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Memorandum on freedom of expression and media freedom in Turkey

1. The Commissioner for Human Rights of the Council of Europe, Nils Muižnieks (the Commissioner), conducted a visit to Turkey from 6 to 14 April 2016, during which he travelled to Istanbul, Diyarbakir and Ankara. The visit focused on the fight against terrorism and human rights, with a particular attention to the situation in the South East; freedom of expression and media freedom; and the administration of justice.
2. In the course of his visit, the Commissioner held discussions with representatives of the national authorities, including the Minister of the Interior, Mr Efkân Ala; the Minister of Justice, Mr Bekir Bozdağ; the President of the Constitutional Court, Prof. Zühtü Arslan; Turkey's Chief Ombudsman, Mr Nihat Ömeroğlu, and other ombudspersons; the Chair of the Commission of Human Rights of the Turkish Grand National Assembly, Mr Mustafa Yeneroğlu; the Chair of the Turkish Human Rights Institution, Mr Hikmet Tülen; and members of the High Council of Judges and Prosecutors. In Diyarbakir, the Commissioner met the Governor, Mr Hüseyin Aksoy, several prosecutors, as well as the co-Mayors of Diyarbakir Metropolitan Municipality, Ms Gülten Kışanak and Mr Fırat Anlı. The Commissioner also visited the location of the assassination of the President of the Diyarbakir Bar Association, Mr Tahir Elçi, and presented his condolences to his widow.
3. The Commissioner held discussions with the representatives of a number of Bar Associations in the South-Eastern region and the President of the Turkish Union of Bar Associations, Mr Metin Feyzioğlu. He also met representatives of two associations of judges and prosecutors. The Commissioner's visit also comprised numerous meetings with civil society representatives, including a number of non-governmental organisations active in the field of protecting human rights, as well as with several journalists, academics and lawyers.
4. The Commissioner was preparing the report following this visit when a coup attempt occurred in Turkey on 15 July. He returned to Turkey (Ankara) for a second visit between 27 and 29 September in order to express in person his solidarity with the democratic forces in Turkey in the aftermath of this attempted coup, as well as to receive updated information on relevant human rights developments, as regards both the implications of the state of emergency declared in Turkey and the topics he had examined during his April visit. A memorandum on the human rights implications of the state of emergency was issued following the September visit.¹
5. The Commissioner would like to thank the Turkish authorities in Strasbourg and Ankara for the assistance they provided in organising both visits and facilitating their independent and effective execution. He extends his thanks to all interlocutors, from the national authorities and civil society, for their willingness to share with him their knowledge and views.
6. The present memorandum focuses on freedom of expression and media freedom in Turkey. It is the second memorandum based on the Commissioner's April visit, with updated information from the September visit, after a first memorandum was published on 2 December 2016 on the human rights implications of anti-terrorism operations in South-Eastern Turkey.²

¹ Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, [CommDH\(2016\)35](#), 7 October 2016.

² Memorandum on the human rights implications of anti-terrorism operations in South-Eastern Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, [CommDH\(2016\)39](#), 2 December 2016.

Introduction

7. Freedom of expression and media freedom have been a major priority in the work of the Commissioner regarding Turkey. This needs to be seen against a pattern of persistent violations by Turkey of Article 10 of the European Convention on Human Rights (ECHR) on the right to freedom of expression, which is clearly apparent in the case-law of the European Court of Human Rights (ECtHR). According to the statistics published by the ECtHR on violations found by the Court between 1959 and 2015,³ out of 619 judgments ever rendered by the Court finding a violation of Article 10, 258 concerned Turkey, thereby putting it ahead of all other member states by a very wide margin (the member state with the next highest number of violations has 34).
8. The Commissioner's predecessor published a report on this subject in 2011,⁴ which outlined major issues causing some of these violations. Two important aspects in that respect were certain provisions of the Turkish legislation, in particular of the Turkish Criminal Code and the Anti-Terrorism Act, and their interpretation and application by Turkish prosecutors and judges, which ran counter to the ECHR. The Commissioner and his predecessor had observed in previous reports that prosecutors and courts in Turkey often perceive dissent and criticism as a threat to the integrity of the state, and see their primary role as protecting the interests of the state, as opposed to upholding the human rights of individuals. Particular concerns relating to freedom of expression have been the use of the concept of "incitement to violence", which was systematically interpreted in a non-ECHR-compliant manner.
9. Other issues examined and problems identified in the aforementioned report included internet censorship, actions of non-state actors (attacks against and intimidation of journalists, civil defamation cases), as well as concerns relating to media pluralism, ownership structures, editorial independence and social rights of media professionals.
10. In the period following the publication of the 2011 report, there was tangible progress regarding freedom of expression in Turkey. There were legislative changes partly addressing some of the concerns of the Commissioner's Office and explicitly taking account of specific recommendations, and a human rights action plan aimed at eliminating violations of the ECHR, including of Article 10, entered into force in March 2014, having been signed by the then Prime Minister Erdoğan and all cabinet ministers. These were accompanied by efforts within the judiciary, for example the inclusion of knowledge of the ECHR and ECtHR case-law among performance criteria for judges or training provided to members of the judiciary about Council of Europe standards concerning freedom of expression, including through extensive co-operation projects with the Organisation. A highly significant and positive development was the introduction of individual petitions to the Constitutional Court and a series of judgments of the latter which were fully in line with ECHR standards.
11. These measures were clearly starting to bear fruit as shown by many indicators, for example the decrease in the number of journalists in prison, or the increasing use of alternative measures to detention in trials involving freedom of expression. There were also a number of progressive judgments, both by high courts and lower courts in Turkey. The Commissioner shared his satisfaction about these improvements both publicly and with the Turkish authorities.
12. However, this positive trend was halted and replaced by backsliding in an increasingly turbulent and difficult context. This backsliding regarding freedom of expression again became a major issue of concern for the Commissioner prior to his visit to Turkey in April. The Commissioner intervened on numerous occasions, in particular in 2015 and 2016, on matters pertaining to freedom of expression and media freedom in Turkey through various statements, as well as through his dialogue with the Turkish authorities. The issues on which the Commissioner publicly shared his concerns include the following:
 - The worsening of the internet legislation, such as new grounds for blocking, including without prior judicial approval (September 2014);

³ See the [statistics](#) published by the European Court of Human Rights on violation by Article and by state for the period 1959-2015.

⁴ Report by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to Turkey from 27 to 29 April 2011, Issue reviewed: Freedom of expression and media freedom in Turkey, [CommDH\(2011\)25](#).

- Sentencing of two cartoonists for insulting the President of the Republic and the proliferation of such criminal proceedings (March 2015);
 - Several arrests of journalists, including but not only from media outlets affiliated with the Fethullah Gülen movement (December 2014, October 2015), from Nokta weekly (September 2015), and of Can Dündar and Erdem Gül (November 2015);
 - Raids of the offices of Nokta weekly and VICE news, the expulsion of the foreign-national correspondents of the latter (September 2015);
 - The media blackout (including social media) imposed after a terrorist attack in Ankara (October 2015);
 - Physical assault of the prominent journalist Ahmet Hakan (October 2015);
 - Removal of TV channels from broadcasting platforms by order of a prosecutor (October 2015);
 - Takeover, by court-appointed trustees, of the media outlets of the Koza-Ipek Holding (October 2015) and the Feza media group which includes Zaman, Today's Zaman and the Cihan News Agency (April 2016);
 - Detention of three academics for having signed a petition for peace in the South-East (March 2016).
13. The Commissioner notes that several reputable international NGOs⁵ denounced a worsening of problems relating to freedom of expression in Turkey in recent years. The OSCE Representative on Freedom of the Media also made a series of statements over the same period, deploring severe blows to freedom of expression and media freedom in Turkey.⁶ In June 2016, the Parliamentary Assembly of the Council of Europe expressed its deep concerns about the state of freedom of expression and media freedom in the country, echoing many of the Commissioner's own concerns.⁷ Both the European Commission⁸ and the UN Special Rapporteur on the right to freedom of opinion and expression⁹ expressed similar concerns and alarm, in particular regarding measures taken under the state of emergency.
14. Recent case-law of the ECtHR is not an appropriate indicator of the current situation regarding freedom of expression in Turkey, given the time it takes for infringements to be challenged before domestic courts, including the Constitutional Court, before bringing a case to Strasbourg. The Commissioner nonetheless notes several recent judgments from the ECtHR pointing to the continued impact of structural problems in the approach of the Turkish authorities and courts to freedom of expression.
15. The Commissioner's findings during his April 2016 visit confirmed the numerous concerns regarding backsliding and a clearly negative trend affecting the enjoyment of the right to freedom of expression and media freedom in Turkey.¹⁰
16. Firstly, positive statutory changes introduced by the Turkish authorities, for example in the context of a reform package adopted in July 2012,¹¹ remain too limited to curb the overly restrictive effect of the Turkish statutory framework on freedom of expression. The Commissioner observes, notably, that most of the problematic provisions in the Turkish Criminal Code and the Turkish Anti-Terrorism Law examined by his predecessor in the aforementioned report remain largely intact. Many of the problematic provisions have either not been amended at all despite their incompatibility with ECHR standards, or have been superficially amended without addressing the underlying issues.
17. Secondly, the Commissioner observed a hardening of the Turkish authorities' stance vis-à-vis media freedom and freedom of expression. The already high level of intolerance towards legitimate criticism of elected officials and their policies had further increased and manifested itself through various means, including aggressive civil lawsuits (e.g. by the Mayor of Ankara), exclusions of critical journalists from government events, as well as numerous reported cases

⁵ See for example, relevant reports by Human Rights Watch, Amnesty International, Freedom House and Reporters Without Borders.

⁶ See the statements on Turkey available on the [website](#) of the OSCE Representative on Freedom of the Media.

⁷ Resolution of the Parliamentary Assembly of the Council of Europe on the functioning of democratic institutions in Turkey, [Resolution 2121 \(2016\)](#), 22 June 2016, paragraphs 20-29.

⁸ Commission staff working document, [Turkey 2016 Report](#), 9 November 2016.

⁹ Preliminary [conclusions and observations](#) by the UN Special Rapporteur on the right to freedom of opinion and expression to his visit to Turkey, 14-18 November 2016.

¹⁰ See the Commissioner's [press release](#), published on 14 April 2016.

¹¹ Law No. 6352 of 2 July 2012.

of direct or indirect pressure on media companies to change their editorial policy or fire journalists. The President of the Republic, in particular, made various controversial statements stigmatising critical media and prominent national and international journalists, academics or NGOs writing about human rights violations in Turkey,¹² calling for their punishment, even attacking the Constitutional Court for having taken decisions upholding the ECHR.

18. Thirdly, and perhaps more importantly, the application by Turkish prosecutors and courts of the statutory framework has followed an increasingly negative trend, counterbalancing and reversing some positive efforts, spearheaded notably by the Turkish Constitutional Court, to achieve a more ECHR-compliant interpretation of the Turkish legislation. A clear demonstration of this negative trend was the striking increase in prosecutions on the basis of certain offences which had long been in the statutes, but had never been used so widely and systematically, such as the offense of insulting the President of the Republic or insulting religious values.
19. Prosecutors also continued to bring high numbers of cases for terrorism or membership of an armed organisation mainly based on the consideration of certain statements of the accused as coinciding generally with the aims of a terrorist organisation. Positive trends, for example the fall in the number of prosecutions under Article 301 of the Criminal Code on insulting the Turkish nation, were reversed. While the efforts to promote the use of alternative measures to detention had resulted in a significant decrease in detentions pending trial, this trend appears to have been overshadowed by the increasing number of prosecutions and resistance by lower courts to progressive judgments of the Constitutional Court. For most of these issues, the newly introduced criminal judges of the peace appear to have played a decisive role (see below, paragraphs 69-71).
20. Unfortunately, the deterioration of media freedoms and freedom of expression in Turkey, which as just described had already reached seriously alarming levels, has intensified even further under the state of emergency declared by the Turkish government following the failed coup attempt of 15 July 2016. As set out in his aforementioned memorandum,¹³ the Commissioner does not question the Turkish authorities' right to declare a state of emergency and fight against FETÖ/PDY ("Fethullahist Terrorist Organisation"/"Parallel State Structure") or terrorism in general. However, the measures taken by the authorities confer an almost limitless discretionary power to the Turkish executive to apply seriously sweeping measures without differentiation not only to the public sector, but also to the media or NGOs, and to do so without any evidentiary requirements or judicial control and on the basis of vague criteria of "connection" to a terrorist organisation. As a result, more than 150 media outlets, including newspapers, television stations, radios and publishing houses, were closed and their assets liquidated by governmental decrees, in the absence of any judicial decision. In parallel, the number of journalists in jail which had reduced significantly in previous years, increased manifold, reportedly to 151 at the time of writing of this memorandum.¹⁴
21. The Commissioner thinks that, while the main concerns and findings of his predecessor in 2011 remain relevant and valid, the problems identified have become significantly more pronounced and prevalent. Moreover, they have been compounded by new and increasingly direct attacks on media freedom. As a result, the Commissioner regrets to observe that the current media landscape in Turkey is considerably less diverse, and public debate more stifled and impoverished than in 2011.
22. The Commissioner considers the scale and speed of the deterioration of the situation regarding media freedom and freedom of expression in Turkey to be of utmost concern. The current situation is characterised by numerous, blatant violations of principles enshrined in the ECHR, the case-law of the European Court of Human Rights, standards of the Council of Europe,¹⁵ as well as other relevant international standards. These violations have created a distinct chilling effect manifesting itself not only in self-censorship in the remaining media

¹² See, for example, the aforementioned Memorandum on the human rights implications of anti-terrorism operations in South-Eastern Turkey, [CommDH\(2016\)39](#), paragraph 69.

¹³ Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, [CommDH\(2016\)35](#), 7 October 2016.

¹⁴ According to the [information](#) compiled by the NGO Platform for Independent Journalism (P24) as of 18 January.

¹⁵ Notably the Recommendations of the Committee of Ministers of the Council of Europe to member States on the protection of journalism and safety of journalists and other media actors, [Recommendation CM/Rec\(2016\)4](#), adopted on 13 April 2016.

which is not controlled by or sympathetic to the government and the ruling political party, but also among ordinary citizens. This has led to an extremely unfavourable environment for journalism and an increasingly impoverished and one-sided public debate.

23. This overwhelmingly negative assessment of the Commissioner reflects an overview of countless examples of undue restrictions of media freedom and freedom of expression which have occurred in Turkey in recent years. The scope of this memorandum does not allow the Commissioner to enumerate all the forms these restrictions have taken, let alone raise all relevant cases in a systematic manner. The issues and examples in the following parts of this memorandum should therefore be seen as illustrations of the above-mentioned problems which have led the Commissioner to this assessment, rather than an attempt to present an exhaustive overview of the situation of media freedom and freedom of expression in Turkey.
24. Accordingly, Part I contains an overview of major examples of the ways in which media pluralism and independence deteriorated in recent years. Part II looks at how the combination of a still very repressive statutory framework and its rigid interpretation by the Turkish judiciary, with the encouragement of public officials, effectively led to different groups and sectors being subjected to various forms of judicial harassment as regards freedom of expression. Part III deals more specifically with the safety and security of journalists, who have borne the brunt of the backsliding in the area of media freedom and freedom of expression. Part IV concerns a number of observations regarding the way in which the Turkish authorities sought to restrict the right to freedom of expression on the Internet, including the social media.

I. Media pluralism and independence

25. The Commissioner recalls that media pluralism and diversity of media content are essential for the functioning of a democratic society and are the corollaries of the fundamental right to freedom of expression and information as guaranteed by Article 10 of the ECHR. States have a positive obligation to guarantee pluralism in the media sector, which entails ensuring that a diversity of voices, including critical ones, can be heard.¹⁶
26. At the time of the visit of the Commissioner's predecessor to Turkey in 2011, one of the main concerns regarding media pluralism was the fact that the Turkish media landscape was dominated by large media conglomerations with deep conflicts of interest, affecting editorial policy and leading to self-censorship. Nevertheless, the Commissioner considers that Turkey had a much more diverse and pluralistic media landscape at the time, compared to the situation today. This appears to be the result of various actions.

Fostering pro-government media

27. There are notably clear indications that the Turkish authorities sought to foster a pro-government media by using state resources. Many interlocutors of the Commissioner referred to the so-called "pool media", the name given to media companies with no transparent ownership and reportedly financed by big companies linked to the government through public tenders. According to Freedom House:

"the centralization of public procurement decisions within the prime minister's office under AKP rule has led to increasing use of economic leverage to influence the content of media outlets owned by these companies. [...] In one of the most flagrant examples of the use of economic leverage to shape media ownership, wiretap recordings leaked in 2013 indicated that the government dictated which holding companies would purchase the Sabah-ATV media group in exchange for a multibillion-dollar contract to build Istanbul's third airport. The Savings Deposit and Insurance Fund (TMSF) has also been used to transfer media assets to friendly entities [...]."¹⁷

28. Following the November 2015 parliamentary elections, the OSCE/ODIHR Limited Election Observation Mission also concluded that "Media owners' business interests in obtaining public tenders and state advertising lead to interference into editorial autonomy and result in limited criticism of the government, in particular on television".¹⁸ This is accompanied by biased coverage in public service media: according to the same Observation Mission, for example, the public broadcaster, TRT, favoured the ruling political party, AKP, in news,

¹⁶ Ibid., Part II - Principles, paragraph 15.

¹⁷ Freedom House country report, [Turkey - Freedom of the Press 2016](#).

¹⁸ OSCE/ODIHR Limited Election Observation Mission, [Final Report](#) on early parliamentary elections on 1 November 2015.

current events and discussion programmes. The same criticism is often levelled at Anadolu Agency, a state-owned news agency, following a number of allegedly partisan appointments to its management and numerous dismissals after 2011. It is widely reported that only journalists from such media are invited to many official press conferences, critical journalists and media being excluded from such events. As a result, public officials now rarely, if ever, face critical press or independent journalists.

Pressuring and stifling critical media

29. At the same time, the Turkish authorities appear to have sought to intimidate and punish negative news coverage. In his 2013 report following the Gezi events, the Commissioner had already pointed to fines imposed by the Radio and Television Supreme Council (RTÜK) on several TV channels reporting on the events, for supposedly “one-sided” coverage.¹⁹ The use of such fines continued to be an important tool in stifling critical reporting, notably relating to curfews and anti-terrorism operations in South-Eastern Turkey,²⁰ and were applied disproportionately against more critical broadcasting media. Thus, the concerns that the Commissioner’s predecessor expressed on RTÜK in his aforementioned report²¹ are still entirely valid and have become even more acute.
30. In his 2013 report, the Commissioner had also pointed to pressure exerted on media companies to change editorial policy or fire journalists. He was concerned that “the perception of biased coverage of the Gezi events, which had prompted the Secretary General of the Council of Europe to urge the Turkish media to provide full and accurate coverage of the protests, ha[d] been compounded by the dismissal of a number of journalists in connection with their coverage of the Gezi events”. The Commissioner had mentioned a number of high-profile cases, such as the dismissal of Yavuz Baydar from the daily *Sabah*, and of Can Dündar from the daily *Milliyet*, ostensibly for their coverage of the Gezi events.²²
31. The Commissioner was consistently informed by many of his interlocutors that this trend continued and intensified in the following period. Many journalists, who were dismissed during or after the Gezi events, detailed the ways in which they were pressured to change their reporting to make it less critical of the government or how they were told by their editors that they were being laid off owing to pressure from the government.²³ The Commissioner heard of many cases where pressure was exerted directly in the newsroom, or on media owners, including through criminal lawsuits, for example those against Aydın Doğan, the head of the Doğan Media Group which controls, among others, the influential newspaper *Hürriyet*. According to some journalists, this pressure was the main cause of the closure of another newspaper controlled by the same Group, the daily *Radikal*.
32. Another issue brought to the Commissioner’s attention concerns the functioning of the Press Announcement Agency (*Basın İlan Kurumu*) which is responsible for placing official advertisements in the press. Available statistics clearly show that this agency heavily favours pro-government newspapers, regardless of circulation numbers, thereby stifling opposition media.²⁴ The Commissioner notes that a new regulation adopted in October 2016 makes this tendency very clear, by stating that an on-going prosecution against a periodical, notably for terrorism offences, even before a final judgment, will result in the automatic suspension of official advertisements to that periodical. In case the investigation concerns a journalist, placing of advertisements in the periodical where he or she works are suspended unless the journalist is fired within five working days.²⁵ Combined with the prevalence of frivolous prosecutions against journalists, the Commissioner considers this as a telling example of infringement and lack of state neutrality vis-à-vis the press and of pressure to fire critical journalists.

¹⁹ Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Turkey from 1 to 5 July 2013, [CommDH\(2013\)24](#), 26 November 2013, paragraphs 119-120.

²⁰ For examples, see the report of Human Rights Watch entitled “[Silencing Turkey’s Media](#)”, December 2016, pages 63-66; or the Liberal Perspective Report No. 3: [Freedom of the press in Turkey](#) by the Freedom Research Association, October 2015, pages 22-23.

²¹ Report by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to Turkey from 27 to 29 April 2011, Issue reviewed: Freedom of expression and media freedom in Turkey, [CommDH\(2011\)25](#), paragraphs 32-34.

²² Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Turkey from 1 to 5 July 2013, [CommDH\(2013\)24](#), 26 November 2013, paragraph 121.

²³ For numerous examples, Human Rights Watch, *op. cit.*, pages 48-54.

²⁴ See, for example, Freedom Research Association, *op. cit.*, page 27.

²⁵ Regulation No. 29848 of 5 October 2016, Article 110.

Direct attacks on media freedom and independence

33. While these tendencies, which existed previously, have become more marked in recent years, the Turkish authorities, including prosecutors and courts, have also engaged in novel and increasingly direct attacks on media freedom, in particular in 2015 and 2016 in the context of the intensification of the government's crackdown on media considered to be Gülenist. A notable example was the exclusion of a number of critical TV channels from the main digital distribution platform Digiturk, and subsequently from TURKSAT, the state-controlled satellite signal provider. Despite the fact that RTÜK itself warned that the removal of these channels may violate impartiality requirements of platform operators, the platforms were urged to do so by prosecutors.
34. The Commissioner was shown one document dated 24 February 2016, signed by an Ankara prosecutor and addressed to TURKSAT, requesting the removal of İMC TV, which the prosecutor considered to be engaged in terrorist propaganda on behalf of the PKK, despite the absence of any court decision to that effect. TURKSAT subsequently removed İMC TV, possibly in violation of its contract with the latter and causing a serious loss in viewership. While the prosecutor may have seriously overstepped his competence by taking such an initiative, this action caused irrevocable effects. The Commissioner considers this to be a form of very severe and illegal interference with media freedom, yet highly symptomatic of the current climate in Turkey.

Outright closure of critical media

35. Prior to the declaration of the state of emergency in Turkey, which followed the attempted coup of July 2016, direct interference with media freedom had already reached an alarming level. The Commissioner had notably reacted on 28 October 2015 to the takeover of the Koza İpek holding company by court-appointed trustees. He stated that the violent police raids against media companies controlled by the group were a particularly disturbing illustration of the dangerous path Turkey had undertaken in recent months as regards its stance on media freedom. He further stated that:

“regardless of the reasons motivating the decision to put the parent conglomerate under trusteeship, media must enjoy special provisions concerning freedom of expression and editorial independence. The haste, the extraordinary display of force outside the headquarters and the decision of the trustee to disrupt live broadcasting do not meet the criteria of proportionality and necessity set by international human rights law, in addition to questions raised about their legality in the Turkish legal order and their compatibility with the Turkish Constitution. These measures must be stopped immediately, but they have already sent a very chilling message to the Turkish public and journalists less than a week before general elections, and thereby done great harm.”²⁶
36. Subsequently, the same method was used against the Feza group. The court-appointed trustees immediately changed the editorial policies of the various periodicals and TV channels concerned, rendering them staunchly pro-government. At the same time, journalists were laid off in massive numbers and media archives were rendered inaccessible. Shortly after its takeover, the İpek media group was declared bankrupt and all its journalists were laid off.
37. As the Commissioner stated in his press release after his visit to Turkey in April, “by law, these trustees are supposed to safeguard assets, but they changed editorial policy, causing the loss of readership and ruining the market value of the companies. This is an extremely worrying precedent which has already done irreparable harm to media freedom and pluralism in Turkey, even before a final court judgment”.²⁷ The Commissioner was unable to obtain the reasoning used by the courts to appoint trustees to these companies, the authorities having stated that they could not share this information with the Commissioner, owing to the secrecy of the investigation and the on-going legal proceedings.
38. Based on the available evidence, and regardless of the media companies' links with FETÖ/PDY and the role the latter played in the coup attempt of 15 July 2016, the

²⁶ Statement published on the Commissioner's Facebook page on 28 October 2015.

²⁷ See the Commissioner's [press release](#), published on 14 April 2016.

Commissioner considers the takeover of these media companies to have been motivated by a desire to stifle critical news, the legal basis of the appointment of the trustees to be very questionable at best, and the whole measure to be incompatible with media freedom, as well as basic principles of rule of law.

39. Unfortunately, these outstandingly heavy-handed interventions were to be followed by even greater infringements on media freedom as a result of the measures taken by the authorities after the declaration of a state of emergency in July 2016. By virtue of a series of decrees and executive orders promulgated under the state of emergency, the Turkish government has simply closed a number of media companies. The Commissioner notes that these are purely executive decisions which were taken without any involvement of the judiciary and were not subject to any review by a court of law. The Commissioner welcomes the fact that, with an emergency decree adopted on 23 January 2017, the authorities reinstated remedies, including against these closures. However, while this might address the ancillary human rights violation relating to the non-existence of the right to an effective remedy, it does not change the fact that the closures in question were disproportionate to the aims pursued, incompatible with basic principles of human rights and rule of law in the first place, and produced irrevocable effects. They were taken in the total absence of disclosure to the public or the companies concerned of any evidence establishing the supposed links between these companies and terrorist organisations.
40. While the situation is very complex, since companies were closed through decrees and other executive orders, some of which were rescinded, according to the figures available to the Commissioner a total of 158 media companies had been closed down as of 11 January 2017. These included 45 newspapers, 60 TV and radio stations, 19 periodicals, 29 publishing houses and 5 press agencies.
41. The Commissioner considers that neither the attempted coup, nor other terrorist threats faced by Turkey, can justify these measures, which represent not only an unprecedented infringement of media freedom in the experience of the Commissioner, but also a clear disavowal of rule of law and due process. They are one of the most obvious examples of the excesses of the state of emergency as it is applied in Turkey and the arbitrariness it allows, in spite of the numerous human rights at stake. The Commissioner regrets to note that despite his calls to the contrary in his relevant memorandum on the state of emergency, the Turkish authorities decided to extend the state of emergency, without any modification, for a further three months on 4 January 2017.
42. In the Commissioner's opinion, the aforementioned measures have dealt a very severe blow to media freedom in Turkey, which was already in an extremely weakened state before emergency measures, resulting in a situation where the very essence of media freedom is negated.

II. Judicial harassment restricting freedom of expression

43. As mentioned above, the Turkish statutory framework continues to display numerous incompatibilities with the ECHR, despite limited attempts to change Turkish legislation to stave off further applications to the ECtHR. The aforementioned report of the Commissioner's predecessor contains a long list of provisions of the Turkish Criminal Code and Anti-Terrorism Law which have directly led to violations of Article 10 ECHR.
44. The vast majority of these provisions are still in force in one form or another. The Commissioner notes, in particular, the opinion of the Venice Commission of March 2016 on Articles 216 (incitement to hatred, degrading a sector of the population or its religious values), 220 §6 (committing an offence on behalf of a criminal organisation without being a member) and 220 §7 (aiding and abetting a criminal organisation without being a member), 299 (insulting the President of the Republic), 301 (degrading the Turkish nation or state) and 314 (establishment, command or membership of an armed organisation) of the Turkish Criminal Code. While acknowledging efforts to limit the application of these articles through amendments or case-law of the Turkish Court of Cassation, the Venice Commission concluded that "the progress made is clearly insufficient. All articles subject to the present opinion provide for excessive sanctions and have been applied too widely, penalising conduct

protected under the ECHR, in particular its Article 10 and the related case-law as well as conduct protected under Article 19 ICCPR”²⁸.

Backsliding in the case-law of the Turkish judiciary

45. Indeed, several provisions of the Turkish Criminal Code and the Anti-Terrorism Law continue to generate the majority of the most serious violations of freedom of expression in Turkey. However, in the opinion of the Commissioner, the way these laws are interpreted and applied by Turkish prosecutors and courts is an equally, if not more, serious problem when it comes to the compatibility of the Turkish legal framework with international standards. Already in his aforementioned 2011 report, the Commissioner’s predecessor had noted that violations had continued to occur despite important previous amendments to these two laws, mainly owing to the fact that the provisions in the amended texts kept the contents and general legal approach largely intact. This has been the case with the majority of amendments adopted after 2011 as well.
46. The Commissioner’s predecessor had already stressed the crucial importance of the independence of the judiciary and of the judicial culture in his aforementioned report on freedom of expression as well as a subsequent report on the administration of justice in Turkey,²⁹ pointing to many problems including, among others: a lack of restraint by prosecutors in bringing charges in cases clearly covered by freedom of expression, the excessive use of detentions on remand and defective reasoning in courts’ detention decisions which create a distinct chilling effect, as well as a failure to strike the right balance between freedom of expression and the offences relating to terrorism and criminal organisations, in particular in cases where membership of a criminal organisation is not proven and a statement is merely deemed to coincide with the aims or instructions of that organisation. When changes in legislation occurred, one could observe that prosecutions continued against similar acts and statements, sometimes by using some of the other provisions of the Criminal Code or the Anti-Terrorism Law.
47. Another element that reinforces the Commissioner’s opinion that the judicial culture is a crucial problem in Turkey is the fact that some judgments by the Turkish Constitutional Court, as well as certain judgments by high courts and lower courts, include examples where Turkish judges were able to apply existing criminal law provisions in ways that were compatible with the ECHR and the case law of the ECtHR, notably by throwing out cases where they considered statements by defendants to be protected under the right to freedom of expression as enshrined in the Turkish Constitution, sometimes by including explicit references to the ECHR in the reasoning of their judgments.
48. Many factors contributed to this positive development, including, for example, the inclusion of knowledge of and references to ECtHR case-law in the performance criteria of judges by the HSYK. In any event, the Commissioner considers that this shows that the Turkish courts have a sufficient margin of appreciation which could have allowed them to alleviate the undeniably serious shortcomings in the Turkish statutory framework detailed above, thereby preventing violations of the right to freedom of expression.
49. This progress was however largely halted and reversed, a tendency which became increasingly obvious in 2014 and 2015. A very important development in this respect seems to have been the crackdown on what was then called the “parallel state” in the aftermath of the corruption investigations launched on 17 December 2013. While the Constitutional Court blocked many of the changes affecting the High Council of Judges and Prosecutors (HSYK) which were hastily adopted following these investigations, the HSYK, within which the government already wielded considerable power, intervened in the judiciary much more actively from then on, through a high number of forced relocations of members of the judiciary, followed by investigations, suspensions and dismissals.
50. While these measures were ostensibly aimed at the Gülenist network within the judiciary, the Commissioner heard from many interlocutors that they produced a general atmosphere of apprehension and fear within the judiciary, exacerbating or reviving state-centrist attitudes

²⁸ Venice Commission [Opinion No. 831/2015](#) on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, 15 March 2016, paragraph 123

²⁹ Report by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to Turkey from 10 to 14 October 2011, Issue reviewed: Administration of justice and protection of human rights in Turkey, [CommDH\(2012\)2](#).

and a reluctance to draw attention, for example by taking controversial decisions upholding freedom of expression. Overall, the members of the judiciary seem to have reverted to their previous state-centrist approach which, as already noted by the Commissioner in previous reports, results in prosecutors and courts perceiving dissent and criticism of the government as a threat to the integrity of the state, and seeing their primary role as protecting the interests of the state, as opposed to upholding the human rights of individuals, rule of law and democracy. This situation also seems to have reinforced the widely-held belief that the Turkish judiciary is strongly influenced by the political climate and was responsive to the increasing pressures put on its independence and impartiality in this period. The Commissioner also notes that these pressures were seriously exacerbated after the state of emergency.³⁰

51. The cases of prosecutions against persons who have exercised their freedom of expression and whose statements should clearly be considered protected under Article 10 of the ECHR have not only continued but increased over recent years. This needs to be seen in context with a general increase in prosecutions and requests for detention on remand based on the relevant provisions of the Criminal Code. Official figures provided by the Turkish Ministry of Justice concerning the number of request for detentions on remand by prosecutors for Articles 216, 220 §§6 and 7, 301 and 314 show a more than three-fold increase from 1 698 requests in 2013 to 6 547 requests in 2015. The number of court decisions granting detention requests increased almost four-fold (from 1 099 to 3 732) over the same period.
52. A change in the attitude of the government vis-à-vis judicial proceedings involving freedom of expression also emerges from official figures and could be seen as a support to this hardening of attitude by the judiciary. Articles 299 (insulting the President) and 301 (insulting the Turkish nation or state) require an authorisation from the Ministry of Justice for prosecution; with respect to Article 301, 43 such authorisations were issued in 2013, whereas this figure was 153 for 2015, and 100 for the first four months of 2016 alone. As for Article 299, from 85 files authorised for prosecution in 2013, in 2015 the Ministry had issued 1 540 authorisations (out of 2 476 prosecution requests), more than 18 times more than in 2013. Between 1 January and 30 April 2016 alone, 915 further authorisations had been issued with respect to 2 445 prosecution requests.
53. The authorities justified the increase regarding Article 301 by reference to terrorist events in the South-East and big cities. As for insults against the President, the authorities argued that the increase in the prosecution requests was due to “the fact that the President is directly elected compared to previous Presidents, and that political differences in opinion increased such acts against him. A big number of files concerned swearing against him and his family, using language which can only be used by lower classes”.³¹

Defamation

54. Regarding Article 299, which carries a prison sentence from one to four years, the Commissioner stressed following his visit in April that the application of similar provisions was unprecedented “in any of the other 46 member states of the Council of Europe, including those where insulting the president is still considered a separate criminal offence”.³² The use of this provision seems to have become a tool for stifling any criticism of the President, and by extension of any policy that he supports, and used indiscriminately and at an unparalleled level against all categories of persons, notably journalists, caricaturists, academics, celebrities, students and pupils, including many minors. The impugned acts include, in many cases, statements shared through the social media, including re-posts or re-tweets. 18 persons were in prison for this offence as of June 2016.
55. The Commissioner is convinced that the use made of this provision is profoundly incompatible with the ECHR and amounts to judicial harassment, especially considering that the ECtHR holds that conferring a privilege or special protection to Heads of State, shielding them from criticism solely on account of their function or status cannot be reconciled with modern practice and political conceptions.³³ The Commissioner shares the opinion of the

³⁰ Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, [CommDH\(2016\)35](#), 7 October 2016, paragraphs 23 and 29.

³¹ Official information sent by the Ministry of Justice to the Commissioner’s Office, dated 8 June 2016.

³² See the Commissioner’s [press release](#), published on 14 April 2016.

³³ *Artun and Güvener v. Turkey*, judgment of 26 June 2007, paragraph 31.

Venice Commission that the only solution to these obvious violations of Article 10 is to repeal Article 299. For the Commissioner, the President's declaration following the coup attempt of 15 July that he would withdraw lawsuits concerning this Article as a one-off gesture is immaterial as regards the extreme chilling effect that this provision is continuing to produce in Turkey. The Commissioner notes with regret therefore that the Turkish Constitutional Court found in December 2016 that Article 299 of the Turkish Criminal Code was constitutional, by arguing that it does not touch the essence of the right to freedom of expression.³⁴

56. The use of the offence of defamation is a wider problem in Turkey: defamation continues to be a criminal offense, carrying high fines and a prison sentence from 3 months to 2 years, aggravated when perpetrated against public officials (Article 125 of the Turkish Criminal Code). As stated previously by the Commissioner, "as long as defamation is considered a crime and journalists can be threatened with disproportionate sanctions and fines, a chilling effect risks limiting the exercise of freedom of expression. This situation does not only stifle the media, but ultimately deprives citizens of their right to information, thus affecting negatively the healthy functioning of democracy".³⁵ The criminal law provisions in Turkey send a negative signal to investigative journalists and stifles criticism and the expression of satirical views.
57. This is accompanied by a huge number of civil cases against persons for defamation of public officials. Thus for instance, the Mayor of Ankara boasted on Twitter having brought 3 000 defamation cases against his critics. While this might be an extreme case, many other public officials introduced defamation cases and claims for compensation, mainly against journalists and opposition politicians, including MPs, despite the fact that the use of defamation provisions in Turkey has previously been found to be in violation of the ECHR.³⁶
58. While the use of Article 299 and defamation provisions in general is symptomatic of the growing intolerance of the Turkish officials and the judiciary to criticism of those holding political office, it is only part of the distinct chilling effect caused by judicial harassment which affects all sectors of Turkish society, stifles public debate, reduces the scope of democratic discussion, and thereby increases polarisation in the country.

Use of judicial harassment to restrict parliamentary debate

59. While critical journalists are the most obvious victims of this situation (see below), many other sectors and groups were also directly targeted. A particularly disturbing manifestation of this situation is the lifting of the immunities of parliamentarians. In a move that the Venice Commission described as an *ad hoc*, "one shot" and "*ad homines*" measure, as well as a misuse of the constitutional amendment procedure,³⁷ the majority in the Turkish Parliament lifted the immunities of 139 of its members who were subject to pending prosecution requests submitted to the Parliament. One of the most worrying aspects of this measure was the fact that the majority of impugned acts concerned statements made by these MPs, for example for insulting the President or other public officials, terrorist propaganda or incitement to hatred. The preamble of the constitutional amendment itself stated that its purpose was to address public indignation about, *inter alia*, "statements of certain deputies constituting emotional and moral support to terrorism". As the Venice Commission highlighted, nearly all MPs of a particular opposition party, the HDP, were concerned by the measure. As a result of this measure, prosecutions are on-going against a large number of opposition MPs. Several members of HDP, including its co-Chairs, were arrested in November 2016. The Turkish authorities have stated that the reason of the arrests was the refusal of the MPs to comply with the order to personally appear before the prosecutor. However, even after having forcibly been made to give evidence, 11 MPs are still in prison and cannot carry out their parliamentary mandate at a crucial juncture.

³⁴ Turkish Constitutional Court, judgment no. 2016/186 of 14 December 2016.

³⁵ [Joint Statement](#) of Nils Muižnieks, Council of Europe Commissioner for Human Rights, with Frank La Rue, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and Dunja Mijatović, OSCE Representative on Freedom of the Media, Defamation in Italy: a draft law to be changed.

³⁶ Report by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to Turkey from 27 to 29 April 2011, Issue reviewed: Freedom of expression and media freedom in Turkey, [CommDH\(2011\)25](#), paragraphs 56-57.

³⁷ See the Venice Commission Opinion No. 858/2016 on the suspension of the second paragraph of Article 83 of the Turkish Constitution (Parliamentary Inviolability), [CDL-AD\(2016\)027](#), 14 October 2016.

60. The ECtHR made it very clear that “[w]hile freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament [...], call for the closest scrutiny on the part of the Court.”³⁸ The Commissioner also recalls the ECtHR’s judgment concerning DTP, a precursor party of the HDP, which was unduly closed, mainly for statements of its members which were protected under Article 10.³⁹ The Commissioner notes, in particular, that these statements were very similar to the statements which were used as justification for the lifting of the immunities in the present case.
61. The Commissioner draws the authorities’ attention particularly to the conclusion of the Court that the mere fact that there are parallels between the principles defended by the DTP and those of the PKK did not suffice to conclude that the party approved of the use of force in order to implement its policies. If a political group was considered to be supporting terrorism, merely by advocating those principles, that would reduce the possibility of dealing with related issues in the context of a democratic debate and would allow armed movements to monopolise support for the principles in question.⁴⁰ In the current climate, the Commissioner considers that the lifting of the immunities of MPs and their subsequent arrest and detention not only disenfranchised millions of voters, but sent an extremely dangerous and chilling message to the entire Turkish population, and significantly reduced the scope of democratic debate, including on human rights.

Restriction of academic freedoms

62. Another area where freedom of expression deteriorated very rapidly in Turkey, as a result of the authorities’ hardening attitude concerns academic freedoms. The most prominent case in this respect was the very harsh reaction to the signature campaign “Academics for Peace” in January 2016, which gathered 2 212 signatures from academics in Turkey by 20 January 2016 to a text denouncing the government’s actions in the context of curfews and anti-terrorism operations in South-Eastern Turkey and calling for an end to violence there and resumption of negotiations. The Commissioner repeats, as he did after his April visit, that he regards this declaration⁴¹ as falling clearly within the boundaries of freedom of expression, and the concerns behind it as legitimate and of interest to the public, in particular given the many human rights violations which, according to the Commissioner, were indeed committed during the curfews and anti-terrorism operations.⁴²
63. However, Turkish officials, and in particular the President of the Republic, attacked the initiative, branding the signatories “mock academics” and calling relevant institutions to fulfil their responsibility. The academics were targeted by members of the government, pro-government press, as well as the judiciary: already on 18 January 2016, criminal investigations had started against more than a thousand academics, based on Article 7§2 of the Anti-Terrorism Law, later also Article 301 of the Turkish Criminal Code. Four academics were arrested and detained, but later released. Universities reportedly also came under intense pressure from the government and the Council of Higher Education (YÖK) to conduct disciplinary investigations against the academics and punish them. According to the figures provided by the group, as of September 2016, 511 signatories had been subjected to disciplinary proceedings, 93 academics had been dismissed, 15 forced to resign, 85 suspended, 41 taken into police custody and hundreds called in for questioning.
64. The aftermath of the 15 July failed coup attempt also had a severe impact on academic freedoms: close to 4 500 academics were dismissed through appended lists in emergency decrees, without any due process and with no judicial remedy. All deans in Turkey were summarily dismissed, with some subsequently reappointed, and academics were automatically deprived from the right to travel abroad without authorisation. The autonomy of universities was also severely curtailed, abolishing elections within universities and replacing them with direct appointments by the President of the Republic. The Commissioner considers

³⁸ *Castells v. Spain*, judgment of 23 April 1992, paragraph 42.

³⁹ *DTP v. Turkey*, judgment of 12 January 2016.

⁴⁰ *Ibid.*, paragraph 79.

⁴¹ The text of the declaration is on the website of Academics for Peace: <https://barisicinakademisyenler.net/node/63>

⁴² Memorandum on the human rights implications of anti-terrorism operations in South-Eastern Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, [CommDH\(2016\)39](https://www.coe.int/t/doh/huridocgen/huridoca/CommDH(2016)39), 2 December 2016.

that these developments were a severe blow to another pillar of freedom of expression, namely academic freedom which, as underlined by the ECtHR⁴³ and the Parliamentary Assembly of the Council of Europe, “should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction”.⁴⁴

Generalisation of judicial harassment to other groups

65. These considerations show that judicial harassment no longer targets only media and journalism, but all sectors of Turkish society, including politicians, academics, NGOs, human rights defenders and ordinary citizens expressing themselves in public settings, including on social media. The arrest and clearly unnecessary detention of prominent human rights defenders, such as Şebnem Korur Fincancı for acting as a symbolic co-editor of the pro-Kurdish daily *Özgür Gündem* (later closed under the state of emergency) in a solidarity campaign along with other journalists and activists, and of artists and intellectuals, such as the novelist Aslı Erdoğan and linguist Necmiye Alpay, for having served in a consultative board of the same newspaper, are cases in point. Another example is the fact that the Turkish Ministry of the Interior announced on 24 December 2016 that in the preceding six months, 3 710 judicial proceedings had been initiated against social media users (see below under the section on the Internet).⁴⁵
66. Another example of judicial overreach to stifle public debate concerns the frequent imposition of media bans or blackouts concerning events of clear public interest. On 15 October 2015, the Commissioner reacted to the imposition of such a ban regarding the 10 October terrorist bombings in Ankara, which killed 107 people and injured more than 500: in this case, at the request of the prosecutor, the competent judge of the peace declared a complete ban on any reporting, such as “news, interviews, criticism” regarding the “scope of the investigation file” on all media, including press, broadcasting media, social media and internet media, justifying this on the grounds of the integrity of the judicial investigations, as well as national security, public order and security, and territorial integrity without explicit reasoning. Similar vague and stereotyped wording is used in all decisions of this type.
67. As stressed by the Commissioner, when imposing such bans, the judges do not weigh the public’s legitimate need for essential information which is particularly crucial in times of crisis, in direct contradiction with the relevant Council of Europe standards.⁴⁶ The Commissioner observes that these sweeping bans have become a mainstay of the Turkish judiciary’s response to major events, and is aware of dozens of cases where they were imposed, from corruption investigations, to numerous terrorist attacks, a child-abuse scandal regarding the *Ensar* foundation, or a fire in which several students lost their lives owing to negligence. Since the public cannot be expected to know the contents and the scope of the prosecutors’ investigation files, the Commissioner considers that these bans amount in practice to open-ended, catch-all gag orders, not only for the media but for anyone, and constitute an unacceptable attempt to stifle all public debate on highly significant events and an infringement of the rights not only to impart but also to receive information, as defined in Article 10 of the ECHR.
68. Thus, long-standing problematic attitudes of the judiciary concerning the failure to carry out a proper contextual analysis of statements in order to determine whether they fall outside of speech protected under Article 10, affect a much wider population than before and create an even stronger chilling effect for the entire society. Detention on remand, in particular, which will be examined in more detail with respect to journalists (see below), is still being used widely with defective reasoning straying from ECHR standards and remains a key component of that chilling effect.

⁴³ *Sorguç v. Turkey*, judgment of 23 June 2009, paragraph 35.

⁴⁴ Recommendation of the Parliamentary Assembly of the Council of Europe on academic freedom and university autonomy, [Recommendation 1762 \(2006\)](#), 30 June 2006, paragraph 4. the functioning of democratic institutions in Turkey, [Resolution 2121 \(2016\)](#), 22 June 2016, paragraphs 20-29.

⁴⁵ See the press release of the Turkish Ministry of the Interior on 24 December 2016: <https://www.icisleri.gov.tr/basin-aciklamasi24122016> (accessed on 12 January 2017)

⁴⁶ [Guidelines](#) of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis of 26 September 2007.

The role of the criminal judges of the peace

69. As it appears from this brief summary of the various ways in which judicial harassment manifests itself in Turkey, the criminal judges (or “judgeships”) of the peace which were established in June 2014, are at the nexus of some of the most problematic decisions, including detentions, media bans, appointment of trustees for the takeover of media companies or internet blocking. These formations were supposed to improve the protection of human rights in criminal proceedings by centralising expertise and knowledge of the relevant ECHR standards. As stressed by the Commissioner after his April visit, however, the effect seems to have been the exact opposite, the decisions of these judges being at the origin of the majority of the most obvious violations of the right to freedom of expression.
70. One of the main reasons for this development seems to have been the fact that the system of criminal judges of the peace works as a closed circuit, since the decisions of one judge of the peace can only be appealed to another such judge. According to the figures provided by the Ministry of Justice to the Commissioner in June 2016, in 2015 21.5% of appeals regarding detention decisions were successful, but this appears to include the appeals made by prosecutors to decisions refusing detention. This situation seems to have allowed the criminal judges of the peace to ignore or resist the positive developments in the case-law of Turkish courts, including the Constitutional Court, to better take account of Article 10 standards.
71. While the independence and impartiality of the judiciary has become a major problem in Turkey in recent years in general, and seriously worsened since the failed coup attempt, some of the decisions taken by criminal judges of the peace putting suspects in detention on remand that the Commissioner has examined (see below under safety and security of journalists) stand out for their display of defective reasoning and disregard of Article 10 safeguards. The Commissioner is aware that the Venice Commission is currently carrying out a wider assessment of the “duties, competences and functioning of criminal peace judgeships” at the request of the Parliamentary Assembly of the Council of Europe, but in the light of the practices described above, his own assessment of their concrete impact on the respect of freedom of expression in Turkey can only be negative.

III. Safety and Security of Journalists

72. The Commissioner recalls the Recommendation of the Committee of Ministers of the Council of Europe to member states on the protection of journalism and safety of journalists and other media actors,⁴⁷ which stresses that member states should put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear, guaranteeing public access to information, privacy and data protection, confidentiality and security of communications and protection of journalistic sources and whistle-blowers. In other words, states have not only a negative obligation not to interfere with journalists’ ability to contribute to public debate, but also a positive obligation to create a favourable or enabling environment to ensure their safety and security against threats, attacks, abuse, harassment from state and/or non-state actors, as well as a range of legal, political, socio-cultural and economic pressures, which can be exacerbated in times of economic crisis and financial austerity.
73. The Commissioner observes that journalists in Turkey continue to bear the brunt of judicial harassment and other forms of violence and intimidation in violation of Council of Europe standards. The Platform for the Protection of Journalism and Safety of Journalists administered by the Council of Europe indicates that, of the 250 alerts posted by partner organisations and registered until 20 January 2017, 86 concerned Turkey. 63% of these alerts corresponded to the highest alert level covering “the most severe and damaging violations of media freedom, including physical assaults and murder, intimidation, impunity for crimes targeting journalists and the application of excessively severe penal laws to protect state officials from the level of criticism which is to be expected in a democracy”.⁴⁸

⁴⁷ Recommendations of the Committee of Ministers of the Council of Europe to member States on the protection of journalism and safety of journalists and other media actors, [Recommendation CM/Rec\(2016\)4](#), adopted on 13 April 2016

⁴⁸ See the website of the Platform: <https://www.coe.int/en/web/media-freedom/home>

Attacks and violence

74. In his aforementioned 2011 report on freedom of expression and media freedom, the Commissioner's predecessor had expressed his concerns about the many attempts at intimidation, attacks and murders perpetrated against journalists and human rights defenders in Turkey. Recalling in particular the judgment of the European Court of Human Rights regarding the murder of Hrant Dink, he urged the Turkish authorities to increase their efforts to protect journalists from and conduct effective investigations into such acts.⁴⁹
75. In his 2013 report, the Commissioner expressed his deep concern about police violence perpetrated against journalists covering the Gezi protests.⁵⁰ Representatives of journalists' trade unions and associations informed the Commissioner in April 2016 that the numerous acts of violence suffered by the journalists during this period were brought to the attention of the justice system, but that no effective investigations had been conducted and that the perpetrators remained unpunished.
76. As regards more recent developments, the Commissioner noted with deep concern many serious reported cases of deliberate violence perpetrated by security forces on journalists and media actors trying to cover the curfews and anti-terrorism operations in the South-East, and referred to a number of such examples in his relevant memorandum.⁵¹ Many other cases have been documented,⁵² but the Commissioner is not aware of any case where perpetrators of such violence were investigated or questioned by prosecutors.
77. The Commissioner also reacted with deep shock to the attack in September 2015 against the headquarters of the daily *Hürriyet*, by 200 people including a former AKP Parliamentarian, following the criticism of the paper by the President of the Republic and smear campaigns in pro-government newspapers. While the prosecution is on-going against 26 suspects in connection with this attack, the MP in question is not among them. Shortly after this event, the *Hürriyet* journalist Ahmet Hakan was assaulted and injured near his home by four men. Another attack which produced a deep chilling effect for Turkish journalists was the attempted assassination of Can Dündar by a gunman, who fired two shots after shouting "traitor" at Dündar in May 2016. In December 2016, the daily *Yeni Çağ*, affiliated with the nationalist party MHP, was attacked by a mob of 30 people.
78. Most of the Commissioner's interlocutors argued that there was a clear link between these attacks and the vilification of journalists by public officials – in three of the above-mentioned cases by the President of the Republic himself – and the smear campaigns in pro-government newspapers, which at times amounted to hate-speech and incitement to violence. The Commissioner particularly deplores statements equating journalists with terrorists, traitors or spies, for having published true information of public interest.

Detentions on remand causing a chilling effect

79. Journalists have been among the most affected by the various forms of judicial harassment described above. Detention is the most visible and chilling form that this harassment has taken. As stated by the Commissioner's Office on multiple occasions, the exceptional nature of remands in custody, and the need to provide clear legal reasoning in cases where they are necessary are not embedded in the practice of the Turkish judiciary. A major problem in this connection are the so-called "catalogue crimes", i.e. a list of crimes in the Code of Criminal Procedure with respect to which detention can be ordered during criminal proceedings, and which many Turkish judges still continue to use as the main criterion without a careful examination of the remaining conditions of detention. The ECtHR's case-law is full of cases where the Court found a glaring incompatibility between these detentions and the ECHR, and these judgments are yet to be executed by the authorities.

⁴⁹ Report by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to Turkey from 27 to 29 April 2011, Issue reviewed: Freedom of expression and media freedom in Turkey, [CommDH\(2011\)25](#), paragraph 90.

⁵⁰ Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Turkey from 1 to 5 July 2013, [CommDH\(2013\)24](#), 26 November 2013, paragraph 104.

⁵¹ Memorandum on the human rights implications of anti-terrorism operations in South-Eastern Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, [CommDH\(2016\)39](#), 2 December 2016, paragraph 67.

⁵² Human Rights Watch, *op. cit.*, pages 40-46.

80. In a judgment delivered in July 2014 concerning the detention on remand of investigative journalists accused of aiding and abetting a criminal organisation,⁵³ the ECtHR confirmed this approach, stressing once more that the detention of the applicant only on the basis of stereotypical reasoning had been a violation of Article 5.
81. Crucially, the ECtHR also considered the issue under Article 10 and the chilling effect that such detentions produce: whereas Turkey argued that the applicant's right to freedom of expression had not been infringed since ultimately he was not sentenced following his detention, the Court stated that the applicant's detention in the context of criminal proceedings for offences which carried a heavy sentence did not constitute a purely hypothetical risk but was a real and effective constraint and thus amounted to interference with the exercise of their right to freedom of expression. While the Turkish government argued that the interference in question had been aimed at preventing crime and safeguarding the authority, independence and impartiality of the judiciary, the Court explicitly "wondered whether the aim had not been rather to stifle any criticism of, or commentary on, the conduct of a trial that had already been the subject of widespread public debate".⁵⁴
82. In any event, by detaining the applicants for such a lengthy period without relevant or sufficient reasons, the judicial authorities had had a chilling effect on the applicants' willingness to express their views on matters of public interest. Applying such a measure was liable to create a climate of self-censorship for the applicants and for any investigative journalist planning to carry out research and comment on the conduct and actions of State bodies.
83. At the time of the Commissioner's predecessor's 2011 report on freedom of expression, there were 67 press workers in prison in Turkey. This figure gradually went down to 36 prior to the failed coup of 15 July 2016, but increased very quickly after that date, reportedly to 151 as of 18 January 2017.⁵⁵ This does not include the huge numbers of journalists taken into custody, questioned and released under judicial control. Journalists were also subjected to the full range of measures significantly reducing rights of persons arrested during the state of emergency, including the extension of the maximum custody period without a court decision to 30 days, drastic restrictions to access to lawyers, including the possibility to prevent it altogether for 5 days, as well as limitations on or full abolition of the confidentiality of the client-lawyer relationship.⁵⁶ The Commissioner notes that, as of 23 January 2017, the Turkish government reduced the maximum custody period to 7 days (with a possible extension to 14 days) and removed the possibility to restrict access to a lawyer for 5 days. However, other restrictions, including as regards the confidentiality in client-lawyer communications, are maintained.
84. The Commissioner was alarmed by the rapid increase of cases where journalists (increasingly mainstream, prominent journalists) were detained on the basis of spurious charges and with very little or no *prima facie* evidence suggesting any guilt.
85. The Commissioner examined, for example, the decisions of criminal judges of the peace to detain journalists and administrators of daily *Cumhuriyet*, one of the oldest newspapers in Turkey with a consistent record of critical and courageous investigative journalism vis-à-vis Turkish governments from diverse political movements. As of the date of the writing of this memorandum, the detention had already lasted more than 80 days. These journalists were detained on the basis of charges of acting on behalf of a terrorist organisation, without being a member.
86. For example, in its relevant decision regarding the detention of Bülent Utku, Güray Tekin Öz, Önder Çelik, Ahmet Kadri Gürsel, Turhan Günay, Hacı Musa Kart, Hakan Karasinir and Mustafa Kemal Güngör, the 9th criminal judgeship of the peace of Istanbul stated that "scrutiny of news items, headlines and article details published in the *Cumhuriyet* newspaper lead to the conclusion that the newspaper published many news items which could be considered propaganda for the FETÖ and PKK armed terrorist organisations". To support this

⁵³ *Nedim Şener v. Turkey*, judgment of 8 July 2014.

⁵⁴ *Ibid.*, paragraph 105.

⁵⁵ According to the [information](#) compiled by the NGO Platform for Independent Journalism (P24) as of 18 January, which lists all media workers in question.

⁵⁶ See the Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, [CommDH\(2016\)35](#), 7 October 2016.

assessment, the court listed, among others, a number of articles critical of certain government measures taken in the aftermath of the coup attempt, referred to the affair of the arms sent by the Turkish secret services to Syria which was exposed by the newspaper, as well as to disparaging remarks about the newspaper made by former writers of *Cumhuriyet*, occasional parallels between the headlines of *Cumhuriyet* and *Zaman* newspapers, articles on the destruction caused by anti-terrorist operations in the South-East, and numerous other examples of purely journalistic activity which were considered as pieces of evidence. Considering that the collection of evidence had not been completed, and the seriousness of the charges, the judge decided to order the detention of the suspects.

87. The Commissioner is struck by the complete absence of any consideration for freedom of expression in the judge's assessment, the incongruity of the charges of making propaganda for both FETÖ and PKK at the same time, organisations which have consistently opposed one another, as well as the lack of material evidence establishing any link whatsoever between the suspects and these organisations, aside from a non-contextual reading of newspaper articles critical of the government.
88. In the opinion of the Commissioner, these decisions show that these detentions are unjustified. They also strongly suggest that the aim behind them was that of silencing one of the very few remaining critical, but mainstream and respected, voices in the media. This conclusion is further reinforced by the arrest and subsequent detention of Ahmet Şık, another journalist of the newspaper, for spreading propaganda for the PKK, the Revolutionary People's Liberation Party/Front (DHKP-C) and FETÖ.⁵⁷ These charges against Mr Şık seriously lack credibility: when the Commissioner's predecessor visited him in prison in 2011, he was being kept in detention on remand under what was later revealed to be trumped-up charges by Gülenist prosecutors, in retaliation to his exposure of the infiltration of the Turkish state by the Fethullah Gülen movement.
89. Another detention decision that the Commissioner examined concerns the prominent journalist Ahmet Altan, who was detained for membership in a terrorist organisation and attempt to overthrow the government of the Turkish Republic. The evidence considered by the judge of the peace in this case appears to have been limited to the editorial line of the *Taraf* newspaper of which he had previously been the editor-in-chief, as well as Altan's appearances on *Can Erzincan TV*, with the aim, according to the Court, to "create a public opinion in favour of FETÖ by making programmes against the legitimate government and the elected President". The judge also subscribed to the prosecutors' argument that the fact that the suspect, in a programme on 14 July 2016, used "defamatory statements" against the President and the government, said that their actions were illegal and constituted crimes "with a view to preparing the terrain for a military coup", stated that the President was repeating past mistakes leading to military coups and that he would soon be removed from office and judged, necessarily meant that he knew about the 15 July coup plot in advance. The Commissioner is struck, once more, by the hollowness of the charges and the political content of the decision.

Other forms of harassment specifically targeting journalists

90. It is also a long-standing concern that the Turkish courts systematically fail to carry out a contextual analysis in cases pertaining to journalistic reporting in order to determine whether the contents in question are true, and if so, whether the public has a legitimate interest in the information in question (the so-called defences of truth and public interest), despite the fact that the ECtHR clearly highlighted this issue in a series of judgments. Another principle, established in the case-law of the ECtHR and rarely taken into account by Turkish courts is the need to protect journalistic sources.
91. This problem was illustrated particularly well in the case of the arrest and detention in November 2015 of the then editor-in-chief of *Cumhuriyet*, Can Dündar, and its Ankara correspondent Erdem Gül for espionage after having divulged classified information about trucks used by the Turkish secret services to deliver arms to Syria (and subsequently being singled out by the President of the Republic as traitors and spies). As the Commissioner stated following his April 2016 visit to Turkey, treating the publication of true information of genuine public interest as a form of espionage is simply a threat to journalism as a

⁵⁷ See the [alert](#) in the platform to promote the protection of journalism and safety of journalists.

profession.⁵⁸ While they were released following a judgment of the Constitutional Court on 25 February 2016 finding their detention to be in violation of their right to freedom of expression, this judgment and the Constitutional Court was bluntly attacked by the President and criticised by the Minister of Justice. On 6 May 2016, the lower court convicted them of “revealing state secrets” and convicted them to five years in prison, the sentence being suspended pending appeal.

92. In its judgment, the trial court also overtly criticised the judgment of the Constitutional Court, arguing that it had overstepped its competence, in words alarmingly resembling the remarks of the President and the Minister of Justice. Another cause of concern is the trial court’s decision to admit both the President and the National Intelligence Organization as complainants in the case, despite objections from the defence lawyers, as if they were injured parties. The Court also gave a quasi-limitless definition to the concept of “state secret”, leaving the qualification entirely to the discretion of the authorities, and failed to carry out any balancing between the imperative of protecting state secrets on the one hand, and the public’s interest to know and the contribution of the said articles to the public debate, on the other.
93. This is in blatant contradiction with the case-law of the ECtHR which, in a recent case against Turkey, stated that “press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for publishing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result, the press may no longer be able to play its vital role as “public watchdog” and the ability of the press to provide accurate and reliable information may be adversely affected”.⁵⁹ The Court unanimously found a violation in this case (which involved the search of the professional premises of journalists and the seizure of their documents in order to identify public-sector whistle-blowers), as the Turkish court had not reviewed the classification of the documents in question as confidential, or their potential contribution to the public debate, despite the fact that they had been published in a manner respecting the methods of responsible journalism.
94. The Commissioner notes that the harassment of Mr Dündar, who is currently abroad and risks being imprisoned if he returns to Turkey, continues in other forms, including the arbitrary annulment of his wife’s passport precluding her from travelling, and the current risk of withdrawal of his Turkish nationality by virtue of an emergency decree explicitly providing for that possibility (without regard to whether this would render the persons in question stateless).
95. As detailed above under Part II, the judicial harassment of journalists can be based on several other articles of the Criminal Code, such as incitement to hate and hostility (Article 216), defamation, or propaganda on behalf of a terrorist organisation (Article 7 §2 of the Anti-Terrorism Law). Illustrations of the latter case are the prosecutions related to the solidarity campaign with *Özgür Gündem*, which have targeted, among others, Erol Önderoğlu, the respected journalist and Turkey representative of Reporters without Borders. The examples are too numerous to enumerate and show a consistent pattern of judicial harassment with a clear chilling effect that stifles criticism.⁶⁰
96. The defence often advanced by the Turkish authorities in this connection, i.e. that journalists are not prosecuted or detained in connection with their journalistic activity but for other crimes, loses credibility in view of the facts examined by the Commissioner above. Admittedly, there is no “crime of journalism” and journalists are prosecuted for other crimes in all cases, but their journalistic activity is often the only “evidence” available to establish such crimes.
97. Another observation the authorities have often made is that the persons in question are not journalists. This is linked to the very restrictive system of attribution of press cards by the Turkish authorities, which has moved from a quasi-self-regulatory system where journalists’ trade unions and associations were involved in decisions, to a purely arbitrary administrative

⁵⁸ See the Commissioner’s [press release](#), published on 14 April 2016.

⁵⁹ *Görmüş and others v. Turkey*, judgment of 19 January 2016, paragraph 48.

⁶⁰ See numerous alerts in the Platform, as well as examples in the aforementioned Human Rights Watch report, pages 17 to 32.

one. As a result, only a fraction of journalists exercising their profession in Turkey hold press cards.

98. The Commissioner also notes that pressure on journalism is not limited to Turkish journalists, as a number of foreign correspondents were also targeted, expelled or otherwise prevented from working in Turkey in recent years. One example to which the Commissioner reacted publicly was the raid on the offices of VICE news and the expulsion of its foreign-national correspondents in September 2015.⁶¹
99. Finally, an area examined by the Commissioner's predecessor in his 2011 report on freedom of expression was the social and economic context in which journalists work in Turkey, whose precarious and often exploitative working conditions were already a major problem. Not only has this situation not improved, but it has been compounded in recent years by the fact that many journalists were laid off, often as a direct result of government intervention, such as in pressures exerted on media to fire specific journalists, trustees running companies in a manner conducive to their bankruptcy and, most recently, the outright closure and liquidation of media companies via emergency decrees. It has been estimated that up to 3 000 media workers lost their jobs as a result of this latest measure.

IV. Internet censorship

100. Blocking and filtering of web pages remain a concern since the publication of the Commissioner's predecessor's 2011 report on freedom of expression, in which he found that the censorship of the Internet and the blocking of websites in Turkey was beyond what is necessary in a democratic society.⁶² The Commissioner notes at the outset that Turkey's (now abolished) Telecommunications Authority (TİB) did not provide up to date figures regarding the actual number of blocked URLs or websites since May 2009 and the Turkish authorities declined the Venice Commission delegation's request for these statistics.⁶³ However, according to the EU Commission's Progress Report, as of June 2016 close to 111 786 websites had been banned, of which only 2.6% following a court decision.⁶⁴
101. The blocking and removal of online content continues to be regulated under the Internet Law (Law No. 5651) in Turkey. The Commissioner notes that the Internet Law was scrutinised by the ECtHR which held that blocking access to an entire online platform, as allowed by this Law, was a violation of the right to freedom of expression.⁶⁵ It considered that the legal framework in place in Turkey was inadequate, conferred extensive powers on an administrative body and failed to provide sufficient safeguards against abuses.
102. Despite this clear guidance, the Internet Law was subsequently amended on several occasions since 2014 broadening the scope of internet censorship, although, on the positive side, the authorities allowed for blocking measures to be applied to specific URLs rather than websites. The initial amendments of 8 September 2014 authorized the TIB to collect and store all user logs from the Internet Service Providers (ISPs) and extended its authority to block websites without a court order on the grounds of protecting national security, public order, or preventing crime. Even though on 2 October 2014 Turkey's Constitutional Court annulled the said provisions,⁶⁶ a set of amendments were enacted in March 2015 authorising ministers and the prime minister, in addition to the criminal judges of the peace, to order the TİB to block content when necessary to "defend the right to life, secure property, ensure national security and public order, prevent crime, or protect public health." TİB must execute the order within four hours and submit it to a criminal court for approval within twenty-four hours. The order is automatically revoked if it is not approved by the criminal court within 48 hours.
103. The Commissioner considers that the provisions in the amended texts not only fail to address the core concerns of the ECtHR in the *Ahmet Yildirim* judgment, but aggravate the situation.

⁶¹ Statement published on the Commissioner's Facebook page on 28 October 2015.

⁶² Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey from 27 to 29 April 2011, Freedom of expression and media freedom in Turkey, [CommDH\(2011\)25](#), chapter III b on internet censorship.

⁶³ See the Venice Commission Opinion No. 805/ 201 on Law No 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication ('the Internet Law'), [CDL-AD\(2016\)011](#), 15 June 2016, paragraph 31.

⁶⁴ Commission staff working document, [Turkey 2016 Report](#), 9 November 2016, paragraph 27.

⁶⁵ *Ahmet Yildirim v. Turkey*, judgment of 18 December 2012.

⁶⁶ Turkish Constitutional Court, judgment no 2014/149 of 2 October 2014.

This assessment was validated by the ECtHR in 2015 in its judgment of *Cengiz v. Turkey*,⁶⁷ where it found that the imposition of a blocking order on the entire Youtube website which had remained blocked from 5 May 2008 to 30 October 2010 had not satisfied the condition of lawfulness.

104. The Commissioner draws the attention of the Turkish authorities to the findings of the Venice Commission in its opinion regarding the conformity of the Internet Law and its application in practice with European human rights standards.⁶⁸ The Venice Commission identified a number of important shortcomings in the Internet Law, particularly with regard to the broad authority granted to the authorities to block access to content or to remove it. It recommended that “the law be amended in order to introduce a list of less intrusive measures which would allow the judge to make a decent proportionality assessment and apply the least restrictive measures if they are considered as sufficient and adequate to reach the legitimate aim pursued by the restriction.” Similarly in a press release of 15 April 2016, the OSCE Representative on Media Freedom stated that Law 5651 remained in urgent need of reform.⁶⁹
105. In the aftermath of the coup attempt, through Emergency Decree no. 671 of 17 August 2016 the TİB was closed with all its duties and authority transferred to the Information and Communication Technologies Authority (BTK). The same decree also amended the Law of Digital Communications (Law No. 5809) to authorise the Prime Ministry to take “any necessary measure” on the grounds of “national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms” and to notify the BTK for their implementation. Any company that provides digital communications, including cable or cellular network providers, is obliged to enforce the authorities’ orders within two hours. Thus, the changes effected since July 2016 are, if anything, likely to compound existing problems.
106. As examples illustrating the pervasiveness of Internet censorship in Turkey, over the past two years access to the websites and Twitter accounts of pro-Kurdish media outlets such as Dicle News Agency (DİHA), Özgür Gündem and Azadiya Welat had been banned by the TİB numerous times. Blog-hosting service WordPress was temporarily blocked in July 2015 for hosting five blogs on Kurdish politics. In February 2015 a Turkish criminal court of peace decided to ban access to a total of 49 websites including Charlie Hebdo’s official site, as well as specific pages from the country’s most popular Internet forums, which were deemed to be anti-Muslim or atheist, holding that they “denigrated religious values”.⁷⁰ In April and May 2015 the TİB blocked access to five commonly used LGBTI websites.
107. Access to various social media platforms has also been banned numerous times for not complying with the sweeping broadcasting bans mentioned above. For example in March 2014, access to Twitter and YouTube was blocked following the leak of politically damaging voice recordings of senior officials. Facebook, Twitter, and YouTube were briefly blocked by decisions of criminal judges of the peace on two occasions in April and July 2015⁷¹ until they complied with court orders to remove images and videos related to the killing of prosecutor Mehmet Selim Kiraz and to the deadly bombing of a pro-Kurdish protest in the South-Eastern city of Suruç respectively. In general, criminal judges of the peace appear to have granted blocking requests, and rejected appeals, with very little scrutiny and legal reasoning.
108. In addition to blocking, another issue of concern is the large number of requests made by the Turkish authorities for the removal of content from social media platforms and websites. According to the latest transparency report published by Twitter, Turkey has filed more content removal requests than any other country, suggesting a disproportionate reaction to statements that are considered disturbing or shocking. Requests from courts and government agencies reached 2 493 in the first half of 2016, constituting almost half of the total 5 195 requests Twitter received globally in the period covered by the report. Twitter indicated it complied in 23% of cases.⁷² Likewise, according to Facebook’s Government Requests Report for the period of July to December 2015, the company restricted 2 078 pieces of content on

⁶⁷ *Cengiz and Others v. Turkey*, judgment of 1 December 2015.

⁶⁸ [CDL-AD\(2016\)011](#), *op. cit.*

⁶⁹ See the [press release](#) of Dunja Mijatović, OSCE Representative on Freedom of the Media, published on 15 April 2016.

⁷⁰ Gölbaşı Criminal Court of Peace, decision No 2015/191 of 27 February 2015.

⁷¹ Istanbul Criminal Court of Peace, decision no. 2015/1644 of 3 April 2015 and Suruç Criminal Court of Peace, decision no. 2015/335 of 21 July 2015.

⁷² Twitter [Transparency Report - Turkey](#), accessed on 23 January 2017.

orders from both the BTK and Turkish law enforcement, particularly in compliance with Law No. 5651 on the internet.⁷³

109. The Commissioner welcomes two important judgments delivered by the Turkish Constitutional Court in 2014 regarding freedom of expression on the internet. In a judgment of 2 April 2014 in the framework of an individual application, the Constitutional Court decided that a decision of the TİB on blocking access to Twitter violated the applicants' right to freedom of expression. The Constitutional Court held that the domestic courts' decisions which served as a basis for the blocking order did not justify imposing an access ban on the whole website; thus, TİB's act had no legal basis and constituted a serious violation of the freedom of expression of all Twitter users.⁷⁴ The ban on Twitter was lifted accordingly on 3 April 2014. On 29 May 2014, the Constitutional Court decided, also in the framework of an individual application, that the TİB's decision to block access to YouTube in order to prevent the disclosure of state secrets was in breach of the applicants' right to freedom of expression. Similar to its reasoning in the Twitter case, the Constitutional Court held that there was no legal provision in the Law allowing the domestic authorities to impose a blanket access ban to the entire website (YouTube), on account of one of its contents.⁷⁵ However, both the first instance courts and the legislature appear to be reluctant to follow the principles set by the Constitutional Court in the aforementioned judgments.
110. It is doubtful that the replacement of the TİB by the BTK will have the effect of bringing Turkey's internet censorship practices in line with the Council of Europe standards on freedom of expression. In any event, the Commissioner calls upon the Turkish authorities to limit the arbitrary powers of the relevant administrative authorities in interpreting and applying the law, and to ensure that their actions are subject to review by independent courts.
111. The Commissioner considers that the censorship of the Internet and the blocking of websites in Turkey continues to be exceptionally disproportionate.

Internet throttling and shutdowns

112. It has also been widely reported that Turkish authorities have been increasingly resorting to bandwidth throttling (slowing down) during times of domestic crises, making certain social media and communication platforms inaccessible in practice. Even though the authorities have not acknowledged having recourse to this practice, there have been widespread complaints of severe slowdowns affecting Facebook, Twitter, YouTube and, in some cases WhatsApp, during or after heightened situations such as the release of a video allegedly showing ISIS burning Turkish soldiers alive, the assassination of the Russian ambassador, the night of the coup attempt, as well as the deadly terrorist attacks which took place in Ankara's central station and Güvenpark, and Istanbul's Taksim and Sultanahmet districts. These reports were confirmed by Twitter to some extent, which stated that it suspected "intentional slowing" of their traffic in Turkey.⁷⁶
113. On three occasions on 11 September, 26 October and 4 November 2016, full internet shutdowns affecting the country's southeast regions and millions of internet users were reported. These restrictions, which allegedly lasted for over twelve hours in some cases, coincided with the forced removal of elected HDP mayors from office, the detention of HDP co-mayors Gülten Kışanak and Fırat Anlı and the arrest of multiple HDP MPs.
114. The Commissioner notes that there are no provisions in the Internet Law allowing bandwidth throttling or complete internet shutdowns. An amendment to the Regulation on the Authorisation in Electronic Communications Sector⁷⁷ on 11 June 2016 allows the authorities to suspend and take over services or networks in case of war or similar circumstances, for public security and defence. This amendment has been described by the relevant UN Special Rapporteur as an "Internet killswitch" allowing for the partial or full suspension of Internet access, without any oversight.⁷⁸ However, to the Commissioner's knowledge, neither this

⁷³ Facebook, [Government Requests Report - Turkey](#) (period covered July to December 2015), accessed on 23 January 2017.

⁷⁴ Turkish Constitutional Court, *Yaman Akdeniz and others*, application no. 2014/3986, 2 April 2014.

⁷⁵ Turkish Constitutional Court, *Youtube LLC Corporation Service Company and others*, application No. 2014/4705, 29 May 2014.

⁷⁶ <https://twitter.com/policy/status/754072148289789952>, accessed on 23 January 2017.

⁷⁷ Regulation No. 13078, published in the Official Gazette No 27241 of 28 May 2009.

⁷⁸ Preliminary [conclusions and observations](#) by the UN Special Rapporteur on the right to freedom of opinion and expression to his visit to Turkey, 14-18 November 2016.

regulation nor any other piece of legislation was cited by the authorities when the reported throttling or shutdowns occurred.

115. The Commissioner stresses that the alleged network throttling and shutdowns at such times when access to news updates, communication platforms and emergency services is crucial would constitute a grave infringement of the right to receive information.

Prosecutions and Detentions for Online Activities

116. In his 2013 report,⁷⁹ the Commissioner expressed concerns about arrests carried out during the Gezi protests, reportedly as a result of suspects' social media activities that should have been protected under Article 10 ECHR.
117. The Commissioner notes with concern that prosecutions and arrests for social media activities continued to increase in the period following the publication of this report, some of which resulted in convictions. On 24 December 2016, the Ministry of Interior announced that 10 000 people were under investigation for social media activities considered as, *inter alia*, incitement to hatred, terrorist propaganda and insulting senior state officials. The ministry also stated that in the last six months, 3 710 social media users had been investigated, of whom 1 656 had been detained on remand and a total of 1 203 of those investigations resulted in releases on probation.⁸⁰
118. Over the past year several journalists, public figures as well as ordinary citizens (including a fourteen year old, who was held overnight at a police station in October 2015 for insulting the president on Facebook) have faced such charges for criticising the security operations in south-eastern Turkey on social media or merely sharing caricatures, satirical poems or "memes" (a piece of digital content which is humorous in nature and is spread rapidly by Internet users) about the government or President of the Republic.
119. Another offence which was increasingly used and created a distinct chilling effect was Article 216 regarding insulting the religious values held by a section of society. Fazıl Say, the world-famous pianist and composer, was convicted to a suspended 10-month prison sentence in April 2013, for sharing on Twitter lines attributed to the 11th-century Persian poet Omar Khayyam. Although the sentence was overturned on appeal, this event created a palpable chilling effect, not least because of the attention it received.
120. A recent noteworthy incident in this respect is the lynch attempt against the fashion designer Barbaros Şansal following a controversial video he shared on a social media platform in which he criticised several problems in the country using provocative language and swearing. Persons involved in the lynch attempt, despite being questioned by the police, are, to the Commissioner's knowledge, not under investigation, whereas Mr Şansal was arrested on charges of inciting hatred and violence after the incident. At the same time, no action seems to have been taken against numerous persons who published extremely hateful and violent comments against him on social media, including death threats. The Commissioner stresses that while the language used by Mr Şansal can be considered distasteful or provocative, his remarks still benefit from the protection afforded by Article 10 of the Convention.
121. Referring to his findings in the 2013 report, the Commissioner reminds the authorities of the chilling effect such practices can have on the exercise of the right to freedom of expression and urges them to discontinue resorting to such measures.

Conclusions and recommendations

122. The Commissioner recalls the long-established case-law of the ECtHR which unambiguously states that the freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. It is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".
123. The Commissioner considers that the facts, figures and examples mentioned above, while far from being exhaustive, demonstrate clearly the serious deterioration regarding media

⁷⁹ [CommDH\(2013\)](#), *op. cit.*, paragraphs 127-128.

⁸⁰ See the press release of the Turkish Ministry of the Interior on 24 December 2016: <https://www.icisleri.gov.tr/basin-aciklamasi24122016> (accessed on 12 January 2017)

freedom and freedom of expression in Turkey since his predecessor's 2011 report on the subject. In the Commissioner's opinion, this deterioration represents an existential threat to Turkish democracy.

124. The Commissioner considers that practically all the recommendations in his predecessor's aforementioned report remain valid. This includes the need for a complete overhaul of the Turkish Criminal Code, and in particular of Articles 125 (defamation), 216 (incitement to hatred, degrading a sector of the public or its religious values), 220 §6 (committing an offence on behalf of a criminal organisation without being a member) and 220 §7 (aiding and abetting a criminal organisation without being a member), Articles 285 and 288 (confidentiality of investigations and attempts to influence the judiciary), Article 299 (insulting the President of the Republic), Article 301 (insulting the Turkish nation, the Republic, organs and institutions of the state), 314 (establishment, command or membership of an armed organisation), Article 318 (discouraging persons from doing their military service). The overhaul should take full account of the case-law of the ECtHR and the relevant opinion of the Venice Commission. Similarly, the Anti-Terrorism Law, and in particular its Article 7 §2 (propaganda on behalf of a terrorist organisation), needs to be reviewed completely in order to make it ECHR-compliant.
125. Considering the failure of past amendments of these provisions to prevent new human rights violations, the Commissioner considers that many of these provisions need to be simply abrogated. Defamation, in particular of public officials, should no longer be a criminal offence but, where absolutely necessary, could be subject to proportionate civil sanctions only. It is also clear that legislative changes in this field cannot be piecemeal and must address some structural deficiencies. In the Commissioner's view, this must primarily include the introduction of a systematic reference to the defences of truth and of public interest, to the concept of contribution to public debate, protection of journalistic sources and of the obligation for the judiciary to properly balance any other imperative against freedom of expression and media freedom in all relevant cases, in particular by taking full account of the role of journalism in a democratic society.
126. A profound suspicion of freedom of expression and, in particular, of non-consensual, dissenting, shocking or disturbing statements, permeates the Turkish Constitution and legislation. Whereas the Turkish Parliament recently adopted amendments to the Turkish Constitution which are expected to be submitted to a referendum, the Commissioner regrets to observe that the serious shortcomings in the Constitution's approach to human rights, including freedom of expression, are not at all being addressed and invites the Turkish authorities to remedy this situation. Other crucial legislative changes which are urgently needed concern the Internet Law and the Radio and Television Law, laws and regulations which have been used to punish and stifle critical media and journalists, for example as regards public announcements and press cards, as well as the legal framework affecting academic freedoms.
127. Beyond the important deficiencies of the Turkish legal system, the Commissioner emphasises that a change in attitudes and actions of the Turkish judiciary is a far greater challenge that must be met. Systemic problems in the interpretation and application of legal provisions by judges and prosecutors, highlighted by the Commissioner on numerous occasions, as well as in countless judgments of the ECtHR, have consistently undermined freedom of expression and media freedom in Turkey. The Commissioner's predecessor had underlined, in his relevant report almost six years ago, that in order to eliminate undue restrictions on freedom of expression and media freedom, independence of the judiciary from political or other pressure was key.
128. The validity of that statement was unfortunately proved at different stages in the intervening period. The rapid deterioration in freedom of expression and media freedom went hand-in-hand with the erosion of the independence of the Turkish judiciary. The latter culminated in the drastic measures taken under the state of emergency, which display a serious disregard of the principles of the independence of the judiciary. In this environment of fear, the remaining judges and prosecutors have clearly reverted to their state-centric approach, thereby offsetting progress which was achieved painstakingly through the sustained efforts of the Turkish authorities themselves and the support of various bodies of the Council of Europe.

129. The criminal judges of the peace, in particular, appear to have quickly transformed into an instrument of harassment to stifle opposition and legitimate criticism of the Turkish government, as well as of controlling the information available to the general public, including on the Internet, in co-operation with the prosecutors who have become even more active in targeting critical voices than before. The Commissioner considers that a serious review of these formations is necessary, and urges the Turkish authorities to follow the guidance of Council of Europe bodies, and notably of the Venice Commission whose opinion on this question is pending.
130. Prosecutors and courts must stop using criminal procedures, and in particular detention on remand, to punish and discourage the exercise of freedom of expression, including on the Internet, where there is an absence of direct, incontrovertible evidence establishing criminal wrongdoing and membership of a criminal organisation, in particular when the only basis is the content of journalistic writings or perceived affiliation based on spurious evidence. However, in the Commissioner's opinion, failure to address deep-rooted problems of independence of the judiciary, which have reached alarming levels recently, will render all efforts to improve freedom of expression and media freedom moot. In this connection, the Commissioner must express his grave concerns about the effects of constitutional amendments recently adopted by the Turkish Parliament, as they foresee a significant further diminution of the autonomy of the Turkish judiciary vis-à-vis the executive and legislative branches.
131. When confronted on problems relating to freedom of expression and media freedom, Turkish authorities have tended to minimise the issues, sometimes referring to the existence of similar provisions in the legislation of other member states, but ignoring crucial differences in their interpretation or the scale of their application. In other instances, they have invoked the independence of the judiciary or pointed to cases where proceedings are followed by acquittals. This attitude appears to reflect a disregard for the profound chilling effect which is currently affecting not only the Turkish media, but the entire Turkish society.
132. The Commissioner regrets to observe a significant decrease in the commitment of the Turkish authorities to improve freedom of expression and compliance with the ECHR over the last few years. For example, a government action plan to improve such compliance, in particular with respect to freedom of expression, remained a dead letter, and the Constitutional Court, rather than receiving the support it needed in this critical period, was on the contrary attacked for its most progressive and ECHR-compliant judgments.
133. The Commissioner considers that the main obstacle to an improvement of this situation is a lack of political will, first of all to acknowledge, and then to address the problems highlighted in the body of this memorandum. Indeed, many of the measures which led to the worst forms of chilling effect and impoverishment of the Turkish media landscape were deliberate choices, such as the outright closure of more than 150 media companies. Similarly, there are many examples where the remarkable intolerance of public figures to freedom of expression enabled or encouraged smear campaigns, hate speech and physical violence. In the current context, the judiciary can unfortunately not be expected to resist this overwhelming political pressure, and protect freedom of expression in an ECHR-compliant manner.
134. The Commissioner is aware that this deterioration in media freedom and freedom of expression, as well as increased Internet censorship, came about in a very difficult context: Turkey has been facing civil war at its borders while generously hosting more than three million refugees in an exemplary fashion, as well as a failed coup attempt and innumerable deadly terrorist attacks perpetrated by many violent terrorist organisations. The threats and dangers it must deal with daily are real and formidable. However, the overly wide application of the concept of terrorist propaganda and support to a terrorist organisation, including to statements and persons that clearly do not incite violence, reflects a mistaken belief that restricting freedom of expression in violation of international human rights norms will help solve these problems. Violence and the threat to use violence is the defining component of the concept of "terrorism", which must not be used as a catch-all label to punish statements that do not contain these elements, even when these statements are non-consensual, shocking or politically embarrassing.
135. This, in combination with a clear overuse of defamation, has put Turkey on a very dangerous path, where legitimate dissent and criticism of government policy is vilified and repressed,

shrinking the scope of democratic public debate, including directly inside the Turkish Parliament, and polarising the society. Experience has shown time and time again that it is precisely in such situations that hatred and violence, as well as terrorist organisations, thrive. Protection of human rights, of which media freedom and freedom of expression are the bedrock, is the absolute precondition to the establishment of social peace and a healthy democracy.

136. The Commissioner urges the Turkish political leaders in the strongest possible terms to change course and start separating what is a terrorist action from criticism and dissent, and to display the responsibility and tolerance expected in a democratic society. They must redevelop the political will necessary to tackle the very long-standing systemic issues suppressing freedom of expression, including on the Internet, and finally execute the numerous judgments of the ECtHR, some of which date decades back.
137. It is clearly impossible to do so under the current state of emergency, and the Commissioner once more calls on the authorities to stop it and reverse the numerous unacceptable infringements of freedom of expression, and in particular media freedom and academic freedom, that it engendered. The latest decrees adopted on 23 January 2017, while representing a step in the right direction, are not addressing the core concerns of the Commissioner other than possibly the one on remedies, depending on the future effectiveness of the new commission.
138. The Commissioner wishes to stress his willingness to pursue his constructive dialogue with the Turkish authorities and to offer his assistance and support to their efforts to improve the protection and promotion of human rights in Turkey.