



Strasbourg, 2 December 2016

CommDH(2016)39  
Original version

**Memorandum on the Human Rights Implications of  
Anti-Terrorism Operations in South-Eastern 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. In the course of his visit, the Commissioner travelled to Istanbul, Diyarbakir and Ankara. This 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 Efan 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 of this visit when a coup attempt occurred in Turkey on 15 July. He returned to Turkey 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, both on the human rights implications of the state of emergency declared in Turkey and on topics he had examined during his April visit (see the memorandum issued after the Commissioner's visit to Ankara between 27 and 29 September 2016).<sup>1</sup>
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 specifically on the human rights implications of curfews and anti-terrorism operations in South-Eastern Turkey since July 2015. The Commissioner would like to stress that it does not seek to provide an exhaustive overview of all aspects of Turkish legislation and practice regarding anti-terrorism in South-Eastern Turkey. The scope of the

<sup>1</sup> 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.

memorandum notably excludes the effects of Turkey's anti-terrorism framework on freedom of expression, which the Commissioner intends to deal with in a separate memorandum on freedom of expression and media freedom. It also does not examine issues relating to the lifting of the immunities of Members of the Turkish Parliament elected from the region, an issue which the Parliamentary Assembly of the Council of Europe and the Venice Commission have been following closely.<sup>2</sup> Neither does the present memorandum look into the removal of elected local representatives from office and their replacement by the Turkish government, which was examined by the Commissioner in his aforementioned memorandum on the emergency measures.

7. Following a brief introduction, Part I of this memorandum reviews the use of curfews in South-Eastern Turkey, including their legality and the proportionality of both the curfews and the anti-Terrorism Operations. Part II then reviews the human rights violations caused by curfews and recent anti-terrorism operations in the South-East, including those resulting as a direct effect of curfews and allegations of serious human rights violations due to the conduct of security forces. Part III examines the need for effective investigations and the risk of impunity, focusing first on standards and principles deriving from the European Convention on Human Rights (ECHR), then on shortcomings in the Turkish system identified by the European Court of Human Rights (ECtHR, or the Court) and by the Commissioner and finally on specific findings concerning the effectiveness of investigations with respect to the curfews and anti-terrorism operations. Part IV deals with the need for redress and compensation and is followed by the Commissioner's conclusions and recommendations. Unless explicitly stated otherwise, the information included in the present memorandum was obtained during the Commissioner's visit in April.

## Introduction

8. The Commissioner is fully aware of the severe threat posed to Turkish society by terrorism and terrorist organisations, which include the PKK, as well as of the obligation of the Turkish state to combat this threat. The Commissioner is also aware of the legacy of the armed confrontation between Kurdish separatists and the Turkish security forces, which was characterised by the declaration of a state of emergency in a number of provinces in Eastern and South-Eastern Turkey between 1987 and 2002,<sup>3</sup> and which left in its wake tens of thousands of casualties, an estimated one million displaced persons, as well as a very large body of cases where the ECtHR found that Turkey had breached the European Convention on Human Rights in the context of anti-terrorism operations.
9. Mindful of this particularly difficult legacy, the Commissioner commented in his 2013 Report on the so-called "solution process" announced by the Turkish government in December 2012, aiming at ending the violence in South-Eastern Turkey. In this connection, the Commissioner had particularly welcomed the consultations conducted by Wise Persons with civil society, and encouraged the Turkish authorities to demonstrate how these consultations affect Turkey's human rights policy.<sup>4</sup>
10. The Commissioner notes that, despite reports that an agreement had been reached involving a roadmap for normalising the situation in the South-East, this process was abandoned in the spring of 2015. Following the resumption of hostilities with the PKK starting from July 2015, the Commissioner observed with increasing alarm an escalation of violence in South-Eastern Turkey, as well as a large number of terrorist attacks elsewhere in Turkey, claimed by PKK or groups affiliated with the PKK, or by Daesh. The Commissioner unequivocally condemns once more all terrorist actions and violence targeting Turkish citizens and the Turkish state, expresses his condolences to the families of those who lost their lives in these attacks, and deplores injuries and damages to property.

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<sup>2</sup> 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, which notably found that the constitutional amendment of 12 April 2016 "was a misuse of the constitutional amendment procedure".

<sup>3</sup> Report by Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, following his visit to Turkey from 11 to 12 June 2003, [CommDH\(2003\)15](#), paragraphs 215-235.

<sup>4</sup> 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.

11. The Commissioner wishes to underline that, while terrorist activity in itself is a fundamental violation of human rights, state attempts to combat it must be human rights compliant and remain within the rule of law. Policies which respect established human rights norms, notably those flowing from the ECHR and the case-law of the ECtHR, preserve the values the terrorists are trying to destroy, weaken support for radicalisation among potential adherents and strengthen public confidence in the rule of law. A culture of human rights promotes genuine and lasting security. Conversely, policies which run counter to human rights and democratic values are not only contradictory to Council of Europe member states' international obligations, but also contribute to the spread of extremism,<sup>5</sup> ultimately serving the aims of the terrorist organisations despite the illusion of a short-term increase in security.
12. As articulated by the Committee of Ministers of the Council of Europe, in order to be compatible with established human rights standards, "all measures taken by states to combat terrorism must be lawful" and "when a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued".<sup>6</sup> These principles provided the basis for the following comments and observations of the Commissioner on the new wave of violence and fighting which hit South-Eastern Turkey starting from July 2015.

### **1. The use of curfews in South-Eastern Turkey**

13. As noted above, there has been an escalation in the fighting between Turkish security forces and armed terrorist groups, including in major cities in South-Eastern Turkey starting from the summer of 2015. The Commissioner observes that the hallmark of the Turkish government's response to the deteriorating security situation in South-Eastern Turkey, characterised in particular by the digging of trenches and erecting of reinforced barricades in certain neighbourhoods, has been the declaration of curfews in urban centres starting from August 2015. While these curfews were initially declared for shorter periods in relatively restricted areas, their length, scope and intensity increased quickly and considerably.
14. On 11 September 2015, the Commissioner reacted through a statement to an open-ended curfew which had been declared in the town of Cizre on 4 September, expressing concern at information that public life, including essential services such as healthcare, and means of communication had been severely disrupted, and that entry and exit from the city had been barred, amid reports of disproportionate use of force by security forces against civilians.<sup>7</sup> Already in this statement, the Commissioner stressed that even where there are legitimate reasons to conduct anti-terror operations, these had to be carefully scrutinised in terms of legality and proportionality, including in the light of international human rights standards. The Commissioner also called for access to be granted to independent observers, in particular the national human rights structures in Turkey.
15. On 18 November 2015, the Commissioner made another statement following the lifting of a 12-day long, round-the-clock curfew in Silvan, Diyarbakir (the fifth curfew there since August 2015), stating that imposing open-ended, round-the-clock curfews in entire neighbourhoods or towns until further notice represented a massive restriction of the most fundamental human rights of a huge population. He further stated that the frequent and widespread use of curfews in South-Eastern Turkey since August did not appear to satisfy the criteria of proportionality and necessity in a democratic society, urging the Turkish authorities to reconsider this practice and to ensure that future anti-terrorist operations would be more limited in scope and that the disruption of public life would be strictly proportionate to the aims pursued.<sup>8</sup>
16. Unfortunately, the use of this practice continued and intensified in the months that followed this statement. Official information dated 21 October 2016 received from the Ministry of the Interior refers to 69 curfews in 32 districts (which mainly correspond to towns or neighbourhoods of

<sup>5</sup> See the Position Paper of the Commissioner on Counter-Terrorism and Human Rights Protection, [CommDH/PositionPaper\(2015\)1](#), 5 June 2015.

<sup>6</sup> See the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, [CM/Del/Dec\(2002\)804/4.3-APP3](#), adopted by the Committee of Ministers on 11 July 2002.

<sup>7</sup> See the Commissioner's statement entitled "[Turkey should ensure immediate access to Cizre by independent observers](#)", published on 11 September 2015.

<sup>8</sup> See the Commissioner's statement entitled "[Turkey should ensure the protection of human rights in the fight against terrorism](#)", published on 18 November 2015.

towns) of 9 provinces. The Commissioner observes that these curfews range from periods of less than 24 hours up to round-the-clock curfews lasting 79 days in Cizre and Yüksekova, 81 days in Şırnak or 134 days in Nusaybin<sup>9</sup> for example (before they were converted into more limited curfews that were still in effect as of 21 October). Night curfews were still on-going in Şırnak, Cizre, Silopi and Idil (Şırnak Province), Yüksekova (Hakkari Province), Sur, Lice, Hani, Hazro and Kocaköy (Diyarbakır Province), and in Nusaybin (Mardin Province). Despite the end of anti-terrorist operations, the round-the-clock curfew in one neighbourhood of Sur was being maintained since 11 December 2015, after more than 10 months.

17. The use of curfews raises extremely serious human rights questions, the most important being their lawfulness and proportionality, the two main criteria which would determine their compatibility with Turkey's international human rights obligations. As Turkey did not officially derogate from the ECHR until after 15 July 2016, no deviation from any of Turkey's negative or positive obligations (both substantive and procedural) under the ECHR can be admitted for the period until then, during which the longest curfews and heaviest operations took place.

#### 1.1 *The legality of curfews*

18. The Turkish legal system provides for the use of curfews in the context of states of emergency and martial law, the framework for which is set out in the Turkish Constitution, and the Turkish Laws on the States of Emergency and on Martial Law contain provisions explicitly referring to the imposition of curfews. However, the Commissioner notes that none of the curfews imposed during the period in question had these provisions as their legal basis. Instead, they were all based on administrative decisions, taken by governors and sub-governors in the affected areas, on the basis of the Law on Provincial Administration,<sup>10</sup> which authorises governors (Article 11.a) and sub-governors (Article 32.b) to take the "necessary measures to prevent the commission of crimes and to protect public order and security". This law makes no explicit reference to curfews.
19. Following his visit, the Commissioner already expressed his serious doubts about the legality of these curfews, a question which was yet to be examined by the Venice Commission, Turkey's Constitutional Court and the European Court of Human Rights. The Commissioner stressed that "[a]n administrative decision based on a law that does not even mention the word "curfew" is a very weak basis on which to impose such drastic restrictions of basic human rights, for a huge population and for months on end".<sup>11</sup>
20. The Commissioner notes that in assessing a request for an interim measure relating to a curfew, the Turkish Constitutional Court found that "it could not be argued that the declaration of a curfew by the governor [...] was unfounded".<sup>12</sup> The President of the Constitutional Court informed the Commissioner that the Constitutional Court was not able to apply the tests of legality and proportionality *in abstracto*, and that the curfews would be scrutinized on these two grounds when the relevant applications are examined on the merits. Despite this clarification, the Commissioner observes that many in Turkey concluded from the abovementioned judgment that the Constitutional Court had confirmed that the curfews had sufficient legal basis, including the Minister of Justice who made that assertion to the Commissioner.
21. The Commissioner notes that, at the request of the Monitoring Commission of the Parliamentary Assembly of the Council of Europe, the European Commission for Democracy through Law (Venice Commission) examined this question and adopted an opinion on the legal framework governing these curfews on 13 June 2016. For its opinion, the Venice Commission examined in considerable detail the Turkish legal framework and the arguments of the Turkish authorities regarding their choice not to use the legal basis provided in the Turkish Constitution, including their view that the practice of using the Law on Provincial Administration already provided sufficient legal certainty to the local population. Refuting these arguments, the Venice Commission reached the conclusion that neither the administrative decisions in question, nor the

<sup>9</sup> Based on official information as well as the [report](#) of the Turkish Human Rights Foundation entitled "Declared Curfews between 16 August 2015 and 16 August 2016 and Civilians who lost their Lives", 21 August 2016.

<sup>10</sup> Law No. 5442 of 10 June 1949.

<sup>11</sup> See the Commissioner's [press release](#), published on 14 April 2016.

<sup>12</sup> Decision of the Turkish Constitutional Court in the case of *Mehmet Girasun and Ömer Elçi* (Application no: 2015/15266), 11 September 2015, paragraph 14.

Law on Provincial Administration, met “the requirements of legality enshrined in the Turkish Constitution and resulting from Turkey’s international obligations in the area of fundamental rights, in particular under the ECHR and relevant case-law”.<sup>13</sup> In addition, the Venice Commission identified further important shortcomings in the legal framework governing curfews in Turkey (which had not been used in the latest curfews), recommending a number of measures to remedy this situation.

22. Following this Opinion, the Parliamentary Assembly of the Council of Europe called on Turkey to “abide by its own laws and amend its legal framework in line with the Venice Commission opinion on this issue”.<sup>14</sup>
23. The Commissioner fully agrees with the Venice Commission that the practice surrounding curfews cannot be considered as “prescribed by law” within the meaning of the ECHR and the case-law of the ECtHR. This has the important consequence that restrictions to the enjoyment of human rights protected under several articles of the ECHR caused by the curfews can be automatically considered to be human rights violations.

### 1.2 *Proportionality of curfews and the anti-terrorism operations*

24. The Commissioner considers that the proportionality of curfews and the related counter-terrorist operations is another important element to be taken into account in order to assess the extent of human rights violations which occurred during this period. In particular when conducting operations where lethal force is used, an important principle that the authorities must adhere to is to plan and control them in such a way so as to minimise, to the greatest extent possible, recourse to lethal force and human losses, and to take all feasible precautions in the choice of means and methods by showing the requisite care for the lives of the civilian population.<sup>15</sup>
25. It is clear to the Commissioner that the Turkish authorities faced an extremely dangerous and volatile situation in the present cases. Pictures showed by the authorities and consistent eyewitness reports indicate the deployment by terrorist militia of advanced urban guerrilla warfare tactics, including reinforced barricades, trenches, booby traps, tunnels and passages from one building to another. The Commissioner was also very troubled by the reports that these groups were actively seeking to recruit minors. The Turkish authorities informed the Commissioner that over the course of the operations, they had seized 4 416 firearms and almost 50 tons of explosives, which also attests to the intensity of the terrorist threat. The Commissioner especially deplores the fact that, according to official figures provided by the Undersecretary of the Ministry of the Interior during his visit in September 2016, 198 members of security forces lost their lives and 1 762 were injured in the course of the operations.
26. The Commissioner understands that the operations started mainly as police operations, while becoming mixed police/military operations characterised by an increasing involvement of the military over the period.
27. There is no doubt about the fact that a huge population has been affected by the curfews and anti-terrorism operations. According to the figures quoted by the Parliamentary Assembly of the Council of Europe, 1.6 million people had been affected by the curfews based on the populations of the urban centres according to the latest census figures, and at least 355 000 persons had been displaced.<sup>16</sup> The official figures provided to the Commissioner on 20 May 2016 regarding the total number of displaced persons from seven districts out of the 22 districts affected (Centre, Cizre, Silopi and İdil in Şırnak, Sur in Diyarbakır, Nusaybin in Mardin, and Yüksekova in Hakkari) was 280 500 for a total population of 590 083.

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<sup>13</sup> Venice Commission Opinion No. 842/2016 on the Legal Framework governing Curfews, [CDL-AD\(2016\)010](#), 13 June 2016, paragraph 99.

<sup>14</sup> Resolution of the Parliamentary Assembly of the Council of Europe on the functioning of democratic institutions in Turkey, [Resolution 2121 \(2016\)](#), 22 June 2016, paragraph 11.

<sup>15</sup> See, for example, *Ergi v. Turkey*, judgment of 28 July 1998, and *Finogenov and others v. Russia*, judgment of 20 December 2011.

<sup>16</sup> [Resolution 2121 \(2016\)](#), *op. cit.*, paragraph 10.

28. According to law enforcement records, the number of terrorists “rendered ineffective” or “counteracted” (“*etkisiz hale getirilen*”) was 3 566 according to the information provided by the Undersecretary of the Ministry of the Interior in September 2016. According to official figures provided in October 2016 by the Ministry of the Interior, 873 terrorists were killed, 196 were injured, and 718 surrendered or were captured alive in the areas under police jurisdiction, these figures being 358, 19 and 721 for areas under the jurisdiction of the gendarmerie. The Commissioner must draw attention to a big contrast between these figures and the number of affected and displaced civilians, which raises serious doubts about the proportionality of the operations. According to official figures relating to Sur, for example, 22 000 persons were displaced for 50 terrorists “rendered ineffective”, a ratio of 1 to 440.
29. It is also beyond doubt that the extent of the destruction has been tremendous. For example, the Commissioner witnessed the destruction in a street in the Sur neighbourhood of Diyarbakir from the location where the President of the Diyarbakir Bar Association, Tahir Elçi, was murdered: all the buildings in that street, without exception, had collapsed in heaps of rubble. The Commissioner understands that this was only one street among several neighbourhoods in Sur which had been subjected to curfews. The Governor of Diyarbakir estimated that 50% of houses in six neighbourhoods in Sur had become entirely uninhabitable, and that a further 25% had been damaged. Human Rights Watch released satellite imagery which shows similar levels of destruction in the Cudi and Sur neighbourhoods of Cizre.<sup>17</sup>
30. According to numerous credible reports, backed up by documentary evidence and video footage, the Turkish security forces deployed heavy weaponry in some cases, including artillery and mortar fire, and the use of tanks and heavy machine guns. This is consistent with the level of destruction witnessed by the Commissioner. There have also been some allegations, backed up by video footage, of aerial bombardments, in particular concerning the towns of Idil and Nusaybin.
31. In written information provided to the Commissioner’s Office on 20 May 2016, the Turkish authorities outline the reasons behind the declaration of curfews and operations as the following:
- “clearing booby-trapped trenches and barricades;
  - counteracting terrorists and ensuring public order and security;
  - making the distinction between terrorists and citizens during the course of the operations;
  - preventing civil citizens from being harmed by the trapped bombs planted by the terrorist organisation and being used as human shields;
  - minimising the influence of the conflicts upon the citizens”.
32. The Commissioner fails to see how curfews were considered the most appropriate response, in particular with respect to the last three of these reasons. He was particularly struck by the assertion of the Ministers of the Interior and Justice, as well as of the Governor of Diyarbakir, that the curfews were announced in advance in many cases, or that operations started with some delay after the curfew was declared, so that citizens could evacuate the affected zones. The Commissioner also heard of many cases where the authorities considered it normal that persons would evacuate their homes during a curfew, or were even encouraged or helped by the authorities to do so: the Governor of Diyarbakir estimated, for example, that 95% of the civilian population had left Sur towards the end of the operations.
33. At the same time, it was asserted that curfews continued uninterrupted around the clock, in order to prevent movements into and from the conflict zones by terrorists who, it was argued, would otherwise have planted new bombs or used civilians as human shields. The Commissioner must also note that it was widely reported that in some cases, teachers received messages inviting them to leave the towns in question, even prior to the official declaration of a curfew.
34. For the Commissioner, these two sets of assertions sound entirely contradictory: if evacuation of the zones was desirable, declaring a curfew, which is effectively a ban to leave one’s home at the risk of facing administrative fines and/or criminal sanctions, could hardly be considered the appropriate measure for that purpose. For the aim of removing the trenches, barricades and

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<sup>17</sup> See the [report](#) of Human Rights Watch entitled “Turkey: State Blocks Probes of Southeast Killings”, 11 July 2016.

terrorists from these zones, while preventing harm to the civilian population, it seems to the Commissioner that an evacuation order prior to operations, while fully taking charge of the humanitarian needs of the evacuated civilian population, would have been much more in keeping with those aims. This is all the more so considering the length of these curfews, which lasted for more than three months in some cases, as well as the fact that the local population had no way of knowing how long they would last, since they were open-ended and lasted until further notice.

35. The Commissioner must therefore conclude that the civilians facing a severe terrorist threat were subjected to conflicting orders and had to make extremely difficult choices without clear, unambiguous guidance from the authorities when this was desperately needed.
36. Furthermore, the Commissioner was also surprised by the assertion of the authorities that they took precautions to ensure that some amenities, such as pharmacies, supermarkets and bakeries, were left open in curfew zones, which presupposes that citizens were expected to seek provisions by breaking curfew. In any event, the Commissioner cannot see how civilians who remained under curfew zones for such a long time could have survived without being forced to break the law and leave their houses regularly for basic necessities.
37. This ambiguity is particularly troubling as heavy fighting was going on and persons risked both terrorist fire and collateral damage from security forces, even leaving aside serious allegations of force used by security forces on civilians breaking curfew. While the governor of Diyarbakir told the Commissioner that the authorities distributed 2 100 packages of food and 11 000 loaves of bread in Sur, these figures seem inadequate considering that up to 2 000 civilians were estimated to have stayed in the curfew zone during an uninterrupted, around-the-clock curfew starting on 11 December 2015 and continuing well after the end of the anti-terrorism operations on 9 March 2016.
38. Finally, the authorities gave every assurance that the operations were conducted extremely carefully in such a way as to minimise civilian casualties. However, the Commissioner finds that the level of destruction in some of these areas clearly shows that fighting was very intensive and lends credibility to reports that heavy weaponry was employed by the Turkish security forces. Such a practice is impossible to reconcile with these dense urban zones with such large civilian populations, when open-ended, around-the-clock curfews effectively suspended the freedom of movement of the said population.
39. The Commissioner acknowledges efforts made by the Turkish authorities to cater for those affected by the operations: according to official information provided in May 2016, the authorities provided 39 million TRY in financial aid (approximately 11.6 million euros), 39 340 food packages, 11 000 loaves of bread, 9 750 blankets, one lorry of clothing aid, as well as 3 000 jobs through the Turkish Employment Agency. The Governor of Diyarbakir also informed the Commissioner that the governorate helped parents transfer their children to new schools and helped them with transport.
40. However, the Commissioner gained the impression that, while commendable, this relief effort was organised piecemeal, with no clear co-ordination. These figures also seem wholly inadequate considering the scale of the operations and the extent of the disruption of the lives of the local population, which consequently was mainly left to its own devices or had to rely on the solidarity of their extended families. This, combined with the facts that the curfews were open-ended and that the operations were increasingly conducted by the military, suggests to the Commissioner that the authorities were unable to predict adequately the scale of the terrorist resistance and the length of the operations, thereby failing to take the appropriate precautions to minimise the effects on civilians.
41. Under these circumstances, the Commissioner cannot consider that the curfews and the anti-terrorist operations accompanying them as having been proportionate to the aims pursued.

## 2. Human Rights violations caused by curfews and recent anti-terrorism operations in the South East

42. The practice of curfews, as described above, clearly affected the enjoyment of human rights of a very large number of persons in the cities concerned. In its aforementioned opinion, the Venice Commission stated that the “catalogue of rights and freedoms liable to be affected by a curfew may vary in length depending on the particular context in which it is imposed” and may include: the right to liberty and security of the person (Article 5 of the ECHR); the right to private and family life (Article 8); the freedom of assembly and the freedom of association (Article 11); the freedom of religion (Article 9); the freedom to receive and impart information (Article 10); the right to peaceful enjoyment of property (Protocol No. 1, Article 1); the right to education (Protocol No. 1, Article 2); or the prohibition of torture and inhuman or degrading treatment (Article 3), as well as the right to life and to physical integrity (Article 2).<sup>18</sup>
43. Whereas curfews are generally associated with states of emergency and are ordinarily limited in length (i.e. a certain number of hours per day), the curfews imposed by the Turkish authorities, as described above, were imposed in “normal” times, were open-ended, round-the-clock, uninterrupted for weeks or even months, and affected urban centres with considerable populations. They are unprecedented in the experience of the Commissioner. Neither is there any evidence of such a practice in the case-law of the ECtHR. Indeed, it is difficult to imagine a harsher application of a curfew. The curfews in question are therefore likely to have affected all the rights enumerated by the Venice Commission.
44. Following from the abovementioned considerations relating to the legality and proportionality of these curfews, the Commissioner is of the view that the open-ended, round-the-clock curfews have directly caused a number of human rights violations in their own right (2.1), as opposed to specific human rights violations caused by the implementation of the operations or the conduct of security forces concerning which the Commissioner received numerous, credible and consistent allegations (2.2). Regarding this latter category, the failure to carry out effective investigations would lead to further human rights violations (3).

### 2.1 Human rights violations as a direct effect of curfews

45. In its aforementioned opinion, the Venice Commission stated that questions might be raised about the “direct consequences of an extended curfew on the right to liberty protected by Article 5 of the ECHR [...] and the compatibility of the restrictions on these rights with Article 5.1 of the ECHR”.<sup>19</sup> The Commissioner notes that the ECHR system distinguishes between the right to liberty protected under Article 5 of the ECHR and liberty of movement protected under Article 2 of its Protocol No. 4 (not yet ratified by Turkey). However, the ECtHR clearly stated that “the difference between deprivation of and restriction upon liberty [of movement] is nonetheless merely one of degree or intensity, and not one of nature or substance”.<sup>20</sup>
46. The persons subjected to the curfews in question were in essence confined to their homes for extended periods of time and any deviation from this behaviour was not only unlawful, but punishable with penalties which could extend to imprisonment. This implies a restriction of liberty of the highest degree and intensity, equivalent to a house arrest for all intents and purposes. The Commissioner is therefore of the view that these measures amounted to a deprivation of liberty within the meaning of Article 5 of the ECHR. In this respect, the Commissioner notes that Article 5.1 provides an exhaustive list of cases where a deprivation of liberty is admissible, which do not include any of the grounds for which the curfews were declared. This suggests that the curfews may have violated this Article.
47. It is also clear from the circumstances that, by their very nature, the curfews and the anti-terrorist operations imposed very severe restrictions on the enjoyment of the rights to private and family life, to the freedom of assembly and association, to receive and impart information and to peaceful enjoyment of property. Given that the relevant Articles of the ECHR require any interference with these rights to be prescribed by law and proportionate, and in the light of his

<sup>18</sup> [CDL-AD\(2016\)010](#), *op. cit.*, paragraph 18.

<sup>19</sup> *Ibid.*, paragraph 90.

<sup>20</sup> *Guzzardi v. Italy*, judgment of 6 November 1980, paragraph 92.

assessment above, the Commissioner considers that systematic human rights violations are also likely to have occurred regarding these rights.

48. As regards the right to education, the Turkish authorities recognise that education of many children was severely disrupted during this period, in some cases with teachers being evacuated from the affected areas before the start of the operations. According to the information provided by the responsible Ombudsperson, 68 individual applications had been made to the Ombudsman Institution regarding the violation of the right to education and were being examined. Their information indicated that 115 422 children had been transferred to other schools in the region, and 12 524 had received remedial education. However, it is not disputed that for children of families remaining in the curfew zones, receiving education would have been entirely impossible for extended periods of time. While Article 2 of Protocol No. 1 of the ECHR does not contain an exhaustive list of legitimate aims, in accordance with the case-law of the ECtHR, any restriction to this right must nonetheless be foreseeable for those concerned and proportionate to the aim pursued.<sup>21</sup> The Commissioner is of the opinion that these two conditions are not met in the present context. The Commissioner notes however that the Turkish Ombudsman reached the opposite conclusion, by rejecting applications of 66 persons regarding the right to education, considering that the curfews were legal and restrictions of the right to education were proportionate and necessary.<sup>22</sup>
49. Finally, all evidence suggests some level of deprivation of the local population, with widespread reports of disruptions of access to water, food, essential treatments and medicines, as well as other basic services and means of communication. It is clear that in some cases such deprivation resulted from the actions of terrorists who, according to the authorities, destroyed for example water tanks or pipes, including in summer temperatures above 40°C, or deliberately attacked the electricity infrastructure. Furthermore, access to emergency services appears to have regularly been disrupted owing to barricades and trenches, as well as fighting in the streets. However, the Commissioner considers that the nature of the curfews, confining persons to their homes round-the-clock in an unsafe area, made such deprivation inevitable. The Commissioner also observes that affected persons, including those who have left their homes, were systematically deprived of enjoyment of their property or their income, the authorities' relief efforts appearing to be haphazard and/or inadequate in relation to the scale of the need.
50. In the Commissioner's opinion, it must be acknowledged that this situation which lasted for sustained periods reaching weeks or even months may have gone well beyond a violation of the right to private and family life: the uncertainty as to how long the curfew would last, the conflicting signals from the authorities as to whether persons had to stay in their homes or evacuate the area, as well as the fact that there was a credible threat to life and physical integrity for those who obeyed the curfew order and stayed, cannot but have created severe mental anguish and suffering among the civilian population. It cannot be ruled out, therefore, that the level of psychological suffering may have reached the threshold of inhuman or degrading treatment prohibited under Article 3 of the ECHR, in accordance with the case-law of the ECtHR. This situation also explains the widespread feeling that the Commissioner encountered among the residents in the region of having been subjected to a form of "collective punishment".

## 2.2 *Allegations of serious human rights violations due to the conduct of security forces*

51. Since the beginning of the curfews and anti-terrorism operations in South-Eastern Turkey, The Commissioner's Office has been receiving allegations of very serious human rights violations at an unprecedented scale. Some of these allegations concerned the reported use of unjustified and excessive force by members of security forces, including actions violating Article 2 of the ECHR (right to life). It is important to note that such violations are reported by some of Turkey's leading human rights organisations, such as Mazlumder, Human Rights Foundation and Human Rights Association, as well as international NGOs, including Amnesty International and Human Rights Watch. The Commissioner continued to receive these allegations during and after his visit.

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<sup>21</sup> See *Catan and others v. Moldova and Russia*, judgment of 19 October 2012, paragraph 140.

<sup>22</sup> Decision of the Ombudsman Institution in the petition No. 2015/5329, 23 August 2016.

52. Naturally, during the visit the Commissioner raised these allegations with the Turkish authorities, who defended a diametrically opposing view of the events in question. A striking discrepancy concerns the figures of civilians who died as a result of terrorism or collateral damage in anti-terrorist operations: while the Human Rights Foundation of Turkey claimed having documented 310 deaths of non-combatant civilians during the operations at the time (subsequently updated to 321, of which 79 children and 30 senior citizens),<sup>23</sup> this figure according to the Minister of the Interior was 47.
53. In this connection, the Commissioner notes that, in response to his explicit request for official figures on deaths of civilians during the operations, the information provided by the Turkish authorities in May and October 2016 omits any information about dead or injured civilians and gives only the number of deaths of security officers and the number of “counteracted” terrorists. This reinforces claims that the authorities have so far not fully and publicly acknowledged civilian deaths.
54. The allegations of serious violations of human rights received by the Commissioner are too numerous and varied to describe in detail within the scope of this memorandum. The following should only be considered a brief, non-exhaustive overview.
55. Some of the most serious allegations received by the Commissioner concern the operations conducted in Cizre. The Commissioner examined many reports, including a joint report<sup>24</sup> by five NGOs including the Human Rights Foundation, Human Rights Association and Diyarbakir Bar Association, reports by Mazlumder,<sup>25</sup> and Human Rights Watch,<sup>26</sup> as well as many other national or international bodies. The Parliamentary Assembly of the Council of Europe also referred to “allegations of serious human rights violations, notably in Cizre, which require due and effective investigation”.<sup>27</sup>
56. The Commissioner also notes that the ECtHR indicated five interim measures under rule 39 of the Court regarding requests received with respect to applicants from Cizre: these cases concerned injured persons in need of urgent medical care. The ECtHR ordered the Turkish government to take appropriate measures to protect the lives of the applicants and requested further information on the situation of these persons, while urging applicants to make an application first to the Turkish Constitutional Court. The Constitutional Court refused to grant any interim measures, based notably on certain contradictions in the requests as compared to the information received from the authorities. The Commissioner understands that the ECtHR was satisfied by the assessment made by the Constitutional Court and did not indicate any further interim measures, but decided to give priority to the treatment of the applications. Of the five interim measures indicated, one applicant finally received medical treatment, whereas the other four interim measures were lifted when the applicants died.
57. The number of deaths which occurred in Cizre, other than deaths of security personnel, is heavily disputed. Human rights groups claim that as many as 66 identified civilians, including 11 children, lost their lives during the operations.<sup>28</sup> In footage that caused a strong reaction from the United Nations High Commissioner for Human Rights, security forces are seen opening fire on what appears to be unarmed civilians carrying white flags, who were allegedly trying to rescue injured people and retrieve dead bodies.<sup>29</sup> There have been also numerous claims that the security forces used tanks and mortar fire, causing deaths and injuries. Human Rights Watch claims that it documented at least two incidents in which the evidence indicates security forces firing mortar rounds on the Dağkapı neighbourhood, leading to the death of two children.<sup>30</sup>

<sup>23</sup> Turkish Human Rights Foundation, *op. cit.*

<sup>24</sup> [Joint report](#) by the Human Rights Association, Turkish Human Rights Foundation, Health and Social Service Workers Union, Diyarbakir Bar Association and Agenda Child Association entitled “79 days of Curfew: Cizre Review Report”, 31 March 2016.

<sup>25</sup> [Report](#) by Mazlumder entitled “Cizre Investigation and Monitoring Report on Developments During The Round-The-Clock Curfew Imposed on The Town Between 14 December 2015 and 2 March 2016”, 10 May 2016.

<sup>26</sup> Human Rights Watch, *op. cit.*

<sup>27</sup> [Resolution 2121 \(2016\)](#), *op. cit.*, paragraph 13.

<sup>28</sup> Mazlumder, *op. cit.*, and Human Rights Watch, *op. cit.*

<sup>29</sup> See the [press release](#) of the United Nations High Commissioner for Human Rights entitled “Turkey: Zeid concerned by actions of security forces and clampdown on media”, published on 1 February 2016.

<sup>30</sup> Human Rights Watch, *op. cit.*

58. A major point of contention concerns the events having occurred in three basements, also at the origin of the applications for interim measures to the Court mentioned above, where a number of persons died as a direct result of the anti-terrorism operations, with estimates ranging from 130<sup>31</sup> up to 189.<sup>32</sup> The Commissioner observed that versions of the events, including such basic facts as whether any of those trapped in the basements were injured people, civilians or even children, were very contradictory depending on the interlocutor. However, it is indisputable that the picture is highly incomplete and very troubling.
59. What seems to be established is that those who were surrounded by the security forces towards the end of the operations were all killed. Many human rights NGOs raised concerns that these might have been extrajudicial killings. An MP of the Peoples' Democratic Party (HDP) from Cizre claimed that the basements were stormed while mediation brokered by him was on-going to obtain the surrender of the persons inside, but the authorities deny this claim. There were widespread reports, including in the media, that the bodies of the deceased which were transferred for autopsies were naked at the moment of examination (thus an important part of the evidence was lost) and that some lacked body parts or were charred beyond recognition, necessitating DNA tests for identification, which had not yet been concluded at the time of the Commissioner's visit in April.
60. In general, families reported difficulties in finding and claiming the bodies, as well as unreasonable restrictions regarding burials. A case reported to the Commissioner by lawyers concerned Taybet Inan, a woman shot dead near her home in Silopi, whose body could not be retrieved for seven days due to heavy fighting and, allegedly, indiscriminate fire opened by security forces on family members attempting to retrieve the body. The Commissioner understands that Ms Inan's son made an application to the Constitutional Court, and after its rejection, to the ECtHR.
61. In this connection, the Commissioner notes with profound concern several changes made between January and April 2016 to the Regulations relating to the implementation of the Law on the Forensic Institute,<sup>33</sup> as well as to the Regulations relating to cemeteries,<sup>34</sup> which had as a result a drastic reduction of the period during which family members can claim bodies from the morgue (from 15 to 5 days), and created a new obligation for family members to bury these bodies within 24 hours, failing which governors and sub-governors can exercise a new power to order the burial themselves. The Human Rights Foundation of Turkey claims that due to these changes, 79 bodies were stuck at forensic institutes or buried in locations without the knowledge of family members. The Commissioner must express his shock at this practice, applied in areas subjected to severe restrictions on movement, and which could easily prevent family members from participating in funeral ceremonies and paying last respects. The Commissioner recalls that under the case-law of the ECtHR, such interferences may constitute violations of Article 8.<sup>35</sup>
62. Two cases, which were covered also in the Turkish media, concerned the deliberate dragging of a dead body behind an armoured vehicle and the display of the naked body of a woman, both presumed terrorists captured dead during operations. These cases created public outrage and they are the only two cases in respect of which the Commissioner received information about the existence of criminal proceedings against security forces.
63. The Commissioner also received several allegations of ill-treatment of persons arrested and detained during the curfews. He observes, in particular, that the UN Committee against Torture, in its concluding observations adopted in May 2016, expressed serious concern "about numerous credible reports of law enforcement officials engaging in torture and ill-treatment of detainees while responding to perceived and alleged security threats in the south-eastern part of the country (e.g. Cizre and Silopi)".<sup>36</sup>

<sup>31</sup> Human Rights Watch, *op. cit.*

<sup>32</sup> Mazlumder, *op. cit.*

<sup>33</sup> Regulations published in the Official Gazette No. 25539 of 31 July 2004.

<sup>34</sup> Regulations published in the Official Gazette No. 27467 of 19 January 2010.

<sup>35</sup> See, for example, *Sabanchiyeva and others v. Russia*, judgment of 6 June 2013.

<sup>36</sup> Concluding observations of the United Nations Committee against Torture, [CAT/C/TUR/CO/4](#), 2 June 2016, paragraph 11.

64. Other very serious allegations relating to the operations included the following (the Commissioner stresses that this is a non-exhaustive list):
- Operations conducted outside areas with trenches and barricades, whereas the removal of these were the avowed reason behind the operations;
  - the use of hospitals<sup>37</sup> and schools, as well as private homes by security forces as bases of operations;
  - Unjustified seizure of private property – the Commissioner was informed of at least one case, backed by documentary evidence, where it was claimed that a family manor had been seized by security forces outside the zone of operations, with a retroactive attempt to expropriate the owners who were not able to salvage family heirlooms;
  - Wilful and unnecessary destruction of private property, including humiliating intrusions into personal effects and leaving degrading messages in persons' homes, even smearing personal belongings with human faeces.
65. The Commissioner was also informed – and shown images and video footage – of many cases of racist and chauvinist slogans being painted on buildings by security forces and songs associated with ultra-nationalist movements being played at full volume from armoured vehicles. Some of these clear cases of misconduct have been acknowledged by the Turkish authorities, the Minister of the Interior referring to his personal instructions to stop such practices, as well as to disciplinary proceedings that have been initiated. In this connection, the Commissioner noted Mazlumder's assertion that:
- “the frequency and the content of the messages left on the walls in the streets or in the locals' houses in Cizre are the same or similar to the messages left in other towns under curfew, a situation which strengthens the assumption that those writings are not exceptional. It is thought that investigations launched into such conduct by public officials have not proved a deterrent to the security forces, prompting them to continue similar acts as they go unpunished. Writing of such messages on the walls during operations which are claimed to be aimed at ensuring public security show that members of the security forces are filled with feelings of hatred and hostility towards the civilians in the towns where they conduct security operations”.<sup>38</sup>
66. The Commissioner observes with deep regret that such practices reinforced a widespread perception of the curfews and anti-terrorism operations as “collective punishment” of the civilian population, who were allegedly automatically branded as PKK-sympathisers by the security forces.
67. The Commissioner notes that the special circumstances surrounding these curfews and anti-terrorism operations make these allegations particularly difficult to refute: the areas in question were blockaded and cut off from the outside world, making media access impossible. In addition, journalists seeking to report on the events faced serious risks. Refik Tekin, the cameraman who captured the abovementioned images in Cizre on which the UN High Commissioner commented, was shot during that event. The Commissioner received several allegations of cases where journalists, in particular journalists critical of the government, were deliberately targeted or impeded by security forces. There was even some footage, shown in some Turkish media, of a police officer threatening a journalist by putting a gun against his head in Silvan, before the journalist was taken into custody. It was later reported that the journalist in question was subsequently fined, whereas the police officer faced no sanctions.
68. In addition, contrary to the Commissioner's urgent calls in his two statements concerning Cizre and Silvan referred to above, the authorities do not appear to have facilitated or allowed the access of independent observers into the areas in question. While the Commissioner had welcomed that the Turkish Human Rights Institution visited Cizre after the first round of operations in September, he learned during his visit that the Institution had subsequently abandoned the idea of drawing up a report on that visit. The Commissioner was also perplexed

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<sup>37</sup> Human Rights Watch, *op. cit.*. Human Rights Watch claims that it was able independently to confirm with satellite imagery the presence of several military vehicles within the state hospital compound in Cizre on four separate dates: 18 and 24 December 2015 and 12 and 27 January 2016.

<sup>38</sup> Mazlumder, *op. cit.*

by the Ombudsman's explanation that, despite numerous applications to his Institution, the situation in the region was considered too tense or sensitive to justify a fact-finding visit. This opinion was also reflected in a subsequent dismissal decision by the Ombudsman concerning the basements in Cizre.<sup>39</sup>

69. The authorities' attitude regarding the work of human rights NGOs is another element to be taken into account. The Commissioner received several allegations of NGOs being unduly restricted by security forces from interviewing locals after the operations had been concluded. The Commissioner also noted with concern a statement by the President of the Turkish Republic on 7 April 2016 which referred to certain NGOs, without naming them explicitly, publishing reports on the situation in the South-East, and which challenged their role in writing such reports stating that they should be "countered" (*üzerine gitmek*). It has been reported that, following these statements, police and local authorities prevented several local groups from operating in Cizre, Amnesty International researchers also being prevented from visiting it.<sup>40</sup>
  70. The Commissioner explicitly voiced his concern about this statement after his visit. He repeats once more his concern about such rhetoric concerning NGOs: writing reports is precisely their role in a democratic society. The authorities should not stigmatise them, but create an enabling environment where they can work.
  71. The Commissioner considers that the combination of these factors, namely areas cut off from the outside world with no access of independent observers and media, created a particularly opaque situation, propitious to all kinds of allegations and rumours, and fuelling deep mistrust of the official version of the events among the local population. It is also precisely for these reasons that the Commissioner can neither take at face value nor dismiss these allegations, while stressing that the available evidence supporting them is extremely worrying, despite the assurances of the authorities to the contrary.
  72. The Commissioner considers that for the Turkish authorities to dismiss these allegations outright, as misguided, manipulated, or as malicious "terrorist propaganda", and not to treat them with the requisite seriousness, will only cause the existing resentment to grow and an already big rift in the region to further widen. The only way to convincingly dispel these allegations is to shed light upon these events in a convincing fashion through credible and effective investigations.
- 3. The need for effective investigations and the risk of impunity**
73. It is a core principle of international and European human rights law that those committing serious human rights violations must be held to account for their actions. The fight against impunity is also an essential cornerstone of the rule of law in any democratic society: a lack of accountability encourages repetition of crimes, as perpetrators and others feel free to commit further offences without fear of punishment. Impunity for those responsible for acts amounting to serious human rights violations inflicts additional suffering on victims. All these principles are recalled in the 2011 Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, which provides that "States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system".<sup>41</sup>
  74. The Committee of Ministers observed that, when impunity occurs, faults might be observed, among others, at each stage of the judicial or administrative proceedings. These guidelines include several minimum standards, notably as regards prosecutions (Section VIII), court proceedings (Section IX), as well as the involvement of the victims in the investigations (Section VII).
  75. The Commissioner stresses that the problem of effective investigations and impunity of security forces is a very long-standing and entrenched problem in Turkey, which is widely attested in the case-law of the ECtHR concerning Turkey. It has also been a constant preoccupation of the

<sup>39</sup> Decision of the Ombudsman Institution in the petition No. 2016/737 against the Governor's Office of Şırnak, 14 July 2016.

<sup>40</sup> Human Rights Watch, *op. cit.*

<sup>41</sup> Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, [CM\(2011\)13](#), adopted by the Committee of Ministers on 30 March 2011.

Commissioner's Office.<sup>42</sup> In his 2013 report on Turkey, for example, the Commissioner devoted a long section to this issue and put forward a number of recommendations.<sup>43</sup> This problem was also highlighted within the UN system, UN CAT expressing concern "about a pattern of delays, inaction and otherwise unsatisfactory handling [...] of investigations, prosecutions and conviction of police, law enforcement and military personnel for violence, ill-treatment and torture offences"<sup>44</sup>, the Committee expressing similar concerns in 2016.<sup>45</sup>

76. An illustration of the extent of the problem comes from the number of ECtHR judgments pending for execution before the Committee of Ministers of the Council of Europe, where the Court considered that the shortcomings of the investigation, coupled with the lack of due promptness and diligence, resulted in virtual impunity for the suspected perpetrators of acts of violence. While these judgments pertain to events which occurred in different times and places, for its on-going monitoring of their execution, the Committee of Ministers grouped together many of these judgments into groups of cases, based on common underlying causes which led to similar violations. The Commissioner refers, in particular, to the following groups of cases:
- Aksoy group, involving violations against the background of the fight against terrorism in the 1990s, including shortcomings in establishing criminal liability for abuses at the domestic level: 287 cases;
  - Batı Group, concerning violations stemming from shortcomings during the investigatory phase and/or during the criminal and disciplinary proceedings conducted against members of security forces: 117 cases;
  - Erdoğan and Kasa groups, concerning deaths as a result of unjustified and excessive force used by members of the security forces during military operations. These violations include in particular failure to prepare and supervise or to take all the necessary safety measures to reduce any risk of life to the extent possible during such operations, but also the ineffectiveness of investigations or serious shortcomings in the criminal proceedings brought against members of the security forces: 30 cases;
  - Ataman group, involving excessive force used during public demonstrations, most cases also concerning the issue of ineffectiveness of investigations under Articles 2, 3 and 13 of the Convention: 46 cases.
77. The Commissioner would like to stress that these groups of cases, without being the only ones concerning the lack of effective investigations in Turkey, represent in total close to 500 cases, many of which have multiple applicants. Of particular significance is the fact that many of the cases concern operations conducted in South-Eastern Turkey in the past, notably in the 1990s, and the striking parallels between the facts examined by the ECtHR then and the allegations described above relating to anti-terrorism operations conducted since August 2015.

### 3.1 *Standards and principles deriving from the ECHR*

78. When the use of force by state actors results in the deprivation of life of any person, the ECtHR assigns under Article 2 of the ECHR a much stricter and more compelling test of necessity compared to Articles 8 to 11: the use of force must be no more than "absolutely necessary" for the achievement of and "strictly proportionate" to the goals set out in Article 2,<sup>46</sup> which are limited to protecting a person from violence, effecting a lawful arrest or preventing escape from detention, and action lawfully taken for quelling a riot or insurrection. The Commissioner recalls that, under the established case-law of the ECtHR, states bear the burden of justifying the killing or injuries which were indisputably perpetrated by the agents of the state,<sup>47</sup> or which occur in an area where an operation was conducted by the security forces.<sup>48</sup> In order to discharge that burden, the state must prove that effective investigations were carried out into the events and that the conclusions of these investigations were reliable.

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<sup>42</sup> See, in particular, Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, 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](#), chapter II on impunity, paragraphs 44-62.

<sup>43</sup> 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, Section I.3.

<sup>44</sup> Concluding observations of the United Nations Committee against Torture, [CAT/C/TUR/CO/3](#), 20 January 2011.

<sup>45</sup> Concluding observations of the United Nations Committee against Torture, [CAT/C/TUR/CO/4](#), 2 June 2016.

<sup>46</sup> See *McCann and others v. the United Kingdom*, judgment of 27 September 1995.

<sup>47</sup> *Gülbahar Özer and others v. Turkey*, judgment of 2 July 2013, paragraphs 59-75.

<sup>48</sup> *Akkum and others v. Turkey*, judgment of 24 March 2005, paragraphs 209-211.

79. The ECtHR set out five basic principles concerning effective investigations, namely: (a) independence: there should be no institutional or hierarchical connections between the investigators and the official concerned and there should be practical independence; (b) adequacy: the investigation should be capable of gathering evidence to determine whether the behaviour in question was unlawful and to identify and punish those responsible; (c) promptness: the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law; (d) public scrutiny: procedures and decision-making should be open and transparent in order to ensure accountability; and (e) victim involvement: the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests.
80. The Commissioner notes that the Court takes, *inter alia*, the following features into account, with an emphasis on cases where the ECtHR found violations by Turkey:
- the manner in which the investigation at the scene of the incident and post-mortem examinations were conducted;<sup>49</sup>
  - whether all the evidence was collected immediately and by persons who were not implicated in the events;<sup>50</sup>
  - whether the perpetrators of the killing were immediately questioned by judicial authorities;<sup>51</sup>
  - whether the initial and crucial parts of the investigation were conducted by independent judicial authorities and not by persons who had a hierarchical relationship with the perpetrators, such as governors and military officers;<sup>52</sup>
  - whether all steps were taken to preserve the independence of the investigation and its speed (for example, a delay of fifteen and a half hours was deemed unacceptable);<sup>53</sup>
  - whether the family of the victim was given a real access to the investigation.<sup>54</sup>
81. The Commissioner also recalls the established case-law of the ECtHR according to which the failure of a state to conduct an effective official investigation where “an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents” constitutes a violation of the ECHR.<sup>55</sup>

### 3.2 Shortcomings in the Turkish system identified by the Court and by the Commissioner

82. Numerous shortcomings relating to the effectiveness of investigations are attested in the abovementioned case-law of the ECtHR on Turkey. These shortcomings include, *inter alia*, failure of public prosecutors to secure the primary evidence or to take statements from members of the security forces; the conducting of the initial and critical phases of investigations by the army officers who carried out the military operations or the taking of statements in their presence; failure of public prosecutors to conduct a reconstruction of events or conducting such a reconstruction in the absence of the suspect or his representative; requirement to obtain administrative authorisation for the prosecution of members of the security forces; excessive length of criminal investigations or criminal proceedings brought against members of the security forces.
83. Following a visit he carried out in the immediate aftermath of the Gezi events the Commissioner issued a report in which he also examined the issue of impunity for the police, and state agents in general, and highlighted many shortcomings.<sup>56</sup> These included, *inter alia*:
- The unwillingness of prosecutors to pursue cases against security forces, and justifying this decision in stereotypical terms, focusing only on the presumed unlawfulness of the conduct of the alleged victim of the human rights violation and without taking into account any other circumstances;

<sup>49</sup> *Tanrikulu v. Turkey*, Grand Chamber judgment of 8 July 1999.

<sup>50</sup> *Gülbahar Özer and others v. Turkey*, *op. cit.*, paragraphs 62-68.

<sup>51</sup> *Ibid.*, paragraphs 68-69.

<sup>52</sup> *Saçılık and others v. Turkey*, judgment of 5 July 2011, paragraphs 98-99.

<sup>53</sup> *Ramsahai and others v. the Netherlands*, judgment of 15 May 2007, paragraphs 333-341.

<sup>54</sup> *Beker v. Turkey*, judgment of 24 March 2009, paragraphs 49 and 50.

<sup>55</sup> See, *inter alia*, *Assenov and others v. Bulgaria*, judgment of 28 October 1998.

<sup>56</sup> 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, Section I.3.

- Turkish authorities claiming that the applicants' injuries were caused by their resistance and prosecutors taking such official reports at face value, without any independent verification;
  - Prosecutors failing to secure statements from potential eyewitnesses and not examining video recordings of the incidents other than those submitted by the police;
  - The need for prior administrative authorisation to investigate and prosecute a number of serious human rights violations by state actors, including in case of an alleged violation of the right to life or excessive use of force. The only exception to this rule, torture, was sometimes undermined by prosecutors bringing lighter charges;
  - Prosecutors ignoring independent evidence, including medical evidence;
  - Evidence liable to be used against state actors not being provided (e.g. camera footage unavailable for "technical reasons") or lost;
  - Lack of independence of administrative investigations, in particular when investigations were carried out by civil servants under the same hierarchical structure as the suspected perpetrators;
  - Failure to suspend security forces suspected of having committed human rights violations, including cases where suspects were involved in investigations against them;
  - Inability of victims to claim compensation (for example, as a result of the ill-treatment at the hands of police officers, when the arrest or detention itself was lawful);
  - Lack of reliable statistical information on the number of investigations, prosecutions and convictions concerning serious human rights violations;
  - Persistence of biased, state-centrist attitudes among prosecutors and judges;
  - Political rhetoric reinforcing these patterns.
84. The Commissioner had also expressed his opinion that the best way of combating impunity among members of law enforcement forces was to establish an effective and independent complaints mechanism. Having examined a bill then pending before the Turkish Parliament on the establishment of a law enforcement oversight commission, the Commissioner was of the view that the bill presented numerous shortcomings so that the proposed body could not be considered an independent complaints mechanism.
85. Having received numerous, serious and consistent allegations regarding excessive use of force and other human rights violations committed by law enforcement officials during the Gezi events, the Commissioner had urged the Turkish authorities to ensure that all these allegations are promptly, adequately and effectively investigated. The Commissioner had further stressed that the way these allegations are handled would be an important test of the authorities' willingness to tackle impunity and that failure to do so would further shake public confidence in the rule of law in Turkey.
86. The period following this report only confirmed and exacerbated the Commissioner's concerns. While a number of police officers received punishments in some of the most serious cases concerning the right to life, numerous shortcomings were reported relating to the criminal proceedings and the inadequacy of sentences, for example in the case of Ethem Sarısülük, a case the Commissioner referred to in his aforementioned 2013 report.<sup>57</sup> The Commissioner recognises that many of these cases are still on-going. As for excessive use of force, the Commissioner was only informed of one case where a police officer received a 20-month sentence in a particularly egregious case, whereas according to media reports, 255 participants in the demonstrations had received various prison sentences. The Commissioner considers that, given the response to the number, nature and credibility of the allegations, the authorities' response has been clearly inadequate.
87. The Commissioner considers that his findings in 2013, as well as his recommendation, continue to be entirely applicable at present. In addition, he is of the view that a number of further developments, many of which the Commissioner publicly commented on subsequently, point to the authorities' unwillingness to tackle these shortcomings and to further bolster the shield of impunity of state agents instead. In particular, the Commissioner refers to the following:
- The entry into force of the so-called "internal security package" in March 2015, which increased the powers of the police, including when it comes to the use of deadly force

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<sup>57</sup> *Ibid.*, paragraph 113.

outside the context of protection of life, while weakening judicial control for certain actions, and generally going in the opposite direction of the Commissioner's recommendations;<sup>58</sup>

- The adoption of a law in May 2016 on the Law Enforcement Oversight Commission, along the lines of the aforementioned bill examined by the Commissioner in 2013.<sup>59</sup> According to the information provided by the Human Rights Inquiry Committee of the Turkish Parliament, the authorities took no notice of the Commissioner's comments and observations.
88. Finally, and most significantly, the Commissioner notes the adoption of a law on 23 June 2016 amending, among others, the Provincial Administration Law on the basis of which the curfews mentioned above were declared and anti-terrorism operations conducted.<sup>60</sup> The amendments *inter alia*, subject any judicial investigation of military personnel deployed in operations based on the Provincial Administration Law (*i.e.* all anti-terrorism operations examined by the Commissioner in the present memorandum) to an administrative approval at the ministerial level. They also provide that any offence committed in the framework of these operations would be a military offence, thus to be tried by military courts, effectively shielding military personnel from any civil investigation or proceedings. The law further extends this protection to village guards. The amendments also allow military personnel to enter houses and other private areas without court order, with the authorisation of the unit commander (only with an *ex post facto* judicial review). Most significantly, this law also introduced a provisional Article 5 to the Provincial Administration Law, making these provisions retroactively applicable to operations conducted before its adoption.
89. The Commissioner observes that the Parliamentary Assembly of the Council of Europe declared in June 2016, when this law had not yet been adopted by the Turkish Parliament, that it was "appalled" by the preparation of this legislation,<sup>61</sup> a sentiment that the Commissioner unfortunately shares.

### 3.3 *Specific findings concerning the effectiveness of investigations with respect to the curfews and anti-terrorism operations in the South-East*

90. Already in November 2015, the Commissioner called on the Turkish authorities in a public statement to shed light on numerous allegations of human rights violations directly or indirectly caused by security forces during the curfew in Silvan and other curfews, referring explicitly to the chronic problem of impunity in Turkey. As he had been only informed of one case where a security officer had been suspended pending investigations (the case of the dead body dragged behind an armoured vehicle), the Commissioner stated that the lack of ongoing investigations was disheartening in the face of the number and seriousness of allegations.<sup>62</sup>
91. In addition to the allegations examined in section 2.2 above, the Commissioner received a number of allegations, predominantly from Cizre, specifically regarding the integrity and effectiveness of possible future investigations. Given the seriousness of the allegations, and ahead of his visit to Turkey, the Commissioner wrote to the Prime Minister of the Turkish Republic, drawing his attention notably to the following allegations potentially affecting Turkey's positive obligations under Article 2 of the ECHR:
- that following the government's announcement of an end to anti-terrorism operations in Cizre, and while the curfew was still ongoing, heavy machinery was used to remove the rubble of buildings where presumed terrorists had taken shelter and which were attacked and destroyed by security forces, thus precluding effective investigations at the scene of the events;
  - that some post-mortem examinations of the deceased persons were conducted in the absence of relatives, lawyers and independent medical examiners;

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<sup>58</sup> Law No. 6638 of 27 March 2015.

<sup>59</sup> Law No. 6713 of 3 May 2016.

<sup>60</sup> Law No. 6722 of 23 June 2016.

<sup>61</sup> [Resolution 2121 \(2016\)](#), *op. cit.*

<sup>62</sup> See the Commissioner's statement entitled "[Turkey should ensure the protection of human rights in the fight against terrorism](#)", published on 18 November 2015.

92. Regarding the first set of allegations, the Commissioner subsequently received similar reports in Sur. At the time of his visit in April 2016, the curfew was being maintained in six neighbourhoods, a month after the announced end of the operations and there was serious concern that vital evidence was being destroyed. The prosecutors the Commissioner spoke with in Diyarbakir reassured him that they were systematically conducting crime-scene investigations, which was contested by human rights NGOs. Owing to the nature of the curfews, it was impossible to confirm or refute this claim.
93. Regarding the basements in Cizre, the Commissioner was shocked by consistent reports that the public prosecutor refused to conduct crime-scene investigations in the basements owing to security concerns, and left it to the relatives and lawyers of the deceased to collect the relevant evidence. If this is true, and given the nature of the allegations regarding these basements, the Commissioner finds this behaviour completely unacceptable and worryingly reminiscent of existing judgments of the ECtHR finding violations of Article 2.<sup>63</sup>
94. Regarding the second set of allegations, the Commissioner heard contradictory information from different interlocutors. While human rights NGOs claimed that there had been serious irregularities in the way bodies had been transported to forensic laboratories, notably the fact that they were already naked at the moment of arrival and presumably removed from the scene of the event before any independent investigation, the Commissioner gained the impression that the post-mortem examinations themselves were conducted to an acceptable standard in most cases. However, the Commissioner stresses that regulatory changes regarding forensic institutes and burials described above are highly troubling, also from the point of view of effective investigations.
95. During his visit, the Commissioner had the opportunity to meet prosecutors in Diyarbakir and discuss allegations of human rights violations relating to Sur. The prosecutors informed him that there had been no complaint against security forces until then and that consequently there were no pending investigations against security forces. They only referred to a single case, where the death of a civilian was confirmed, where an investigation was on-going, but no suspects had been identified, the prosecutors' affirming that this death "may well have occurred due to the action of terrorists".
96. During his official meetings and in a written request to the Ministry of the Interior subsequently, the Commissioner asked the Turkish authorities for information regarding the number of on-going judicial investigations in which members of security forces had been interrogated by prosecutors as suspects or witnesses. In their written reply in May 2016, the authorities mentioned disciplinary proceedings against 63 personnel, and the fact that, following four investigations, nine personnel had been punished and a contract for one officer had been terminated, only adding that "necessary administrative and judicial investigations are underway". No information was provided in response the Commissioner's request for an update on this issue following his visit in September 2016.
97. The Commissioner also refers to the findings of the UN Committee against Torture, which stated in May 2016 that it regretted that "the State party did not respond to requests for information as to whether investigations are under way into widely reported cases, such as the alleged killing by police snipers of two unarmed women, Maşallah Edin and Zeynep Taşkın, in the Cudi neighbourhood of Cizre on 8 September 2015." The Committee was further concerned "at reports that family members of those killed in clashes between security forces and members of armed groups have been denied the ability to retrieve their bodies, which has the effect of impeding investigations into the circumstances surrounding those deaths."<sup>64</sup> All evidence suggests that very few judicial investigations, if any, identified security forces as suspects, other than the two cases mentioned above (see paragraph 62).

<sup>63</sup> See, for example, *Gülbahar Özer and others v. Turkey*, judgment of 2 July 2013, paragraph 62: "In this connection, the Court does not find it convincing that the prosecutor had been unable to go to the place of the incident on account of safety concerns. It is noteworthy that the same safety concerns did not stop the soldiers from asking a number of civilian villagers living in a nearby village to go to the area to help them retrieve the bodies [...]. However the prosecutor, who seems to have accepted the soldiers' advice about the safety concerns without any hesitation, did not go to the area until some four months after the incident."

<sup>64</sup> [CAT/C/TUR/CO/4](#), *op. cit.*, paragraph 13.

98. The Commissioner recalls that according to the ECtHR, where it is only the state that has access to information corroborating or refuting certain allegations, the failure to submit such information may give rise to the drawing of inferences as to the well-foundedness of allegations.<sup>65</sup> The circumstances in which the operations in question were conducted (see paragraphs 67 to 71 above) make it indisputable that only the Turkish state and security forces have access to such information. The apparent unwillingness of the prosecutors to seek that information, beyond taking at face value the affirmations of the security forces, seriously undermines trust in the effectiveness of investigations.
99. Indeed, the Commissioner considers that one of the main problems in the present cases is likely to be the attitude of prosecutors and judges, namely their reluctance to confront security forces in an independent and impartial fashion, as well as to take seriously independent sources of information conflicting with the official version of the events. Another worrying attitude which was apparent to the Commissioner was the justification of the killings merely by stating that the persons in question had been terrorists and members of the PKK. The Commissioner must reiterate that the question in such cases is not whether the persons were criminals or members of a terrorist organisation, but whether or not they have been killed in circumstances engaging the responsibility of the Turkish state under the ECHR, notably by reference to whether or not the use of lethal force was absolutely necessary and proportionate.<sup>66</sup> This means that the authorities have an obligation to conduct effective investigations into all deaths, be it of security forces, civilians, as well as presumed or confirmed terrorists.
100. Concerning the effectiveness of investigations, the Commissioner has a particular interest in the investigations surrounding the assassination of Tahir Elçi, human rights defender and President of the Diyarbakir Bar Association. The Commissioner understands that it could not yet be established whether the bullet killing Tahir Elçi was fired by a terrorist or a police officer. The prosecutors in Diyarbakir informed the Commissioner that the investigations were ongoing, that there were no suspects among security forces and that they were waiting for the expert report on the event. This report, submitted after the Commissioner's visit, states that existing information is inconclusive to determine the source of the bullet.
101. Information the Commissioner received from the lawyers of Tahir Elçi's family, however, suggests that the investigation had been riddled with question marks (for example, evidence collection being disrupted owing to a presumed terrorist attack at a crucial stage, footage from the police and several CCTV cameras in the street being "lost" or "irretrievable"). The Commissioner deeply regrets that suspicion continues to reign on this case because of such issues, and notes certain parallels with the findings of the ECtHR regarding the investigations following the assassination of the journalist Hrant Dink,<sup>67</sup> a case which is continuing to expose to this day serious institutional problems causing impunity for state agents, both within the Turkish security forces and judiciary.
102. The Commissioner must take note of these and many other elements concerning investigations into alleged human rights violations committed during curfews, which suggest that entrenched patterns reinforcing impunity, widely attested in the ECtHR's case law, are still in operation. In these circumstances, trust in the integrity of the investigations and impartiality of the judiciary is understandably very low in the region.
103. The Commissioner must also recognise that the adoption of the aforementioned legislation providing immunity to security forces is an important element showing the lack of political will at the highest level to change this situation. Owing to all these circumstances, it appears at present very improbable that the investigations into the allegations referred to in the previous section will be effective enough to satisfy the threshold defined in the case-law of the ECtHR.
104. A final point that the Commissioner wishes to make in this connection concerns Article 34 of the ECHR on the right to individual application. The Commissioner understands that Ramazan Demir, a lawyer who brought many of the requests for interim measures to the ECtHR and to the Constitutional Court during the curfews, was arrested and detained in connection with suspected terrorist activity on 6 April 2016 (he was conditionally released in an on-going trial on 7

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<sup>65</sup> *Akkum and others v. Turkey*, *op. cit.*, paragraph 185.

<sup>66</sup> *Gülbahar Özer and others v. Turkey*, *op. cit.*, paragraph 57.

<sup>67</sup> *Dink v. Turkey*, judgment of 14 September 2010.

September 2016). His lawyers claim that his detention was linked to his having brought these cases to the ECtHR. In this connection, the Commissioner is deeply disturbed by the fact that the questions directed at Mr Demir by the Istanbul Prosecutor's Office on 17 March 2016 included the following allegation: "within his propaganda and agitation activities on behalf of the terrorist organisation, aiming at weakening our country through discourse such as rights violations, torture, etc., both nationally and in the international fora, [Mr Demir] was going to conduct interviews/meetings with a person named 'Delegation' (*sic*), a foreign national". This suggests that the prosecutor considered as incriminating the fact that a lawyer, who had introduced applications to the ECtHR, was intending to inform an international delegation on these cases. Such an attitude is completely unacceptable, as providing such information must be considered an integral part of ordinary human-rights work. The Commissioner must stress the fact that around the same time, his Office had contacted Mr Demir to organise a meeting with him during the Commissioner's visit, to be able to obtain information directly from the lawyer who brought interim measure requests to the ECtHR, some of which had been granted by the latter.

105. The Commissioner takes very seriously this situation which indeed suggests that Mr Demir was arrested, whether primarily or incidentally, in connection with his legitimate role of bringing cases to the ECtHR, in direct violation of Article 34 of the ECHR,<sup>68</sup> or providing information to an international delegation on alleged human rights violations. The Commissioner is also deeply concerned by the assertion of Mr Demir's lawyers that this arrest and detention had an impact on the pursuit by the families in question of their application to the ECtHR and served as a deterrent.

#### 4. The need for redress and compensation

106. Victims of terrorist acts should receive fair, appropriate and timely compensation for the damages which they suffered. When compensation is not available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State on the territory of which the terrorist act happened must contribute to the compensation of victims for direct physical or psychological harm. These principles are recalled in the 2002 Guidelines of the Committee of Ministers of the Council of Europe on Human rights and the fight against terrorism acts as well as the 2005 Guidelines of the Committee of Ministers of the Council of Europe on the protection of victims of terrorist acts.
107. A "Law on Compensation for Losses resulting from Terrorism and the Fight against Terrorism" ("Compensation Law") entered into force on 27 July 2004,<sup>69</sup> which lays down the principles and procedure for compensating damage sustained by persons as a result of terrorist acts or of measures taken by the authorities to combat terrorism. In particular, it aims to compensate the material damage sustained by natural or legal persons who have migrated or have been displaced due to terrorism or anti-terrorism activities. In this respect, compensation commissions were set up to determine the damage incurred and the compensation payable to the claimants. Following the determination of the amount of compensation, the commissions prepare a friendly-settlement declaration. If the claimant accepts the terms of the settlement declaration prepared by the commission, the declaration must be signed by the claimant or his or her representative and by the president of the commission. If the claimant refuses to sign the declaration or is deemed to have refused the terms of the declaration, a protocol of non-agreement must be prepared and sent to the claimant, following which the claimant can bring an action for compensation in the courts.
108. In its *İçyer* judgment, the ECtHR found the compensation procedure introduced by the Compensation Law to constitute an effective remedy with regard to complaints lodged under Article 8 (right to private life) and Article 1 of Protocol No. 1 (right to property) of the Convention.<sup>70</sup>
109. The Commissioner notes, however, the findings of the ECtHR in cases which concerned the issue of the right to life. The Court held in those judgments that the compensation procedure in question could not be regarded as an effective remedy for the purposes of Article 2 of the

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<sup>68</sup> In this respect see, for example, *Colibaba v. Moldova*, judgment of 23 October 2007, paragraphs 67-69.

<sup>69</sup> Law No. 5233 of 17 July 2004.

<sup>70</sup> *İçyer v. Turkey*, decision of 12 January 2006, paragraph 72.

Convention as it did not afford adequate redress.<sup>71</sup> In this respect, the Commissioner stresses that, given the fundamental importance of the right to protection of life, in addition to the payment of compensation, Article 13 of the Convention requires a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure.

110. The ECtHR has similarly considered that the Compensation Law was not capable of offering redress for grievances under Article 10 (freedom of expression).<sup>72</sup> Moreover, this law does not contain a right to non-pecuniary damages. It has also been argued that there are certain shortcomings in the structure and working methods of the compensations commissions set up under this law, notably that their members have a very limited margin of appreciation and could be prejudiced towards claimants, since they are all civil servants (with the exception of one member out of seven appointed by the provincial bar association).
111. In written information provided to the Commissioner's Office on 25 October 2016, the Turkish authorities stated that 175 million TRY (approximately 50 million EUR) was allocated for compensation for the year 2016 in the framework of the Compensation Law. According to figures provided by the Ministry of the Interior during the Commissioner's visit in September, 125 million TRY (approximately 36 million EUR) had already been paid in compensation by the commissions within the last six months. It should be noted however that the Commissioner is in not in possession of any information about the content of the commissions' decisions or the exact number of people who had received compensation. One of the interlocutors of the Commissioner argued that claimants had received a lump sum of 3 000 TRY per person (approximately 870 EUR), which if true, cannot be regarded as sufficient monetary reparation for pecuniary and non-pecuniary damages sustained by everyone affected by the anti-terrorist operations.
112. Regarding the destroyed property in the areas of curfew, the Turkish government passed a decree on 25 March 2016 ordering the urgent expropriation of certain plots of land in Diyarbakır's Sur and Şırnak's Silopi districts in accordance with Article 27 of the Expropriation Law.<sup>73</sup> A second decree of urgent expropriation in respect of areas in Şırnak's Cizre and İdil districts, Mardin's Kızıltepe district, Hakkari's Yüksekova and Çukurca districts, Diyarbakır's Kayapınar and Bağlar districts was issued on 5 April 2016. According to this decree, the immovable properties within the expropriated zones will be transferred to the Ministry of Environment and Urban Planning and those who own land or property in the said areas will be paid in instalments.
113. According to Article 27 of the Expropriation Law, in cases of expropriation subject to a Cabinet Decree for national defence or an emergency, any immovable property may be seized by the related administration. In that case, the proceedings other than those related to appraisal shall be concluded later.
114. During the Commissioner's visit, members of the local population voiced their fears that they were going to be doubly punished by being deprived of their property that had been destroyed during the curfews. The authorities argued that that the only purpose was to speed up the rebuilding of the affected zones.
115. There is no doubt that the urgent expropriation of the affected areas will constitute an interference with the residents' right to property. In this regard the Commissioner recalls the ECtHR case-law, according to which any interference with the right to property must be justified by reference to public interest. Moreover, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.
116. The Commissioner has serious doubts as to whether the measures in question are sufficiently reasoned and justified by reference to a legitimate objective in the public interest. The cabinet decree ordering the urgent expropriation of the areas in question is drafted in very general and vague terms which do not define with sufficient precision and clarity the reason for the urgent

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<sup>71</sup> *Gasyak and Others v. Turkey*, judgment of 13 October 2009, paragraphs 70-71 and *Fadime and Turan Karabulut v. Turkey*, judgment of 27 May 2010, paragraphs 38-39.

<sup>72</sup> *Fevzi Saygılı v. Turkey*, judgment of 8 January 2008, paragraph 23.

<sup>73</sup> Law No. 2942 of 4 November 1983.

expropriation, nor does it offer any credible or sufficient justification for it. As the Commissioner already expressed in his statement following his visit, expropriation is not compensation. Although the Commissioner agrees that rebuilding the area in a speedy fashion is a legitimate aim, it is not understandable how excluding the owners from decisions regarding that rebuilding effort can be considered a remedy. The Commissioner is further concerned about certain statements by officials which imply that current owners may eventually not receive back their titles to the rebuilt properties. Rather than a compensation for a violation of the right to property, this process could potentially lead to a second violation compounding the first one. The Commissioner also notes with regret that the lack of official communication and reasoning relating to these measures fuels perceptions among the local population that the aim behind them was to alter the social fabric in the areas.

117. The Commissioner considers that any rebuilding effort must take the wishes of the owners into account, preferably by helping them to rebuild their property in the way they see fit (provided that it conforms to applicable building regulations), in order to be considered a form of compensation for the clear breach of the right to property they have suffered.

## **5. Conclusions and recommendations**

118. The Commissioner is fully aware of the extent of the terrorist threat faced by Turkey and recognises the right and duty of the Turkish state to fight against terrorism in all its forms. The Commissioner also understands the circumstances in South-Eastern Turkey, where an armed, separatist organisation, recognised as terrorist by the EU, NATO and many countries, has systematically used violence and terror in a decades-long conflict which has claimed tens of thousands of lives. Nothing in this memorandum should be considered as justifying the actions of the PKK or any other terrorist activity in South-Eastern Turkey.
119. At the same time, the response of the Turkish state, in accordance with its international obligations, must adhere to the principles of rule of law and human rights standards, which require any interference with basic human rights to be defined in law, necessary in a democratic society and strictly proportionate to the aim pursued. In this respect, Turkey has a very long record of extremely grave human rights violations recognised as such by the European Court of Human Rights, with the most severe forms of violation having occurred in South-Eastern Turkey in the 1990s. Following a period of relative peace during the so-called “solution process”, the Commissioner deeply regrets the resumption of hostilities and their rapid escalation in South-Eastern Turkey.
120. For the purposes of this memorandum, the Commissioner examined the response of the Turkish authorities to the situation in the South-East since the summer of 2015, which mainly took the form of declaration of curfews accompanied by police and/or military operations. In the light of this examination as set out in the body of this memorandum and in view of the applicable international and European standards, as well as of the tremendous restrictions on the enjoyment of core human rights that they imposed, the Commissioner considers these measures to have been neither legal, in the sense of being sufficiently foreseeable and defined in law, nor proportionate to the legitimate aim pursued by Turkey.
121. In the opinion of the Commissioner, therefore, the response the Turkish authorities developed since August 2015, characterised by the declaration of open-ended, 24-hour curfews, have caused a number of very serious human rights violations simply by virtue of having been imposed on the affected local populations. The Commissioner urges the Turkish authorities in the strongest possible terms to put an immediate end to this practice. Any future measures deployed in the region must show much higher regard to the human rights of the local civilian population when balancing them against the imperative of the fight against terrorism.
122. As regards numerous allegations of human rights violations committed by security forces, the Commissioner finds them to be extremely serious and consistent. He considers many of these allegations to be credible, given their sources and considering past patterns of human rights violations committed by Turkish security forces during anti-terrorism operations in the South-East, as well as the Turkish authorities’ efforts to reinforce the immunity of security forces from prosecution during this period. At any rate, given the fact that these allegations concern violations

in areas cut off from the world during operations which were under the complete control of the authorities, it is for the Turkish authorities to prove convincingly that they are unfounded.

123. The Commissioner observes that the Turkish authorities not only have not shown any willingness to tackle the long-standing problem of impunity and to implement the recurrent recommendations of the Commissioner's Office on this issue, but that the patterns which have led to serious human rights violations in the past remained in operation during the period in question. All evidence indicates that the authorities did neither treat with the requisite seriousness the allegations of human rights violations, nor conduct *ex officio* criminal investigations into lives lost during the operations in a way that would be liable to shed light on the events. The priority seems to have rather been to reassure and shield from prosecution the security forces, who have only been subjected to disciplinary sanctions for particularly egregious forms of misconduct with the exception of very few criminal cases where members of security forces were treated as suspects, while at the same time vilifying human rights NGOs and lawyers bringing these allegations. In the Commissioner's opinion, this situation falls woefully short of Turkey's international obligations.
124. For investigations into these allegations to be considered effective, they should have been immediate, diligent and thorough. Unfortunately, given the elapsed time since some of the operations, the fact that evidence might have been actively destroyed with heavy machinery in the affected zones, as well as the general attitude of prosecutors, it seems very improbable that any future investigation will fully satisfy the criteria for effectiveness. Turkish authorities will therefore have to contend with the fact that Turkey will be presumed to have committed many serious human rights violations, including violations of the right to life, during the period in question.
125. This situation brings home the urgency for a mentality shift in Turkey when it comes to the accountability of state agents. The Commissioner considers that impunity has been a nefarious influence throughout Turkey's recent history, legitimising and fostering behaviour fundamentally at odds with human rights, and undermining all efforts to protect and promote them. It is true that the authorities took swift action to punish state agents suspected of involvement in the coup attempt of 15 July 2016, but the Commissioner regrets that one of the first measures taken in this connection was to give administrative, legal and criminal immunity to other state agents enforcing emergency decrees. In the opinion of the Commissioner, a crucial test for human rights in Turkey is whether the same diligence can be shown when the actions are not directed against the state but the human rights of its individual citizens.
126. The Commissioner once more urges Turkey in the strongest possible terms to finally tackle the numerous root causes of impunity in Turkey (see paragraph 83 above) and implement the recommendations he repeatedly made to Turkey for combatting it.
127. In the light of his examination set out in this memorandum, the Commissioner considers that numerous human rights of a very large population in South-Eastern Turkey have been violated in the context of the anti-terrorism operations conducted since August 2015. The priority for Turkey must therefore be to abandon the approach which has led to this situation, followed by the demonstration of a clear will to remedy its effects.
128. This requires, firstly, public recognition by the authorities of the mistakes and human rights violations committed. This must be accompanied by serious efforts to compensate moral and material damages suffered by the people concerned, be it because of the failure of the Turkish state to protect them from terrorism or the direct effect of the anti-terrorist operations themselves. The Commissioner gained the impression that the Turkish authorities do not grasp the scale of the efforts needed in this connection and the existing framework for compensation appears clearly insufficient in many respects. Regarding the approach to expropriate the local population in certain cities affected by the operations, the Commissioner thinks that such a measure would represent a double punishment for the persons affected and cannot be considered a form of redress.
129. 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.