



Provisional version

## Committee on Legal Affairs and Human Rights

### Securing access of detainees to lawyers

#### Report\*

Rapporteur: Ms Marietta KARAMANLI, France, Socialist Group

#### A. Draft resolution

1. The Parliamentary Assembly emphasises the importance of the right to the assistance of a defence counsel in criminal cases, as enshrined in Article 6.3.c of the European Convention on Human Rights (“the Convention”, ETS No. 5). It reiterates that this right comprises the possibility for defendants to defend themselves, to be assisted by a defence counsel of their own choosing or to be provided with the assistance of an officially appointed lawyer free of charge if they do not have sufficient means and when the interests of justice so require.

2. The Assembly notes that the implementation of the right to the assistance of a defence counsel is an intrinsic part of the right to a fair trial guaranteed by Article 6.1 of the Convention and the principles of the rule of law. It stresses that respect for this right is fundamentally important for persons deprived of their liberty, whatever the nature of that deprivation.

3. In its [Resolution 2077 \(2015\)](#) on the “Abuse of pre-trial detention in States Parties to the European Convention on Human Rights”, the Assembly already called on member States to ensure greater equality of arms between the prosecution and the defence by allowing defence lawyers unfettered access to detainees, granting them access to the investigation file and providing sufficient funding for legal aid.

4. The Assembly notes that the limitations to that right may infringe other rights and freedoms guaranteed by the Convention, such as the right to life, the right not to be subjected to torture or inhuman or degrading treatment or punishment or the right to appeal against the initial decision on deprivation of liberty. It emphasises that guaranteeing detainees the right to access a lawyer can be a decisive means of preventing torture or inhuman or degrading treatment or punishment within the meaning of Article 3 of the Convention.

5. The Assembly stresses that it is crucially important for a detainee to have access to a lawyer from the outset of the detention – whatever the nature of the offence and whether it be minor or major – in order to guarantee that the rights of defence are practical and effective rather than theoretical and illusory. It is often at the very start of the detention that the risk of abuse in order to obtain confessions in the absence of a lawyer and/or under duress is highest.

6. The Assembly therefore calls on member states to:

6.1. guarantee the effective access of detainees to a lawyer of their choice from the outset of custody or of any other measure involving deprivation of liberty – including the administrative detention of migrants and asylum-seekers – and not only at the beginning of the police interview, and to guarantee that access throughout the proceedings;

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\* Draft resolution adopted unanimously by the committee on 13 December 2016.

- 6.2. ensure the confidentiality of lawyer-client communications in all circumstances and, in this connection, ensure that all places of detention have the infrastructure necessary to enable detainees to speak to their lawyers in private;
  - 6.3. guarantee the presence of a lawyer during hearings of detainees, including in connection with the detention of foreign nationals;
  - 6.4. set up, where necessary, a system of free legal aid, which is a fundamental guarantee of the effectiveness of the right to access a lawyer, and to allocate appropriate funds for this purpose;
  - 6.5. introduce, if this is not yet the case, an independent national system for designating officially-appointed lawyers, as a means of preventing abuses and in order to avoid direct contacts in advance between the investigator and the potential lawyer;
  - 6.6. repeal, if need be, procedural provisions stating that lawyers need the prosecutor's permission to meet their clients;
  - 6.7. ensure that any exception to the presence of a lawyer is subject to very strict conditions. Such an exception must be limited in time and be subject to the authorisation or supervision of a court responsible for guaranteeing individual freedom, including in connection with the fight against terrorism and the application of exceptional measures;
  - 6.8. introduce effective remedies in the event of the absence of or an obstacle to detainees' access to a lawyer.
7. The Assembly stresses that a self-incriminating testimony obtained in the absence of a lawyer or if access to a lawyer has been impeded should in no case be accepted as valid evidence before a court or serve as a basis for convicting a defendant.
  8. In addition, the Assembly calls on member States to investigate promptly, effectively and entirely independently all allegations of threats to, intimidation of or violence against lawyers, including allegations of murder.
  9. In the light of restrictions on the right of access to a lawyer imposed by some member States in the context of the fight against terrorism and in a state of emergency, the Assembly reminds member States that a state of emergency is an exceptional situation that should not persist and should be lifted as early as possible in order to return to the application of ordinary law. It also calls on national parliaments to establish parliamentary scrutiny of a state of emergency where applicable. It further calls on them to improve the *ex ante* judicial review of measures restricting individual freedoms. Lastly, it would like decisions on implementing and renewing such measures to be assessed and reviewed in terms of the extent to which they are appropriate, necessary and proportionate with regard to the aims they are claimed to pursue.
  10. The Assembly calls on member States to continue to cooperate with the CPT and authorise the publication of the reports of the CPT's visits as early as possible.

## B. Explanatory memorandum by Ms Marietta Karamanli, rapporteur

### 1. Introduction

#### 1.1. Current state of the process

1. The motion for a resolution entitled “Securing access of detainees to lawyers”<sup>1</sup> was forwarded to the Committee on Legal Affairs and Human Rights on 22 June 2015.<sup>2</sup> At its meeting in Strasbourg on 29 September 2015, the Committee appointed me as its rapporteur. On 21 June 2016, the Committee heard three experts: Mr Mark Kelly, member of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in respect of Ireland, Ms Heather McGill, Amnesty International, and Ms Marie-Laure Basilien-Gainche, Professor of Public Law at the University Jean Moulin, Lyon 3 and member of the Trans Europe Experts Network. In order to obtain more detailed information on certain counterterrorism laws and on the state of emergency, I sent a letter to the heads of the Belgian, French and Turkish delegations to the Assembly on 25 October 2016. I wish to thank them for their replies.

#### 1.2. Issues at stake

2. The above-mentioned motion for a resolution focuses on access to a lawyer under the conditions laid down by the European Convention on Human Rights (the Convention) at all stages of proceedings, that is to say during judicial proceedings and during imprisonment (for the purposes of judicial proceedings in progress, especially pending cases, appeals and complaints about conditions of detention). The authors of this motion for a resolution are concerned that some member States are restricting access to a lawyer by persons deprived of their liberty at various stages of proceedings.

3. It should be reiterated that the right to access a lawyer of one’s choice or be assisted free of charge by an officially-appointed lawyer when one cannot afford a defence counsel is enshrined in Article 6.3.c of the Convention. This right has two key functions: firstly, guaranteeing equality of arms (understood as a balance in procedural conditions and the means enabling a suspect or an accused or imprisoned individual to assert his or her rights) and a fair trial; secondly, ensuring the presence of an independent party who can help prevent ill-treatment and accordingly safeguard the right to freedom and security

4. For the purposes of this report, the term “detainee” will be understood in the broad sense of a “person deprived of his or her liberty by a public authority”.<sup>3</sup> For the purposes of drawing up this report, I subsequently submitted to the Committee details of the various international legal instruments that guarantee this right and of its many constituent parts as interpreted by the European Court of Human Rights (“the Court”). In the interests of brevity, I will not go into these here as they are available in an information memorandum (AS/Jur (2016) 34) on our Committee’s website.

5. I will detail here the various stages of criminal procedure and the restrictions observed on detainees’ right to access a lawyer. I will also consider specific situations currently facing all Council of Europe member States, namely 1) access to a lawyer for all irregular migrants and asylum-seekers placed in administrative detention and 2) this access for detainees in the context of a state of emergency and the fight against terrorism. These are exceptions that by their very nature amount to departures from the ordinary law governing prosecutions. Lastly, I cannot overlook the situation in Turkey since the attempted coup on 15 July 2016.

6. Despite the many differences between the member States with regard to the regulations governing the right of access to a lawyer, the international obligations remain the same for Council of Europe member States: access to a lawyer from the police interview onwards and during the first hours of deprivation of liberty, one’s own choice of lawyer, the right to access the case files, the right to legal aid, the right to an interpreter, the confidentiality of communications, the effectiveness of the lawyer’s assistance and waiving this right of access in accordance with clear principles and procedures. International and European law regulates precisely and in detail the right of access to a lawyer in criminal proceedings. The regulations governing this right in cases of administrative detention, especially the detention of irregular migrants and

<sup>1</sup> [Doc. 13781](#) of 4 May 2015.

<sup>2</sup> Reference to Committee No. 4137 of 22 June 2017.

<sup>3</sup> This definition is in conformity with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No. 126, Article 2.

asylum-seekers, are not well-developed or are less detailed.<sup>4</sup> In criminal proceedings, there has been some erosion of the right of access to a lawyer in Europe in recent years in the context of anti-terrorism legislation.

7. Access to a lawyer can also be restricted in a more insidious way through intimidation of lawyers, with the aim of discouraging them from defending certain detainees, especially human rights activists. For example, in Azerbaijan these intimidation techniques have resulted in limiting the number of lawyers willing to risk their safety to defend certain detainees.<sup>5</sup> This major problem was discussed in detail by our fellow Assembly member Mailis Reps (Estonia, ALDE) in her report “Strengthening the protection and role of human rights defenders in Council of Europe member States”<sup>6</sup> and in previous Assembly documents on this subject.<sup>7</sup> This intimidation can, among other things, take the form of judicial harassment; of various threats that cast doubt on the lawyer’s moral standing, rights or, indeed, independence; of prison sentences; or of dismissal from the bar. By way of example, mention might be made of the case of Rasul Jafarov, an Azeri human rights activist, and his lawyer, Mr K. Bagirov.<sup>8</sup> In that case, disciplinary proceedings were instituted against Mr Bagirov and he was suspended from the bar. The authorities also prevented him from meeting his client in prison. The Commissioner for Human Rights, as a third party, submitted written observations to the Court. He said that Mr Bagirov’s “*disbarment exemplifies a more general practice whereby lawyers are prevented from pursuing their human rights defence work or punished for doing so, in blatant disregard of Azerbaijan’s international obligations*”.<sup>9</sup> Furthermore, Elchin Sadigov, an Azeri lawyer who represents human rights defenders, such as Leyla Yunus and Anar Mammadli, reports that he has been repeatedly threatened by the police. On 2 November 2016, threats were allegedly made to him directly by a Ministry of the Interior investigator warning him not to take up the allegations of torture and ill-treatment described by his client, the journalist Fikret Farmazoglu.<sup>10</sup> Our former colleague Michael McNamara (Ireland, SOC) also established how dangerous it is to work in the North Caucasus part of the Russian Federation, summing up the situation as follows in his report “(t)he situation of lawyers in the North Caucasus is indicative of the overall system of justice in the region: if lawyers, whose profession it is to defend others, are unable to protect themselves from such human rights violations, then what hope is there for their clients?”. The draft resolution pertaining to this states: “Lawyers defending victims of human rights violations have themselves become targets of aggressions, intimidation and trumped-up criminal charges in reprisal for their work.”<sup>11</sup> Assembly [Recommendation 2085 \(2016\)](#) on “Strengthening the protection and role of human rights defenders in Council of Europe member States” contains a specific subparagraph on lawyers who represent their clients before the European Court of Human Rights (“the Court”) and calls on the Committee of Ministers to “hold regular exchanges of information with the Registry of the European Court of Human Rights on reprisals or intimidation against lawyers”.

## 2. A right guaranteed at different stages of criminal proceedings

8. The right of access to a lawyer must be guaranteed at all stages of criminal proceedings, from the beginning of the period in police custody. This requirement is reiterated in Principle 1 of the UN’s Basic Principles on the Role of Lawyers and in Article 6.3.c of the Convention. I have noticed a tendency to restrict a detainee’s access to a lawyer at different stages of criminal proceedings, especially in the initial period of deprivation of liberty.

### 2.1. During police custody

9. Access to a lawyer for persons held by the police comprises the right to contact and consult a lawyer without undue delay and, in principle, the right of the person concerned to have the lawyer attend police interviews. The CPT clearly promotes this access to a lawyer as a fundamental guarantee against the ill-treatment of persons deprived of their liberty by the police during a period in police custody.<sup>12</sup>

<sup>4</sup> For further details, see information memorandum AS/Jur (2016) 34.

<sup>5</sup> Human Rights House Foundation, Azerbaijan: NGO coalition report on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Reply to the list of issues (CAT/c/AZE/Q/4) of 11 July 2012, paragraphs 54, 55 and 56.

<sup>6</sup> [Doc 13943](#) of 28 January 2016. See in particular paragraph 10 and footnote 15.

<sup>7</sup> See in particular Resolutions 1660 (2009) and 1891 (2012) on the situation of defence lawyers in Council of Europe member States.

<sup>8</sup> Rasul Jafarov v. Azerbaijan, Application No. 69981/14, 17.03.2016.

<sup>9</sup> [Azerbaijan: Repression of lawyers who defend human rights must stop](#), Commissioner for Human Rights, 28.11.2016.

<sup>10</sup> Amnesty International, [Take Action! - End Harassment Of Human Rights Lawyer And Family \(Azerbaijan: UA 252/16\)](#), 9.11.2016.

<sup>11</sup> [Doc. 14083](#), 08.06.2016.

<sup>12</sup> [CPT/Inf/E \(2002\) 1](#), paragraph 18.

10. The Court has firmly established the requirement to grant access to a lawyer when a person is questioned, especially by the police, while held in police custody, and it severely limits the exceptions to this principle. Failure to allow access to a lawyer while in police custody is regularly penalised by the Court. In 2008, it delivered a significant judgment concerning the right of persons placed in police custody to be assisted by a lawyer during questioning from the moment of the first interview (*Salduz v. Turkey*).<sup>13</sup> Charged and then convicted for taking part in an unauthorised demonstration in support of the PKK (the Kurdistan Workers' Party), the applicant had made a statement, without the presence of a lawyer, in which he admitted guilt. In its *Dayanan v. Turkey* judgment, the Court then made it clear that access to a lawyer must be granted as soon as a person is taken into custody and not only from the time questioning begins. *"Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."*<sup>14</sup>

11. The *Salduz* case law has strengthened the right of access to a lawyer and had a positive impact on the legislation of several Council of Europe member States: Belgium, France, Ireland, Monaco, the Netherlands, the United Kingdom (Scotland) and Turkey, the country directly concerned by the judgment. According to the new Turkish Code of Criminal Procedure, which entered into force on 1 July 2015, a suspect or accused person has the right to consult a lawyer privately before being questioned and the right to have a lawyer present during police interviews. Similarly in Belgium, parliament passed a law on 13 August 2011 (referred to as the "Salduz Act") providing for any person questioned and deprived of his or her liberty to have certain rights, such as the right to consult and be assisted by a lawyer. This Belgian law was followed by measures to make these rights effective, including the adaptation of the state legal aid system. The Netherlands Supreme Court has adjusted its case law to bring it into line with the Strasbourg Court's decision in *Salduz* and held in a judgment of 30 June 2009<sup>15</sup> that a suspect has the right to consult a lawyer before being questioned and that arrested minors are entitled to have a lawyer present during questioning.<sup>16</sup> Scottish criminal law has also been amended to bring it into line with the *Salduz* judgment and now requires the police to give arrested persons the opportunity to consult a lawyer before being interviewed, as was already the case in the rest of the United Kingdom.<sup>17</sup> In Monaco, the Act of 25 June 2013 laid down the requirement that a lawyer be present from the beginning of the period in police custody. The *Salduz* judgment was also taken into account in the EU directive on the right of access to a lawyer.<sup>18</sup>

12. During the hearing before the Committee, Heather McGill, of Amnesty International, emphasised the practical difficulties faced by lawyers when trying to gain access to their clients held in police custody in Russia. In particular, she pointed out that access was conditional upon written confirmation that they had been retained as defence lawyers, on the basis of which the prosecutor could permit them to meet their clients. Even when that permission was granted, lawyers often had to queue for hours owing to the lack of proper meeting-rooms at remand centres. Ms McGill mentioned the example of Pyotr Pavlensky, who was unable to meet his lawyers from December 2015 to 26 February 2016 even though his lawyers had queued on several occasions in front of the Butyrka remand centre where he was being held. The case of Stanislav Klykh, sentenced to 20 years for allegedly organising a group of armed volunteers to fight in Chechnya in 1994-1995, also speaks for itself: he had no access to a lawyer during his ten months of detention from August 2014 to June 2015. The lawyer retained by his family was never able to find out from the authorities where his client was being held and the officially-appointed lawyer was not present at any of the interrogations (even though her signature is to be found on the interrogation reports despite the fact that she was officially on maternity leave on those dates). Mr Klykh claims that he was tortured and forced to "confess" during these interrogations.<sup>19</sup> On the day Mr Klykh was sentenced, the judge expressed the opinion that his lawyers should be dismissed from the bar for breaching its code of ethics (because they were allegedly absent from one of their client's hearings and for raising their voices against the prosecutor and the judge during another).

<sup>13</sup> *Salduz v. Turkey*, Grand Chamber, Application No. 36391/02, judgment of 27 November 2008, paragraph 55. See also *Brusco v. France*, Application No. 1466/07, judgment of 14 October 2010, paragraph 54 (available in French only).

<sup>14</sup> *Dayanan v. Turkey*, Second Section, Application No. 7377/03, judgment of 13 October 2009, paragraph 32.

<sup>15</sup> No. 2411.08 J, NbSr 2009, 249.

<sup>16</sup> For more details on these three cases, see AS/Jur/Inf (2016) 04, [Impact of the European Convention on Human Rights in States Parties: selected examples](#), 8 January 2016.

<sup>17</sup> see *Cadder v Her Majesty's Advocate [2010] UKSC 43*.

<sup>18</sup> [Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013](#) on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

<sup>19</sup> Amnesty International, [Russian Federation: Victim of unfair trial, health at risk: Stanislav Klykh](#), 06.07.2016.

13. According to the Amnesty International expert, these practices are not specific to Russia but are also widespread in other countries in the region. Amnesty International reports that lawyers in Azerbaijan often have access to their clients only 48 hours or more after their arrest, during which period their clients are questioned, threatened and pressured to sign “confessions”.<sup>20</sup> The case of the student Khalid Khanlarov is an illustration of this: he was arrested after creating, with a friend, a Facebook page satirising the government. He refused to reveal the identity of the page administrators and was then detained on remand for refusing to co-operate with the police. His defence lawyer was prevented from visiting him in prison for over a week. Mr Khanlarov claims to have been threatened and beaten during this period and forced to give the names of the administrators of the Facebook page in question.<sup>21</sup> Elvin Abdullayev, arrested and questioned by the police about his political activism and Facebook posts, had no access to his lawyer for 48 hours, during which period he was subjected to ill-treatment by the police and forced to renounce his political convictions and agree to stop putting critical posts on Facebook. Rovshan and Rufat Zahidov (a cousin and nephew respectively of Ganimat Zahid, editor-in-chief of *Azadliq*, a major opposition newspaper), who were arrested for drug possession and trafficking, also allege that they signed confessions under duress at the police station, in the absence of their lawyer, who was unable to see them during the first five days of their detention.<sup>22</sup>

## 2.2. During pre-trial detention/remand in custody and judicial proceedings

14. I will not go into details on this important subject, which has to a large extent been covered in a report by our colleague and Assembly President Pedro Agramunt (Spain, EPP) on “Abuse of pre-trial detention in States Parties to the European Convention on Human Rights”, adopted by the Assembly in October 2015. In the resolution 2077 (2015) accompanying that report, the Assembly encourages the States Parties to implement measures to reduce pre-trial detention by “ensuring greater equality of arms between the prosecution and the defence, including by allowing defence lawyers unfettered access to detainees, by granting them access to the investigation file ahead of the decision imposing or prolonging pre-trial detention, and by providing sufficient funding for legal aid, including for proceedings related to pre-trial detention (...)”.

15. Committee of Ministers [Recommendation \(2006\)13](#) establishes a set of minimum standards which must be guaranteed during the period that the arrested person is remanded in custody and includes precise standards with regard to the assistance of a lawyer during such periods of detention,<sup>23</sup> including “access to documentation relevant to (the decision to be taken) in good time” (paragraph 26), free legal aid (paragraph 25.3) and an adequate opportunity to consult with that lawyer in order to prepare the detainee’s defence (paragraph 25.2).

## 2.3. During imprisonment

16. During imprisonment, i.e. after a custodial sentence has been imposed, access to a lawyer must be guaranteed to ensure the proper conduct of the judicial proceedings underway, especially with regard to pending cases, appeals and complaints about conditions of detention. In a 2012 recommendation, the Committee of Ministers stated that “prison staff shall ensure that prisoners can exercise their right to have regular and adequate access to their lawyers and families throughout their imprisonment”.<sup>24</sup>

17. In Turkey, at the İmralı Island prison, lawyers have, under various reasons and pretexts, not been allowed to meet their clients, in particular, since 27 June 2011, Abdullah Öcalan, the leader of the Kurdistan Workers’ Party (PKK). On 21 June 2016, I spoke in Strasbourg to Abdullah Öcalan’s lawyers about the difficulties they face in accessing their client. According to the information they gave me, meetings between Mr Öcalan and his lawyers must always be authorised in advance, are subject to strict restrictions in terms of their number and duration (one hour a week) and are recorded. This is contrary to the law until recently in force, which provided that meetings between a client and his/her lawyer could take place without any limit on the number of times and their duration.<sup>25</sup> They are not flatly denied access, but it proves impossible each

<sup>20</sup> Amnesty International, [“Revolving doors”: The ongoing persecution of government critics in Azerbaijan](#), 16.06.2016.

<sup>21</sup> Ibid, p. 4

<sup>22</sup> Ibid, p. 8.

<sup>23</sup> [Recommendation of the Committee of Ministers to member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse](#), adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers’ Deputies.

<sup>24</sup> [Appendix to the Recommendation of the Committee of Ministers to member States on the European Code of Ethics for Prison Staff](#), CM/Rec (2012) 5, paragraph 28.

<sup>25</sup> Section 59 of Law No. 5275 on the enforcement of penalties and security measures, recently amended by Decree-Law No. 676, see section 5 below.

time they try, on various pretexts (such as “the weather” allegedly preventing the boat from sailing to and from the mainland).<sup>26</sup> In its *Öcalan v. Turkey* judgment in 2014, the Court observed that communication between Abdullah Öcalan and his lawyers was subject to greater restrictions than that of persons held in other prisons. It added on this point, however, that “while persons deprived of their liberty for terrorist activities cannot be excluded from the scope of the provisions of the Convention and the essence of their rights and freedoms recognised by the latter must not be infringed, the national authorities can impose “legitimate restrictions” on them inasmuch as those restrictions are strictly necessary to protect society against violence”.<sup>27</sup> Ms Josette Durrieu (France, Socialist Group), former rapporteur for the post-monitoring dialogue with Turkey, noted that he still did not have access to his lawyers in spite of the ongoing domestic judicial proceedings against him and proceedings before the European Court of Human Rights.<sup>28</sup> The CPT has strongly criticised this particular situation in several of its reports and has called on the Turkish authorities to take the necessary measures to ensure that all İmralı prison inmates are able to receive visits from a lawyer if they so wish.<sup>29</sup> The CPT travelled to the island of İmralı on 28 and 29 April 2016. During their visit, the CPT delegation examined the treatment and conditions of detention of the four detainees, paying particular attention to the implementation of their right to receive visits from their lawyers.<sup>30</sup> The Turkish authorities have so far failed to authorise the publication of the CPT’s report, which is regrettable.

18. Another worrying fact is that it seems that measures restricting the right of access to a lawyer applied for a long time specifically at İmralı have now been imported into other prisons. The prisoners Nasrullah Kuran and Çetin Arkaş have been transferred from İmralı to Silivri No. 9 prison, in Istanbul province, in which restrictions on visits were also implemented before the attempted coup on 15 July 2016 (meetings only once a week, after prior authorisation from the prison administration).<sup>31</sup>

#### 2.4. Witness status

19. Most of the legislation in force in Council of Europe member States is based on the principle of voluntary testimony. However, like the status of “material witness” in the United States, some laws enable a witness to be forced to testify, even at a police station. In addition to the risk of intimidating potential witnesses, this system may result in the “detention” of individuals at police stations in order to hear them as witnesses. They are not officially held in police custody but their “detention” may last for several hours, or even days, and here the procedural safeguards for witnesses are particularly limited. This is all the more worrying because some witnesses may become suspects after being questioned as witnesses without being given proper procedural guarantees during that period.<sup>32</sup> This was still recently the case in Georgia, and the Commissioner for Human Rights was concerned about the postponement of the entry into force of the reform providing for the abolition of the compulsory questioning of witnesses before a case comes to court.<sup>33</sup> On 20 February 2016, the reform of the Code of Criminal Procedure adopted by the Georgian parliament in December entered into force. This reform prohibits the practice of forced interrogations. In France, the Code of Criminal Procedure provides that “if the needs of the investigation so require” witnesses may, under the rules on questioning individuals without their being formally taken into police custody (“*audition libre*”), be detained “for the time strictly necessary for them to be heard, this period not to exceed four hours” (Article 62). If plausible reasons were to emerge during the questioning for believing that the person heard is a suspect, he or she could then only be held under the police custody regime. After a change in the law, it has been compulsory since 1 January 2015 for any summons to an *audition libre* to mention the right of the

<sup>26</sup> See on this subject the partly dissenting opinion of Judge Pinto de Albuquerque on the *Öcalan v. Turkey* judgment, 18.03.2014, Applications Nos. 24069/03, 197/04, 6201/06 and 10464/07, in which he states (paragraph 22): “with regard to the difficulties of access to the island, the Government have two choices: if they want to detain the applicant on an island, they have to provide the necessary means of transport, possibly including more boats when the existing ones are not available, or a helicopter in the event of adverse sea conditions; if the Government cannot or do not want to provide these additional means of transport, then they have to place the applicant in the continent. What they cannot do is to keep him on an island without providing the means of access to it.”

<sup>27</sup> *Öcalan v. Turkey*, 18.03.2014, Applications Nos. 24069/03, 197/04, 6201/06 and 10464/07, paragraph 135.

<sup>28</sup> AS/Mon(2014) 18 rev, [Post-monitoring dialogue with Turkey – Information note by the rapporteur on her fact-finding visit to Istanbul, Ankara and Eskişehir \(26-29 Mai 2014\)](#), paragraph 59.

<sup>29</sup> [CPT/Inf \(2014\) 7](#), Report to the Turkish Government 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 16 to 17 January 2013, 13 March 2013, paragraph 19.

<sup>30</sup> [Council of Europe anti-torture Committee visits prison on the island of İmralı \(Turkey\)](#), press release, 02.05.2016.

<sup>31</sup> According to written information sent to me by Abdullah Öcalan’s lawyers on 01.10.2016.

<sup>32</sup> [Reform of witness interrogation rules in Georgia](#), Bad de Wilde, Richard Vogler, 2015

<sup>33</sup> CommDH(2014)9, para.15. See also [Reform of witness interrogation rules in Georgia](#), Bad de Wilde, Richard Vogler, 2015, p. 66.

person concerned to be assisted by a lawyer from the start of the proceedings, and to be granted legal aid (which was not the case in the past).<sup>34</sup>

20. I also note with some concern the practice of calling lawyers as witnesses in cases in which they defend an accused. Their status as witnesses obliges them to relinquish the case and they can therefore no longer defend their client(s). This practice was brought to my notice in particular with regard to Bosnia and Herzegovina. An application, of which the applicant has forwarded to me a copy, is currently pending before the Court.<sup>35</sup> The applicant complains about a violation of her rights as a lawyer to defend her clients. She was summoned as a witness in the same case by the Bosnia and Herzegovina public prosecutor's office. She claims that she was asked questions only of a procedural nature and none about her clients' alleged crime. She states that she was summoned as a witness with the aim of disqualifying her as a lawyer in this case and that this is not an isolated instance but a routine practice at the public prosecutor's office in order to disqualify defence lawyers in certain cases.

### **3. The administrative detention of irregular migrants and asylum-seekers and the right of access to a lawyer**

21. The issue of access to a lawyer is arising more and more frequently in the context of the administrative detention of irregular migrants and asylum-seekers. The European Court of Human Rights has ruled on this question from the point of view of Article 5.4 of the Convention, especially in *Rahimi v. Greece*,<sup>36</sup> which concerned the detention of an unaccompanied foreign minor at an adult centre. In that particular case, it found a violation of that article, especially as the applicant was in practice unable to contact any lawyer.<sup>37</sup>

22. Moreover, in its Twenty Guidelines on Forced Return, the Committee of Ministers set out the procedural guarantees to which individuals placed in detention are entitled, including the right to be informed about the legal remedies available to them and the immediate possibilities of contacting a lawyer.<sup>38</sup>

23. According to the CPT standards, *"Immigration detainees should - in the same way as other categories of persons deprived of their liberty - be entitled, as from the outset of their detention, to inform a person of their choice of their situation and to have access to a lawyer. The CPT has observed that these requirements are met in some countries, but not in others. [...] The right of access to a lawyer should apply throughout the detention period and include both the right to speak with the lawyer in private and to have him present during interviews with the authorities concerned"*.<sup>39</sup> The CPT notes that *"The right of access to a lawyer should include the right to talk with a lawyer in private, as well as to have access to legal advice for issues related to residence, detention and deportation. This implies that when irregular migrants are not in a position to appoint and pay for a lawyer themselves, they should benefit from access to legal aid"*.<sup>40</sup>

24. The Assembly has considered this question on several occasions. In its [Resolution 1707 \(2010\)](#) on the detention of asylum seekers and irregular migrants in Europe, it established that *"the safeguards afforded to immigration detainees who have committed no crime are often worse than those of criminal detainees"* and that *"detainees' access to lawyers is limited"*. It recommended that *"detainees (...) be guaranteed effective access to legal advice, assistance and representation of a sufficient quality, and (that) legal aid (...) be provided free of charge"*.

25. In addition, in June, on the basis of a recent report by our Committee, it adopted [Resolution 2122 \(2016\)](#) on administrative detention. The report by our colleague Lord Balfe (United Kingdom, European Conservatives Group) covers the situation of administrative detention for irregular migrants and asylum-seekers and stresses in particular the lack of procedural guarantees and speedy access to a lawyer for people held in administrative detention.<sup>41</sup>

26. At the hearing before the Committee, Ms Marie-Laure Basilien-Gainche drew attention to States' tendency to broaden the category of cases that involve limitation or deprivation of liberty by administrative

<sup>34</sup> "Les conséquences inattendues de la réforme de l'audition libre", Sophie Liotard and Sébastien Schapira, *Dalloz actualités*, 24.09.2014.

<sup>35</sup> VIDOVIĆ v. Bosnia and Herzegovina, Application n° 40139/16.

<sup>36</sup> Judgment of 5 April 2011, Application No. 8687/08.

<sup>37</sup> *Ibid*, paragraphs 120-121.

<sup>38</sup> [Twenty Guidelines on Forced Return](#), adopted by the Committee of Ministers on 4 May 2005, Guideline 6.2.

<sup>39</sup> CPT standards; CPT/Inf/C (2002) 1 [Rev. 2015] | Section: 56/86 | 21/01/2015; IV. Immigration detention / Foreign nationals detained under aliens legislation / C. Safeguards during detention

<sup>40</sup> CPT standards; CPT/Inf/C (2002) 1 [Rev. 2015] | Section: 61/86 | 21/01/2015; IV. Immigration detention / Safeguards for irregular migrants deprived of their liberty / Basic rights at the initial stages of deprivation of liberty

<sup>41</sup> [Doc 14079](#), 06.06.2016.



means, thus reducing detainees' procedural guarantees, especially their access to a lawyer. In her opinion, access to a lawyer is often little more than a simple list of telephone numbers, and getting to a telephone may prove difficult. Moreover, when access to a lawyer does exist it is virtually impossible for the conversation to take place in complete confidentiality. Furthermore, deadlines for appealing against expulsion measures and detention are relatively short, which quite often makes access to a lawyer impossible in practice. According to a recent Amnesty International report, in response to a decision of the Belgian High Court of Justice the Minister for Immigration suspended the fast-track asylum procedure in Belgium in July 2015, under which a large number of asylum-seekers had been detained and had had very little time to consult lawyers or gather evidence to support their claim.<sup>42</sup>

27. The CPT has also made concrete recommendations in this area. For example, in its report published on 23 February 2016, it recommended that the Swedish authorities change the law to ensure that all individuals placed in detention under the Aliens Act have effective access to a lawyer from the moment they are deprived of their liberty and at all stages of the proceedings. According to current legislation, foreigners held only have access to a lawyer in connection with the implementation of a refusal-of-entry or expulsion order after they have been in detention for three days.<sup>43</sup> As far as "the former Yugoslav Republic of Macedonia" is concerned, the CPT has established that the vast majority of detained foreign nationals did not have access to legal aid at any stage of their proceedings because domestic legislation provides that only asylum seekers are eligible for free legal aid.<sup>44</sup> In its report on its visit to Finland, the CPT points out that foreign nationals have access to a lawyer after arriving at a detention centre but not when they are in the custody of the police or border guards, even though the initial interviews take place at this stage.<sup>45</sup>

28. The CPT travelled to Greece on two occasions in April and July 2016 to investigate the situation of foreign nationals deprived of their liberty in the recently established "Reception and Identification Centres" (so-called "hotspots"), which lawyers and associations for the defence of migrants' rights have difficulty in accessing. It paid particular attention to the legal safeguards provided to these foreign nationals.<sup>46</sup> The CPT had also travelled to Turkey in June 2015 to examine the treatment and conditions of detention of foreign nationals detained under immigration legislation as well as the procedures applied to them in the context of their detention pending removal.<sup>47</sup> The CPT's report on Greece has not yet been published but the three-month deadline for the government's reply has not yet expired. On the other hand, the report on Turkey has not yet been published even though the deadline has long expired as the authorities have not authorised its publication. It will be interesting to read the CPT's conclusions on the question of access to a lawyer for foreign nationals held in administrative detention. Overall, the CPT will no doubt need to give even greater consideration to this question in a large number of member States that are directly or indirectly affected by the current refugee crisis.

#### **4. Access to a lawyer in connection with the fight against terrorism and during a state of emergency**

29. The challenges facing the member States can justify restrictions to, and derogations from, access to a lawyer only in limited circumstances and on a temporary basis. The Court recently gave a ruling on the temporary restrictions to access to a lawyer during the police questioning of the 21 July 2005 London bombers. It found there had been no violation of the right of the three applicants to a fair trial and to access to a lawyer, holding that there had been compelling reasons – in that case preventing other suicide attacks – for temporarily restricting their right to consult a lawyer. However, it did find a violation of Article 6.1 and 6.3.c. of the Convention in respect of the fourth applicant, who had initially been heard as a witness, had not been informed of his right to remain silent and had had no access to a lawyer at the time he had begun to incriminate himself.<sup>48</sup>

<sup>42</sup> Amnesty International, Report 2015/2016, p. 382.

<sup>43</sup> CPT/Inf (2016) 1, [Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\) from 18 to 28 May 2015](#), paragraph 41.

<sup>44</sup> "The former Yugoslav Republic of Macedonia": Visit 2014, CPT/Inf (2016) 8 | Section: 42/60 | Date: 25/03/2015

<sup>45</sup> Finland: Visit 2014, CPT/Inf (2015) 25 | Section: 16/34 | Date: 17/03/2015; B. Foreign nationals deprived of their liberty under aliens legislation / 5. Safeguards

<sup>46</sup> <http://www.cpt.coe.int/documents/grc/2016-04-20-eng.htm>

<sup>47</sup> <http://www.cpt.coe.int/documents/tur/2015-06-25-eng.htm>. For more information on access by refugees, asylum-seekers and migrants in Turkey, see [Barriers to the right to effective legal remedy: The problem faced by refugees in Turkey in granting power of attorney](#), Opinion Paper by Refugee Rights Turkey, 02.2016.

<sup>48</sup> *Ibrahim and Others v. The United Kingdom* (Grand Chamber judgment), Applications Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13.09.2016.

30. The Committee of Ministers states in a recommendation that an emergency within the meaning of Article 15 of the Convention should have no effect on the right of access to a lawyer:

*“The existence of an emergency in accordance with Article 15 of the European Convention on Human Rights should not normally affect the right of access to and consultation with a lawyer in the context of remand proceedings.”*<sup>49</sup>

31. With regard to prosecutions for criminal terrorist acts, the Venice Commission considers that “access to a lawyer from the very beginning of the proceedings would not only enhance the accused's right of defence, but could also facilitate his or her collaboration with the judiciary in a manner respectful of his fundamental rights”.<sup>50</sup>

32. In its [Resolution 2122 \(2016\)](#) on administrative detention, the Assembly expresses its concern that “administrative detention has been abused in certain member States to (...) obtain confessions in the absence of a lawyer and/or under duress” and encourages all member States “to make use of available tools respecting human rights in order to protect national security or public safety, and to prevent crimes, including acts of terrorism”.<sup>51</sup>

33. In **France**, a state of emergency was declared on 14 November 2015 after the murderous attacks perpetrated in Paris the day before. In January 2016, the National Bar Council (CNB) came out strongly against extending the state of emergency, firmly criticising its consequences for the rights of the defence.<sup>52</sup> It was also concerned about another draft law reinforcing the measures to combat organised crime and its funding and strengthening the effectiveness of criminal proceedings and procedural safeguards. It insisted that “in a preliminary investigation, the exercise of defence rights must begin from the very moment a measure is implemented against a suspect to interview, search or seize property”. The state of emergency was extended once again on 26 July 2016. During the hearing before the Committee, our expert Ms Basilien-Gainche condemned the increasingly administrative nature of proceedings, which are brought before the administrative court, which only carries out an ex post facto check and conducts a limited review of the legality of measures.<sup>53</sup> Notwithstanding that he intervenes after the fact, the judge of the administrative court cannot deal with everything on his own and may generally prove to pay more attention to public security requirements than the imperatives of individual freedom. Ms Basilien-Gainche also voiced her concerns in the light of the Council of State's decision of 11 December 2015 that the provisions of the French State of Emergency Act of 1955 do not specify that there has to be a connection between the purpose of the declaration of the state of emergency and the reasons for decisions taken on the basis of its provisions.<sup>54</sup> The house arrest, in the context of the state of emergency, of environmental activists planning to demonstrate during COP21 was therefore questioned.<sup>55</sup> According to the expert, “some of the procedures examined were accompanied by detention without any speedy access to a lawyer.”<sup>56</sup> More generally, the possibility to have an emergency review by a judge before a decision of the administrative authority should be strengthened. On 15 November 2016, the French President announced his intention to seek a further extension of the state of emergency until the next presidential elections scheduled for April and May 2017.<sup>57</sup>

34. In reply to my letter, the head of the French delegation, Mr René Rouquet (SOC), informed me that “the establishment of the state of emergency has not led to any exceptions to the rules on detainees' access to a lawyer”. Quite the contrary: although Section 11 of [Law No. 55-385](#) of 3 April 1955 on a state of emergency gives the authorities the power to order searches at any location, it expressly excludes places for

<sup>49</sup> Rec (2006) 13, [Recommendation of the Committee of Ministers to member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse](#) (adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Deputies), paragraph 25.4.

<sup>50</sup> Venice Commission report on counter-terrorism measures and human rights, Study no. 500/2008, [CDL-AS\(2010\)022](#), 05.07.2010.

<sup>51</sup> *Ibrahim and Others v. The United Kingdom* (Grand Chamber judgment), Applications Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13.09.2016.

<sup>52</sup> National Bar Council (CNB), [Délibération du Conseil national des barreaux – vers un Etat d'urgence permanent?](#), adopted by the General Assembly on 22 and 23 January 2016; see also [https://www.courdecassation.fr/publications\\_26/discours\\_publications\\_diverses\\_2039/discours\\_2202/premier\\_president\\_7084/gardiennne\\_liberte\\_33544.html](https://www.courdecassation.fr/publications_26/discours_publications_diverses_2039/discours_2202/premier_president_7084/gardiennne_liberte_33544.html).

<sup>53</sup> That is to say, checking for any manifest error of assessment; see also <http://www.journal-du-droit-administratif.fr/?p=511>.

<sup>54</sup> Conseil d'Etat, Section 11, December 2015, nos. 394989, 394990, 394991, 394992, 394993, 395002 and 395009.

<sup>55</sup> “Les militants de la COP21, cibles de l'état d'urgence”, *Le Monde*, 27.11.2015; see also the [press release](#) of the Human Rights League of 26.11.2015.

<sup>56</sup> Contribution of Marie-Laure Basilien Gainche to the hearing before the Committee on Legal Affairs and Human Rights, Strasbourg, 21 June 2016, text available from the Secretariat.

<sup>57</sup> [François Hollande “veut prolonger l'état d'urgence jusqu'à l'élection présidentielle”](#), *Le Monde*, 15.11.2016.

“the professional activities of lawyers”. However, I gather from the documentation sent to me by the French delegation that the question of the presence of a lawyer (not compulsory) during searches is the subject of discussion. I also note that Section 11 of Act No. 55-385 provides that, persons placed in administrative detention in the course of a search may, “for reasons related to the detention” and on the decision of the Public Prosecutor, be denied the possibility of asserting their right to have a police officer inform someone of their choosing.

35. It is interesting to note that the French National Assembly and the Senate have established parliamentary scrutiny of the state of emergency through their respective Legal Committees. The report of the National Assembly’s Legal Committee stresses the need for “innovative parliamentary scrutiny”: “An emergency situation requires emergency scrutiny”, “parliamentary scrutiny very quickly became necessary as a factor of the legitimacy of this state of emergency”.<sup>58</sup> The main aim of this parliamentary scrutiny is to obtain details from the government on certain individual or general measures, such as searches, house arrests, bans on demonstrations, etc.

36. In **Belgium**, numerous new counterterrorism laws and regulations were passed following the attacks in Paris in November 2015 and Brussels in March 2016. A report by Human Rights Watch (HRW) expresses concern about the impact of these measures on fundamental rights.<sup>59</sup> As far as detainees’ access to a lawyer is concerned, HRW emphasises that a draft law currently going through the federal parliament would triple (from 24 to 72 hours) the maximum period that police can detain suspects without charge in terrorism-related cases. While Belgium’s “Salduz Act” guarantees a suspect’s access to a lawyer during pre-trial detention in accordance with the Court’s case law, the draft law provides that this contact does not have to take place until just before the start of a police interrogation. According to HRW, that would mean a suspect could remain without counsel for almost three days.<sup>60</sup> The Belgian delegation states in its reply to my letter that the law relating to certain rights of individuals subject to interrogation, passed by the Chamber of Representatives on 10 November 2016,<sup>61</sup> transposes Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings<sup>62</sup> and guarantees the right of access to a lawyer at all hearings, including for persons in detention on remand. Section 6.9 adopts the wording of the Directive and provides for exceptions to the right to consult a lawyer before the first interrogation and to the right to be assisted by a lawyer at hearings “in the light of the particular circumstances of the case” when one or more compelling reasons (mentioned in the law) justify this.<sup>63</sup>

## 5. The situation in Turkey following the attempted coup on 15 July 2016

37. As mentioned above, we are currently witnessing a very serious and disconcerting erosion of the principles and standards of the rule of law in Turkey. This erosion, which began before the attempted coup on 15 July 2016 and has already been condemned by our Assembly in [Resolution 2121 \(2016\)](#),<sup>64</sup> has since then taken on new proportions. The state of emergency, initially declared on 20 July 2016 for a period of three months, was extended for a further three months from 19 October 2016. Mass arrests, which amount to large-scale purges, of tens of thousands of people,<sup>65</sup> have taken place and there is every reason to

<sup>58</sup> Rapport n° 3784 sur le contrôle parlementaire de l’état d’urgence (Report No. 3784 on parliamentary scrutiny in a state of emergency) by Dominique Raimbourg and Jean-Frédéric Poisson, 25.05.2016, p. 6.

<sup>59</sup> [Grounds for concern – Belgium’s Counterterrorism Responses to the Paris and Brussels Attacks](#), HRW, 11.2016.

<sup>60</sup> *Ibid*, pp. 30 and 31.

<sup>61</sup> <http://www.lachambre.be/FLWB/PDF/54/2030/54K2030009.pdf>

<sup>62</sup> [Directive 2013/48/EU](#) of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

<sup>63</sup> The Remand in Custody Act of 20 July 1990 provides for the possibility for the judicial authorities to derogate temporarily from the right of access to a lawyer in exceptional circumstances (Section 2bis.5).

<sup>64</sup> See [Resolution 2121 \(2016\)](#) on the functioning of democratic institutions in Turkey, 22 June 2016, in which the Parliamentary Assembly establishes that “(r)ecent developments in Turkey pertaining to freedom of the media and of expression, erosion of the rule of law and the human rights violations in relation to anti-terrorism security operations in south-east Turkey have, however, raised serious questions about the functioning of its democratic institutions. These findings are corroborated by recent reports adopted by several Council of Europe monitoring bodies, such as the European Commission for Democracy through Law (Venice Commission), the Group of States against Corruption (GRECO) and the Office of the Commissioner for Human Rights, which have highlighted concurring and serious concerns that Turkey should address without further delay”. It also concludes that “the latest developments pertaining to freedom of the media and of expression, erosion of the rule of law and the human rights violations in relation to the anti-terrorism security operations in south-east Turkey constitute a threat to the functioning of democratic institutions of the country and its commitments to its obligations towards the Council of Europe”.

<sup>65</sup> [European Commission Turkey 2016 Report](#), COM(2016) 715 final, 9.11.2016; see also “[Turkey: Independent monitors must be allowed to access detainees amid torture allegations](#)”, Amnesty International, 24 July 2016.

believe that a number of these arrests were arbitrary. Lawyers have said that they have been pressured not to represent individuals suspected of belonging to the FETÖ/PDY (*Fetullahçı Terör Örgütü/Paralel Devlet Yapılanması* – Gülenist Terrorist Organisation/Parallel State Structure) movement or are afraid of being associated with it if they do so.<sup>66</sup> Dozens of lawyers are reported to have been detained on suspicion of having links to FETÖ/PDY.<sup>67</sup> The figures are very revealing and I refer here to the information memorandum published by the Assembly's Monitoring Committee.<sup>68</sup> A group of United Nations experts, including the Special Rapporteur on the Independence of Judges and Lawyers, Ms Monica Pinto, have called on Turkey to respect the independence of the judiciary and the principles of the rule of law, including in times of crisis. In particular, these experts have urged the authorities to guarantee detainees access to the lawyer of their choice.<sup>69</sup> In a memorandum published in October 2016, the Council of Europe's Commissioner for Human Rights condemned the drastic restrictions to access to lawyers, as well as limitations on the confidentiality of the client-lawyer relationship.<sup>70</sup> Some lawyers appointed to represent detainees ultimately refused to do so for fear of reprisals.<sup>71</sup> Against the background of extremely serious allegations of torture and the inhuman or degrading treatment of detainees, the lack of access to a lawyer is all the more worrying.

38. Since the declaration of the state of emergency, several decree-laws have introduced limitations to detainees' right to access a lawyer. Decree No. 667 published on 23 July 2016 increased the duration of legal detention without charge from four to thirty days. The reply I received from the Turkish delegation stated that this increase was necessary to deal with the sudden arrest of a very large number of people. This period can apply in cases involving threats to state security, to the constitutional order, to state secrets and national defence and to terrorist crimes, as well as group crimes. The delegation also emphasises that the maximum duration of thirty days provided for has so far, it would appear, never been applied. The decree also directly calls into question the principle of the confidentiality of client-lawyer communications since it authorises officials to be present during conversations between persons held in police custody and their lawyers as well as to record and even interrupt those conversations. Moreover, detainees are no longer free to appoint a lawyer of their own choosing.<sup>72</sup> Another decree, dated 27 July, 2016, allows the prosecutor to limit a detainee's access to a lawyer during the first five days of detention.<sup>73</sup> According to lawyers' concurring testimonies, many people arrested have been held incommunicado for several days without any contact with their family and with no possibility of speaking to a lawyer.<sup>74</sup>

39. The decree of 27 July 2016 allows prosecutors to order lawyers' offices to be searched and documents seized without the prior decision of a court.<sup>75</sup>

40. The Turkish delegation has provided me with detailed information on changes to the law made by decree-laws, in particular by Decree-Law No. 676 of 29 October 2016, on their implications for the right to access a lawyer and on the procedure for declaring a state of emergency. A state of emergency is declared by government decision, which is submitted to the Grand National Assembly for approval.

41. A suspect's right to communicate with his/her lawyer can indeed be limited during the state of emergency but the suspect may not be questioned during this period. The aim of this measure is allegedly to prevent the transmission of information for terrorism purposes between suspects/detainees and terrorist organisations through lawyers. In my view, excluding the lawyer at this stage eliminates an effective means of preventing cases of torture or inhuman or degrading treatment in the period preceding interrogations.

<sup>66</sup> ["Turkey: Judges, Prosecutors Unfairly Jailed - Pretrial Detention, Unfair Dismissals, Asset Freezes Follow Failed Coup", HRW, 5.08.2016.](#)

<sup>67</sup> *Ibid.*

<sup>68</sup> "The failed coup in Turkey of 15 July 2016: some facts and figures, information memorandum by the Monitoring Committee as part of the post-monitoring dialogue with Turkey, [AS/Mon/Inf\(2016\) 14 rev 2](#), 8.11.2016.

<sup>69</sup> ["UN experts urge Turkey to respect the independence of the judiciary and uphold the rule of law"](#), 19.07.2016.

<sup>70</sup> Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, [CommDH\(2016\)35](#), 7.10.2016. See also the summary of Amnesty International's concerns regarding the failed coup attempt in Turkey and its aftermath, 6 September 2016.

<sup>71</sup> *Ibid.*

<sup>72</sup> ["Turkey: Independent monitors must be allowed to access detainees amid torture allegations"](#), 24 July 2016, Amnesty International.

<sup>73</sup> ["The Government Response to Turkey's Coup Is an Affront to Democracy"](#), Benjamin Ward, Human Rights Watch, 3 August 2016.

<sup>74</sup> ["Turkey: Independent monitors must be allowed to access detainees amid torture allegations"](#), 24 July 2016, Amnesty International.

<sup>75</sup> ["Turkey clamps down on lawyers amid post-coup torture claims"](#), 28.07.2016, RFI Europe.

42. Moreover, owing to the very large number and scope of the investigations concerning the FETÖ/PDY movement, legal representation at hearings has been limited to three lawyers with the aim of guaranteeing a fair trial without impeding prosecutions.

43. A lawyer subject to a criminal prosecution in progress or suspected of terrorist crimes or crimes enumerated in Articles 220 and 314 of the Turkish Criminal Code (membership of criminal and/or armed organisations), may be prohibited from representing a detainee suspected/accused of committing the same crimes or a person convicted of those crimes.

44. Section 59 of Law No. 5275 on preventive measures and the enforcement of sentences has also been amended: in the event of a threat to society or the prison administration or if there is a risk of a person directing a terrorist or criminal organisation or giving it orders or instructions, the following measures may be implemented with regard to access to a lawyer by convicted persons held in prison facilities: conversations between the convicted inmate and his/her lawyer may be recorded (sound and/or video), an official may be present at those conversations, and documents passed on may be confiscated. The number and duration of conversations may also be limited. These measures may be taken for a period of three months (which may be extended) on the basis of a decision of the sentence-enforcement judge made at the request of the Principal State Prosecutor. If these rules are infringed during the conversations between a detainee and his/her lawyers, the detainee's contacts with them may be prohibited for a period of six months, in which case another lawyer will be officially appointed by the relevant bar association. The authorities claim that the aim of these measures, which are subject to appeal, is not to undermine the principle of the confidentiality of lawyer-client communications but to prevent communications between FETÖ/PDY members through their lawyers.

45. I do not share the view expressed by the Turkish delegation in its reply that all the measures taken since the attempted coup on 15 July 2016 have been "necessary, urgent and proportionate". The arguments concerning necessity and urgency, more than four months after the attempted coup, seem to me to have lost some of their relevance. As regards the matter of the proportionality of these measures, it is highly likely that the Court, to which hundreds of applications have now been made in this connection, will issue a ruling on this subject.<sup>76</sup>

46. Furthermore, the Turkish delegation states in its reply that a number of the amendments made to legislation by the decree-laws adopted in the state of emergency are of a permanent nature and not limited to the state of emergency. Under the guise of the state of emergency, the Turkish legislators are in the process of revising laws, especially the Code of Criminal Procedure, and permanently lowering the safeguards regarding human rights and the principle of a fair trial, which is extremely disturbing.

47. We must ensure that the legislation once again complies with international standards guaranteeing the rule of law and human rights – especially those defined in the Venice Commission's [Rule of Law Checklist](#) – and we must condemn these situations in the strongest possible terms and call on the Turkish authorities to re-establish the procedural guarantees of a fair trial by upholding human rights and the principles of a state governed by the rule of law and conducting effective, impartial and conscientious investigations without delay into the allegations of torture, inhuman or degrading treatment and, indeed, deaths in detention. I fully endorse the recent appeal made by the Assembly's Monitoring Committee in a statement calling for "the state of emergency to be lifted at the earliest possible date".<sup>77</sup>

## 6. Conclusions

48. This report reiterates that access to lawyers must be guaranteed under the conditions laid down by the Convention from the outset of police custody and at each stage of criminal proceedings. It also examines the question of detainees' access in practice to a lawyer in three specific contexts of particularly topical relevance: access to a lawyer in migration situations, the fight against terrorism and Turkey since the attempted coup of 15 July 2016. These three topical issues warrant our full attention.

49. This report highlights the situation of lawyers in Council of Europe member states. Their role as guarantors of the rights of defence and a fair trial, and of the prevention of torture or inhuman or degrading treatment, should not be underestimated. Access to a lawyer may be impeded or refused either directly (for

<sup>76</sup> A first application on the legality of a judge's detention on remand following the coup on 15 July 2016, was rejected by the Court on 17 November 2016 for failure to exhaust domestic remedies, *Mercan v. Turkey* (Application No. 56511/16).

<sup>77</sup> Statement by the Assembly's Monitoring Committee entitled "[Turkey: the arrest of HDP parliamentarians jeopardises the functioning of democracy](#)", 9.11.2016.

example by delaying access) or indirectly (when lawyers are targets of intimidation or threats or prosecuted with the aim of disqualifying them).<sup>78</sup>

50. Difficulties in accessing a lawyer are real and commonplace in the context of the administrative detention of irregular migrants and asylum-seekers. The CPT focused in particular on this important question during its recent visits to Greece and Turkey and it is regrettable that the reports have not yet been made public.

51. The fight against terrorism obliges governments and legislators to take exceptional measures but that should not be done at the expense of the right to a fair trial. Emergency situations should, however, receive special attention from national parliaments, which should establish parliamentary scrutiny of a state of emergency. It is necessary to ensure that these situations are not exempt from proper procedural safeguards. The authorities must not resort to arbitrary detention and ignore human rights and the principles of the rule of law, especially by resorting to inappropriate administrative procedures or blocking access to a lawyer by various means. As she so pertinently pointed out in a [statement](#), Anne Brasseur, then President of our Assembly, said: *“Human rights should not be sacrificed on the altar of the fight against terrorism – this is precisely what the terrorists want!”*

52. As far as Turkey is concerned, obstacles to access to a lawyer by individuals arrested after the attempted coup are being reported in large numbers. Under the guise of the state of emergency, the Turkish parliament is severely and permanently restricting the guarantees of a fair trial. In my opinion, the amendments made lack precision and open up the possibility of very broad interpretations. In view of the present situation, we may legitimately ask whether any lawyers able to defend individuals arrested or prosecuted after the attempted coup will remain, other than officially-appointed lawyers. I therefore urgently call for the state of emergency to be lifted as quickly as possible.

53. The Court has detailed in its case law the aspects of the right of access to a lawyer and reiterated on numerous occasions the lawyer’s fundamental role in a fair trial. This report makes it clear that this access cannot always be taken for granted. On the contrary, it is often directly impeded either by law or in practice. I have therefore drawn up a number of practical proposals for recommendations in a preliminary draft resolution with the aim of strengthening and guaranteeing this right in all circumstances. In its resolution, the Assembly should reiterate the crucial importance of detainees’ effective access to a lawyer from the outset of custody – whatever the nature of the offence and whether it be minor or major – in order to guarantee that the rights of defence are substantial and effective rather than theoretical and hypothetical.

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<sup>78</sup> I note with interest that a motion for a recommendation entitled “The case for drafting a European Convention on the profession of lawyer” ([Doc. 14181](#)) has been tabled by Mr Fabritius and several of our colleagues. I am convinced of the merits of this motion, to which I am myself a signatory.