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Ad Hoc Delegation for the Observation of Trials of Journalists in Turkey

INTERIM ACTIVITY REPORT

30.05.2013

I. INTRODUCTION

I a) Composition and mandate

1. On 1 June 2011, the European Parliament (EP) Conference of Presidents authorised the constitution of an Ad Hoc Delegation for the Observation of **"important Trials of Journalists in Turkey, including those of Nedim Sener and Ahmet Sik,"** at the request of Gabriele Albertini, Chair of the Committee on Foreign Affairs, and Hélène Flautre, Chair of the European Parliament Delegation to the EU-Turkey Joint Parliamentary Committee (JPC).
2. Composed of five Members,¹ the Ad Hoc Delegation was authorised to organise up to three missions to Turkey per year, with up to two Members travelling to Turkey at the same time. It effectively started its activities with a first mission to Turkey on 21-22 November 2011.
3. Over the period covered by the present report, the Ad Hoc Delegation conducted three trial observations in Turkey and held numerous meetings with prosecution and defence magistrates, lawyers, bar associations, journalists, press groups, civil society and human rights organisations, as well as with Turkish government representatives. It also followed relevant judicial developments through the EU Delegation to Turkey, the Ministry of Justice, lawyers and other observers and all publicly available data, reports and news.
4. The Ad Hoc Delegation has thus been able to observe the functioning of the Turkish judiciary in practice, from the point of view of both the legislation and its implementation, and in the light of European and international legal standards. In carrying its work, the Ad Hoc Delegation follows a strict methodology based on the respect of the principle of judicial independence. Members of the Ad Hoc Delegation are thankful for the cooperation of Turkish authorities in this exercise.
5. This interim report presents factual observations gathered by the Ad Hoc Delegation, in particular between November 2011 and November 2012. It is submitted as a contribution to discussions in the relevant bodies of the European Parliament, and as a basis for the continuation of a constructive dialogue with Turkish authorities in the framework of the Ad Hoc Delegation's activities.

I b) Background

6. The European Parliament follows developments relating to judicial reform and freedom of expression in Turkey very closely. These matters are addressed in its annual resolutions on Turkey's progress, prepared by the Committee on Foreign Affairs. They are also regularly discussed with Members of the Turkish Grand National Assembly in meetings of the EU-Turkey JPC. Hearings and exchanges of views have been held in Brussels and Strasbourg with civil society and government representatives, journalists, academics, human rights defenders and high-level representatives of the Turkish judiciary.²
7. Judicial reform has become a major topic in Turkey's public debate. Concerns have been expressed particularly in relation to the country's record at the European Court of Human Rights (ECtHR) where Turkey has received the highest number of judgements in relation to its

¹ Jaroslaw WALESA, Chairman (EPP, Poland), Michael CASHMAN (S&D, United Kingdom), Hélène FLAUTRE (Greens/EFA, France), Sajjad KARIM (ECR, United Kingdom), Barbara MATERA (EPP, Italy).

² In 2011, delegations from the four high judicial authorities of Turkey (Constitutional Court, Council of State, Cassation Court and High Council of Judges and Prosecutors) visited the European Parliament and debated concrete aspects of the implementation of constitutional and judicial reforms with Members.

violations of the European Convention on Human Rights (ECHR), and comes second after Russia in the number of applications filed. Among those cases, violations of Article 10 of the ECHR on freedom of expression feature prominently.

8. The Turkish government has expressed its willingness to address this problem, however. In 2004, Article 90 of the Turkish Constitution was amended to give precedence to international treaties related to fundamental rights and freedoms over national law. In 2010, constitutional amendments reformed the composition and functioning of Turkey's high judicial bodies. Practical and administrative reforms ensued, aimed at improving the implementation of ECHR standards by judges and prosecutors. In July 2012, a so-called "third judicial reform package" entered into force, introducing a set of legislative amendments. Finally, on 7 March 2013, a "fourth judicial reform package" was sent by the Turkish government to Parliament.
9. Throughout the process, progress in a number of areas has been acknowledged, including by the European Parliament.³ Major concerns remain, however. In its 2012 Progress Report, the European Commission underlined that the third judicial reform package fails to "address issues related to definitions of criminal offences under either the Criminal Code or the Anti-terror Law that are at the source of a number of problems of the Turkish criminal justice system." It adds that, "the increasing incidence of violations of freedom of expression raises serious concerns," and that "the increasing tendency to imprison journalists, media workers and distributors fuelled these concerns."⁴ In the context of the preparation of the "fourth judicial reform package," the Minister of Justice Sadullah Ergin acknowledged, in his meetings with the Ad Hoc Delegation and in public statements, that certain laws stood as obstacles to freedom of expression and freedom of the press, and should be amended.
10. This issue is further documented in progress reports of the European Commission, as well as in recent reports from the Commissioner for Human Rights of the Council of Europe,⁵ the OSCE Representative on Freedom of the Media,⁶ the UN Human Rights Council Special Rapporteur on the independence of judges and lawyers,⁷ and in a number of documents issued by Turkish and international civil society organisations and professional associations.⁸ The Ad Hoc Delegation took due note of the data and assessments provided in these documents in the preparation of its own work.
11. Observations contained in this report concerning the Turkish legislation apply to the situation before the adoption of the fourth judicial package.
12. The Ad Hoc Delegation acknowledges the domestic political context within which judicial reforms are being debated in Turkey. The existence of terrorist activities in Turkey is

³ See, for example, previous European Parliament resolutions of 9 March 2011 on Turkey's 2010 progress report, and of 29 March 2012 on the 2011 Progress Report on Turkey

⁴ European Commission, Turkey 2012 Progress Report, 10 October 2012, pages 15-16

⁵ Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey from 27 to 29 April 2011, on freedom of expression and media freedom in Turkey, Strasbourg, 12 July 2011 and second Report following his visit to Turkey from 10 to 14 October 2011, on the administration of justice and protection of human rights in Turkey, Strasbourg, 10 January 2012

⁶ OSCE Representative on Freedom of the Media, Main Findings of the Table of Imprisoned Journalists in Turkey, April 2012, updated in August 2012

⁷ UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul - Mission to Turkey, 4 May 2012

⁸ Including Reporters Without Borders, the Committee to Protect Journalists, the International Press Institute, the European Federation of Journalists, PEN International, Human Rights Watch, Amnesty International, Bianet, the Turkish Trade Union of Journalists, the Platform for Solidarity with Arrested Journalists, and others.

acknowledged and systematically condemned in the strongest terms by the European Parliament. In the fight against terror, the rule of law should be respected, especially with regard to the protection of fundamental rights and freedoms, in particular the freedom of expression. The Ad Hoc Delegation takes note of the efforts made by Turkey to address this issue through the adoption of the 4th judicial reform package.

II. CASES

II a) Overview

13. Besides terror-related crimes, criminal charges include defamation, incitement to hatred, violation of the secrecy of an instruction, attempts to influence a trial, obtaining and revealing confidential information or praising a criminal (see further details in part III). Among the total number of journalists facing judicial prosecution, a certain number are in prison – some being detained on remand, others having been convicted.
14. The number of imprisoned journalists is a key issue surrounding the debate. The Istanbul-based Independent Communications Network (Bianet) reported figures varying from 66 journalists in prison on 1 October 2011 to 72 on 1 October 2012, with a peak of 104 on 1 January 2012.⁹ This peak corresponds to broad-scale arrests in the framework of the investigation on the Kurdish Communities Union (KCK) at the end of 2011 (see point II c. below), while the post-July 2012 decrease is, at least partly, due to the implementation of certain provisions of the third judicial reform package. These figures are consistent with the estimates released by other organisations and press groups,¹⁰ and with the figure provided by the Minister for EU Affairs, who reportedly stated in response to a parliamentary question in May 2012 that 92 journalists were then in prison.¹¹
15. This report does not aim at making a new evaluation of the number of journalists in prison in Turkey. Instead, it adopts a more qualitative approach based on original and direct observations of trials of journalists by the Ad-Hoc Delegation as well as exchanges with prosecutors, lawyers, journalists, judges, the Ministers of Justice and of European Affairs of Turkey.
16. According to the government, journalists are not imprisoned due to their journalistic activities. On 10 July 2012, the Minister of Justice Sadullah Ergin wrote to the Committee to Protect Journalists that “the great majority” of those in prison “are deprived of their liberty on the grounds of serious offences such as membership of an armed terrorist organization, kidnapping, possession of unregistered firearm and hazardous substance, bombing and murder,” as well as some “convicted on the grounds of disgraceful offences such as theft, armed robbery and forgery.” He adds, nevertheless, that he is “not denying that very few press members might have been deprived of their freedoms in the past due to their actions that could

⁹ BIA Media Monitoring Reports, www.bianet.org/english

¹⁰ The lists published by the OSCE Office of the Representative on Freedom of the Media included 57 names in March 2011. The Platform for Solidarity with Detained Journalists released a list of 91 journalists on 5 May 2012. In August 2012, the updated OSCE list included 78 names while the Committee to Protect Journalists (CPJ) gave a figure of 76, including 61 whom it had verified were imprisoned for journalistic activities¹⁰. On 5 December 2012, the International Press Institute and the Turkish Journalists Association said that 71 journalists were still imprisoned. On 11 December 2012, CPJ said that the figure had dropped from 61 in August 2012 to 49, further to a number of releases¹⁰.

¹¹ “92 Journalists in Prison, Says Minister”, in *Today's Zaman*, 8 May 2012, http://www.todayszaman.com/newsDetail_getNewsById.action?newsId=279765 (link valid on 27 February 2013)

relatively be related to journalism activities.”¹² More recently, on 23 January 2013, Minister Ergin stated that his Ministry "would not allow or tolerate any single journalist serving a prison term because of their writing but that journalism cannot be used as a means to justify people committing crimes."¹³

17. The Ad Hoc Delegation has noted an excessively broad definition of criminal offences and, in particular, what constitutes an act of terrorism under the Penal Code or the Anti-Terror Law, and the urgent need to introduce a clear distinction between, on the one hand, the promotion of terrorism and the incitement to violence and, on the other hand, the expression of non-violent ideas, in full compliance with ECtHR case law, in order to safeguard the freedom of expression, freedom of assembly, including student protests, and the freedom of association.
18. Throughout the period covered by the present report, all imprisoned journalists were prosecuted under charges of connection with terror groups or illegal organisations: a majority for connections with KCK, PKK or DYG; a second group in relation with the Ergenekon indictments; and others in relation to the “Revolutionary People's Liberation Party -Front” (DHKP-C), the “Marxist Leninist Communist Party” (MLKP), and the “Revolutionary Camp”.
19. The Ad Hoc Delegation therefore decided to attend, in its first year of activity, hearings of cases falling under numerous journalists' groups, namely the Oda TV and the KCK Istanbul "press" trial cases.
20. Both the *Oda TV* and the *KCK* cases are briefly described below. Observations and findings are presented in more details in part III.

II b) The *Oda TV* case

21. The Ad Hoc Delegation¹⁴ attended the hearings of 22 November 2011 (first hearing) and of 18 June 2012 in the Oda TV case in the Caglayan Courthouse, Istanbul. It also met two of the defendants, Ahmet Sik and Nedim Sener, in the Silivri high-security penitentiary complex on 21 November 2011. During the first hearing, the Ad Hoc Delegation faced problems in entering the Court room, which was too small and had a poor audio system. At the hearing of 18 June, conditions had improved considerably.
22. The 16th Istanbul High Criminal Court, in charge of the case is an assize court with special powers, established under former¹⁵ Articles 250-252 of the Turkish Code on Criminal Procedure (TCCP).
23. 13 persons are standing trial, including Ahmet Sik (*Haber Vesaire* newspaper), Nedim Sener (*Milliyet* and *Posta*) as well as journalists from the *Oda TV* news website, including its owner, Soner Yalcin. Defendants also include Yalcin Küçük, a professor and writer, and Hanefi Avci, a former chief of police.¹⁶ A fourteenth defendant, Kasif Kozinoglu, a former National Intelligence Agency member, died of a heart attack on 12 November 2011.

¹² Annex to the Committee to Protect Journalists' Report on *Turkey's Press Freedom Crisis*, October 2012

¹³ "Ergin: Journalism Cannot Justify Committing Crimes", in *Today's Zaman*, 23 January 2013, <http://www.todayszaman.com/news-304924-ergin-journalism-cannot-justify-committing-crimes.html> (link valid on 26/02/2013)

¹⁴ Barbara Matera MEP and Sajjad Karim MEP on 22 November 2011, Hélène Flautre MEP and Jaroslaw Walesa MEP on 18 June 2012

¹⁵ Abolished by the third judicial reform package

¹⁶ Hanefi Avci also wrote a book on what he describes as the influence of the Fethullah Gülen movement on state structures.

24. 11 of them were arrested and detained in February and March 2011. They spent approximately six months in jail without knowing the charges put forward against them. From 22 November 2011 onwards, 9 detained defendants were successively released pending trial.¹⁷ Ahmet Sik and Nedim Sener were released on 12 March 2012 after 375 days of detention. At the time of this report's writing, two defendants were still in prison: Hanefi Avcı and Yalcin Küçük.
25. The 134-page indictment (No. 2011/425) was released in August 2011 and accepted on 9 September 2011. All defendants are charged under Article 314 of the Criminal Code (TCK) in conjunction with Article 5 of the Anti-terror Law (TMY), which provides for the aggravation of sentences for terror offences. Sik, Sener and a third defendant (Hanefi Avcı) are accused of membership of an armed criminal group (Article 314/2 TCK) and of knowingly and willingly assisting the organisation, although without being part of its hierarchical structure (Article 220/7 TCK). All other defendants are accused of membership of an illegal organisation under Article 314/2 TCK, except Yalcin Küçük, who is accused of forming an organised criminal group under Article 314/1 TCK.
26. Defendants are individually accused of various other charges, including aiding and abetting a criminal organisation (Article 220/7 TCK), openly inciting sections of the population to enmity or hatred toward another (Article 216 TCK), obtaining documents related to state security (Article 327 TCK), obtaining confidential information (Article 334 TCK), the violation of privacy (Article 134 TCK) and attempting to influence the result of a trial (Article 288 TCK).
27. The core of the evidence presented by the prosecution is based on digital documents found in several Oda TV computers, including a note entitled "National Media 2010." According to the prosecution, these documents would demonstrate the existence of an organised plan to manipulate public opinion and spread chaos in society. More specifically, the indicted journalists are accused of planning to discredit the Ergenekon trial (in which high-level army officials are tried for allegedly fomenting a coup) by making people believe that the whole case would be a conspiracy against the army. The alleged plan would also include intimidation actions against those media which, on the contrary, support the legitimacy of the Ergenekon case. Besides, it would include a propaganda campaign aimed at spreading the idea that the ruling party's policies have led to the weakening of the army and have, as a direct result, strengthened the PKK. The indictment also accuses the defendants of seeking to discredit the government, through the manipulation of street protests and youth movements. Finally, it includes various other charges against Oda TV journalists, such as illegally collecting personal information against other journalists, and blackmailing politicians.
28. The defendants deny these charges and contest the lawfulness and the coherence of the indictment. They point to the weakness of the evidence and claim that they have been detained due to their journalistic work. They also emit hypotheses as to the "real motives" behind their trial. Mr Sik, for example, refers to a book he wrote on the influence of the Fethullah Gülen Movement within state institutions, which was seized by the police (the book was published in November 2011 under the "co-authorship" of 125 writers as a sign of protest).¹⁸ Mr Sener, on his side, has written two books on the alleged involvement of state officials in the assassination of Hrant Dink.
29. The defence has contested the authenticity of the digital documents upon which the accusation is based. At the request of their lawyers, three state universities and an American institute analysed this evidence and concluded that the computers had been infected by viruses, that

¹⁷ Dogan Yurdakul was released on 22 February 2012 (on health grounds); Ahmet Sik, Nedim Sener, Sait Cakir, Coskan Musluk on 12 March 2012; Müyesser Yildiz on 18 June 2012; Baris Pehlivan and Baris Terkoglu on 14 September; and Söner Yalcin on 27 December 2012.

¹⁸ The Imam's Army (Imamin Ordusu) by Ahmet Sik

these documents had been planted via those viruses and that they had not been opened by the owners of the computers. The court commissioned another report to the Scientific and Technological Research Council of Turkey (TUBITAK), an official agency.¹⁹ Released in August 2012 with a delay of several months, the TUBITAK report found that the computers were infected with viruses allowing external reach, and that the documents had not been opened or changed by the users of the computers. Nevertheless, the report noted that it could not conclude on whether these documents were installed via these viruses. A second report was therefore requested and released in November 2012. It claimed that, despite the presence of viruses, the documents had most likely been transferred not by a virus but by an external device (such as a USB flash drive), and therefore that some of the defendants could be their authors.

II c) The KCK-press case

30. The Ad Hoc Delegation²⁰ attended the hearing of 12 November 2012 in the Istanbul trial of journalists, media employees and distributors accused of connections with the Union of Communities of Kurdistan (KCK), in the courthouse of the Silivri high-security penitentiary complex.
31. The 15th Istanbul High Criminal Court, in charge of the case, is also an assize court with special powers established under former Article 250 TCCP. The first series of hearings took place on 10-13 September 2012 in the Caglayan Courthouse, Istanbul. Citing disorder inside and outside the courtroom during the hearings (see par. 36), the court decided to transfer future hearings to the courthouse of the Silivri high-security penitentiary complex, located some 80km from Istanbul. The hearing attended by the Ad Hoc Delegation on 12 November 2012 was the first to take place in Silivri, located 80 km from Istanbul. The delegation noted a limited audience (many seats remained empty) as well as the presence of anti-riot police at the entrance, and strict security measures, but no incident took place.
32. 44 journalists and media employees are being tried in this case. 36 were detained on 20 December 2011 or on the following days. They worked for the newspapers Özgür Gündem, Dicle News Agency (DIHA), Vatan, Birgün, Günlük Erensel, Demokratik Modernite, Azadiya Welat, Prestij, and for the Firat Distribution Company. On 13 September 2012, two prisoners were released pending trial, a further two on 15 November 2012, and seven others in February 2013, bringing the total number of detained defendants to 25 at the time of drafting the present report.
33. The 800-page indictment was released on 27 April 2012 and accepted on 11 May 2012. The defendants are accused of "membership of an armed organisation" (Article 314/2 TCK) and, for some of them, of "forming and running an armed organisation" (article 314/1 TMY), in conjunction with Article 5 of the Anti-terror Law. They reportedly face prison sentences of up to 15 years.
34. According to the indictment and various news reports, the Union of Communities of Kurdistan is an umbrella organisation coordinating the PKK and related organisations in several regions. Its structure reportedly includes a number of governing bodies, at the top of which is Abdullah Ocalan, the jailed PKK leader. Most of the accused in the Istanbul KCK-press case are accused

¹⁹ According to its website, TUBITAK acts as an advisory agency to the Turkish Government and is the secretariat of the Supreme Council for Science and Technology, an organisation chaired by the Prime Minister. <http://www.tubitak.gov.tr/>

²⁰ Michael Cashman MEP and Hélène Flautre MEP

of belonging to the "Press Committee" of the KCK, and for acting in accordance with guidelines provided by the organisation. According to the prosecution, the KCK Press Committee coordinates a large media network, which aims at spreading propaganda for PKK/KCK, at creating panic and fear in the society and at mobilising its supporters. The Press Committee allegedly owns, administers and finances several press organs, and convenes regularly in Northern Iraq; its members are accused of receiving and executing direct orders from PKK leader Abdullah Ocalan, transmitted by his lawyers.

35. The Istanbul KCK trial against journalists and media employees is only one of several cases against hundreds of alleged KCK members in Turkey. The main KCK trial, under which more than 150 politicians are prosecuted, started in October 2010 in Diyarbakir and is still ongoing. In Istanbul, several related trials are being conducted. One of them involves more than 200 suspects, including Professor Busra Ersanli and publisher Ragip Zarakoglu. Another trial involves 46 lawyers. Both started in July 2012 in Istanbul, following waves of arrests at the end of 2011.
36. Defence lawyers point out that the evidence presented in the KCK "press" indictment is based on journalistic activities and on the non-violent expression of opinions: reporting news on sensitive issues, events or protests, depicting the government's policy in an unfavourable light; publishing interviews with PKK and KCK leaders; travelling abroad; not revealing to the police information obtained while covering certain events; publishing a photo of a protester holding a portrait of the PKK leader etc. They stress that advocating political ideas similar to those of PKK/KCK is presented as proof of acting under instructions.
37. Hearings have been marked by numerous procedural disputes between the court and defence lawyers. During the first series of hearings (not attended by the Ad Hoc Delegation), the defence reportedly made several requests which were all turned down, including a request to the court to declare itself incompetent further to the adoption of law No.6352, which abolishes special courts (third judicial reform package, see section III); demurrers (objections) to the validity of the indictment; request to eliminate invalid evidence from the indictment; and requests for the defendants to be allowed to express themselves in Kurdish.
38. During the hearing attended by the Ad Hoc Delegation, most of the defenders presented themselves in Kurdish and asked for the right to defend in Kurdish. While the judge allowed the defendants to speak in Kurdish, he also stressed that he did not understand the language. Some of the defenders made reference to the ongoing hunger strikes of hundreds of Kurdish prisoners throughout Turkey. One of their claims concerned the right to speak in Kurdish in tribunals. In this tense atmosphere, the hearing was again marked by procedural disputes (see part III b)). On several occasions, lawyers protested the attitude of the President of the court, who then declared breaks and excluded the audience from the room, although the Ad Hoc Delegation's Members were permitted to stay. While the indictment started in front of the defenders, it continued in the absence of all but one defendant. The Ad Hoc Delegation notes that the media coverage of this trial was mainly ensured by the Kurdish Press.
39. On 24 January 2013, the Turkish Grand National Assembly adopted a law amending the Code of Criminal Procedure to introduce the right to defend in the language of preference. This new right should apply in upcoming hearings in the KCK press trial.

III. MAIN OBSERVATIONS

40. In its direct observations of the Oda TV and KCK-press cases and its various meetings with magistrates, lawyers, bar association representatives and press groups, the Ad Hoc Delegation focused its attention on the legal basis of trials against journalists as well as on issues

concerning the concrete application of legislation. Its observations are listed below in two respective sub-parts.

III a) The definition of crimes in Turkish legislation

- **Terrorist offences**

41. Terror crimes are defined both in the Anti-Terror Law and in the Criminal Code of Turkey. The Anti-Terror Law provides definitions of the notions of *terrorism* (Article 1) and *terrorist offender* (Article 2). It qualifies a number of crimes defined in the Criminal Code as *terrorist offences* (Articles 3) or as *offences committed with terrorist aims* when committed in the framework of a terrorist organisation (Article 4). It provides for an aggravation of sentences for such crimes (Article 5). Further, Article 6 directly relates to publications, press and media. Article 7, in conjunction with Article 314 of the Criminal Code, refers to membership and leadership of terrorist organisations, as well as to terrorist propaganda crimes.
42. In the cases observed by the Ad Hoc Delegation, a crucial issue is that of the definition, in the acts of accusation, of the alleged link of the accused with a terror organisation. Article 314 of the Criminal Code provides for a distinction between *leading* (Article 314.1) and *being a member* (Article 314.2) of a criminal organisation. In addition, Article 2 of the Anti-Terror Law provides that persons who, *not* being members of a terrorist organisation, commit a crime in the name of the organisation *shall be punished as members*. The Criminal Code further defines the offences of committing a crime on behalf of an organisation (Article 220.6), aiding and abetting an organisation knowingly and willingly, without being a member of its hierarchical structure (Article 220.7) and making propaganda for a criminal organisation and its objectives (Article 220.8).
43. A widespread concern with this set of provisions is that the concepts of "membership" and "propaganda" are not well defined and typically enable journalists to be accused of membership of a terrorist organisation on the basis of their publications. In particular, the notion of making propaganda *for the objectives* of a criminal organisation allows statements expressing views overlapping with those of that organisation to be used as evidence of an organic link, i.e. of "acting under orders," and therefore to consider their authors as members.
44. The third judicial reform package, entered into force in July 2012, has marginally responded to some of the concerns expressed. Under Article 220.6 of the Criminal Code, the reform has introduced the possibility for the judge to reduce the sentence by half for those who committed a crime without being a member of the organisation. Under Article 220.7 (aiding and abetting an organisation knowingly and willingly, without being a member of its hierarchical structure) it has decreased the sanction by up to one third depending on the assistance provided. But the concrete application of these amendments by the judges remains to be seen. More importantly, these amendments do not address the core problem of the vague definition of those crimes and the unclear notion of "membership."
45. The third judicial reform package also amended Article 6 of the Anti-Terror Law. Former Article 6/5 on the suspension of publications inciting or praising terrorist crimes or propaganda, which was found to violate Article 10 ECHR, was abolished. However, the rest of the Article remains, including Article 6/2 on printing and publishing declarations and announcements of terrorist organisations, which has been used for example against journalists publishing interviews with members of illegal organisations and was also found to violate Article 10 ECHR.

- **Other criminal charges**

46. A number of journalists are being charged for crimes against public order, such as "praising a crime or a criminal" (Article 215) or "openly inciting sections of the population to enmity or hatred toward another group on the basis of social class, race, religion, or sectarian difference, in a manner which may present a clear and imminent danger in terms of public safety" (Article 216).
47. Some journalists have been prosecuted for reporting on "state security" issues and have been charged, in particular, for obtaining documents related to state security (Article 327), obtaining confidential information (Article 334) and revealing it (Article 336). Several journalists reporting on sensitive judicial cases have also been prosecuted for violating the confidentiality of investigations (Article 285) or trying to influence the result of a trial (Article 288). These charges have been used, in particular, against journalists reporting on the Ergenekon and KCK trials.
48. The much-criticised Article 301 of the Turkish Criminal Code, which was found by the ECtHR to violate Article 10 ECHR, was amended in 2008. It now defines the offence of "denigration of the Turkish nation, of the state of the Turkish Republic, its institutions and its organs," which reflects a change of wording: the problematic notion of denigrating "Turkishness," in particular, was removed. Besides, prosecution under this article is now subject to the approval of the Minister of Justice. This has led to a considerable reduction in the number of cases brought under this article. Concerns remain with regard to Article 301 in its current form, however, and with regard to the system of ministerial approval, a solution which does not address the core of the problem in a sustainable manner.
49. Criminal trials against journalists also include criminal defamation cases (Article 125) and violation of privacy (Article 134).
50. The third judicial reform package provides that cases of offences committed by means of press before 31 December 2012, and requiring a judicial fine or a sentence of imprisonment of less than 5 years, would be suspended (be it at investigation, prosecution or execution phases). If a new offence is not committed in three years, a decision of non-prosecution or decision of dismissal shall be rendered. The Ad Hoc Delegation notes concerns that this condition might create a form of self-censorship.

III b) Implementation of the law and procedural aspects

- **Interpretation of the law by judges and prosecutors**

51. The unclear definitions of such notions as "propaganda" and "membership" of a terror organisation leave room to their application in ways that have been found by the ECtHR to violate freedom of expression. As Thomas Hammarberg put it, "most violations of Article 10 ECHR result from a lack of proportionality in the interpretation and application of the legal provisions relating to freedom of expression by both judges and prosecutors."²¹
52. In the cases found by the ECtHR to be in violation of Article 10 ECHR, Turkish prosecutors and judges considered that some statements and opinions, despite being non-violent, constituted offences. They have gone beyond the notion of acceptable restriction to freedom of

²¹ *Report by Thomas Hammarberg...* (2011), *ibid.*, p.10

expression as defined by the ECtHR case-law, according to which restrictions to freedom of expression should be limited to incitement to violence. Defence lawyers in the Oda TV and KCK trials refer to such prior ECtHR judgements and point to the fact that, in their cases too, the accusation is based on publications, including books and news articles, expressing non-violent ideas and containing no evidence of a link with a terror organisation (see further observations on the question of the nature of the evidence below).

53. It should be noted that the problem of Turkey's violations of the ECHR is not only rooted in the flaws of the legislation, which should make such definitions clear and unequivocal, but also in practices going against Turkish law itself. Indeed, as mentioned in paragraph 8 of this report, Article 90 of the Turkish Constitution, which provides for the precedence of international agreements in the area of fundamental rights and freedoms over national legislation, already integrates ECHR norms and standards into the Turkish legal corpus. Judges should therefore apply them directly, but court practices in that respect still vary widely throughout the country.
54. The Ad Hoc Delegation has taken due note of some of the recent judgements of the Court of Cassation, based on Article 10 ECHR, on the ECtHR case-law and on Article 26 of the Turkish Constitution on freedom of expression, overturning certain condemnations pronounced by assize courts against individuals accused of "making propaganda for a terrorist organisation" or "praising a crime or a criminal" on the basis of statements they had made.²² Such judgements constitute positive steps towards the integration of relevant ECHR standards. However, the remaining number of criminal cases and condemnations against journalists indicate that the Turkish legal system and practice continue to require profound reforms.
55. Turkish authorities have taken a number of measures to improve the application of ECHR standards, including the development of human rights training programmes for judges and prosecutors; the creation of a Human Rights Department in the Ministry of Justice; and the introduction, by the High Council of Judges and Prosecutors, of the application of ECHR law as part of its performance and promotion criteria. The Ad Hoc Delegation has met with the presidents of the three chambers of the High Council of Judges and Prosecutors and its secretariat; it took note of the High Council's genuine determination to carry out reforms, and of the remaining challenges ahead.²³
56. The lack of restraint of prosecutors in launching new cases is also frequently pointed out. For instance, when Ahmet Sik, after his release in July 2012, reportedly stated that the police officers, prosecutors and judges who plotted against him should go to prison, he immediately faced new charges for "threatening judges and prosecutors and making them targets of a terrorist organisation."
57. Concerns were raised on what was described as the close relationship between prosecutors and judges. Lawyers and press freedom groups have noted that judges tended to follow the prosecutor too often and therefore that in these cases, "the indictment was the judgement." The UN Special Rapporteur on the independence of judges and lawyers has also expressed concern

²² For example, the Court of Cassation overturned the decision of the 11th Ankara Assize Court (11 March 2008, judgement No. 2006/290 – 2008/69) to condemn two persons under Article 215 of the Criminal Code ("praising a crime or a criminal") for referring to PKK leader Abdullah Öcalan as "sayin" Öcalan (a respectful way to say "Mr"). Such condemnation for the use of the expression "sayin Öcalan" had been very frequent.

²³ Read also Professor Dr. iur. Thomas Giegerich, *Peer Review Mission to Turkey (25-27 April 2012) - Report on the Turkish High Council of Judges and Public Prosecutors: Assessment of Its Initial Track Record of Operation*, 4 February 2013

with regard to this proximity and the issue it raises in relation to the principles of impartiality and equality of arms.²⁴

- **Nature of the evidence**

58. In the Oda TV and in the KCK cases, journalists are accused of writing and reporting news in an "organised" manner as part of a plan to support a terror organisation. The core of the accusation is therefore based on news articles, books and photographs as well as on elements meant to demonstrate the existence of an organisational connection. In both cases the defence, supported by press freedom groups, denounces the indictments as being constructed as "scenarios" based on "hypotheses," underlining that the accusation does not relate to concrete criminal acts. They qualify the evidence as "absurd" or "tragicomic."
59. The role of the Ad Hoc Delegation is not to verify every single accusation and its accompanying evidence. It has taken note, however, of recurring concerns expressed by defence lawyers and press freedom groups with regard to the nature of the evidence presented in both the *Oda TV* and *KCK*-press indictments, and in other cases against journalists.
 - Books (including non-published manuscripts) have been seized by the police and news articles and photographs are referred to in detail in the indictments.
 - The fact of investigating certain news, accessing a piece of information before others and keeping sources secret is presented as evidence of conspiracy activity. Journalists in the KCK press case are accused of collusions with KCK/PKK for not reporting certain information (such as the holding of a meeting or a protest) to the police. Defence lawyers point to the contradiction of this accusation with the principle of privacy of journalistic sources, guaranteed by article 12 of the 2004 Press Law.
 - Reporting on "negative" news (e.g. the state response to the earthquake in Van, ongoing court cases, mass demonstrations, etc.) is presented by the prosecution as an act intended at damaging the image of the state. Objections to this type of accusations have been raised several times by the ECtHR, which stressed the principles of defence of truth and public interest in its judgements.
 - Expressing political opinions similar to those of a terror organisation (e.g. expressing support to the model of "democratic confederalism" and to regional autonomy, also supported by PKK) is described as evidence of an organic link with the organisation.
 - Phone conversation records are presented as evidence of criminal connections between various individuals. The defendants, on the contrary, point to normal working relationships, either among journalists or between journalists and sources, and refer to some of the prosecution's allegations as "absurd" speculation on the implicit meaning of conversations. A leading defence lawyer in the KCK press case also underlined that it was not humanly possible to read the thousands of pages of transcripts gathered in the case.
 - Digital evidence, in the Oda TV case, consists in "meeting notes" meant to demonstrate the defendants' intent to write books and news together in an organised manner. As underlined

²⁴ UN Human Rights Council, *Report of the Special Rapporteur...*, *ibid.*, p.10

above, the verification of the authenticity of this type of evidence has given rise to intense debates.

- Evidence of travels abroad (visa stamps, etc.) are referred to in the KCK indictment in support of the allegation that several defendants participated in KCK meetings, for instance in Iraq. The defence argues that travelling is part of any journalistic activity, and points to incoherencies in the accusation.
- The use of anonymous witnesses.

- **Access to the evidence**

60. In the *Oda TV* and *KCK*-press cases, defendants were held in detention for several months without knowing the exact charges and the evidence put forward against them. In the *Oda TV* case, the indictment was released some six months after their arrest; in the *KCK*-press case, the indictment was released after four months.
61. According to Article 10 of the Anti-terror Law and Article 153 of the Code of Criminal Procedure, the defence lawyer's access to the prosecution file may be limited upon the request of the Prosecutor and by decision of the judge, if the aim of the investigation is endangered.
62. Defences lawyers stress that such restrictions violate the right to a fair trial enshrined in Article 6 of the ECHR. The Commissioner for Human Rights of the Council of Europe has also expressed concerns with regard to the non-disclosure of evidence to defendants in Turkey.²⁵ According to the ECtHR case-law, while certain pieces of information may be withheld in certain circumstances, disclosing as much information as possible remains necessary in remand cases, in order to justify the continued detention of the accused.

- **Remands in custody and excessive length of criminal proceedings**

63. Ahmet Sik and Nedim Sener were released after more than one year of pre-trial detention. Most other defendants in the *Oda TV* case were released progressively throughout the second year of their detention (see details of the case in section II). Their lawyers have systematically contested the lawfulness of the judge's decisions to keep them in jail and the absence of satisfactory justification to these decisions. Several requests for release on bail were turned down. In the *KCK* case, most defendants remain detained since December 2011.
64. Turkey has been condemned several times by the ECtHR for the length of detention on remand (up to 10 years according to Turkish law). In its judgements, the ECtHR underlined that Turkish courts failed to motivate sufficiently their decision to extend detention (in violation of Article 5/3 ECHR). They have also failed to consider alternative restrictions including bans on leaving the country, release on bail and so forth. Additionally, the court found that the applicants had no satisfactory domestic remedy to challenge the lawfulness of their detention.
65. In response to part of these concerns, the third judicial reform package has introduced more precise criteria for detention decisions in Article 101 of the Criminal Procedure Code. It is not clear, however, if these criteria apply to cases such as *Oda TV* and *KCK*, which fall under Article 100 of the Criminal procedure Code. It has also introduced new forms of judicial control as alternatives to detention, and lifted the former restriction according to which such

²⁵ Report by Thomas Hammarberg... (2012), *ibid.*, p.18

alternatives could only apply to those accused of crimes carrying a maximum prison sentence of 3 years. Its concrete application to ongoing cases remains to be assessed. The permitted length of pre-trial detention has not been changed and remains at 10 years.

66. The excessive length of criminal proceedings, which causes lengthy detention periods, has also been underlined numerous times by the ECtHR. The Court, which continued to receive a high number of applications in this regard, called on Turkey to introduce an effective domestic remedy mechanism. In response, Turkey passed a law (entered into force on 19 January 2012) establishing a Conciliation Committee to deal with these cases. Practical measures have also been taken to reduce the backlog of cases, which is partly responsible for the length of criminal proceedings. The continued training of judges and prosecutors remain necessary, and the lack of judges and prosecutors, which has been a key obstacle to the establishment of the regional court of appeals, should be filled.

- **Assize courts with special powers**

67. The Oda TV and KCK cases are handled by assize courts with special powers, established under (former) Articles 250 - 252 of the Code of Criminal Procedure, entered into force in 2005. These courts have taken over the cases previously handled by state security courts. In application of derogations from ordinary criminal procedures, the procedural rights of the defence are considerably restricted and prosecutors are endowed with special powers. Such restrictions include, for example, the possibility of restricting the defence's access to the prosecution file (see above) and of controlling correspondences between defendants and lawyers, as well as restrictions to the number of defence lawyers during custody, among others.
68. These courts were abolished by the third judicial reform package, and it establishes regional serious crimes courts, under Article 10 of the Anti-terror Law, to hear the same criminal cases. However, ongoing cases have not been affected, and assize courts with special powers remain in charge of the Oda TV and KCK-press cases. The latter's lawyers have contested the lawfulness of the case on the basis of this amendment.

- **Other issues**

69. The Ad Hoc Delegation has been informed about the issue of ownership in the media, and disproportionately high administrative tax fines on the media, leading, in some cases, to their closure or to self-censorship, as well as the urgent need to reform Internet Law and the Radio and Television Supreme Council (RTÜK).

IV. Preliminary observations

70. The European Parliament in its resolution of 18 April 2013 on the 2012 Progress Report on Turkey "*Notes that Parliament's ad hoc delegation for the observation of trials of journalists in Turkey will continue to monitor the trials of journalists and will follow judicial reforms in Turkey that address freedom of expression and of the media.*"²⁶

²⁶ Paragraph 15.; web: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0184+0+DOC+XML+V0//EN&language=EN>

71. The Ad Hoc Delegation is aware that the European Parliament has expressed concerns about the ongoing trials and the long pre-trial detention periods affecting, amongst others, journalists, and it is therefore important to address these matters.
72. The Ad Hoc Delegation was informed that the Turkish Penal Code and the Anti-Terror Laws are used to prosecute non-violent statements when they are perceived as supporting the aims of a terrorist organisation. The Ad Hoc Delegation is aware that Articles 26 and 28 of the Turkish Constitution limit freedom of expression on the basis of national security, public order and national unity. These points deserve attention and further observation.
73. Furthermore, the Ad Hoc Delegation reminds the previous calls of the European Parliament to the Government of Turkey to "finalise the review of the legal framework on freedom of expression and to bring it, without delay, into line with ECtHR case law."²⁷
74. The Ad Hoc Delegation noted the third and fourth judicial reform packages and the preparation of a Human Rights Action Plan by the Turkish Ministry of Justice in cooperation with the Council of Europe and based on the case law of the ECtHR. It will closely follow their implementation within the scope of its mandate and report back on its findings in the final activity report.
75. It notes the large number of cases launched against journalists writing on the Kurdish issue.
76. The Ad Hoc Delegation was informed about allegations regarding the use of inconsistent evidence against the defendants in monitored trials.
77. It noted the engagement demonstrated by the Ministry of Justice and by Turkey's high judicial bodies towards European and international institutions. It will continue the constructive dialogue it has established with Turkish authorities.
78. The Ad Hoc Delegation will continue observing trials of journalists in Turkey and will deliver its final activity report in the first semester of 2014.

²⁷ Paragraph 18, *idem*