Measures taken under the state of emergency in Turkey

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STATEMENT

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It is with profound concern that I examined the first decree with the force of law ("Kanun Hükmünde Kararname", KHK/667) adopted within the framework of the state of emergency declared in Turkey last week.

I note that Turkey has submitted a formal notice of derogation to the European Convention on Human Rights (ECHR) as foreseen under Article 15 of the Convention. As I expressed in a statement last week, I have no sympathy for the coup plotters. I think that those who actively plotted to overthrow democracy must be punished. I am also not putting into question Turkey's right to declare a state of emergency, nor to derogate from the ECHR. But I must stress that, as recalled by the Secretary General of the Council of Europe, such derogations are not limitless: the European Court of Human Rights (ECtHR) remains the ultimate authority to determine whether measures taken during the state of emergency are in conformity with the ECHR. One of the criteria used by the Court in this context is whether the measures derogating from the ECHR are taken only to the extent strictly required by the exigencies of the situation.

The tests of necessity and proportionality used by the ECtHR are understandably altered in such situations, but they are not removed altogether and will apply to the measures foreseen in the

aforementioned Decree. While it will of course be ultimately up to the ECtHR to decide on their compatibility with the Convention, I have very serious misgivings on both counts.

Already in the past, the ECtHR had had the opportunity to examine measures taken by Turkey during states of emergency, finding for example that, despite a derogation, holding a suspect for fourteen days or more in detention without access to a judge was not necessitated by the exigencies of the situation. The Court had notably considered that such detentions without access to a judge left persons vulnerable not only to arbitrary interference with their right to liberty, but also to torture (Aksoy v. Turkey, judgment of 18 December 1996).

It is therefore particularly striking in the light of this case-law that the present Decree authorises detentions without access to a judge for up to thirty days. This period is exceptionally long and will apply not only to those suspected of involvement in the coup attempt, but all persons suspected for involvement in terrorist offences and organised crime, during the validity of the state of emergency. At the same time, while acknowledging that procedural guarantees applicable to police custody have improved since the abovementioned judgment, I am also concerned about the practical application of this measure, noting in particular the findings of the European Committee for the Prevention of Torture in 2013 that suspects in Turkey may not in all cases have access to a lawyer immediately from the very outset of deprivation of liberty so as to prevent torture and ill-treatment. This is all the more worrying in the light of concerns regarding allegations of torture I expressed in my previous statement.

I consider that the aforementioned Decree contains several other aspects that raise very serious questions of compatibility with the ECHR and rule of law principles, even taking into account the derogation in place:

- Restrictions to the right of access to a lawyer, including the confidentiality of the client-lawyer relationship for persons in detention, which could affect the very substance of the right to a fair trial, and restrictions to visitation rights (Article 6);
- The scope of the Decree, which concerns not only the coup attempt, but the fight against terrorism in general; both for physical and legal persons, punishments foreseen in the Decree apply not only in cases of membership or belonging to a terrorist organisation, but also for contacts with such an organisation (Articles 1, 2, 3 and 4);
- Simplified procedures to dismiss judges, including judges of the Constitutional Court and Supreme Courts, without any specified evidentiary requirements (Article 3);
- The immediate closure of 1 125 associations, 104 foundations, 19 trade unions, 15 universities, 934 private schools, and 35 private medical establishments. I note that it is not the activities of these bodies that are suspended or placed under trustee control: they are disbanded and their assets revert automatically to state authorities. The Decree further provides a simplified administrative procedure for the disbanding of further organisations (Article 2);
- A simplified administrative procedure to terminate the employment of any public employee (including workers), with no administrative appeal and no evidentiary requirements (Article 4);

- Automatic cancellation of passports of persons being investigated or prosecuted, without court order (Article 5);
- Cancellation of rental leases between public bodies and persons considered to be a member of or in contact with a terrorist organisation, a measure that is likely to affect not only the suspects but also their families (Article 8).

Another worrying feature of the Decree is that it foresees complete legal, administrative, criminal and financial impunity for administrative authorities acting within its framework (Article 9) and the fact that administrative courts will not have the power to stay the execution of any of these measures (Article 10), even if they consider that such measures are unlawful. These two provisions effectively remove the two main safeguards against the arbitrary application of the Decree. In my view, given the extremely broad and simplified procedures, arbitrariness is in all likelihood unavoidable and damages caused to any physical or legal person may therefore be irrevocable. Such urgency and derogation from ordinary guarantees of due process might be necessary for certain groups, for example for military personnel in the light of the shocking events of 15 July, but perhaps not for others.

I therefore fear that the combination of such a wide scope, extremely wide and indiscriminate administrative powers affecting core human rights, and the erosion of domestic judicial control may result in a situation where the very foundations of rule of law are put in jeopardy, and where the ECtHR will have to face a huge number of new cases coming from Turkey. Violations of other core Council of Europe standards, and in particular of the European Social Charter, are also likely.

Turkey's derogation is not the first one I had to deal with since I took up office and it is my duty, in the spirit of impartiality enshrined in my mandate, to be consistent in my criticism. For example, I have severely criticised from the outset the use of the state of emergency in France, in terms of necessity, proportionality and expediency (http://www.coe.int/en/web/commissioner/-/luttons-contre-le-terrorisme-dans-le-respect-du-droit). While many of my concerns about France remain still valid, I note nevertheless that important checks and balances have been quickly put in place in France by the judiciary, by both chambers of the French Parliament, as well as by the National Human Rights Institution and the Ombudsman, who are closely and effectively monitoring the use of administrative powers and formulate harsh criticisms and recommendations for improvement. I also note that the measures decided by the French government have been far more limited in scope compared to measures provided in the aforementioned Decree. I think that Turkey will also need to put mechanisms in place in order to ensure safeguards against abuse and to preserve separation of powers and the rule of law.

I urge the Turkish authorities to take account of these very serious concerns which are meant in a spirit of constructive dialogue with a view to avoiding future human rights violations during the very difficult period Turkey is going through at the moment.