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Report on the mission to Turkey 24-27 February 2014

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Executive Summary

On 24-27 February 2014, a delegation of the Committee on the Human Rights of Parliamentarians conducted an on-site mission to Turkey to gather first-hand information on the cases of Turkish parliamentarians referred to it, in particular the cases of nine parliamentarians prosecuted and held in pretrial detention for several years in a series of complex judicial cases.

Further to the mission, the delegation notes with satisfaction that the parliamentarians have now all been released and sworn in to parliament, following ground-breaking decisions of the Constitutional Court of Turkey on the excessive length of pretrial detention, the right of elected parliamentarians to sit in parliament and the need to respect fair trial guarantees in line with international and European human rights standards.

The delegation, however, remains deeply concerned that the nine parliamentarians' fundamental rights have been violated, particularly the rights to a fair trial and to freedom of expression and association. In light of recent decisions delivered in the cases, it can but express the hope that the ongoing judicial proceedings will lead to a prompt and satisfactory settlement of the cases. It further calls on the Turkish authorities to strengthen the right to freedom of expression and take other appropriate measures to prevent similar situations from occurring again in the future.

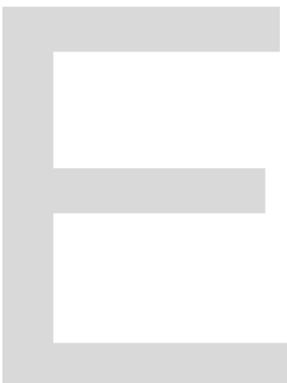


TABLE OF CONTENTS

A.	Origin and conduct of the mission.....	3
B.	Outlines of the cases and concerns of the Committee before the mission.....	4
2.1	Ongoing judicial proceedings against the nine parliamentarians	4
2.2	Case of Mr. Sinçar	5
C.	Information gathered during the mission	5
3.1	Parliamentary immunity, pretrial detention and releases of parliamentarians	5
3.2	Overview and current status of proceedings against the parliamentarians	10
3.3	Freedom of expression and association.....	11
3.4	Fair trial guarantees and the independence of the judiciary.....	18
3.5	Prospects for the resolution of the cases	26
3.6	Case of Mr. Sinçar	27
D.	Observations and recommendations further to the mission	27
4.1	Case of the parliamentarians prosecuted in the Sledgehammer, Ergenekon and KCK cases	27
4.2	Case of Mr. Sinçar	29
Annex:	Observations supplied by the authorities on the general context of the report and the conduct of the mission	30

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A. Origin and conduct of the mission

1.1 Two cases concerning ten Turkish parliamentarians are currently under examination before the IPU Committee on the Human Rights of Parliamentarians: (i) the cases of nine parliamentarians elected in June 2011 while in prison, who are being tried for attempting to overthrow the constitutional order, including through membership of terrorist organizations, in three complex cases known as the “Sledgehammer/Bayloz case”, the “Ergenekon case” and the “KCK case” and (ii) the case of the assassination of Mr. Sinçar in 1993.

1.2 At its 138th session (July 2012), the Committee considered that, in the light of its concerns in the cases of the nine parliamentarians, outstanding questions and the complexity of the cases, an on-site mission would enable it to gather first-hand information on the precise charges, the facts adduced to substantiate them, the prospects for swift completion of the judicial proceedings and the adoption of a legislative framework that would allow the parliamentarians to exercise their mandates. It requested the Secretary General to seek the approval of the parliamentary authorities for the proposed mission.

1.3 At its 191st session (October 2012), the Governing Council was pleased to note that the President of the Turkish IPU Group concurred that an on-site mission, which would meet the parliamentary, executive and judicial authorities and the parliamentarians concerned, could be conducive to promoting a better understanding of the cases, including with regard to the context in which the different criminal proceedings had to be seen. Following several attempts to organize the mission in the course of 2013, the President of the Turkish IPU Group officially communicated her approval of the final mission dates in December 2013.

1.4 The Committee designated its Vice-President, Ms. Ann Clwyd (United Kingdom), and her substitute, Ms. Margret Kiener-Nellen (Switzerland) to conduct the mission. Ms. Gaëlle Laroque, IPU Human Rights Programme Officer, accompanied the delegation. A team of three interpreters assisted the delegation. The delegation conducted meetings in Ankara (24–26 February 2014) and Istanbul (27 February 2014) with the following people:

- Parliamentary authorities
 - Mr. Cemil Çiçek, Speaker of Grand National Assembly of Turkey
 - Ms. Fazilet D. Çiğlik, member of parliament, President of Turkish IPU Group
 - Mr. Ahmet İyimaya, member of parliament, Chair of the Justice Committee
 - Mr. Ayhan Sefer Üstün, member of parliament, Chair of the Human Rights Inquiry Committee
 - Mr. Murat Yildirim, member of parliament, member of the Turkish IPU Group, member of the Human Rights Inquiry Committee
- Executive authorities
 - Mr. Bekir Bozdağ, Minister of Justice
- Judicial authorities
 - Mr. Haşim Kiliç, President of the Constitutional Court
 - Mr. Ali Alkan, President of the Supreme Court
 - Mr. Hadi Salihoğlu, Prosecutor General of İstanbul
- Political parties
 - Members of parliament and members of the CHP, including Mr. Kemal Kiliçdaroğlu, President of People’s Republican Party (CHP), Mr. Faruk Loğoğlu (Vice-President) and Ms. Nur Serter, member of parliament, member of the Turkish IPU Group
 - Prof. Dr. Yusuf Halaçoğlu, MP, Deputy Chairman of Nationalist Movement Party (MHP)
 - Mr. Selahattin Demirtaş, Co-chair of Peace and Democracy Party (BDP), and Mr. Nazmi Gür
- Bar Associations
 - Mr. İ. Güneş Gürseler, Secretary General of the Union of Bar Associations
 - Mr. Ümit Kocasakal, President of the İstanbul Bar Association
- Members of parliament concerned, their lawyers and family members
 - Mr. Mehmet Haberal, member of parliament
 - Mr. Mustafa Balbay, member of parliament, and his defence lawyers, Mr. Mehmet Ipek, Mr. Çağrı Yılmaz, Mr. Ulaş Özkan, Mr. Oktay Yılmaz
 - Mr. Engin Alan detained at Sinçan prison in Ankara, his daughter Ms. Tülin Alan Pekkoç and his lawyer Mr. Yakup Akyüz
 - Ms. Gülser Yildirim, member of parliament

- Ms. Selma Irmak, member of parliament
- Mr. Ibrahim Ayhan, member of parliament
- Mr. Kemal Aktas, member of parliament

- Human Rights NGO
- Mr. Andrew Gardner, Amnesty International

- Others
- The delegation also held a number of informal meetings with a number of politicians, lawyers, academics and journalists.

1.5 Regarding visiting Mr. Alan in detention, the delegation was repeatedly told before and during its mission that he did not wish to be contacted. This was communicated by the Turkish authorities, as well as by members of his party. The delegation, however, noted that no one had submitted its request to visit Mr. Alan to him personally. Throughout the mission, the delegation insisted both to the authorities and to his political party that Mr. Alan should be asked personally whether or not he would agree to meet with the delegation. As a result, the MHP sent someone to ask Mr. Alan and the delegation was informed just a few hours before it was due to leave Ankara on 26 February that Mr. Alan's answer was positive. The authorities agreed to facilitate the visit, which was successfully conducted that same day. The delegation was able to meet with Mr. Alan for over 1.5 hours. Mr. Alan appeared to be able to speak freely despite the presence of prison guards in the room during the meeting.

1.6 Due to the last-minute organization of the visit Mr. Alan in detention, meetings scheduled with the chargé d'affaire of the European Union and the Ambassador of Switzerland were cancelled. The delegation was, however, particularly appreciative of the assistance provided by Ambassador Haffner of Switzerland throughout its mission. The delegation was also not able to meet with the Deputy Prime Minister, Mr. Beşir Atalay, as the meeting was cancelled.

1.7 The delegation observed that most persons it met with had not received prior information from the Turkish parliament as to the purpose of its mission, the work and concerns of the Committee or its prior requests for information. It was further surprised to find out that the resolutions of the IPU Governing Council relating to the present cases had not been shared with the different parliamentary groups. Extensive documentation was provided to the delegation in the course of its mission, including by the judicial authorities. The documentation was reviewed by the delegation and has been taken into account in the present report. The delegation observes in particular that it was provided with a report published by the CHP in 2013 on the situation of the imprisoned deputies (thereafter referred as "the CHP Report"), which it found particularly helpful.¹ The delegation wishes to point out that it checked with all of the parliamentarians concerned and their respective political parties and lawyers that the CHP report accurately reflected their respective situations.

1.8 The delegation wishes to thank the host authorities for their cooperation. Special thanks go to the Speaker of the Grand National Assembly of Turkey and the Minister of Justice for making themselves available to the mission despite a very heavy workload and for facilitating the visit to Mr. Alan in detention at short notice.

B. Outlines of the cases and the Committee's concerns before the mission

2.1 Ongoing judicial proceedings against the nine parliamentarians

2.1.1 This case concerns nine persons who were all elected to parliament while in prison, in the June 2011 election. They were arrested, detained and prosecuted prior to their election as part of three complex cases involving hundreds of defendants known as the "Sledgehammer/Bayloz coup case", the "Ergenekon case" and the "KCK case". They were charged with attempting to destabilize and overthrow the constitutional order, or with membership of a terrorist organization.

2.1.2 Mr. Dicle's election was invalidated almost immediately² and he remained in pretrial detention at the time of the mission. The remaining eight parliamentarians were also held in pretrial detention for several years and prevented from taking up their parliamentary duties until recent rulings of the Constitutional Court

¹ Republican People's Party, Report on the imprisoned deputies, Turkey: Grand prison for deputies – the outcry of a country whose will is under attack, 2013, <http://www.chp.org.tr/wp-content/uploads/2013/11/tutuklumvrappingkpli.pdf>.

² See paras. 3.4.3.15-17

ordering their release, except for Mr. Alan. The judicial proceedings against all of them continue to date. The complainants have consistently affirmed that the proceedings were deeply flawed, that the parliamentarians' right to a fair trial has been violated and that the charges brought against them criminalized peaceful opposition political activities and amounted to violations of their fundamental rights to freedom of expression and association.

2.1.3 The Committee's overall concerns were essentially related to (i) the excessive length of pretrial detention of the parliamentarians that prevented them from exercising their parliamentary mandate, and the conditions attached to their release; (ii) the criminalization of peaceful and legal conduct of opposition parliamentarians amounting to violations of their fundamental rights to freedom of expression and association, and (iii) judicial proceedings allegedly characterized by flaws, lack of due process and lack of independence of the judiciary.

2.2 Case of Mr. Sinçar

2.2.1 Mr. Sinçar, a former member of the Grand National Assembly of Turkey of Kurdish origin, was shot dead at close range in September 1993 in Batman (south-eastern Turkey). Two individuals, Mr. Rifat Demir and Mr. Cihan Yildiz, were found guilty in October 2010 of the many murders, including that of Mr. Sinçar, perpetrated in the 1990s in south-eastern Turkey. They were sentenced to life imprisonment.

2.2.2 Mr. Sinçar's family, which was admitted as joint plaintiff in the proceedings, appealed the verdict before the Supreme Court, which it considered to have failed to establish the identity of the instigators and to take account of reports showing that the many assassinations during the period in question in south-eastern Turkey had been part of a "State policy" to combat terrorism. One of the sources further informed the Committee in March 2012 that two books published in the 1990s referred to statements by intelligence agents acknowledging the involvement of the Turkish Intelligence Service in Mr. Sinçar's murder and identifying five agents who were involved in planning and executing the crime and whose names were often mentioned in connection with political assassinations and forced disappearances that took place at that time. According to information provided by the authorities prior to the mission, the appeal was still pending. The Committee remained concerned about the status of the appeal proceedings and the prospects for the full elucidation of Mr. Sinçar's assassination. It particularly wished to ascertain whether the above-mentioned information had been examined during the proceedings and if so, to what effect.

C. Information gathered during the mission

All other sections below relate to the case of the nine parliamentarians, except for section 3.6, which addresses the case of Mr. Sinçar.

3.1 Parliamentary immunity, pretrial detention and release of parliamentarians

3.1.1 Detention of parliamentarians and parliamentary immunity

3.1.1.1 All authorities met by the delegation recalled that the arrests and initial investigations in the present cases had taken place between 2008 and 2010 at a time when none of the detained persons were yet members of parliament. The Turkish authorities considered that the present situation was therefore entirely different from a situation in which members of parliament were arrested during their term of office. It is also for this very reason that, at the time of their arrests, they were not protected by parliamentary immunity. Once elected, the detained parliamentarians claimed that they should be allowed to carry out their parliamentary duties and that pursuant to the Constitution, as members of parliament, they should not be detained or tried for an offence they were alleged to have committed before election, unless the Assembly decided otherwise by lifting their parliamentary immunity. They also claimed that the presumption of innocence should prevail at least until a final judicial verdict was delivered.

3.1.1.2 The authorities and the parliamentarians concerned have confirmed that in the present case the latter did not enjoy parliamentary immunity due to the nature of the charges brought against them pursuant to Article 83(2) of the Turkish Constitution:

"A deputy who is alleged to have committed an offence before or after election shall not be arrested, interrogated, detained or tried unless the Assembly decides otherwise. This provision shall not apply in cases where a member is caught in *flagrante delicto* committing a

crime punishable by a heavy penalty and in cases subject to Article 14 of the Constitution as long as an investigation has been initiated before the election. However, in such situations, the competent authority shall notify the Grand National Assembly of Turkey immediately and directly” (emphasis added).

3.1.1.3 Article 14 of the Constitution prohibits the abuse of fundamental rights and freedoms.³ Read together with Article 83, it provides that parliamentary immunity shall not be applicable to cases that fall within its scope, if an investigation has been initiated before the election of the concerned member(s) of parliament. Article 14 is broad in scope and does not mention specific types of crimes explicitly but rather expresses general principles. It prohibits “activities aimed at” endangering the existence of the Republic of Turkey. It focuses on the objectives of the activity pursued and not on the type of activity or its criminal character. Turkish jurisprudence and doctrine consider that the following crimes under the Criminal Code are within the scope of Article 14: offences against national security (Article 302-308), offences against constitutional order and operation of constitutional rules (Article 309-316), offences against national defence (Articles 317–325), offences against state secrets and spying (Article 326-339). In current practice, it is sufficient to simply bring such charges against a parliamentarian to deprive him or her of their parliamentary immunity, regardless of the outcome of the trials. Adhering to this interpretation of the scope of parliamentary immunity, the courts therefore considered that, in the present cases, the detained parliamentarians were not protected by parliamentary immunity.⁴

3.1.1.4 According to the parliamentary authorities, unless Articles 83 and 14 are amended, similar situations may occur again. To date, however, during the constitutional review process, no agreement has been found on these two articles. Several members of parliament indicated that the AKP had proposed an amendment to broaden the scope of parliamentary immunity but had not been able to obtain support from other parties. Members of the CHP confirmed their lack of support for such an amendment and expressed the fear that, under the current political conjuncture, it would only serve to place parliamentarians above the law to avoid accountability. In the present case, they felt that the issue at stake was not so much one of parliamentary immunity as one of fair trial. They consider that the presumption of innocence should have been respected until a final court decision had been delivered by an independent and impartial court and the elected members of parliament should therefore have been allowed to carry out their parliamentary duties instead of being kept in pretrial detention.

3.1.2 *Process leading to the release of the detained parliamentarians*

3.1.2.1 All detained parliamentarians spent approximately four years – half of their parliamentary term – in pretrial detention. The Speaker of the Grand National Assembly of Turkey, other parliamentary authorities met by the delegation, and the Minister of Justice all affirmed, and deeply regretted, that the courts had adopted a conservative approach by rejecting the requests for release submitted by the members of parliament after their election. All parliamentary authorities affirmed that the position taken, and consistently maintained by the judiciary in the present cases - until the recent decisions of the Constitutional Court - had not been conducive to progress. They highlighted that the judges could have granted pretrial release, but had refused to do so. They recalled that the Code of Criminal Procedure had been amended several times to limit judicial discretion in that respect, but that the judicial practice had not changed. According to them, the judiciary systematically refused to use the legislative tools at its disposal, including judicial control, to enable the parliamentarians to fulfil their parliamentary mandate. They also referred to an existing precedent, the case of member of parliament, Ms. Sebahat Tuncel, in which the courts had adopted a different approach. Ms. Tuncel was elected in 2007 while in detention on charges of membership of a terrorist organization. Upon her election, she was discharged from prison, sworn in to parliament and able to fulfil her parliamentary mandate while her trial continued. She was re-elected in 2011 and to date still holds her seat in parliament.⁵

3.1.2.2 The delegation noted that the judicial authorities were of a different opinion. In particular, the President of the Supreme Court informed the delegation that the conditions of pretrial release were restrictively set by the Code of Criminal Procedure and that no exception could be made simply because

³ Article 14 of the Turkish Constitution: “None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights. No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution”.

⁴ Decision of the Constitutional Court of 04/12/2013 on Mr. Balbay’s individual petition (Application Nr. 2012/1272), and appeal decision of the Court of Cassation of 09/10/2013 in the Sledgehammer case.

⁵ Republican People’s Party (CHP), Report on the imprisoned deputies, Turkey: Grand prison for deputies, the outcry of a country whose will is under arrest, 2013, p. 13.

they had been elected MPs while in detention. This, he believes, was not sufficient ground to grant them release. The delegation noted that his opinion was echoed by a decision of the 13th Criminal Court of Istanbul of 23 June 2011 rejecting Mr. Balbay's request for release, in which the Court considered that the argument that being elected as deputy eliminates the possibility of escape for the accused person is a subjective consideration. The Court went on to find that "if the accused persons are released upon their election as deputies just acting on the argument that 'being elevated as deputy leads to release', which lacks any legal basis, and the continuation of detention is decided for those not elected or other accused persons, this does not comply with any principle of rights and equity law."⁶

3.1.2.3 The Speaker and the Minister of Justice explained to the delegation that neither parliament nor the executive branch had been able to resolve the situation owing to the independence of the judiciary and the separation of powers. It was only after the right to individual petitions to the Constitutional Court on alleged violations of fundamental freedoms had been introduced in Turkish law, following the 2010 constitutional amendment, that the parliamentarians concerned were themselves able to seek redress from the Constitutional Court.

3.1.3 *Groundbreaking decisions of the Constitutional Court*

3.1.3.1 On 4 July 2013, the Constitutional Court had already issued a ruling deeming unconstitutional the legislative provisions that allowed for up to ten years' pretrial detention for suspects charged with organized crime and terrorism-related offenses. Then, on 4 December 2013, ruling on an individual petition lodged by Mr. Balbay, the Constitutional Court, finding that the excessive length of his detention had violated his right to be elected, ordered his release. That decision set a new precedent for all parliamentarians held in detention. In January 2014, the Constitutional Court reached similar conclusions in respect of the Kurdish parliamentarians who remained in detention in the KCK case.

3.1.3.2 The rationale for these decisions is well stated in the ruling concerning Mr. Balbay. The Constitutional Court found that the right to be elected covers not only the right to be a candidate in elections but also the right to participate in the activities of the parliament after being elected. It considered that any interference in an elected member of parliament's participation in the legislative activities of parliament would not just constitute interference in his right to be elected but would also constitute interference in the voters' right to express their free will.⁷ It ruled that Article 67(1) of the Constitution and Article 19(7) had been violated.⁸ The Court further emphasized that disproportionate interferences that prevent the elected deputies from performing their legislative activities may "eradicate the political representation authority formed by the public will and such interference may also prevent the electorate's will from being reflected in parliament".⁹ The Court stated that, as Mr. Balbay was not released upon his election as a deputy, "he could not take oath in the Turkish Grand National Assembly and could not execute his duties and responsibilities in his capacity as a deputy. It is evident that the detention of the applicant, by preventing him from executing such duties and responsibilities, constitutes an infringement of the right to be elected as it constrains the right to political activity and representation (...) Considering the time period the applicant [Mr. Balbay] was detained after his election as a deputy, this grave interference with his right to be elected and to engage in political activities as a deputy is not proportionate and does not comply with the requirements of democratic social order".¹⁰

3.1.3.3 The Court also underlined that "reasonable suspicion of crime is not sufficient to justify detention. There must also be a suspicion that the accused is going to flee, hide, tamper with evidence, effect and put pressure on the judicial proceedings, breach the public order or commit a new crime".¹¹ It ruled that detention may disable the deputy elected from representing the whole nation for a certain period of time, then the feasibility of such measures must be duly considered.¹² The Constitutional Court concluded that the decisions for the continuation of his detention were "unjustified and did not meet the necessary conditions."¹³ The Court held

⁶ Decision quoted on pp. 2-6 of the Constitutional Court decision of 04/12/2013 on Mr. Balbay's individual petition.

⁷ See para. 111 of the Constitutional Court decision of 04/12/2013 on Mr. Balbay's individual petition.

⁸ Article 67 relates to the right to vote, be elected and to engage in political activity. Its first paragraph reads as follows: "In conformity with the conditions set forth in the law, citizens have the right to vote, to be elected, and to engage in political activities independently or in a political party, and to take part in a referendum."; Article 19(7) relates to the fundamental rights to liberty and security and provides that "Persons under detention shall have the right to request trial within a reasonable time or to be released during investigation or prosecution. Release may be made conditional to the presentation of an appropriate guarantee with a view to securing the presence of the person at the trial proceedings and the execution of the court sentence."

⁹ See para. 129 of the Constitutional Court decision of 04/12/2013 on Mr. Balbay's individual petition.

¹⁰ See paras. 132-133 of the Constitutional Court decision of 04/12/2013 on Mr. Balbay's individual petition.

¹¹ See para. 99 of the Constitutional Court decision of 04/12/2013 on Mr. Balbay's individual petition.

¹² See para. 115 of the Constitutional Court decision of 04/12/2013 on Mr. Balbay's individual petition.

¹³ See para. 99 of the Constitutional Court decision of 04/12/2013 on Mr. Balbay's individual petition.

that in deciding whether to continue detention, it is a *sine qua non* to consider the specific and individual situation of the person requesting release, as well as the general course and circumstances of the case and, on the basis of those considerations pertaining to the individual, assess the grounds for detention. The Court reviewing the applicant's requests for release did not assess the grounds for detention on a sufficiently individual basis and could not present convincing evidence of the applicant's escape or tampering with evidence after being elected as deputy.¹⁴

3.1.4 *Situation at the time of the mission*

3.1.4.1 During the mission, the delegation was able to confirm that, except for Mr. Alan, all of the parliamentarians concerned had been released by the courts and sworn in to parliament. The delegation was able to meet with six of those who had been released (Mr. Haberal, Mr. Balbay, Ms. Yildirim, Mr. Aktas, Mr. Ayhan, and Ms. Irmak), as well as with Mr. Alan in detention.

3.1.4.2 Although Mr. Haberal and Mr. Balbay had been released, the delegation was told that they remained prohibited from travelling abroad. Both were concerned that these restrictions affected their ability to carry out their parliamentary and other duties. At the time of the mission, they had petitioned the courts to lift those restrictions. The delegation was informed after the mission that the courts had acceded to their requests and that the restrictions had been lifted.

3.1.4.3 The President of the Turkish IPU Group confirmed to the delegation that now that the parliamentarians concerned had been sworn in to parliament, they would enjoy full parliamentary immunity for the rest of their term. She affirmed that, until a final court decision was delivered, they would remain free and be able to stand in the 2015 elections. If found guilty by a final court decision, they would not serve their sentences until after the end of their term of office, pursuant to Article 83(3) of the Constitution.¹⁵

3.1.4.4 In the case of Mr. Alan, however, who was found guilty in a final court decision, the delegation was not able to clarify why the execution of the sentence had not been suspended until after the end of his parliamentary term. Furthermore, the delegation was informed that the United Nations Working Group on Arbitrary Detention had delivered an opinion on 5 July 2013 on the situation of the 250 defendants in the sledgehammer case, including Mr. Alan, and concluded that the Government of Turkey had violated Article 9(3) of the International Covenant on Civil and Political Rights and Article 9 of the Universal Declaration of Human Rights. The Working Group considered, after taking into account the responses provided by the Government of Turkey, that the latter had not demonstrated that: (i) the defendants had effective remedies available to contest the legality of their pretrial detention; (ii) the courts had provided periodic decisions justifying the legal and factual grounds of the continued detention (the complainants had asserted that the courts only invoked generic pronouncements that the detention was necessary due to, for example "the nature of the charges" or "the continued presence of strong suspicion of criminal activity"); and (iii) the courts had addressed the proportionality review in determining continued detention in lieu of release on bail. The delegation was told by Mr. Alan's lawyer and relatives that a petition had been lodged with the Constitutional Court and that they were awaiting the ruling. The delegation was later informed that the ruling was delivered on 18 June 2014 and led to the release of Mr. Alan the next day. Mr. Alan was sworn in to parliament on 24 June 2014.

3.1.5 *Conditions of detention*

3.1.5.1 The President of the parliamentary Human Rights Inquiry Committee told the delegation that he had visited the parliamentarians in detention and spoken to them, which was confirmed by some of the members of parliament. The delegation was also told by the Prosecutor of Istanbul, previously the chief prosecutor with jurisdiction over Silivri prison, that he had met Mr. Balbay and Mr. Haberal in detention several times and verified their conditions of detention. The delegation obtained confirmation from all that the conditions of the parliamentarians' detention were similar to those of other detainees: they did not benefit from any privileges. The parliamentarians told the delegation that they had been deeply affected by the time spent in prison. They had experienced the small size of the cells, the lack of daylight, the permanent environment of concrete and iron, the poor quality of the food and hygiene, restricted access to drinking water and limited access to communication with the outside world. Some of them, including Mr. Haberal and Mr. Alan, suffered the loss of close relatives while in prison and deplored the fact that they had not been

¹⁴ See paras. 116-117 Constitutional Court decision of 04/12/2013 on Mr. Balbay's individual petition.

¹⁵ Article 83(3) of the Turkish Constitution stipulates that: "The execution of a criminal sentence imposed on a member of the Turkish Grand National Assembly either before or after his election shall be suspended until he ceases to be a member; the statute of limitations does not apply during the term of membership."

granted permission to see them before they died. All of the parliamentarians that the delegation spoke to pointed out the inadequate standard of health services in detention.

3.1.5.2 In particular, **Mr Haberal**, suffered greatly from deficient medical assistance in detention. He told the delegation that he was lucky not to have died in detention as a result of the conditions in which he was detained. Mr. Haberal suffered repeated cardiac spasms after his arrest and had to receive intensive treatment and be kept under strict medical monitoring. He, his lawyers and his political party reported that a medical diagnosis had been made from the outset, stating that he should not be detained in prison in light of his health. He was kept in the best specialist cardiology hospital for an initial 22 month period, after which the Court insisted on placing him in detention. Mr. Haberal says that he was forcibly transferred to a State hospital, which was instructed - according to Mr. Haberal and his lawyers - to conclude that his medical condition was suitable for prison contrary to prior medical reports. Mr. Haberal stated that he spent most of his time in detention being transferred back and forth between the prison and the State hospital, as his health deteriorated seriously. Mr. Haberal claimed that the State hospital was not adequately equipped to handle his medical condition. Mr. Haberal's lawyer reminded the delegation that the Court systematically denied all requests for pretrial release regardless of Mr. Haberal's medical condition and even ordered that Mr. Haberal be held in solitary confinement.

3.1.5.3 According to his lawyer, Mr. Haberal brought a civil lawsuit before the Fourth Civil Division of the Supreme Court against the judges who had ordered his detention. The Court ruled in 2010 that Mr. Haberal's life was at risk in detention, that the conditions for his continued detention had not been met and that the presumption of innocence and the principle of equality before the law had been violated. However, according to Mr. Haberal's lawyer, the decision was never enforced and the same judges continued to order the extension of his detention. Mr. Haberal lodged a petition to the European Court of Human Rights on the grounds that his right to life had been violated and that he had suffered ill-treatment amounting to torture. The European Court has not yet delivered its decision on the merits of the case. The delegation took note that the views of the Prosecutor General of Istanbul differed from Mr. Haberal's. He reminded the delegation that Mr. Haberal's detention and transfer to Silivri prison had been decided by the Court on the basis of a medical report and that, once in Silivri prison, every medical complaint had been assessed very carefully and attended to. He insisted that medical advice had been followed at all times by the prison personnel.

3.1.5.4 As regards the detention of **Mr. Balbay**, his lawyer pointed out to the delegation that Mr. Balbay had been held in solitary confinement for a large part of his detention. His lawyer had brought a complaint to the Ministry of Justice and requested that he be placed in a ward with other persons. Although that request was eventually granted, Mr. Balbay was transferred back into solitary confinement shortly after it was implemented. He was later transferred to Sinçan prison in Ankara where, once again, he was detained in solitary confinement.

3.1.5.5 On meeting **Mr. Alan** in detention, the delegation was struck by his poor physical appearance. However, Mr. Alan said that his health was good and told the delegation that he had no complaints about the conditions of his detention. The delegation noted with concern, however, that Mr. Alan stated that he was not authorized to make any telephone calls, including to his lawyer and family members. Mr. Alan's relatives and his lawyer were not aware of this prohibition and stated that detainees were normally allowed to make calls for ten minutes every week at a time allotted by the prison. They confirmed that Mr. Alan never called them but did not know whether that was because he preferred not to or because of a prohibition. His lawyer stated that he had been allowed to visit Mr. Alan without restrictions.

3.2 Overview and current status of proceedings against the MPs

3.2.1 Case of Mr. Engin Alan (Sledgehammer and 28 February coup trials)

3.2.1.1 Mr. Alan is a military officer by profession and held many high ranking military functions throughout his career. Mr. Alan was prosecuted as part of the Sledgehammer case, which is the name of an alleged Turkish secularist military coup plot reportedly dating back to 2003. Defendants were accused of planning a coup against the AKP Government that was never carried out. The judicial investigation was initiated by the Prosecutor of the Republic of Istanbul on 20 January 2010 after a Taraf journalist handed over to the police a suitcase he had received from an unidentified retired military officer. The suitcase contained more than 2,000 pages of documents, 19 CDs of digital documents, 10 audio cassettes and handwritten notes. The police later conducted several raids and seized thousands of pages of additional documents. Charges were pressed against 365 people, mostly high-ranking, serving or retired military officers. The case was referred to the Tenth Criminal Court of Istanbul, a specially authorized court. The trial began on 16 December 2010 and lasted

21 months. The first instance verdict was issued on 21 September 2012. In all, 325 of the 365 defendants, including Mr. Alan, were found guilty of attempting to remove the government by force and concealing evidence. On 21 September 2012, Mr. Alan was sentenced to 18 years in prison by the Tenth Criminal Court of Istanbul. The full judicial decision is over 1,000 pages long and available only in Turkish. The sentence was confirmed on appeal by the Ninth Criminal Division of the Supreme Court on 10 October 2013.¹⁶

3.2.1.2 In November 2013, Mr. Alan lodged a petition with the Constitutional Court on the grounds that his fundamental rights to liberty and to a fair trial had been violated. At the time of the mission, the Constitutional Court had not yet ruled on the petition. On 18 June 2014, the Constitutional Court delivered a landmark ruling deciding that the rights of the accused in the Sledgehammer case had been violated, which, according to Turkish media reports, was expected to pave the way for a retrial.¹⁷

3.2.1.3 Mr. Alan and his relatives informed the delegation that he was also being prosecuted in the “28 February coup” case (also known as the “postmodern coup trial”). Charges have been pressed against more than 100 suspects, mostly military officers, accused of overthrowing the government in 1997 through intimidation, ultimatums and manipulation and preventing it from performing its duties. The name of the trial derives from an unarmed military intervention, which originated on 28 February 1997 during a nine-hour meeting of the National Security Council (MGK). This meeting was widely seen as a show of power by the military against Turkey’s first Islamic-led government. The MGK reportedly pressured the Prime Minister to implement measures aimed at curbing certain practices allowed by his government that the military and others perceived as a growing threat against secularism in the country. The pressure reportedly continued until a senior member of parliament left the government’s Welfare Party and the Prime Minister lost a parliamentary confidence vote by one vote and resigned after having served just one year in office. The cabinet was deposed and replaced by a new Prime Minister. The indictment is 1,300 pages long. The trial started in 2013 and continues to date. The Court has granted provisional release to most defendants in this case, including Mr. Alan.

3.2.2 Case of Mr. Mehmet Haberal and Mr. Mustafa Balbay (Ergenekon trial)

3.2.2.1 According to the prosecution, a terrorist organization named Ergenekon was established in order to prepare a number of terrorist attacks against, among others, the AKP government, the Turkish Council of State and the media outlet *Cumhuriyet*, planning assassinations and attempting a military coup in 2003–2004. The 275 defendants in the case were charged with either leadership or membership of the terrorist organization. Twenty-one indictments - more than 21,000 pages - were prepared and merged into a single case in a 2009 ruling. The mass trial, known as the Ergenekon trial, took place before the 13th Criminal Court of Istanbul, a specially authorized court. Mr. Haberal and Mr. Balbay, like many of the other civilian defendants, including well-respected academics, journalists, lawyers, medical doctors and politicians, were charged with terrorism-related offences for fomenting unrest, but were never accused of having advocated or committed any violence themselves.

3.2.2.2 The first instance trial concluded with a verdict issued on 5 August 2013. Both members of parliament were found guilty. Mr. Balbay was sentenced to 34 years and 8 months in prison and Mr. Haberal to 12 years and 6 months. Mr. Balbay was found guilty under Articles 147, 136, 326, 327 and 334 of the 2004 Criminal Code for attempting to dissolve the Government and various counts related to the acquisition, use or disclosure of secret information.¹⁸ Mr. Balbay and Mr. Haberal told the delegation that they did not know the detailed grounds of the verdict as the reasoned decision of the Court had not yet been issued at the time of the mission, more than six months after the verdict had been handed down. They confirmed that they would lodge appeals against the verdict and had already petitioned the European Court of Human Rights. The delegation was later informed that a reasoned decision of 17,000 pages had been issued by the 13th Criminal Court of Istanbul on 3 April 2014.

3.2.3 Cases of the MPs of Kurdish origin (KCK trial)

3.2.3.1 The organization known as the Kurdish Communities Union (KCK) is accused of being the urban wing of the Kurdistan Workers Party (PKK). The PKK is listed as a terrorist organization by Turkey and many others, including in the European Union and the United States. The KCK is believed to have been

¹⁶ A copy of the English translation of the Court of Cassation’s decision (Decision No. 2013/12351, Docket No. 2013/9110) was provided by the Permanent Mission of Turkey to the United Nations Office in Geneva.

¹⁷ Hurriyet, Top Turkish Court paves way for retrial of Balyoz coup case convicts, 18 June 2014, <http://www.hurriyetdailynews.com/top-turkish-court-paves-way-for-retrial-of-balyoz-coup-case-convicts.aspx?pageID=238&nid=67961&NewsCatID=339>.

¹⁸ See paras. 47 and 62 of the Constitutional Court decision of 04/12/2013 on Mr. Balbay’s individual petition.

established in 2005 by Abdullah Öcalan and to operate pursuant to a constitution-like charter with broad objectives, which has established executive, legislative and judicial branches. It defines a KCK citizen as anyone born and living in Kurdistan or who is loyal to the KCK. The Turkish government considers that the PKK used the KCK to create a parallel state structure with the ultimate aim of declaring independence in due time. Thousands of people, including mayors, politicians, lawyers and journalists, have been arrested and investigated in connection with the KCK. There are several ongoing KCK mass trials before several courts in Turkey. Most defendants, including the parliamentarians concerned, are being prosecuted on charges of membership of a terrorist organization and/or aiding and abetting a terrorist organization. At the time of their arrests, they were mayors, members of municipal councils or held local functions in pro-Kurdish political parties. They were all charged solely for membership of the KCK. They are not accused of any criminal acts as such or of incitement to violence.

3.2.3.2 The trial has been ongoing before the Sixth Criminal Court of Diyarbakir, operating as a specially authorized court, for five years. During the mission, the delegation was not able to obtain confirmation that the trial was expected to conclude in 2014 or to obtain detailed judicial information on the current stage of the proceedings. The MPs concerned told the delegation that they would appeal the verdict if convicted and had already petitioned the European Court of Human Rights but needed to exhaust all domestic remedies before the Court could examine the case.

3.3 Freedom of expression and association

3.3.1 At the outset, the delegation wishes to underline that its mission took place in a highly tense and polarized political environment. This tension stemmed from a political environment focused on the allegations of corruption levelled against some members of the AKP political establishment, including the Prime Minister himself, since December 2013, and on the forthcoming local elections scheduled on 30 March 2014 (and to be followed by presidential elections in August 2014 and legislative elections in 2015). Following the graft accusations brought against him, the Prime Minister denounced a judicial coup, accused the Gülen movement (a religious group funded by United States-based Islamic scholar Fethullah Gülen) of orchestrating the graft probe and denounced the existence of a “parallel State” within the police and the judiciary.

3.3.2 During the mission, most members of the opposition who the delegation met, particularly those from the CHP, referred to a general climate of fear and intimidation in Turkey in recent times. They made references to increasingly large numbers of journalists, academics, lawyers, politicians and elected officials charged and detained in what they perceived to be a form of retaliation for having criticized the policies of the government. They stated that this had created fear in many circles of society and had a deterrent effect on many professions, particularly intellectual and political elites, who felt oppressed and restricted. Quite a few of the delegation’s interlocutors expressed the fear that they may be arrested and charged any time: one opposition member told the delegation, “I’m relieved when I read the newspaper in the morning and don’t see my name in it” and indicated that he had most likely been under surveillance for years, like thousands of others in Turkey, and that anything said in any past, present or future telephone conversations or emails could be used to justify the issuance of an arrest warrant against them should the government decide so.

3.3.3 The President of the Constitutional Court, who acknowledged that the political atmosphere was exceptionally tense due to the upcoming elections, strongly deplored the fact that Turkish society had become overwhelmingly politicized by political parties: “every morning we wake up with politics and every evening we go to bed with politics”. However, he did not consider that this environment had restricted freedom of expression, since political parties were able to criticize the action of the government extensively.

3.3.4 Regarding the specific cases under examination, the delegation noted that the Turkish authorities on the one hand, and the concerned members of parliament, opposition parties and a number of lawyers, journalists and human rights activists on the other, held contradictory positions on the issue of whether the parliamentarians concerned had been targeted by criminal charges because of their dissenting political opinions and whether their freedom of expression had been violated. These contradictory positions are reflected below.

3.3.1 Position of the Turkish authorities

3.3.1.1 The delegation takes note that all Turkish authorities with whom it discussed this issue consistently affirmed that none of the members of parliament had been charged in relation to freedom of expression, but rather that the charges had been related to alleged membership of terrorist organizations and attempted military coups. They further pointed out that all alleged criminal activities had been carried out before they

had been elected as members of parliament and had nothing to do with the exercise of their parliamentary mandate or their status as parliamentarians, and could therefore not constitute a violation of the parliamentarians' right to freedom of expression. The Speaker further wished to reassure the delegation that he attached the utmost importance to respect for freedom of expression and that legislative amendments had been recently passed to reflect the jurisprudence of the European Court of Human Rights, according to which only opinions expressed which incite violence can be criminalized. The Minister of Justice also confirmed that measures had been taken in respect of freedom of expression as part of the 3rd and 4th judicial packages adopted in 2012 and 2013.

3.3.1.2 The judicial authorities, including the President of the Supreme Court, generally acknowledged that Turkey still faced some challenges with respect to freedom of expression as pointed out by the numerous condemnations delivered by the European Court of Human Rights. They noted, however, that significant progress had been made through recent legislative amendments. While they observed that a State-centered mentality remained prevalent in the judiciary, they were of the opinion that it was progressively changing and that courts had now started to balance the interests of the Turkish State with the fundamental rights of individuals. The President of the Supreme Court told the delegation that the Court was now referring more systematically to the European jurisprudence and that more and more members of judicial personnel were being trained on human rights standards. With regard to the present cases, the judicial authorities shared the opinion of the executive and legislative branches.

3.3.2 Position of the members of parliament concerned, opposition parties and a number of lawyers, journalists and human rights activists

3.3.2.1 During its mission, the delegation was told by the parliamentarians concerned, members of their political parties, and by a number of lawyers, journalists and human rights activists that the Turkish judiciary had been politically instrumentalized. They were of the view that these important judicial proceedings, which they also said should have been an opportunity for Turkey to face its past of military coups and human rights abuses, had been used as a pretext to detain and silence an increasing number of government critics, who were usually active supporters of secularism. They stated that this pattern of political arrests was initially blurred by the complexity of the cases, the seriousness of the accusations and the large number of suspects, which they said did include a wide spectrum of individuals, including some whose guilt, they believed, was less questionable.

3.3.2.2 They considered that the prosecution had abusively stretched the scope of the proceedings and targeted, together with the real culprits, a large number of innocent persons because of their dissenting political opinions. They pointed out that it had become more and more evident over the years with the endless expansion of the cases. They believed that thousands of government critics have been targeted in all circles of society, but particularly among opposition politicians and elected officials, journalists, human rights activists, academics and even lawyers. Members of the Peace and Democracy Party (BDP), an established pro-Kurdish opposition party, told the delegation that hundreds of cases had been brought against their members. According to a report by the International Crisis Group, more than 2,100 persons linked to BDP, including 274 elected officials (elected deputies, mayors, provincial councilors), have been charged with belonging to a terrorist organization while another 5,000 are being held for propagating the ideas of such an organization or attending meetings. Over 90 journalists and other media workers, hundreds of students as well as many lawyers, the majority of whom are Kurds, are under arrest on similar charges.¹⁹

3.3.2.3 The delegation was told that the Turkish legal framework, despite recent reforms, continues to allow for abusive prosecutions restricting the rights to freedom of expression and association. The legal definitions of the offences of "terrorism" and "membership of a criminal/terrorist organization" are broad and have been interpreted even more broadly by the courts. Article 1 of the anti-terrorism law defines terrorism in terms of its aims, without the requirement for material acts of violence to be employed in furthering of these aims. The delegation was told that the offence of "membership of a terrorist organization", which is punishable by 10 to 15 years of imprisonment, has been used to prosecute and sentence individuals whose conduct was not criminal in itself by linking the individual to a terrorist organization or an alleged plot merely because the prosecution and the Court consider that the individual had the same overall objective as that terrorist group. In practice charges have frequently been brought against individuals who advocate political ideas that are shared by armed groups, even when the prosecuted individuals have not themselves advocated violence, hatred or discrimination and are not being prosecuted for direct involvement in violent acts. Many individuals have been prosecuted for membership of a terrorist organization on charges relating

¹⁹ International Crisis Group, Turkey: The PKK and a Kurdish Settlement, 11 September 2012, p. 22.

solely to their engagement in peaceful and lawful pro-Kurdish activities (such as calling for education in the Kurdish language, greater regional autonomy, free education and an end to military operations against the PKK, the cessation of armed clashes between the army and the PKK; protesting against police violence and other alleged human rights abuses; and attending the funerals of PKK members).

3.3.2.4 The delegation further noted that the parliamentarians concerned, their political party, and lawyers, asserted that they were charged under the Criminal Code and anti-terrorism legislation for peaceful and legal activities undertaken before their elections in the normal course of their respective professions as politicians, journalists, doctors and, in the case of Mr. Alan, a general of the Turkish army. They stated that the facts and evidence adduced in support of the criminal charges included: Organizing or participating in protests, sit-ins, distributing leaflets or holding press conferences; and expressing dissent and criticism of the Government's policies, including with respect to the peace process in the south-eastern part of Turkey, and the defence of the rights of Turkish citizens of Kurdish origin in the KCK case.

3.3.3 Specific information collected by the delegation on the facts and evidence substantiating the charges brought against the members of parliament concerned

3.3.3.1 Confronted with these contradictory positions, the delegation reviewed the extensive information and documentation obtained during its mission on a case-by-case basis, together with the specific information and opinions shared by the parliamentarians concerned.

(a) Mr. Alan

3.3.3.2 Mr. Alan was charged with attempting to overthrow the government in 2003. Evidence brought forward relates to his participation in a military seminar in March 2003 – where the coup would have been planned – and being in contact with, and under the command of, other high-ranking military officials who the Court have considered to be the instigators of the coup attempt. Excerpts of the first instance judgment provided by the Turkish authorities (confirmed by the appeal decision) indicate that the Court found that Mr. Alan had participated in the attempted coup by virtue of his position as Commander of the 2nd Corps at that time. It considered that, in that capacity, he was offered and accepted a mission on behalf of the criminal organization under the leadership of General Cetin Dogan, then Chief of Staff of the Turkish armed forces. The Court found that he was highly esteemed by his leadership and considered to be close to the Ergenekon leaders. According to the Court, Mr. Alan was among those who attended and made a presentation during the March 2003 seminar, which for the Court constituted evidence of his involvement in the coup preparation.

3.3.3.3 Mr. Alan and his lawyer stated that the case files contain over 10,000 pages of emails and tapped telephone conversations, none of which concern him. They claim that the March 2003 military seminar was simply a regular army exercise, in which Mr. Alan was required to participate as per instructions of the military command. They said that the seminar never discussed a coup attempt but rather conducted a war game scenario, in which hypothetical events were laid out and possible solutions discussed, an exercise commonly practiced by the Turkish army and NATO forces. He further noted that out of the 163 military officers who had attended the seminar, only 48 were prosecuted, which to him made no sense if the assumption was that they had been planning a coup. Mr. Alan did not deny being under the command of higher military officers or knowing a number of officers, which he stated was perfectly normal as he was a General who had served his whole career in the Turkish army. He did, however, deny all allegations related to the existence of plans for a military coup attempt in 2003, and asserted that at any rate he was not aware of or involved in any such plans. He further raised serious concerns regarding the integrity and authenticity of the evidence supporting his conviction (see section 3.4.1 on this issue).

3.3.3.4 Mr. Alan expressed the opinion that the case against him was political, not legal. He explained that, in his opinion, the AKP government had put a lot of effort into showing that the Turkish army was a force opposed to democracy and had used the judicial system to repress forces of all sorts, the army included. He is convinced that he has been targeted by the proceedings because he was a well-known army General and that the Prime Minister held a personal grudge against him. According to Mr. Alan, the real story behind his arrest is related to an incident that occurred between him and Prime Minister Erdogan in 2004. Mr. Alan, who was the highest-ranking military officer present at an official military ceremony he had been instructed to organize, had not applauded at the end of the Prime Minister's speech because the latter had thanked everyone except him. According to Mr. Alan, that was sufficient for the Prime Minister to decide that he was not loyal to him, and from that point on their relationship deteriorated.

(b) Mr. Balbay

3.3.3.5 Mr. Balbay is a journalist by profession. He was for many years the Ankara correspondent for *Cumhuriyet*, a long-running daily in Turkey. He is a well-known critic of the government and has written over 5,000 columns and 31 books and has regularly been involved in TV and radio programmes.

3.3.3.6 In the indictment of 8 March 2009, which was accepted by Istanbul 13th Criminal Court on 25 March 2009, Mr. Balbay was charged with being a member of the leadership of the Ergenekon terrorist organization with special missions and duties. He was charged with being responsible for the coordination of high-level persons and having procured and kept 436 secret documents relating to State security. The chief prosecutor was of the opinion that it was impossible for Mr. Balbay to have obtained these documents as a journalist and that he must have obtained them from other members of the Ergenekon criminal organization.²⁰ Information on military coups planned by Ergenekon was found in Mr. Balbay's computer. The texts were in the form of diaries and included "anecdotes relating to the military coup preparations between 2003 and 2004". These diaries included information that seemed to corroborate the said military coup plans, according to the prosecution's evidence. That evidence comprises documents, DVDs, computer and telephone records seized during searches.²¹

3.3.3.7 According to Mr. Balbay's lawyers, Mr. Balbay and Mr. Haberal were accused of preparing the ground for a coup through their writings and respective social networks. They claimed that the evidence used against Mr. Balbay comprised: (i) meetings he had with a number of Turkish authorities, political parties, military officers etc. in the course of his professional activities as a journalist; (ii) critical articles he has written; (iii) documents that he retained as part of his work and that helped him prepare his articles and books; and (iv) notes and information on his journalists' sources of information. Mr. Balbay's lawyers provided some specific examples of the evidence included in the indictments: the interview of a military official in Ankara, which had been secretly recorded (and which they say did not contain any element of crime and had been carried out as part of his journalistic activities); a news item published under the name of Mr. Balbay entitled "young military officials are uneasy" (this media report did not contain any criminal element, and was confirmed by the Chief of Staff himself after its publication); documents called "secret documents" in the indictment, which were in no way secret as they had all been published previously and were largely related to the situation in Iraq, Syria and others. Mr. Balbay testified that he had obtained and used all of the documents for his journalist activities. He did not deny that he had an extensive network of contacts, since that was normal for any journalist with years' experience. He did, however, contest the authenticity of notes allegedly found on his computer, which he considers have been fabricated/alterd after his computer was seized (see section 3.4.1 on issues related to evidence). In his petition to the Constitutional Court, Mr. Balbay claimed that his right to freedom of expression had been violated because he had been charged for his activities as a journalist. In its decision of 4 December 2013, the Court found that it could only review that claim after the end of the appeal process.

(c) Mr. Haberal

3.3.3.8 Mr. Haberal is a medical doctor by profession and an internationally renowned surgeon. He is also a professor, specializing in general surgery, and the rector and founder of Baskent University. He is also the founder of a television channel that is known to be critical of the government. Mr. Haberal was charged with attempting to dissolve the Government on the grounds that he had been in contact with some of the other defendants. The prosecution evidence against him appears to consist essentially of telephone records and digital evidence found on computers seized by the police.

3.3.3.9 According to Mr. Haberal, there is no solid evidence to substantiate the charges against him. According to his defence lawyers, the prosecutor and then the Criminal Court, drew the assumption that he was linked to a terrorist organization on the sole basis of his social relationships and meetings he had with other individuals accused of being leaders of Ergenekon. Mr. Haberal acknowledged to the Court that he knew or had met some of these persons. As a rector and a well-respected doctor he participated in many meetings and social activities over the years, which, in his opinion, was not a criminal activity. Mr. Haberal pointed out to the delegation that the prosecution also used as evidence against him the fact that he had participated in demonstrations and public meetings, including a meeting aimed at founding a political party.

²⁰ See paras. 76-77 of Constitutional Court decision of 04/12/2013 on Mr. Balbay's individual petition.

²¹ See paras. 41-43 and 38 of Constitutional Court decision of 04/12/2013 on Mr. Balbay's individual petition.

3.3.3.10 The prosecution further accused Mr. Haberal of plotting to remove from office Prime Minister Bülent Ecevit in 2002 by preparing a fake medical report while he underwent surgery at Mr. Haberal's hospital. Mr. Haberal testified before the Court that he had not been part of the team of surgeons who had treated the former Prime Minister, but that the operation had been successful and the Prime Minister had been able to remain in office for another six months and had lived a further four years after the treatment. His defence team responded similarly, point by point, to all of the prosecution's arguments. It has also raised many issues regarding the misinterpretation and falsification of evidence (see section 3.4.1 in that respect).²²

(d) Accusations against the Kurdish parliamentarians

3.3.3.11 The charges brought against the Kurdish parliamentarians essentially criminalize legal political activities that they conducted on behalf of the DTP and the BDP – recognized pro-Kurdish political parties. The DTP was a Kurdish nationalist political party set up by veteran Kurdish politicians, including former deputies Leyla Zana and Hatip Dicle. Like many other Kurdish political parties in the past, it was banned by the Constitutional Court of Turkey in 2009, on grounds that it had become the "focal point of activities against the indivisible unity of the State, the country and the nation". The ban was widely criticized at the domestic and international levels as a violation of the rights to freedom of association and expression. The Peace and Democracy party (BDP) was then created to replace it and remains one of the opposition parties represented in parliament. The campaign of arrests in the KCK case started in April 2009, just weeks after local elections in which the BDP had doubled the municipalities under its control to about 100.

3.3.3.12 The defendants were charged in a 7,578-page indictment. The basis for the charges comprises statements, participation in meetings or protests, or participation in other activities that have been interpreted by the prosecution as implying support for one or more of the goals of the KCK. According to all Kurdish parliamentarians, the KCK trial is an attempt to ban all Kurdish political activities by criminalizing them regardless of their actual legality. They have voiced the opinion that when Kurds are involved in a political party and express their concerns, their political activities are systematically labeled as criminal or terrorist for overlapping with the aims of the PKK, which are very broad. They have reaffirmed that none of the detained Kurdish parliamentarians had resorted to, or incited violence, and that they had always acted solely through peaceful means. All of the parliamentarians told the delegation that all their political activities had been labeled as terrorist activists for having been "at the instigation of the PKK".

3.3.3.13 The CHP report on imprisoned deputies provided extensive examples of legal political activities considered to be criminal by the prosecution, such as holding meetings with elected officials, participating in protests, sit-ins or peaceful commemorations, issuing press statements and holding press conferences. According to the CHP report, all these activities were carried out under the structure of a legal political party but the prosecution has systematically assumed that they were conducted on behalf of the illegal organization KCK. Listening to Kurdish music ("the music listened to by the organization", "propaganda of the organization"), wearing local clothes ("the clothing of the organization"), being in possession of books on various topics (history of religion, philosophy, anarchism, ecology etc., considered as "organizational documents"), and following Kurdish news (following "news of the organization") were also considered criminal.

3.3.3.14 Ms. Gülser Yildirim told the delegation that she has worked for Kurdish political parties since 2000, including HADEP, DEHAP DTP and BDP. She was the president of the women's branch and the chairperson of the district branch of the BDP in central Mardin at the time of her arrest. According to the CHP report, she is accused of membership of a terrorist organization and of having conducted criminal activities within the organizational structure called the "town assembly", which allegedly had links with the KCK. She is accused of having given interviews concerning issues such as putting up peace tents and using the word "martyr" to talk about dead PKK members. She is also accused of having organized meetings aimed at registering new members and giving them assignments on behalf of the "town assembly". The indictment criminalizes, among other examples, Ms. Yildirim's participation in various marches and sit-in protests, the fact that she read a press statement urging the Turkish army to halt its military operations and contribute to the process of democratic opening and her attendance at the funeral of a PKK member killed during military operations.²³ Ms. Yildirim confirmed to the delegation that, among the evidence supporting the charges against her, is her participation in the setting up of peace tents, a political action supportive of the peace process, which was

²² See Prof. Dr. Mehmet Haberal's Defence Counsel Response to the Opinion of the Prosecution at http://www.mehmethaberal.com.tr/en/mutalaaya_yanitlar_en.pdf as well as the book written by Mr. Haberal in prison, which details his deposition and cross-examination before the Court: What is my Crime? Professor Mehmet Haberal Oral Silivri Deposition, 2011, http://www.mehmethaberal.com.tr/en/what_is_my_crime.pdf.

²³ Republican People's Party (CHP), Report on the imprisoned deputies, Turkey: Grand prison for deputies, the outcry of a country whose will is under arrest, 2013, pp. 57-59.

conducted with the approval of the governor. Ms. Selma Irmak further told the delegation that activities to promote the role of Kurdish women, including their participation in international conferences, had also been deemed to be terrorist activities by the prosecution. The Democratic Free Women's Movement (DÖKH), an organization of women composed of women of Kurdish origin but also of Turkish women of non-Kurdish origin, according to Ms. Irmak, was considered to be the women's arm of the KCK.

(e) Particular case of Mr. Hatip Dicle

3.3.3.15 **Mr. Hatip Dicle** is a veteran Kurdish politician who was first elected in to parliament in 1991 and has been detained many times. Prior to his June 2011 election, he was convicted sentenced by the Ankara 11th Criminal Court to a 20-month prison term. Although the final conviction was delivered by the Supreme Court on 22 March 2011, the Supreme Election Board was only informed of it on 9 June 2011, two days before the election. The Board was therefore not able to disqualify Mr. Dicle until after the election, on 21 June 2011. Mr. Dicle has not been a member of parliament since that date.

3.3.3.16 During the mission, the delegation was able to obtain confirmation from Mr. Dicle's political party that he had been convicted and deprived of his parliamentary mandate pursuant to the anti-terrorism law, in connection with a statement he had made to the ANKA news agency on 23 October 2007. The statement related to the unilateral ceasefire, which the PKK had declared in 2006, and to the subsequent alleged intensified attacks by the army. Mr. Dicle had reportedly stated, "This ceasefire has become invalid. The PKK will use its legitimate right of defence unless the army stops the operations." Representatives of the BDP considered Mr. Dicle's conviction and disqualification unfair and a violation of his right to freedom of expression, since Mr. Dicle had neither resorted to nor incited violence. They further commented on the unfairness of the procedure in the absence of an avenue of appeal against decisions of the Supreme Election Board under Turkish law. They informed the delegation that Mr. Dicle had submitted a petition to the European Court of Human Rights.

3.3.3.17 The delegation also obtained confirmation that, at the time of the mission, Mr. Dicle, who is also currently being tried for membership of the KCK, like the other Kurdish parliamentarians, had remained detained in Diyarbakir prison for five years after his arrest. The delegation was repeatedly told by the authorities that Mr. Dicle was no longer a member of parliament and for this reason did not benefit from pretrial release. According to the CHP report, a number of ordinary political activities were also cited in the indictment as constituting crimes, including participating in numerous political rallies and demonstrations, making speeches and press statements and wearing traditional clothes. Nothing indicates that any of these speeches and press statements incited violence in any way, rather, quite the contrary.²⁴

3.3.3.18 According to a Turkish media report, the Second High Criminal Court of Diyarbakir ordered the release of Mr. Dicle and other KCK defendants on 28 June 2014 on grounds of the amount of time they had served in prison, as new legislation adopted in early 2014 reduced the maximum period of pretrial detention from ten to five years.²⁵

3.3.4. Position of international human rights bodies

3.3.4.1 Reports provided to the delegation make it clear that Article 26 of the Turkish Constitution protects the right to freedom of expression but allows for restrictions broader than those permissible in international law. The grounds on which freedom of expression can be restricted include "[protecting] the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation". The European Court of Human Rights has examined numerous criminal prosecutions in Turkey and has repeatedly found violations of the right to freedom of expression.

3.3.4.2 Furthermore, the Council of Europe's Commissioner for Human Rights, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Organization for Security and Cooperation in Europe, Human Rights Watch and Amnesty International have consistently raised concerns regarding the use of anti-terrorism provisions to criminalize conduct that is protected under international human rights law, including the broad interpretation of "membership of a terrorist organization".²⁶ In its concluding observations on the initial report of Turkey,

²⁴ Republican People's Party (CHP), Report on the imprisoned deputies, Turkey: Grand prison for deputies, the outcry of a country whose will is under arrest, 2013, pp. 38-41.

²⁵ Hurriyet, Only two remain arrested in KCK case after 30 more releases, 1 July 2014, <http://www.hurriyetdailynews.com/only-two-remain-arrested-in-kck-case-after-30-more-releases.aspx?pageID=238&nid=68551&NewsCatID=339>

²⁶ Amnesty International, Turkey: Decriminalize dissent - Time to deliver on the right to freedom of expression, 2013, p. 19-20; Council of Europe, Commissioner for Human Rights, Report by Thomas Hammarberg Commission for Human Rights of the Council of Europe

adopted at its 106th session (15 October - 2 November 2012), the United Nations Human Rights Committee concluded that several provisions of the Anti-Terrorism Law were incompatible with the International Covenant on Civil and Political Rights and expressed the following concerns: (i) the vagueness of the definition of a “terrorist act”; (ii) the far-reaching restrictions imposed on the right to due process; (iii) the high number of cases in which human rights defenders, lawyers, journalists and even children are charged under the Anti-Terrorism Law for the free expression of their opinions and ideas, in particular in the context of non-violent discussion of the Kurdish issue. The Human Rights Committee recommended that the legislation be brought into conformity with international human rights standards by addressing the vagueness of the definition of a terrorist act and ensuring that its application is limited to offences that are indisputably terrorist offences and that all prosecutions on such grounds be carried out in full respect of all the legal safeguards enshrined in Article 14 of the Covenant. The Committee expressed further concerns about the vagueness of the definition of “illegal organizations” which has the effect of restricting the right to freedom of association and recommended that the concept of illegal organizations should be strictly defined.

3.3.4.3 The delegation further observed that Amnesty International had conducted an in-depth review of hundreds of criminal cases threatening the right to freedom of expression in order to publish its 2013 report “Turkey: Decriminalize dissent - Time to deliver on the right to freedom of expression”, which was shared with the delegation. The report concluded that “these prosecutions represent one of the most entrenched human rights problems in Turkey today. Such cases are generally instigated against individuals who criticize the state or who express opinions contrary to official positions on sensitive issues”. The report noted an increasingly arbitrary use of anti-terrorism laws to prosecute legitimate activities, including political speeches, critical writing, attending demonstrations and association with recognized political groups and organizations, in violation of the rights to freedom of expression, association and assembly. The report highlighted that, due to the broad definition of terrorism, terrorism-related offences may put severe limitations on the legitimate expression of opinions critical of the Government or State institutions, on the forming or organizations for legitimate purposes and on the freedom of peaceful assembly.²⁷ Furthermore, several reports, including the European Commission 2013 Progress Report on Turkey, emphasized that the overall scope and arbitrary interpretation of parliamentary immunities remained a major concern and continued to pose a risk to parliamentarians’ freedom of expression in light of shortcomings in anti-terrorism legislation and of the interpretation of Article 14 of the Constitution.²⁸ Successive legislative reform packages have so far failed to overhaul the inadequate constitutional protection of the right to freedom of expression and provisions within the Criminal Code and the Anti-Terrorism Law.

3.4 Fair trial guarantees and the independence of the judiciary

In addition to the length of the pretrial detention and judicial proceedings in the cases under examination, serious concerns have been raised with respect to the fairness of the trials and the independence of the judiciary. This section examines a series of specific fair trial-related concerns raised with the delegation during the mission and the way they have been addressed by the competent authorities.

3.4.1 Evidence

(a) Concerns

3.4.1.1 The parliamentarians concerned and their lawyers, the Union of Turkish Bar Association and the Istanbul Bar Association, as well as a large number of international reports and Turkish media reports, have raised serious concerns related to the admissibility, authenticity and integrity of the prosecution evidence in the Sledgehammer, Ergenekon and KCK cases. Some have gone as far as to state that the evidence used was completely fictitious. Furthermore, allegations have been made that only the prosecution evidence was taken into account and that the ability of the defendants to prepare and present their defence was seriously restricted throughout the judicial process. Due to the number of serious concerns raised, the delegation has chosen to reflect only a few illustrative examples in the present report.

following his visit to Turkey from 10 to 14 October 2011, Administration of justice and protection of human rights in Turkey; Strasbourg 10 January 2012, CommDH(2012)2; Mission to Turkey: Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

²⁷ Amnesty International, Turkey: Decriminalize dissent - Time to deliver on the right to freedom of expression, 2013, pp. 17–23; Mission to Turkey: Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

²⁸ Turkey 2013 Progress Report, extract from the Communication from the Commission to the European Parliament and the Council ‘Enlargement Strategy and Main Challenges for 2013-2014’, COM (2013) 700 final, p. 8; available at http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf.

3.4.1.2 In the Sledgehammer case, Mr. Alan's defence team, in its application to the Constitutional Court, pointed out that it had not been able to contest the prosecution evidence or present its own. Out of 943 requests to the Court made to that end, only 7 were accepted. Conversely, according to the defence team, all except one of the requests made by the prosecution were granted. They further deplored that the Court did not take into account any of their lines of defence, including the argument that the March 2003 seminar at the First Army Headquarters discussed a hypothetical war game scenario and not a coup plot.

3.4.1.3 In Mr. Haberal's case, the defence lawyers claim that none of the defence witness statements or exonerating evidence was taken into account either by the prosecution or by the Court. They say that the Court refused to call many of the witnesses requested by the defence. Mr. Haberal's legal team considers that "the prosecution has neglected solid evidence, official documents, and objective witness testimonies collected during the trial phase and relied on forged evidence, witnesses who have been convicted of infamous crimes and imaginary scenarios". They also observed that none of the 185 questions directed to Mr. Haberal by the prosecution and the panel of judges were related to terrorism, force, violence or attempting to overthrow the government.

3.4.1.4 Still in the case of Mr. Haberal, defence lawyers also allege that the supporting evidence used to convict him had come from illegally intercepted telephone conversations and from searches and seizures of computers illegally conducted by the police, and should therefore not have been considered admissible. They pointed to an expert report prepared by the Counter-Terrorism Unit of the Istanbul Security Headquarters, which concluded that no evidence of any crime had been obtained as a result of comprehensive searches of Mr. Haberal's residence and office. According to the lawyers, Mr. Haberal was accused of being in contact with persons that the prosecution said had ties with the Ergenekon organization, but there was no evidence that Mr. Haberal had contacted but a few of those people, whom he knew socially and professionally. There was also no record, according to the lawyers, of any telephone conversations incriminating Mr. Haberal or showing his involvement in plans to overthrow the government. They considered that the prosecution had misled the public by trying to infer that all telephone calls conducted via the main switchboard of Baskent University (where hundreds of people work) had been made by Mr. Haberal. The issue of illegal telephone tapping and searches and seizures was also raised by the defendants in the KCK case.

3.4.1.5 Furthermore, in the Sledgehammer and Ergenekon cases, serious concerns were voiced about digital evidence (which constituted a large part of the prosecution evidence in both cases) as not only defence lawyers but also expert witnesses called into question its integrity and authenticity. Mr. Alan's legal team told the delegation that the defendants in the Sledgehammer case did not have access to the case file or digital evidence for a very long time and could not therefore conduct any forensic examination of the digital files to verify their authenticity. Once the defence was finally granted access to it, they contracted forensic experts who, according to Mr. Alan and his lawyer, all concluded that the evidence had been tampered with and was unreliable. They pointed out that the digital data contained numerous discrepancies, anachronisms, contradictions and errors, such as names of organizations and places that did not exist even in 2008, let alone in 2003. They also noted that the digital files were dated 2003 and their content related to events in 2003 but that they had been produced with a version of Microsoft marketed in 2007. The Court, however, refused to take their reports into account or to appoint an independent expert to analyse the digital data and instead relied on the disputed evidence to convict the defendants. Mr. Alan and his lawyer, reportedly like most defendants in the Sledgehammer case, considered that the digital evidence was fraudulent and believed that they had been forged to frame the defendants. They indicated that the digital files contained documents with the names of hundreds of military officers to be assigned to the preparation of the Sledgehammer operations, including Mr. Alan's, as well as lists of civilians who would be in government if the coup were successful (but none of these civilians have been prosecuted in the case). According to them, the documents were not signed and could not be traced back to military computers, and there was no evidence provided to the effect that Mr. Alan or any other defendants were aware of their existence.

3.4.1.6 The delegation was informed that the United Nations Human Rights Council Working Group on Arbitrary Detention (hereafter "the UN Working Group") had issued an opinion on 5 July 2013 on the Sledgehammer case and concluded that fair trial guarantees had been violated. The delegation was provided with copies of the petition submitted to the UN Working Group and of the opinion adopted. The UN Working Group found that the restrictions on the accused's access to confidential material in the investigation file violated Article 14(3)(b) of the International Covenant on Civil and Political Rights as the accused, on the pretext of national security, were denied access to some substantial evidence (including potentially exculpatory evidence) used by the prosecution at trial. It also concluded that "the [Turkish]

government's response did not dispute the source's allegation about procedural irregularities in the first phase of the trial under Turkish law used for evaluating the authenticity of evidence or that they refused to consider three expert reports from the defence refuting the authenticity of the digital evidence and to appoint its own expert to evaluate that evidence. Furthermore, the Government's response did not dispute that the Court refused to allow the defence to call two key witnesses, one of whom claimed to have thwarted the alleged coup".²⁹

3.4.1.7 The evidence brought against Mr. Balbay by the prosecution was also mainly digital evidence that the prosecution claimed to have been recovered from his computer. This digital evidence further included diaries and journalistic notes upon which the prosecution extensively relied, to incriminate him and other defendants. However, Mr. Balbay told the delegation that he was never provided with a copy of the diaries and other data allegedly extracted from his computer and does not know the exact content of the evidence used against him, which is a violation of his rights. Mr. Balbay and his lawyer have contested the content of the diaries that have been attributed to him and alleged that the documents were fabricated. They indicated that the back-up of his computer was not made on the day it was seized, as required by law, but rather seven days after his arrest which easily allowed for data to be altered. Mr. Balbay's lawyers informed the delegation that two expert reports had reached similar conclusions that the data was likely to have been altered and was unreliable as evidence, but were not taken into account by the Court. Furthermore, according to Mr. Balbay's lawyers, at some point in the proceedings, the Court had made a decision to examine all issues related to the integrity of the digital evidence after completing witness testimonies, but then omitted that stage.

(b) Measures taken by the competent authorities to address the concerns

3.4.1.8 As the reasoned decision in the Ergenekon case had not yet been issued, the delegation was unable to assess how the Court had taken into account the above-mentioned concerns. Similarly, in the KCK case, no decision was yet available as the first instance trial was still ongoing. In the Sledgehammer case, however, the decisions delivered addressed those concerns to a large extent.

3.4.1.9 The Court of first instance made its own assessment of all the evidence available, including the digital evidence. It concluded that it was not convinced that the issues raised regarding the integrity of the digital evidence justified a retrial of the case due to the fact that the rest of the evidence brought forward was substantial and, it considered, established the commission of the crimes. The Court concluded that "the lists contained consistent and concrete information, the studies had integrity and contained the records of the personnel's ID, duty, rank and covered many provinces; it was impossible for these studies to be prepared without military knowledge and experience". It considered that inconsistencies in dates were due to later updates of documents to be used in another coup operation when the time was right. It further considered that inconsistencies, failure to comply with military rules of correspondence and other mistakes pointed out by the defence counsels should be regarded as "normal" because of the poor qualifications of the personnel who had prepared the documents. The Court further ruled that, according to information provided by Microsoft, if data prepared in one version of Microsoft Office was later opened with a newer version of the software, the computer could open the document by converting it to be compatible with the new version, which could then make the previously prepared document appear to have been produced with the newer version. The Court of first instance took note that reports prepared by military forensic experts concluded that the digital data had been altered but rejected their conclusions that they could not be considered as admissible evidence on the basis of Articles 63 and 67 of the Code of Criminal Procedure, which provide that the Court has the discretion to decide on the admissibility of evidence. The Court reiterated that, in principle, it is not bound by expert reports and further observed that it had been convinced that the experts were not objective because "they tried all efforts to refute the evidence as if they had been the accused, (...)" and concluded that the digital data could not be considered admissible evidence.

3.4.1.10 The Court of first instance therefore relied solely on the assessments commissioned by the prosecution for the evaluation of the evidence, which it deemed sufficient. On the omission of the stage of evaluating the evidence during the trial, the Court ruled that the defence had been able to contest the evidence during other stages of the trial, which, in its view, was sufficient. The Court further addressed the fact that some defence witnesses and experts were not heard, as follows: "given the nature of the offence and the evidence, the experts' and the aforementioned witnesses' statements would not have affected the decision, this request was clearly made to increase the public pressure on the Court. As the seminars and other documents were factual, the Court held that there was no need to hear the experts and witnesses".

²⁹ United Nations General Assembly, Human Rights Council, Opinions adopted by the Working Group on Arbitrary Detention at its 66th session (29 April – 3 May 2013), 5 July 2013, A/HRC/WGAD/2013/6.

3.4.1.11 In its appeal ruling, the Supreme Court discussed the evaluation of evidence made by the court of first instance and found that “the allegations that the digital evidence was changed by the law enforcement and legal authorities after its seizure do not reflect the truth”. It further concluded that the allegations according to which the Sledgehammer Security Operations plan was completely “fictional, ill-founded and fake [...] was not compatible with the content of the case file and natural flow of life. (...) it is impossible for the plan in question and its annexes to have been fictionally prepared years later with such a large scale and content consistent with detailed information which was relevant years ago and covers a large area”. The Court further clarified that participation in the March 2003 military seminar, as part of the defendants’ duty, would not give rise to any legal responsibility and the Court therefore thought to establish beyond reasonable doubt that the accused who had participated in the seminar knew of its hidden agenda in advance. The Court considered that the accused listed in the digital document entitled “personnel authorized to assign tasks” had, in respect of their positions in the illegal entity, the capability of being aware of it. Mr. Alan’s name appeared to have been on this list. The Court however ordered the acquittal of persons whose names were on other lists since “it was not established beyond reasonable doubt that some of them had been assigned tasks within the scope of the aimed offence”.

3.4.1.12 The Supreme Court also addressed the omission by the Court of first instance of the stage of evaluation of the evidence. It observed that under Article 206 of the Code of Criminal Procedure, no stage of the procedure is compulsory and the only issue of importance is that the discussion of evidence actually took place during the course of the trial “in an accurate and equitable manner”. The Supreme Court found that the Court of first instance had complied with this requirement as the defence had been able to plead without time constraints, to discuss the evidence and submit opinions as to the accusations after the prosecutor as well as to take opinions from experts on the evaluation of evidence and submit them to the file.

3.4.1.13 On 18 June 2014, the Constitutional Court ruled unanimously that the rights of the accused in the Sledgehammer case had been violated with regard to “digital data and the defendants’ testimony” according to a Turkish media report.³⁰ The decision and the precise grounds of the ruling have not yet been shared with the Committee.

3.4.2 Specially authorized Courts

(a) **Concerns**

3.4.2.1 All the parliamentarians under examination have been prosecuted and tried by “specially-authorized courts” (also referred to as “heavy penal/assize courts” or “special authority courts”). These courts were established by the AKP government under the new Criminal Code, adopted in 2005. Prime Minister Erdogan presented them as having been designed to strengthen the rule of law after the abolition of the feared State security courts. Specially authorized courts have jurisdiction over cases of terrorism, organized crime and organized drug trafficking. They are endowed with special powers and allowed to limit ordinary procedural safeguards pursuant to the Anti-Terrorism Law: they may hold suspects in custody for months or even years without trial, detain them incommunicado, restrict access to defence counsel and to the judicial file, and intercept and filter communication between detainees and their lawyers. The use of secret witnesses has also been allowed and very much criticized.³¹ Such disregard for procedural safeguards has long been a matter of serious concern for international and regional human rights monitoring bodies and mechanisms.³²

3.4.2.2 The parliamentarians concerned, their lawyers and political parties, as well as the Union of Turkish Bar Associations and the Istanbul Bar Association, all affirmed that the rights of the accused had been unduly restricted during the trials which, in their view, had violated due process. Lack of access to the prosecution files and limited ability to call defence witnesses and cross examine prosecution witnesses, the very short time frames given to the accused and their counsel to present their defence, the lack of impartiality of the judges and recordings of communications between the defence counsels and their clients, were among the concerns raised in relation to these specific trials. Mr. Balbay’s lawyers, for example, told the delegation that when they were finally granted access to the prosecution file, they were only able to

³⁰ Hurriyet, Top Turkish Court paves way for retrial of Balyoz coup case convicts, 18 June 2014, <http://www.hurriyetdailynews.com/top-turkish-court-paves-way-for-retrial-of-balyoz-coup-case-convicts.aspx?pageID=238&nid=67961&NewsCatID=339>

³¹ Report of the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 4 May 2012, A/HRC/20/19/add.3, paras. 47-49; European Commission, Turkey 2012 Progress Report accompanying the document Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2012-2013, Brussels, 10/10/2012 SWD(2012) 336, p.16; US Department of State, 2013 Country Report on Human Rights Practices, Turkey section.

³² Including the UN Special Rapporteur on the independence of judges and lawyers, the Committee against Torture, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the UN Working Group on Arbitrary Detention and the Council of Europe Commissioner for Human Rights.

examine the file, on USB sticks, for 30 minutes a day and were unable to print it. It was therefore impossible for them to read the thousands of pages in the file and properly prepare their defence. Mr. Balbay affirmed that he was not informed of the charges against him before being interrogated and was only told afterwards. He was therefore unable to prepare and present a defence in respect of those charges. Mr. Balbay stated that he appeared for 3,000 hours before the judges. He was only allowed to defend himself after the 3rd indictment was issued. The trial eventually proceeded on the basis of 22 indictments joined together. However, he stated that he was not allowed to present his defence again in respect of the 19 other indictments that were added. Mr. Haberal further claimed that the indictment was never fully presented to him and his lawyer, which made it impossible for him to properly prepare and defend himself.

3.4.2.3 The concerned parliamentarians and their lawyers indicated that, in the second year of the Ergenekon trial, after a judge who had supported Mr. Balbay's pretrial release was removed, the oral defence was restricted. The Court heard prosecution witnesses, including secret witnesses, but then interrupted the stage of presentation of defence witnesses before its completion. According to Mr. Balbay only 20 per cent of the defence witnesses were granted permission to appear before the Court, as it considered that the appearance of the remaining defence witnesses was not necessary because they would not contribute any further information to the case.

3.4.2.4 In the KCK trial, according to the CHP Report, the indictment was finalized only a year and a half after the defendants were arrested. Ms. Irmak was only heard by a judge after 18 months of detention. Mr. Sariyildiz was heard one year after his arrest and Mr. Kemal Aktas submitted his first defence five years after his arrest.³³ Ms. Irmak narrated her experience during the cross-examination of the prosecutor as follows: "When the prosecutor told me, in a manner which hinted that he was not in an effort to engage in a cross-examination to uncover the truth but was only performing the formal procedure for a decision that had already been given, that I should give short answers since it was already late at night and he was tired, I became completely convinced that this was just a show whereby they did not even try to act as if legal procedures were being performed(...)"³⁴

3.4.2.5 Furthermore, some of the parliamentarians, particularly Mr. Balbay, confirmed that the prosecution and the Court had relied extensively on secret witnesses and that the defence had been unable to cross-examine them. Neither the identities nor the statements of these witnesses had been released to the defence. The Court suggested that they could submit their questions in writing but never gave them the opportunity to actually do so in practice. On the other hand, according to Mr. Balbay and his lawyers, the secret witnesses had been able to accuse anyone and everyone in any way they wanted. The secret witnesses were able to watch the courtroom from a back room and, when interrogated, pointed to suspects and simply said that they had seen them. In one case, a secret witness pointed to someone and said he had seen him in a meeting two years before. It however turned out that the suspect in question had been in jail at that time and could not possibly have attended the said meeting. According to Mr. Balbay, some of the secret witnesses were identified in the course of the proceedings because of their statements and it appeared that some of them were previous convicts, including one person who had been convicted for false testimony in the past. There was also much speculation about whether some of the secret witnesses may have been tortured. According to the CHP Report, secret witnesses were also used in the KCK proceedings.³⁵

3.4.2.6 The parliamentarians concerned, their lawyers and the representatives of the Bar associations shared the opinion that the cases should have been heard by ordinary criminal courts, not specially authorized courts. They highlighted that these courts were no longer legal, as they had been abolished in 2012 in response to growing public concern, and had no constitutional jurisdiction. They strongly criticized the fact that an exception had been made for these particular trials and that these courts had continued to operate two years after their abolition despite widespread national and international criticism.

(b) Measures taken by the competent authorities to address the concerns

3.4.2.7 The Minister of Justice, as well as the parliamentary authorities, particularly the Chairman of the parliamentary Human Rights Inquiry Committee, acknowledged that there had been many complaints lodged in relation to the specially authorized courts and explained to the delegation that those complaints had been

³³ Republican People's Party (CHP), Report on the imprisoned deputies, Turkey: Grand prison for deputies, the outcry of a country whose will is under arrest, 2013, p. 20, 49, 54.

³⁴ Republican People's Party (CHP), Report on the imprisoned deputies, Turkey: Grand prison for deputies, the outcry of a country whose will is under arrest, 2013, p. 48.

³⁵ Republican People's Party (CHP), Report on the imprisoned deputies, Turkey: Grand prison for deputies, the outcry of a country whose will is under arrest, 2013, p. 60.

the very reason why the government had decided to abolish them. They were abolished in July 2012 and replaced by regional serious crimes courts. Under the new legislation, many of the previous due process restrictions are no longer allowed.³⁶ However, a derogation clause was included in the 2012 law to allow the specially authorized courts to continue operating until the completion of ongoing trials. Pursuant to this clause, the abolition of these courts made no difference in the cases under examination. Furthermore, the delegation noted that in the appeal ruling delivered in the Sledgehammer case, the Supreme Court had rejected the defence argument that the specially authorized courts had violated the “guarantees of lawful judgment” under Article 37 of the Constitution.

3.4.2.8 At the time of the mission, the Minister of Justice informed the delegation that he had submitted another bill to parliament to put an immediate end to the operations of all specially authorized courts in order to address growing concerns. The bill had recently been adopted by parliament and its promulgation was pending the approval of the President of the Republic. The law was effectively promulgated on 6 March 2014. The Minister of Justice told the delegation that, as a consequence, all specially authorized courts would immediately be abolished and the cases would be transferred to the regional criminal courts. It would also put an end to the special rules applicable to terrorism charges so that ordinary rules of procedure would be applicable to all trials in future.

3.4.2.9 The delegation was told by a number of executive and parliamentary authorities that this new law would pave the way for retrials. However, it appears that the law that was adopted did not explicitly provide for that, but rather left the matter to the discretion of the courts under existing laws regulating retrials (which reportedly allow for a retrial in the case of a violation of fair trial guarantees, falsification of evidence or false testimony provided by witnesses). The delegation further noted that, at the time of the mission, there were ongoing debates about a possible retrial in the Sledgehammer case. The Minister of Justice confirmed to the delegation that discussions were ongoing both in and out of parliament to find a solution to Mr. Alan's case. According to media reports, the 18 June 2014 Constitutional Court ruling in the Sledgehammer case is expected to lead to a retrial. In the Ergenekon and KCK trials, the judicial authorities believed that retrials could not be considered at a time when first instance and appellate proceedings had not yet been completed.

3.4.3 Other alleged violations of the rights of the accused

(a) **Concerns**

3.4.3.1 Several other issues of concern were mentioned to the delegation in respect of the fairness of the proceedings. With the exception of the authorities, these concerns were shared by most of those with whom the delegation spoke during its mission, particularly lawyers and Bar association representatives.

- **Lack of reasoned decision issued in the Ergenekon case:** At the time of the mission, in late February 2014, seven months had passed since the ruling was delivered orally on 5 August 2013. No one knew when the decision would be published and the delegation was unable to obtain any information from the authorities in that regard. There was much speculation that political considerations accounted for the lack of a reasoned decision. Because of the lack of a reasoned decision, neither Mr. Balbay or Mr. Haberal knew the specific charges against them, evidence or grounds for their convictions. Mr. Balbay told the delegation that he felt that it was a deliberate strategy meant to maintain a permanent threat against him to deter him from further journalistic and political activities. According to media reports, a reasoned decision of 17,000 pages was eventually delivered on 3 April 2014.
- **Violation of the presumption of innocence:** The parliamentarians, their lawyers and representatives of the Union of Turkish Bar Associations and the Istanbul Bar Association all shared the view that the defendants had been presumed guilty by the courts from the outset. It was believed to be the main grounds justifying their pretrial detention (“serious suspicions of guilt”) before they were even given a chance to present their defence. Furthermore, by not questioning the validity of the prosecution evidence and systematically restricting the defence, the courts had, in their opinion, shifted the burden of proof to the defendants to prove their innocence.
- **Refusal of the courts to address alleged violations of fair trial guarantees and criminalization of the lawyers’ protests:** The delegation was told during its mission that defence

³⁶ European Commission, Turkey 2012 Progress Report accompanying the document Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2012-2013, Brussels, 10/10/2012. SWD(2012) 336, p.15; Committee to Protect Journalists (CPJ), Special Report on Turkey's Press Freedom Crisis, the Dark Days of Jailing Journalists and Criminalizing Dissent, October 2012.

lawyers were forced to resort to various forms of protests, including as a last resort boycotting of the hearings, in light of the refusal of the courts to address alleged violations of fair trial guarantees. While Turkish law requires the presence of defence lawyers at any hearing, the Court in the Sledgehammer case had decided to pursue the trial in their absence. According to Mr. Balbay, in the Ergenekon case, approximately 20 defendants, including himself, had been handed down a criminal sentence for affirming their right to a fair trial and the prosecution had brought charges against a number of defence lawyers on similar grounds. Mr. Balbay stated that he was convicted to an additional 4 years' imprisonment because of the statements he had made to defend himself before the Court. The delegation was further shocked to learn that, in the Sledgehammer case, the President and the board members of the Istanbul Bar Association had been charged in January 2013 by the Prosecutor General of Istanbul with attempting to influence members of the judiciary. They had eventually been acquitted but, according to the President of the Istanbul Bar Association, many Turkish lawyers remain under direct threat for their involvement in these cases: many were intimidated; some were prosecuted and arrested for insulting the Court, for interference or on similar charges as their clients only because they had accepted to represent them (in the KCK cases, lawyers and clients have all been charged for terrorism and there is an ongoing separate KCK trial against dozens of lawyers).

- **Inability of defendants to defend themselves in Kurdish:** The concerned Kurdish parliamentarians told the delegation that they had wanted to defend themselves in the Kurdish language but that the Court had not allowed it. It had recorded their interventions in Kurdish as being made "in an unknown language" and systematically turned off their microphones, effectively depriving them of a defence. The fact that they had insisted in speaking Kurdish was further considered as evidence that they were members of a terrorist organization. Two years into the trial proceedings, in 2012, the parliament had agreed to amend the law and allow defendants to speak Kurdish before the courts upon condition that they contract, at their own cost, a private interpreter. However, according to the parliamentarians concerned, the specially authorized court maintained its prior position, even after the legislation had been amended, and they had remained unable to defend themselves in Kurdish.

(b) Measures taken by the competent authorities to address the concerns

3.4.3.2 All of the parliamentarians have submitted petitions to the Constitutional Court alleging the violation of their right to a fair trial. These have not been ruled admissible by the Court at this stage because all judicial domestic remedies need to be exhausted first. In the case of Mr. Alan - the Sledgehammer case having exhausted all domestic remedies – a ruling was delivered on 18 June 2014 but a copy of the decision has not yet been provided.

3.4.3.3 The first instance decision delivered in the Sledgehammer case and the decision of 9 December 2013 of the 13th Criminal Court of Istanbul (ordering Mr. Balbay's release) give a sense of how the Turkish judiciary has chosen to address these concerns to date. In the case of Mr. Balbay, the 13th Criminal Court of Istanbul stressed that delays in the proceedings were caused by some of the defendants, explicitly naming Mr. Balbay, who "behaved in such a way as to disrupt the hearing" during incidents caused by him and his lawyer (with other defendants) inside and outside the courtroom. In the Sledgehammer case, the first instance criminal court, addressing defence objections that the right to a fair trial had been violated, acknowledged that some of the defendants had been removed from the Court for "making the proceedings unfeasible" by repeatedly requesting the floor. It stated that it had made extensive efforts to obtain the appointment of new defence counsels when the lawyers had decided to boycott the hearings, even though the accused wished to retain their counsels. It observed that its efforts to replace them had failed because the Istanbul Bar Association itself had objected to the Court's request. The Court had considered this as misuse of the principle of obligatory defence counselling and had ruled that "considering that defence counsels chose not to be present before the Court and therefore adopted an attitude to hamper the proceedings of the Court, it can be considered that the accused have abdicated their defence rights".

3.4.3.4 The delegation, which only discussed fair trial issues in general terms during its meetings with the Turkish authorities, observed that they generally acknowledged that there had been some shortcomings in the proceedings, which they attributed to the complexity of the cases but also to special powers of the specially authorized courts, as discussed above. The delegation noted that the Prosecutor General of Istanbul was of the opinion that the defence lawyers had disrupted the proceedings and insulted the judicial system by claiming that the trials were not fair and that subsequently it was only legitimate for the Turkish judiciary to signal clearly that this was inappropriate behaviour on their part.

3.4.4 Independence of the judiciary

3.4.4.1 As previously mentioned in section 3.3.2, the delegation was repeatedly told about political interference and lack of impartiality and independence in the Sledgehammer, Ergenekon and KCK cases. Many general concerns relating to the independence of the judiciary underlined by the UN Special Rapporteur on the independence of judges and lawyers in her 2012 report remained valid, particularly with regard to the role of public prosecutors in the administration of courts, the position and functions of the Minister of Justice within the High Council of Judges and Prosecutors, the need for separation between the careers of judges and prosecutors and the excessively close relationship between judges and prosecutors, the appointment, transfer and rotation system for judges and prosecutors, and the mindset of judges and prosecutors.³⁷

3.4.4.2 According to Mr. Haberal's lawyers, the Supreme Court judges who supported his pretrial release (one prosecutor and seven judges) had been either forced to retire or appointed to other posts. They further claimed that the prosecutors who had brought the charges and the judges who had voted to keep him in prison had been promoted and that the judges, despite having been found responsible for abuse of process by the Supreme Court, had continued to sit on the case. Lawyers involved in the cases confirmed to the delegation that hundreds of complaints had been lodged with the Supreme Board for Judges and Prosecutors against judicial personnel assigned to the Ergenekon and Sledgehammer cases, but that none of those complaints had been duly processed. Furthermore, they told the delegation that the Prime Minister had threatened prosecutors and judges directly on several occasions, including members of the Supreme Board for Judges and Prosecutors. The fact that the Prime Minister had reportedly said, "I am the prosecutor of this case" was also mentioned repeatedly to the delegation.

3.4.4.3 Although the Minister of Justice, the President of the Supreme Court and the President of the Constitutional Court strongly reasserted the full independence of Turkish judiciary, the delegation observed a climate of general mistrust towards the judiciary during its mission. It was told that in the wake of the accusations of alleged corruption brought against the Prime Minister and the AKP political establishment, the Prime Minister had denounced a judicial coup and accused the Gülen movement (funded by United States-based Islamic scholar Fethullah Gülen) for orchestrating the graft probe exposing a "parallel State" within the police and the judiciary. Prime Minister Erdogan had subsequently taken a number of measures throughout January and February 2014, which were criticized by the opposition as aiming to cover up the corruption scandal and further restrict judicial independence. Such measures included the dismissal or transfers of over 5,000 police officers and of some 200 prosecutors and judges (including the Chief Prosecutor of Istanbul and prosecutors in charge of investigating the corruption scandal), a move deemed a "massive purge" by the media. In conjunction with this large-scale reassignment of judicial personnel, the abolition of the specially authorized courts was, in the opinion of members of the opposition and of many lawyers, a measure aimed at halting the corruption charges investigations, as was the restructuring of the High Council of Judges and Prosecutors (HSYK), which had just been approved by parliament at the time of the mission.

3.4.4.4 The new law on the HSYK was strongly criticized by the opposition and the Bar Associations for allegedly placing the HSYK back under the direct authority of the Minister of Justice, which they claimed violated the Constitution. A 2010 constitutional amendment had, for the first time, established the independence of the judiciary by giving the Supreme Board the responsibility to appoint all judicial personnel. In her 2012 report on Turkey, the UN Special Rapporteur on the independence of judges had considered that "despite improvements in the High Council of Judges and Prosecutors, the current position and functions of the Minister of Justice within the High Council may jeopardize the full respect of the independence and impartiality of the judiciary and the perception thereof".

3.4.4.5 The Minister of Justice told the delegation that the new law would not restructure the Supreme Board as its composition was decreed by the Constitution and could not be changed by law. He stated that the main changes introduced by the new law were essentially: (i) a lower quorum and majority (12 instead of 15 out of 22 members) to enable the Supreme Board to take decisions in the absence of some of the members; (ii) the introduction of a requirement of 20 years' experience to become a member of the Supreme Board (before the only requirement was to be a first degree judicial officer which, according to the Minister was not sufficient and led to conflicts in terms of seniority among judicial personnel); (iii) new rules for the appointment of inspectors and rapporteur judges working for the Supreme Board (previously directly elected by the Board and now selected in two stages by the Board); and (iv) a new rule that would prevent the President of the Supreme Board from attending meetings of the chambers or casting a vote, including in disciplinary procedures against judges and prosecutors. The Chairman of the parliamentary committee on

³⁷ United Nations General Assembly, Human Rights Council, Report of the UN Special Rapporteur on the independence of judges and lawyers on her mission to Turkey, 4 May 2012, A/HRC/20/19/add.3.

justice explained to the delegation that the government was facing a “juristocracy”, that is, he believes, a judiciary that was trying to gain power and where political interest groupings had formed within the structure of the HSYK. He was therefore supportive of the Prime Minister’s efforts to put an end to this situation.

3.4.4.6 At the time of the mission, the President of the Republic expressed reservations on the constitutionality of the law. He did not, however, refer it to the Constitutional Court but instead approved it on 27 February 2014.³⁸ The CHP did refer the law to the Constitutional Court, which on 11 April 2014 partially overturned the provisions conferring new powers to the Minister of Justice and gave a six-month period to the government in which to propose amendments.

3.5 Prospects for the resolution of the cases

3.5.1 Towards judicial resolution of the cases?

3.5.1.1 Both the President of the Constitutional Court and the President of the Supreme Court confirmed to the delegation that the Turkish Courts continued to have primary jurisdiction over the cases. The President of the Constitutional Court acknowledged that Turkey continued to face many challenges with regard to respect for human rights and expressed the hope that, over time, the Constitutional Court would be able to contribute to progress in that respect. The President of the Constitutional Court confirmed that he had received individual petitions from the parliamentarians and that the Court would be competent to rule on all allegations of violations of their fundamental rights if the issue was not properly addressed by the criminal courts. The Chief Prosecutor of Istanbul affirmed that there was a strong will on the part of the Turkish judiciary to overcome outstanding legal shortcomings and deficiencies, which in his view were minor.

3.5.1.2 On the other hand, the delegation observed that the Speaker and other parliamentary authorities were not confident that the Turkish judiciary had the will to resolve the cases under examination in light of the way they had handled them thus far, particularly their resistance to releasing the parliamentarians from detention. The Speaker and the Minister of Justice provided numerous examples of legislative reforms undertaken in the past few years to improve Turkey’s human rights record but said they were dismayed that the judiciary had made little use of these new legislative tools.

3.5.1.3 Finally, the delegation took note that the parliamentarians concerned, their political parties and lawyers, as well as Bar Associations, had completely lost faith in the Turkish judiciary following the decisions delivered in the cases so far. They considered that the decisions should be annulled and that retrials before independent courts should take place following the abolition of the specially authorized courts.

3.5.2 Parliamentary monitoring and prospects for legislative and constitutional reform

3.5.2.1 The concerned parliamentarians deplored the lack of effective action undertaken by parliament to defend their rights. They generally felt that the parliament had taken a political stance instead of defending the fundamental rights of its members irrespective of their political affiliation. Parliamentary authorities affirmed that it was difficult for parliament to intervene as the cases were pending before the judiciary and the parliament was strictly bound by the principle of separation of powers. They confirmed that the parliament had not monitored the prosecutions against the parliamentarians or discussed the fairness of the proceedings, as this was prohibited pursuant to Article 138(3) of the Constitution.³⁹

3.5.2.2 The Speaker clearly stated that he was against any members of parliament being placed in detention and that he had undertaken repeated initiatives to seek the release of the concerned parliamentarians so that they would be able to sit in parliament and fulfill their parliamentary duties. Other parliamentary authorities, however, including the President of the Turkish IPU Group, expressed the opinion that the parliament had no role to play in defending the rights of the concerned parliamentarians because the acts for which they were being prosecuted did not relate to their parliamentary term but rather had been committed as ordinary citizens before being elected to parliament.

3.5.2.3 Regarding the prospects for constitutional reform, the delegation noted that there was general agreement that many issues of concern stemmed from the current constitutional framework and that Turkey needed to adopt a new constitution. In an attempt to overhaul the Constitution and draft a new one, a Constitutional Reconciliation Committee had been established in parliament. All four political parties were equally represented and unanimity was required to adopt new constitutional provisions, so as to secure

³⁸ Hurriyet, Turkish opposition asks Constitutional Court to annul bill on board of judges, 28 February 2014.

³⁹ Article 138(3) of the Constitution: “No questions shall be asked, debates held or statements made in the legislative Assembly relating to the exercise of judicial power concerning a case under trial.”

broad political consensus and reconciliation. The Committee had been operational for two years but had only been able to agree on 60 of the 150 articles. In the absence of any agreement on the way forward, the Committee had been suspended in early 2014. At the time of the mission, there was no consensus on the appropriate mechanism that could enable the completion of the process and it was felt that this situation was unlikely to change until after the completion of the local, presidential and legislative elections.

3.5.2.4 The Speaker, as well as the Minister of Justice, and the Presidents of the Supreme Court and the Constitutional Court, acknowledged that shortcomings remained in the existing legislative framework, which needed to be overcome. They highlighted that significant legislative reform had already been undertaken to address shortcomings in the functioning of the judicial system. The Minister of Justice explained that the Government had adopted successive reforms to prevent lengthy detention: the maximum period of pretrial detention had been reduced from ten to five years; judicial control had been introduced as an alternative to pretrial detention; evidence was now required before any arrest could be made; a mechanism had been established to reject an indictment if it was not based on strong and reliable evidence. Both the Speaker and the Minister of Justice told the delegation that legislative reform could bring about significant progress on some of the key issues of concern in the present case, even if no constitutional change was forthcoming in the immediate future. The Minister of Justice also expressed commitment to taking additional corrective measures. He informed the delegation that he was currently preparing a plan of action on the basis of judgments of the European Court of Human Rights to address the root causes of these violations and take appropriate action in future. The Speaker also emphasized that, while legislative reform was critical and could lead to a change of mentality, implementation of the law was equally important in practice.

3.6 Case of Mr. Sinçar

3.6.1 The President of the Supreme Court informed the delegation that the appeal procedure had concluded in January 2011 and that the Court had confirmed the first instance verdict of 2010, sentencing around 20 persons for their involvement in terrorist activities on behalf of the PKK and the "Hezbollah" terrorist organizations in south-eastern Turkey, including for the murder of Mr. Sinçar. He provided the delegation with a copy of that decision. The decision itself does not contain any specific reference to the murder of Mr. Sinçar, the appeal brought by Mr. Sinçar's family or any of the arguments raised by their lawyers. Neither does it indicate whether the Court has examined information implicating the Turkish Intelligence Services in the planning and carrying out of Mr. Sinçar's murder or that the instigators of the crime have been identified and punished.

3.6.2 At the delegation's request, the IPU Secretariat contacted the complainants in the case to ask for their views on the ruling and find out whether any judicial proceedings were ongoing at the domestic or European level. By early July 2014, no response had been forthcoming.

D. Observations and recommendations further to the mission

4.1 Case of the parliamentarians prosecuted in the Sledgehammer, Ergenekon and KCK cases

4.1.1 Detention of parliamentarians and Parliamentary immunity

4.1.1.1 The delegation notes with satisfaction that the eight detained parliamentarians have now all been released and sworn in to parliament. It particularly welcomes the release of Mr. Alan on 19 June 2014. It also notes with satisfaction the release of Mr. Dicle on 28 June 2014. It further observes with interest that Mr. Balbay's and Mr. Haberal's restrictions on the freedom of movement have been lifted. It is nevertheless appalled that the parliamentarians concerned spent over half of their parliamentary term and an average of four years in detention before a solution was found. The delegation urges the Turkish authorities to take appropriate measures to prevent similar situations from occurring again in the future. It commends the Constitutional Court of Turkey for delivering decisions, which were groundbreaking in Turkey, on the excessive length of pretrial detention, the right of elected parliamentarians to sit in parliament and the need for respect for fair trial guarantees in line with international and European human rights standards.

4.1.2 Freedom of expression and association

4.1.2.1 The delegation has taken note of the contradictory positions expressed on this issue. It observes that protection of freedom of expression in Turkey has been a long-standing issue of concern in prior cases before the IPU Committee on the Human Rights of Parliamentarians, which, since 1992 has repeatedly, called on the Turkish authorities to take action to enhance respect for this fundamental right.

4.1.2.2 In the cases currently under examination, undoubtedly the delegation notes with deep concern that, based on the documentation reviewed, that peaceful and legal political activities of the parliamentarians concerned - which should have been protected under the right to freedom of expression and of association - have been regarded as evidence of criminal and terrorist acts by the prosecution and the courts. This raises serious concerns as to respect for freedom of expression and association, particularly as all of the parliamentarians concerned belong to the opposition and are known critics of the Government. Furthermore, the delegation shares the long-standing concerns of international and regional human rights bodies regarding the use of broad anti-terrorism and criminal legislative provisions (particularly the offense of "membership of a criminal organization") to criminalize conduct that is protected under international human rights law. The delegation observes that, despite progress made in recent legislative reforms, the Turkish legal framework, as well as judicial practice, continues to largely fail to distinguish between peaceful protest and dissenting opinions on the one hand, and violent activities in pursuance of the same goals on the other.

4.1.2.3 Regarding the specific case of Mr. Dicle, and in line with the existing jurisprudence of the Committee, the delegation considers that Mr. Dicle's statement, publicly expressing a non-violent opinion supportive of the PKK, fell within the scope of his freedom of speech and should have been protected by Turkey. As a consequence, it considers that Mr. Dicle's parliamentary mandate was arbitrarily invalidated and that he was convicted and sentenced in violation of his right to freedom of expression.

4.1.2.4 The delegation calls on the Turkish authorities to take urgent steps to strengthen the right to freedom of expression. It expects the Turkish parliament to bring Article 26 of the Turkish Constitution and existing legislation in line with international human rights standards as recommended, inter alia, by the UN Human Rights Committee and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. It also urges the Turkish judiciary, in the cases under examination, to effectively uphold international human rights standards, particularly as regards the fundamental right to freedom of expression.

4.1.3 Fair trial guarantees

4.1.3.1 In the light of the information and documentation reviewed during and after the mission, the delegation has concluded that the judicial process under which the parliamentarians concerned have been, and continue to be, tried is not in compliance with international standards of due process. Considering the numerous and extremely serious violations of due process alleged in the proceedings, the delegation considers that justice was neither done, or perceived to have been done, in the present cases to date. It is of the opinion that the large scope of the proceedings and the broader context in which these trials have taken place, together with fair trial and freedom of expression concerns, lend weight to the allegations that the judicial proceedings may have been politically orchestrated. The delegation further observes that they were widely viewed as political trials, which did not attempt to achieve justice. The delegation notes with concern that, to date, while the KCK trial is not yet completed, similar concerns as to those which arose in the Ergenekon and Sledgehammer cases remain prevalent and unaddressed by the competent court.

4.1.3.2 The delegation notes with satisfaction that the Constitutional Court ruling of 18 June 2014 has concluded there were fair trial violations in the Sledgehammer case, which will pave the way for a retrial of Mr. Alan and other defendants in the case. It hopes that this landmark decision will also contribute to ensuring full respect for fair trial guarantees in the Ergenekon and KCK cases. It wishes to receive a copy of the full reasoning of the decision.

4.1.3.3 The delegation hopes that the ongoing judicial processes will lead to a prompt and satisfactory settlement of the cases. It calls on the parliamentary authorities to liaise with the competent executive and judicial authorities to keep the Committee apprised of any future developments so as to facilitate a dialogue conducive to a satisfactory settlement of the cases under examination.

4.2 **Case of Mr. Sinçar**

4.2.1 The delegation noted with surprise that the appeal had concluded in January 2011 and deeply regretted that neither the parliamentary authorities nor the complainants had ever communicated this information to the Committee. The delegation took note of the Supreme Court's confirmation of the first-instance verdict without making any specific reference to the murder of Mr. Sinçar, to the appeal lodged by his family or to any of the arguments raised by their lawyers. The delegation remains therefore deeply concerned that the judicial process did not probe the political and security context prevailing at the time of

the murder of Mr. Sinçar and the possible responsibility of the chain of command of the Turkish intelligence and security officers.

4.2.2 It urges the Turkish authorities to pursue further investigations in the case and fully take into account existing information implicating five agents of the Turkish Intelligence Services in planning and executing the crimes, whose names have often been mentioned in connection with political assassinations and forced disappearances. It further invites the parliamentary authorities to consider establishing a parliamentary commission to investigate Mr. Sinçar's murder together with other serious human rights violations committed in the 1990s in south-eastern Turkey, including abuses by suspected state perpetrators.

ANNEX

Observations supplied by the authorities on the general context of the report and the conduct of the mission

- **Communication from the Turkish Grand National Assembly (3 October 2014)**

1. It was stated in the above-referenced letters in sum that the Inter-Parliamentary Union (IPU) Parliamentary Committee on Human Rights had paid an official visit to Turkey on 23-27 February 2014 with a view to performing an inquiry about the imprisoned parliamentarians in Turkey and that the preliminary report drawn up by the above-mentioned Committee in respect of the visit was communicated to the Presidency of the IPU on 14 July 2014, and the Turkish Ministry of Justice was asked to submit its opinions in this regard.

2. It was stated in the assessment made by the Ministry of Justice that, in general, there has been no issue in the preliminary report to be opposed, but it is considered appropriate to share the opinions to be stated below with the Committee and to have the identified material mistakes corrected in the preliminary report.

- **Regarding the item 2.1.2**

3. In paragraph 2.1.2 of the Preliminary Report (hereinafter “the Report”), it was stated that Hatip Dicle still remained in pretrial detention to date. It is considered that since Hatip Dicle was released pending trial with the 2nd Chamber of the Diyarbakır Assize Court’s decision of 28 June 2014 in the KCK case under which he was tried, it would be appropriate to have this matter added into the relevant paragraph.

- **Regarding the item 2.2.2**

4. It was stated that the appellate review of the Sincar case was still pending before the Court of Cassation. As the Court of Cassation concluded the appellate review of the mentioned case by upholding the decision in 2011, it is considered appropriate to have this matter added into the relevant paragraph.

- **Regarding the item 3.1.2.1**

5. It was stated that the judges could have granted pre-trial release in the cases addressed in the Report but they had refused to do so and that the Code of Criminal Procedure had been amended several times to limit the discretionary discretion in that respect, but the judicial practice had not changed. With the amendments made by the “Law no. 6526 of 21 February 2014 on the Amendment of the Anti-Terrorism Act, the Code of Criminal Procedures and Others Laws” which is known to the public as the Fifth Judicial Reform Package, presence of “**concrete evidence**” has been stipulated as a requirement to issue custody orders and more difficult conditions have been laid down for courts to issue custody orders.

6. Furthermore, with this new amendment, the Magistrates’ Courts in Criminal Matters have been abolished, and their judiciary tasks have been turned over to the Criminal Courts of General Jurisdiction. On the other hand, Criminal Courts of Peace have been established mainly to render the decisions to be taken and to carry out the works to be performed by a judge during the investigation stage and to examine eventual objections to those decisions. Accordingly, these courts shall be authorized to decide, during the investigation phase, on the proceedings such as taking under custody, body search on and sampling from the suspect, arrest warrant, **detention**, judicial control, search and seizure that are carried out under the criminal procedure or some measures of protection.

7. This regulation allows for the fundamental rights and freedoms to be protected during the investigation phase, and uniformity in application and specialization to be ensured regarding measures of protection.

- **Regarding the item 3.1.3.1**

8. It was stated that in June 2013 the Constitutional Court had already issued a ruling deeming unconstitutional the legislative provisions that allowed for up to ten years’ pretrial detention for suspects charged with organized crime and terrorism-related offenses. Since the Constitutional Court rendered the

ruling in question on 4 July 2013, it is considered appropriate to have the phrase “June 2013” corrected as “4 July 2013”.

9. As you may well know, with a provision reading as “The detention period provided for in the Code of Criminal Procedure shall be doubled”, detention periods were limited to ten years in the Anti-Terrorism Act No. 3713. This provision was cancelled with the Constitutional Court decision dated 4 July 2013, and it was decided that the decision of annulment would enter into force one year after its publication in the Official Gazette. With the amendments made by the “Law no. 6526 of 21 February 2014 on the Amendment of the Anti-Terrorism Act, the Code of Criminal Procedures and Others Laws” which is known to the public as the Fifth Judicial Reform Package, the detention period, which was ten years in practice, is limited to a maximum of 5 years without distinction of crime.

- **Regarding the item 3.1.4.1**

10. It was stated that during the mission, the delegation was able to confirm that, except for Engin Alan, all of the parliamentarians concerned had been released by the courts and sworn in to parliament. As Engin Alan was released on 19 June 2014 following the Constitutional Court’s decision of 18 June 2014 in respect of the individual applications in the case of Alan-Sledgehammer, it is considered appropriate to have this matter added into the relevant paragraph.

- **Regarding the item 3.2.1.2**

11. It was stated that in November 2013, Engin Alan had lodged a petition with the Constitutional Court on the grounds that his fundamental rights to liberty and to a fair trial had been violated, that at the time of mission, the Constitutional Court had not yet ruled on the petition, that on 17 June 2013, the Constitutional Court had delivered a landmark ruling deciding that the rights of the accused in the Sledgehammer case had been violated, which, according to Turkish media reports, was expected to pave the way for a retrial. Since the Constitutional Court delivered the ruling in question on 18 June 2014, it is considered appropriate to have the phrase “18 June 2013” corrected as “18 June 2014”.

12. On account of the fact that the Constitutional Court’s ruling in question paved the way for the retrial in respect of 236 accused persons, including Engin Alan, in the Sledgehammer case, that the retrial would be held by the 4th Chamber of the Anatolian Assize Court under the file with docket no. 2014/188 and that the first hearing was scheduled for 3 November 2014, it is considered appropriate to have this matter added into the relevant paragraph.

- **Regarding the item 3.2.3.2**

13. It was mentioned that detailed judicial information on the current stage of the proceedings conducted in the KCK case could not be obtained. As regards the KCK main case, on 11 July 2014 the 2nd Chamber of the Diyarbakir Assize Court granted pre-trial release to both detainees. Thus, there are no accused persons who remain in pre-trial detention, the proceedings were adjourned with a view to correcting the deficiencies and it is considered appropriate that this point should be added to the relevant paragraph.

- **Regarding the item 3.4.1.13**

14. It was stated that on 18 June 2013 the Constitutional Court had ruled unanimously that the rights of the accused in the Sledgehammer case had been violated with regard to “digital data and the defendants’ testimony” according to a Turkish media report, and that the decision and the precise grounds of the ruling had not yet been shared with the Committee. Since the Constitutional Court rendered the mentioned decision on 18 June 2014, it is considered appropriate to have the phrase “on 18 June 2013” corrected as “on 18 June 2014”. Moreover, the decision in question is annexed to our letter along with its reasoning in order to be submitted to the Committee.

- **Regarding the item 3.4.2.1**

15. It was stated that all the relevant parliamentarians had been tried by “specially-authorized courts”, that these courts had jurisdiction over cases of terrorism, organized crime and organized drug trafficking, that they were endowed with special powers and allowed to limit ordinary procedural safeguards pursuant to the Anti-Terrorism Law, that they might hold suspects in custody for months or even years without trial, detain

them incommunicado, restrict access to defence counsel and to the judicial file, and intercept and filter communication between detainees and their lawyers.

16. It was mentioned that in view of the fact that the use of secret witnesses by the above-mentioned courts had also been allowed, such disregard for procedural safeguards had been a matter of serious concern for international and regional human rights monitoring bodies and mechanisms.

17. As you may well know, with the Law No. 6526, specially authorized courts under Article 10 of the Anti-Terror Code were abolished and it was prescribed in the said Law that the hearing of the cases involving crimes over which these courts had jurisdiction, namely the crimes defined in Volume No. 1, Chapter No. 4, Section Nos. 4, 5, 6 and 7 (except for Articles 318, 319, 325, 325 and 332) and the crimes falling within the scope of the Anti-Terror Code (Law No. 3713) shall be carried out by assize courts of general jurisdiction. Assize courts have jurisdiction over crimes committed more than ten years ago. With the amendment in question, cases involving terror crimes shall not be heard by certain assize courts, but by all the assize courts within the framework of general procedures. In Article 9 of the Law No. 5235 it was stipulated that a president and sufficient number of members shall be present in the assize court that the court shall gather with a president and two members. Both the specially authorized courts which were abolished by Article 10 of the Anti-Terror Code, both the assize courts of general jurisdiction are courts which operate as chambers composed of a president and two members. There are no differences between the two courts in respect of their establishment and operation. Presidents of the assize courts are selected among the experienced judges who have come to the fore in their profession.

- **Regarding the conduct of the mission**

- **Regarding the item 1.5**

(a) Regarding the visit of Engin Alan:

1. After the approval of the Mission's visit by Speaker of Turkish Parliament Mr. Cemil Çiçek, the Secretariat of the Turkish IPU Group all informed the requested authorities through formal correspondences and was able to arrange whole meetings except from Deputy Prime Minister due to his busy agenda. It should be further stressed that Mrs. Fazilet D. Çiğlık, the Head of the Turkish IPU Group, spent a great deal of effort to arrange the meetings. Furthermore Mrs Çiğlık personally got into contact with the Minister of Justice and other authorities to speed up the process of arrangements and to fully meet the demands of the Committee.

2. However, at the time appeals trial of the Sledgehammer coup plot case had already finished (as of 9 October 2013) and the Supreme Court approved the convictions of 237 suspects, including former General Mr. Engin Alan. Therefore as being a convicted inmate Mr. Engin Alan could not be contacted personally, so the secretariat conveyed the request to the Nationalist Movement Party (MHP) Group orally. No response was taken until we have found out from the secretary of Yusuf Halaçoğlu, the Deputy President of MHP, that Alan's assistant was going to visit him in prison those days, so the request of the Committee could be communicated to Mr. Alan through his personal assistant. Following days, the Secretariat of the Turkish IPU Group kept contact with the secretary of Yusuf Halaçoğlu and as soon as learning Mr. Alan accepted the meeting, the necessary arrangements was made promptly and the meeting took place at the last day of the mission.

- **Regarding the item 1.7**

3. With respect to the requests taken from the Committee, all the appointments were arranged officially by the Secretariat of the Turkish IPU Group. Naturally, a general information (purpose of the mission, working methods of the Committee, information about the delegation) about the Committee and its mission was also communicated to all requested authorities. It was further communicated that if any other information is needed, the Secretariat would be there to respond to the demand immediately.

4. On the other hand, resolutions of the IPU Governing Council relating to the case of Turkey are not hidden for parliamentary groups, indeed they are open and available in the web site of IPU anyone who is interested. Besides there are three opposition party members in the Turkish IPU Group (two from CHP, one from MHP) whom are fully aware of the IPU, its work and logically of its resolutions.

(b) Other Statement

5. Keep in mind the difficulty of arranging and ordering the appointments of high authorities, the overall programme of the Mission was delicately arranged by the the Secretariat of the Turkish IPU Group in nearly a month. Therefore, it was suprised to find out that although the meeting with Mr. Kemal Kılıçdaroğlu was already scheduled by the Turkish Secretariat with consultations to the CHP Group, it was changed by the Committee without informing the Secretariat of the Turkish IPU Group. Beside being unprofessional, the change might have put the Secretariat in a difficult situation if it had affected the other scheduled meetings.

6. In addition, Commitee did not initially inform the Turkish Secretariat about their practice on the secrecy of the its meetings. The Secretariat naturally expected to participate and it's perfectly natural for them to participate to the meetings they arranged in the first place, especially when it took place under the roof of Turkish Parliament. Any concerns regarding the secrecy of the mission should have talked through prior to the mission in order to prevent any kind of misunderstanding. Unfortunately, the Commitee's officer decided to break this important prosedural detail to the Secretariat only during the meeting with CHP.