



AS/Mon(2009)10 rev.

7 April 2009

amondoc10r_2009

Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

Post-monitoring dialogue with Turkey

Information note on the fact-finding visit to Turkey by the Chair of the Committee (24-26 November 2008)¹

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¹ This information note has been made public by decision of the Monitoring Committee dated 31 March 2009.

I. Introduction

1. In my capacity as Chair of the Monitoring Committee, I went to Ankara and Istanbul from 24 to 26 November 2008, the first visit by a chair of the committee as part of the post-monitoring dialogue process.

2. Turkey has been involved in a post-monitoring dialogue with the Parliamentary Assembly's Monitoring Committee since the closure of the monitoring procedure in April 2004 with the adoption of Resolution 1380 (2004).² This text sets out 12 issues that Turkey was asked to address in order to carry out its reforms. Written information provided by the Turkish delegation concerning these 12 issues raised by that resolution was examined by the Monitoring Committee in 2006 and 2007 but never made public.³

3. In its Resolution 1622 (2008) on "The functioning of democratic institutions in Turkey: recent developments", adopted in June 2008 following a debate under urgent procedure⁴ concerning the judicial proceedings against the ruling party, the Assembly asked its Monitoring Committee to intensify its post-monitoring dialogue with Turkey, closely follow the development of the democratic functioning of its state institutions and, in particular, the constitutional drafting process and, if need be, seriously consider the possibility of re-opening the monitoring procedure for Turkey.

4. I was able to discuss most of these issues during my visit and an update is provided in the various sections of this note. As regards the matters still outstanding or those that I did not have an opportunity to discuss for lack of time, I would ask the authorities to send me all additional information relating to the post-monitoring dialogue. It is, incidentally, still possible to envisage a further visit in continuing this post-monitoring dialogue with Turkey in order to discuss the more complex issues in greater depth.

5. The political crisis that shook the country in the spring of 2008 highlighted the weaknesses of the 1982 Constitution and the urgent need for reforms which the Assembly has called for on many occasions. I was also given some encouragement in this regard in most of my conversations during my fact-finding visit. The effective separation of powers and the democratic functioning of state institutions, including the independence of the judicial system, are crucial for the modernisation of the Turkish state.

II. Political background

6. The Turkish political scene remains polarised in the climate of suspicion prevailing between the various political players, especially between the government and its traditionally Kemalist opponents. In this connection, many reforms announced by the government are perceived from the outset as attempts to erode the founding principles of the Turkish Republic enshrined in the Constitution, especially the principle of the secular nature of the state.

7. In 2007, Turkey was divided on the election of the President of the Republic, which required three votes by parliament. I would refer here to the report by Mr Luc van den Brande⁵, which considers this first crisis in detail, and the early parliamentary elections that followed in July that year. Suffice it to say that the Justice and Development Party (AKP) won those elections with 46.6% of the votes, giving it a large absolute majority with 341 seats out of a total of 550 in the Turkish Grand National Assembly (hereinafter the "parliament"). Mr Erdogan retained the post of Prime Minister and, on 28 August 2007, Mr Abdullah Gül was elected President of the Republic with 339 votes.

8. 2008 was also marked by various political crises that once again involved the government and its traditionally Kemalist opponents. These crises, which were linked in particular to the issue of allowing the Muslim headscarf to be worn at universities⁶ and to the judicial proceedings against the ruling party, accused of anti-secular activities, are also mentioned in Mr Luc van den Brande's June 2008 report.

9. The Turkish Constitutional Court's decision in July 2008 not to apply the extreme measure of banning the ruling party enables Turkey to regain some political stability and press ahead more intensively with the necessary economic and political reforms, including the drafting of an entirely new civil constitution.

² See Doc. 10111 on honouring of obligations and commitments by Turkey, 17 March 2004

³ Doc. AS/Mon(2006)16 and AS/Mon(2007)58 confidential

⁴ Doc. 11660 "The functioning of democratic institutions in Turkey: recent developments", report of 24 June 2008 by the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Rapporteur: Mr Luc van den Brande, Belgium, Group of the European People's Party

⁵ *Idem*

⁶ *Idem*

Nonetheless, as long as the relevant provisions on this subject remain in force there is still a risk of new proceedings against the ruling party, and the threat of possible closure hangs over other political parties.⁷

III. Democracy

i. Constitutional and legislative reforms

10. In its Resolution 1380 (2004), the Assembly called on the Turkish authorities to **“carry out a major reform of the 1982 Constitution, with the assistance of the Venice Commission, to bring it into line with current European standards”**.

11. In the spring of 2007, Prime Minister Erdogan submitted to the Grand National Assembly a package of constitutional and legislative reforms. The proposed constitutional amendments included:

- election of the president by direct universal suffrage for a renewable term of five years;
- reducing an MP's term of office from five to four years;
- establishing a quorum of one-third for all sessions and decisions of parliament.

12. An additional amendment was for the age of eligibility to become a member of parliament to be lowered from 30 to 25 years.

13. The adoption of these constitutional amendments was hampered by the political crisis triggered by parliament's inability to elect the President of the Republic. Moreover, as the opposition had complained that there had not been enough discussion on the proposed reform package, President Sezer exercised his constitutional powers to reject the constitutional amendments. The package of reforms was once again approved by parliament on 31 May 2007. As the President was unable to oppose them a second time, he chose to refer the matter to the Constitutional Court, which, on 5 July 2007, declared admissible the constitutional amendments proposed for the election of the Turkish president by direct universal suffrage.

14. Meanwhile, President Sezer also exercised his right of veto against the legislative reforms proposed by the ruling majority, especially the Law on the Ombudsman, the Law on Foundations and the Law on Private Education Institutions.

15. The constitutional amendments approved by parliament in May 2007, including the election of the president by direct universal suffrage, were finally endorsed by a referendum held on 21 October 2007.

16. The constant confrontations between the opposition and the government have shown how the accumulation of appeals to the Constitutional Court for political purposes can be dangerous for the country's democracy and prevent Turkey from making any progress on its reforms. The President of the Constitutional Court confirmed during our meeting that all these appeals and constitutionality issues represent an excessive workload for the court, which has to deal with nearly two hundred cases a year and has a two-year backlog. He would like to see a structural change involving a kind of prior filtering system, perhaps in the form of a second chamber in parliament, which would make it possible to reduce the number of laws referred to the Constitutional Court.

17. During our meeting, the President of the Constitutional Court stressed the importance of Article 90 of the Constitution, which states that international human rights treaties take precedence over any national legislation incompatible with their provisions, and this is increasingly having an impact on judges' decision-making. While he accepts that structural changes could be made at the Constitutional Court to bring its work into line with the standards of the European Court of Human Rights, he does not think that there is a need for new constitutional amendments in this connection.

ii. Elections

18. In its Resolution 1380 (2004), the Assembly called on the Turkish authorities to **“amend the electoral code to lower the 10% threshold and enable Turkish citizens living abroad to vote without having to present themselves at the frontier”**.

19. In its more recent Resolution 1619 (2008) on the functioning of democratic institutions in Europe, the Assembly also pointed out that “the electoral threshold remains too high, in particular in [...] Turkey (10%)”. In its Resolution 1547 (2007) on the state of human rights and democracy in Europe, the Assembly declared

⁷ See below section IV, I, b. on freedom of association

that in well-established democracies “there should be no thresholds higher than 3% during the parliamentary elections. It should thus be possible to express a maximum number of opinions. Excluding numerous groups of people from the right to be represented is detrimental to a democratic system. In well-established democracies, a balance has to be found between fair representation of views in the community and effectiveness in parliament and government”.

20. As pointed out, Turkey held its parliamentary elections on 22 July 2007. The Ad Hoc Committee of the Bureau⁸ concluded that these had generally been in compliance with Turkey’s Council of Europe commitments and with European standards for free and fair elections. The voting had been organised in a professional manner and conducted without any significant difficulties, which testified to the long tradition of democratic elections in Turkey. The high voter turnout had showed that there was confidence in the democratic process in Turkey. All the election officers, and at all levels, had discharged their duties efficiently and with integrity.

21. The required threshold of 10%, which is far higher than the thresholds applied by the 47 Council of Europe member states, was officially introduced to guarantee stability by avoiding excessive fragmentation within parliament. However, many people believe it was introduced with the Democratic Society Party (DTP) – and its mainly Kurdish electorate – in mind and in order to prevent its election to parliament.

22. The 10% threshold can lead to serious distortions. For example, after the threshold had been fixed at 10%, 45% of the votes cast in the 2002 parliamentary elections in Turkey did not result in a single seat being obtained in parliament. Only two parties were represented in the Grand National Assembly and the majority party, with 34% of the vote, obtained a two-thirds majority.

23. In 2007, three parties passed the threshold of 10% of votes cast required for parliamentary representation. They were the Justice and Development Party (AKP – 341 seats), the Republican People’s Party (CHP – 98 seats) and the Nationalist Movement Party (MHP – 70 seats). 26 independent candidates were also elected. Twenty of these, from the Democratic Society Party (DTP), subsequently formed their own political group of the same name, bringing the number of parliamentary groups to four.⁹ In order to circumvent the national electoral threshold, these candidates took part in the elections as independent candidates and then rejoined their preferred party.

24. The Democratic Left Party (DSP), with 13 seats, the Great Union Party (BBP) and the Freedom and Solidarity Party (ÖDP), with one seat each, are also represented in parliament.

25. As pointed out in the report of the Bureau of the Assembly¹⁰, the fact that the new parliament elected on 22 July 2007 is more representative than the outgoing parliament, representing about 90% of the opinions of the electorate, is due to the fact that three instead of two parties are represented and to the ploy of opposition parties to put up “party-sponsored independent candidates”. It is not due to any steps taken by the Turkish authorities.

26. However, this system and the ways in which it is circumvented do not appear to give those elected complete legitimacy and tend to pervert the course of direct universal suffrage.

27. During my visit, I again pointed out to those with whom I spoke that the electoral threshold, which is the highest in Europe, should be lowered, in accordance with the Assembly’s recommendations. I also suggested that the Turkish authorities should contact the Venice Commission about ways of simplifying the electoral legislation.

28. The Turkish authorities point out that Article 3 of Protocol No. 1 to the European Convention on Human Rights, on the right to free elections, does not mention any electoral system in particular and does not impose any limit on the use of such thresholds. They especially refer to the 8 July 2008 judgment of the European Court of Human Rights in *Yumak and Sadak v. Turkey*¹¹, in which the Court stated: “The rules in this area vary in accordance with the historical and political factors specific to each State; the large variety of situations provided for in the electoral legislation of numerous member states of the Council of Europe shows

⁸ See the report of the Bureau of the Assembly on the observation of the parliamentary elections in Turkey (22 July 2007), Rapporteur: Mr Luc van den Brande, Belgium, Group of the European People’s Party, Doc. 11367, 12 September 2007

⁹ Under Turkish law, twenty members of parliament or more can create a parliamentary group after being elected

¹⁰ *Op.cit.*

¹¹ Application no. 10226/03

the diversity of the possible options". The Court concluded that "Turkey [had not] overstepped its wide margin of appreciation with regard to Article 3 of Protocol No. 1".

29. However, the Court agreed with the applicants' contention that an electoral threshold of about 5% corresponds more closely to the common practice among member states. The Court accordingly had to assess the effects of the correctives and other safeguards involved in the system concerned.

30. In its reasoning, the Court considered that "in general a 10% electoral threshold appears excessive. In this connection, it concurs with the organs of the Council of Europe, which have stressed the threshold's exceptionally high level and recommended that it be lowered". This threshold "compels political parties to make use of stratagems which do not contribute to the transparency of the electoral process".

31. As regards enabling Turkish citizens living abroad to vote without having to present themselves at the border, this is a matter that has been studied for a long time by the authorities concerned. Article 67 of the Constitution, as amended by Decree 4121 of 23 July 1995, establishes the statutory foundations of practical measures in this connection. In March 2008, an amendment to the Elections and Electoral Lists Act was passed and gave Turkish citizens living abroad the right to vote in parliamentary elections by post. However, the Constitutional Court declared this vote unconstitutional in May 2008 in response to an appeal by the CHP.

32. The President of the Constitutional Court confirmed to me his opposition to this. In his opinion, postal voting would open the way to abuses and pressure on voters, thus impeding the exercise of their free will. He is, however, quite open to the idea of Turkish citizens living abroad voting via diplomatic missions.

iii. Local democracy

33. In its Resolution 1380 (2004), the Assembly called on the Turkish authorities to "**[...] *viii. reform local and regional government and introduce decentralisation in accordance with the principles of the European Charter of Local Self-Government (ETS No. 122); as part of the reform, to give the relevant authorities the necessary institutional and human resources and arrange redistribution of resources to compensate for the underdevelopment of certain regions, particularly south-east Turkey, and move from a dialogue to a formal partnership with United Nations agencies to work for a return, in safety and dignity, of those internally displaced by the conflict in the 1990s***".

34. The parliament passed a new Local Government Act in March 2008. This creates 43 new districts, merges 239 municipalities and abolishes 863. However, it was referred to the Constitutional Court following an appeal by the CHP. The court had ruled on this a few days before my visit and its President informed me that the Act had been considered constitutional and that it could come into force after a few minor alterations.

35. In July 2008, the parliament passed a law raising the income of local authorities to enable them to discharge their functions more effectively.

36. In January 2007, a number of sets of proceedings were brought against mayors and municipalities in South-East Anatolia, in particular: proceedings against 56 mayors who, in a letter to the Danish Prime Minister, had supported the television channel Roj TV, which broadcasts in the Kurdish language; and proceedings in Diyarbakir against the mayor of Sur, Mr Abdullah Demirbaş, and the municipal council for deciding to issue information regarding the provision of certain public services not only in Turkish but also in other languages (Kurdish, Armenian, Syriac, English and Arabic) in a resolution entitled "Multilingual Municipality Service".

37. As a consequence, the municipal council and mayor of Sur were dismissed by a decision of the Council of State, upon the request of the Ministry of the Interior, and the town was administered by an official appointed by the governor's office from June 2007 until the local elections in March 2009, despite the fact that partial elections should have been held 110 days after the suspensions of the mayors and at least 100 days before the local general elections. The court finally cleared Mr Abdullah Demirbaş of all the charges against him on 4 March 2009.

38. Although the task of the Congress delegation that visited the region was not to state whether the Sur case and the constitutional and legislative provisions on which it was based demonstrated a breach of the standards of the Charter, it did reach the provisional view that that was indeed the case. According to the

delegation, “the circumstances do not demonstrate ‘repeated and established violations’ or a proportionate response justifying such an intrusive intervention into the autonomy of the local authority”.¹²

39. As time was short, I was unable to travel to the region to meet the people concerned, but the Congress report indicates that the legislation (Sections 30 and 44 of the Local Government Act) remains the key to solving the problem and that it is also necessary to amend the Constitution in this area.

IV. Human Rights and the Rule of Law

i. Freedom of expression and association

40. In its Resolution 1380 (2004), the Assembly called on the Turkish authorities to “[...] **vi. complete the revision of the Criminal Code, with the Council of Europe’s assistance, bearing in mind the Assembly’s observations on the definitions of the offences of insulting language and defamation, rape, honour crimes and, more generally, the need for proportionality arising from the European Court of Human Rights’ case-law on freedom of expression and association; vii. undertake, with the Council of Europe’s assistance, a comprehensive examination of the legislation dating from the period of the state of emergency, particularly that relating to association, trade unions and political parties, to ensure that as far as possible it reflects the spirit of recent reforms**”.

a. Freedom of expression

41. The NGO representatives I met reported that the year had been a very bad one for Turkey with regard to human rights in general and freedom of expression in particular. Amnesty International believes that freedom of expression is not guaranteed given the various articles of the Criminal Code that restrict it. The reform of Article 301 by no means lifted all the obstacles to freedom of expression. For example, 1,300 websites are said to have been closed down by the authorities in 2008.

42. In a resolution of 12 March 2008 on the Turkey 2008 Progress Report¹³, the MEPs expressed their regret that freedom of expression and freedom of the press were still not fully protected in Turkey. They also thought that the amendment to Article 301 of the Criminal Code, passed in April 2008, did not go far enough as people continued to be prosecuted for expressing non-violent opinions, the most notable case being that of Leyla Zana, the winner of the European Parliament’s Sakharov Prize in 1995.

43. The Committee of Ministers is currently supervising the measures taken and envisaged by the Turkish authorities in the execution of 82 judgments of the European Court of Human Rights and 9 friendly settlements concerning freedom of expression. In the judgments concerned, the applicants’ right to freedom of expression had been violated as a result of their conviction by the state security courts following the publication of articles, drawings or books or the drafting of messages for public consumption. In some other cases, the violations had been due to the seizure of publications.¹⁴

44. The Assembly, for its part, has on several occasions expressed its concern over Article 301 of the Criminal Code, which punishes anyone who insults government institutions or offends the concept of “Turkishness”.¹⁵

45. The government and, in particular, the present Prime Minister, have undertaken to reform the legislation restricting freedom of expression to bring it into line with Article 10 of the Convention. In April 2008, the Turkish parliament passed amendments to Article 301 of the new Criminal Code (which entered into force in May 2005) to strengthen the measures to protect freedom of expression in Turkey. The changes modified the wording of that Article, which punished statements that “publicly denigrate Turkishness” or the state institutions. The Minister of Justice now has to authorise the initiation of inquiries under Article 301, which opens up the possibility of a political interpretation of the law. The reform replaces the offence of denigrating “Turkishness” by that of insulting the “Turkish Nation” and lowers the maximum sentence from

¹² See the report of the Bureau of the Congress of Local and Regional Authorities on “Local democracy in Turkey, situation in Sur/Diyarbakir (South-East Anatolia, Turkey)”, CG/Bur (14)29 rev2, 18 September 2007.

¹³ Resolution adopted on 12 March 2009 by the European Parliament with 528 votes in favour, 52 against and 43 abstentions.

¹⁴ See Memorandum CM/Inf/DH (2008)26 on Freedom of expression in Turkey: Progress achieved – Outstanding issues, General and individual measures required by the judgments of the European Court of Human Rights – Follow-up to Interim Resolutions ResDH(2006)79, ResDH(2001)106 and ResDH(2004)38, prepared by the Directorate General of Human Rights and Legal Affairs.

¹⁵ “Turkishness” is defined as follows in Article 66 of the Constitution: “Everyone bound to the Turkish state through the bond of citizenship is a Turk”.

three to two years' imprisonment. Most proceedings should in future take place before the police courts rather than the criminal courts.

46. On 9 May 2008, the Ministry of Justice issued a circular concerning the entry into force of the amendment to Article 301. It set out the principles for conducting a criminal investigation under that Article for "insulting the President, the Turkish Nation and the higher state authorities".

47. According to the Turkish authorities, Article 301 of the new Turkish Criminal Code was used to bring a total of 1,072 proceedings between June 2005 and April 2008 and led to the conviction of 192 people.

48. Between the adoption of the amendments in April 2008 and February 2009, 585 cases were submitted to the Minister of Justice with a request for permission to bring prosecutions under Article 301. Permission was refused in 395 of these cases, which resulted in their being closed. Permission was granted in 70 cases, and 120 others are currently being examined by the Minister of Justice.

49. The other legal provisions restricting freedom of expression, such as Articles 215, 216 and 217 of the Turkish Criminal Code, remain problematic insofar as they penalise breaches of public order and are used, together with the Anti-Terrorism Act, in proceedings against individuals who express their opinions on the Kurdish issues in non-violent ways, with judges and prosecutors adopting a broad interpretation of the provision on "incitement to violence" or "public interest".

50. I pointed out that in its case-law on freedom of expression the European Court of Human Rights draws a clear distinction between the expression of opinion by violent and by non-violent means. In its *Özgür Gündem v. Turkey* judgment of 16 March 2000¹⁶, it held that there had been a violation of Article 10 of the Convention because the Turkish state had failed to take "adequate protective and investigative measures to protect *Özgür Gündem's* exercise of its freedom of expression and that it (had) imposed measures on the newspaper, through the search-and-arrest operation [...] which were disproportionate and unjustified". The judgment has still not been fully executed, nor have the judgments in the other cases involving freedom of expression included in the Committee of Ministers' Interim Resolutions¹⁷. These cases were examined by the Committee of Ministers again on 17 and 19 March 2009.

51. When I met representatives of the *Özgür Gündem* newspaper, which specialises in Kurdish affairs, they complained about numerous attacks on their freedom of expression when the subject-matter involved the Kurdish issue. They said they were subject to considerable pressure from the Turkish government and armed forces, as was everyone who advocated a settlement to the question by means other than the intervention of the army. According to their figures, 19 newspapers had been suspended 43 times between 4 August 2006 and 4 November 2008, and I was provided with a detailed list. They complain about discriminatory treatment because they are punished for articles most of which are carried by other newspapers that are not subsequently placed under investigation.¹⁸

b. Freedom of association

52. The restrictions on freedom of association in Turkey mainly relate to political parties. This subject has already been discussed on several occasions by the Assembly and other Council of Europe bodies, in particular the Venice Commission.

53. Turkey is notorious for the many dissolutions of political parties, one of the most recent instances being the attempt to dissolve the ruling AKP party in 2008 and the political crisis that ensued. I once again refer to Luc van den Brande's report on the functioning of democratic institutions in Turkey¹⁹.

54. In its last monitoring report on Turkey in 2004, the Assembly already considered that the frequency with which political parties were dissolved in Turkey was not only a breach of the freedom of association and assembly guaranteed by Article 11 of the European Convention on Human Rights but also revealed a more general problem of the functioning of the country's institutions. Of all European countries, Turkey has had the most dissolutions of political parties.

¹⁶ Application No. 23144/93

¹⁷ ResDH(2001)106 and ResDH(2004)38; CM/Inf/DH(2003)43

¹⁸ For the case of the 53 mayors of the DTP (pro-Kurdish) party who were prosecuted, see the section on local government above.

¹⁹ *Op. cit.* See also paragraph 9 above on the Constitutional Court's decision

55. Moreover, in almost all the cases concerning the dissolution of political parties by the Constitutional Court between 1991 and 1997, the European Court of Human Rights has concluded that the sanction was disproportionate and was thus a violation of the right to freedom of association enshrined in Article 11.

56. Apart from the AKP, another recent case involved the above-mentioned DTP party (pro-Kurdish), which entered parliament after the 2007 general election by having 20 candidates elected as independents. In application of Articles 68 and 69 of the Constitution and the relevant legal provisions of the Political Parties Act, the Constitutional Court, on 16 November 2007, granted the Attorney General's request to examine the closure of this party. 221 of the party's members, including 8 members of parliament, could be banned from politics for five years. Moreover, four members of parliament, including Ms Emine Ayna, vice-chair of the party, the Istanbul member Ms Sabahat Tuncel and the members for the city of Van, Mr Özdal Üçel and Mr Bengi Yıldız, who are accused of involvement in the terrorist activities of the PKK, risk imprisonment. The party is accused of activities harmful to the unity and integrity of the country. Anticipating a verdict closing down the party, 42 Kurdish politicians with links to the DTP have applied to set up a new party to be known as the Peace and Democracy Party. This almost systematic circumvention of the problem of banning parties only underlines the perverse effects of the existing legal framework.

57. The DTP case is currently before the Constitutional Court and its President told me that the decision is likely to be announced by mid-2009.

58. It is true that, through the 1995 and 2001 constitutional reforms and the 2003 amendments to the Political Parties Act, the Turkish authorities have introduced provisions that strengthen the requirement of proportionality for any state interference in the freedom of association enjoyed by political parties. Also, an amendment to Article 90 of the Constitution in 2004 provided that international human rights treaties take precedence over any incompatible domestic legislation.

59. Nonetheless, the recent cases involving the closing down of the AKP and the DTP illustrate the fact that the legislation currently in force does not provide politicians with sufficient protection against state interference in their freedom of association and expression. The question of the dissolution of political parties in Turkey is still ongoing, and it is clear that more constitutional and legislative reforms are essential in this connection.

60. On this subject, the Monitoring Committee asked the Venice Commission on 15 September 2009 to look at the relevant constitutional and legal provisions concerning the banning of political parties in Turkey. The Venice Commission's opinion was adopted at its 8th Plenary Session (13-14 March 2009)²⁰.

61. The Venice Commission is of the opinion that the provisions in Article 68 and 69 of the Constitution and the relevant provisions of the Political Parties Act together form a system that as a whole is incompatible with Article 11 of the ECHR, as interpreted by the European Court of Human Rights, and with the criteria adopted in 1999 by the Venice Commission and since endorsed by the Council of Europe Parliamentary Assembly.

62. According to the Venice Commission, the basic problem with the present Turkish rules on party closure is that the general threshold is too low, both for initiating procedures and for prohibiting or dissolving parties. This in itself deviates *in abstracto* from common European democratic standards and too easily leads to action that breaches the Convention, as demonstrated by the many Turkish cases before the European Court of Human Rights.

63. The Venice Commission is of the opinion that, although the 2001 reform was an important step in the right direction, it is still not sufficient to raise the general level of party protection in Turkey to that of the Convention and the common European democratic standards. Further reform is necessary in order to achieve this, both on the substantive and the procedural side. Any reform to the Turkish rules on party closure will require constitutional amendment. The Venice Commission remains at the disposal of the Turkish authorities should they desire its assistance with and advice on amending the rules on party prohibition, as a separate process or as part of broader constitutional reform.

64. I urged the authorities to carry out a serious in-depth revision of the Constitution and the legislation on the political parties in order to bring the provisions in line with European standards. The Venice Commission's opinion on the relevant constitutional and legal provisions concerning the banning of political parties in Turkey only confirms the importance of these reforms and emphasises their urgency.

²⁰ CDL (2009) 014

65. As regards the Law on Foundations, the amendments passed in February 2008 were a step forward in improving the statutory framework aimed at guaranteeing freedom of association and religion. The scope of the new law extends to all existing foundations, including those of the non-Muslim communities.

66. All those with whom I spoke who represent the various communities organised as foundations supported this law and said they were satisfied with it, stressing at the same time that the way the law was implemented would be crucial. The new provisions facilitate the procedure for setting up foundations as well as the regulatory framework for their activities, the acquisition and sale of property, the collection of funds from abroad and co-operation with foreign foundations. The new law provides for tax rebates for donations to all foundations and tax exemptions for work on, and the restoration and development of, cultural properties belonging to foundations. It also provides for the establishment of a foundations council as the highest-ranking decision-making body in which all foundations are themselves represented.

67. That said, I share the concerns expressed by Mr Hunault in his report on freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (Eastern Greece)²¹ to the extent that the new law has failed to remove all references to the “reciprocity” principle, which is quite out of place in this context. Also, the law provides that the new foundations must be set up in accordance with the Turkish Civil Code, which, in Article 101 (4), prohibits the setting up of foundations with a view to supporting a group of a specific origin or a community. This is liable, in practice, to prevent the setting up of new foundations by minority groups.²² I also share the opinion of the representatives of the various communities that the true test of the progress represented by this law remains its implementation by the various authorities concerned and its interpretation by the courts.

ii. *The security forces and the judicial system*

68. In its Resolution 1380 (2004), the Assembly called on the Turkish authorities to “**continue the training of judges and prosecutors as well as the police and gendarmerie, with the Council of Europe’s assistance**”.

a. *The security forces*

69. Last year, the Committee of Ministers adopted its fourth Interim Resolution²³ on the execution of the judgments of the European Court of Human Rights, the progress made and outstanding issues regarding the Court’s 175 judgments and decisions relating to Turkey delivered between 1996 and 2008. These judgments mainly concern deaths resulting from the excessive use of force by members of the security forces, the failure to protect the right to life, the disappearance and/or death of individuals, ill-treatment and the destruction of property. These judgments also draw attention to the lack of effective domestic remedies available to complainants.

70. The Committee of Ministers has referred to the reforms undertaken by the Turkish authorities since its first two Interim Resolutions of 1999 and 2002, which highlighted the general measures aimed at preventing such violations. Following its examination of the measures adopted since its last Interim Resolution, in 2005, it decided to close the examination of these issues in view of the measures taken, especially: the improvements in procedural guarantees during police custody; the improvement in the training of members of the security forces; the direct effect of the requirements of the Convention; the prompt and efficient implementation of the “Law on Compensation of the Losses Resulting from Terrorism and from the Measures Taken against Terrorism”, and the training of judges and prosecutors.

71. With reference to enhancing the criminal liability of members of the security forces, the Committee of Ministers considers that Turkish legislation remains ambiguous regarding the requirement to obtain administrative authorisation to prosecute members of the security forces in cases involving allegations of serious breaches of the law other than allegations of torture and ill-treatment. The Committee of Ministers urges the Turkish authorities to take the necessary legislative steps to remove any ambiguity regarding the fact that administrative authorisation is no longer required to prosecute for not only torture and ill-treatment but also any other serious crimes and to ensure that members of security forces of all ranks can be prosecuted without administrative authorisation.

²¹ See doc. AS/Jur(2009)14 restricted to be considered by the Committee of Legal Affairs and Human Rights at its meeting of 24 March 2009 in Berlin.

²² As regards the failure of the new law to (a) settle the question of return of property which belonged to foundations of minorities (“*vafks*”) and, following expropriation, was sold to third parties, and (b) provide for compensation when property cannot be returned, see chapter IV, v. below on the protection of minorities, with further references.

²³ CM/ResDH(2008)69

72. When we met last November, the Interior Minister reiterated the authorities' commitment to the protection of human rights and pointed out that there was a specialised unit within his ministry whose objective was to promote respect for human rights in the police and gendarmerie. He also explained that, in addition to their initial training and the various training programmes on human rights, the members of the security forces were given specific training on the implementation under domestic law of the judgments of the European Court of Human Rights.

73. Nonetheless, during my discussions with NGO representatives, mention was made of several cases of violence committed last year by the security forces. Amnesty International speaks of many cases of ill-treatment and torture in the prisons and by the police and has drawn attention to the death of Engin Ceber, a young man of 29 who died on 10 October 2008 as a result of the torture allegedly inflicted on him by police officers, prison staff and members of the gendarmerie. He was part of a group of people arrested on 28 September 2008 during a demonstration and press conference in Istanbul's Sariyer district.²⁴

74. It is worth noting that, following the death of Engin Ceber, the Minister of Justice publicly apologised for the use of disproportionate force by the law enforcement bodies and promised swift action to combat torture and curb police abuses. On the basis of an indictment issued by the Prosecutor's Office, a trial was opened on 21 January 2009 on the Ceber case, involving 60 suspects, including police officers, prison governors and prison staff, as well as a prison doctor. The charges brought against the suspects include, among others, the offences of ill-treatment, torture and aggravated torture. The proceedings are on-going.

75. In June 2008, parliament amended the Law on the Rights and Duties of the Police, extending police officers' rights to resort to lethal force and authorising them to fire on any suspect who ignores a warning to stop.

76. In addition, in dealing with demonstrations held on 1 May 2008 in various places in the country to celebrate Labour Day, the police used truncheons and tear-gas against people who were marching peacefully. In Istanbul alone, more than 800 people were arrested, but the total number of arrests has not been made public.²⁵

77. I therefore noted an obvious contradiction between the government's stated "zero tolerance" policy aimed at the total eradication of torture and other forms of ill-treatment, and the different testimonies given. The national authorities must make considerable efforts to guarantee that proper investigations are carried out into allegations of abuses by members of the security forces and that perpetrators are effectively punished.

78. In this respect, I have requested detailed statistics on the number of investigations, acquittals and convictions in cases involving allegations of abuse in order to show the positive impact of the measures taken to date. I would also like to be informed of the outcome of the trial regarding the Ceber case.

b. Judicial training and application of the European Convention on Human Rights by judges

79. Following its revision in April 2004, Article 90 of the Turkish Constitution now provides that international human rights conventions take precedence over any national legislation incompatible with their provisions.²⁶

80. When it examined the action taken by the Turkish authorities to execute a series of judgments of the European Court of Human Rights, the Committee of Ministers considered that Article 90, as amended, should facilitate the direct application of the European Convention on Human Rights and the Court's case-law in the interpretation of Turkish law.²⁷

81. During my visit to Turkey in November 2008, the Minister of Justice told me that both judges and applicants for the post of judge or public prosecutor benefited from not only initial training and various human rights training programmes but also specific training on the application of the case-law of the European Court of Human Rights in domestic law. He told me that judges and public prosecutors were also urged, by means of a circular that reiterates and interprets the articles concerned, to apply the Court's case-law directly.

²⁴ See Amnesty International's press release on the death of Engin Ceber.

²⁵ See Amnesty International's 2008 annual report on Turkey <http://www.amnesty.org/en/region/turkey/report-2008>

²⁶ See also above

²⁷ See CM//Inf/(2008)26

82. Nonetheless, in spite of Article 90 of the Constitution and the aforementioned training and circular, it would appear that, in practice, the European Convention on Human Rights and the Court's case-law is not directly applied by the judges systematically.

83. Article 90 of the Constitution should enable cases to be reopened following judgments by the European Court of Human Rights finding a violation of the Convention. This would be particularly important for cases that do not fall within the scope of Article 311 of the Code of Criminal Procedure, which provides for the reopening of proceedings only in respect of Court judgments which became final before 4 February 2003 or those delivered in applications lodged with the Court after that date. Nonetheless, the Court's judgments finding a violation of the Convention do not systematically lead to the reopening of proceedings under Article 90 of the Constitution.

84. I also mentioned the case of *Hulki Güneş v. Turkey*²⁸, in which execution of the judgment is still pending. In this case, the Court found a violation of Article 6.1 and Article 3 of the Convention, noting the lack of independence and impartiality of the Diyarbakır National Security Court which tried the applicant, and the ill-treatment inflicted upon him while in custody in 1992. Since the Court's judgment was made final after 4 February 2003, Article 311 of the Code of Criminal Procedure is not applicable and only the direct application of Article 90 of the Constitution would enable the proceedings to be reopened. It should be further noted that the execution of many other judgments of the Court is still pending, awaiting practical examples proving that judges directly and systematically apply Article 90 of the Turkish Constitution and the Court's case-law.

85. As regards the organisation and independence of the judicial system, the High Council of Judges and Public Prosecutors is responsible for the selection, appointment and transfer of judges and prosecutors and for disciplinary measures against them.

86. From my discussions with members of this council, I understood that the influence of the Ministry of Justice on this body is in fact of a structural nature. The Minister of Justice is its president and sets its agenda; its offices and those of the Ministry of Justice adjoin one another, its budget is controlled by the ministry and it does not have its own secretariat. Moreover, the Judicial Inspection Department answers directly to the Ministry of Justice itself.

87. I was also surprised to learn that the High Council of Judges and Public Prosecutors cannot initiate the prosecution of a judge or prosecutor without the consent of the Minister of Justice. I find it hard to see how the High Council of Judges and Public Prosecutors can operate independently of the Ministry of Justice under these circumstances.

iii. Right to conscientious objection and alternative civilian service

88. In its Resolution 1380 (2004), the Assembly called on the Turkish authorities to “[...] **recognise the right of conscientious objection and establish an alternative civilian service.**”

89. The legislation in this area has not yet been amended to this effect and the establishment of an alternative service is not on the government's agenda.

90. Under Article 10 of the Constitution, “all individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such consideration. No privilege shall be granted to any individual, family, group or class.” Article 72 provides: “National service is the right and duty of every Turk. The manner in which this service shall be performed, or considered as performed, either in the Armed Forces or in public service shall be regulated by law.”

91. Section 1 of Law No. 1111 on military service provides: “Every male Turkish citizen shall be obliged to perform military service”, while Article 45 of the Military Criminal Code states that “the fact that a person considers an act necessary on the grounds of conscience or religion shall not exempt him from punishment.”

92. In a recent case, *Ülke v. Turkey*²⁹, the Court concluded that the many convictions and prison sentences imposed on the applicant for refusing to do his military service constituted degrading treatment in violation of Article 3 of the Convention.

²⁸ Application No. 28490/95. The judgment became final on 19 September 2003

²⁹ Application No. 39437/98, judgment of 24 January 2006

93. The Court held that the existing legal framework was insufficient as Turkish law contained no specific provision regulating the sanctions provided for in the case of individuals who refuse to do their military service on grounds of conscience or religion and that the only rule applicable in this area seemed to be the rules of the Military Criminal Code that provide for punishments in general terms for disobeying the orders of a superior. Every state's obligation under Article 46, paragraph 1, of the Convention, to abide by the Court's judgments involves the adoption of individual measures that put an end to the violations found and remove their effects for the applicant as far as possible, as well as general measures aimed in particular at preventing similar violations.

94. At the 997th meeting of the Committee of Ministers in June 2007, the Turkish authorities stated that a bill had been drafted to prevent new violations of Article 3 similar to the one established in that particular case and that, as soon as the opinions concerned were received, the draft would be sent to the Prime Minister's Office for submission to parliament.

95. Nonetheless, the applicant was ordered in April 2007 to present himself to serve the sentence previously imposed on him, and his request for a stay of the order was turned down by the Eskişehir Military Court on the ground that the aforementioned statement to the Committee of Ministers was inadmissible as the content of the revision of the law – and what it would determine for cases like his – was not yet known.

96. In its Interim Resolution CM/ResDH(2007)109³⁰, the Committee of Ministers urged the Turkish authorities to take without further delay all necessary measures to put an end to the violation of the applicant's rights under the Convention and to adopt rapidly the legislative reform necessary to prevent similar violations of the Convention. It also called on the Turkish authorities rapidly to provide the Committee with information concerning the adoption of the measures required by the judgment. On 19 March 2009, the Committee of Ministers adopted a second Interim Resolution on the *Ülke v. Turkey* case (Interim Resolution CM/ResDH(2009)45).

97. I reminded the people with whom I spoke that Article 90 of the Turkish Constitution stated that the European Convention on Human Rights took precedence over Turkish law. However, despite this legal provision the applicant is about to be imprisoned on the basis of a previous conviction.

98. Moreover, conscientious objectors continue to be prosecuted and frequent allegations of their ill-treatment in prison are reported. Furthermore, public statements calling for the right to conscientious objection have led to convictions.

99. The authorities have confirmed that a reform of the Military Criminal Code and the law on military service is under consideration in the Grand National Assembly. According to the Interior Minister, Mr Atalay, the reform will amend the law on citizenship. Turkish citizens living abroad who do not perform their military service would no longer have their citizenship removed. According to Mr Atalay, the idea of a professional military service is also being considered but such reforms require a change in mentalities and take a great deal of time.

iv. *The institution of the Ombudsman*

100. In its Resolution 1380 (2004), the Assembly called on the Turkish authorities **to establish the institution of the Ombudsman**.

101. The Law on the Ombudsman was approved by parliament on 15 June 2006. However, on 30 June 2006 the former President of the Republic of Turkey vetoed a dozen of its sections concerning the establishment and operation of the Ombudsman. It was again passed by parliament on 28 September 2006 and published in the Official Gazette on 13 October 2006.

102. The former President of the Republic then turned to the Constitutional Court and asked it to repeal certain sections of that law, in particular the key provisions on the creation of the institution of the Ombudsman. The court ordered that their implementation be suspended pending a final decision on the merits.

103. On 25 December 2008, the Constitutional Court decided to abrogate the Law on the Ombudsman as unconstitutional. The reasoning of the Court's judgment has not been made public yet. The future of the law will depend on this reasoning.

³⁰ Adopted by the Committee of Ministers on 17 October 2007 at the 1007th meeting of the Ministers' Deputies

104. I was informed that it is planned to include an article in the new draft Constitution providing for the creation of the institution of the Ombudsman. Also, in parallel with the developments related to the Law on the Ombudsman, preparatory work is being carried out to put in place a legal framework providing for a National Human Rights Institution.

105. At the moment, in the absence of an ombudsman mechanism there is no alternative but to turn to the judicial system to examine complaints relating to compliance with the rule of law and respect for human rights against the administrative decisions of local or central government.

v. *Cultural rights and protection of minorities*

106. In its Resolution 1380 (2004), the Assembly called on the Turkish authorities to **“pursue the policy of recognising the existence of national minorities living in Turkey and grant the persons belonging to these minorities the right to maintain, develop and express their identity and to apply it in practice.”**

107. As I have mentioned above, the new Law on Foundations is generally seen as a step forward, and the authorities and representatives of various communities with whom I spoke stressed that it was crucially important to implement it.

108. I refer to the report by Mr Michel Hunault (France, European Democrat Group)³¹ for the Assembly's Committee on Legal Affairs and Human Rights on the subject of freedom of religion and other human rights of non-Muslim minorities in Turkey and the Muslim minority in Thrace (eastern Greece). This report will probably be presented at the June 2009 plenary session.

109. The members of the religious minorities I was able to meet believe they are free to exercise their religion. However, they all emphasised the problem that they do not have legal personality. This affects all the communities and has direct consequences in terms of property rights and asset management. During our meetings, the Chief Rabbi, the Turkish Armenian Patriarchal Archbishop and His All Holiness Ecumenical Patriarch Bartholomew I all said that they had tried to contact the government on this subject but had received no reply.

110. The difficulties encountered in terms of ownership of religious institutions are explained in detail in both the 2003 report of the Commissioner for Human Rights on his visit to Turkey³² and in the above-mentioned report by Mr Hunault. To sum-up, following a 1974 judgment by the Court of Cassation, religious foundations, on the basis of this case-law, were the subject of mass expropriations, without compensation, and the Directorate General of Foundations was assigned responsibility for managing very many of them (considered to be no longer in existence). This applied not only to church buildings, but to all property belonging to a parish (including churches, school buildings houses and fields). The number of property items actually belonging to religious minorities has been considerably reduced, with effect for the foreseeable future. Such confiscations of property without payment of compensation have prompted numerous applications to the European Court of Human Rights which has ruled against Turkey on several occasions for a violation of Article 1 of Protocol No. 1 of the Convention (protection of property)³³.

111. Legislative reforms which took place under the European legislative harmonisation package (2002-2003) enabled some foundations to purchase and register property after 2002. But the new legislation had no retroactive effect and did not cover property belonging to religious establishments which passed into state ownership before 2002 as abandoned property. The new 2008 Law on Foundations has provided new solutions to the problems of religious foundations. It allows for registration of property given to foundations or purchased after 1936 but returned to the donors, the Treasury or the Directorate General of Foundations, but has not remedied the situation in respect of properties which were subsequently sold to third parties.

³¹ As/Jur (2009)14 restricted

³² See Doc. CommDH(2003)15 (19 December 2003), Report by Mr Álvaro Gil-Robles, Commissioner for Human Rights, on his visit to Turkey, 11 and 12 June 2003, paragraph 94

³³ Apostolidi and Others v. Turkey (Application no. 45628/99, 27 March 2007), Fener Rum Patrikligi (Ecumenical Patriarchate) v. Turkey, (Application no. 14340/05, 8 July 2008) and the cases of Yedikule Surp Pirgiç Ermeni Hastanesi Vakfi v. Turkey, Application no. 36165/02, 16 December 2008, Samatya Surp Kervok Ermeni Kilisesi, Mektebi Ve Mezarligi Vakfi Yötenim Kurulu v. Turkey (Application no. 1480/03, 16 December 2008) and Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfi v. Turkey no. 2 (Application nos. 37639/03, 37655/03, 26736/04 and 42670/04, 3 March 2009). In the latter judgment, the European Court of Human Rights ruled against Turkey for depriving a Greek Orthodox foundation of land and a building, holding that the right to the protection of the property of the Foundation of the Bozcaada Kimisis Teodoku Greek Orthodox Church had been violated and that, if this property was not registered within three months in the land register under the Foundation's name, the Turkish state had to pay 100,000 euros in respect of pecuniary damage.

Moreover, the new law in no way provides for compensation where property cannot be returned. Accordingly, it would not appear to put an end to the outstanding property issues of minorities.

112. In my interview with him, His Holiness the Ecumenical Patriarch Bartholomew I also mentioned the difficulties encountered regarding his title and in the field of education.

113. First and foremost, I was surprised to learn that the Turkish Court of Cassation not only referred in its decision of 26 June 2007 to the official position that the Greek Orthodox Patriarchate is an institution without legal personality but also stated that it was non-ecumenical. To say the least, I question the competence of a court of justice to take up a position on such a matter of a religious nature (with internal ecclesiastical connotations) and linked to the freedom of religious expression and the protection of the autonomy of the minority.³⁴

114. After a law was passed placing religious education under state control, the Greek Orthodox theological college in Heybeliada (Halki seminary) was closed down in 1971. The Patriarchate, which has since then called for the reopening of the seminary with its pre-1971 status, wants all Orthodox Christians, whatever their nationality, to be able to study at Halki. Given these difficulties in training new members of the clergy, one solution is to bring in members of religious orders from abroad, but the Patriarchate says they then face the problem of obtaining work permits. The Patriarch regretted the Turkish authorities' refusal to engage in dialogue on this subject, despite his having sent 84 letters to the Turkish government, which it systematically failed to answer. Moreover, the Patriarch met the Turkish President in September 2007, as well as the Foreign Minister, the Interior Minister and the Education Minister, and clearly described all the problems concerning the Patriarchate. He also has regular contacts with the competent Turkish administrative authorities. Like the rapporteur Michel Hunault, I personally very much hope that the Halki seminary will be reopened.³⁵

115. On 6 March 2009, the United Nations Committee on the Elimination of Racial Discrimination, in its Concluding Observations on Turkey, called upon Turkey "to redress such discrimination and to urgently take the necessary measures to reopen the Greek Orthodox theological seminary in the island of Heybeliada, to return confiscated properties and to promptly execute all relevant judgments by the European Court of Human Rights in that respect."³⁶

116. As the Armenian Orthodox seminary (Skudari seminary) has also been closed because of insufficient student numbers, the representatives of the Armenian Orthodox community said they regretted not having the means to send their members abroad for training and would like a department for the study of the Armenian Orthodox religion to be opened at a Turkish university.

117. The representatives of the Jewish community informed me that the rabbinical school had also been closed because of insufficient student numbers but the question of clergy training was not perceived as a major problem for them.

118. The representatives of the Jewish community said they were generally satisfied with relations between them and the Turkish government but expressed their concern at the rise in anti-Semitism and the various acts of vandalism against their community. They expressed their regret that the hate speech put out by extremist media, which made sweeping generalisations between Israel and Judaism, went unpunished. The former Criminal Code actually contained a provision making incitement to hatred a criminal offence but under the new Criminal Code incitement to hatred must have a "real and immediate effect" if it is to be classed as a crime. According to the representatives of the Jewish community, anti-Semitic acts go unpunished as the danger is not considered to be real and immediate.

119. The various community representatives I met confirmed that there is a strong tendency in the Turkish press landscape towards extremist nationalist and overtly hostile positions towards minorities, whether religious or not.

120. The Turkish authorities stick solely to the Treaty of Lausanne (signed on 24 July 1923), which grants the non-Muslim religious minorities in Turkey a number of rights (Articles 37 to 44) but identifies precisely

³⁴ See also the above-mentioned report of Mr Hunault

³⁵ Idem

³⁶ See the Concluding Observations on [...] Turkey of the seventy-fourth session of the Committee on the Elimination of Racial Discrimination, 6 March 2009, [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/1C8828472FF6ACF0C125757100584C87?OpenDocument&cntxt=86A74&cookielang=en](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/1C8828472FF6ACF0C125757100584C87?OpenDocument&cntxt=86A74&cookielang=en)

neither the minorities concerned nor their geographical location. The authorities recognise the Jewish, Armenian and Greek Orthodox minorities and have pointed out that they consider all Turkish citizens as having equal rights and not as individuals belonging to a minority or a majority.

121. However, this should not prevent Turkey from guaranteeing, in accordance with European standards, specific rights to some Turkish citizens on the basis of their ethnic origin, religion or language in order for them to preserve their identity.

122. During our talks, the authorities did not provide any new information on this subject. They stand by their position and, according to written information provided by the Turkish authorities in December 2007, the signing of the Framework Convention for the Protection of National Minorities and the Charter for Regional and Minority Languages is not on the Turkish government's agenda.

123. I also met Mr Ali Kenanoğlu, President of the Alevi-Bektashi Foundation. He said Alevism was, as one of the branches of Islam, the second most important religious belief in Turkey after Sunnism, and had between 15 and 20 million believers, equivalent to a third of the Turkish population. This religious minority has no political representation and, according to Mr Kenanoğlu, does not really want any.

124. However, the community seems to be organising itself in defence of the rights that it considers to have been eroded. A first mass demonstration was held on 9 November 2008 with, according to the organisers, some 135,000 participants. As the Alevis do not recognise mosques as places of worship or the Five Pillars of Sunni Islam, they are calling for recognition of their faith and, especially, the abolition of compulsory (Sunni) religion classes, the abolition of the Religious Affairs Directorate, which functions as the state's religious body even though the state is constitutionally secular, and the statutory recognition of their place of worship, the "Cem houses". They have also asked the authorities to allow them to turn a hotel in Sivas, where 33 Alevis died in a tragic arson attack in 1993, into a museum.

125. In a case brought before the Strasbourg Court by an Alevi student and her father, the Court found a violation of the applicants' right to education under Article 2 of Protocol No. 1 to the European Convention of Human Rights. This violation originated in a problem with the implementation of the religious instruction syllabus in Turkey and the absence of appropriate methods to ensure respect for parents' convictions. The Court held that Turkey, in executing this judgment, should bring its education system and domestic legislation into conformity with Article 2 of Protocol No. 1 and this would also represent an appropriate form of compensation for the applicants. The judgment became final on 9 January 2008 and should now be executed.³⁷

126. In its Turkey 2008 Progress Report, the European Commission discusses at length the issue of freedom of religion. Referring to the difficulties in the trial of the killers of the three Protestants in Malatya, the report also looks in some detail at the situation of the Alevis in Turkey. Although the report's authors welcome the recognition by a municipality for the first time that a Cem house is a place of prayer and are pleased that the Council of State has recognised the right of children of Alevi families to be exempt from religious education classes, they note that the general situation is far from being satisfactory, especially regarding the status of places of worship and the issue of religious education classes, which are compulsory under Article 24 of the Constitution.³⁸

127. The issue of cultural minorities, especially the Kurds, remains an important one.

128. In its resolution of 12 March 2008 on the Turkey 2008 Progress Report³⁹, the European Parliament called on the Turkish government "to launch as a matter of priority a political initiative favouring a lasting settlement of the Kurdish issue, which initiative needs to address the economic and social opportunities of citizens of Kurdish origin, and to tangibly improve their cultural rights, including real possibilities to learn Kurdish within the public and private schooling system and to use it in broadcasting and in access to public services and to allow elected officials to use a second language apart from Turkish in communicating with their constituents."

129. During my discussions with representatives of the DTP (Democratic Society Party) group in the Turkish Grand National Assembly, they voiced their regret that the rights of the Kurds did not form part of the Turkish identity even though they numbered 20 million people. In their opinion, the 10% threshold was

³⁷ *Hasan and Eylem v. Turkey* (Application no. 1448/04)

³⁸ Turkey 2008 Progress Report, Brussels, 5 November 2008, Commission staff working document, SEC (2008)2699

³⁹ Resolution adopted on 12 March 2009 by the European Parliament with 528 votes in favour, 52 against and 43 abstentions

introduced to prevent Kurdish representation in parliament and the current legal action against the DTP⁴⁰ was just one of many attempts to limit the expression of their political views. Contrary to what happened in the case of the AKP, they fear the Constitutional Court will order the party to be closed down, as it has already done on several occasions in the past.⁴¹

130. The launch of a public 24-hour television channel broadcasting in the Kurdish language on 1 January 2009 is to be welcomed.

131. Owing to a lack of time, it was possible to discuss this question only briefly on this occasion but it will be examined in the post-monitoring dialogue context during a forthcoming visit.

vi. *The state of health of Mr Abdullah Öcalan*

132. A motion for a resolution on the state of health of Mr Abdullah Öcalan was presented by Lord Russell Johnston and others in April 2007⁴². On 15 April 2008, the Committee on Legal Affairs and Human Rights (AS/Jur), which was asked to draft an opinion on the appropriate follow-up to be given to this motion, considered that it was not necessary to appoint a special rapporteur on Mr Öcalan's state of health. As regards the follow-up to the recommendations of the European Committee for the Prevention of Torture (CPT) – fully endorsed by the AS/Jur – concerning the effects of Mr Öcalan's long-term seclusion, the post-monitoring dialogue between the Assembly and Turkey should provide enough opportunities to monitor developments in the situation.

133. Mr Öcalan's state of health is being monitored by the CPT, whose report (which contains an addendum on the allegations of poisoning by heavy metals) was made public with the agreement of the Turkish authorities in March 2008.⁴³ The findings of the experts appointed by the CPT indicate that the prisoner has not been the subject of intoxication by heavy metals.

134. However, the CPT clearly criticised the seclusion of Mr Öcalan and continues to co-operate with the Turkish authorities under the European Convention for the Prevention of Torture.

135. Mr Öcalan has made several applications to the European Court of Human Rights concerning, amongst other matters, the conditions of his detention.⁴⁴

136. I also met one of Mr Öcalan's lawyers in Strasbourg during the January 2009 part-session and was able to gather a considerable amount of information on his situation. His lawyer complained about various violations of the European Convention for the Prevention of Torture from which Mr Öcalan is still suffering today, as well as numerous breaches of his defence rights. The defence lawyers are regularly suspended from the case and consequently have to be replaced, which has an impact on procedural deadlines. Mr Öcalan has also complained that his lawyers are prevented from sending him documents crucial for his defence.

vii. *Refugees and asylum-seekers*

137. In its Resolution 1380 (2004), the Assembly called on the Turkish authorities to “[...] **lift the geographical reservation to the 1951 Geneva Convention relating to the Status of Refugees and implement the recommendations of the Council of Europe Commissioner for Human Rights on the treatment of refugees and asylum seekers.**”

138. This geographical reservation excludes non-European citizens from the scope of the Convention.

139. I met the deputy representative of the UN High Commissioner for Refugees (UNHCR) and the head of the Asylum Transition Planning Unit located at the UNHCR Ankara office, and they emphasised the excellent co-operation between their organisation and the Turkish government. However, they also raised various issues. The Turkish authorities have introduced a new procedure for allowing access to persons in detention pending the consideration of their asylum applications. The UNHCR is not permitted access to people who

⁴⁰ See above

⁴¹ See above, in paragraph 56, about the “perverse effects” of the existing legal framework and the almost systematic circumvention of the problem of banning parties by the setting up of new parties with different names

⁴² Doc. 11271, 24 April 2007

⁴³ See *Addendum to the report on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 to 22 May 2007 CPT/Inf (2008) 13 Addendum*

⁴⁴ Applications Nos. 24069/03, 197/04, 6201/06 and 10464/07

wish to make such an application or who are trying to leave Turkey illegally. The majority of these individuals were said to be held in prolonged detention in Edirne, Kirklareli or Kumkapi.

140. The absence of a host country agreement between Turkey and the UNHCR, the lack of co-ordination in the organisation of assistance, the vexed question of the Iranian refugees and the necessary lifting of the geographical reservation to the 1951 Geneva Convention are at the heart of the co-operation between the UNHCR and the Turkish government.

V. Next steps

141. The political crisis that shook Turkey in 2007 and 2008 has already highlighted the weakness of the country's constitutional and legal framework and had an impact on the whole of society, affecting the smooth functioning of all the democratic institutions.

142. I became convinced during this fact-finding visit that Turkey has to continue its reforms in order to more firmly establish and develop its democratic institutions and ensure that they can operate properly and independently.

143. The authorities and all the people with whom I spoke demonstrated a considerable willingness to work with the Council of Europe and attach particular importance to the values defended by this organisation. I urge them to provide additional comments and information to enhance this post-monitoring dialogue, and I hope I shall be able to come back to the Committee with more detailed information on all the issues raised in this connection.

144. Turkey will take over the Chair of the Council of Europe Committee of Ministers in November 2010 and I hope it will embark on this work having instituted an impressive set of reforms that modernise its democracy.

APPENDIX I

Programme of the fact-finding visit to Turkey (24-26 November 2008)

Rapporteur: Mr Serhiy HOLOVATY, Chair of the Monitoring Committee

Secretariat: Ms Jane DINSDALE, Director of Political and Legal Affairs
Ms Marine TREVISAN, co-secretary of the Monitoring Committee

Monday 24 November 2008

- 08:30 Meeting with Council of Europe Ambassadors
- 10:00-11:00 Meeting with Mr Hasim KILIC, Chief Judge of the Constitutional Court
- 11:15-12:15 Meeting with Mr Hasan GERCEKER, Head of the Supreme Court of Cassation
- 12:30-14:00 Working lunch hosted by Mr Mevlut CAVUSOGLU, Head of the Turkish Delegation to the PACE
- 14:15-15:15 Meeting with Mr Abdurrahman YALCINKAYA, Chief Prosecutor of the Supreme Court
- 15:30-16:15 Meeting with Mr Osman ÇAKIR, Deputy Chairman, Nationalist Movement Party (MHP)
- 16:30-17:15 Meeting with M. Onür ÖYMEN, Vice-Chairman, and Mr Sükrü ELEKDAĞ, Republican People's Party (CHP)
- 17:30-18:15 Meeting with Mr Cüneyt YÜKSEL, Justice and Development Party (AK Party)
- 18:30-19:15 Meeting with Mr Ahmet TÜRK, President, Democratic Society Party (DTP)
- 20:30 Working dinner with Mr Roland SCHILLING, Deputy Representative, and Mr Wojciech TROJAN, Head of the Asylum Transition Planning Unit, UNHCR Office in Ankara

Tuesday, 25 November 2008

- 10:15-11:15 Meeting with Mr Mehmet Ali SAHIN, Minister of Justice
- 12:00-13:00 Meeting with Mr Ali BABACAN, Minister for Foreign Affairs
- 13:15-13:45 Meeting with Mr Murat AKGUN, NTV Ankara
- 14:00-14:45 Meeting with Mr Beşir ATALAY, Minister of Interior
- 14:45-16:00 Meeting with the members of the High Council of Judges and Public Prosecutors
- 16:15-17:15 Meeting with Mr Enis BERBEROGLU, Hurriyet Daily News
- 19:00 Departure from Ankara to Istanbul

Wednesday, 26 November 2008

- 09:00-10:00 Meeting with Chief Rabbi Ishak HALEVA
- 10:15-11:15 Meeting with Aram ATESYAN, Turkish Armenian Patriarchal Archbishop, Chairman of the Religious Council
- 12:00-12:45 Meeting with His All Holiness Ecumenical Patriarch BARTHOLOMEW I
- 13:00-14:00 Lunch hosted by Mr Kadir TOPBAS, Istanbul Metropolitan Municipality Mayor
- 14:30-15:30 Meeting with the representatives of Özgür Gündem newspaper

- 15:45-16:45 Meeting with Mr Ali KENANOGLU, Vice-President of the Alevi-Bektashi Federation
- 17:15-18:15 Meeting with Mr Ergun BABAHAN, Editor in chief, Sabah Daily News
- 18:00-20:00 Meeting with the representatives of NGOs:
Mr Avi HALIGUA, Amnesty International
Ms Emel KURM, Helsinki Citizens' Assembly
Mr. Serhan ARIKANOGLU, Chairman of the Progressive Lawyer Association

APPENDIX II

Chronology of accession/monitoring/post-monitoring procedures

9 August 1949	Turkey's accession to the Council of Europe
April 1996	Monitoring procedure was initiated by the competent committees
25 April 1997	PACE set up the Monitoring Committee, which took over responsibility for all the on-going monitoring procedures
22 June 2004	PACE adopted Resolution 1380 (2004), which provided for the closure of the monitoring procedure in respect of Turkey and the continuation of the dialogue with the country's authorities "on the issues raised in paragraph 23 [...], and on any other matter that might arise in connection with Turkey's obligations as a Council of Europe member state".
8 March 2006	PACE Monitoring Committee decided to initiate post-monitoring dialogue with Turkey. The Turkish authorities were consequently invited to send written observations on the progress made with regard to the 12 issues mentioned in paragraph 23 of Resolution 1380 (2004).
19 May 2006	Consideration of written information provided by the Turkish Delegation
15 October 2007	PACE Monitoring Committee decided to carry on with post-monitoring dialogue with Turkey. The Turkish authorities were consequently invited to send written observations on the progress made with regard to the 12 issues mentioned in paragraph 23 of Resolution 1380 (2004).
18 December 2007	Consideration of written information provided by the Turkish Delegation
25 & 26 June 2008	Adoption of Resolution 1622 (2008) on the functioning of democratic institutions in Turkey: recent developments, and Resolution 1619 (2008) on the functioning of democratic institutions in Europe and progress of the Assembly's monitoring procedure.