



## **FPC Briefing: What differences will the Fourth Package of Reforms make for Turkey in international judicial co-operation?**

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### **Introduction**

Turkey's long trailed fourth judicial reform package was enacted by the Turkish Parliament on 11<sup>th</sup> April 2013.<sup>1</sup> This is another step in the right direction towards improvements in Turkey's justice system to attain internationally recognised standards. However in itself, these reforms will have a limited effect on Turkey's judicial co-operation with other countries, particularly in the area of extradition. Substantial improvements in extradition flows need a deeper and wider overhaul of the Turkish penal code. Moreover, the judicial reform package, which is largely about human rights, does not tackle other issues in judicial co-operation, especially in the area of money laundering and the financing of terrorism. Overall, more and quicker progress is needed to establish Turkey's credentials as a solid partner in judicial co-operation.

### **The fourth judicial package**

There are grounds for strong criticism of the Turkish justice system, despite a decade long process of reform. Among the main problems are vaguely worded offences in the Turkish penal code that allow what in other countries would be considered normal journalistic activity and peaceful protests to be criminalised. Such activity could generate 50 alleged crimes under the penal code. For instance, under the notorious constitutional Article 301, it is an offence to "insult" "... the Turkish nation, the State of the Turkish Republic, the Turkish Grand National Assembly, the Government of the Republic of Turkey or the judicial organs of the state."<sup>2</sup> Defamation is a criminal offence, as is criticism of modern secular Turkey's founder, Kemal Ataturk. Then there is the Turkish Anti-Terrorist Act of 1991. Its Article 1 has such a wide prescription for terrorism, including "... any criminal action conducted by one or more persons belonging to an organisation with the aim of changing the attributes of the Republic...", that nearly any conduct can be criminalised.<sup>3</sup> This act was further amended in 2006 in response to the worsening of the security threat posed by the banned terrorist organisation, the Kurdistan Workers Party (PKK). Some of these amendments were over-zealous, exacerbating already restrictive practices and, among other things, increasing opportunities to prosecute media editors. Prior to 2006, criminal conduct occurred if "propaganda" was produced for "terrorist organisations ... on their behalf." This was then amended with the effect that any "propaganda" produced, even if not done in support of a terrorist organisation - for instance a genuine discussion about Kurdish issues, could be prosecuted. A number of new offences capable of prosecuting legitimate expression were also created.<sup>4</sup>

Turkish authorities have been quick to employ both sets of laws to jail journalists or others repeating the statements or printing publications of the PKK. This is in part a response to the threat it faces from the PKK, in a struggle that has cost nearly 30,000 lives. The problem, though, with these measures is that they are too readily applied to a legitimate critique of government policies, even if these present an alternative point of view or provide public interest reporting. There are public debates, which properly air all sides of the arguments, to be had about Kurdistan, Armenia, the Ergenekon case and trade union

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<sup>1</sup> "Turkish president approves 4th judicial package", *Hürriyet Daily News*, 29th April 2013

<http://www.hurriyetdailynews.com/turkish-president-approves-4th-judicial-package.aspx?pageID=238&nid=45908>

<sup>2</sup> "Review of the Draft Turkish Penal Code: Freedom of Media Concerns", Miklos Haraszti, The Representative on Freedom of the Media, OSCE, Vienna, May 2005 <http://www.osce.org/fom/14672>

<sup>3</sup> Republic of Turkey Ministry of Justice Website, Law on Fight against Terrorism 12th April 1991 [http://www.justice.gov.tr/basiclaws/Law\\_on\\_Figh.pdf](http://www.justice.gov.tr/basiclaws/Law_on_Figh.pdf)

<sup>4</sup> "Balancing national security and freedom of expression in amended terror law", Open Letter of 27th July 2006, ARTICLE 19 Global Campaign for Free Expression, <http://www.article19.org/data/files/pdfs/letters/turkey-amendments-to-terror-law.pdf>



rights amongst others. However, the expression of a non-government view can lead to prosecution. The well known writer Orhan Pamuk was prosecuted for expressing his own views about Armenia and Kurdistan.<sup>5</sup> (The case was eventually dropped by the authorities). Other cases of journalists being prosecuted for non-Government views about Kurdistan have been documented by the Committee To Protect Journalists.<sup>6</sup> As is continuously reported, Turkey has the largest number of jailed journalists in the world, many of whom have been jailed under anti-terror laws.<sup>7</sup>

Then there is a heavy use of internet censorship, such the as blocking of websites not only for terrorist sources but for sites which are critical of Turkey, which are critical of Ataturk, as well as news outlets covering south eastern Turkey and Kurdish issues. The OSCE has called for the abolition of Law 5651, known as the Internet Law in Turkey, which provides the powers for the Government to block sites en masse.<sup>8</sup>) Those who actively incite violence should of course be prosecuted according to due process and should not be allowed air time. But there has to be a balance with appropriate freedom of expression, which permits, unhindered, journalistic and other legitimate and objective scrutiny of government which informs the public. A contributing factor to this situation is that there is no clear definition of terrorism in Turkey in Article 1 of the 1991 Act.

Alongside these problems are significant procedural flaws in Turkey's justice system. There are unacceptable stays in custody awaiting trial or investigation. Indeed, pre-trial detention can regularly last five years, sometimes a decade or more, until the case comes to trial. In other words a defendant could have languished in jail for many years and then be found not guilty. In August this year, Turkey's Constitutional Court argued that pre-trial detention periods of five years were now a rights violation - ten years in the case of terrorist cases.<sup>9</sup> Trials themselves can be drawn out affairs. A defendant's access to all relevant evidence is an issue, as is the use, sometimes, of tangible evidence at a trial.

Turkey, albeit in a jaded manner, is still pursuing accession to the European Union. It is conscious of its poor image and the need to improve its justice system to assist the accession process. Two thirds of rulings against Turkey by the European Court of Human Rights (ECHR) have involved freedom of expression cases.<sup>10</sup> (The rulings of the ECHR, part of the Council of Europe have, more or less, become a standard which it is expected that EU member countries should in general follow.) Turkey came second behind Russia in 2012 as the two countries against which the ECHR most ruled against for violations of the European Convention on Human Rights. Indeed, Turkish ministers have stated that the specific purpose of the latest judicial reforms is to try and correct the number of ECHR rulings against it and bring it in to line with norms in European justice standards.

The fourth judicial package therefore introduced some one hundred reforms to address these criticisms. Undoubtedly, the package has introduced significant progress. It has narrowed the scope of propaganda related offences. The amendment to prosecute only for propaganda activities in which it could be shown

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<sup>5</sup> "Author's trial set to test Turkey", Sarah Rainsford, BBC News Istanbul, 14th December 2005

<http://news.bbc.co.uk/1/hi/world/europe/4527318.stm>

<sup>6</sup> "Turkey's Press Freedom Crisis: The Dark Days of Jailing Journalists and Criminalising Dissent", A Special Report by the Committee to Protect Journalists, October 2012 <http://cpj.org/reports/turkey2012-english.pdf>

<sup>7</sup> "Press Freedom in Turkey", Marc Pierini, The Carnegie Papers, January 2013 [http://carnegieendowment.org/files/press\\_freedom\\_turkey.pdf](http://carnegieendowment.org/files/press_freedom_turkey.pdf)

<sup>8</sup> Report of the OSCE Representative on Freedom of the Media on Turkey and Internet Censorship, OSCE, 2009

<http://www.osce.org/fom/41091>

<sup>9</sup> "Turkish high court takes action in line with ECtHR rulings", Fatma Disli Zibak, Weekly Zaman, 8<sup>th</sup> July 2013

[http://www.weeklyzaman.com/en/newsDetail\\_getNewsById.action?newsId=7815](http://www.weeklyzaman.com/en/newsDetail_getNewsById.action?newsId=7815)

<sup>10</sup> "Minister: 4th judicial package to help rid Turkey of bad record at ECtHR", Weekly Zaman, 15th February 2013

[http://www.todayszaman.com/newsDetail\\_getNewsById.action?newsId=307208](http://www.todayszaman.com/newsDetail_getNewsById.action?newsId=307208)



that there was an incitement to violence (a violence criterion) is a good step. A last minute change to the bill in the Turkish Assembly to stop those being prosecuted for terrorism propaganda offences or participating in “illegal meetings” also being prosecuted for membership of a terrorist organisation is to be welcomed. There is an explanation about what statements or comments made in support of terrorist organisations would now be prosecuted. There were further minor reductions to the restrictions on freedom of expression (for instance, restricting the criminalisation of what constituted “terrorist propaganda”). Although it remains to be seen how it will be implemented, all trials are now to happen within an “appropriate timeframe.” There have been developments on evidence, which inter alia bars the use of illegally obtained evidence. Other reforms are helpful. Among them are developments in women’s rights (women will now be able to keep their maiden names when married) and the removal of a statute of limitations for investigations of torture. Advances in the Turkish justice system brought about by these changes should not be underestimated.

Some of the larger problems remain, however, insufficiently corrected. Genuine freedom of expression remains under threat. Those critical of or presenting different points of view from the Government are still open to prosecution. . For instance, the offence of denigrating Turkey, its institutions or ethnicity (Article 301) is untouched. Similarly, defamation remains a criminal offence (Article 125): it is this offence which has often been used to prosecute and fine those critical of government policy. More importantly, there is no positive development on who can be considered to be a member of a terrorist organisation. Article 314 of the penal code, “membership “of an armed organisation, has been the main instrument for convicting Kurdish political activists, journalists, trade union members. Overall, the penal code and the 1991 Act’s definition of terrorism remains far too broad and open to manipulation to criminalise proper journalistic behaviour. There must be legitimate comment and protest as part of freedom of expression which is free of punishment. There is some way yet to go to achieve this environment.

Turkey has long a journey ahead to bring its domestic justice system up to internationally recognised standards in some areas. It does, though, need to be recognised, just how much change there has been in the Turkish justice system during the last ten years. There have been three previous significant judicial packages which have seen Turkey develop its laws, judiciary and prosecutorial system. It has formally ended capital punishment. Some of its constitutional articles which restrict freedom of expression are, in a painfully slow manner, being narrowed. The judiciary’s independence, impartiality, breadth of representation and methods has improved. Judges are, albeit far too slowly and in a far too delicate way, starting to question some of the prosecution cases appearing before them. (The next step is for the Judiciary to become more interpretative of laws rather than simply applying them as defenders of the state – there are indications that this is happening – again, terribly slowly). Last year’s third judicial reform programme (July 2012) led to the release of thousands of prisoners under court supervision, i.e. licence, as an alternative to custodial sentences. Even Article 301 was amended in 2008 when an insult against “Turkishness” was replaced by such an offence against the “Turkish nation.” Nonetheless, Turkish Ministers know that heavy duty changes remain to be done.

### **Extradition**

Why is change required? Improvement is necessary if Turkey is to acquire the full cooperation it demands from fellow nation states in returning accused persons to face trial or convicted ones to serve their sentence. Turkey has recently complained about the failure of European countries to extradite alleged PKK activists back to Turkey to face trial. Only seven of hundreds of accused persons have been



returned in the last five years.<sup>11</sup> Germany has only extradited two alleged terrorists out of 170 extradition requests.<sup>12</sup>

There is general confidence in Turkey as an extradition partner. EU countries, America and other democratic rule based nation states do extradite to and from Turkey. Extradition traffic with the UK is low but consistent. In March 2011, the UK returned to Turkey the business man, Orhan Asliturk, to stand trial on fraud related charges. Between 2004 and 2011 seven people were extradited to Turkey of the 17 extradition requests received from it.<sup>13</sup> In the same period, two people were extradited back to the UK. Despite sour political relations between Israel and Turkey, the Turkish judicial authorities in July this year extradited Guy Hassid, a 35 year old an Israeli citizen, to face charges of large scale human trafficking and running an international prostitution ring. Extradition was granted even though Hassid had allegedly been running his trafficking operation from Northern Cyprus. In other words Turkey was, very responsibly, extraditing for an extra-territorial crime.

Even Germany has extradited to Turkey. In 2004 it returned Metan Kaplin, the self styled “Caliph of Cologne”, when assurances were received from the Turkish Government that Kaplin would not face torture, inhumane or degrading treatment. Kaplin was sought in Turkey for a plot to crash a plane into the mausoleum of Kemal Ataturk. Extradition also works reasonably effectively in the other direction. In 2010, Turkey “responded positively” to 16 extradition requests from Germany.<sup>14</sup>

Turko-German extradition relations are, though, a problem, especially in Kurdish related issues. Germany has the largest Kurdish community in Europe, about 700,000, the majority of which emigrated from Turkey. (Germany also has a population of 3 million Turks). It is believed that the PKK has about 13,000 members in the country with many thousands of sympathisers.<sup>15</sup> There are accusations of significant fund-raising and other support activities by the PKK in Germany.

There is a real soreness amongst Turkish ministers about what it sees as failed cooperation with Germany and other European countries over PKK issues. The Turkish Prime Minister, Recep Tayyip Erdogan, has been a particular critic of Germany which he has accused of being lax on terrorism. Following the suicide bombing attack on the American embassy in Ankara in February 2013, he accused Germany of being “...negligent in the fight against terrorism...” when it emerged that the bomber, Ecevit Şanlı, had lived for many years in Germany, having just returned to Turkey before the attack.<sup>16</sup> He also criticised Germany in relation to the killing of three women activists of the PKK in Paris on 10<sup>th</sup> January this year. One of three, Sakine Cansiz, a founding PKK member, was first arrested in Hamburg in 2006 in response to a Turkish extradition request, but was later released when German courts refused the request, mainly on administrative grounds due to the inadequacy of the request itself. Against the background of the murders in Paris, for which there is yet no full explanation - though intra-PKK rivalry

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<sup>11</sup> “Turkey complains only 7 terrorists extradited from Europe in past 5 years”, Today's Zaman, 16th February 2013

<http://todayszaman.com/news-307284-turkey-complains-only-7-terrorists-extradited-from-europe-in-past-5-years.html>

<sup>12</sup> “Germany to extradite to Turkey only 2 terrorists out of 170”, Today's Zaman, 3rd March 2013

[http://www.todayszaman.com/newsDetail\\_getNewsById.action?newsId=308665](http://www.todayszaman.com/newsDetail_getNewsById.action?newsId=308665)

<sup>13</sup> “A Review of the United Kingdom’s Extradition Arrangements”, P464 - 466, Sir Scott Baker, presented to the Home Office, September 2011

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117673/extradition-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf)

<sup>14</sup> “Germany and Turkey set aside differences, focus on economy”, Ayhan Simsek, SES Turkiye, 1<sup>st</sup> March 2013

[http://turkey.setimes.com/en\\_GB/articles/ses/articles/features/departments/world/2013/03/01/feature-02](http://turkey.setimes.com/en_GB/articles/ses/articles/features/departments/world/2013/03/01/feature-02)

<sup>15</sup> Ibid.

<sup>16</sup> “Terrorism in the EU”, Mart Casamba, Ankara Strategy Institute, 13th March 2013 <http://www.ankarastateji.org/en/news/terrorism-in-the-eu-593/>



appears the most plausible - Erodogan said of Germany that this "... carelessness and indifference can no longer be accepted."<sup>17</sup>

In France the position is worse. Erodogan criticised France for granting Cansiz political asylum. And there has not been a single extradition of a PKK terrorist to Turkey from France in the last 20 years, a point recently made by Turkish interior minister İdris Naim Şahin.<sup>18</sup> Franco-Turkish relations suffer though on many fronts.

There is also a Kurdish element to US-Turkish extraditions. Turkey recently turned down an American extradition request for the return of an al Qaeda operative and son in law of Bin Laden, Suleiman Abu Ghaith, a Kuwaiti citizen. He was eventually deported back to Iran. Turkey's "technical" reasons for refusing extradition are not yet clear, though it may be linked to frustration at what it perceives as Washington's disposition towards Kurdish interests in Iraq.<sup>19</sup>

Whatever the matters of wider political context, the principal causes of failed Turkish extradition requests are law based ones, both legal process issues and human rights issues. Extradition is, after all, a legal process. There is no shyness from countries like Britain and Germany in dealing with alleged terrorist offenders. Britain expended much time in extraditing Kani Yilmaz, then a senior member of the PKK, to Germany in 1997 despite considerable protest, which included demonstrations by 3,000 Kurds outside the Home Office. Yilmaz, accused of organising attacks on Turkish businesses in Germany, actually arrived in the UK in 1994 to address a meeting at Westminster when he was first arrested on national security grounds and when deportation proceedings were started. Germany does clamp down, where it reasonably, can on illicit activity within its borders.

One plain fact is that far too many Turkish extradition requests are flawed. A primary reason for this is because of the nature of the offences. Most extraditions between Turkey and European countries are transacted under the 1957 Council of Europe Convention on Extradition (ECE) as amended by several protocols. The main extradition test under this instrument is that the alleged conduct must equate to an offence in both the requesting and requested state and attract a minimum of one year's sentence.<sup>20</sup> Many of the offences in Turkish extradition requests do not meet this basic test. Too often the offence supporting the extradition request is vague, does not equate to an offence in the requested country or rather is deemed to be a "political crime" which is excluded from extradition (as indeed is the case in Turkey's own laws when considering extradition requests from other countries). For instance, extradition requests made to Germany and other nations which charge individuals with "infringing upon the unity of Turkey", insulting the Turkish nation or with other charges related to the exercise of freedom of expression are bound to fail in courts in established rule of law democracies. On occasion, the problems can be as simple as incoherent warrants of arrest, a key document in the extradition application.

It is because of this incomplete paperwork that many European judicial authorities request from Turkey further credible information about the nature of the offences in support of extradition requests. Strictly speaking, "evidence" is not required by the 1957 European Convention on Extradition. However, more

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<sup>17</sup> Ibid.

<sup>18</sup> <http://www.todayszaman.com/columnist-303774-the-pkk-bookkeeper-and-cover-up.html>

<sup>19</sup> "Turkey refused to extradite bin Laden's son-in-law", Joseph Fitsanakis, InteNews 4th February 2013 <http://intelnews.org/2013/02/04/01-1189/>

<sup>20</sup> European Convention on Extradition, signed in Paris on 13.XII.1957 <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>



“evidence” or “information” is usually needed from the Turkish government to substantiate the alleged offence. Far too often it is not clear from the details provided what specific crime has been committed, when, where and how. In practice, many courts have a hard time matching the alleged crime to the legislative provisions that are submitted. If the offences are not clear and the alleged conduct does give rise to offences in the requesting country, then there can be no extradition offence.

Underpinning these problems is an underlying concern, in certain cases, that an accused person, if returned to Turkey, might not be treated fairly or receive a fair trial. This can manifest itself in many ways, from concerns about the nature of the accusations and to ones about the procedural aspects of prosecution. For example, as recently as September 2012, Westminster Magistrates’ Court turned down the extradition request for the return of a person, Miss Aykol, accused by the Turkish Government of PKK membership and of conspiracy to murder offences. The grounds of refusal were the passage of time. She had been arrested in Turkey in 1999 and then released. In 2001 she was sentenced in absentia, a sentence which was upheld by a Turkish court in 2006. Only in late 2011 was an international arrest warrant issued. In other words, the Turkish government appeared to have ample opportunity both to prosecute in 1999 and then subsequently to seek her return from Britain apparently knowing of her whereabouts over at least six years, but failed to act. The main point, however, is that European courts and governments will not return those who are going to be prosecuted for non-violent freedom of expression and/ or legitimate trade union activities.

The curious question is why, with such a significant failure rate, does Turkey not improve the way it presents extradition requests? The answer appears to be, largely, a stubborn cultural approach. There is still an attitude with the Turkish Government that because Turkey has made a request the receiving country should simply respond, irrespective of the adequacy of the documentation. An inadequate approach is taken in which vague material about the case and even vaguer descriptions of how the case constitutes an offence are thrown together to support the request, without consideration of how this will comply with the requested country’s laws. This does not wash with European or American courts or those in other trusted democracies. This type of attitude can be seen over the killings in Paris of the three female PKK members about which Ankara has demanded that Paris hand over the investigation notes to Turkey. The refusal of the French judicial authorities to do so has led to accusations from Turkey about a failure to co-operate.<sup>21</sup> Why would Paris do this? Why would the judicial authorities in whose jurisdiction three murders have occurred, of people belonging to a terrorist organisation, pass over their case files or the investigation to another country (without good cause) simply on demand? France is hardly a country incapable of carrying out such investigations. Relevant information should of course be exchanged but investigating authorities are unlikely to step in to line with a demand to hand over their notes to a foreign country. (Turkey is, itself, a problem in the exchange of the information about terrorist cases – as the Americans are finding over the February 2013 bombing).

Undoubtedly there are extradition requests in which Turkey is going through the motions, knowing that high profile cases, primarily Kurdish ones, are going to struggle. This is not a new situation in extradition relations between countries. The UK requested the extradition from Russia of Andrey Lugovoy for the alleged assassination by radiation poisoning in 2006 of Alexander Litvinenko. London knew full well that Moscow was likely to refuse the request. Nonetheless, it was the right and lawful thing to do. A serious crime had allegedly been committed and a point had to be made. Turkey is making the same statements when seeking the return of alleged terrorists. It is perfectly right to do so. But unlike Russia, Turkey has

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<sup>21</sup> “France fails to cooperate with Turkey on Paris Killings”, Izzettin Cicek, Today’s Zaman, 11<sup>th</sup> August 2013  
<http://www.todayszaman.com/news-323223-france-fails-to-cooperate-with-turkey-on-paris-killings.html>



limited grounds for complaint when the request fails. It is European courts, mostly, rather than European Governments, which refuse extradition on legal grounds.

There is more than likely a fatigue within the Turkish judicial system about what it sees as the unresponsive attitude of Europe and America to extradition requests. But as hard a tablet as this is to swallow, the cause largely lies within Turkey not outside it. The point is that Germany and other countries and their legal systems will be much more sympathetic to properly thought-out and prepared extradition requests which meet the required legal tests. Admittedly until there are significant changes in the Turkish justice system described in this paper below then extradition will remain problematic. But this does not mean that all extradition requests are bound to fail. Better prepared extradition requests will improve an unnecessarily high failure rate.

### **Money Laundering/Financing of Terrorism**

Extradition is not the only source of problems in international judicial co-operation. Another is Turkish co-operation in the broader international initiative against money laundering, particularly but not exclusively in terrorist financing, which the fourth judicial package has not touched. Turkey, despite participating in initiatives to suppress financing for terrorism, has a poor record of compliance in this field. There is no satisfactory criminalisation of international terrorist financing and related activities; nor is there in place a sufficient system to identify, freeze and seize terrorist assets and the general proceeds of crime in international cases. Turkey does have through its penal code and Anti-Terror Law means to address proceeds for crime related to domestic terrorism: the concept of money laundering as criminal conduct was legislated for in 1996. But these powers have, until recently, not been used for international terrorism, and even within in a domestic structure, these are under-developed.

Turkey, by virtue of a thriving financial sector and a geography connecting it with the Caucasus, the Middle East Eastern, Europe and Central Asia, is a centre of money laundering for drug traffickers. It is believed that Turkish-based traffickers pay drugs providers in Pakistan and Afghanistan by accounts in the United Arab Emirates, Pakistan, and other Middle Eastern countries. Much of this drug smuggling is linked to terrorist financing. There are other culprits linked to money laundering including smuggling, invoice fraud and tax evasion, and to a lesser extent, counterfeit goods, and forgery.<sup>22</sup> These may, in part, also have a connection to terrorism. (Around one third of the Turkish economy is powered by a black market of unregistered businesses and unregistered transactions.<sup>23</sup> Other observers think that the figure is nearer fifty percent).<sup>24</sup>

Late last year, 2012, Turkey was threatened with expulsion from the Financial Action Task Force (FATF), the intergovernmental body created from a G7 initiative in 1997 to tackle money laundering and terrorist financing. A grim FATF report on Turkey in 2007 found the country wanting in many areas. Only by some emergency minimal measures in January this year, 2013, did Turkey have the threat of expulsion from the FATF lifted before the February deadline. By placing Turkey in the same category as Iran and North Korea, such an expulsion would have damaged international confidence, and with it financial inflows, in Turkey. Until the January changes, Turkey did not have in place any legislation which criminalised the financing of terrorism directed against the interests of foreign states. Turkish banks are

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<sup>22</sup> 2013 International Narcotics Control Strategy Report (INCSR), U.S. Department of State, 5th March 2013  
<http://www.state.gov/j/inl/rls/nrcrpt/2013/vol2/204067.htm#Turkey>

<sup>23</sup> "Council of Europe: Shadow economy in Turkey is alarming", Abdullah Bozkurt, Today's Zaman, 4th October 2011  
<http://www.todayszaman.com/news-258858-council-of-europe-shadow-economy-in-turkey-alarming.html>

<sup>24</sup> 2013 INCSR, op cit.



a source of contention. Their verification process for identifying customers is weak. They still do not carry out effective monitoring or supervision of suspicious transactions or have a continual process for performing customer due diligence.

Why has Turkey not adequately addressed this problem? One of the issues has been that Turkey has focused only on domestic terrorism, its own war against the PKK, the DHP/C (a so-called Marxist Leninist group responsible for political assassinations) and the Turkish Hezbollah, and has turned away its eyes at activities in relation to international terrorism. It has not until this year recognised the crime of terrorism which is not aimed at the Turkish state. It has not established specific mechanisms for coordinating seizure and confiscation with foreign authorities and it does not have arrangements to share confiscated assets with countries where the confiscation was the result of coordinated action (an international asset forfeiture fund).<sup>25</sup> Indeed, there has been little oversight, investigation or record keeping of unusual and large transactions going through its banks and other institutions.

Turkey's slow response to money laundering at the international level until now is a little bemusing. After all, it plays a leading role in the newly established Global Counter Terrorist Forum (GCTF). And one would expect that its experience of dealing with domestic terrorism causes it to be sympathetic to threats faced by other countries. There are possible reasons to explain Turkey's position. Turkey has purportedly become a financial backer of Hamas in the Gaza strip filling a funding gap left by Iran's exposure to international sanctions.<sup>26</sup> Another suggestion is allegedly because of Turkey's growing commercial relationship with Iran, from which it purchases natural gas in methods that may not be consistent with international sanctions.<sup>27</sup>

The story is not all negative. Following a previous FATF evaluation in 1998, Turkey did enact some supervision and seizure powers in relation to money laundering and terrorist financing. (The financing of terrorism as a separate offence in its own right became law in 2006). However, these were limited to terrorist acts rather than to the general financing of terrorism, did not cover support given to individual terrorists and were still limited to terrorism against Turkey and its citizens. It did in 1997 establish a financial crimes investigation board, MASAK within the Ministry of Finance, which was substantially reorganised in 2006. To meet the minimal FATF requirement, it has this year introduced anti-money laundering measures with an international focus. The definition of "financing of terrorism" is extended to cover those who fund terrorism nationally or internationally for organisations designated under relevant United Nations Security Council resolutions. Individuals designated under these resolutions will now also be categorised as criminals. MASAK will be able to freeze the affected assets of these persons and groups quickly, as preventative measures, without the need for a judge's order: a court review will follow later. (In return Turkey will seek liability protection, in the form of cash or collateral guarantees, from the requesting country in case anyone whose assets are frozen sues it for compensation.)

These measures are the bare minimum required by the FATF. Their effectiveness can be assessed only over time. There is still much to do to avoid a repeat threat of expulsion in 2014. For its part, the FATF has reserved judgment while calling on Turkey to correct the other identified deficiencies.<sup>28</sup> Initially, the proposed measures appear incomplete. It remains to be seen whether all the offences set out on Article

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<sup>25</sup> "Third Mutual Evaluation Report, Anti-Money Laundering And Combating the Financing of Terrorism ... Turkey", Financial Action Task Force, 23<sup>rd</sup> February 2007, paragraph 568. <http://www.fatf-gafi.org/countries/s-t/turkey/>

<sup>26</sup> "Turkey's Terror Finance Problem, Jonathan Schanzer, The Blog, The Weekly Standard, 7th February 2013 [http://www.weeklystandard.com/blogs/turkeys-terror-finance-problem\\_700428.html](http://www.weeklystandard.com/blogs/turkeys-terror-finance-problem_700428.html)

<sup>27</sup> Ibid

<sup>28</sup> FATF Public Statement – 21st June 2013 <http://www.fatf-gafi.org/countries/s-t/turkey/documents/public-statement-june-2013.html>





2 of the UN Convention on Terrorist Financing will be covered by the new rules. And it is worrying that Turkey still requires evidence that an organisation is involved in terrorism before taking action rather than to adopt automatic procedures against it.<sup>29</sup> There appears to be no deadlines for financial institutions to comply with freezing orders.

It is certainly an improvement for Turkish authorities to be able to freeze assets, though how broad these new powers will be and whether these will be responsive to the freezing instruments of other jurisdictions and to all UN resolutions will similarly take time to assess. There is no national list of internationally prescribed persons and/or institutions which are financing (non-domestic) terrorism. However, even though the freezing of assets will not require the initial decision of a judge, they will still not necessarily be automatic. For instance, an 'Evaluation Commission on the Freezing of Assets' (MDDK) is being set up to examine individual requests from domestic and foreign sources and to then to submit its decisions to the Cabinet for approval or otherwise.<sup>30</sup> And what, in particular, appears to be missing is the construction of a thorough system for monitoring and reporting on large suspicious transactions in both the financial and not-for-profit sectors.

Turkey deserves a little sympathy. One of the reasons why even these minimal compliance measures were delayed in enactment was because of protests by opposition parties. The latter argued that the new powers would be abused and applied to dissenting media organisations and trade unions. They further claimed that the Government of Turkey was heeling to American pressure.<sup>31</sup> Consequently, the minimal FATF compliance measures became a domestic political football, used by the opposition in their challenge to Prime Minister Erdogan's development of a presidential system. The government in turn was forced to give assurances that these new measures would not lead to abuse.

There is a perennial conundrum for this maturing rule of law democracy, in balancing its international obligations with domestic ones. The international community has to be sensitive. On the one hand Erdogan's government is quite properly under continued international pressure to improve human rights within the Turkish justice system, now most likely through a fifth judicial package. On the other hand, it is under other international pressures to introduce further anti-money laundering measures which Turkish opposition parties claim can lead to further human rights abuses. Of course, there is no conflict between a healthy anti-money laundering scheme and the rule of law, as America, the UK and other countries have shown. But the dilemma facing Erdogan's government, especially against the recent background of the Gezi Park demonstrations, has to be borne in mind by those Governments applying pressure for FATF changes.

### **What are the next steps?**

Turkey has to take a number of measures to improve judicial co-operation for own its benefit as well as for the wider interests of justice. It is worth laying out what these primary actions are together with recommendations on others that can be taken.

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<sup>29</sup> "Terror financing bill not exactly in line with FATF recommendations", Guven Sak, Daily News, 9th February 2013  
<http://www.hurriyetdailynews.com/terror-financing-bill-not-exactly-in-line-with-fatf-recommendations.aspx?pageID=449&nID=40758&NewsCatID=403>

<sup>30</sup> "Turkey: Law to Combat Financing of Terrorism", Wendy Zeldin, Library of Congress, 12th March 2013  
[http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205403516\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403516_text)

<sup>31</sup> "Government, opposition differ over bill targeting financing of terrorism", Ali Aslan Kilic, Today's Zaman, 3<sup>rd</sup> February 2013  
<http://www.todayszaman.com/news-305908-government-opposition-differ-over-bill-targeting-financing-of-terrorism.html>



### Extradition improvements

First and foremost, Turkey has to drive ahead with the full **criminalisation** of acts of terrorism and of terrorist groups that threaten other democratic rule of law nation states. It has taken a significant step on this road, but to be effective in international judicial co-operation, it cannot ignore terrorist organisations attacking fellow democracies. Waiting for evidence that a certain group is a terrorist organisation even when it has been so designated by the UN lacks credibility.<sup>32</sup> It could look to the UK's proscribed list or America's Foreign Terrorist Organisations list for guidance for developing its own national list. Of course, there will always be differences from time to time about one off cases: witness, for instance, the U.S and UK push for Hezbollah's military wing to be labelled as a terrorist organisation by the EU. Individual case differences are not the problem with Turkey's position. It is instead Turkey's general approach which needs modification: after all, the UN list is, in the main, about proscribing organisations and individuals linked to Al Qaida and the Taliban.

These actions will, in the long term, improve extradition co-operation. Admittedly, in the short term, this is more likely to be in the favour of other nations than Turkey and will not necessarily by itself lead to improvements in extradition traffic to Turkey. (It will remove one component of the barrier to returning people from Turkey which is the failure to meet the dual criminality test). However, it will facilitate other countries' confidence in extradition co-operation, which is what Turkey needs. It faces significant domestic terrorist threats and rightly needs to be supported. It cannot expect full support if it does not apply similar standards against terrorist threats faced by other democracies.

One measure which the Turkish government could consider for its own benefit is to agree improved prisoner transfer agreements within the context of extradition. Why not broker a convention with relevant countries that allows for a person extradited to Turkey and subsequently convicted by a Turkish court to be returned to the country from which they came to serve a prison sentence? For instance, Holland, or a similar country, might be more amenable to surrender one of its own citizens to stand trial in Turkey for any alleged crime committed there, in the knowledge that following conviction, sentence would be carried out in a Dutch jail. Italy and Montenegro recently concluded this type of arrangement.

Secondly, Turkey must overhaul its domestic penal code and **decriminalise** legitimate protests, journalistic activity and public comment including criticism of the Turkish state. Having vaguely word laws which can be widely interpreted to mean a number of offences according to a judge's discretion is going to be cause for appeals against extradition in trusted democracies. Turkey must reform its penal code to develop specific offences which meet internationally recognised standards, prosecuting for genuine criminal activity while protecting legitimate freedom of expression. This will help mitigate any appeals made in requested countries against Turkish extradition requests to domestic higher courts or to the ECHR on human rights grounds. A wider study of comparable Western European justice systems will assist it here.

This clearly points to the need for a further judicial reform package which introduces the significant changes the Turkish justice system requires. Such judicial reform will foster improvements in extradition. The freer and fairer the Turkish system, the more likely it is that extradition requests will be accepted by U.S, European and other courts. The fourth judicial package is an advance and, together with the

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<sup>32</sup> Compendium of United Nations Security Council Sanctions Lists, UN Security Council Sanctions Committees  
[http://www.un.org/sc/committees/list\\_compend.shtml](http://www.un.org/sc/committees/list_compend.shtml)



previous reform packages, should bring about yet further changes in the culture of prosecutors and the judiciary. However, cultural changes require tangible poles around which to navigate.

Related to this is the need for a comprehensive extradition system brought in by statute. While the incorporation of a wide range of international agreements including the 1957 European Convention on Extradition into Turkish domestic law is welcome, this has been done without any accompanying domestic legislation. In consequence, there is no specific and detailed extradition legislation. Instead, international aspects of its domestic provisions are dispersed across the penal code. Having a comprehensive extradition system will undoubtedly improve the confidence of other countries in Turkey. It would, for example, lay down in statute the timelines for the decision points of an extradition process, as happens in the UK and elsewhere, to ensure timely extradition. This includes setting down the period of time in which the executive branch of government, subject to any appeals made to the courts, will have to make any final decisions. (There currently appears to be no time limit under which the final decision on surrender has to be made by a Turkish government).

There also needs to be further reform of the prison system. This, again, will limit the grounds for appeal against return to Turkey, on human rights grounds of Article 3 of the ECHR, for inhumane or degrading treatment or punishment.

At the same time as proceeding with these structural improvements, Turkey must learn to get its extradition paperwork in order. Over fifty years have passed since it entered into the 1957 European Convention on Extradition and a decade has passed since the start of its reform programme during which it has had close engagement with judicial contacts in American and European justice systems. There is no excuse for not having a full familiarity of what is required in an extradition request to comply with a requested country's laws - and indeed for realising what does and does not stand a good chance of succeeding. An accurate warrant of arrest has to be submitted alongside copies of the relevant legal provisions with a statement of how these apply to the alleged offence. Translations of the documents have to be precise. To this end, Turkey should develop a programme to send a dedicated team of prosecutors to spend a month with their counterparts in Germany, France and the UK for a full examination of how extraditions are processed in those countries in accordance with applicable statutes, legal custom and practice. This team should take the opportunity to follow through at least one case in each country from start to finish. (A similar idea is to develop a programme of rolling visits for its judiciary to visit American and European courts to improve their understanding of international practices).

Turkey must also work much harder to dismantle Northern Cyprus's reputation as a safe haven for criminals who consider themselves immune from prosecution and arrest while there. It has a significant say in the affairs of the island and needs to stamp down hard. While there are problems with other nations recognising the status of the Turkish Republic of Northern Cyprus, there is no reason why the TRNC cannot agree to all extradition requests in accordance with due process.

To burnish its judicial co-operation credentials further, one radical measure Turkey might consider examining is the removal of the bar on extraditing its own nationals. Under its Law 5237 of 1 June 2005, it will not extradite Turkish nationals but may institute domestic proceedings against the sought person. Many countries' constitutions, not the least France, retain a similar provision. However, the general trend in modern extradition relations is towards the surrender of all accused persons irrespective of nationality, under appropriate safeguards.



### **Money laundering and mutual legal assistance improvements**

Turkey's record in responding to mutual legal assistance enquiries is not bad and it generally works to ensure that the dual criminality test is not a barrier to co-operation. However, Turkey is singularly deficient when it comes to the confiscation of assets. The principle action here is for Turkey, whether through MASAK or a new agency, to develop a comprehensive proceeds of crime statute and a related implementation structure. It should seize the assets of, and prosecute, those involved in funding or assisting international terrorism immediately - and in accordance with due process. Special attention must be applied to suspicious transactions from higher risk countries. It must aim to properly empower, resource, train and structure the financial and judicial institutions involved in anti-money laundering policing - and improve their coordination and co-operation. There must be an active pursuit of prosecutions, which remain traditionally low in this area. And there must be proper reporting of statistics. Such a structure should incorporate practice that facilitates smooth international co-operation and the sharing of proceeds of crime with other relevant countries.

There should be complementary legislation compelling the compliance of all financial institutions to money laundering monitoring regulations. This legislation should provide for the reporting of all suspicious financial transactions and the performance of appropriate customer due diligence. Regulation should be developed addressing matters of ownership and control of financial entities. And there needs to be effective measures for addressing the problem around wire transfers, one off electronic movement of funds.

At the same time there should be tighter control of the not-for-profit sector, which includes approximately 116,000 organisations (foundations and associations). While there is a regulatory regime in place to ensure that such organisations are aware of their fiduciary duties, including the recording of cross-border transactions, there are many gaps. For instance, there is no programme in place to raise awareness within these organisations about the risk of terrorist abuse; Turkish authorities do not appear to closely assess this sector for terrorist financing vulnerabilities; there are no restrictions on Turkish associations or foundations financing activities abroad through foreign non-profit organisations; and since terrorism is defined narrowly as acts against the Turkish state, it may not be an offence for non-profit organisations to provide financial support to foreign terrorist groups.

To help develop such a structure, Turkey should send a team of officials to the UK to study what is a landmark piece of legislation in the Proceeds of Crime Act 2002 and the related Crime (International Co-operation) Act 2003. It should devise and negotiate with relevant UK authorities a detailed programme of study visits to examine how UK policy makers, investigators and prosecutors work in this field. Turkey, given the aspiration for its own financial centre, can learn much from the regulation of the City of London, one of the world's financial centres, in anti-money laundering and terrorist financing. London's regime is far from perfect but there is still here to be found one of the most rigorous anti-money laundering regimes anywhere. In particular this study should be in the insurance markets, where London is the global leader and where Turkey has a particular monitoring weakness. More generally, Turkish justice officials and prosecutors should deepen their general contact and co-operation with their UK counterparts building on the 2012 signature of a Memorandum of Understanding on the exchange of financial intelligence. (It has signed similar memoranda with Canada, Belarus, Finland, Australia and Monaco in 2011 and with United States, Belgium, Netherlands, Poland, Malaysia and Kosovo.)

As a supporting step, Turkey should also look to sign, ratify and implement the Second Additional Protocol of the European Convention on Mutual Assistance in Criminal Matters on 2001. Among other



things, this instrument seeks to enhance assistance between its member countries on money laundering related crimes, providing for information on bank accounts, bank transactions and the monitoring of bank transactions.<sup>33</sup> (The UK implemented the Second Additional Protocol on 1<sup>st</sup> October 2010.)

### **Conclusion**

Turkey is a country which has consciously decided to join the group of trusted law based democracies. It is, undoubtedly, taking steps to become a more effective judicial partner. It is trying to improve its human rights record by means of a fourth judicial package of reforms – only a year after the third set of reforms were introduced. It is trying to improve its anti-money laundering and anti terrorist financing record by the implementation of the February 2013 measures – there have been scores of minor money laundering and terrorist financing laws passed on the way. And even in border management related issues, there are efforts to improve the record, most prominently, by the enactment in April this year of a new law, the Law on Foreigners and International Protection establishing a framework for asylum and migration.<sup>34</sup> (Among other things, foreigners and internationally protected persons will not be sent back to places where they risk suffering from torture, inhumane treatment or punishment or otherwise be threatened due to race, religion or a group membership.) This progress is tangible and linear.

However, by any measure, these advances remain insufficient in the area of judicial co-operation. It must now implement the further necessary wide-scale changes needed to seal its reputation as a trusted judicial partner. There needs to be at least one further judicial package embracing both the deep domestic changes and the international changes to its justice system and to legal cooperation as set out in this paper. (There are, in addition, a range of other well aired measures that Turkey must also implement to radically improve its border management – and to improve legal cooperation in terrorism cases). Change cannot be achieved overnight. But the electoral campaigns for the 2014 Presidential elections and for the 2015 General Election which are warming up, present an opportunity to build on the momentum created by the changes that have occurred this year (the judicial reform package, the minimal FATF compliance measures and the April asylum law). With this background, an agenda for more substantial change can be produced and enacted.

### **September 2013.**

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<sup>33</sup> Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters  
CETS No: 182, signed Strasbourg 8<sup>th</sup> November 2001, Council of Europe

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=182&CM=7&CL=ENG>

<sup>34</sup> "Turkey adopts laws to protect foreigner's rights", Erdem Gunes, Hürriyet Daily News, 19th April 2013

<http://www.hurriyetdailynews.com/turkey-adopts-law-to-protect-foreigners-rights.aspx?pageID=238&nid=45190>