, Heavy Penal Court authorised by Law 5190
- Mr. Recep Kınalı, Judge, General Criminal Court
- Dr. Lokman Eğilmez, doctor at Forensic Medicine Directorate at Courthouse
- Mr. Sedat Demirtaş, Judge, General Civil Court
- Mr. Halil Kızılkaya, Judge, Juvenile Court
- Mr. Yaşar Sezikli, Judge, General Court of Peace
- Mr. Devrim Barış Baran, Chairman, Contemporary Lawyers Association Diyarbakir
- Mr. Sezgin Tanrıkulu, Chairman and Mr. Kasım Alpkaya, Diyarbakir Bar Association
- Mr. Muhsin Bilal, Chairman, Human Rights Foundation Diyarbakir
- Mr. Selahattin Demirtaş, Chairman, Human Rights Association Diyarbakir

Annex B – Criminal Proceedings Against Lawyers

The trial of Sezgin Tanrikulu, the President of the Diyarbakir Bar Association and three other lawyers, Sabahattin Korkmaz, Burhan Deyar and Habibe Deyar, concluded on 24 December 2003 with the defendants being acquitted. The defendants, who had previously appeared before the Diyarbakir Heavy Penal Court No 1 on 17 October and 5 December 2003, were charged with "*professional misconduct*" pursuant to Article 240 of the Turkish Penal Code. The charges arose out of the defendant's representation of villagers seeking compensation from the State authorities for the destruction of their homes in South-East Turkey during the conflict between the PKK and the Turkish state authorities. A gendarme commander had made a complaint to a public prosecutor accusing the lawyers of fabricating a human rights claim on behalf of the villagers, despite the fact that the villagers originated from the same village as the applicants in the case of *Orhan v. Turkey*[62] before the European Court of Human Rights.

The trial of Hussein Cangir, a member of the Mardin Bar Association and Chairman of the management committee of the Mardin branch of the Human Rights Association, continued before the Derik Criminal Court of Peace in the province of Mardin in Southeast Turkey on 17 March and 21 April 2004. The indictment against Hussein Cangir, dated 5 January 2004, charged him with the "*hanging of posters without permission on 9th of December 2003*" on the basis that he "*did not request permission from the Governor.*" The charge was laid under Article 536, paragraph 3 of the Turkish Penal Code. The posters in question were Human Rights Association (HRA) posters that carried the HRA logo and the inscription "*Peace Will Win, Equality with Diversity*" displayed underneath in Kurdish and in Turkish. They were placed on municipal sites in the town of Derik on 9 December 2003 to coincide with Human Rights Week, from 10 - 17 December 2003. At the conclusion of the hearing on 21 April 2004, Mr. Cangir was convicted of the offence charged and sentenced to hefty fines.

The President of the Diyarbakir branch of the Contemporary Lawyers Association, Mr. Devrim Baran, was tried at the Diyarbakir State Security Court under Article 169 of the Turkish Penal Code following a complaint by a gendarme officer regarding a speech that he gave at a meeting of the Association of Friends and Relatives of Detainees and Prisoners. In his words, "I mentioned current conditions of the convicts and that Ocalan was isolated and unable to meet a lawyer. I said this created tension in the region". Mr. Baran was acquitted of the offence under Article 169 of the Turkish Penal Code after the provision was amended during the course of the trial in line with the reforms introduced by the harmonisation packages. Subsequently however a complaint was lodged under Article 312 of the Turkish Penal Code and a new trial commenced in Spring 2003 on a charge of contravening this provision. Mr. Baran was finally acquitted in May 2004.

[62] *Orhan v Turkey*, application no. 25656/94.

Proceedings are presently continuing against 23 lawyers from the Diyarbakir Bar Association charged with "*professional misconduct*" pursuant to Article 240 of the Turkish Penal Code. The charges arose out of the fact that various lawyers were allegedly harassed at a police station in 2000 and the Bar Association adopted a resolution not to send lawyers to that particular police station thereafter. Twenty-three lawyers were asked to attend the police station in the following days and refused. The charges arose out of their refusal to attend the police station. The lawyers were initially acquitted following a trial before the Diyarbakir Heavy Penal Court, however the public prosecutor appealed to the High Court of Appeals. The High Court of Appeals overturned the decision of the Heavy Penal Court and remitted the case to be reheard de novo before the Heavy Penal Court. The trial is continuing. The next hearing is scheduled for September 2004.

Proceedings have recently been initiated against the Chairman of the Diyarbakir Bar Association, Sezgin Tanrikulu, following an incident at a courthouse in Mardin. Between 15 and 20 lawyers from the Diyarbakir Bar Association attended the courthouse in Mardin in proceedings against a man accused of raping a minor. After the hearing the lawyers were prevented from leaving the courthouse by relatives and friends of the victim. Mr. Tanrikulu spoke with the Chief Public Prosecutor and asked for his assistance. The Chief Public Prosecutor allegedly replied that the safety of lawyers was not his problem. Mr. Tanrikulu commented, in his words, "This is as far as your understanding of the law goes". In April 2003 the Chief Public Prosecutor commenced an investigation against Mr. Tanrikulu. Mr. Tanrikulu complained to the Ministry of Justice about the conduct of the Chief Public Prosecutor. The Chief Public Prosecutor of Diyarbakir was appointed to take over the case and the Chief Public Prosecutor of Mardin was transferred to Izmir. In July 2004 Mr. Tanrikulu received a notice informing him that the Ministry of Justice had authorised criminal proceedings against him based on an allegation that he caused "insult to a public servant on duty", an offence contrary to the Turkish Penal Code. Mr. Tanrikulu has been summoned to appear before a public prosecutor in order for his testimony to be taken.

In July 2004 the Ministry of Justice forwarded two files regarding lawyers to the Diyarbakir Bar Association with a request that it commence civil disciplinary proceedings. It is alleged that in two different courtrooms the clerk to the court complained about the conduct of the lawyers in the courtroom in so far as they had gesticulated and shut the door too forcefully. The public prosecutor is presently considering whether or not to prepare a criminal indictment.

A civil action has been brought to close the Diyarbakir branch of the Contemporary Lawyers Association under the Law on Associations. The first hearing in the case is scheduled for 9 September 2004 at the Diyarbakir General Civil Court. The complaint arises out of the fact that certain members of the Association were detained following their involvement in public demonstrations when they were law students. The police have a record of the detentions but have now sought to find out more about the results of the investigations against the lawyers. The police have demanded that the

lawyers produce copies of the court decisions in their cases. The lawyers have refused on the ground that they are not legally obliged to produce such documents. The action to close the Contemporary Lawyers Association in Diyarbakir is brought on the basis that the lawyers have failed to submit records in accordance with the requirements of the Association Law.

On 23 October 2003, lawyer Abdullah Akin, the former mayor of Batman (HADEP) was arrested on suspicion of committing an offence contrary to Article 159 of the Turkish Penal Code. Agri Penal Court of First Instance reportedly issued an arrest warrant in absentia against him in connection with a speech he made on 1 September 2000 in Dogubeyazit district of Agri.[63]

Finally, we note that so far in 2004 a total of 5 criminal charges have been brought against the Diyarbakir Branch of the Human Rights Association, many of whose members are practising lawyers. The Head of the Human Rights Association in Diyarbakir, Selahattin Demirtas, himself a practising lawyer, has recently faced criminal proceedings under Article 312/2 of the Turkish Penal Code on a charge of insulting people to hatred. The case was launched following a concert and meeting organised on 21 June 2003. The case commenced on 17 February 2004 and the next session was due to be held on 27 April 2004 at the then Diyarbakir State Security Court.[64] Since the first Advisory Visit Mr. Demirtas has also faced criminal proceedings followed a complaint by the State Security Court prosecutor in Van on an allegation of "making propaganda of an illegal organisation". The indictment alleged that Mr. Demirtas stated during a congress of the Mus branch of the Human Rights Association on 11 October 2003 that "PKK/KADEK was not a terrorist organisation but it was working for democratisation." The indictment called for Mr. Demirtas to be sentenced according to Article 7 of the Anti-Terror Law.[65]

[63] European Commission Monthly Report on Turkey, October 2003.
[64] European Commission Monthly Report on Turkey, March 2004.
[65] European Commission Monthly Report on Turkey, April 2004.

Annex C – Application of the ECHR in the Domestic Courts

Example 1:

Court: Mesudiye Criminal Court.
Name of Defendant: Ali Nurcan.
Case Details: The defendant was a local resident of Mesudiye who wrote an article in a small local newspaper in April 2003 based on his personal experiences of a civil court case. In his article, the defendant questioned whether the scales of justice were really equally balanced and wrote that the scales of justice may sometimes be corrupt. The defendant was charged with insulting the immaterial personality of the judiciary in violation of Article 159/1 of the Turkish Penal Code.
References to ECHR (Convention) and/or case law of ECtHR (Court): Article 10 of the ECHR (freedom of expression) and decision of ECtHR in *Handyside v. United Kingdom* (1976).
Court Decision: Acquittal on grounds that the article only intended to criticise and not insult the judiciary.
Date of decision: 20.05.2004.

Note: the permission of the Ministry of Justice is necessary to file a case for violating Article 159 of the TPC; the Directorate General of Criminal Affairs gave such a permission on the above case on 03.07.2003.

Example 2:

Court: Izmir State Security Court.
Name of Defendant: Ibrahim Incal.
Case Details: Re-trial; The defendant, who was a member of the Executive Board of the political party, HEP, was convicted and sentenced to 6 months 20 days imprisonment and a heavy monetary fine for publishing 10.000 leaflets to be distributed to the public. The leaflets had been found to incite racial hatred and enmity in violation of Article 312 of the Turkish Penal Code. The decision was approved by the High Court of Appeals in 1993. The defendant applied to the ECtHR in the same year. In 1998 the ECtHR ruled that Articles 6 and 10 of the ECHR had been violated. In January 2004 the defendant applied for a re-trial after this procedure was introduced into Turkish law as part of the reform packages. In the re-trial the prosecutor asked for the cancellation (dismissal) of the former court decision and requested the acquittal of the defendant on the grounds that the action of the defendant no longer constituted a crime under Article 312 of the Turkish Penal Code, which had been amended by Law 4744. The State Security Court accepted the arguments of the prosecutor, dismissed the former court decision and acquitted the defendant.

References to ECHR and/or case law of ECtHR: Articles 6 (fair trial) and 10 (freedom of expression) of the ECHR and decisions of the ECtHR in *Handyside v.United Kingdom* (1976) and *Castells v. Spain* (1992).
Court Decision: Acquittal.

Example 3:

Court: Sakarya Regional Administrative Court.
Name of Defendant: Sakarya University Rectorate.
Case Details: The plaintiff, Mr. Sinan Ulu, distributed leaflets with political and ideological content in the University where he was a student. In December 2003 he was suspended from the university for one year following a decision of the Faculty Management Board according to the University Students Disciplinary Regulation. The plaintiff applied to the Administrative Court in Sakarya requesting a stay of execution of the order. The court rejected this request in March 2004. The plaintiff then appealed to the Sakarya Regional Administrative Court, claiming that he did not distribute any leaflets and that even if he did, the leaflets did not include any political or ideological content. The plaintiff also complained that the Court did not hear the evidence of witnesses in his favour. The Regional Administrative Court found that the content of the leaflets in question was against the American and British occupation of Iraq and against the High Board for University Education (YÖK) in Turkey. The Court concluded that the leaflets did not include any content that could be said to be against national security, the territorial integrity of the state or public order and they did not call for any violence nor restrict the freedom of learning and teaching. Accordingly, in distributing the leaflets the plaintiff had simply exercised his guaranteed right to freedom of expression.
References to ECHR and/or case law of ECtHR: Article 10 (freedom of expression) of the ECHR and decisions of the ECtHR in *Handyside v. United Kingdom* (1976), *Vogt v. Germany* (1995), *Observer and Guardian v. United Kingdom* (1995).
Court Decision: Stay of execution of order.

Example 4:

Court: Istanbul No.2 State Security Court.
Name of Defendants: Ali Celik Kasımogullari, Mehmet Colak (owner and chief editor of the daily newspaper *Yeni Gundem*).
Case Details: The SSC Chief Public Prosecutor's Office filed a case against the defendants following the publication of 5 articles in a supplement to the daily newspaper on 02.01.04. The defendants were accused of making public the names of persons who were involved in the combat against terrorism and publishing the announcements and statements of a terror organisation. The Court decided that some of the articles did not constitute a crime and should be considered within the scope of freedom of expression as defined by Article 10 of the ECHR and Article 25 of the Turkish Constitution. However, other articles in fact did publish announcements and statements of the armed faction of a terror organisation. The articles included statements inciting the use of force and violence and thus contained expression that was not protected by the scope of Article 10 of the ECHR.

References to ECHR and/or case law of ECtHR: Articles 10/1 and 10/2 (freedom of expression) of the ECHR and decision of the ECtHR in *Mehdi Zana v. Turkey*.
Court Decision: **1**-Acquittal for both; **2-**Heavy fine for owner (1,500 Euros) and heavy fine for chief editor (700 Euros); **3-**two days of temporary closure.

Example 5:

Court: Istanbul No.2 State Security Court.
Name of Defendants: Ali Celik Kasimogullari, Mehmet Colak (owner and chief editor of the daily newspaper *Yeni Gundem*).
Case Details: The defendants were convicted of publishing the announcements and statements of an illegal organisation in violation of Article 6/2 of Law No.3713 (Anti-Terror Law) (publishing announcements and statements of terror organisations). The court found that the published articles included statements inciting the use of force and violence and thus contained expression that was not protected by the scope of Article 10 of the ECHR.
References to ECHR and/or case law of ECtHR: Articles 10/1 and 10/2 (freedom of expression) of the ECHR and decision of the ECtHR in *Mehdi Zana v. Turkey*.
Court Decision: **1**-Heavy fine for owner (1,500 Euros); **2-** Heavy fine for chief editor (800 Euros); **3-**one day of temporary closure.

Example 6:

Court: Istanbul No.2 State Security Court.
Name of Defendants: Ali Celik Kasimogullari, Mehmet Colak (owner and chief editor of the daily newspaper *Yeni Gundem*).
Case Details: The defendants were convicted of publishing an article in the daily newspaper on 15.10.03 in violation of Articles 6/2 and 7/2 of Law No. 3713 (Anti-Terror Law) (publishing announcements and statements of terror organisations; and aiding and abetting propaganda of terror organisations through incitement to violence and other terrorist methods). The Court found that Article 10/1 of the ECHR did not protect the content of the article because the conditions justifying an interference with the right to freedom of expression as set forth in Article 10/2 of the ECHR had been satisfied. The expression constituted a threat to national security, territorial integrity, public security and order and the prevention of crime. Accordingly the conviction did not violate Article 10 of the ECHR. The Court also ruled that the chief editor had to take responsibility for the article published in the newspaper as he had failed to present the name of the author to the court even though an additional 3-month period for the preparation of the defence was accorded to him.
References to ECHR and/or case law of ECtHR: Articles 10/1 and 10/2 (freedom of expression) of ECHR and decision of the ECtHR in *Mehdi Zana v. Turkey*.
Court Decision: **1**-Heavy fine for owner (1,500 Euros); **2-** Heavy Fine (300 Euros) and imprisonment for 1 year for chief editor; **3-**one day of temporary closure.

Example 7:

Court: Istanbul No.2 State Security Court.
Name of Defendants: Bulent Demirel, Fadıl Ozcelik (owner and chief editor of bi-monthly journal DEMA NU).
Case Details: Following the publication of an article in April 2001, the defendants were convicted of offences in violation of Article 6/2 of Law No. 3713 (Anti-Terror Law) (publishing announcements and statements of terror organisations). The Court sentenced the two defendants to heavy fines and a temporary suspension of the journal for 15 days. The defendants appealed to the High Court of Appeals. In 2002 the High Court of Appeals overruled the decision of the State Security Court on the ground that it had made its decision in the absence of any evidence regarding whether the organisation in question (PSK) could be classified as a terror organisation or not. The case was referred back to the Istanbul State Security Court but it insisted on its initial decision. The case was appealed to the Criminal General Assembly of the High Court of Appeals. The General Assembly decided that first it must be determined whether the PSK is a terror organisation or not. This decision of the Supreme Court of Appeals was accepted by the lower court. In its ruling, the Istanbul State Security Court stated that it was understood from information submitted by the police that the PSK had not yet carried out any armed activities, although there were other court decisions on the terrorist nature of the organisation in question. However, the Court ultimately decided to acquit the two defendants on alternative grounds, namely that the article in question did not include any incitement to the use of force or violence and should therefore be considered as protected by the right to freedom of expression within Article 10 of the ECHR. The Court went on to state that Turkey, being a party to the ECHR, should abide by the decisions of the ECtHR.
References to ECHR and/or case law of ECtHR: Article 10/1 and 10/2 (freedom of expression) of ECHR and some ECtHR decisions on similar cases, in particular *Surek-Ozdemir v. Turkey*, reform package amending Article 7 of the Anti-Terror Law and Article 90 of the Turkish Constitution (international treaties to which Turkey is a party having the effect of national law).
Court Decision: Acquittal for both.

Example 8:

Office: Germencik Office of the Chief Public Prosecutor.
Name of Defendant: Tuncer Bakirhan, Chairman of DEHAP.
Case Details: The Chief Public Prosecutor was required to determine whether or not to initiate a criminal prosecution against the defendant in respect of a speech given on 18 October 2003 in which the defendant allegedly incited hatred and enmity (the speech was videotaped by security forces).
References to ECHR and/or case law of ECtHR: Article 10 (freedom of expression) of ECHR and decisions of the ECtHR in *Handyside v. United Kingdom* (1976), *Costells v. Spain*, *Lingens v. Austria*, *Jerusalem v. Austria*, *Surek and Ozdemir v. Turkey*, *Karatas v. Turkey*, *Incal v. Turkey* and *Aksoy v. Turkey*, plus decision of the Criminal General Assembly of the High Court of Appeals dated 03.07.01 stating that criticism by persons holding public posts is necessary in a democratic society.
Court Decision: Non-prosecution.

Example 9:

Court: Hakkari General Civil Court
Name of Defendant: Hakkari Birth Registration Directorate
Paintiff: Ulku Yildirim
Case Details: This case concerned a request for a change of name. The plaintiff stated that she was a Turkish citizen of Kurdish origin and that although her family wanted to give her a Kurdish name at her birth, this could not be done due to the existing legal barriers. She applied stating that she had learned that she could use a Kurdish name within the framework of the reform packages and requested that her first name be changed to "Warjin". The plaintiff also stated that she would not accept the use of the letter "V" instead of the letter "W" simply on the basis that the latter is not within the Turkish alphabet. The Court accepted that the plaintiff was entitled to apply to change her first name on the ground that she was known with the name "Warjin" amongst her circle of family and friends. The Court also accepted that the requested name, which means "place to live" in Kurdish, does not have any improper meaning. The Court proceeded to reject the case on the ground that the plaintiff did not accept that her name could be written with the letter "V" instead of "W". The Court concluded that writing the name "Warjin" with the letter "W" could not be accepted because this letter does not exist in the Turkish alphabet. Its use would lead to spelling and pronunciation mistakes and this would not be in the public interest.
References to ECHR and/or case law of ECtHR: Article 8 (private life) of the ECHR and decisions of the ECtHR in *Sterjna v. Finland* (1994) and *Guillot v. France* (1996).
Court Decision: Rejection of case.

Example 10:

Court: Gelendost Criminal Court of Peace.
Subject: On 21.04.04 Yalvac Office of Forest Management applied for permission to search the homes of Eflatun Eskici, Yasar Aksoy, Mevlut Cicek, Mehmet Cicek, Kemal Uygun and Kadir Dulger after receiving an anonymous phone call claiming that the above-named persons had smuggled and stored wood illegally in their homes. The Court found that the conditions for granting such a permission had not been met as there must be a reasonable suspicion that a crime has been committed before a search warrant can be issued and an anonymous telephone call does not provide a sufficient evidential basis for there to be a reasonable suspicion.
References to ECHR and/or case law of ECtHR: Article 8 (private life and home) of ECHR and decisions of the ECtHR in *Niemietz v. Germany*, *Ernst v. Belgium*, *Arrowsmith v. United Kingdom*, *Fox and Others v. United Kingdom* and *Aksoy v. Turkey*.
Court Decision: Request for permission to search homes denied.

Example 11:

Court: Gelendost Criminal Court of Peace.

Subject: The Office of the Gelendost Public Prosecutor applied to the court for permission to hold Abdullah Uysal under observation for three weeks in a public health institution on grounds of having a psychiatric disorder and disturbing public order.
References to ECHR and/or case law of ECtHR: Article 5 (liberty and security) of ECHR and decisions of the ECtHR in *Guzzardi v. Italy*, *Witold Litwa v. Poland*, *DeWilde, Oom and Versyp v. Belgium* (1971), *Engel and Others v. United Kingdom*, *Ashingdane v. United Kingdom*, *Van der Leer v. Netherlands*, *Anguelova v. Bulgaria*, *Johnson v. United Kingdom*, *Winterwerp v. Netherlands*.
Court Decision: Permission granted to place Abdullah Uysal under observation in a public health institution for three weeks with requirement that relatives be informed and the Office of the Public Prosecutor submit documents evidencing release from the health institution three weeks after the start of the observation.