

# **The Criminal Justice System – Luca Perilli**

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**THE CRIMINAL JUSTICE SYSTEM  
EXECUTIVE SUMMARY**

According to the 2008 progress report of the European Commission reforms in the area of the judiciary are a priority of the Accession.

To respond to the need of reforms the Turkish government presented in spring 2008 a draft judicial reform strategy, which covers issues related to the independence, impartiality, efficiency and effectiveness of the judiciary, enhancement of its professionalism, the management system and measures to enhance confidence in the judiciary, to facilitate access to justice and to improve the penitentiary system.

This report is aimed at assessing the capacity of the Turkish criminal justice system to comply with the European Standards in the field and to cope with the reforms envisaged by the judicial reform strategy.

It focuses on the shortcomings of the current legal and organisational framework and proposes recommendations.

The statistics provided by the Turkish Authorities show that many prosecution offices and particularly those authorized by article 250 of Law No 5271 to prosecute serious crime and to fight against organised crime, face problems of inefficiency and are accumulating backlog year after year.

This report indicates three recommendable solutions to increase the effectiveness of prosecutors:

- to increase in the number of prosecutors and the office personnel and to speed up the procedures for the recruitment of new prosecutors;
- to enhance the recourse to mediation as an alternative and effective system for resolution of disputes;
- to increase the efficiency of the prosecution service by a better coordination and specialization of prosecutors.

An efficient prosecution office has to be assisted by a sufficient budget. During the past years the Turkish Government made significant efforts to increase the budget for the judiciary. Nevertheless comparison with European Union Countries shows that in Turkey public expenditure on prosecutors, courts and legal aid whether per inhabitant or in terms of national budget or as a percentage of gross average salary, is still low. It is then recommendable that the proportion of the budget allocated to the administration of justice continues to be increased and to separate the budget of courts from that of prosecutors and legal aid, in a way to identify and attend the peculiar needs of each service.

An increase in the quality of the investigations demands the improvement of the institutional relationship between, on the one hand, the police and the gendarmerie and, on the other, the judiciary. To this respect, the expert supports the full implementation of the Regulation on judicial police; the settlement of specialised police units attached to the prosecution offices; the establishment of written guidelines and protocols by prosecutors to guide police and gendarmerie in the investigations

As to the restriction of personal liberty, particular concerns are related to the allegations by NGOs regarding cases of torture and ill-treatment of arrested people by law enforcement agents.

Turkish judges and prosecutors are expected to take care that pre-trial detention be limited to those circumstances where it is strictly necessary in the public interest; to carry out, in particular in cases of allegation of torture and ill-treatment by State's agents, effective and independent investigations and to ensure full and prompt access by the applicant to all the relevant information.

Furthermore, the process of transferring forensic examinations to state hospitals or health centres should be expedited and, in cases of alleged torture or mistreatment, lawyers should always be allowed to attend forensic examinations.

The proper implementation of the new criminal procedural code has revealed difficult. An intense, specific and widespread training for prosecutors, judges and lawyers should be conducted by the Judicial Academy about the new criminal procedural provisions regarding mediation, return of indictment and cross examination.

Equality between prosecution and defence counsel has to be ensured, by fully permitting lawyers to consult with their client during the course of court proceeding and the accused to have access to the relevant documents pointing at innocence or guilt already early in the proceedings. Public prosecutors and defence lawyers should be positioned on an equal level in court rooms.

Measures are expected to be promptly adopted to ensure the appearance of impartiality of judges and prosecutors. In particular in case of change of functions from judge to prosecutor or vice versa, the person concerned should be obliged to change the location of work; public prosecutors should have their offices located in a completely separate part of the courthouse from that occupied by judges; they should be required to enter and leave the courtroom through a door other than that used by the judge.

At to the right to defence, measures must be taken to extend the scope of compulsory defence to all cases in which the defendant cannot afford to pay for legal representation and a system of accredited interpreters should be enhanced.

Juvenile Justice is a cause of serious concerns. The new Law on child protection has not properly implemented so far. Children of age between 15 and 18 are often arrested, kept in detention and tried together with adults. Turkish Authorities are expected:

- to establish juvenile courts and prosecutor's bureau for juveniles in every province and to appoint psychologists, psychiatrists and pedagogues to the juvenile courts, where they do not already exist.
- To ensure to every minor, irrespective of his/her age and the accused charged against him or her, full protection in accordance with the International Conventions for the protection of children and law on child protection.
- To consider detention or imprisonment of a child only as a measure of last resort and to apply it for the shortest appropriate period of time; to separate from adults every child deprived of liberty and try him (or her) separately.
- To display special diligence when treating cases in which children are involved and to speed up investigations and trials regarding children.
- To constantly and intensively providing training on international and national principles and techniques about the protection of children for judges and prosecutors who deal with trials investigations regarding children.

Finally, the legislator is expected to adopt adequate measures to protect victims of criminal offences and vulnerable persons in particular in case of rape; for victims of terrorism; domestic violence and ethnic minorities.

## METHODOLOGY

The expert drafted the present report relying on information gathered during the official visit to Turkey, which took place from 17 to 21 November 2008, and on documents provided by the Turkish authorities and the European Commission before and during the mission.

The visit to Turkey consisted of full five days meetings arranged by the Turkish Authorities with: chief prosecutors, prosecutors and staff from Public Prosecutor Offices in Mardin, Diyarbakir and the Prosecution Office attached to the Court of Cassation; Judges and judicial staff from various criminal Courts in Mardin and Diyarbakir; representatives from the Ministry of Justice; chief, deputy chief and various members of the Ministry of Justice Inspectorate Board; representatives from NGOs in Ankara, Diyarbakir and Mardin; lawyers from the Union of Turkish Bar Association and from the Ankara and Mardin Bar associations; police officers in Mardin; doctors and technicians from the Forensic Institute in Ankara; representatives from the Judicial Academy.

The expert started his analysis of the criminal justice system from the data displayed by reports released by the European Commission or elaborated in the framework of projects, missions and studies supported by the European Commission and Council of Europe. To this respect the main references go to: Turkey 2006, 2007 and 2008 Progress Report issued by the Commission of the European Communities, the European Commission's Screening Report about Chapter 23 (Judiciary and Fundamental Rights), the Third Advisory Report of 2005 by Kjell Björnberg and Ross Cranston titled "The Functioning of the Judicial System in the Republic of Turkey", the 2008 report by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe.

The main sources of Turkish Law consulted by the expert for the assessment can be listed as follows: the Constitution of the Republic of Turkey, law no: 5235 *on the establishment, duties and powers of the ordinary courts of first instance and regional courts of appeal*, law no 2802 *on judges and prosecutors*, the criminal and criminal procedural codes, regulation no 25832 *on apprehension, detention and statement taking*.

This assessment is guided by the reference to the European standards derived mainly from the following sources: The European Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the Strasbourg Court; Recommendation Rec(2000)19, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 on "*The role of public prosecution in the criminal justice system*", Recommendation (1994)12 adopted by the Committee of Ministers of the Council of Europe on 13 October 1994 and its explanatory memorandum on *Independence, efficiency and role of judges*, the "Budapest Guidelines" adopted in Budapest on 31 May 2005 by the Conference of Prosecutors General of Europe, the United Nations Convention on the Right of the Child of 20 November 1989

The assessment takes note of the important progresses and efforts made by the Turkish Authorities to improve the criminal justice system and of the Judicial Reform Strategy drafted by the Turkish Ministry of Justice.

**This report has been made possible thanks to the constant, open and warm cooperation by the Turkish Authorities and the expert and wise support by the representatives from the European Commission DGs Enlargement and Justice Freedom and Security and the EC Delegation in Turkey.**

#### A. ROLE OF THE PROSECUTION OFFICE IN TURKEY

***"Public prosecutors" are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal***

**sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system”.**<sup>1</sup>

Public Prosecution Service has a central role within the Criminal Justice System. As an objective body independent of direct political influence it has to control investigation, to decide on bringing cases before the court and to guarantee that the legal rights of the persons concerned are observed<sup>2</sup>.

The mission of the Public Prosecution Service is then to secure citizens’ basic rights to freedom and liberty.’

According to the Turkish Constitution, prosecutors enjoy the same **guarantees of independence and irremovability** as judges; they share with judges the same system for entry into the profession, the same pre-service and in-service training, the same system of promotion and change or post or location, the same disciplinary system: in a word the same career. The Constitution establishes that the High Council of Judges and prosecutors is responsible for governing the professional career of judges and prosecutors and, this way, for preserving their independence from external interferences.

#### ➤ REPORT OF CONSIDERATIONS

Public prosecutors in continental jurisdictions often belong to the judicial branch (e.g. in France and in Italy). This is in accordance with the inquisitorial tradition in which the prosecutor is seen as a neutral and impartial party. There is a long tradition in civil law systems of public prosecutors taking responsibility for prosecutions in the public interest, In those countries (but also in the Netherlands and Germany) judges and prosecutors usually train together on the same postgraduate training course, with some law graduates opting to enter the judicial branch of the legal profession and others the prosecution and defence branches.

In Turkey, like in Italy and France, after following the same education programme, judges and prosecutors become members of the same body, the *Magistratura* (in Italy) or *Magistrature* (in France), and it is not uncommon for them to change from *prosecutor* to the bench or vice versa during their career.

#### 1.1 ORGANIZATION AND FUNCTIONS OF THE PROSECUTION OFFICE

According to the law no: 5235 “on the establishment, duties and powers of the ordinary courts of first instance and regional courts of appeal”<sup>3</sup> **prosecution office** should be **established**:

- in every provincial capital and district in which a court organisation is to be found and shall be named after the said province or district (art. 16 of the law);
- at each regional court of appeal (art. 30).

The chief public prosecutor’s office at first level and at regional court of appeal “shall be composed of a chief public prosecutor and an adequate number of public prosecutors”.

Currently, **prosecution office at regional court of appeal** level have not yet been settled, since the law No 5253 establishing the courts of appeal has not yet been implemented so far<sup>4</sup>.

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<sup>1</sup> Recommendation Rec(2000)19 Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 on “*The role of public prosecution in the criminal justice system*”, hereinafter referred to as the Rec(2000)19.

<sup>2</sup> Recommendation Rec(1987)18 Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 on “*The simplification of criminal justice*”.

<sup>3</sup> Entered into force on the first of April 2005.

<sup>4</sup> The Ministry of Justice (MoJ) has taken a decision on 18 May 2007 after receiving a positive opinion from the High Council for Judges and Public Prosecutors to establish regional courts of appeal (RCoA) in 9 provinces namely; İstanbul, Bursa, İzmir, Ankara, Konya, Samsun, Adana, Erzurum and Diyarbakır. The jurisdiction area of 9 courts will cover the whole territory of Turkey. However, taking into consideration the geography of Turkey, this number has been found insufficient and recommended to be higher than 9

The same law No 5253 provides that **the chief public prosecutor's office at first instance level**<sup>5</sup> has the following **duties**: to conduct an investigation or have one conducted in order to decide whether there are grounds for bringing a public prosecution; to follow and take part in judicial proceedings on behalf of the state; exercise legal remedies where necessary; to take and monitor the necessary measures to enforce court decisions that have become final; to perform any other duties conferred on the office by law.

The duties of the chief public prosecutor's office at regional level shall be: to draw up written opinions on judgments and decisions concerning criminal cases, to attend hearings and state the office's views and to exercise the legal remedies available against the decisions of the criminal divisions of the regional courts of appeal.

Both prosecutor offices at first instance and regional level are headed by a **chief public prosecutor**, whose tasks are (article 18 and 40 of law No 5253): to represent the chief public prosecutor's office; to direct and supervise the office; to ensure that the chief public prosecutor's office functions in an efficient, harmonious and organised manner and to distribute tasks among their staff; to carry out the general administrative tasks of the court; where necessary, to conduct procedures relating to judicial functions, take part in court hearings and exercise legal remedies; to prepare the promotion reports of court's prosecutors.

A separate law regulates the **Chief Public Prosecutor Office** which is attached to the Court of Cassation. It is composed by nine prosecutorial units and 160 public prosecutors. It examines and issues opinions on the appeals which go from the first instance courts to the Court of Cassation; its prosecutors take part in the trials in front of the Court of Cassation; it exercises special competences, such as prosecuting in front of the Constitutional Court, in its capacity as Supreme Court, the most important States' Authorities, such as the President of the Republic, members of the Council of Ministers, presidents and members of the Constitutional Court, of the High Court of Appeals, of the Council of State, of the Military High Court of Appeals, of the High Military Administrative Court of Appeals, their Chief Public Prosecutors, Deputy Public Prosecutors of the Republic, and the presidents and members of the Supreme Council of Judges and Public Prosecutors, and of the Audit Court (article 148 paragraph 3 of the Turkish Constitution).

#### ➤ REPORT OF CONSIDERATIONS

Although the Law establishes the Chief public prosecutor's duty to ensure that his office functions in an efficient, harmonious and organised manner, it does not expressly provide for specific powers of the Chief prosecutor to issue directives and guidelines for the prosecutors working in his/her office. In the course of the visits at Mardin and Diyarbakir prosecution offices the expert was informed that Chief prosecutors are not used to issue written guidelines and circulars in order to ensure the objectivity and to enhance the effectiveness of the investigations.

This turns into problems of effectiveness of prosecution system, as stressed below in chapters 1.2, 1.6 and 1.7

## 1.2 STATISTICS AND EFFECTIVENESS

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<sup>5</sup> The jurisdiction of the office is regulated by article 2 of the law 5235, according to which: Public prosecutors shall have jurisdiction within the administrative borders of the provincial capital or district in which they are located and those of the districts judicially attached to it. Chief public prosecutors' offices located in the area of jurisdiction of aggravated felony courts and other criminal courts established by means of special laws shall conduct investigations relating to offences that fall under the jurisdiction of these courts, within their own geographical area of jurisdiction, and having completed the urgent and mandatory tasks and added the investigation documents to their written opinion, they shall send them to the chief public prosecutor's office at the assize court or other criminal court established by means of a special law. Chief public prosecutors in post within the borders of metropolitan municipalities shall have jurisdiction within the area of jurisdiction of the criminal courts of this locality. However, the provision of the above paragraph shall apply in cases falling under the jurisdiction of the aggravated felony courts and other criminal courts established by means of special laws that are situated within the territory of the metropolitan municipality.

According to the 2007 and 2008 EC progress reports, **the number of the newly appointed judges during the period from 3 October 2006 to 27 April 2007 was 864 and that of prosecutors 476.**

Thus, as of 1 May 2007, the total number of judges reached 6,785 and that of prosecutors 3,744.

In 2007, a total of 846 judges and prosecutors were appointed.

**The total number of judges and prosecutors on 1 May 2008 was 6,914 (6,785 on 1 May 2007) and 3,917 respectively. On the same date, the total number of vacant posts for judges and prosecutors was 4,166.**

According to the statistics released by Ministry of Justice, at the time of the experts' visit, the number of prosecutors was **4007**; 3847 of which are attached to first instance courts and 160 prosecutors to the Court of Cassation.

The Judges of first instance are 5121 and rapporteurs of the Court of Cassation 492

Following the figures contained in the **European Commission for the Efficiency of Justice** (hereinafter also referred as: **CEPEJ**) report, edited in 2008 but based on figures from 2006, about the *Efficiency and quality of justice in the European Judicial System*, in year 2006 the number of prosecutors was 3936 in Turkey, 5084 in Germany and 2231 in Italy<sup>6</sup>.

Number of prosecutors per 100.000 inhabitants was 5,4 in Turkey, 6,2 in Germany and 3,8 in Italy.<sup>7</sup>

The report edited by **CEPEJ** display **statistics** (regarding year 2006) about the **effectiveness** of prosecution offices in Europe (see annex I).

#### ➤ **REPORT OF CONSIDERATIONS**

In the course of the last two years there has been a modest increase in the number of prosecutors which have passed from 3936 in year 2006 (according to the CEPEJ report) to 2007 at the time of the mission.

According to the information provided by the Turkish Ministry of Justice, the total number of vacant posts for judges and prosecutors is 4,166, which is more than 50% of the number of judges and prosecutors currently servicing in Turkey.

The CEPEJ report displays that despite of huge number of vacant posts, the current number of prosecutors, if related to the number of cases filed every year, is bigger than in Italy and in Germany (Table B) This is due to the lower number of cases filed in Turkey than in Italy and in Germany (Table B)

The table C (in ANNEX II) demonstrates that the Turkish prosecution system as a whole faces problems of efficiency, since in year 2007 the number incoming cases has been bigger than that of outgoing cases of almost 6%.

Furthermore **serious concerns** regard the effectiveness of prosecution offices authorized by article 250 of Law No 5271 to prosecute serious crime and fight against organised crime.

It is clear from the statistics (ANNEX II table D) that all the prosecution offices under examination are seriously suffering and are accumulating backlog, since all of them, in the course of year 2007, transferred to the next year more files, and in some cases much more files, than those received during the year.

The statistics suggest that, as an average, those prosecution offices are accumulating a backlog of approximately 7% of the files received during the year.

This situation, if not properly tackled, could cause serious problems of duration and affect the right management of investigations and trials, with specific reference to those criminal offences (such as organised crime, trafficking of drugs and human beings) which are of relevant interest not only for the Turkish society but also for the international community.

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<sup>6</sup> They have been considered in this assessment countries which are comparable in terms of population.

<sup>7</sup> The Italian ratio is one of the lowest in EU Countries.

Furthermore, if one looks at the numbers of offences and suspects recorded one can observe that for decades an enormous rise in crime has taken place in Western Europe and that this is also true for Central and Eastern European Countries for the last 15 years, in particular with reference to the so-called mass-crimes, i.e. traffic offences. Following this trend it is then possible an increase in criminal offences also in Turkey in the next years.

How could the criminal justice system react to this situation?

In principle there are different ways of dealing with the increased number of criminal proceedings:

- 1) In accordance with the **principle of legality** (chapter 1.4 below) followed by the Turkish criminal system, one necessary solution is the increase in the number of **prosecutors and the office personnel.**
- 2) A second way is enhancing **alternative systems of resolution of disputes** (like mediation)
- 3) Finally it would be recommendable increasing the efficiency of the prosecution service by a better **coordination** and **specialization** of prosecutors (chapter 1.7 below).

**We recommend:**

- to speed up the recruitment of new prosecutors and judicial personnel and to increase their capacity to work.
- To enhance the recourse to mediation as an alternative system of resolution of disputes.

### **1.3 THE BUDGET AND ADMINISTRATIVE FUNCTIONS**

The budget of courts and prosecution office is **part of the budget of the Ministry of Justice.** The 2007 and 2008 EC progress reports display that **the funds for the judiciary** increased in 2006 to approximately € 482 million from € 409 in 2005 and reached **€ 865 million in 2007.** These funds cover salaries and social security payments for all members of the judiciary as well as services and real estate acquisition for the judiciary.

According to the European Commission for the Efficiency of Justice (**CEPEJ**) report of **2006**, the **total annual budget** allocated to courts, public prosecution and legal aid in Turkey in year 2006 was **€ 522.486 876.**

In the same year the budget allocated by Germany (for a population of 82 351 000) and by Italy (for a population of 58 751 711) was respectively of € 8 731 000 000 and of € 4 088 109 198.

The same CEPEJ reports that **the budget** allocated in Turkey to the judicial system **per inhabitant** in year 2006 was one of the lowest in CoE Countries: it amounted indeed to € 7, compared to € 106 of Germany or € 70 of Italy.

In the same year Turkey distinguished for one of the lowest level of **budget** for the Judiciary also in the perspective of total public budget allocated to the judicial system **as percentage of per capita GDP**; the figures on this parameter are as following: Turkey 0,16%, Germany 0,38%, Italy 0,26%.

In the course of the visits the experts were reported by the staff of the prosecution offices that the budget allocated to the single office is not sufficient to cover the ordinary operational needs of the office.

As to the **administration of the budget**, in Turkey the courts and the prosecutor's offices are closely linked to each other, being located together. The administrative duties are – as we have understood it – led by an internal board containing representatives both of the court and the prosecution office. The daily administrative work and executive tasks are under the responsibility of the chief public prosecutor, who normally delegates tasks to one of the prosecutors. The administrative functions of public prosecutors are related to the management

of courthouses and prisons. Public prosecutors have overall responsibility for all aspects of the day-to-day administration and support work of the courts and the prisons. It is their duty to ensure that the necessary services are provided to judges and prosecutors, court users and personnel so as to ensure the efficient functioning of the justice system. In this capacity, public prosecutors are also responsible for matters such as the maintenance of lighting, the provision of electricity, the cleaning of the buildings and ensuring that there is adequate stationery. Public prosecutors are also responsible for overseeing the administration of the quarters where judges and public prosecutors live.

➤ **REPORT OF CONSIDERATIONS**

The figures in the CEPEJ report can only, of course, be a rough guide because courts perform different functions in the different countries. Overall, however, public expenditure on courts and legal aid whether per inhabitant or in terms of national budget or as a percentage of gross average salary, is low in Turkey compared with countries belonging to European Union. The budget remains low even after the important efforts made by the Government in the past three years for almost doubling it<sup>8</sup>.

Furthermore the data provided by the Ministry of Justice do not allow to estimating the budget allocated to prosecution offices, since it is confused with the budget destined to the courts. This does not facilitate the process of selection of the budgetary needs of courts, on one side, and prosecution offices on the other side.

The management of the budget allocated to the single office by the chief prosecutor both for court and prosecution offices could in principle affect the independence of the court.

The system of administration of the budget by the Chief prosecutor is not in compliance with the principle of effectiveness, which demands that prosecutors take care of the judicial activity, leaving the administrative task to the office's staff.

**We recommend:**

- that the proportion of the budget allocated to the administration of justice continue to be increased.
- To separate the budget of courts from that of prosecutors and legal aid.
- To involve prosecutors in the process of identification of the budgetary needs.
- That administrative duties currently undertaken by public prosecutors be transferred to administrative staff.

**1.4 CRIMINAL PROSECUTION. PRINCIPLE OF LEGALITY. DISCONTINUATION OF CRIMINAL PROCEEDINGS**

Turkish prosecutors are **obliged to institute criminal prosecution** if reasonable suspicion exists that a criminal offence is committed. The prosecutor shall institute the prosecution and represent the charge against perpetrators of criminal acts

Pursuant to article 170 of the criminal procedural law (titled: *Duty to bring a public prosecution*): the duty to bring a public prosecution rests with the public prosecutor *if the evidence collected at the end of the investigation phase creates sufficient suspicion that a crime has been committed; then the public prosecutor shall prepare an indictment.*

Pursuant article 172 of the same criminal procedural code (hereinafter also referred as CPC), **the Prosecutor can dismiss a crime report** by a ruling with a **statement of reasons**

All the decisions to dismiss a crime report are controlled by the Chief Public Prosecutor through UYAP (for what see below).

Once a decision of a non-prosecution is taken, that file will not be reopened unless new evidence against the suspect is found (Article 172/2 of CPC).

<sup>8</sup> According to the data reported by CEPEJ, the total budget allocated to the Judicial system have increased of 57% between 2004 and 2006.

**A non-prosecution decision is open to judicial review** by the president of the nearest heavy penal court on complaint of victim of the crime (Article 173 of CPC).

Unmeritorious proceedings before the courts will be prevented by article 174 which gives the court the competence to return unfounded indictments.

#### ➤ REPORT OF CONSIDERATIONS

The power to decide whether a particular case should be forwarded to courts or filtered out of the system is regarded as the central function – the *sine qua non* – of every prosecuting authority.

The **legality principle** commands that every case in which there is enough evidence and in which no legal hindrances prohibit prosecution has to be brought to court. Adherence to the legality principle in the procedural sense means that the prosecution service cannot exercise any discretion over the prosecutorial decision. Its role is limited to the legal assessment of the sufficiency of the evidence against the suspect.

The adoption of the legality principle is usually connected with the continental tradition in which enforcement agencies are, at least theoretically, denied any discretion and primacy is given to the legislative power of the State (e.g. Germany, Italy and Spain)..

Two principal reasons are usually given for the mandatory prosecution of all offences as prescribed by the law. The first is the safeguard of the principle of equality before the law and the second is the upholding of the concept of general deterrence. The guarantee that all offenders will be tried and that no offence will remain unpunished would be an important means by which to uphold the trust of the population in law enforcement, and in the proper administration of justice<sup>9</sup>.

Nevertheless, differently from Italy, the power to decide about the discontinuation of the investigations rests with the prosecutors and not with the judge. The criminal procedural code allows the prosecutor to dismiss a crime report by a ruling with a statement of reasons. Only the injured party can contest the dismissal decision by appealing to the president of the nearest heavy penal court.

The system is in compliance with the international standards and in particular with principle 33 of *Rec(2000)19*<sup>9</sup>.

Nevertheless, taking into account the high attention focused by the international community and the European Commission on the problem of corruption in the Turkish public administration, a judicial review of the dismissals decisions would be highly advisable in any case in which the injured party is the State. In the corruption cases, indeed, the Prosecution Office, which decides the dismissal, represents at the same time the prosecuting party and the injured party which is the State. That means that the dismissal of the crime report is currently not subject to any external control.

#### **We recommend:**

- to establish a judicial review on the decisions assumed by prosecutor to dismiss a case in which the injured party is the State.

#### **1.5 THE INVESTIGATIVE PHASE. JUDICIAL POLICE**

The 2007 EC progress report raised concerns for the **quality of the investigations** and pointed to the need to **improve the institutional relationship between**, on the one hand, **the police and the gendarmerie and**, on the other, **the judiciary**.

2008 EC progress report stresses that no progress has been made on enhancing civilian control over the gendarmerie when engaged in law enforcement activities

<sup>9</sup> Principle 33 recites that *Interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising to parties to engage private prosecution.*

According to article 161 of the CPC, **it is the Public Prosecutor** - either directly himself or through the judicial police under his/her command – **to conduct the investigations**.

Pursuant article 164 of the same code regarding Judicial police, investigation procedures shall be undertaken primarily by the **judicial police** upon the instructions of the Public Prosecutor. Members of the judicial police shall **carry out the instructions given by the Public Prosecutors** with respect to judicial duties. Judicial police shall be obliged to **notify** its particular Public Prosecutor **immediately** about the incidents that it has taken over, the persons apprehended and the measures applied; and it is obliged to comply with the judicial orders<sup>10</sup> of the particular Public Prosecutor without any delay (Art. 161/2 of the CPC).

In order to define the relations between prosecution and judicial police, **“Bylaw on Judicial Police”** has been adopted jointly by the Ministry of Justice and the Ministry of Interior as foreseen in article 167<sup>11</sup> of the new CPC. It came into force on the same day as the new Criminal Procedure Code on 1 June 2005.

Pursuant to the above regulation, the public prosecutors should have full supervision over the police forces in judicial investigations and cases.

The Ministry of Justice said in its response to the 2004 advisory mission recommendations that the regulation *is a milestone in the judicial reform process as the public prosecutors will have effective supervisory competence over the police, which will result in more adequate investigations leading to a presentation to the courts of complete files and indictments. The average duration of trials should reduce as the number of hearings and adjournments in each case will decrease substantially.*

The experts have nevertheless ascertained that **the regulation has not been implemented so far**.

The prosecutors currently operate availing of judicial police units within the police headquarters, which operate are under the hierarchical control of the Ministry of Interior.

Furthermore, according to article 166 of the CPC (titled: *power to prepare an evaluation report*), at the end of every year, the Chief Public Prosecutors should prepare **evaluation reports on the judicial police** authorities and convey these reports to the civil administrative superiors.

The rule has been so far implemented in very few cases. According to the information received by the expert from the Ministry of Justice, it is even not clear which are the judicial police authorities under the supervision and subject to evaluation report by the Chief Public Prosecutor.

Finally the experts were informed that, in the prosecution offices they visited (in Mardin and Diyarbakir), the Chief Public Prosecutor and the public prosecutors do not use to issue written guidelines or to establish written protocols to guide and direct the police in its investigations; the prosecution offices rely, instead, on verbal agreements.

#### ➤ **REPORT OF CONSIDERATIONS**

Prosecutors are responsible for the whole pre-trial stage, including investigations. In most systems, the prosecuting authority is empowered to give instructions on the scope of

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<sup>10</sup> According to paragraph 3 of article 161 of CPC public prosecutor shall give his orders to the law enforcement officials in writing; in urgent cases, the orders may be given verbally.

<sup>11</sup> Article 167 of CPC states that (1) the qualifications of the members of the judicial police, their pre- and in-service training, their relations with other service units, the preparation of evaluation reports, the departments where they will work according to their areas of specialization and other issues shall be laid down in a regulation to be issued jointly by the ministries of Justice and Interior within six months after the date of entry into force of this Law.

investigations, personally to investigate criminal cases, to participate in investigations and to decide on the type of investigations.

Furthermore the appearance of new forms of criminality (organized crime, especially money-laundering, drug-trafficking, trafficking in human beings and terrorism) and the ever-increasing complexities of substantive and procedural rules makes the police more dependent on the guide of prosecutors for the investigations.

According to Rec(2000)19, *in countries where police investigations are either conducted or supervised by the public prosecutor, that State should take effective measures to guarantee that the public prosecutor may:*

*a. give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.;*

*b. carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;*

*c. sanction or promote sanctioning, if appropriate, of eventual violations.*

In order to comply with the mentioned standards the full implementation of regulation on judicial police is needed.

It would then be highly recommendable to establish police units attached to the prosecution office and to set up, within the bigger prosecution offices, specialized judicial police units for investigations related to the most challenging criminal offences.

In the meantime it would be highly recommendable that the prosecutors instruct the police about the investigative techniques by issuing written guidelines and establishing written protocols about the investigation, at least for those related to the most complex and delicate cases (such as: terrorism, trafficking in human beings, money laundering)

At the same time it would be recommendable that the Chief prosecutors effectively exercise the power to prepare an evaluation report on the judicial police authorities, as provided for by article 166 of CPC.

**We recommend:**

- to establish police units attached to the prosecution office and to set up specialized judicial police units for investigations related to the most challenging criminal offences.
- The prosecutors to instruct the police about the investigative techniques by issuing written guidelines and establishing written protocols about the investigations.
- The Chief prosecutors effectively to exercise the power to prepare an evaluation report on the judicial police authorities.
- That training for officers in the Judicial Police and prosecutors about the new regulation be developed and carried out by the Judicial Academy.

**1.6 THE AUTONOMY OF PROSECUTORS**

According to the 2006 EC progress report, **in January 2006 the Ministry of Justice updated all existing circulars through the issuing of some 100 new ones mainly targeting public prosecutors.** The move aimed at creating a clearer and more concise framework for the implementation in particular of the New Code of Criminal Procedure.

**As to the assignment of cases within the prosecution offices,** the experts were informed that cases are assigned randomly with an exception regarding prosecutors attached to the heavy penal courts or to specialised courts. In the latter case the Chief Prosecutor decides about the assignment of the cases taking into account the specialization of prosecutors.

Finally, even though the case assigned to a public prosecutor attorney may be **withdrawn** by the Chief Prosecutors, it does not happen very frequently also because the reasons for withdrawal are not defined by the law.

#### ➤ REPORT OF CONSIDERATIONS

There is a basic acceptance in European countries that the prosecution service should be free of political influence and yet there is a clear need for political accountability and control at least at a general level.

If the prosecution service is to gain trust as an objective body, supporting the rule of law, it is vital that it be regarded as independent in its decision-making.

At the same time, its handling of the cases must also be seen to be objective and fair.

This will only be true if similar cases are dealt with in similar ways. If individual prosecutors are making discretionary decisions it is therefore important that these are co-ordinated.

According to principle 36a of Rec(2000)19, *hierarchical methods of organisation* can be considered to a certain extent necessary *with a view to promoting fair, consistent and efficient activity* of the Prosecution Office.

**Nevertheless, it has to be reminded that, according to the same Rec(2000)19**, the hierarchical method of organisation has to be balanced by other rules to ensure the internal independence of the prosecutors, such as the following: *the assignment and re-assignment of cases should meet requirements of impartiality and independence and maximise the proper operation of the criminal justice system, in particular the level of legal qualification and specialisation devoted to each matter (principle n. 9).*

In the above perspective, in order to preserve the autonomy of prosecutors from the political influence, the power of the Ministry of Justice to issue circulars and instructions targeting prosecutors should be strictly limited to the administrative tasks of the offices. The Ministry of Justice should be prevented from interfering not only in the judicial activity of prosecutors but also in the organisation and coordination criteria of prosecution offices.

On the other side it is advisable a better co-ordination of the activities of single prosecution office by establishing guidelines and circulars put in writing<sup>12</sup> by the Chief Public Prosecutor in order to ensure the objectivity and to enhance the effectiveness of the investigations.

#### **We recommend:**

- That the power of the Ministry of Justice to issue circulars and instructions targeting prosecutors be strictly limited to the administrative tasks of the offices.
- To establish rules and procedures for a better coordination of prosecution offices.
- To establish legal criteria for the withdrawal of cases.

#### **1.7 EFFECTIVENESS AND SPECIALIZATION**

The experts were not provided with statistics regarding the average **duration** of the investigations phases and the criminal trials. According to the EC 2006 progress report, the average criminal trial period increased from 210 days in 2004 to 234 days in 2005, even though the *pending cases* before the criminal courts remained stable: 1 050 754 criminal cases were carried over from 2004 to 2005, while 1 050 250 criminal cases were carried over from 2005 to 2006.

<sup>12</sup> According to principle n. 10 of Rec(2000)19: *All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.*

For what regards the **specialization of criminal courts**, article 25 of the CPC assigns serious crimes to heavy penal courts in provinces determined by the Supreme Council of Judges and Prosecutors upon the recommendation of the Ministry of Justice in such a way that the jurisdiction of these courts shall cover more than one province. Beyond to the heavy penal courts, do they exist (but not everywhere, for what see below) other specialized courts, such as juvenile court, juvenile heavy penal courts, traffic courts, enforcement penal courts and intellectual property criminal courts.

**As to prosecutors**, article 251 of CPC provides that the investigation of crimes that are mentioned in article 250 shall personally be conducted by the public prosecutors assigned by the Supreme Council of Judges and Prosecutors for the investigation and prosecution of such crimes. Even if these crimes were committed during or because of the performance of a duty, the Public prosecutors shall directly conduct the investigation. The Chief Public Prosecutor's office shall not assign these Public prosecutors to courts other than the ones that handle cases relating to crimes mentioned in article 250 or with other tasks.

### **REPORT OF CONSIDERATIONS**

According to principle 8 of Rec(2000)19, *specialisation should be seen as a priority, in terms of the organisation of public prosecutors, as well as in terms of training and in terms of careers. Recourse to teams of specialists, including multi-disciplinary teams, designed to assist public prosecutors in carrying out their functions should also be developed.*

This need of specialization is of particular important to fight those forms of criminal offences which fall under the competence of prosecution offices authorised by article 250 of the CPC.

The fight against organized crime, trafficking of human beings, money laundering and corruption require special skilled and trained prosecutors and the development of **special investigative techniques**<sup>13</sup>.

Furthermore for combating those forms of criminality **national strategies** and **special investigative units** should be set up at regional or even at national level.

#### **We recommend:**

- That prosecution offices be organised according to the principle of specialisation.
- The JA to develop training on special investigative techniques

### **1.8 UYAP AND INFORMATION AND COMMUNICATION TECHNOLOGY IN THE JUDICIARY**

An important contribution to the efficiency of the system is ensured by the **Judicial Network Project (UYAP)** on court proceedings

According to CEPEJ report of 2006, Turkey is included in the groups Countries, in which Judiciary enjoys a very high level of Computerization.

All judges and prosecutors of Turkey dispose of laptops, Internet access and e-mal facilities .

Trough the electronic devices they have access to the UYAP system which ensures :

- *word processing/office facilities* where a judge or a prosecutor or staff member can draft his/her decisions or prepare a court case in an "*electronic file*";
- the registration and management of cases, and the monitoring of the statistics<sup>14</sup> of a court or a prosecution office, which means that traditional court docket books and other registers are replaced by computerized databases with court records<sup>15</sup>.

<sup>13</sup> According to article 140 of CPC, to fight these crimes, **special investigative means** are available, like the activities and the workplace of the suspect or the accused may be monitored in public places, or it may be subject to audio-visual recording by means of technical devices.

<sup>14</sup> The generation of information concerning the performance of courts, financial management of courts and case management support systems (for case tracking, case planning and document management).

<sup>15</sup> The advantage of these applications lies in the fact that the registration of similar data can be reduced and that manually recorded data can be replaced by electronic registration of information (for example by using scanned

Nevertheless the experts were informed that they still remain problems in the use of UYAP for example for what regards the accessibility to UYAP by lawyers, at least in criminal proceedings, and the lack of interoperability between UYAP and the police information system, called *Polnet*. As an example, the crime reports have to be reregistered manually by the Police and then transferred in the electronic system by the Prosecution office staff.

➤ **REPORT OF CONSIDERATIONS**

Completing (UYAP) and providing an effective functioning of the system also for lawyers and police are the priorities in this field, as envisaged by the **Reform Strategy**

**We recommend:**

- UYAP to be completed, by allowing lawyers full access to the system and be ensuring the interoperability with *Polnet*.

**2. JUDICIAL CO-OPERATION IN CRIMINAL MATTERS**

According to 2008 EC progress report, no progress can be reported on **judicial cooperation in criminal matters**; cooperation is ensured by means of international and bilateral agreements and, in the absence there, on the basis of reciprocity and international customary law. Key pending issues are related to effective implementation of relevant Council of Europe conventions, especially on mutual legal assistance and on extradition. Turkey has not signed key international conventions, such as the Second Additional Protocol to the Council of Europe Convention on mutual legal assistance or the Convention on cybercrime. Turkey has not yet taken necessary steps to sign a **cooperation agreement with Eurojust**. Limited progress has been achieved in the area of **police cooperation at international level**.

The experts were informed by the representatives of Turkish Ministry of Justice that the process has started to appoint contact persons for cooperation with Eurojust and for enhance international cooperation.

➤ **REPORT OF CONSIDERATIONS**

Turkish is expected to sign and implement the relevant international Conventions in the field of judicial co-operation in criminal matters and to **take the necessary steps to sign a cooperation agreement with Eurojust**. In order to allow the Turkish Judges to communicate, exchange documents and information with the European counterparts, the JA is expected to plan and implement training on technical linguistic skills.

**We recommend**

- The Republic of Turkey to sign and implement the relevant international Conventions in the field of judicial co-operation in criminal matters and to take the necessary steps to sign a cooperation agreement with Eurojust.

**B. THE REFORM OF CRIMINAL LEGISLATION**

**3. PRE- TRIAL DETENTION**

**3.1 RESTRICTION OF PERSONAL LIBERTY**

Article 19 of the Turkish Constitution enshrines the **right to liberty and security of person**: the same article states that no one shall be deprived of his or her liberty except in cases where and under conditions prescribed by law and that the person arrested or detained shall be

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documents).

brought before a judge within at latest forty-eight hours and in the case of offences committed collectively within at most four days.

Pursuant article 92 of the CPC, as part of their judicial duties, chief public prosecutors or public prosecutors appointed by them shall inspect the holding cells where persons taken into custody are accommodated, the interview rooms if any, the situation of persons in custody, the reasons for and duration of custody, and all records and procedures relating to custody; they shall record the outcome in the custody register. According to article 91 of the same code, if a person apprehended under the above article is not released by the public prosecutor, it may be decided to take him into custody in order to complete the investigation. However, **the custody period shall not exceed twenty four hours** starting from the time of apprehension.

**Exceptions** to the maximum twenty four hours duration of the custody period are provided by:

- paragraph 3 of article 91 of the criminal procedural code, according to which in case of **collective offences**, where there are difficulties in collecting evidence or where there is a large number of suspects, the public prosecutor may give a written order extending the custody period for a period of three days provided that each time the extension ordered does not exceed one day;
- article 251 of the code which establishes for those who were apprehended in relation to the **crimes that fall under article 250** of the CPC, the 24-hour period mentioned in paragraph one of article 91 of the law shall be implemented as **48 hours**;
- the same article 251 according to which people, who are apprehended in places where **state of emergency** is declared as a requirement of article 120 of the Constitution, the time in custody can be extended **up to seven days** upon the request of the Public prosecutor and the decision of the judge.

As to the duration of **detention on remand**, article 102 of CPC provides that, in cases which do not fall under the jurisdiction of the heavy criminal court, the maximum period of detention on remand is **six months**. However, where there are compelling reasons, such period may be extended for a period of four months by citing its justification.

In cases which fall under the jurisdiction of the heavy criminal court, the maximum period of detention on remand is **two years**. Where there are compelling reasons, such period may be extended by citing its justification; however, the extended period in total cannot exceed **three years**.

#### ➤ **REPORT OF CONSIDERATIONS**

The criminal provisions related to pre-trial detention and detention on remand are, in principle, in compliance with article 5 of the European Convention for the Protection of Human Rights, as interpreted by the European Court for Human Rights<sup>16</sup>.

Nevertheless, it has to be recommended that, to respect article 5 of the Convention in the implementation of the mentioned legislation, Turkish judges and prosecutors should take care that pre-trial detention should be limited to those circumstances where it is strictly necessary in the public interest and that not only the initial but also the continued detention has to be justified<sup>17</sup>.

#### **We recommend**

- Turkish judges and prosecutors to take care that pre-trial detention be limited to those circumstances where it is strictly necessary in the public interest.

<sup>16</sup>ECtHR *Aksoy v. Turkey*, judgment of 18 December 1996, a leading case related to the arrest of a person on suspicion of involvement with the Kurdish terrorist organization PKK.

<sup>17</sup> ECtHR, *Scott. V. Spain*, judgment of 18 December 1996.

### 3.2 TORTURE AND ILL TREATMENT IN THE COURSE OF PRE-TRIAL DETENTION

According to 2008 EC progress report, there have been no developments as regards ratification of human rights instruments about torture. In particular the Optional Protocol to the UN Convention against Torture (OPCAT), signed in September 2005, has not been ratified.

At the same time, however, the number of appeals to NGOs concerning cases of torture and ill-treatment, in particular outside official places of detention, has increased.

As to Human Rights issues, according to 2008 progress report, during the reporting period, the **European Court of Human Rights** delivered a total of 266 judgments finding that Turkey had violated the ECtHR. The total number of new applications to the ECtHR continued to increase, with 3,705 applications in the course of 2008. The majority of these new applications concerned the **right to a fair trial** and protection of property rights. **Few** of them concerned **violations of the right to life or torture and ill-treatment**.

In the course of the mission the experts were reported by representatives of NGOs and lawyers about the persistence of torture and ill treatments in case of arrests related to the implementation of the anti-terror legislation.

As regards criminal investigation against State agents accused of torture and ill-treatment, according to the same 2008 progress report a great concerns remain as to the **impunity of member of security forces**<sup>18</sup>, also because of the need of the authorisation by the Governor -which is sometimes denied- for opening an investigation against the police in case of allegations of disproportionate use of force during demonstration.

#### ➤ REPORT OF CONSIDERATIONS

The case law of ECtHR indicates that, in cases of allegation of **torture and ill-treatment by State's agents**, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention<sup>19</sup>. In these cases, the State has to ensure **full and prompt access** by the applicant to all the relevant information.<sup>20</sup>

It then is of utmost importance that the **investigation** onto the application is **effective**<sup>21</sup>.

<sup>18</sup> The progress report displays that despite of the fact that the Minister of Justice expressed a public apology for a recent case of death following torture in detention, however, impunity for human rights violations is a cause for concern. According to the report, **there is a lack of prompt, impartial and independent investigation into allegations of human rights violations** by members of security forces. None of the 70 complaints submitted to the prosecutor in relation to the Diyarbakir incidents in March 2006 have been closed so far. Furthermore, judicial proceedings into allegations of torture and ill treatment are often delayed by the lack of efficient trial procedures or abuse of such procedures.

<sup>19</sup> The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see, amongst other authorities, *Tekin v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, § 52).

<sup>20</sup> See case of *Dizman v. Turkey*, judgment of 20 September 2005, in which the Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrikulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV). It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances **solely the respondent Government have access to information** capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI). The same applies to delays by the State in submitting information which prejudices the establishment of the facts in a case (see *Orhan v. Turkey*, no. 25656/94, § 266, 18 June 2002).

<sup>21</sup> **The remedy required by Article 13 must be "effective" in practice as well as in law**, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State. (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95; *Aydın*

Effectiveness of the investigation means that the **prosecutors** have to comply with the following **duties**<sup>22</sup>: to take detailed statements from the police officers, including the testing of their version of events through questioning them; to secure the police officers' weapons and to carry out, *inter alia*, forensic tests on them to establish whether there was evidence that they had come into contact with the applicant; to investigate the scene of the incident for footprints and tyre marks; to locate and take statements from persons who can give relevant information; to conduct the proceedings in an expedite and prompt manner<sup>23</sup>; to test by questions the versions of events presented by the defendants; to question the doctor who draws up the medical report.

In other terms, in such cases, the prosecutors must demonstrate to have taken the reasonable steps available to them to **secure the evidence** concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death<sup>24</sup>.

For an investigation into alleged unlawful conduct by State agents to be effective, it may generally be regarded as necessary for **prosecutors** responsible for and carrying out the investigation<sup>25</sup> **to be independent from those implicated in the events**<sup>26</sup>; this means not only a lack of hierarchical or institutional connection but also a practical independence<sup>27</sup>.

**We recommend** that in cases of allegation of torture and ill-treatment by State's agents:

- the State ensure full and prompt access by the applicant to all the relevant information.
- That the investigation be effective and the prosecutors comply with the duties established by the case law of the ECtHR.
- That prosecutors secure the evidence and be independent from those implicated in the events.

### 3.3 THE ROLE OF THE FORENSIC INSTITUTE

Forensic Medicine Institution (hereinafter referred as to: FMI) is **charged** with offering expert witness services to judiciary. FMI's doctors are generally responsible for the forensic medical examination of detainees and the documentation of torture and other cruel, inhuman or degrading treatment or punishment.

**The FMI is attached to the Ministry of Justice**, has seven branch offices and, according to 2008 progress report, is preparing for ISO quality accreditation, which will enhance the

*v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, § 167).

<sup>22</sup> ECHR, *Dizman v. Turkey*, cited above. According to the Court's decision the defects in the trial process are the primary responsibility of the prosecutor's office.

<sup>23</sup> About promptness and reasonable expedition see *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80-87 and 106, ECHR 1999-IV, *Tanrikulu*, cited above, § 109, and *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106-107, ECHR 2000-III.

<sup>24</sup> See, concerning autopsies, *Salman v. Turkey* [GC], no. 21986/93, § 106, ECHR 2000-VII; concerning witnesses, *Tanrikulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV; concerning forensic evidence, *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000.

<sup>25</sup> According to paragraph 5 of art. 161 of CPC, public prosecutor shall directly launch an investigation about public officials, who abuse or breach their duties or functions pertaining to their official status or those related with the judiciary requested from them within the context of law, and about law enforcement officials and their senior officers, who abuse or breach their duties concerning the verbal or written orders given by the Public Prosecutors.

<sup>26</sup> See *Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82, and *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III.

<sup>27</sup> *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV, §§ 83-84, where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident

credibility of its reports and, subject to the increasing of financial resources, to create units in each of Turkey's 81 provinces.

Forensic Medicine Institution is a member of the European Networks of Forensic Sciences (ENFSI). It coordinates and implements training programmes within the context of its tasks.

On February 2008 it started the implementation of a project, whose funding is supported by the European Commission on the training of 1500 judges and prosecutors and 4000 doctors, who are not forensic medicine experts, on Istanbul Protocol on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment.

#### ➤ REPORT OF CONSIDERATIONS

The previous advisory reports, recommended, among others, 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.

Following the recommendations the Ministry of Justice started a process to relocate the 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.

- That in cases of alleged torture or mistreatment **lawyers should always be allowed to attend forensic examinations** when the person to be examined so requests<sup>28</sup>.

In its responses to the third advisory visit report the Ministry of Justice replied as follows: *Presence of the lawyers in the course of forensic examination is objected by the authorities from Ministry of Health on the ground that lawyers may disturb the examination. In cases of alleged torture or mistreatment the Forensic Medical Institution does not always approve the lawyers' presence in the forensic examinations when the person to be examined so requests. In such cases, if the law enforcement officers are considered as a party, the lawyers should also be considered as a party. Moreover, the physician and the victim should be left themselves alone.*

In the course of the visit to the Ankara Forensic Medicine Institution Branch the experts were reported that the Forensic Medical Institution does not raise any objection to the presence of the lawyers during the medical examinations. Furthermore the argument of the Ministry of Justice according to which *lawyers should also be considered as a party* is not understandable. At the time of arrest, there are not parties in a legal-technical sense, since there are not yet indictments and trial. The presence of the lawyer is only to ensure the fundamental right to defence for a person who needs it, having been deprived of his or her liberty.

- That the Ministry of Justice and the Ministry of Interior take all necessary steps **to inform and train, also with the help of the Judicial Academy**, law enforcement officers and physicians carrying out forensic examinations on the subject about the provisions contained in the by-law on Apprehension, Detention, and Statement Taking and in particular about the provision of paragraph 3 of the mentioned article 9, according to which in principle law enforcement officers involved in the investigation of the actual crime are not allowed to transport detainees or to be present during medical examinations.

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<sup>28</sup> Paragraph 10 of Article 9 of the by-law on Apprehension, Detention, and Statement Taking states that: "Principally the forensic medicine examination shall be between the physician and the person examined in a framework in accordance with the doctor patient relations. However, the doctor may demand the examination to be made under the surveillance of law enforcement officials by raising security reasons and such request shall be written. In this case the lawyers may attend to forensic medicine examination at the request of their clients provided that it does not cause delay."

The experts received complaints by the NGOs that the provision is not always respected in the practice. Therefore the recommendation has to be reiterated.

**We recommend:**

- that the process on transferring forensic examinations to state hospitals or health centres in accordance be expedited.
- That in cases of alleged torture or mistreatment lawyers should always be allowed to attend forensic examinations when the person to be examined so requests.
- That the Ministry of Justice and the Ministry of Interior take all necessary steps to inform and train law enforcement officers and physicians carrying out forensic examinations on the subject about the provisions contained in the by-law on Apprehension, Detention, and Statement Taking .

#### 4. CRIMINAL PROCEEDING THE PRINCIPLE OF EQUALITY OF ARMS . FAIR TRIAL

##### 4.1 MEDIATION

The new Criminal procedural code introduced the mediation in the Turkish criminal system. Mediation can be conducted by the **prosecutor** during the investigations<sup>29</sup> or by the **court** at trial stage<sup>30</sup>.

In both cases the criminal procedure provides for the possibility of an intervention of a **lawyer** acting as a mediator<sup>31</sup>.

During the mission the experts were informed that the procedure of mediation occurs very rarely both during the investigations and at trial.

The experts did not receive any information about cases of mediation conducted by lawyers acting as mediators.

The experts were not provided with official statistics about mediation

##### ➤ REPORT OF CONSIDERATIONS

The provision related to mediation could have very positive effects to facilitate the reconciliation between the accused persons and victims and to contribute to the effectiveness of the criminal system (chapter 1.2 above).

Nevertheless it has not been used sufficiently in practice.

<sup>29</sup> Article 253 of the CPC (titled “Mediation”) states that: (1) In cases where statute permits the procedure of mediation, and in accordance with the case investigated, the **public prosecutor** shall summon the offender according to the procedures provided for in this Code and shall ask him whether he accepts responsibility with regard to the offence concerned. (2) If the offender confesses to the offence and agrees to pay for all or most of the material and non-material damage caused by his offence and act or to compensate/make good the damage, the victim of the offence or his lawyer or legal representative, if any, shall be notified of the fact. (3) If the victim of the offence states that he will accept a friendly settlement of his own free will if reparation is made for all or most of the damage caused, the investigation shall be discontinued. (8) The decision not to prosecute shall be given when reparation is made for the damage according to the mediation agreement and the costs of the mediation process have been paid by the offender.

<sup>30</sup> Pursuant article 244 of the CPC (“**Mediation conducted by the court**”): In cases where a public prosecution is brought in respect of an offence subject to the mediation procedure, the mediation procedure can be conducted by the court in accordance with the procedures laid down in Article 253. (2) If the mediation takes place it shall be decided that the case is dropped.

<sup>31</sup> Art. 253 of CPC (4) states that if the offender and the victim cannot agree upon a lawyer, the public prosecutor may ask the Bar Association to appoint one or more **lawyers as mediators** in order to lead the mediation procedure between the offender and the victim, to bring the parties together and reach a solution. (5) The mediator shall finalize the mediation procedure in thirty days at the latest as of the day the application is made. The public prosecutor may extend this period with thirty more days for only once. During the course of the mediation process, statute of limitation shall be suspended. (7) The mediator shall submit a report to the public prosecutor within ten days, setting out the steps he has taken and the interventions he has effected in order to achieve a settlement.

The scarce recourse to mediation is apparently due not only to the lack of experience but also to the poor knowledge of the procedure by judges, prosecutors and lawyers.

The **reform strategy** proposes to tackle the shortcomings in the implementation of mediation providing for activities aiming at improving legislation and organizing training courses in order to enable reconciliation method to be applied in a more effective manner.

**We recommend:**

- that the new regulation enabling mediation be fully implemented.

#### 4.2 RETURN OF INDICTMENT

The new code of criminal procedure empowers courts to reject indictments brought on insufficient evidence. According to Article 174<sup>32</sup>, on the occasion of the existence of certain deficiencies, mentioned in article 170 of the new Criminal Procedure Code or when the prosecutor opens the case for certain crimes, although there is an offer to pay a fine, judges can return the indictment. Prosecutors are authorized to object to the decision.

➤ **REPORT OF CONSIDERATIONS**

The provision has not fully been understood and is not widely used.

For example the experts verified uncertainties among the judges about the possibility to order the discontinuation of the case, instead of sending back the case, when, irrespective of the fact that evidence obtained is sufficient or not, the Judge is convinced that the fact does not constitute a criminal offence.

The recommendations issued by the experts of the previous advisory report mission have then to be reiterated.

**We recommend**

- that the criteria for sending back indictments be clarified and that courts be entitled not only to send back but also to reject indictments.
- A more extensive training on the issue.

#### 4.3 EQUALITY OF ARMS. CROSS EXAMINATION

According to CPC, as reformed in year 2005, the accused has the right to ask to summon a witness or an expert or to have defense evidence collected at trial. Pursuant to article 201 of the CPC, his or her defense lawyer has the right to **put direct questions** to the witnesses, the experts, the intervening party, the accused himself or herself and other persons summoned to the hearing. The accused and the intervening party, instead, may also ask questions through the presiding judge or the judge. If an objection is raised to the questions asked, the presiding judge shall decide whether the question needs to be asked or not.

The experts were informed that the provision of direct questioning has been so far implemented very rarely.

➤ **REPORT OF CONSIDERATIONS**

The provision on direct questioning is aimed to make the Turkish criminal trial to comply with the fair trial guarantees as contained in art. 6, paragraph 3 letter d of the European

<sup>32</sup> Article 174 of CPC establishes that: (1) The trial court shall examine all the documents relating to the investigation phase within seven days of the delivery of the indictment and investigation file, and in cases where it is concluded that the indictment does not contain the issues specified in Article 170, the trial court shall decide to return the indictment to the public prosecutor's office, by pointing out the omissions and errors.

(3) Upon the return of the indictment, the public prosecutor shall remedy the omissions and correct the errors, and then re-arrange the indictment and send it to the court. (4) The public prosecutor can file an objection to the decision to return the indictment.

Convention for the Protection of Human Rights and Fundamental Freedoms, according to which everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him.

The provision is intended to ensure that the accused is placed on a footing of equality with the prosecution as regards the calling and examination of witnesses<sup>33</sup>. Equality of arms means then a new role for the defence.

The direct question or cross-examination technique demands the acquisition of new skills by prosecutors, judges and in particular lawyers who are still not in the position fully to assume their new responsibilities.

Considering that the implementation of the above provision requires the commitment of not only judges and prosecutors but also lawyers, it is highly recommendable a common training for prosecutors, judges and lawyers. The training model of training of trainers (ToT) would be highly advisable in this field, allowing to train at central level a certain number of prosecutors, judges and lawyers which could then act as trainers at local level in a way to reach all judges, prosecutors and lawyers with a view to take into account the local practises and training needs and to save costs of training related to transport and hospitality.

**We recommend**

- that measures be taken to ensure equality between prosecution and defence counsel during the course of criminal proceedings and that the new regulation enabling defence lawyers to cross-examine be fully implemented.
- That an intense, specific and widespread training for prosecutors, judges and lawyer be conducted about the new criminal procedural provisions regarding mediation and direct questioning.

**4.4 . FAIR TRIAL. MANDATORY DEFENCE. LEGAL AID.**

Article 150 paragraph 3 of the CPC ensures that a defense lawyer shall be appointed for the suspect or accused if he declares that he **wants to benefit from a defense lawyer** but is not in a position to appoint one.

**It is compulsory** to appoint a defence lawyer for juveniles and the mentally retarded, disabled persons not capable of defending themselves. At the time of the CPC entering into force the provision was extended to person suspect of a crime punishable by more than five years' imprisonment.

The same article of CPC establishes that defendants unable to meet the costs of a lawyer are entitled to have a **lawyer for free**.

In December 2007 amendments to the Turkish criminal code and the criminal procedure code were adopted in relation to, among other things, the compulsory commissioning of a defence lawyer. According to the new provision, a defence lawyer shall be appointed for suspects and defendants without requesting them in cases where the suspect or the defendant does not have a defence lawyer and the offence is calling for a lower limit of imprisonment of more than five years. Previously, as above clarified, a defence lawyer was appointed in case of offences calling for an upper limit imprisonment of 5 years or more.

According to members of bar associations met by the experts in the course of the mission, the change in the law brought the case of mandatory defence from 80% of the total criminal cases to only 20%.

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<sup>33</sup> Sess HCRH, *Bonisch v. Austria*, judgment of 6 May 1985, Series A No 92 (1987) 9 EHRR 135.

As to **rights to information** of the accused person, pursuant to article 147 of the CPC a suspect or accused, during statement taking or the questioning enjoys the right to be informed that he has the right to appoint a lawyer and take advantage of the legal assistance provided by this lawyer; he shall also be informed that if he so requests the lawyer will be present during the statement taking or questioning. If he is not in a position to appoint one, the bar association shall appoint a lawyer if he expresses his/her will to take advantage of a lawyer.

#### ➤ **REPORT OF CONSIDERATIONS**

The limitation of the scope of offences qualifying for compulsory commissioning of a defence lawyer has greatly reduced the number of suspects and detainees automatically qualifying for legal aid.

This limitation can impair the fair trial guarantees provided for by article 6 paragraph 3 letter c of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that everyone has three minimum rights: (1) to defend himself in person, or (2) to defend himself through legal assistance of his/her own choosing, and (3) if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require.

The aim of this provision is to ensure that defendants have the possibility of presenting an effective defence; as to legal aid, it has been interpreted by the Court of Human Rights in strict terms, having the Court stated that “where the deprivation of liberty is at stake, the interests of justice in principle call for legal representation” and if the defendant cannot afford to pay for this himself, public funds must be available as of right<sup>34</sup>.

In other terms compulsory defence is to be ensured, irrespective of the minimum or maximum punishment provided by the law, in any case defendant cannot afford to hire a lawyer.

As to the right of the accused person to be informed about his/her defence rights and legal aid, previous Advisory Visit reports 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 and, when provided for by the law, to be assisted free of charge. It is 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.

This recommendation has to be reiterated.

#### **We recommend**

- that measures be taken to extend the scope of compulsory defence to all cases in which the defendant cannot afford to pay for legal representation.
- That the accused be properly informed about his/her defence rights and legal aid.

#### **4.5 FAIR TRIAL. RIGHT OF THE LAWYER TO COMMUNICATE WITH THE CLIENT.**

**As to the right of the lawyer to meet the suspect**, paragraph 3 of article 149 of CPC states that at no stage of the investigation and prosecution, the right of the lawyer to meet with the suspect or accused, to accompany him during statement taking or questioning, and to provide him legal aid can be avoided or restricted.

Pursuant to article 154 of the same law, a suspect or accused shall have the right to meet his/her defense lawyer at all times, without power of attorney being required and out of earshot

<sup>34</sup> *Benhm v. United Kingdom* (ap. 1938/92), Judgment of 10 June 1996; (1996) 22 EHRR 293.

of other persons. The persons' correspondence with their defense lawyer shall not be monitored.

In the course of the visit the expert noted that judges and public prosecutors continue to look unfavourably upon requests from lawyers to speak to their clients during the course of court's hearing and instead regard such requests as an obstruction.

The experts found that in the courts they visited, during the trial the accused person stays standing in the middle of the Court's room far enough from his/her lawyer to be prevented from communicating with him.

➤ **REPORT OF CONSIDERATIONS**

As stressed by the previous Advisory Mission report, the above practise has to be regarded as undermining the right to an adequate defence, hindering lawyers from explaining the nature and content of proceedings to clients who may otherwise not understand the processes of the court, impeding defendants from giving instructions to their lawyers as to how they wish their case to be presented to the court and obstructing lawyers from seeking relevant information from their clients on novel points that arise during the course of court proceedings.

**We recommend**

- a continued follow up of the practical implementation of permitting lawyers to consult with their client during the course of court proceeding.

**4.6 EQUALITY OF ARMS. ACCESS BY THE LAWYER TO INVESTIGATIONS FILE**

Pursuant article 153 of the CPC, the defense **lawyer may examine the full content of the file during the investigation** phase and may take a copy of the documents of his choice free of charge.

The power of the defense lawyer to access the file may be restricted at the request of the public prosecutor only **by decision of the district judge** dealing with criminal matters, if his/her examining the contents of the file or taking copies is likely to jeopardize the aim of the ongoing investigation.

By contrast article 22 paragraph 1 of regulation on Apprehension, Detention and Statement Taking establishes that for the defence lawyer to examine the contents of the file kept by the law enforcement during the investigation phase, a **written order from the competent Public prosecutor** shall be required

In the course of the visit, the experts received complaints by the lawyers about the restrictions put by prosecutors and judges for the accession to the investigative file until the trial takes place.

➤ **REPORT OF CONSIDERATIONS**

There is a serious contradiction between the regulation, which provides for an order of the prosecutor to access the investigative file when it is kept by the law enforcement and the law which ensure the power of the lawyer to access the file and that restrictions can be imposed only by a judge for justified reasons pertaining to the effectiveness of the investigation.

Lawyers' access to files concerning the defendant is a crucial element in the right to a fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (paragraph 3 letter b) establishes that those charged with a criminal offence are to have adequate time and facilities for the preparation of a defense.

On the other side, it has to be taken into account that in Turkey, as in most continental criminal procedures much or most evidence is compiled in the pre-trial stages, in particular during the investigations. In the pre-trial phase the accused's rights coincide with the public prosecutors duty to conduct the investigations and the preparations for the accused's

indictment efficiently and rapidly. The accused, if made aware that certain incriminating evidence has been found, may abuse this information. They may wish to destroy further evidence which would incriminate the accused even more or to instruct others to do so. Evidence obtained may also assist the accused in committing further offences. Finally the Public prosecutor may wish to protect witnesses, for instance in vulnerable situations, such as victims, in particular juvenile victims. In this situation, the public prosecutor has every interest in keeping the relevant evidence confidential for as long as possible in order to conduct the proceedings effectively. This interest directly collides with the interest of the accused in being placed on an equal level with the public prosecutor and in particular being entitled to comment on the evidence and put questions to the witnesses.

The Convention strikes a balance between the different interests. The public prosecutors must be aware that, as a rule, the accused shall have access to the relevant documents pointing at innocence or guilt already early in the proceedings and that the limitation of the right had to be justified by the need of protection of concrete public interests and has to be always allowed by a judge's decision upon the evaluation of this need.

**We recommend:**

- that the accused be permitted to have access to the relevant documents pointing at innocence or guilt already early in the proceedings and that the limitation of the right be justified by the need of protection of concrete public interests and be allowed by a judge's decision.

#### **4.7 EQUALITY OF ARMS. LOCATION OF PROSECUTORS WITHIN THE COURTS' ROOMS. IMPARTIALITY OF PROSECUTORS**

The reports of the previous EC Advisory Missions raised the problem of **appearance of impartiality of prosecutors**, that because of the position of the prosecutor in Turkish courts having their offices in the court buildings near the judges in charge of court administration, sitting next to the judges in the courtroom, entering and leaving the courtroom together, sitting at the same bench in the same elevated position, wearing quite similar robes, while the defence lawyer, dressed in different robes, enters and leaves the courtroom through another door together with the public and stay below.

The same reports considered that the **common career of judges and prosecutors** could, in principle, affect the impartiality of both of them.

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.

#### **➤ REPORT OF CONSIDERATIONS**

As above highlighted it is common in continental systems that judges and prosecutors share the same career.

Accordingly principle 18 of REC(2000)19 affirms that *states should take measures in order to make it possible for the same person to perform successively the functions of public prosecutor and those of judge or vice versa.*

Nevertheless practical measures should be promptly adopted to ensure the appearance of impartiality of judges and prosecutors. In particular in case of change of functions from judge to prosecutor or vice versa, the person concerned should be obliged to change the location of work.

The recommendation expressed by the previous advisory report mission on this point has to be reiterated that public prosecutors and defence lawyers be positioned on an equal level in court rooms; preferably with both of them sitting at ground floor level opposite to each other.

**We recommend:**

- that public prosecutors have their offices located in a completely separate part of the courthouse from that occupied by judges.
- That public prosecutors be required to enter and leave the courtroom through a door other than that used by the judge.
- That public prosecutors and defence lawyers be positioned on an equal level in court rooms.
- That in case of change of function from judge to prosecutor and vice versa change of location of work to become mandatory.

#### **4.8 INTERPRETATION SERVICE**

Pursuant to article 202 of the CPC, if the accused or the victim does not know sufficiently Turkish language to explain his plight, during the hearing the essential points of the prosecution and defense shall be interpreted by an interpreter to be appointed by the court. The provisions of this article shall also apply in respect of suspects, victims or witnesses heard during the investigation phase.

The expert were informed that in most cases they were not appointed professional interpreters for non non-Turkish speaking citizens but court clerks or other civil servants working at other public offices who have command of locally spoken language.

#### **➤ REPORT OF CONSIDERATIONS**

Such kind of service does not always result in a good quality and reliable interpretation service.

The **Reform Strategy** has considered the issue, providing that, in order to find a solution to the problem faced by the courts, a list of professional interpreters having good command of the local languages will be determined and put forward the courts for consideration.

**We recommend**

- that that a system of accredited interpreters be introduced.

#### **5. MINORS**

**The law on child protection** was adopted in year 2005. It provides, among others, for the institution of Juvenile Courts, prosecutor's bureau for juveniles and special procedures for trials in which children are involved.

According to 2008 EC progress report, during the reported period the Social Services and Child Protection Agency (SHCEK) has recruited new members of staff; the number of specialised staff such as psychologists, child development experts and sociologists increased during the same period.

In the same period staff of institutions involved in child care, including members of the judiciary, have been trained on juvenile justice.

The report remarks that despite some progress in the juvenile justice system, **the number of child courts is still inadequate**<sup>35</sup>, there is a lack of social workers in these courts and their workload is heavy. This results in **longer trials**<sup>36</sup> and, thus, possibly in children being deprived of their liberty for longer periods of time. In the same period there has been an

<sup>35</sup> Under the 2005 Law on child protection, child courts need to be established in every province. However, currently there are such courts in only 40 of the 81 provinces in the country

increase in the number of children in detention and the probation system does not work effectively.

According to the information provided by the Ministry of Justice, currently 31 psychologists, 24 pedagogues, 23 social workers serve in juvenile courts, and appointment procedure related to 20 psychologists, 22 social workers and 17 pedagogues is underway.

As to arrest and pre-trial detention of minors, the law on child protection establishes that arrest or imprisoning of children must be applied as a last resort. Article 21 of the same law provides that a decision of arrest cannot be taken related to children who do not attain the age of fifteen on grounds of acts maximum limit of imprisonment for which do not exceed 5 years. Article 16 of the law prescribes that that children placed into custody are kept at a child division of the law enforcement office or in a different place from the adult in places where there is no child division.

As to the procedural rules, juvenile courts and a juvenile heavy penal courts are competent to deal with criminal offences committed by children.

According to article 185 of the CPC hearings concerning persons under the age of eighteen have to be conducted in camera.

The prosecutor does not take part in the hearing.

The judge should be assisted by social services and psychologists.

Art. 52 of the CPC provides for the recording of the juvenile's testimony so that the child will not be exposed to repetitive statement-taking procedures.

#### ➤ REPORT OF CONSIDERATIONS

After the visits of to the Courts of Mardin and Diyarbakir , the experts raise **serious concerns regarding the juvenile justice.**

In Mardin there is not a juvenile court.

In Diyarbakir there are both a juvenile court and a juvenile heavy penal court, the second of which competent for crimes provided for by article 250-252 of the CPC.

Despite of the existence of specialised courts, in Diyarbakir children between the age of 15 and 18, charged with the commission of serious criminal offences falling under the provisions of articles 250 of the CPC, are **tried together with adults** by the ordinary heavy penal courts. Furthermore they are **arrested and kept in pre-detention facilities together with adults.**

In conclusion, despite of the adoption of the Law on child protection, children between the age of 15 and 18, which are accused to have committing serious criminal offences, are treated as adults.

Furthermore in the prosecution offices visited by the expert there were not yet been established specific public prosecutor's bureau for juveniles, provided for by article 30 of the Law on Child protection.

This situation causes particular concerns, taking into account that, according to the international standards, minor are to be considered among the most vulnerable persons and considering that, according to what reported to the expert by Ngos' representatives, it is not infrequent that, in the area visited by the expert (South-East Turkey), children are arrested and tried following charges of committing a criminal offence on behalf of a criminal organisation (art. 200/6 of Turkish penal code), of aiding a criminal organisation (art. 200/7) or of making propaganda for the organisation (art. 200/8), in a world of committing very serious offences following under the competence of heavy criminal courts.

It has to be reminded that, according to the provision of the United Nations Convention *on the Right of the Child* of 20 November 1989 ***the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of***

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<sup>36</sup> On the basis of 2005 data, the average duration of trials in child courts is 326 days, compared with 234 days in ordinary courts.

*time*<sup>37</sup> and every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. **In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so**<sup>38</sup> and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

Another serious reason of concern is the duration of the trials in which children are involved. According to the decisions of the European Court of Human Rights in interpreting article 6 of the Convention about Fair Trial principle, the reasonableness of the length of proceedings is to be assessed also in the light of the interest involved in the case. The Strasbourg Court requires a *special diligence* by prosecutors and judges when vulnerable parties and especially children are involved<sup>39</sup>.

As to the trial procedure the expert were informed that most courts lack a technically equipped room where the juvenile's statement can be recorded.

#### **We recommend**

- juvenile courts and prosecutor's bureau for juveniles be established in every province and that where they do not already exist, psychologists, psychiatrists and pedagogues be appointed to the juvenile courts.
- That every minor, irrespective of his/her age and the accuses charged against him or her, be fully ensured the protection provided by the International Conventions for the protection of children and by the Turkish law on child protection.
- That arrest, detention or imprisonment of a child be used only as a measure of last resort and for the shortest appropriate period of time.
- That every child deprived of liberty be always separated from adults and tried separately, irrespective of seriousness and kind of the criminal charge.
- Prosecutors and judges to display special diligence when treating case in which children are involved and to speed up investigations and trials, giving them precedence over ordinary investigations and trials.
- Prosecutors to communicate, once a week, to the local bar the list of the children arrested or detained in order to ensure to minors a full right of defence.
- Specialised judges and prosecutors be constantly trained on international and national principles and techniques about the protection of children involved in criminal investigations and trials.

#### **6. PROTECTION OF VICTIMS**

According to the CEPEJ report of 2006, Turkey is included in the groups of countries having very few special arrangements and for very few categories of vulnerable persons and victims. The CEPEJ registers the lack of special arrangements for: victims of rape; for victims of terrorism; domestic violence and ethnic minorities

In the course of year 2008 Turkey adopted the Witness Protection Law which protects the identity of victims of human trafficking who agree to testify against the perpetrators and opens the way to include them in a witness protection programme.

The CPC does not contain specific rules enabling the role for the public prosecutor with respect to the protection of the position and assistance of victims.

#### **➤ REPORT OF CONSIDERATIONS**

<sup>37</sup> article 37(b). The Turkish law on Child protection reproduces the same provision.

<sup>38</sup> article 37(c)

<sup>39</sup> *H v. United Kingdom*, judgement of 16 July 2002

Pursuant to principle 33 of Recommendation Rec(2000)19, public prosecutors should take proper account of the views and concerns of victims when their personal interests are affected and take or promote actions to ensure that victims are informed of both their rights and developments in the procedure.

**We recommend**

- The legislator to adopt adequate measure to protect victims of criminal offences and vulnerable persons in particular in case of rape; for victims of terrorism; domestic violence and ethnic minorities.
- That prosecutor be entrusted with the task to take care of the rights of the victims during the investigations and at trial.

## ANNEX I CEPEJ STATISTICS

TABLE A

Country	Cases received by the public prosecutor:	Total of Discontinued cases	Discontinued by the public prosecutor because the offender could not be identified	Discontinued by the public prosecutor for reasons of opportunity	Concluded by a penalty, imposed or negotiated by the public prosecutor	Charged by the public prosecutor before the courts
Germany	4 917 575	1 294 402		1 294 747	241 102	1 187 323
Italy	2 938 649		1 247 516			572 887
Turkey	2 733 767	1 694 588				725 210

TABLE B

Country	Number of cases received by prosecutor per 100 000 inhabitants	Average number of Cases received by prosecutors	Number of cases charged before the courts per 100 000 inhabitants	Average number of cases charged before the courts per prosecutor
Germany	5 971	967	1 442	234
Italy	5 002	1 317	975	257
Turkey	3 723	695	988	184

**ANNEX II STATISTICS RELEASED BY THE TURKISH MINISTRY OF JUSTICE AND REFERRED TO THE PERIOD 1/1/2007 – 31/12 2007 ABOUT THE WORKLOAD OF THE TURKISH PROSECUTOR'S OFFICES (TABLE C) AND PROSECUTION OFFICES AUTHORIZED BY ARTICLE 250 OF LAW NO 5271 (TABLE D):**

TABLE C

Workload of prosecutor offices of Turkey	Files received from previous year	Files received during the year	Total of Discontinued cases	Cases Charged by the public Prosecutor before the courts	Cases transferred to the next year
	2.543.444	2.899.593	1.509.939	912.892	2.726.211

TABLE D

	Files received	Files received	Total of	Cases	Cases
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Public Prosecution Office	from previous year	during the year	discontinued cases	Charged by the public prosecutor before the courts	transferred to the next year
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ADANA	280	830	98	351	425
ANKARA	442	751	128	163	519
DİYARBAKIR	<b>11228</b>	2268	544	724	<b>11715</b>
ERZURUM	1082	386	73	110	1133
İSTAMBUL	1251	3170	639	1104	1588
İZMİR	538	674	78	362	593
MALATYA	1610	386	67	102	1685
VAN	<b>4434</b>	1572	518	376	<b>4667</b>
<b>TOTAL</b>	20865	10037	2145	3292	22325