

# The limits of transnational justice

Citation for published version (APA):

Kurban, D. (2018). *The limits of transnational justice: The European Court of Human Rights, Turkey and the Kurdish conflict*. [Doctoral Thesis, Maastricht University]. Maastricht University. <https://doi.org/10.26481/dis.20180223dk>

## Document status and date:

Published: 01/01/2018

## DOI:

[10.26481/dis.20180223dk](https://doi.org/10.26481/dis.20180223dk)

## Document Version:

Publisher's PDF, also known as Version of record

## Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

## General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

[www.umlib.nl/taverne-license](http://www.umlib.nl/taverne-license)

## Take down policy

If you believe that this document breaches copyright please contact us at:

[repository@maastrichtuniversity.nl](mailto:repository@maastrichtuniversity.nl)

providing details and we will investigate your claim.

# **The Limits of Transnational Justice: The European Court of Human Rights, Turkey and the Kurdish Conflict**

DISSERTATION

to obtain the degree of Doctor at  
Maastricht University on the authority of the Rector Magnificus  
Prof.dr. Rianne M. Letschert  
in accordance with the decision of the Board of Deans,  
to be defended in public  
on Friday 23 February 2018 at 10.00 hours

by

Dilek Kurban

Supervisors:

Prof. Dr. Bruno de Witte

Prof. Dr. Monica Claes

Assessment Committee:

Prof. Dr. Fons Coomans, chairman

Prof. Dr. Dia Anagnostou, Pantelon University, Athens, Greece

Prof. Dr. Ozan Erözden, MEF University, Istanbul, Turkey

Prof. Dr. Jure Vidmar

*To my parents,  
Zeynep and Bakıl Kurban,  
for their unconditional love and support*



# Table of Contents

<i>Preface and Acknowledgments</i>	vii
<b>1. Introduction</b>	<b>1</b>
1.1 Apocalypse Now	1
1.2 Setting the Research Framework	6
1.3 The Top Down View: Assessing the ECtHR's Impact	8
1.3.1 <i>Turkey: The Perpetual Footnote</i>	8
1.3.2 <i>ECtHR's Impact, Compliance and the Authoritarian State</i>	13
1.3.3 <i>Shifting the Lens to the ECtHR</i>	15
1.4 The Bottom Up View: Mobilizing the ECtHR for Political Change	17
1.4.1 <i>Legal Mobilization: A Literature Review</i>	17
1.4.2 <i>Transnational Legal Mobilization before the ECtHR</i>	19
1.5 Filling the Gap: ECHR, Turkey and the Kurdish Conflict	22
1.5.1 <i>Beyond the Binary: The Turkey Puzzle</i>	22
1.5.2 <i>Contesting State Violence in Authoritarian Settings: Kurdish Lawyers</i>	24
1.5.3 <i>Bridging the Gap</i>	26
1.6 Research Timeframe and Methodology	27
1.7 Layout	29
<b>Part I: Law and Politics of Democracy, Human Rights, Constitution-Making and the Kurdish Conflict in Turkey</b>	<b>33</b>
<b>2. Turkey's Search for Democracy and Human Rights Reforms under European Watch</b>	<b>35</b>
2.1 Introduction	35
2.2 Transition to Democracy? Perpetual Authoritarianism under Polyarchy	37
2.2.1 <i>Transition to Polyarchy and Constitution-Making under Military Intervention: 1950-1980</i>	38
2.2.2 <i>Post-1980: The Institutionalization of Constitutional Authoritarianism</i>	42
2.2.2.1 The Making of a Constitution and the Transition (back) to Civilian Rule	43
2.2.2.2 "Paradigmatic Authoritarianism": The 1982 Constitutional Regime	45
2.2.3 <i>Turkey's Constitutional Regime and the Jurisprudence of its Constitutional Court</i>	50
2.3 Turkey's Human and Minority Rights Policies	53
2.3.1 <i>Turkey's Minority Policies: Historical Origins</i>	54

2.3.2	<i>Turkey's Foreign Policy on Human Rights Treaties: A Selective Engagement</i>	57
2.4	European Oversight of Turkey During the Cold War	63
2.4.1	<i>Political Institutions: The EU and the CoE</i>	63
2.4.2	<i>Before the Kurdish Cases: The ECtHR's Early Engagement in Turkey</i>	65
2.5	After the Cold War: The EU's Engagement in Turkey	69
2.5.1	<i>The pre-Copenhagen Process</i>	71
2.5.2	<i>From Helsinki to Brussels (2000-2004): The Peak of the EU-Turkey Relations and Human Rights Reforms in Turkey</i>	73
2.5.3	<i>EU-Turkey Relations in Turbulence and the AKP's Rollback of Reforms</i>	75
2.6	Conclusion	84
<b>3.</b>	<b>The Kurdish Question in Historical Context</b>	<b>87</b>
3.1	Introduction	87
3.2	From the Empire to the Republic: The Tackling of the Kurdish Demands	89
3.2.1	<i>The Ottoman Legacy</i>	90
3.2.2	<i>The Republican Foundation</i>	93
3.3	Kurdish Political Mobilization in the Multiparty Era (1950-1980)	99
3.4	Law is not Blind: The Exceptionalization of the Kurds under the 1980 Legal Regime	103
3.4.1	<i>Denial and Suppression of Kurdish Linguistic and Political Rights</i>	103
3.4.2	<i>Emergency Rule in the Context of Counter-Terrorism</i>	104
3.4.2.1	State Security Courts	104
3.4.2.2	State of Emergency	106
3.4.2.3	Anti-Terror Law	110
3.5	Kurdish Political Mobilization in the Era of Counter-Terrorism	110
3.6	Turkey's EU Process and its Impact on the Kurdish Question	120
3.6.1	<i>The EU Process: The Age of Legal Reforms</i>	120
3.6.2	<i>When the EU Withdraws: Seeking a Political Solution in the Shadow of War</i>	123
3.7	The ECtHR on Kurdish Political and Linguistic Rights	127
3.7.1	<i>Cases Concerning Kurdish Political Representation</i>	128
3.7.1.1	Political Party Dissolutions	128
3.7.1.2	Electoral Threshold	131
3.7.1.3	Local Political Representation	133
3.7.2	<i>Linguistic Rights</i>	136
3.7.2.1	In Education: Kurdish Linguistic Rights Demands	136
3.7.2.2	In Official Documents: The Use of the Kurdish Alphabet	137
3.7.2.3	In Prisons: The Right to Correspond in Kurdish	138
3.7.2.4	In Politics: The Use of Kurdish in Electoral Campaigns	139
3.8	Conclusion	140

**Part II: Kurdish Legal Mobilization against State Violence and the ECtHR's Response to and Impact on Turkey's Policies** **145**

<b>4. From the Grassroots to the Transnational: Kurdish Legal Mobilization before the ECtHR</b>	<b>147</b>
4.1 Introduction	147
4.2 The Emergence of the Kurdish Human Rights Movement	150
4.2.1 <i>The İHD: A People's Movement</i>	151
4.2.2 <i>Solitary Advocates: The Kurdification of the İHD</i>	154
4.2.3 <i>"Living at Gunpoint": Life and Death at İHD Diyarbakır</i>	158
4.2.4 <i>The Price of Attestation: Investigating Human Rights under Fire</i>	162
4.3 Kurdish Legal Mobilization in Strasbourg: Setting Precedents for Europe	164
4.3.1 <i>Early Beginnings, Converging Paths: The Kurdish Advocates Meet the ECtHR</i>	165
4.3.2 <i>London-Diyarbakır: A Novel Model of Transnational Legal Mobilization</i>	168
4.3.3 <i>Paying the Price without Getting Full Credit</i>	171
4.3.4 <i>The Growing Visibility of the ECtHR among the Kurdish Lawyers</i>	175
4.3.5 <i>1993-2001: The Golden Age of Kurdish Legal Mobilization in Strasbourg</i>	176
4.4 The Second Phase: A Less Receptive Court	181
4.4.1 <i>Turkey's Counter-Tactics: Winning Strike-Outs with Unilateral Decisions</i>	182
4.4.2 <i>"Counter-Reforms": Turkey Wins a Pilot Judgment in Strasbourg</i>	186
4.4.3 <i>The End of the KHRP, the End of an Era</i>	190
4.4.4 <i>Internal and External Obstacles to Legal Mobilization</i>	193
4.5 Conclusion: The Legacy of Kurdish Legal Mobilization	196
<b>5. Violence as State Policy: Actors, Acts and Victims</b>	<b>201</b>
5.1 Introduction: Definitions, Terminology and Methodology	201
5.2 Actors Involved in State Violence	203
5.2.1 <i>JİTEM</i>	204
5.2.2 <i>The Village Guards</i>	209
5.2.3 <i>Hizbullah</i>	214
5.2.4 <i>Confessors/Informants</i>	218
5.3 The Acts of State Violence	219
5.3.1 <i>Enforced Disappearances</i>	220
5.3.2 <i>Extrajudicial Executions</i>	224
5.3.3 <i>Forced Evictions, Village Burnings and Property Destructions</i>	228
5.3.4 <i>Torture</i>	232
5.4 Impunity	237
5.5 Victims of State Violence: Four Stories	238
5.5.1 <i>Enforced Disappearances: 'The Missing of Kulp'</i>	239

5.5.2	<i>Torture: Rape as a Punitive Instrument against Kurdish Resistance</i>	242
5.5.3	<i>Extrajudicial Killings: The Targeting of Kurdish Intellectuals and Dissidents</i>	245
5.5.4	<i>Forced Evictions and Property Destructions</i>	248
5.6	Conclusion	251
<b>6.</b>	<b>When the ECtHR Speaks: The Impact of Transnational Judicial Oversight on State Violence in Turkey</b>	<b>253</b>
6.1	Introduction: The ECtHR's Impact in State Parties	253
6.2	The Golden Age: The First Phase of the ECtHR's Review of State Violence in Turkey	256
6.2.1	<i>The ECtHR on Issues of the Convention Mechanism and Procedure</i>	259
6.2.1.1	Admissibility: The Exhaustion of Domestic Remedies	260
6.2.1.2	Establishing the Facts amidst Government Denial and non-Cooperation	264
6.2.2	<i>The ECtHR on Substantive Issues</i>	270
6.2.2.1	Turkey's Emergency and Derogation Regimes	271
6.2.2.2	Violence as a State Policy: The ECtHR on Administrative Practice Claims	276
6.2.2.3	Impunity as a State Policy: Denial of Effective Remedies to Victims	281
6.2.2.4	Defining the Scope of Substantive Rights	284
6.2.2.4.1	Enforced Disappearances	285
6.2.2.4.2	Extrajudicial Executions	288
6.2.2.4.3	Torture and Degrading and Inhuman Treatment	293
6.2.2.4.4	Forced Displacement/Property Destruction	295
6.2.2.4.5	Discrimination	296
6.3	A New Phase: Collaboration between the ECtHR and Turkey	298
6.3.1	<i>The Era of Reforms: Complying with the ECtHR with an eye to the EU</i>	299
6.3.2	<i>Back to Domestic Remedies: The ECtHR's "Partnering" with Turkey</i>	304
6.3.3	<i>A Lost Opportunity? The Search for Truth and Justice in Turkey</i>	311
6.4	The ECtHR's Reluctant Comeback	317
6.4.1	<i>Old Wine in not-so-New Bottle: The Resumption of State Violence in the Kurdish Region</i>	317
6.4.2	<i>When "Partnering" goes Wrong</i>	320
6.5	Conclusion: The Legacy of Strasbourg in Turkey's Kurdish Conflict	324
<b>7.</b>	<b>Conclusion</b>	<b>329</b>
7.1	Main Research Findings	329
7.1.1	<i>Transnational Judicial Oversight of State Violence</i>	329

7.1.2	<i>The ECtHR's Oversight of Kurdish Cultural and Political Rights Claims</i>	333
7.1.3	<i>Geopolitics as a Limitation on Effective Transnational Oversight</i>	336
7.2	Recent Developments	338
7.2.1	<i>After the Storm: Lawlessness</i>	338
7.2.2	<i>When the Kurdish Cases Strike: The AYM's Paradox</i>	341
7.2.3	<i>The ECtHR between Self-Interest and Individual Justice</i>	343
7.2.4	<i>Persecution of Kurdish Human Rights Lawyers and Deputies</i>	346
7.2.5	<i>Crackdown on the Kurds' Political Participation and Linguistic Rights</i>	348
7.2.6	<i>Conclusion</i>	349
7.3	Implications for Further Research	350
	<i>List of Abbreviations</i>	355
	<i>List of Interviews</i>	357
	<i>Bibliography</i>	361
	<i>Summary</i>	411
	<i>Author's biography</i>	415



## Preface and Acknowledgments

I met them for the first time in summer 1998 in Diyarbakır. I was a young student at Columbia University, assisting a group of legal scholars from the United States in their fact finding mission on Turkey's state security courts. They were Kurdish lawyers in their early 30s, having survived the state violence ongoing in their region for a decade. 'Lucky' in comparison to their murdered colleagues, their persecution had been limited to death threats, arbitrary detentions and torture. Translating into English what they had to say about being a human rights defender in a region governed by lawlessness under the pretext of counter-terrorism, I was struck by the resilience of these men and women who refused to be broken. Representing illiterate, impoverished and marginalized Kurdish civilians who had been executed, tortured, disappeared and displaced by Turkish security forces and their proxies, Kurdish lawyers were determined to keep seeking before the European Court of Human Rights (ECtHR) the justice they were denied in Turkey. This brief encounter has had a lasting impact on my life. I decided to study law after completing my master's studies and to thereafter work on the Kurdish cases before the ECtHR. I did study law. I did not, however, litigate at the ECtHR. Instead, I wrote this thesis to tell the story of those who did.

Over the years, I sought to give voice to Kurdish victims of state violence and the lawyers seeking justice on their behalf. What motivated me were not only the gruesome stories I heard on the field. I was also moved by something deeply personal – as the daughter of Kurdish emigrants who left their village in the late 1960s to give their children a better life and the granddaughter of a Kurdish patriarch who was displaced from his village by the Turkish state in 1994. Having hidden my ethnic background to blend into my middle class environment in Istanbul, where I was born and raised, yet having always been aware of the injustices brought upon the Kurds in the emergency region, where I visited my extended family in summer holidays, I had finally found the right mix of circumstances to reflect on the personal through the lens of the law. In summer 2005, while interviewing hundreds of displaced Kurds, I had a striking moment of realization that I had never asked my own grandfather, grandmother, uncle, aunts and cousins about their experiences of displacement from our ancestral lands. A few months later, in a law and society moment, I found myself interviewing them in Istanbul.

It has taken me a while to write this thesis. Initially, being involved in what many of us had believed to be Turkey's historic democratization process was more urgent and important. Subsequently, after I moved to Berlin, I was emotionally distracted by the political climate in the country I left behind. I have seen dozens of friends and colleagues – academics, lawyers, politicians and journalists – imprisoned, prosecuted, banned from leaving Turkey, dismissed from their jobs and, in the case of Tahir Elçi, murdered in circumstances implicating state responsibility. Tahir's loss was a devastating blow. He was one of the Kurdish lawyers I had met in 1998, whose impeccable advocacy has been an inspiration for this research. The last

time we met in April 2015, I had visited Tahir in his office. Since becoming the President of Diyarbakır Bar Association, he was too busy for the long conversations we used to have. Yet, he made time to answer my pressing questions for an article I was working on. I also wanted to hear his story of why and how he became a human rights lawyer litigating at the ECtHR. We agreed to do that another time, finished our drinks and said goodbye. Several months later, he was in Berlin and asked whether we could meet. I was out of town and there went my last chance to see Tahir and do the interview we had postponed. In November, he was killed.

The research culminating in writing this thesis was undertaken in two stages. The first period, 2005-2012, coincides with my tenure at the Turkish and Economic Social Studies Foundation (TESEV) in Istanbul. The research I conducted under its premises has formed the background of this study. After I relocated to Berlin in 2012, I was able to develop and implement this project with the support of two research fellowships. The IPC-Mercator Fellowship at the Stiftung Wissenschaft und Politik (SWP) enabled me to carry out a project on the European Union's (EU) engagement and impact in Turkey's Kurdish conflict, the findings of which I drew on in Chapter 2 of this thesis. I thank the fellowship committee for their support. I am also grateful to the colleagues at SWP for providing me with a supportive research environment. The Marie Curie Fellowship awarded by the European Commission enabled me to make research trips to Diyarbakır, Ankara, Istanbul, Cologne and Strasbourg and to take the much needed time for reading and writing. The data I generated from fieldwork and desk research during 2014-2017 constitutes the empirical core of this thesis. I am grateful to colleagues at the Hertie School of Governance for being such inclusive, collegial and kind hosts. I owe special thanks to Mark Dawson, who has been an amazing colleague and mentor. I am happy that I also gained a dear friend along the way. I also thank the Hertie School librarians for being such a good sport in meeting my never ending inter-library loan requests.

Of the professors who supported my academic advancement and intellectual growth over the years, I am particularly thankful to Mine Eder, Taha Parla and Penny Green during my undergraduate studies at Boğaziçi University, J. Paul Martin and Stephen Marks during my master's at Columbia University's School of International and Public Affairs, Ellen Chapnick, Gerald L. Neuman, Lori Damrosch and late Robert Ferguson while pursuing a Juris Doctor degree at Columbia Law School, and Gráinne de Búrca and Bruno de Witte during a semester abroad at the European University Institute. I had the good fortune of being trained by Bill Goodman at the Center for Constitutional Rights and Reed Brody at Human Rights, from whom I learned a great deal about human rights lawyering at exigent times. From the fantastic Tamara Pozdnyakova, I learned as much about life as about the practice of the United Nations Security Council during my employment at that organization. I am grateful to Etyen Mahçupyan for entrusting me with leading the Democratization Program at TESEV and providing me with the space to work on issues close to my heart. During this phase of my life in Turkey, I learned a great deal about law, politics and society, including from colleagues with whom I collaborated in various projects. Apologizing for my inability to name every one of them, I would like to acknowledge in particular Barış Yavuz, Baskın Oran, Cihan Aydın, Deniz Yüksek, Dia Anagnostou, Elif Kalaycıoğlu, Emel Kurma, Emin Aktar, Emma Sinclair-Webb, Erdal Doğan, Eren Keskin, Etyen Mahçupyan, Ferda Balancar, Fırat Anlı, Haldun Gülalp, Hişyar Özsoy, Hüsnü Öndül, Koray Özdil, Mahsun Karaman, Meral Danış Beştaş, Mesut Beştaş, Mesut

Yeğen, Necdet İpekyüz, Nurcan Baysal, Osman Baydemir, Ozan Erözden, Özge Genç, Pınar Önen, Reyhan Yalçındağ, Rober Koptaş, Roberta Cohen, Selahattin Demirtaş, Sema Kılıçer, Serkan Yolaçan, Sezgin Tanrikulu, Şehbal Şenyurt, Şemsa Özar, Tamer Aker, Ümit Cizre, Yılmaz Ensaroğlu and Zozan Özgökçe. I dearly miss Derya Demirler, Dicle Koğacıoğlu, Hrant Dink, Tahir Elçi and Zekeriya Aydın, and regret that I will never be able to thank them for the wonderful ways in which they enriched my life. In Berlin, I found new/old friendships in Bilgin Ayata, Esra Özyürek and Gökçe Yurdakul, whom I relied for friendship, guidance and fun during a period of transition in my personal and professional life.

I thank the organizers and participants of workshops and panels where I presented sections of this thesis, including the Department of Political Science and the Henry M. Jackson School of International Studies at University of Washington, the Centre for the Study of Democratic Institutions at University of British Columbia, the EUSA conference, the Law and Society Association meeting, the ICON S conference, the Center for Global Constitutionalism at WZB Berlin Social Science Research Center, the Institute for Social Sciences of Humboldt University, the Centre for Global Public Law at Koç University and PluriCourts at University of Oslo, and the European and Global Governance Research Cluster at the Hertie School of Governance. I am particularly grateful to Michael McCann and Uğur Erdal for reading and commenting on the earlier drafts of chapters 4 and 6; they have been most generous with their time and expertise on legal mobilization and the ECtHR's rules of procedure and case law. In addition to sparing time for my lengthy interviews, Sevtap Yokuş and Kerim Yıldız were very kind in responding to my follow-up questions. I owe special thanks to McCann who has been a great mentor. My dear friend Reyhan Yalçındağ patiently answered my endless questions about national legislation and case law and provided moral support from afar throughout the writing process.

I am indebted to hundreds of unnamed Kurdish victims who shared their stories with me over the past twelve years. In addition, dozens of Kurdish lawyers and advocates, Turkish national and local government officials, representatives of local, national and international NGOs, and officials of EU and Council of Europe institutions have been most generous with their time and expertise. Many of them have been acknowledged in prior works. Those I interviewed during 2013-2017 as well as several I had interviewed in earlier years and cited in this study are listed at the end of this thesis. I am thankful to them for their trust and faith in me and my research. Needless to say, I bear the sole responsibility for the way in which I interpreted the information and opinions they shared with me.

I owe a special thank you to Bruno de Witte, my research supervisor turned mentor and friend turned PhD supervisor. For over a decade, I contemplated pursuing a PhD in law, a thought I occasionally shared with Bruno. When the time had come, he helped me realize this. I am grateful to him for believing in the value of telling the story of “unsung heroes” and for his invaluable guidance and support during my transition from the world of politics to that of academia. I thank Prof. Monica Claes for agreeing to be my second supervisor and the members of the committee for endorsing and critically commenting on my dissertation, which will be most helpful in turning it into a book.

We all owe much to our parents and it may at times sound like a cliché to thank them. But, my beloved parents did save the future of their children by their single decision to immigrate to Istanbul. They had to work hard in an environment where their lack of formal education and social capital, as well as minority identity, must have made it very difficult to be accepted and respected. The remarkable Zeynep and Bakıl Kurban managed to send all three of their children to university and also supported the choices they made in their personal lives. They have been exceptional parents who raised their daughters as strong and independent women in a patriarchal society. I have been blessed for having had a *de facto* second set of parents in my brother Haydar and sister Melek. They contributed to my upbringing as much as my parents, and guided me in my academic and personal life with the know-how they had to gain on their own. To them, I am eternally grateful. In their spouses Gülriz and Şinasi, I found a second sister and a second brother ever since they entered my life.

And, another cliché-sounding truth: I would not have written this thesis if not for my wonderful husband Ruud Koopmans. It was his love which made me leave Turkey, enabling the transition I had been contemplating for years. And it was his constant, and at times rebuking, support and encouragement which forced me to write the story which he knew had long been ready in my head. In conversations over dinner, on the beach, on the road and wherever we happened to be, Ruud tremendously helped me in my thought process. He read every single line of this thesis and helped me improve my writing – stylistically and substantively. I know my tardiness has at times cost us precious personal time and I am grateful for his patience. And for the love...





---

## Introduction

### 1.1 Apocalypse Now

On 19 December 2015, at around 7 p.m., 57-year-old Taybet Inan, a mother of eleven, was shot to death outside her home by Turkish security forces. She was on her way back from visiting a neighbour across the street. Her ‘crime’ was to step out during a round-the-clock curfew in the Kurdish town of Silopi. While she lay wounded in front of her doorstep, her family called for an ambulance, which never arrived. Her brother-in-law Yusuf, too, was shot when he stepped out to help her. The family called the emergency police line again, this time for authorization to leave their home in order to bring an ambulance themselves. The authorities said they would be safe to leave if they carried white flags. They obliged, but were nonetheless shot at by the security forces. After several failed attempts, the family watched Taybet and her brother-in-law Yusuf bleed to death. Yusuf awaited an ambulance for 20 long hours before he died. Taybet’s husband Halit was able to talk to his wife from afar after she was injured. Her last words were how cold and thirsty she was. The family were able to retrieve Yusuf from their courtyard into the house, but Taybet’s body remained out on the street. For a week, her dead body lay in front of her house, while her family repeatedly begged the authorities for permission to retrieve and bury her. Once again, the family was told they could leave as long as they carried white flags. They obliged, only to be shot at again. This time Taybet’s husband Halit got injured. One of Taybet’s sons later wrote: “My mother remained on the street for a whole seven days. None of us could sleep, worrying dogs would come around, birds would perch on her. As she lay 150 meters away from us, we, too, died.”<sup>1</sup> On 25 December, Taybet’s body was finally taken from the street by the authorities to the morgue of the local hospital. When the authorities buried Taybet 18 days later, they allowed only two of her children to be present at the funeral. Her husband and nine children were denied a farewell. She was buried without a religious ceremony.

Five months before these events, in July 2015, the Turkish military had launched a security operation in the country’s Kurdish region. It went into densely populated towns with thousands

---

<sup>1</sup> The incident was widely reported in the Turkish media. See e.g. Sertaç Kayar, “Cenazesi 7 Gün Yerde Kalan Taybet Ana’nın Evinde ‘Kara’ Bayram” [‘Dark’ Eid at the House of Mother Taybet, whose Body Lay out on the Street for Seven Days], *T24*, 5 July 2016.

of combat-ready troops, tanks, armoured vehicles and heavy artillery allegedly to remove the barricades and trenches that the Kurdistan Workers' Party (*Partiya Karkerên Kurdistan*-PKK) had built in residential areas. The military bombed and razed entire towns, without any regard to the presence of civilians trapped in the midst of the operations. From August onwards, with the stated purpose of combatting terrorists and protecting public order and security, the government declared over 60 round-the-clock, open-ended curfews in more than 30 towns and neighbourhoods, which lasted several days, weeks or months, affecting 1,6 million people.<sup>2</sup> In the most extreme case, the curfew in the town of Nusaybin lasted 134 days.<sup>3</sup> Civilians were trapped in the curfew zones, without access to food supplies, water, electricity, power and emergency health services during the long winter months. No one, including the sick, the wounded, children, elderly and disabled, was allowed to leave without authorization. Breaching the curfew was not only very risky, but also subject to monetary fines and criminal sanctions. Domestic and international humanitarian aid workers, human rights observers and parliamentarians were denied access to the curfew zone. Journalists who tried to enter were threatened, arrested and, in at least one case, shot. In two cases reported in the media, dead bodies of two presumed terrorists were dragged behind an armoured vehicle and, in the case of a woman, displayed naked. Images and video footage circulated on the Internet showing masked special operations forces spray-painting buildings with racist and chauvinist messages and playing ultra nationalist songs from armoured vehicles. The most alarming reports came from the town of Cizre, where over 100 people sheltered in three basements surrounded by the security forces were allegedly burned to death.<sup>4</sup> Witnesses and family members of victims interviewed by the United Nations (UN) Human Rights Office of the High Commissioner "painted an apocalyptic picture of the wholesale destruction of neighbourhoods where up to 189 persons, mostly IDPs fleeing security operations, were trapped for weeks in basements without water, food, medical attention and power, during the coldest months of the year."<sup>5</sup>

During July 2015-December 2016, some 2,000 people were killed in the curfew areas, of whom 1,200 were civilians including women and children. Many of them died for lack of urgent health care.<sup>6</sup> Over 355,000 residents were displaced, and numerous people were disappeared, tortured and subjected to excessive use of force.<sup>7</sup> Satellite imagery documents the wholesale destruction of entire neighbourhoods, which in most cases were razed to the ground by the authorities in the immediate aftermath of security operations to prevent the return of the displaced.<sup>8</sup> The

---

<sup>2</sup> Parliamentary Assembly of the Council of Europe (PACE), *The Functioning of Democratic Institutions in Turkey*, Resolution 2121(2016), 22 June 2016, at para. 10.

<sup>3</sup> Commissioner for Human Rights of the Council of Europe, *Memorandum on the Human Rights Implications of anti-Terrorism Operations in South-Eastern Turkey*, CommDH(2016)39, 2 December 2016 (hereafter "Memorandum"), at para. 16.

<sup>4</sup> The information in this paragraph is based on the reports of intergovernmental human rights bodies, and international and domestic human rights NGOs. United Nations Human Rights Office of the High Commissioner (OHCHR), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017, at pp. 5-7 (hereafter "Report on the Human Rights Situation"); Commissioner for Human Rights of the Council of Europe, Memorandum.

<sup>5</sup> OHCHR, Report on the Human Rights Situation, at pp. 7-8.

<sup>6</sup> Ibid, at pp. 5-7.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid, at p. 10.

destruction of private property was “systematic”.<sup>9</sup> Not only did the authorities fail to open a single investigation into any of the allegations, but accused the deceased of being terrorists and retaliated against their families, charging those demanding accountability with terrorism.<sup>10</sup>

Individuals trapped in the curfew zones, facing a real risk of being killed and unable to meet their basic needs for food, water, medicine, heating and electricity, did precisely what would be appropriate in a country that claims to be a democracy under the rule of law: they went to courts. They appealed to Turkey’s Constitutional Court (*Anayasa Mahkemesi*-AYM) for immediate relief. They requested the AYM to issue an interim measure<sup>11</sup> by ordering the government to end the curfews and to either cease the military operations or carry them out in accordance with international legal standards. What the petitioners were asking from Turkey’s highest court was to intervene to save lives. One after another, they failed. The AYM issued its first decision in a petition filed in September 2015 by two residents of Cizre, who claimed that the curfew violated several rights under the European Convention on Human Rights (ECHR/Convention).<sup>12</sup> In rejecting the requests for an interim measure, the AYM concluded that the petitioners failed to prove that their lives would be endangered if they complied with the curfew. According to the AYM, there was no serious danger necessitating the granting of an interim measure. The second decision concerned a petition filed in December by a member of the Turkish Parliament from the Peoples’ Democratic Party (*Halkların Demokratik Partisi*-HDP).<sup>13</sup> By then, 52 curfews had been declared in seven provinces and 17 towns, where 63 civilians had been shot to death or died due to lack of emergency medical care. The AYM did not address these casualties. Instead, pointing out that the petitioner herself did not live in the curfew areas and was not personally affected by the measures, it dismissed her application on ground of lack of victim status.

By the time the AYM issued its third decision on 26 December, Taybet’s dead body had just been moved off the street. Due to wide coverage in the Turkish media, the AYM judges were presumably aware of this and many other incidents of civilian death. Yet, they rejected the petition of seven civilians including a 15-year-old disabled boy, a nine-month pregnant woman, and a man shot by the security forces although he had received authorization from the police to get out of his house in order to open the water valve of his hometown and whose arm had to be amputated due to lack of immediate medical intervention.<sup>14</sup> In doing so, the AYM exclusively relied on the government’s arguments that the applicants, *inter alia*, had left the curfew area, received medical care after their petition, and were free to call an emergency police line to seek medical care, food and funeral services. The AYM’s unquestioning deference to the executive was striking, not least because Taybet’s family, and many others, *had* called the emergency line and the government was of course aware of the dire humanitarian situation in the curfew zones.

---

<sup>9</sup> Ibid, at p. 12.

<sup>10</sup> Ibid, at p. 8.

<sup>11</sup> The AYM can issue interim measures pending the final judgment in a case where it sees a serious threat to the life or physical or mental integrity of the petitioner. *Anayasa Mahkemesinin Kuruluşu ve Yargılama Usulleri Hakkında Kanun* [Law on the Establishment and Adjudication Procedures of the Constitutional Court], no. 6126, 30 March 2011, Official Gazette, no. 27894, 3 April 2011, at Article 49(5).

<sup>12</sup> See e.g. AYM, *Mehmet Girasun ve Ömer Elçi*, Application no. 2015/15266, Decision (Interim Remedy), 11 September 2015.

<sup>13</sup> AYM, *Meral Daniş Betaş*, Application no. 2015/19545, Decision (Interim Remedy), 22 December 2015.

<sup>14</sup> AYM, *İrfan Uysal ve Diğerleri*, Application no. 2015/19907, Decision (Interim Remedy), 26 December 2015.

Yet, Turkey's highest court was seemingly not concerned, even though at least some within the international community were. The allegations of extrajudicial killings, disproportionate use of lethal force, mass displacement of civilians, and destruction of homes and cultural monuments had alarmed the non-judicial human rights mechanisms of the Council of Europe (CoE) and the UN. Two weeks before the third AYM decision, Nils Muižnieks, the Commissioner for Human Rights of the CoE, expressed concern about "very distressing information" he had received about Cizre and urged the Turkish authorities to allow independent authorities immediate access to this town.<sup>15</sup>

Seemingly detached from the reality of the country they lived in, the AYM judges continued to deny interim measures, including to a woman who could not breastfeed her new born daughter kept in an intensive care unit outside the curfew zone,<sup>16</sup> to wounded people trapped in several basements in Cizre who were surrounded by security forces and unable to access emergency medical care,<sup>17</sup> and to individuals unable to locate and retrieve the bodies of their family members whom the media had reported to have been killed by the security forces.<sup>18</sup> Doing so, they adopted an extremely legalistic approach, limiting their analysis to the situation of the petitioner(s) in front of them and refraining to review the state policy at work in the Kurdish region. The AYM did not review whether the curfew decisions indeed lacked a legal basis as argued by some petitioners,<sup>19</sup> let alone engage in a proportionality analysis.

The road to the European Court of Human Rights (ECtHR/Court) was still open, however, and the petitioners next pursued that road. Human rights observers in Turkey were confident of an intervention from Strasbourg. The expectation seemed particularly justified after November 2015, when the CoE's own Muižnieks issued another statement expressing concern about frequent and widespread "open-ended, round-the-clock curfews in entire neighbourhoods or towns until further notice" as well as "the chronic problem of impunity concerning actions of security forces."<sup>20</sup> Yet, out of the 34 applications made by over 160 applicants between late 2015 and April 2017,<sup>21</sup> the ECtHR rejected the requests for interim measures under Rule 39<sup>22</sup>

---

<sup>15</sup> Commissioner for Human Rights of the Council of Europe, "Turkey Should Ensure Immediate Access to Cizre by Independent Observers", Statement, 11 September 2015.

<sup>16</sup> AYM, *Nuriye Acar*, Application no. 2015/20218, Decision (Interim Remedy), 31 December 2015.

<sup>17</sup> AYM, *Mehmet Yavuzel ve Diğerleri*, Application no. 2016/1652, Decision (Interim Remedy), 29 January 2016; *Ferhat Balcal ve Diğerleri*, Application no. 2016/2602, Decision (Interim Remedy), 12 February 2016.

<sup>18</sup> AYM, *Ayhan Sevikte ve Mehmet Oran*, Application no. 2016/43, Decision (Interim Remedy), 8 January 2016. For other examples, see AYM, *Ekrem Şen ve Diğerleri*, Application no. 2015/20376, Decision (Interim Remedy), 20 January 2016 (concerning the death of the applicants' 12-year-old relative and their inability to meet their basic needs); *Mehmet Denan Dağlı ve Diğerleri*, Application no. 2016/1905, Decision (Interim Remedy), 3 February 2016 (concerning the petitioners' inability to meet their basic needs in curfew zones or to leave such areas, the financial losses they suffered due to their inability to work and the deprivation of their children from education).

<sup>19</sup> See e.g. *Ayhan Sevikte ve Mehmet Oran*; *Ekrem Şen ve Diğerleri*.

<sup>20</sup> Commissioner for Human Rights of the Council of Europe, "Turkey Should Ensure the Protection of Human Rights in the Fight against Terrorism", Statement, 18 November 2015.

<sup>21</sup> Interview with the applicants' co-counsel Benan Molu, Berlin, 27 April 2017.

<sup>22</sup> Under Rule 39(1) of its Rules, the ECtHR "may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings." In practice, the Court has granted interim measures only where the applicants' "core rights" are at stake and where there is "an imminent risk of irreparable harm", the vast majority of cases concerning the expulsion or extradition of foreigners. Henrik Jorem,

in all but five cases.<sup>23</sup> Out of the five cases where the Court asked the government to ensure the immediate access to a hospital of applicants who suffered life-threatening injuries, the government defied the interim measures in four cases, which resulted in the deaths of their applicants.<sup>24</sup> For the remaining 29 cases, the Court did not apply Rule 39 because “the elements at its disposal were insufficient”<sup>25</sup> and because the petitioners could apply to the AYM, which was “relevant and potentially capable of providing interim relief for the applicants”.<sup>26</sup>

Taybet’s family was among the petitioners whose request for interim measures was rejected by the ECtHR. Before applying to Strasbourg, they, too, sought help from the AYM. Taybet’s petition reached the AYM on 6 January 2016 – after her body was taken off the street and before she was hastily buried by the authorities on 11 January. The type of interim measure the family requested from the AYM was very specific; the return of Taybet’s body so that she could be buried properly with a religious ceremony. Despite the urgency of the situation, the AYM did not respond. Meanwhile, the day after Taybet’s family petitioned the AYM, the government amended the Regulation on the Application of the Law on Forensic Medicine, stipulating that bodies not claimed by families within three days will be handed over to local councils or local governors to be buried by these authorities.<sup>27</sup> On 8 January, the family petitioned the ECtHR, requesting the same interim measure they sought from the AYM. According to the family’s co-counsel Benan Molu, the authorities went to Taybet’s family home that night<sup>28</sup> and asked his illiterate son to sign a document, which was later found out to state that the family had until 9 a.m. the same day to claim the body or otherwise the authorities would bury Taybet in a place of their choosing. By the time the rest of the family was informed of the situation, they were too late to claim the body. Taybet was buried by the authorities. The lawyers informed the ECtHR of this development and insisted on their request for an interim measure, this time to enable the family to hold a religious ceremony by Taybet’s grave. Nonetheless, the ECtHR rejected. On 2 February, the AYM finally issued its decision, rejecting the family’s request for interim measures on the grounds that Taybet had already been buried on 11 January.<sup>29</sup>

---

“Protecting Human Rights in Cases of Urgency: Interim Measures and the Right of Individual Application under Article 34 ECHR”, *Nordic Journal of Human Rights*, vol. 30, no. 4 (2012), pp. 404-428.

<sup>23</sup> Ibid.

<sup>24</sup> With the exception of the applicant in *Öncü*, all the applicants died due to the government’s failure to send an ambulance to dispatch them to hospitals. ECtHR, *Öncü v. Turkey*, Application no. 4817/16 (interim measure granted on 21 January 2016); *Zehide Paksoy and Others v. Turkey*, Application no. 3758/16 (interim measure granted on 18 January 2016); *Ahmet Tunç and Zeynep Tunç v. Turkey and Ahmet Tunç and Güler Yerbasan v. Turkey*, Application nos. 4133/16 and 31542/16 (interim measure granted on 19 January 2016); *Cemil Altun v. Turkey*, Application no. 4353/16 (interim measure granted on 19 January 2016); and *Mehmet Latif Karaman v. Turkey*, Application no. 5237/16 (interim measure granted on 22 January 2016).

<sup>25</sup> ECtHR Registrar, “Requests for Lifting of Curfew Measures in South-Eastern Turkey: The Court Refuses to Indicate Interim Measures for Lack of Elements, but is Pursuing its Examination of Applications”, Press Release, ECHR 016 (2016), 13 January 2016.

<sup>26</sup> ECtHR Registrar, “Curfew Measures in South-Eastern Turkey: Court Decides to Give Priority Treatment to a Number of Complaints”, Press Release, ECHR 054 (2016), 5 February 2016.

<sup>27</sup> *Adli Tıp Kurumu Kanunu Uygulama Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik* [Regulation on the Application of the Law on Forensic Medicine], Official Gazette, no. 29586, 7 January 2016.

<sup>28</sup> The ECtHR’s partial admissibility decision states this date to be 11 January. ECtHR, *Mehmet Oran and Three Other Applications v. Turkey*, Application no. 1905/16, Decision, 6 December 2016.

<sup>29</sup> Interview with Benan Molu.

During this entire time, the European Union (EU) and the European governments were remarkably silent vis-à-vis the state violence that was being unleashed in the Kurdish region, although they were the only ones capable of exerting effective external pressure on Turkey. Not only did they not speak up, but they effectively endorsed the Justice and Development Party (*Adalet ve Kalkınma Partisi*-AKP) government by partnering with it for the containment of Syrian refugees in Turkey. Under the leadership of German Chancellor Angela Merkel, the EU and its members turned a blind eye to the atrocities against Kurdish civilians for their political and security interests. To appease the AKP government, the EU leaders violated established European norms and principles by, *inter alia*, Merkel's official visit to President Recep Tayyip Erdoğan only two weeks before the Turkish parliamentary elections in November 2015 and the European Commission's decision to postpone the release of its unflattering report on Turkey's progress towards EU accession until after the elections.

## 1.2 Setting the Research Framework

How has all of this been possible? The gross human rights abuses occurred in a country which not only ratified the ECHR as early as in 1954, but is among its drafters. Turkey has been subject to the oversight of the world's "most effective court"<sup>30</sup> of "the most effective human rights regime in the world"<sup>31</sup> for over three decades since its recognition of the compulsory jurisdiction of the ECtHR in 1990. The recent human rights abuses moreover, as Nils Muižnieks pointed out, showed "striking parallels" to violations committed in the same region in the 1990s,<sup>32</sup> regarding which the ECtHR had issued hundreds of rulings which found Turkey to have committed multiple violations of the ECHR. The violations took place at a time when Turkey was in the process of acceding to the EU, a status reserved for candidate countries which uphold the rule of law, guarantee human rights and protect their minorities. In light of all of this, how could such egregious abuses occur in the first place? And what explains the AYM's persistent reluctance to review the legality and proportionality of the curfew decisions even in life and death situations? Most importantly, what accounts for the ECtHR's denial of interim measures despite the clear presence of an "imminent risk of irreparable harm", as evident in the fact that hundreds of civilians had already died when the Court declined to issue interim decisions?

In authoritarian regimes where the state is engaged in violence against a minority group in the context of an ethno-political conflict and claiming legitimacy from counter-terrorism, what are the possibilities and limitations for consequential engagement by a transnational human rights court? This study aims to answer this question by taking the ECtHR's involvement in Turkey's Kurdish conflict as a case study. Primarily, how has the Court approached the gross human rights abuses committed against Kurdish civilians within an emergency framework? Did the

---

<sup>30</sup> Laurence R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", *The European Journal of International Law*, vol. 19, no. 1 (2008), pp. 125-159, at p. 126.

<sup>31</sup> Alec Stone Sweet and Helen Keller, "Introduction: The Reception of the ECHR in National Legal Orders", in Helen Keller and Alec Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008), pp. 3-28, at p. 3.

<sup>32</sup> Commissioner for Human Rights of the Council of Europe, Memorandum, at para. 77.

ECtHR make use of every adjudicatory means available to it to influence Turkey's policies? What accounts for continued state violence in the Kurdish region? To what extent does the ECHR regime empower legal mobilization by minority groups in an authoritarian context?

As a secondary research question, the study also looks into the restriction of Kurdish linguistic and political rights. A proper treatment of the principal research question requires also addressing the ways in which an authoritarian regime subject to ECtHR oversight has handled the rights claims arising from an ethno-political conflict between the state and a minority group. How has the ECtHR responded to the Kurds' linguistic rights claims in light of the ECHR's individualistic approach to human rights protection? As a transnational court reputable for its strong defence of political freedoms, how has the ECtHR addressed the continuing restrictions of the political activities of Kurdish politicians, parties and activists? How has the ECtHR tackled the Kurds' political claims which have collective rights elements?

Given the Court's performance with regard to the Kurdish question, which conclusions can one draw as regards its possibilities and limitations more generally? Ultimately, the fundamental issue underlying these questions concerns the principal dilemma of representative democracy – the potential for the majority's abuse of its numerical superiority for the disempowerment, repression and disenfranchisement of those who are numerically, and thus politically, inferior. In authoritarian regimes where the majority takes advantage of its political power to subjugate minority groups to what O'Donnell has called a "low-intensity civil citizenship",<sup>33</sup> what role is there for transnational human rights bodies "in correcting some of the systemic deficiencies of democracy"?<sup>34</sup> Specifically, is the ECtHR able and willing to uphold the rights of those minority groups who, in Benvenisti's characterisation, are "persistently outvoted and, hence, underrepresented in the political process [and] ... are in a very real sense political captives of the majority"?<sup>35</sup> What are the jurisdictional, doctrinal and political constraints and opportunities that respectively disable and enable the Court in fulfilling this function? Certainly, the ECHR is not a minority protection regime. However, the question is not whether the ECtHR can and should extend positive and group rights to minority groups, but if and how it can ensure that members of such groups can exercise the individual rights that they are entitled to under the Convention.

More broadly, why does Turkey remain a "failed case" of democratic consolidation,<sup>36</sup> where the basic essentials of the rule of law and human rights are lacking after nearly three decades of ECtHR oversight? What accounts for the fact that, after countless constitutional, legislative

---

<sup>33</sup> Guillermo A. O'Donnell, "Democracy, Law and Comparative Politics", *Studies in Comparative International Development*, vol. 36, no. 1 (2001), pp. 7-36, at p. 27.

<sup>34</sup> Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards", *International Law and Politics*, vol. 31 (1999), pp. 843-854, at p. 847.

<sup>35</sup> Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards", at p. 848.

<sup>36</sup> Jon C. Pevehouse, *Democracy from Above: Regional Organisations and Democratization* (Cambridge University Press, 2005), at p. 204. While pertinently naming the Turkish case as "an intriguing puzzle" which illustrates the limits of the effectiveness of European institutions in assisting the consolidation of democracy, Pevehouse's analysis is limited to the political institutions of Europe and does not extend to the ECtHR. Moreover, his treatment of re-transition from military regime to civilian rule as "democratization" is problematic in its oversight of the authoritarian nature of Turkey's politico-legal regime, under civilian and military rule alike.

and administrative reforms adopted to execute the ECtHR rulings and fulfill the EU's accession conditionality, the country remains subject to an authoritarian legal framework, the security forces continue to enjoy impunity for their crimes, thousands of individuals engaged in peaceful opposition, including elected Kurdish politicians, are imprisoned on terrorism charges and Kurdish political parties continue to be subject to dissolution threats? Is this merely a compliance problem? Or does it also speak to the ECtHR's effectiveness as a regional human rights court?

### **1.3 The Top Down View: Assessing the ECtHR's Impact**

#### **1.3.1 Turkey: The Perpetual Footnote**

The ECtHR's jurisprudence on Turkey has had a transformative effect on the ECHR system. From refining the procedural rules concerning the burden of proof and the exhaustion of domestic remedies to expanding the substantive scope of the Convention, the ECtHR wrote much of the bedrock of its jurisprudence through its judgments on Turkey, particularly those on the Kurdish conflict. The multi-faceted aspect of the Kurdish issue has raised novel and diverse legal issues ranging from establishing state responsibility for gross human rights abuses to protecting the political and linguistic rights of minorities against policies of cultural assimilation, administrative centralization and political disenfranchisement.<sup>37</sup>

And yet, Turkey has been not much more than a footnote in theoretical scholarship on the ECHR system. In studies theorizing the ECtHR's effectiveness in human rights protection and its role in constitutional and democratic transitions, as well as in recent scholarship on reforming the ECHR system, Turkey has been overlooked or at best acknowledged as an outlier, often literally in a footnote or parenthesis. Take Helfer and Slaughter's study on the ECtHR's effectiveness, widely accepted as an authoritative work on the ECHR system.<sup>38</sup> In explaining the ECtHR's "remarkable and surprising success" in supranational adjudication, Helfer and Slaughter, as they acknowledged, based their analysis on Western European nations – established democracies with strong rule of law traditions and shared common values.<sup>39</sup> Their article was published in 1997. By then, Turkey was well-known to the international community as a repeat offender regarding gross human rights abuses; in Cyprus in the framework of its military occupation of the northern part of the island, across Turkey during the military regime (1980-1983), and in the Kurdish region in the context of the armed conflict between the Kurdish insurgency and the Turkish military, particularly after the declaration of an emergency regime in 1987. The first two groups of abuses were contested in a series of inter-state complaints brought by Cyprus and a group of Western European countries. Through complaints it filed in

---

<sup>37</sup> Any textbook on the ECHR system is full of references to the ECtHR's rulings on Turkey, particularly those concerning the Kurdish question, which have shaped and enhanced the human rights standards in Europe. See e.g. Robin C.A. White and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (Oxford University Press, 2010).

<sup>38</sup> Laurence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication", *The Yale Law Journal*, vol. 107, no. 2 (1997), pp. 273-391.

<sup>39</sup> *Ibid*, at p. 276.

1974,<sup>40</sup> 1975,<sup>41</sup> 1977<sup>42</sup> and 1994,<sup>43</sup> Cyprus accused Turkey of enforced disappearances, indiscriminate killings, torture, unlawful deprivation of liberty, forced displacement and property destruction in northern Cyprus. The cases resulted in two Grand Chamber judgments; on the preliminary objections in 1995<sup>44</sup> and on merits in 1996.<sup>45</sup> The inter-state case brought by France, Denmark, Sweden, Norway and the Netherlands against gross human rights abuses of the military regime had been settled as early as 1985.<sup>46</sup> Finally, by the mid-1990s, dozens of complaints had already been filed against Turkey by the Kurdish victims of gross human rights abuses in the emergency region.<sup>47</sup> While it is not clear whether Helfer and Slaughter were aware of the piling applications of the Kurds, they were certainly aware of the Cyprus cases, as evident in their citation of the ECtHR's judgment.<sup>48</sup> They also presumably knew about the inter-state complaint against the junta since they cited a study criticizing the settlement of the case as "a political compromise that failed to protect adequately individual rights" in the context of their discussion on the effectiveness of inter-state as opposed to individual complaints.<sup>49</sup> Helfer and Slaughter in fact admitted that their positive assessment of the ECtHR's impact was partly due to the fact the cases they studied were mostly those concerning "minor and unintentional" or "relatively few, minor, and discrete" rights violations.<sup>50</sup>

Helfer and Slaughter's neglect of the Turkish case has gone unnoticed even in studies focusing specifically on the engagement of regional human rights courts in serious human rights abuses. In their otherwise invaluable contribution, Cavallaro and Brewer took Helfer and Slaughter's claim at face value, emphatically accepting "the climate of entrenched rule of law and the frequently minor violations seen in Western Europe" as key factors to explain the ECtHR's effectiveness.<sup>51</sup> Their deference to Helfer and Slaughter led them to argue that it is only *now* (in the 21st century) that the ECtHR faces the challenge of addressing human rights outside the

<sup>40</sup> *Cyprus v. Turkey*, Application no. 6780/74, filed on 19 September 1974.

<sup>41</sup> *Cyprus v. Turkey*, Application no. 6950/75, filed on 21 March 1975.

<sup>42</sup> *Cyprus v. Turkey*, Application no. 8007/77, filed on 6 September 1977.

<sup>43</sup> *Cyprus v. Turkey*, Application no. 25781/94, filed on 22 November 1994.

<sup>44</sup> ECtHR, *Loizidou v. Turkey*, GC, Application no. 15318/89, Judgment (Preliminary Objections), 23 March 1995.

<sup>45</sup> ECtHR, *Loizidou v. Turkey*, GC, Application no. 15318/89, Judgment (Merits), 18 December 1996.

<sup>46</sup> EComHR, *France v. Turkey*, Application no. 9940/82, *Norway v. Turkey*, Application no. 9941/82, *Denmark v. Turkey*, Application no. 9942/82, *Sweden v. Turkey*, Application no. 9943/82, *Netherlands v. Turkey*, Application no. 9944/82, Report, 7 December 1985.

<sup>47</sup> See e.g. ECtHR, *Akdivar and Others v. Turkey*, GC, Application no. 21893/93, Judgment, 16 September 1996 (forced displacement and village burning); *Aksoy v. Turkey*, Application no. 21987/93, Judgment, 18 December 1996 (torture in detention); *Aydın v. Turkey*, Application no. 57/1996/676/866, Judgment, 25 September 1997 (rape and torture in detention); *Kurt v. Turkey*, Application no. 15/1997/799/1002, Judgment, 25 May 1998, (enforced disappearance); *Mahmut Kaya v. Turkey*, Application no. 22535/93, Judgment, 28 March 2000 (extrajudicial execution); *Akkoç v. Turkey*, Application no. 22947/93 and 22948/93, Judgment, 10 October 2000 (sexual abuse and torture in detention); *Çakıcı v. Turkey*, Application no. 23657/94, Judgment, 8 July 1999 (enforced disappearance); *Taş v. Turkey*, Application no. 24396/94, Judgment 14 November 2000 (enforced disappearance); *Tanrıkulu v. Turkey*, Application no. 23763/94, Judgment, 8 July 1999. The first six of these cases were filed in 1993, the remaining in 1994.

<sup>48</sup> Helfer and Slaughter, "Toward a Theory of Effective Supranational Adjudication", at pp. 293, 311 and 313.

<sup>49</sup> *Ibid.*, at p. 297, citing Arthur Henry Robertson and J.G. Merrills, *Human Rights in Europe* (Juris Publishing, 1993), at p. 284.

<sup>50</sup> *Ibid.*, at p. 329.

<sup>51</sup> James L. Cavallaro and Stephanie Erin Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court", *The American Journal of International Law*, vol. 102, no. 4 (2008), pp. 768-827, at p. 769.

entrenched democracies of Western Europe “with respect to many newly admitted member states”.<sup>52</sup> They effectively included Turkey within this group by pointing out that the post-Cold War enlargement “has presented the ECHR with a significantly different political climate” where the Court faces challenges to the authority of its judgments concerning serious human rights abuses and an increased number of cases involving such violations.<sup>53</sup> Immediately after, they cited Turkey together with Russia, Romania, Ukraine and Poland as the top five member states producing the highest number of applications, giving the impression to an uninformed reader that Turkey joined the ECHR system simultaneously with the Central and Eastern European Countries (CEECs).<sup>54</sup>

At the heart of Turkey’s exclusion from theoretical and empirical discussions on the Court’s role in constitutionalism and democratic transitions in Europe lies a narrative which rests on a dichotomy between the ‘old’ and ‘new’ CoE member states. According to Mahoney, the old members are established democracies with strong rule of law traditions which needed “fine tuning”<sup>55</sup> of their legal systems, whereas newcomers are post-communist nations with fragile democracies and weak rule of law systems in need of structural guidance. Scholars of constitutionalism marked the beginning and end of the demarcation line between these two groups of member states with two dates: the end of the World War II and the end of the Cold War. Stone Sweet put forth the constitutionalist argument for the post-1945 European legal order as follows:

Western Europe became the epicenter of a ‘new constitutionalism’ which, with successive waves of democratization, spread across the Continent. The basic formula – an entrenched, written constitution; a charter of rights; and a mode of constitutional judicial review (typically a specialized constitutional court) to protect those rights – was replicated in every new European constitution adopted since 1949.<sup>56</sup>

This argument is incapable of accounting for Turkey, which was one of the drafters of the ECHR and among its earliest signatories in 1954. Yet, the “basic formula” did not apply to Turkey, whose new constitutions did not produce a “rights-based”<sup>57</sup> but, as Işıknel has shown,

---

<sup>52</sup> Ibid, at pp. 774-775 (presenting the IACtHR, rather than the ECtHR, as the relevant model to explain the domestic impact of supranational litigation in states with endemic human rights violations, resistance to supranational legal authority and lack of entrenched respect for human rights, pointing out that the IACtHR came into being at a time when the Americas were characterized by authoritarian regimes and widespread and grave human rights abuses).

<sup>53</sup> Ibid, at p. 773.

<sup>54</sup> Ibid.

<sup>55</sup> Paul Mahoney, “New Challenges for the European Court of Human Rights Resulting from the Expanding Caseload and Membership”, *Penn State International Law Review*, vol. 21 (2002), pp. 101-114, at p. 104. See also Antoine Buyse and Michael Hamilton, “Conclusions”, in Antoine Buyse and Michael Hamilton (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge University Press, 2011), pp. 286-300, at p. 296 (that “the initial signatories to the European Convention on Human Rights comprised a relatively stable group of democracies”).

<sup>56</sup> Alec Stone Sweet, “A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe”, *Journal of Global Constitutionalism*, vol. 1, no. 1 (2012), pp. 53-90, at p. 60.

<sup>57</sup> Stone Sweet, “A Cosmopolitan Legal Order”, at p. 60.

an “authoritarian”<sup>58</sup> constitutionalism. While Stone Sweet mentions Turkey, in parenthesis and together with Greece, as a state unexpectedly accepted for CoE membership after World War II which “placed a huge burden on the Court”,<sup>59</sup> he does not explain why the basic formula did not apply to these countries.

The constitutionalists depict the early 1990s, after the fall of communism, as the second phase of constitutionalism, this time eastbound.<sup>60</sup> The CEECs’ accession, argues the scholarship, has required the ECtHR to assume the role of a constitutional court due to the emergence of “many cases of greater importance, both in terms of the severity of the violations and the systemic nature of the challenged deficiencies”.<sup>61</sup> Notably, in making this claim, Sadurski was mindful of Turkey’s misfit, acknowledging its exceptionality to his main argument. He emphatically noted that he was making a comparative and generalized argument regarding a trend in the ECtHR’s jurisprudence and did not overlook the fact that before the enlargement the Court had issued numerous rulings in “a number of cases of dramatic urgency” against Turkey, among others.<sup>62</sup> More importantly, Sadurski noted that the Court’s evolution from a fine-tuning role to a more constitutional role was the outcome of “the enlargement to the East (and the accession of Turkey)”<sup>63</sup> – mind the parenthesis.

Scholarship on the ECtHR’s role in democratic transitions is predominantly based on a similar dichotomy. Until the fall of the Berlin Wall, wrote Paul Mahoney, the Convention was “an international control mechanism for fine-tuning sophisticated national democratic engines that were, on the whole, working well”<sup>64</sup> and the Court was offering protection “against good-faith limitations on liberty...[in]...Western European client countries”.<sup>65</sup> It was with the accession of the CEECs at the start of their “democratic path”<sup>66</sup> that the Court gained a new role “in the consolidation of democracy and the rule of law in wider Europe”<sup>67</sup> and started to offer a new type of protection against “bad-faith abuse of governmental power”.<sup>68</sup>

If one were to follow Mahoney’s categorization, why wasn’t the ECtHR expected to have a role in the consolidation of democracy and the rule of law in Turkey during the Cold War? Notwithstanding Turkey’s late recognition of the individual petition mechanism, the inter-state complaint mechanism was always available to other member states, at the very least in response to the *coups d’état* in 1960, 1971 and 1980. Yet, as stated earlier, it was only in response to the

---

<sup>58</sup> Türküler Işıksel, “Between Text and Context: Turkey’s Tradition of Authoritarian Constitutionalism”, *I CON*, vol. 11, no. 3 (2013), pp. 702-726, at p. 716.

<sup>59</sup> Stone Sweet, “A Cosmopolitan Legal Order”, at p. 78.

<sup>60</sup> *Ibid.*

<sup>61</sup> Wojciech Sadurski, “Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments”, *Human Rights Law Review*, vol. 9, no. 3 (2009), pp. 397-453, at p. 402.

<sup>62</sup> *Ibid.*, at p. 407.

<sup>63</sup> *Ibid.*, at p. 402.

<sup>64</sup> Mahoney, “New Challenges for the European Court”, at p. 104.

<sup>65</sup> Paul Mahoney, “Speculating on the Future of the Reformed European Court of Human Rights”, *Human Rights Law Journal*, vol. 20, no. 1-3 (1999), pp. 1-4, at p. 2.

<sup>66</sup> Mahoney, “New Challenges for the European Court”, at p. 104.

<sup>67</sup> *Ibid.*, at p. 105.

<sup>68</sup> Mahoney, “Speculating on the Future”, at p. 2.

1980 *coup* that an inter-state complaint was filed by a group of Western European governments which, as I will discuss in Chapter 2, resulted in a shocking settlement on the basis of very minimal assurances by the Turkish government.

There have been notable, albeit very few, acknowledgments of the Turkish exception. In his discussion of hard cases, Greer characterized Turkey as an “authoritarian democracy” which presents a “problem” for the ECHR system.<sup>69</sup> Similarly, Sadurski named Turkey, in a footnote, as “at best” a semi-democracy with a strong illiberal tendency and, in parenthesis, as “the only distant relative” among a “like-minded community of West European liberal democracies”.<sup>70</sup> The major problem for comparative and theoretical studies on the ECtHR’s impact in domestic legal and political orders is that they have inevitably relied on individual case studies on member states. In the case of Turkey, until recently, empirical studies have been extremely few in number, mostly in English<sup>71</sup> and lacking in depth, scope and analysis.<sup>72</sup>

While the majority of legal scholarship has and remains focused on the legal, institutional and juridical analyses of the ECHR system and the ECtHR case law,<sup>73</sup> recently emerging interdisciplinary studies have started to look beyond legal texts and court rulings and into the interplay between law and politics which has shaped the development of the ECHR system. Notable in this regard is the edited volume by Christoffersen and Madsen, which looks into the ways in which the ECtHR’s “original and contemporary legal, political, and institutional history” has shaped its jurisprudence.<sup>74</sup> And yet, the study is remarkably silent on the Turkish case.<sup>75</sup> In his informative study on the impact of Cold War on the ECtHR’s jurisprudence, Madsen shows how the *détente* politics and the related emergence of international human rights in the 1970s has transformed the Court’s jurisprudence on non-democratic regimes in Europe. Yet, Madsen limits his discussion to the cases of Spain (under Franco), Portugal (under Salazar) and Greece (under the colonels), not once mentioning the case of Turkey. The inter-state complaint the Scandinavian governments and the Netherlands filed against Greece in 1967 was available to

---

<sup>69</sup> Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006), at pp. 94-103.

<sup>70</sup> Sadurski, “Partnering with Strasbourg”, at p. 399 and 401.

<sup>71</sup> With few exceptions, academic work in the Turkish language has been predominantly limited to descriptive legal studies on the incorporation of the ECHR into domestic law and the translation of the ECtHR’s leading judgments. The exceptional studies looking into the Court’s impact in Turkey’s legal system are cited throughout this study.

<sup>72</sup> At the time of his writing, the only literature available to Greer were the Turkey chapter in Blackburn and Polakiewicz’s collection of country-specific studies, which he considered to be “not a wholly satisfactory source”, a few articles on the ECtHR’s jurisdiction on political party dissolutions, and several articles on the EU’s impact on democratization and human rights reforms in Turkey. Greer, *The European Convention on Human Rights*, at p. 82 (citing Yasemin Özdek and Emine Karacaoğlu, “Turkey”, in Robert Blackburn and Jörg Polakiewicz (eds.), *Fundamental Rights in Europe: The European Convention in Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), pp. 879-913).

<sup>73</sup> Robertson and Merrills, *Human Rights in Europe*; Greer, *The European Convention on Human Rights*; Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010).

<sup>74</sup> Jonas Christoffersen and Mikael Rask Madsen, “Introduction: The European Court of Human Rights between Law and Politics”, in Jonas Christoffersen and Mikael Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011), pp. 1-13, at p. 4.

<sup>75</sup> The exception is Rachel Cichowski’s chapter on the role of NGOs in ECtHR litigation, which is discussed separately in the section on the legal mobilization literature below.

be triggered against Turkey as well and, yet, as mentioned earlier, was only used after the third military intervention, only to be settled in a problematic way. Not only did Madsen not discuss the role of Cold War politics in the failure of member states to file a complaint against Turkey in response to the 1960 and 1971 *coups d'état*, but also rather inaccurately claimed that the “Irish case was in fact to be the last of this series of highly delicate interstate complaints”<sup>76</sup> with which the ECtHR showed that it “was not going to accept the kind of human rights games which characterized Latin America in the 1970s, where recourse to national emergency had become the preferred tool of Latin-American dictatorships to evade UN human rights.”<sup>77</sup> In fact, the ECtHR failed to challenge Turkey for its systematic and gross human rights abuses, by approving the settlement reached in the inter-state complaint filed after the 1980 *coup*, and never questioned Turkey’s routine recourse to emergency rule or identified an administrative practice of gross human rights abuses in Turkey’s Kurdish region, as I will discuss in Chapter 6.<sup>78</sup>

### 1.3.2 ECtHR’s Impact, Compliance and the Authoritarian State

Early legal studies<sup>79</sup> and recent interdisciplinary research<sup>80</sup> on the ECtHR’s impact in domestic legal and political orders have measured enforcement on the basis of institutional and doctrinal factors, such as the Convention’s formal incorporation into domestic legal orders. The conclusions drawn in these studies rested on the assumption that incorporation enables national courts to uphold the ECHR in case of a conflict with domestic law and empowers the judiciary vis-à-vis other branches of the government.<sup>81</sup> This assumption has not only been contested by empirical data showing that incorporation is not significantly associated with low national violation rates,<sup>82</sup> but is also based on an understanding that courts by definition uphold human rights where they have the power to do so. The near equation of legal reforms giving the ECHR supremacy over domestic laws with enforcement has led to Stone Sweet’s highly problematic conclusion that member states’ compliance with the ECtHR rulings has been “routine”.<sup>83</sup> To the extent that compliance studies acknowledged the hard cases such as Russia, Ukraine,

---

<sup>76</sup> Mikael Rask Madsen, “Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence”, in Christoffersen and Madsen, *The European Court of Human Rights*, pp. 43-60, at p. 57 (referring to ECtHR, *Ireland v. UK*, Application no. 5310/71, Judgment, 18 January 1978; EComHR, *Denmark, Norway, Sweden and The Netherlands v. Greece (The Greek Case I)*, Application nos. 3321/67, 3322/67, 3323/67, 3344/67, Report, 5 November 1969; EComHR, *Denmark, Norway, Sweden and The Netherlands v. Greece (The Greek Case II)*, Application no. 4448/70, Reports, 5 October 1970 and 4 October 1976; EComHR, *Greece v. United Kingdom (First Cyprus Case)*, Application no. 176/56, Report, 26 September 1958.

<sup>77</sup> *Ibid.*, at p. 58.

<sup>78</sup> For critiques of the ECtHR’s emergency jurisprudence on Turkey and the UK, see Fionnuala Ní Aoláin, “Transitional Emergency Jurisprudence: Derogation and Transition”, in Buyse and Hamilton (eds.), *Transitional Jurisprudence and the ECHR*, pp. 24-51; Oren Gross and Fionnuala Ní Aoláin, “From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights”, *Human Rights Quarterly*, vol. 23 (2001), pp. 625-649.

<sup>79</sup> Blackburn and Polakiewicz (eds.), *Fundamental Rights in Europe*.

<sup>80</sup> Keller and Stone Sweet (eds.), *A Europe of Rights*; Stone Sweet, “A Cosmopolitan Legal Order”.

<sup>81</sup> Stone Sweet, “A Cosmopolitan Legal Order”, at pp. 67-68.

<sup>82</sup> Greer, *The European Convention on Human Rights*, at p. 84.

<sup>83</sup> Alec Stone Sweet, “Constitutionalism, Legal Pluralism, and International Regimes”, *Indiana Journal of Global Legal Studies*, vol. 16, no. 2 (2009), pp. 621-645, at p. 642.

Turkey, Greece and “many other” post-communist new members,<sup>84</sup> they did not engage in any meaningful attempt to explain the ECHR system’s failure in these countries.

With respect to Turkey, compliance studies focused on formal reception processes without analyzing the Court’s actual impact on domestic laws, policies and court practices.<sup>85</sup> To the extent that Turkey was acknowledged as a problematic case within the ECHR system, this was attributed to frequent overthrows of the constitutional regime through *coups d’état*.<sup>86</sup> The reality is of course much more complex, where democratically elected civilian governments have been complicit in upholding the authoritarian legal regime introduced by the single-party regime in the 1930s and furthered by successive military interventions since 1960. As for Turkey’s high courts, the problem has never been their “negligence or ignorance” vis-à-vis the Convention norms and the ECtHR case law, as Keller and Stone Sweet argued,<sup>87</sup> but an active rejection of European values and norms. Members of the Turkish judiciary have always perceived their priority to be the support of security forces in maintaining national security, even where it may come at the expense of justice.<sup>88</sup>

In recent years, more nuanced and contextualized studies have emerged assessing the ECHR’s domestic impact with a mindfulness of variations in the political, legal and social cultures, histories and traditions of signatory states. Based on comparative and country-specific studies, the scholarship has shown that the Court’s impact varies significantly across states, rights claims, political issues and time.<sup>89</sup> The judiciary is not necessarily a natural agent of progressive change, but rather an actor with its own interests which may or may not align with the ECtHR.<sup>90</sup> Among the policy areas in which states have shown the highest resistance to executing the ECtHR rulings related to religious or ethnic national minorities stand out.<sup>91</sup> In Bulgaria,<sup>92</sup>

---

<sup>84</sup> Stone Sweet, “A Cosmopolitan Legal Order”, at p. 78.

<sup>85</sup> İbrahim Özden Kaboğlu and Stylianos Ioannis G. Koutnatzis, “The Reception Process in Greece and Turkey”, in Keller and Stone Sweet (eds.), *A Europe of Rights*, pp. 451-529; Özdek and Karacaoğlu, “Turkey”.

<sup>86</sup> Stone Sweet, “Constitutionalism, Legal Pluralism, and International Regimes”, at p. 641.

<sup>87</sup> Helen Keller and Alec Stone Sweet, “Assessing the Impact of the ECHR on National Legal Systems”, in Keller and Stone Sweet (eds.), *A Europe of Rights*, pp. 677-712, at p. 705 (that “through negligence or ignorance, some courts have failed to negotiate much of a relationship [with the ECtHR] at all”, giving the examples of Greek (until the 1990s), Turkish (at least until 2004) and Russian courts).

<sup>88</sup> Neil Hicks, “Legislative Reform in Turkey and the European Human Rights Mechanisms”, *Human Rights Review*, vol. 3 (2001), pp. 78-85; Mithat Sancar and Eylem Ümit Atılğan, “*Adalet biraz Es Geçiliyor*”: *Demokratikleşme Sürecinde Hakimler ve Savcılar* [“Justice can be Bypassed Sometimes”: Judges and Prosecutors in the Democratization Process] (TESEV Yayınları, 2009).

<sup>89</sup> Dia Anagnostou (ed.), *The European Court of Human Rights: Implementing Strasbourg’s Judgments on Domestic Policy* (Edinburgh University Press, 2013).

<sup>90</sup> Dia Anagnostou, “Introduction: Untangling the Domestic Implementation of the European Court of Human Rights’ Judgments”, in Anagnostou (ed.), *The European Court of Human Rights*, pp. 1-24. See also Benvenuti, “Margin of Appreciation, Consensus, and Universal Standards” (on the complicity of national judicial authorities in the majority’s suppression of minority rights in authoritarian settings).

<sup>91</sup> Nicholas Sitaropoulos, “Implementation of the European Court of Human Rights’ Judgments Concerning National Minorities or Why Declaratory Adjudication does not Help”, European Society of International Law, Conference Paper Series no. 4/2011, Tallinn Research Forum, 26-28 May 2011 (Bulgaria, Greece and Turkey); Dia Anagnostou and Yonko Grozev, “Human Rights Litigation and Restrictive State Implementation of Strasbourg Court Judgments: The Case of Ethnic Minorities from Southeast Europe”, *European Public Law*, vol. 16, no. 3 (2010), pp. 401-418 (looking at cases of Bulgaria, Greece, Romania and Turkey).

<sup>92</sup> Yonko Grozev, “Political Opposition and Judicial Resistance to Strasbourg Case Law Regarding Minorities in Bulgaria”, in Anagnostou (ed.), *The European Court of Human Rights*, pp. 122-142.

Greece<sup>93</sup> and Turkey<sup>94</sup>, nation-states with turbulent histories and divided societies, where minorities are perceived as potential security threats rather than citizens entitled to equal protection under the law, the Court's rulings supportive of the political rights and freedoms of minorities remain unimplemented. The domestic courts' political conservatism, ideological stance and deference to the executive have played a key role in this outcome. Contrary to Stone Sweet's claim that the "massive reforms" in Turkey and many post-communist member states "would not have been made without ECHR membership and incorporation",<sup>95</sup> studies have shown that what triggered the reforms in Turkey and Romania has been the prospect of EU membership, not the effectiveness of the ECHR system.<sup>96</sup>

### 1.3.3 Shifting the Lens to the ECtHR

The empirical findings of the burgeoning literature on the Court's impact in hard cases have shown the inadequacy of existing theoretical accounts in explaining the ineffectiveness of the ECHR system in certain countries, particularly with regard to human rights violations against minorities and abuses emerging from counter-terrorism and/or emergency settings. At the same time, much of the ECHR scholarship, including recent studies which have embraced a more nuanced understanding of judicial impact, has failed to look into the ECtHR's role in this outcome. The literature has been fairly generous in its assessment of the Court's tackling of politically sensitive and socially contested issues, obscuring the instances where the Court has failed to uphold the rights of the individual.<sup>97</sup> Diagnosing this problem over two decades ago, Fionnuala Ní Aoláin argued that this phenomenon was due to "the relatively efficient individual complaint mechanism (which) has focused attention on access rather than outcome in the protection of certain rights" and the Convention institutions' "judicial fortitude" in areas such as the state's non-interference into the individual's private life, the right to due protection in non-emergency situations and the non-limitation of procedural access to effective remedies.<sup>98</sup>

The absence of meaningful progress in some countries has been depicted as a compliance issue and the Court has too often been excused, as by Keller and Heri, for its inability to "fully

---

<sup>93</sup> Dia Anagnostou and Evangelia Psychogiopoulou, "Under what Conditions do National Authorities Implement the European Court of Human Rights' Rulings? Religious and Ethnic Minorities in Greece", in Anagnostou (ed.), *The European Court of Human Rights*, pp. 143-165.

<sup>94</sup> Dilek Kurban and Haldun Gülalp, "A Complicated Affair: Turkey's Kurds and the European Court of Human Rights", in Anagnostou (ed.), *The European Court of Human Rights*, pp. 166-187.

<sup>95</sup> Stone Sweet, "A Cosmopolitan Legal Order", at p. 78.

<sup>96</sup> Özdek and Emine Karacaoğlu, "Turkey"; Dilek Kurban, Ozan Erözden and Haldun Gülalp, *Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: A Case Study of Turkey*, prepared for project titled 'JURISTRAS: The Strasbourg Court, Democracy and the Human Rights of Individuals and Communities: Patterns of Litigation, Implementation and Domestic Reform' and funded by the European Commission, October 2008; Başak Çalı, "The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996-2006", *Law and Social Inquiry*, vol. 35, no. 2 (2010), pp. 311-338; Kurban and Gülalp, "A Complicated Affair"; Dragoş Bogdan and Alina Mungiu-Pippidi, "The Reluctant Embrace: The Impact of the European Court of Human Rights in post-Communist Romania", in Anagnostou (ed.), *The European Court of Human Rights*, pp. 71-93.

<sup>97</sup> See e.g. Keller and Stone Sweet (eds.), *A Europe of Rights*; Helfer and Slaughter, "Toward a Theory of"; Stone Sweet, "A Cosmopolitan Legal Order".

<sup>98</sup> Fionnuala Ní Aoláin, "The Emergence of Diversity: Differences in Human Rights Jurisprudence", *Fordham International Law Journal*, vol. 19, no. 1 (1995), pp. 101-142, at pp. 109-110.

compensate for the failure of state cooperation” particularly in cases of gross human rights abuses in states where the rule of law and democracy are not well established.<sup>99</sup> Much of the literature has taken the Court’s “democracy-enhancing”<sup>100</sup> and rights-guarding functions at face value, explaining entrenched human rights abuses with compliance failure on the part of signatory states. With regards to hard cases such as Russia, Turkey, Georgia and Ukraine, compliance scholars have drawn attention to ethnically rooted conflicts giving rise to protracted and complex human rights violations which the ECtHR “is not well equipped to deal with”.<sup>101</sup> Yet, the Court’s failure to penetrate the laws and policies of these states is attributed to institutional and jurisprudential limitations preventing it from addressing the root causes of the problems. While the limitations of judicial review by transnational human rights courts tasked with upholding individual rights and liberties are self-evident, is the ECtHR truly ill-equipped to deal with gross human rights abuses stemming from ethnic conflicts or with the systematic infringement of the political freedoms of minorities in countries pursuing homogenization policies?

Debates over the democratic deficit of judicial review and the non-majoritarian nature of courts, particularly transnational courts, generally treat all countries with representative institutions and regular elections as democracies, irrespective of their politico-legal regimes.<sup>102</sup> With respect to the ECtHR, a minority perspective argues otherwise, particularly with respect to the protection of minorities against majority abuse. Tackling the question of democratic legitimacy of judicial review from the perspective of equality, Benvenisti has argued that international human rights courts have a vital function in authoritarian settings where the majority abuses its political power arising from a numerical superiority to curtail the individual rights of minorities. He objected to the ECtHR’s application of the margin of appreciation and consensus doctrines in member states with suspect democratic credentials, pointing out:

the less the court is able to identify a European-wide consensus on the treatment of a particular issue, the wider the margins the court is prepared to grant to the national institutions. Minority values, hardly reflected in national policies, are the main losers in this approach.<sup>103</sup>

Similarly, in his overview of repetitive cases concerning national minorities in Greece, Turkey and Bulgaria, Nicholas Sitaropoulos has criticized the Court for its “casuistic, neutral, out-of-context” declaratory judgments which avoid looking in depth into the national, politico-legal

---

<sup>99</sup> Hellen Keller and Corina Heri, “Enforced Disappearance and the European Court of Human Rights: A ‘Wall of Silence’, Fact-Finding Difficulties and States as ‘Subversive Objectors’”, *Journal of International Criminal Justice*, vol. 12 (2014), pp. 735-750, at p. 735.

<sup>100</sup> Robert O. Keohane, Stephen Macedo and Andrew Moravcsik, “Democracy-Enhancing Multilateralism”, *International Organization*, vol. 63 (2009), pp. 1-31.

<sup>101</sup> Keller and Stone Sweet, “Assessing the Impact of the ECHR”, at p. 698. See also Blackburn and Polakiewicz (eds.), *Fundamental Rights in Europe*.

<sup>102</sup> See e.g. Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999); Alec Stone Sweet, “Constitutional Courts and Parliamentary Democracy”, *West European Politics*, vol. 25, no. 1 (2002), pp. 77-100; Mattias Kumm, *Democracy is not Enough: Rights, Proportionality and the Point of Judicial Review*, Public Law and Legal Theory Research Paper Series, Working Paper no. 09-10 (New York University Law School, 2009). But see Işık, “Between Text and Context”.

<sup>103</sup> Benvenisti, “Margin of Appreciation, Consensus, and Universal Standards”, at p. 851.

and sociological context which generate repetitive and systematic rights human rights violations against minorities.<sup>104</sup> Ní Aoláin and Gross showed how in cases concerning the restriction of individual rights in emergency situations the ECtHR has unduly deferred to domestic policies in the name of margin of appreciation, enabling and legitimizing entrenched or *de facto* emergencies justified by member states in the name of counter-terrorism.<sup>105</sup>

## 1.4 The Bottom Up View: Mobilizing the ECtHR for Political Change

### 1.4.1 Legal Mobilization: A Literature Review

Scholarly interest in the use of courts for political change was inspired by the civil rights movement in the United States (US).<sup>106</sup> In the words of Paul Burstein, the African-American community's use of strategic litigation to end racial segregation "helped spark a revolution in the study of social movements"<sup>107</sup> and inspired socio-legal research on legal mobilization as a form of resistance by marginalized groups.<sup>108</sup> While urging caution against "the myth of rights"<sup>109</sup>, socio-legal scholars argued that litigation is most effective as part of broader political mobilization.<sup>110</sup> Drawing on protest studies, they conceptualized legal mobilization as a "resource"<sup>111</sup>, "tactic",<sup>112</sup> "political tool"<sup>113</sup> or "repertoire"<sup>114</sup> social movements use alongside with "outside the system" political action<sup>115</sup> such as public protests, lobbying, electoral mobilization, and media publicity.<sup>116</sup>

---

<sup>104</sup> Sitaropoulos, "Implementation of the European Court of Human Rights", at p. 27.

<sup>105</sup> Ní Aoláin, "Transitional Emergency Jurisprudence"; Gross and Ní Aoláin, "From Discretion to Scrutiny"; Oren Gross, "'Once More unto the Breach': The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Democracies", *The Yale Journal of International Law*, vol. 23 (1998), pp. 437-501.

<sup>106</sup> See e.g. Taylor Branch, *Parting the Waters: America in the King Years 1954-63* (Simon & Schuster Paperbacks, 1988); Robert Jerome Glennon, "The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957", *Law and History Review*, vol. 9, no. 1 (1991), pp. 59-112.

<sup>107</sup> Paul Burstein, "Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity", *American Journal of Sociology*, vol. 96, no. 5 (1991), pp. 1201-1225, at p. 1202.

<sup>108</sup> Michael McCann, "Litigation and Legal Mobilization", in Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008), pp. 522-540; Frances Kahn Zeman, "Legal Mobilization: The Neglected Role of the Law in the Political System", *The American Political Science Review*, vol. 77, no. 3 (1983), pp. 690-703 (characterizing legal mobilization as a form of political activity by citizens); Burstein, "Legal Mobilization as a Social Movement Tactic"; Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (The University of Michigan Press, 2005).

<sup>109</sup> Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (Yale University Press, 1974) (referring to the overly optimistic view that gains in courts lead to affirmative social change).

<sup>110</sup> Scheingold, *The Politics of Rights*, at p. 9.

<sup>111</sup> *Ibid.*, at p. 84.

<sup>112</sup> Andersen, *Out of the Closets and into the Courts*, at p. 25; Burstein, "Legal Mobilization as a Social Movement Tactic."

<sup>113</sup> Scheingold, *The Politics of Rights*, at p. 131.

<sup>114</sup> Burstein, "Legal Mobilization as a Social Movement Tactic," at pp. 1203-1204 (citing Charles Tilly, "Social Movements and National Politics", in Charles Bright and Susan Harding (eds.), *Statemaking and Social Movements* (University of Michigan Press, 1984)).

<sup>115</sup> Burstein, "Legal Mobilization as a Social Movement Tactic," at pp. 1203-1204.

<sup>116</sup> Michael McCann, "Law and Social Movements: Contemporary Perspectives", *Annual Review of Law and Social Science*, vol. 2 (2006), pp. 17-38, at p. 31.

A distinctive feature of these studies has been their emphasis on what Michael McCann has called the law's "double-edged"<sup>117</sup> function as an instrument of both progress and conservatism. As Ellen Ann Andersen noted, empirical studies on workplace equity,<sup>118</sup> the gay rights movement<sup>119</sup> and women's movement<sup>120</sup> have shown "both the promise and the limits of legal mobilization" in achieving social justice.<sup>121</sup> In trying to understand the broader social and political circumstances in which legal mobilizations emerges and progresses, law and society scholars have adopted a "bottom up" approach to the use of courts for social change.<sup>122</sup> Departing ways with conventional "top down" approaches to judicial impact which deemed courts to be the principal agents of social change, "movement-oriented studies of law"<sup>123</sup> have analysed the perceptions, mobilizations and contestations of law by ordinary individuals marginalized on account of race, ethnicity, class and/or gender.

Charles Epp defined legal mobilization as "the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights."<sup>124</sup> In addition to conventionally cited structural conditions such as constitutional rights, judicial independence, rights-supportive judges and popular rights consciousness, resource-mobilization scholars stressed the necessity of material and organizational resources for social movements to seek social change through the courts. Based on empirical case studies, they showed that for "challenging the status quo"<sup>125</sup> or undertaking "rights revolutions",<sup>126</sup> litigants must have access to sustained financial and legal support from resourceful organizations, expert lawyers, donors and, in some countries, the government.

Introducing the notion of "legal opportunity," Chris Hilson suggested that whether social movements choose litigation, lobbying or protest as a strategy at any given time is determined by the domestic and supranational political and legal opportunities available.<sup>127</sup> Referring to new social movement studies' emphasis on the role of identity politics in group strategy

---

<sup>117</sup> Ibid, at p. 19.

<sup>118</sup> Michael W. McCann, *Rights at Work: Pay Equality Reform and the Politics of Legal Mobilization* (University of Chicago Press, 1994).

<sup>119</sup> Andersen, *Out of the Closets and into the Courts*; Patricia A. Cain, "Litigating for Lesbian and Gay Rights: A Legal History", *Virginia Law Review*, vol. 79, no. 7 (1993), pp. 1551-1641 (providing an historical overview of the gay rights movement and litigation in the US).

<sup>120</sup> See e.g. Sally Engle Merry, "Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence", *Human Rights Quarterly*, vol. 25, no. 2 (2003), pp. 343-381 (discussing how victims of violence again women adopt a rights consciousness through their experiences with the legal system).

<sup>121</sup> Andersen, *Out of the Closets and into the Courts*, at p. 216.

<sup>122</sup> McCann, "Litigation and Legal Mobilization", at p. 524 (explaining the bottom up approach with its "beginning with nonofficial rather than officials of law, and focusing on the less powerful or marginalized among the unofficial ordinary people in civil society").

<sup>123</sup> McCann, "Law and Social Movements", at p. 18.

<sup>124</sup> Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998), at p. 18.

<sup>125</sup> Burstein, "Legal Mobilization as a Social Movement Tactic," at p. 1215.

<sup>126</sup> Epp, *The Rights Revolution*. On the indispensable role of federal government involvement for successful legal mobilization in the US context, see also Burstein, "Legal Mobilization as a Social Movement Tactic."

<sup>127</sup> Chris Hilson, "New Social Movements: The Role of Legal Opportunity", *Journal of European Public Policy*, vol. 9, no. 2 (2002), pp. 238-255. Hilson argued that legal opportunity has both structural (rules determining access to justice and funding for strategic litigation) and contingent (e.g. judicial receptivity) features.

choices,<sup>128</sup> Hilson suggested that due to their “critical stance on liberal rights”, counter-cultural and sub-cultural groups may never resort to litigation, “whatever the opportunities” or resources.<sup>129</sup> Andersen outlined access to courts, judicial elite alignment, and rights-conducive frames as the elements of “legal opportunity structures”, whose openness or closeness for legal mobilization “shape movement strategies and are shaped by those strategies in turn.”<sup>130</sup>

Legal mobilization theory predominantly draws upon the US legal and political context. The existence of an independent and strong judiciary, the responsiveness of the political branch to judicial action, the practice-oriented legal education, the availability of financing for public interest litigation and legal defence, the ability of courts to make or change laws, a legal culture which empowers human rights lawyers vis-à-vis their adversaries create generous “moments of opportunity”<sup>131</sup> for legal mobilization in the US. Although the empirical basis has expanded to other national contexts in recent years, it is still predominantly based on the Anglo-American context.<sup>132</sup> Its applicability to authoritarian regimes which lack the minimum requirements of a democratic regime has not been sufficiently tested.<sup>133</sup>

#### **1.4.2 Transnational Legal Mobilization before the ECtHR**

In recent years, socio-legal scholars started to look into the international dimension of legal mobilization by studying litigation at regional courts in Europe. Bridging social movement, legal mobilization, judicial impact and European studies, social scientists – recently joined by lawyers – analyse how social groups use international law to contest rulemaking at domestic and supranational levels. Inspired by Frances Zeman’s conceptualization of litigation as a form of political participation, they have examined legal mobilization by women, social movements

---

<sup>128</sup> Ruud Koopmans, *Democracy from Below: New Social Movements and the Political System in West Germany* (Westview Press, 1995) (arguing that whether the social movement is instrumental, counter-cultural or sub-cultural in orientation affects the resistance strategies it adopts).

<sup>129</sup> Hilson, “New Social Movements”, at pp. 250-251.

<sup>130</sup> Andersen, *Out of the Closets and into the Courts*, at p. 8.

<sup>131</sup> *Ibid*, at p. 15.

<sup>132</sup> See e.g. Hilson, “New Social Movements” (analyzing the use of lobbying, litigation and protest by the women’s, environmental, lesbian and gay, and animal welfare movements in the UK); Lisa Vanhala, “Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK”, *Law and Society Review*, vol. 46, no. 3 (2012), pp. 523-556; Gianluca De Fazio, “Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States”, *International Journal of Comparative Sociology*, vol. 53, no. 1 (2012), pp. 3-22; Lisa Vanhala, “Anti-Discrimination Policy Actors and their Use of Litigation Strategies: The Influence of Identity Politics”, *Journal of European Public Policy*, vol. 16, no. 5 (2009), pp. 738-754 (looking at the legal mobilization of disability and LGBT movements in the UK).

<sup>133</sup> Michael McCann, discussant in panel titled “Formal Institutions as Instruments of Social Movements”, Law and Society Association annual conference titled “At the Delta: Belonging, Place and Visions of Law and Social Change”, 1-5 June 2016, New Orleans.

and various minority groups at the European Court of Justice (ECJ)<sup>134</sup> and the ECtHR,<sup>135</sup> at times comparing the receptiveness of the two courts.<sup>136</sup>

One common theme that cuts across this literature is an opportunity-based approach to legal mobilization, which focuses on supranational courts' standing and admissibility rules, and their receptivity to rights claims as key factors affecting transnational litigation by social groups. EU scholars showed how the Union's rules and the ECJ's judicial doctrines expanding the scope of fundamental rights enabled social movements and individuals to successfully make rights claims. A minority opinion expressed scepticism on the democratic empowering effect of ECJ's expanded judicial power, pointing out that only those individuals and groups who have access to domestic courts and material resources are able to mobilize the EU.<sup>137</sup> In the case of the ECtHR, the Court's victimhood requirement for standing has been cited as a structural barrier to collective litigation by minority groups and to NGOs' ability to litigate on behalf of human rights victims, while its incremental expansion of the scope of anti-discrimination protection is seen as a contingent factor opening up opportunities for legal mobilization in that field.<sup>138</sup>

As in the legal mobilization literature in general,<sup>139</sup> the ECtHR studies focus on what Hodson has named the "behind the scenes" role of NGOs in the legal mobilization of human rights victims.<sup>140</sup> Predominantly, the object of analysis are professional, issue-driven, well-organized and resourceful international NGOs which engage in *strategic* litigation to influence

---

<sup>134</sup> Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press, 2002); Rachel A Cichowski, *The European Court and Civil Society: Litigation, Mobilization, and Governance* (Cambridge University Press, 2007); Rachel A. Cichowski, "Women's Rights, the European Court, and Supranational Constitutionalism", *Law and Society Review*, vol. 38, no. 3 (2004), pp. 489-512; Tanja Börzel, "Participation through Law Enforcement: The Case of the European Union", *Comparative Political Studies*, vol. 39, no. 1 (2006), pp. 128-152.

<sup>135</sup> Effie Fokas, "Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence", *Oxford Journal of Law and Religion*, vol. 4 (2015), pp. 54-74; Freek van der Vet, "Holding on to Legalism: The Politics of Russian Litigation on Torture and Discrimination Before the European Court of Human Rights", *Social and Legal Studies*, vol. 23, no. 3 (2014), pp. 361-381; Freek van der Vet, "Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights", *Human Rights Review*, vol. 13 (2012), pp. 303-325; Loveday Hodson, *NGOs and Litigation before the European Court of Human Rights* (Hart Publishing, 2011); James A. Goldston, "The Struggle for Roma Rights: Arguments that Have Worked", *Human Rights Quarterly*, vol. 32, no. 2 (2010), pp. 311-325; Rachel A Cichowski, "Courts, Rights, and Democratic Participation", *Comparative Political Studies*, vol. 39, no. 1 (2006), pp. 50-75; James A. Goldston, "Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges", *Human Rights Quarterly*, vol. 28 (2006), pp. 492-527.

<sup>136</sup> Dia Anagnostou (ed.), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System* (Hart Publishing, 2014); Lisa Conant, "Individuals, Courts, and the Development of European Social Rights", *Comparative Political Studies*, vol. 39, no. 1 (2006), pp. 76-100.

<sup>137</sup> Börzel, "Participation through Law Enforcement".

<sup>138</sup> Dia Anagnostou, "Law and Rights' Claiming on behalf of Minorities in the Multi-level European System", in Anagnostou (ed.), *Rights and Courts in Pursuit of Social Change*, pp. 1-24, at pp. 9-11. But see Rachel A. Cichowski, "Civil Society and the European Court of Human Rights", in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011), pp. 77-97, at p. 86 (arguing that there are signs of an "expanded opening for greater NGO participation" in the future).

<sup>139</sup> McCann, "Litigation and Legal Mobilization", at p. 532.

<sup>140</sup> Hodson, *NGOs and Litigation*.

government policies and to expand the ECtHR case law.<sup>141</sup> They “select and screen” applicants who match their “strategic goal”,<sup>142</sup> develop well-crafted legal arguments, frame legal claims in accordance with the ECtHR’s case law and at times use social science methodology, such as statistics, to meet the Court’s evidentiary rules.<sup>143</sup> To the extent that domestic NGOs are included in case studies, they are selected due to their transnational linkages<sup>144</sup> or, as van der Vet explained, access to “foreign funding, expertise, and qualified staff”.<sup>145</sup> The focus on litigation as a strategic and concerted effort by a resourceful organization, international or domestic, also overlooks the role of ‘the loner’ lawyer who litigates alone and with scarce resources. Rather than reflecting a “paradigm of liberal individualism”,<sup>146</sup> as Hodson claimed, analysing litigation by lawyers acting on their own is “essential ... in any meaningful study of legal mobilization as a social movement tactic”, as Burstein argued.<sup>147</sup>

The emerging literature on minority mobilization at the ECtHR is predominantly focused on “strategic” litigation which Anagnostou has defined as “centrally interested in law and policy reform, with case selection aimed at bringing to the surface broader problems.”<sup>148</sup> There has indeed been significant such litigation in Europe, with the leadership and financial support of US-based public interest law groups and donors.<sup>149</sup> However, characterizing as strategic all instances of minority litigation before the ECtHR risks overgeneralization. Relatedly, the nearly exclusive focus on the role of international actors leads to incomplete accounts of legal mobilization against state violence directed towards minority communities during armed conflicts. Domestic human rights lawyers face particular hurdles in these contexts, especially when they belong to the communities for whom they seek justice at the transnational level. Such hurdles go beyond the availability of resources, opportunities or judicial receptiveness, but concern life-and-death situations. If legal mobilization is indeed a process starting with the violation, skipping the domestic component leaves the story incomplete.

This nascent literature also has a built-in methodological bias clouding some of its conclusions. It exclusively focuses on the ECtHR’s substantive rulings (judgments), and does not look into cases where the Court declined review (inadmissibility and strike-out decisions), even where

---

<sup>141</sup> See e.g. Van der Vet, “Seeking Life, Finding Justice” (focusing on the work of the Moscow-based Dutch organization Stichting Russian Justice Initiative (SRJI) and the London-based British organization European Human Rights Advocacy Centre (EHRAC) on the basis that they “account for the majority” of ECtHR cases concerning disappearance in Chechnya); Hodson, *NGOs and Litigation* (looking at the formal and “behind the scenes” involvement of the UK-based Kurdish Human Rights Project (KHRP), the AIRE Centre, Liberty and Stonewall, the Canada-based Greenpeace and the Budapest-based the European Roma Rights Centre (ERRC) in the ECtHR litigation on gross human rights abuses against the Kurds, general human rights protection, gay rights, environmental rights and police brutality against the Roma. The only domestic NGO in Hodson’s case selection is a “tiny” Finnish group advocating the right to family life); Cichowski, “Civil Society and the European Court of Human Rights” (focusing on the involvement of the KHRP, the AIRE Centre, Stonewall and Liberty).

<sup>142</sup> Van der Vet, “Seeking Life, Finding Justice”, at p. 312.

<sup>143</sup> Adriána Zimová, *Strategic Litigation Impacts: Roma School Desegregation* (Open Society Foundations, 2016).

<sup>144</sup> See e.g. Van der Vet, “Seeking Life, Finding Justice”.

<sup>145</sup> Van der Vet, “Holding on to Legalism”, at p. 363.

<sup>146</sup> Hodson, *NGOs and Litigation*, at p. 4.

<sup>147</sup> Burstein, “Legal Mobilization as a Social Movement Tactic”, at p. 1208.

<sup>148</sup> Anagnostou, “Law and Rights’ Claiming”, at p. 4.

<sup>149</sup> Goldston, “The Struggle for Human Rights”; Zimová, *Strategic Litigation Impacts*.

they raised gross human rights violations. This omission conceals the critical instances where the ECtHR was *not* receptive to legal claims, disabling marginalized individual/groups to use the ‘opportunity’ assumed to be available to everyone with a justiciable claim, and leads to a biased account of legal mobilization. Finally, as far as politically marginalized and oppressed groups are concerned, the narrow focus on legal opportunity structure in the literature is, as Vanhala noted, “unable to account for a situation where a group can not only not gain access, but may be politically and personally ostracized” for their strategy choices.<sup>150</sup> Where legal mobilization against state violence in emergency settings is concerned, a processualist approach to access to justice is all the more ill-equipped to account the price that movement activists pay, which goes beyond ostracizing and often involves intimidation and physical attacks or even death.<sup>151</sup>

## **1.5 Filling the Gap: ECtHR, Turkey and the Kurdish Conflict**

### **1.5.1 Beyond the Binary: The Turkey Puzzle**

The old/new member states dichotomy in the ECHR scholarship does not capture the case of Turkey. Unlike the CEECs, Turkey’s engagement with European and international institutions dates back to the founding or initial years of these organizations. Turkey is a founding member of the UN, respectively joined the Organisation for Economic Co-operation and Development (OECD)<sup>152</sup>, the CoE and the North Atlantic Treaty Organization (NATO) in 1948, in 1949 and 1952, very soon after their establishment, and has been associated with the EU since the 1960s. Certainly, Turkey kept its engagement with the ECHR system at a minimum as long as it could and recognized the individual right of petition the European Commission for Human Rights (EComHR) and the ECtHR only in 1987 and 1990, to enhance its chances for EU accession.<sup>153</sup>

Unlike the transition to democracy from military dictatorships in southern (Spain, Portugal and Greece) and from totalitarianism in central/eastern European countries, the transition in Turkey was from an authoritarian single party regime to (a frequently interrupted) polyarchy, where the “state qua legal” system has remained undemocratic.<sup>154</sup> In other words, there has never been an identifiable rupture with the ancient regime or, what Greer has named, “a decisive break

---

<sup>150</sup> Vanhala, “Anti-Discrimination Policy Actors”, at p. 748 (pointing out that in addition to closed political opportunity and lack of receptivity, gay rights organizations in the UK faced additional obstacles such as discrimination in the law and the criminalization of same-sex conduct).

<sup>151</sup> On political violence against defence lawyers in the emergency state of Northern Ireland, see Martin Flaherty, “Human Rights Violations against Defense Lawyers: The Case of Northern Ireland”, *Harvard Human Rights Journal*, vol. 7 (1994), pp. 87-123. In Russia, the abduction and killing of Natalya Estemirova, a prominent human rights defender renowned for her research on gross human rights abuses in Chechnya has become the symbol of intimidation of human rights defenders. Julia Lapitskaya, “ECHR, Russia, and Chechnya: Two is not Company and Three is Definitely a Crowd”, *International Law and Politics*, vol. 43 (2011), pp. 479-547, at p. 506.

<sup>152</sup> At the time of its foundation, the institution was named the Organisation for European Economic Cooperation (OEEC). It acquired its current name in 1961.

<sup>153</sup> One should note that the weakness of the European Convention system also enabled Turkey to more or less control the terms of its relationship with the CoE. Until the entry into force of Protocol 11 to the ECHR in 1998, the individual petition mechanism and the ECtHR’s jurisdiction were not mandatory for CoE member states.

<sup>154</sup> O’Donnell, “Democracy, Law and Comparative Politics”.

with an anti-democratic past.”<sup>155</sup> In contrast, the regime change in southern and central/eastern European states was coupled with an overhaul of their legal systems. There were what Sweeney has called “constitutional moments” where the new political elite drafted democratic constitutions, which were handed over to new courts tasked with transitional mandates ranging from restoring property rights to prosecuting the perpetrators of war crimes or serious human rights violations under the old regimes.<sup>156</sup> In these states, democratic transition, constitution making and transitional justice were simultaneous and interwoven processes. In Turkey, the authoritarian regime set up by the founding fathers has been expanded by military and civilian governments alike, precluding a transition to a truly democratic regime. Neither has the war between the Kurdish insurgency and the state come to an end, precluding a post-conflict peace arrangement having transitional justice components. In this sense, embodying both an authoritarian regime *and* an ongoing war, Turkey is not even a “conflicted democracy”, a term which Ní Aoláin and Campbell coined in reference to that which “has some kind of ideological commitment to, and therefore claims adherence to, ‘democratic values’” and have experienced prolonged political violence.<sup>157</sup>

Nonetheless, Turkey has been a nominal democracy since its transition to polyarchy in 1950. Notwithstanding multiple *coups d'état*, it has had a constitutional court and a bill of rights since 1961, a parliament which has occasionally used its extremely weak oversight powers to document the state’s involvement in gross human rights abuses, a small yet vocal independent media tradition which has at critical moments spoken truth to power, a weak yet vibrant civil society which has quite effectively used “transnational advocacy networks”<sup>158</sup> to raise international awareness and solidarity, and a marginal yet resilient community of human rights lawyers who have been remarkably successful in mobilizing the ECtHR system to seek accountability against state violence in the Kurdish region.

The temporal proximity between Turkey’s recognition of the Court’s jurisdiction and the CEECs’ accession to the ECHR has resulted in a debate on the ECtHR’s role in democratic transitions and constitutionalism in the new and old member states without paying due attention to the fact that Turkey was neither nor. The distinction to be drawn among CoE member states should not be on the basis of the date of their accession, but of the maturity of their democratic institutions and the effectiveness of their legal systems. The recent setbacks in the CEECs such as Poland and Hungary, once aspiring and promising models of democratic transition,<sup>159</sup> render such a conceptual and theoretical rethinking all the more necessary. As Conor Gearty had noted in 2000, any assessment of the ECtHR’s effectiveness needs to be based on a differentiated approach which takes into account the distinction between “countries on the edge of democracy, committed in the abstract to representative government and human dignity, but hostile on the

---

<sup>155</sup> Greer, *The European Convention on Human Rights*, at p. 94.

<sup>156</sup> James A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge, 2013).

<sup>157</sup> Fionnuala Ní Aoláin and Colm Campbell, “The Paradox of Transition in Conflicted Democracies”, *Human Rights Quarterly*, vol. 27, no. 1 (2005), pp. 172-213, at p. 174.

<sup>158</sup> Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998).

<sup>159</sup> See e.g. Pevehouse, *Democracy from Above*, at pp. 121-127 (presenting the case of Hungary as a “success” story of democratic transition).

ground to the infiltration of such ideas” and those with a “reasonably effective set of democratic institutions” and constitutional structures able to produce political solutions to disagreements within their societies. Explicitly referring to Turkey within the first category, Gearty had projected that:

the results on the ground of the Strasbourg Court’s engagement with Turkey may in time provide the definitive case-study on the effectiveness of a charter of human rights imposing itself through litigation in relatively hostile territory.<sup>160</sup>

Clearly, Turkey is much more than a footnote for the ECHR system. Any attempt to theorize or conceptualize the Court’s effectiveness, domestic impact and future function must account for the fact that an increasing number of member states are authoritarian regimes engaged in systematic human rights breaches, denying victims effective remedies, suppressing the rights of minorities on the basis of a majoritarian understanding of democracy and defying the basic premises of the rule of law by eradicating checks and balances. And any such attempt has to start its narrative from Turkey, whose authoritarian laws and human rights abuses, particularly against the Kurdish minority, had considerably been tolerated and legitimized by the ECHR system for decades, long before the CEECs had joined the board.

There still does not exist an in-depth, process-oriented analysis of the historical evolution of the relationship between the ECHR system and Turkey over the course of their engagement since the 1950s. This study aims to fill this gap from an interdisciplinary perspective, based on the understanding that the domestic impact of a transnational human rights mechanism is never solely a matter of law, but is highly influenced by domestic and international political factors. In accounting for the ECHR system’s failure to bring meaningful political and legal change in Turkey, this study adopts a process-oriented approach, tracking the converging and diverging processes of political and legal developments in Europe and in Turkey, and in their bilateral relations. Owing to the indispensable role the EU has played in whatever progressive change has occurred in Turkey since the late 1990s, this study understands Europe to refer broadly to the EU and the CoE and their key political and legal institutions which are relevant for Turkey. These institutions are the European Parliament, the European Commission and the European Council on the part of the EU, and the EComHR, the ECtHR, the Committee of Ministers (CoM) and the Parliamentary Assembly on the part of the CoE.

### **1.5.2 Contesting State Violence in Authoritarian Settings: Kurdish Lawyers**

The literature on legal mobilization also does not sufficiently account for the case of Turkey. Studies on Kurdish legal mobilization before the ECtHR are limited in number, largely based on secondary sources and to the extent that they produce new empirical data, they account Kurdish litigation at the ECtHR from the perspective of transnational links forged through a

---

<sup>160</sup> Conor Gearty, “Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal”, *Northern Ireland Legal Quarterly*, vol. 51, no. 3 (2000), pp. 381-396, at p. 385.

London-based international NGO, the Kurdish Human Rights Project (KHRP).<sup>161</sup> While the KHRP has indeed built a systematic litigation campaign against Turkey, it did not *initiate* Kurdish litigation at the ECtHR. It was a handful of lawyers in the Kurdish region who commenced supranational legal mobilization on behalf of the Kurds. At this initial stage, Kurdish litigation was not strategic – in terms of goals or purpose. First-generation lawyers who filed the first petitions in the early 1990s were in no position to engage in case selection or pursue policy change, but were motivated by the sole purpose of saving lives by documenting state violence.

The transnationalist focus in the few studies on Kurdish legal mobilization before the ECtHR has led to biased case selections. This is largely because transnational actors enter the picture after domestic human rights lawyers had already mobilized against their state and leave earlier, often after exhausting their material resources, achieving victory or defeat before the ECtHR or simply losing their curiosity and shifting focus to another case or topic. Thus, a transnationalist approach inherently limits the temporal scope of legal mobilization before the ECtHR. For example, Loveday Hodson samples eleven KHRP-litigated cases out of the 25 cases in which the ECtHR delivered judgment in 2000. She justifies this selection on the basis of a quantitative approach, pointing out that the number of judgments delivered in 2000 represents 40 percent of the Court's total number of judgments to that date.<sup>162</sup> However, the case selection based on an unrepresentative sample leads to an unduly positive account of the ECtHR's receptiveness and leaves unaccounted the Court's growing inaccessibility for Kurdish victims since the early 2000s. This stems from and amplifies Hodson's methodological bias, namely her transnationalist approach.

As stated earlier, the broader literature on legal mobilization directed towards European courts is focused on collective litigation efforts by social movements and/or NGOs on their behalf, neglecting the role of the 'lone lawyer' who acts on his/her own. In the Kurdish case, this oversight leads to the exclusion of litigation by individual lawyers who started to petition the ECtHR as early as in 1989<sup>163</sup> and won leading judgments which set precedents for the ECHR system.<sup>164</sup> Though unsuccessfully, they raised novel legal issues pushing the boundaries of the

---

<sup>161</sup> Nicole F. Watts, "Institutionalizing Virtual Kurdistan West: Transnational Networks and Ethnic Contention in International Affairs", in Joel S. Migdal (ed.), *Boundaries and Belonging: States and Societies in the Struggle to Shape Identities and Local Practices* (Cambridge University Press, 2004), pp. 121-147; Dia Anagnostou, "From Belfast to Diyarbakir and Grozny via Strasbourg: Transnational Legal Mobilisation against State Violations in Contexts of Armed Conflict", in Anagnostou (ed.), *Rights and Courts in Pursuit of Social Change*, pp. 157-218; Hodson, *NGOs and Litigation*; Cichowski, "Civil Society and the European Court of Human Rights."

Admittedly, my earlier collaborative work is partially responsible for the undue KHRP-focused account of Kurdish legal mobilization before the ECtHR. Kurban, Erözden and Güllalp, *Supranational Rights Litigation*.

<sup>162</sup> Hodson, *NGOs and Litigation*, at pp. 45-60.

<sup>163</sup> EComHR, *Gürdoğan, Müştak, Müştak and Müştak v. Turkey*, Application nos. 15202/89, 15203/89, 15204/89, 15205/89, Decision, 12 January 1993 (approving the friendly settlement reached between the parties in a case raising Article 3 violations by members of the security forces during a military operation conducted in the Yeşilyurt village of Mardin province on 15 January 1989).

<sup>164</sup> See e.g. ECtHR, *Zana v. Turkey*, GC, Application no. 18954/91, Judgment, 25 November 1997 (drawing the boundaries of freedom of expression, litigated by Sezgin Tanrıku); *Benzer and Others v Turkey*, Application no. 23502/06, Judgment, 12 November 2013 (citing the principles of international humanitarian law governing non-international armed conflicts for the first time in a case concerning the Kurdish conflict and for the second time in its jurisprudence, litigated by Tahir Elçi); *Opuz v. Turkey*, Application no. 33401/02, Judgment, 9 June

individual rights protection of the Convention.<sup>165</sup> The studies on *Kurdish* legal mobilization before the ECtHR suffer from an additional problem in that they focus exclusively on the role of a *transnational* NGO, the KHRP, overlooking the crucial role played by a domestic NGO, the Human Rights Association (*İnsan Hakları Derneği-İHD*). As I will discuss in Chapter 4, the İHD's involvement in Kurdish legal mobilization before the ECtHR has been complex and rather indirect. At the same time, for reasons discussed in the same chapter, the filing of the Kurdish cases would not have been possible in the absence of the İHD umbrella and victims who petitioned the ECtHR deemed as their "primary representative" the Kurdish lawyers at İHD Diyarbakır, not the KHRP as Cichowski has claimed.<sup>166</sup> The exclusion of the experiences of individual Kurdish lawyers who litigated on their own as well as those who mobilized under the rubric of İHD Diyarbakır renders the analyses of Kurdish legal mobilization incomplete and at times inaccurate.

### 1.5.3 Bridging the Gap

Based on an in-depth, historically grounded, interdisciplinary and process-oriented analysis of the 'Turkish problem', this study offers theoretical insights on the limitations and possibilities for the engagement of regional human rights courts in authoritarian settings. Mainly drawing on the judicial impact and legal mobilization literatures with a view to provide a top down and a bottom up approach to explaining the interaction between the ECtHR and Turkey, it pursues the dual objectives of improving the understanding of the Turkish case by looking through the ECtHR lens, and, conversely, of the European human rights system through the Turkish lens.

In terms of the top down perspective, the study looks into the ECtHR's democracy-expanding and rights-protecting as well as democracy-constraining and rights-inhibiting roles in Turkey, explaining the variation in the Court's engagement and effectiveness with the political developments in Europe such as the end of the Cold War and the enlargement of the CoE. Based on the Court's rulings on state violence in the emergency region and the restrictions of Kurdish political and linguistic rights, I explore the Court's interpretation of fundamental rights at exigent times and protection of the individual rights of minorities against majority abuse in authoritarian settings. Conversely, based on the political and legal consequences of the ECtHR's rulings in Turkey, I will analyze the Court's impact on state violence, the impunity of security officials engaged in gross abuses and the protection of cultural and political rights of minorities in settings where the *sine qua non* ingredients of the rule of law are lacking and a majoritarian understanding of democracy enables elected governments to abuse their numerical superiority to deny minorities their fundamental rights.

In terms of the bottom up perspective, tracing the political and legal developments in the ECHR system and in Turkey, I discuss how Turkey's recognition of the right of individual petition, its

---

2009 (breaking new ground by finding gender-based domestic violence to constitute discrimination against women, litigated by Mesut Beştaş).

<sup>165</sup> See e.g. ECtHR, *Yumak and Sadak v. Turkey*, GC, Application no. 10226/03, Judgment, 8 July 2008 (finding Turkey's 10 percent electoral threshold not to be in violation of the ECHR, litigated by Tahir Elçi). For a detailed discussion of this case, see Chapter 3.

<sup>166</sup> Cichowski, "Civil Society and the European Court of Human Rights", at p. 91.

efforts to accede to the EU and the post-enlargement reforms of the ECtHR have affected and been affected by Kurdish legal mobilization. I adopt a process-based approach by looking at what McCann has named the “host of activities and relationships” surrounding Kurdish legal mobilization in Strasbourg.<sup>167</sup> Drawing on the law and society literature, particularly the legal mobilization scholarship, I reconstruct how a small group of lawyers at the Diyarbakır branch of the İHD used the ECtHR’s individual petition mechanism to resist state violence within the emergency context.

## 1.6 Research Timeframe and Methodology

In assessing the evolution of the relationship between the ECtHR and Turkey, the main temporal focus of this study is 1987-2012. The former year marks Turkey’s recognition of the right of individual petition to the ECtHR and the latter the entry into force of the constitutional complaint mechanism, which added a new layer of domestic remedy that needs to be exhausted before applying to Strasbourg. At the same time, in recognition of the significant legal and political developments during 2012-2017, including the resumption of state violence in the Kurdish region, I updated this study during the final writing. In addition to reflecting on relevant recent developments in the respective chapters, I added sections to the Introduction and Conclusion chapters to discuss the AYM’s and the ECtHR’s responses to new claims arising from state violence in the Kurdish region, restrictions of Kurds’ political rights and the broader collapse of the rule of law and human rights protection in Turkey.

My timeframe enables paying attention to critical junctures in the democratization process in Turkey and the evolution of the ECHR system. *With regard to Turkey*, the critical junctures are: the government’s recognition of the right of petition to the ECtHR and its declaration of a state of emergency in the Kurdish region, both in 1987; the EU-induced reforms triggered by Turkey’s acceptance as a candidate for membership in 1999; and the effective halting of the EU accession and domestic reform processes in the mid-2000s. Individual petition enabled the Kurdish victims of state violence to seek justice in Strasbourg, compelling the ECtHR to address novel legal issues and issue ground-breaking, though limited and incoherent, judgments against Turkey. At the same time, the adoption of legal reforms for the execution of these judgments would have to wait for tangible progress in Turkey-EU relations. The EU-induced reforms enabled Turkey to introduce new domestic remedies, enlarging the distance between human rights victims and Strasbourg. The effective end of the EU accession process and domestic reforms, the resumption of state violence in the Kurdish region and the erosion of the rule of law more broadly demonstrated the ineffectiveness of the new domestic legal mechanisms, prompting a new wave of petitions to the ECtHR. *With regard to the ECtHR*, the critical junctures for the purpose of this study are the end of the Cold War, the expansion of the CoE and the accession of the CEECs to the ECHR system in the 1990s; and the introduction of reforms in the Convention system in the 2000s to address the ECtHR’s docket crisis resulting from this expansion. These junctures are critical since they led to procedural revisions in the workings of the ECtHR, resulting in the inadmissibility of over 1,000 Kurdish cases on grounds

---

<sup>167</sup> McCann, “Litigation and Legal Mobilization”, at p. 524.

of new domestic legal mechanisms the government had adopted in the EU accession process to address structural problems. As a result, it has become much more difficult for human rights victims in Turkey to access the Court, rendering them more dependent on domestic legal systems.

Drawing from the methodological approaches of law, political science and sociology, I engage in an inter-disciplinary analysis which combines legal and qualitative social science research. My legal research consists of an analysis of primary legal texts such as the ECtHR's judgments and decisions on the Kurdish conflict, Turkey's constitutional, legal and regulatory texts, and the CoM's resolutions on Turkey's execution of the ECtHR case law, as well as the reports, documents and statements of the non-judicial branches of the CoE and the EU. In surveying the ECtHR's case law, I did not engage in a systematic data collection by analyzing all of the judgments and decisions concerning the thematic focus of this study. Rather, I aimed at tracing the development of the ECtHR's jurisprudential doctrine by studying the precedent-setting judgments, as well as those leading up to and following them. I also examine the Court's responsiveness to Kurdish rights claims by looking at the major inadmissibility and strike-out decisions which constituted turning points in its engagement with the Kurdish conflict and its jurisprudence more broadly. I also studied the handful of inter-state complaints filed against Turkey concerning its gross human rights abuses. Finally, I did not confine myself to majority opinions, but also studied the opinions of dissenting judges, both to support my own arguments, and to contest the conventional understanding that there is a single and definitive 'legal truth'.

The empirical data used in this study is the product of my 12-years of engagement with the Kurdish conflict and human rights reforms in Turkey. During this period, my involvement has been multi-faceted. I conducted fieldwork research, predominantly in the Kurdish region but also in Istanbul and Ankara, where I interviewed dozens of displaced Kurds, Kurdish and Turkish human rights lawyers, Turkish government officials, the representatives of national and local human rights NGO, as well as Armenian, Greek Orthodox and Jewish minority representatives and lawyers as part of my work on the property rights of Turkey's non-Muslim minorities. Much of my earlier research on the Kurdish conflict has been part of collaborative projects where I conducted interviews and field observations individually and with colleagues. Where I draw on the findings of this earlier research, I indicate that. In conducting new research for this study during 2013-2017, I made 34 new targeted interviews with Kurdish human rights lawyers and British legal experts who have litigated before the ECtHR, the founding members and former and current leaders of the İHD, officials from the Turkish Ministry of Justice, the former and current ECtHR judges from Turkey, lawyers at the ECtHR Registrar specialized on Turkish cases, officials from the CoM and the Office of the Commissioner for Human Rights of the CoE, former members of the European Parliament, and EU officials. Appendix B lists the interviews cited in this study, showing separately the recent ones I conducted for this study, and those I made over the years individually and with colleagues as part of collaborative research projects.

The essence of this study, however, rests on the knowledge and observations I have accumulated through personal and professional relationships I have built with Kurdish human

rights lawyers over the past 20 years. During this period, I have ‘studied’ them by reading their books, articles, media interviews and court applications and listening to them in panels and on television. I have ‘talked’ to them not only by conducting interviews recorded in tape, but by hearing their stories in numerous social and professional gatherings, corresponding over e-mail, phone and in person, and simply by being friends. I also worked with them as part of my policy and advocacy work for the Turkish Economic and Social Studies Foundation (TESEV). During the decade stretching between the mid-2000s and the mid-2010s, in the context of the TESEV Democratization Program, we collaborated with bar associations and human rights NGOs in the Kurdish region in conducting research, organizing conferences, producing documentary films and publishing policy papers on forced displacement, human rights, transitional justice and constitutional and judicial reform. Some of the outputs of this period are cited throughout this study.

## **1.7 Layout**

This study consists of two parts. Part I provides a background to the ECtHR’s engagement in and impact on Turkey’s policies and practices regarding the Kurdish conflict, and engages with the Court’s jurisprudence on the Kurds’ cultural and political rights claims. To explain why Turkey remains an authoritarian regime with entrenched human rights problems after over 60-years of engagement with the ECHR, Chapters 2 and 3 situate in a historical context Turkey’s human rights and minority rights policies as well as the European response to and engagement with them. Therefore, in terms of timeframe, they go back further than the other chapters. Part II is the core of this study; it addresses the main research question by focusing on the legal mobilization of Kurdish lawyers against gross human rights abuses in the Kurdish region (Chapter 4); the actors, acts and victims of this state violence (Chapter 5); and the nature and impact of the ECtHR’s response to these violations (Chapter 6).

Chapter 2 lays out the history of Turkey’s transition to polyarchy and its tumultuous experience with representative democracy, constitutionalism, human rights and minority protection against the backdrop of its engagement with inter-governmental institutions since the end of World War II. It explains how the political climate of the Cold War and Turkey’s geostrategic importance for Western Europe have insulated the leaders of this country from external pressure and enabled the survival and expansion of its authoritarian politico-legal culture. It then shows the interplay between the post-1990 political and legal order in Europe, which gave rise to the re-birth of minority protection and the strengthening of human rights, and the emerging state violence in Turkey’s Kurdish region in the context of counter-terrorism. The chapter then traces the versatile impact of the EU on the rule of law and human rights in Turkey since the latter’s declaration as a candidate for accession in 1999. In terms of the ECHR system, Chapter 2 is limited to the engagement of the ECtHR and the EComHR until Turkey’s recognition of the right of individual petition in 1987. Thus, the only cases analysed in this chapter are the inter-state complaints filed against Turkey by Cyprus and a group of Western European countries respectively concerning the gross violations in Cyprus in the 1970s and across Turkey during the military regime (1980-1983).

Chapter 3 provides a historical account of the evolution of Turkey's policies on the Kurdish question. Since the Kurds emerged as a 'problem' for the state in the late Ottoman period, the timeframe of this chapter starts from the late 19<sup>th</sup> century. I discuss the development and implementation of the state's administrative centralization, assimilation, discrimination and repression policies vis-à-vis the Kurds, during military regimes and civilian rule alike. I then show the Kurdish response to these policies, tracing the evolution of Kurdish political mobilization in the form of armed uprisings until the 1930s, peaceful and democratic opposition from the 1950s onwards, and a combination of both since the emergence of the PKK in the late 1970s. I discuss how Turkey's European integration has affected and been affected by this mobilization by discussing the substance and implementation of reforms undertaken to fulfil the EU's accession criteria and to execute the ECtHR judgments. My discussion of Kurdish rights claims and the Turkish state's violations in this chapter is limited to political and cultural rights. The ECtHR judgments and EU-induced legal reforms I analyse in this chapter are also limited to this group of rights claims.

Chapter 4 accounts how a small group of lawyers at the Diyarbakır branch of the İHD have used the ECtHR's individual petition mechanism to resist state violence within the emergency context in the Kurdish region. Drawing on the legal mobilization literature, I trace the varying ways in which Turkey's recognition of the right of individual petition, its efforts to accede to the EU and the post-enlargement reforms of the ECtHR have affected and been affected by Kurdish legal mobilization since the early 1990s. I discuss how Kurdish lawyers who ran the Diyarbakır İHD office during the first half of the 1990s commenced their ECtHR litigation on their own with virtually no resources, how and why they formed a transnational network with British legal experts through the intermediary of a Kurdish refugee in London and how they continued to litigate after this network fell apart. While my focus are the Diyarbakır İHD lawyers, I also discuss the cases filed by individual Kurdish lawyers some of whom pioneered the ECtHR litigation by petitioning the Court as early as 1989.

The aim of Chapter 5 is to draw a picture of state violence in the context of the emergency rule in the Kurdish region by identifying and describing its actors, acts and victims. Based on the principle of state responsibility under human rights law, the chapter focuses solely on Turkish military, civilian and judicial authorities and those who acted with the authority of the law and/or the acquiescence of the government. Therefore, the PKK's criminal acts against Turkish security forces, Kurdish village guards and civil servants are beyond the scope of this study.<sup>168</sup> In this chapter, I lay out the main actors of state violence in the emergency region; describe the *modus operandi* of four types of gross human rights abuses committed by these actors (enforced

---

<sup>168</sup> On crimes committed by the PKK, see e.g. Human Rights Watch, *Destroying Ethnic Identity: The Kurds of Turkey – An Update* (1990), at pp. 5-7; Amnesty International, *Turkey: No Security without Human Rights*, AI Index: EUR/44/84/96 (1996), at pp. 25-28. On the PKK's summary execution of civil servants such as teachers and preachers employed in Kurdish villages, see e.g. ECtHR, *Çakıcı v. Turkey*, Application no. 23657/94, Judgment, 8 July 1999, at para. 45. On the extrajudicial and summary execution of current and former PKK militants accused of treason by the leadership, see Aliza Marcus, *Blood and Belief: The PKK and the Kurdish Fight for Independence* (New York University Press, 2007); Martin van Bruinessen, "Between Guerrilla War and Political Murder: The Workers' Party of Kurdistan", *MERIP Middle East Report*, no. 153 (1988), pp. 40-46.

disappearances, torture, extrajudicial executions and forced displacement); show how the perpetrators of these crimes were insulated by an impunity regime upheld by the Turkish judiciary; and, in an effort to put names and stories to statistics, present detailed accounts of four cases which resulted in an ECtHR ruling. In selecting these cases, I paid attention to reflect the diversity of crimes, victims and perpetrators I lay out in the earlier sections of this chapter. I discuss the way the Court has addressed the principal legal questions raised in these four cases in Chapter 6.

In Chapter 6, I focus on the ECtHR's response to Kurdish legal mobilization against state violence. I trace the evolution of the ECtHR's jurisprudence on the four types of gross human rights abuses committed by the Turkish security forces in the Kurdish region discussed in Chapter 5. I show how the Court has interpreted its procedural rules and substantive doctrine in addressing the Kurds' legal claims. Discussing the evolution of the ECtHR's case law and Turkey's execution of these judgments against the backdrop of developments in Europe (the CoE's enlargement, the Court's docket crisis and the reforms in the ECHR system) and in Turkey (the commencement of the EU accession process, the coming to power of AKP, the rise and fall of the democratization process), I show that the ECtHR's engagement in the Kurdish conflict has varied in response to these developments.

In conclusion, I revisit the primary and secondary research questions of this study in light of its empirical findings. I then provide a brief analysis of the AYM's evolving jurisprudence on the constitutional complaint mechanism in light of the resumption of state violence in the Kurdish region in summer 2015 and the collapse of democracy and the rule of law in Turkey since the failed *coup* attempt in July 2016. I conclude with a discussion of the implications of my findings for the judicial impact, legal mobilization and judicial politics scholarships and put forth suggestions for further research.



## **Part I:**

# **Law and Politics of Democracy, Human Rights, Constitution-Making and the Kurdish Conflict in Turkey**



---

## Turkey's Search for Democracy and Human Rights Reforms under European Watch

### 2.1 Introduction

Only recently, the 'new' Turkey under the leadership of the Justice and Development Party (*Adalet ve Kalkınma Partisi*-AKP) was seen by the international community as a beacon of light in the Middle East. Turkey's then Prime Minister Recep Tayyip Erdoğan was acclaimed as a visionary politician leading his nation in the pursuit of its long-standing dream of the European Union (EU) membership. However, within a decade, Turkey has turned from a country in democratic transition whose reforms earned it EU accession status and major victories before the ECtHR to an authoritarian regime governed by lawlessness. Using the *coup* attempt on 15 July 2016 as an opportunity to curb democratic opposition, the AKP government put in place a protracted state of emergency, closed down 180 media organizations<sup>169</sup> and nearly 1,500 non-governmental organizations (NGOs)<sup>170</sup>, seized over 80 municipalities run by the pro-Kurdish HDP, and arrested without due process over 100,000 judges, prosecutors, journalists, academics, teachers, police, soldiers, activists and politicians on terrorism charges.<sup>171</sup>

As shocking and incomprehensible to an informed observer as it may be, a closer reading of Turkey's political history shows that the current situation is not unprecedented. Rather, the rapid rise and fall of Turkey's experiment with democratization is yet another instance of the country's failed effort to gain international recognition without discarding the undemocratic essence of its legal and political system. In 1996, Guillermo O'Donnell had protested the prevailing conceptualization in conventional democracy studies which perceived democratization as a linear process, eventually resulting in full institutionalization or

---

<sup>169</sup> Hülya Karabağlı, "CHP'den 'OHAL Bilançosu' Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Camına Kıydı" [CHP's Report on 'State of Emergency Balance': The Number of Suspects Exceeded 100,000; at least 25 People Committed Suicide], *T24*, 2 March 2017.

<sup>170</sup> *T24*, "Tam Liste: 15 Temmuz'dan Sonra Kaç KHK Çıkarıldı, Kaç Kurum Kapatıldı, Hangi Kurumdan Toplam Kaç Kişi İhraç Edildi?" [The Full List: How many Decrees have been Adopted since 15 July, how many Institutions have been Closed Down, how many Individuals have been Dismissed and from which Institutions?], 2 December 2016.

<sup>171</sup> <https://turkeypurge.com/>.

consolidation, unless countervailing forces render it incomplete. As he remarked “[t]hat some of these polyarchies have been in a state of ‘protracted unconsolidation’ for some 20 years suggests that there is something extremely odd about this kind of thinking.”<sup>172</sup> The frequent labelling of Turkey as a democratizing country *en route* to consolidation merits a similar objection. Nearly 70 years after its transition from an “authoritarian monoparty system”<sup>173</sup> to competitive politics after World War II, Turkey remains a country where not only the “liberal”<sup>174</sup> components of democracy, but also the political freedoms regarded to be *sine qua non* of democracy are selectively and subjectively adhered to. In other words, Turkey has long been in what Aurel Croissant and Wolfgang Merkel have named the “‘grey zone’ between open autocracy and liberal democracy” commonly associated with the third-wave Central and Eastern European Countries (CEECs) at the turn of this century.<sup>175</sup>

At the same time, as explained in the Introduction, unlike the CEECs, Turkey’s engagement with European and international intergovernmental institutions dates back to the founding or initial years of these organizations. Furthermore, the country has nominally been a democracy since its transition to polyarchy in 1950, notwithstanding multiple interruptions with direct or indirect military interventions. Yet, nearly 70 years since its transition to electoral democracy and engagement with the international and European human rights regime, Turkey remains a “failed case” of democratic consolidation.<sup>176</sup> What accounts for this?

The temporal focus of this chapter is the post-World War II period which witnessed the emergence of the human rights regime in Europe and Turkey’s transition to multiparty system and ratification of international human rights conventions.<sup>177</sup> In tracing Turkey’s experience with democracy since its transition to polyarchy in 1950, Section 2.2 explains the authoritarianism in Turkey not only with frequent *coups d’état*, some of which resulted in the overhaul of representative institutions, but also with a political culture which has never tolerated dissent – during military and civilian rules alike. In this section, I also discuss the authoritarianism embedded in Turkey’s constitutional regime by analysing the texts of the constitutions adopted and amended by the military since the 1960 *coup* and the jurisprudence of the Constitutional Court (*Anayasa Mahkemesi*-AYM) since its establishment in 1962. Section 2.3 traces Turkey’s minority policies since the late Ottoman era and its engagement with the global human rights regime since the end of World War II. I focus on Turkey’s policies towards the European Convention on Human Rights (ECHR/Convention) system by showing how despite its early ratification of the Convention, Turkey has kept its engagement at a bare minimum for as long as it could by, *inter alia*, recognizing the right of individual petition in

---

<sup>172</sup> Guillermo O’Donnell, “Illusions about Consolidation”, *Journal of Democracy*, vol. 7, no.2 (1996), pp. 34-51, at p. 38.

<sup>173</sup> İlkay Sunar and Sabri Sayarı, “Democracy in Turkey: Problems and Prospects”, in Guillermo O’Donnell, Philippe C. Schmitter and Laurence Whitehead (eds.), *Transitions from Authoritarian Rule: Southern Europe* (Johns Hopkins University Press, 1986), pp. 165-186, at p. 165.

<sup>174</sup> *Ibid.*, at p. 44.

<sup>175</sup> Aurel Croissant and Wolfgang Merkel, “Introduction: Democratization in the Early Twenty-First Century”, *Democratization*, vol. 11, no. 5 (2004), pp. 1-9, at p. 3.

<sup>176</sup> Jon C. Pevehouse, *Democracy from Above: Regional Organisations and Democratization* (Cambridge University Press, 2005), at p. 204.

<sup>177</sup> This temporal scope leaves out the early experiments with constitution-making during the late Ottoman and early republican era.

1987 and the ECtHR's compulsory jurisdiction in 1990 only to enhance its chances for EU membership. Section 2.4 turns the lens to European institutions by discussing their responses to Turkey's authoritarian politico-juridical regime during the Cold War. Following an analysis of the Council of Europe's (CoE) and the EU's political institutions' oversight of democracy in Turkey, I discuss the ECHR system's early engagement by analysing the handful of inter-state cases filed against Turkey for its gross human rights abuses in Cyprus in the 1970s and across Turkey during the military regime of 1980-1983. Finally, in Section 2.5, I discuss the EU's versatile impact on Turkey's human rights policies during the various phases of bilateral relations since the end of the Cold War.

## **2.2 Transition to Democracy? Perpetual Authoritarianism under Polyarchy**

Modern Turkey was founded as a single-party system under the leadership of Mustafa Kemal (Atatürk),<sup>178</sup> the leader of the liberation movement (1920-1923) and the founder of the Republic. Until the transition to multiparty politics, the party and the state were one; ideology, vision, leadership and cadres of the Republican People's Party (*Cumhuriyet Halk Partisi*-CHP)<sup>179</sup> were those of the state. After the transition, while the CHP lost its monopoly over the government, the ideology it was based upon has survived. Kemalism, consisting of Mustafa Kemal's ideas and reforms, has dominated laws, judicial rulings, policies and political thinking as what Taha Parla and Andrew Davison have named "the constitutionally declared, official ideology of Turkey".<sup>180</sup>

While Turkey ended single-party rule in 1950, its transition to polyarchy did not entail a transition to democracy – neither in procedural nor in substantive terms. The Turkish Armed Forces (*Türk Silahlı Kuvvetleri*-TSK) frequently interfered into politics through *coups d'état* (1960, 1980), by forcing elected governments to step down (1971, 1997) or by giving them ultimatums (2007).<sup>181</sup> Many times, the military (re)designed Turkey's constitutional regime by drafting new constitutions (1961, 1982) or amending existing ones (1971).

Brief periods of relative political liberalization, as in the early 1960s and mid-late 1980s, did not alter the authoritarianism embedded in Turkey's politico-juridical regime. The problem was not just frequent military interventions into nominal democracy. Rule by civilian governments was also marked by authoritarianism and the suppression of democratic dissent. Exceptional legal regimes, special criminal tribunals and anti-terror laws conferring on the executive special powers have been constant features of Turkey's politico-legal system during military *and*

---

<sup>178</sup> Following the adoption of the Surname Law in 1924, which required every citizen to have a last name, Mustafa Kemal obtained the surname of Atatürk (the ancestor of the Turk).

<sup>179</sup> Initially named the People's Party (*Halk Partisi*) upon its foundation on 9 September 1923, the party was renamed as the CHP in 1924.

<sup>180</sup> Taha Parla and Andrew Davison, *Corporatist Ideology in Kemalist Turkey: Progress or Order?* (Syracuse University Press, 2004), at p. 38 (providing a detailed account of Kemalism as an antisocialist, anti-liberal solidaristic corporatist ideology, which has been influenced by fascistic corporatism during the interwar period).

<sup>181</sup> There were also two failed *coup d'état* attempts in 1962 and 1963.

civilian rule. Emergency rule, in particular, has been the norm rather than the exception.<sup>182</sup> During the 79 years between the establishment of the Republic and the end of emergency rule in the Kurdish region in 2002, Turkey was formally governed by a state of emergency or martial law for 41 years.<sup>183</sup> Likewise, non-violent democratic opposition has always been criminalized as terrorist or separatist propaganda, particularly when expressed by the Kurds and leftists.

### **2.2.1 Transition to Polyarchy and Constitution-Making under Military intervention: 1950-1980**

By the mid-1940s, the alliance that the bureaucratic and intellectual cadres had made with the land and property owners during the national liberation war and the founding of the nation state was collapsing due to the CHP's redistributive economic policies such as land reform, a wealth levy and nationalization of forests which infringed on the property rights of the wealthy class. The longevity of single party rule led to increasing protests by the middle class which wanted a transition to democracy, while the Islamist and traditional segments of society were disturbed by Kemalist reforms, particularly in the area of secularism.<sup>184</sup> In addition, as Bülent Tanör argued, the post-World War II global order and the deepening Cold War pushed Turkey towards the Western democratic alliance, facilitated a domestic development which was long overdue: transition to multiparty rule.<sup>185</sup>

The first parliamentary elections held in 1950 resulted in the victory of the Democrat Party (*Demokrat Parti*-DP). Reaping the advantages of the electoral system at the time, DP won over 83 percent of the seats in the Parliament although it received over 53 percent of the national votes, leading, according to Tanör, to “the domination and even dictate of the majority” represented by a political party which deemed itself as the sole representative of “the national will”.<sup>186</sup> According to İlkay Sunar and Sabri Sayarı, although it came to power on a pro-democracy agenda, the DP kept intact “the centralized, Jacobin institutions of the monopoly regime” to establish and consolidate its authoritarian rule.<sup>187</sup> Through its clientelist policies, accommodation of religious demands and “arrogance” with its victory over the CHP, the DP

---

<sup>182</sup> This practice was a legacy of the late Ottoman period. In fact, the Republican state maintained and enforced much of the Ottoman martial law regime until it adopted its own Martial Law Act in 1940. Mehmet Semih Gemalmaz, “Historical Roots of Martial Law within the Turkish Legal System: Perspectives and Texts”, *Turkish Yearbook of Human Rights*, vol. 13 (1991), pp. 73-145, at p. 86.

<sup>183</sup> I reached this number by updating the figures provided by Gemalmaz, who had recorded the period Turkey was ruled by a state of exception between 29 October 1923 and 29 October 1991 to be 30 years and two months. Gemalmaz, “Historical Roots of Martial Law”, at p. 74. State of emergency, which was still operative in 1991, was formally abolished on 30 November 2002. For a similar emphasis on the marking of Turkey's political life by states of exception, see Bülent Tanör, “States of Exception in Turkey”, in International Commission of Jurists (ICJ), *States of Emergency: Their Impact on Human Rights* (ICJ, 1983), pp. 309-336, at p. 311 (pointing out that martial law was in effect during ten out of the 20 years between the 1960 and 1980 military interventions). For a detailed analysis of the application of state of siege (martial law) during the single-party rule, see Mehmet Semih Gemalmaz, “1920-1950 Martial Law in Turkey: Is it Additional Measure or a Main Instrument for Repression? Perspectives and Texts”, *Turkish Yearbook of Human Rights*, vol. 14 (1992), pp. 85-115.

<sup>184</sup> Bülent Tanör, *Osmanlı-Türk Anayasal Gelişmeleri: 1789-1980* [Ottoman-Turkish Constitutional Developments: 1789-1980] (Yapı Kredi Yayınları, 2015), at pp. 335-339.

<sup>185</sup> *Ibid*, at pp. 337-338 (arguing that the Allies, first and foremost the US, were much more interested in Turkey's strength and political stability rather than the type of regime it was governed by).

<sup>186</sup> *Ibid*, at p. 351.

<sup>187</sup> Sunar and Sayarı, “Democracy in Turkey”, at p. 173.

alienated the civilian and military bureaucratic elite.<sup>188</sup> It pursued liberal economic policies favouring landowners and big capital owners at the expense of impoverished peasants, urban middle classes and small businesses, which generated economic recession and social unrest, expanding the social base of the political opposition.<sup>189</sup> The DP government resorted to increasing suppression of dissent by, *inter alia*, expropriating the CHP's properties; banning opposition parties from making election campaigns on the radio, holding assemblies or protests outside the election season, forming pre-election coalitions and submitting parliamentary queries to oversee the executive; arresting opposition leaders; restricting the autonomy of universities and removing from public universities dissident professors; penalizing provinces and districts that had voted for opposition parties by downgrading their administrative status; and establishing a parliamentary commission tasked with judicial powers to investigate the CHP.<sup>190</sup>

The growing rift between the DP and the CHP and the ensuing polarization provided the military with the legitimacy it sought to overthrow a government it perceived to undermine the founding values of the Republic and the Kemalist ideology.<sup>191</sup> Behind this political facade, Kemal Karpat has argued, the intervention was also a reaction to the government's economic policies which impoverished the officers and deteriorated the army's "social status".<sup>192</sup> The military overthrew the government with a *coup d'état* on 27 May 1960, dissolved the DP, arrested its leaders and put them on trial for violating the constitution.

The junta named itself the Committee of National Unity (*Milli Birlik Komitesi-MBK*) and established a corporatist<sup>193</sup> bicameral Constituent Assembly<sup>194</sup> made up of itself and the House of Representatives constituted of select civilians.<sup>195</sup> The Assembly established a Constitutional Commission tasked with drafting a constitution. The 1961 Constitution was a text of firsts. It established a constitutional court, introduced the notions of separation of powers and the supremacy of the constitution, and included an extensive bill of rights, partially inspired by the

---

<sup>188</sup> Ibid, at p. 174.

<sup>189</sup> Bülent Tanör, *İki Anayasa: 1961-1982* [Two Constitutions: 1961-1982] (XII Levha, 2013).

<sup>190</sup> Tanör, *İki Anayasa*, at pp. 7-8.

<sup>191</sup> Kemal Karpat, "The Military and Politics in Turkey, 1960-1964: A Socio-Cultural Analysis of a Revolution", *The American Historical Review*, vol. 75, no. 6 (1970), pp. 1654-1683, at p. 1669.

<sup>192</sup> For an in-depth study of the political and social background of the intervention from a historical perspective and an assessment of the 1960 *coup* as a "military revolution", see Karpat, "The Military and Politics in Turkey", at pp. 1681-1682.

<sup>193</sup> Taha Parla, *Türkiye'nin Siyasal Rejimi: 1980-1989* [Turkey's Political Regime: 1980-1989] (İletişim Yayınları, 1993), at p. 50 (pointing out that the junta thereby introduced to Turkish constitutional law the institution of "constituent assembly" which it established in accordance with the principle of corporatism).

<sup>194</sup> *Kurucu Meclis Teşkilî Hakkında Kanun* [Law on the Establishment of the Constituent Assembly], no. 157, 13 December 1960, Official Gazette, no. 10682, 16 December 1960 (hereafter "Law no. 157").

<sup>195</sup> Among the civilian institutions represented in the House of Representatives were bar associations, labour unions, press, youth organizations, artisan organizations, chambers of trade and industry, agricultural organizations, universities, the judiciary and teachers' unions. CHP and the Republican Peasants' Nation Party were also represented in the Assembly. Law no. 157, at Article 4. DP and its supporters were entirely excluded.

ECHR.<sup>196</sup> The Constitution characterised the Republic as a state “based on human rights”<sup>197</sup> which would remove all “political, economic and social obstacles that restrict the fundamental rights and freedoms of the individual in ways irreconcilable with the principles embodied in the rule of law, individual well-being and social justice.”<sup>198</sup> The Constitution also prohibited laws from infringing upon “the essence of any right or liberty not even when it is applied for the purpose of upholding public interest, morals and order, social justice as well as national security.”<sup>199</sup>

Notwithstanding its liberal bill of rights, the 1961 Constitution was not based on democratic principles. The principal preoccupation of the drafters was to introduce institutional safeguards against unchecked popular rule.<sup>200</sup> Doing so, Parla has argued, they “unnecessarily generalized” the DP’s abuse of majority rule to infringe the political rights of the opposition by questioning the legitimacy of democratic representation itself.<sup>201</sup> Distrustful of elected politicians, the drafters created a number of bureaucratic institutions with direct or indirect military representation. First and foremost was the National Security Council (*Milli Güvenlik Kurulu-MGK*), made up of the Chief of Staff, the representatives of the TSK and government ministers, with the mandate to state its “opinions” to the Council of Ministers on national security issues.<sup>202</sup> What the CHP-dominated Constituent Assembly envisioned was a political system where the DP’s successor parties would be kept under bureaucratic control if and when they came to government once again whereas a future CHP government could rule on a strong platform through its “traditional alliances with the administrative, judicial, military and university bureaucracies.”<sup>203</sup>

The constitution was submitted to a referendum on 9 July 1961 and adopted against a very large number of negative votes; 3,934,370 no against 6,348,191 yes.<sup>204</sup> The trial of DP leaders resulted in the sentencing of Prime Minister Adnan Menderes and his ministers Fatin Rüştü Zorlu and Hasan Polatkan to the death penalty. On 16-17 September 1961, Menderes, Zorlu and Polatkan were executed. In October, the MBK organized general elections and handed power back to civilians. The transition did not bring political stability; the following years

---

<sup>196</sup> It has been argued that the liberal rights regime of the 1961 Constitution was an inadvertent outcome of the drafting undertaken by legal scholars under the watch of the military. Türküler Işıksel, “Between Text and Context: Turkey’s Tradition of Authoritarian Constitutionalism”, *International Journal of Constitutional Law*, vol. 11, no. 3 (2013), pp. 702-726, at p. 713, citing Perry Anderson, *The New Old World* (Verso, 2009), at p. 436.

<sup>197</sup> *1961 Anayasası* [1961 Constitution], 27 May 1961, Official Gazette, no. 10859, 20 July 1961, at Article 2.

<sup>198</sup> *Ibid*, at Article 10.

<sup>199</sup> *Ibid*, at Article 11.

<sup>200</sup> Sunar and Sayarı, “Democracy in Turkey.”

<sup>201</sup> Parla, *Türkiye’nin Siyasal Rejimi*, at p. 23.

<sup>202</sup> 1961 Constitution, at Article 111. Pursuant to Law no. 129 of 11 December 1962 establishing the MGK, the body was composed of the President; the Prime Minister; the deputies of the Prime Minister; the Ministers of Defence, Interior, Foreign Affairs, Finance, Transportation and Labour; the Head of the Chief of Staff; and the heads of the Army, the Navy, the Air Force and the Gendarmerie. Under this formulation, the civilian members had the absolute majority over their military counterparts.

<sup>203</sup> Parla, *Türkiye’nin Siyasal Rejimi*, at p. 31.

<sup>204</sup> Karpat, “The Military and Politics in Turkey”, at p. 1680.

witnessed two *coup* attempts by low ranking officials,<sup>205</sup> enhanced tensions between the DP's successor Justice Party (*Adalet Partisi-AP*) and the military,<sup>206</sup> political mobilization and ideological polarization.<sup>207</sup> On the pretext of restoring law and order in an increasingly turbulent political environment, the military staged another intervention on 12 March 1971.<sup>208</sup> This time, instead of overthrowing the government, the generals gave an ultimatum to the Parliament to form a new government above party lines and adopt reforms to "protect the republican laws" or else face dissolution.<sup>209</sup> Thereupon, the AP government stepped down and a civilian-military technocratic government took over.

During 1971-1973, a period known as the 'March 12<sup>th</sup> regime', the military ruled the country without formally taking over the government. It declared a state of siege on 26 April 1971, six weeks after its intervention, seemingly to create legitimacy for the constitutional amendments it was planning to introduce.<sup>210</sup> These amendments enhanced the powers of the military vis-à-vis the executive, diminished the powers of the judiciary, expanded the powers of the executive vis-à-vis the legislature and limited the exercise of fundamental rights.<sup>211</sup> The MGK's function was expanded from stating its opinions to "issuing recommendations" to the Council of Ministers, the jurisdiction of military courts was expanded at the expense of civilian ones by, *inter alia*, creating the Supreme Military Administrative Court as the sole judicial body to review cases concerning members of the TSK and conferring on military courts exclusive jurisdiction over civilians charged with military offenses or offenses against military personnel.<sup>212</sup>

To undermine the powers of the judiciary, the military disabled small political parties from the right to seek the constitutional review of newly enacted laws and re-introduced the constitutional provisions which had been annulled by the AYM.<sup>213</sup> To weaken the legislature, the military authorized the Council of Ministers to issue executive decrees with the force of law and limited the Parliament's oversight powers over the executive.<sup>214</sup> In the area of human rights,

---

<sup>205</sup> The *coup* attempts failed mainly because the officers did not have the backing of the generals and the bulk of the army. The colonel and his deputy who led both attempts were subsequently sentenced to death and executed.

<sup>206</sup> For more on the dynamics of this tension and how it was temporarily resolved in 1964, see Karpat, "The Military and Politics in Turkey", at pp. 1679-1681.

<sup>207</sup> Sunar and Sayarı, "Democracy in Turkey", at pp. 174-176.

<sup>208</sup> On the other hand, Tanör convincingly argues that the military used this pretext to conceal the true intention of its intervention, namely to rapidly introduce fundamental constitutional amendments to enhance its authority. Tanör notes that even 40 days after the intervention, the leader of the new government placed by the junta told the reporters that the security situation in the country did not warrant a state of siege. Tanör, *İki Anayasa*, at pp. 41-42.

<sup>209</sup> Text of the ultimatum issued by the Chief of Staff on 12 March 1971, available in Turkish at: <http://rehber.ihya.org/yenirehber/oniki-mart-muhtirasi.html>.

<sup>210</sup> Tanör, *İki Anayasa*, at p. 42.

<sup>211</sup> The constitution was amended on 30 June 1971, 20 September 1971 and 15 March 1973.

<sup>212</sup> Respectively, Article 111, 140 and 141 of the 1961 Constitution, as amended with *Türkiye Cumhuriyeti Anayasasının bazı Maddelerinin Değiştirilmesi ve Geçici Maddeler Eklenmesi Hakkında Kanun* [Law on the Amendment of Certain Provisions of and the Addition of Provisional Articles to the Constitution of the Turkish Republic], no. 1488, 20 September 1971, Official Gazette, no. 13964, 22 September 1971 (hereafter "Law no. 1488").

<sup>213</sup> Tanör, *İki Anayasa*, at pp. 45-46. The AYM had revoked constitutional provisions disabling small political parties from state financial aid and enhancing the jurisdiction of military courts over civilians.

<sup>214</sup> 1961 Constitution, as amended with Law no. 1488, at Article 64. The history of ruling with executive decree was not a new phenomenon in Turkey's history. During the last years of the Ottoman Empire, when the capital

a broad restrictive clause was added to Article 11 of the Constitution, enabling the limitation of rights on grounds of “the unity of the state with its country and nation, the protection of the Republic, national security, public order, the common good, public morality and public health.”<sup>215</sup> New restrictions were brought on the exercise of civil and political rights. For example, while the 1961 Constitution stated that no law could restrict freedom of information or seek to control ideas or public opinion, the 1971 amendments made the exercise of this freedom subject to the protection of the “unity of the state with its country and nation”, national security and public morality.<sup>216</sup> In order to weaken civil society, civil servants were banned from forming trade unions and university academics from joining political parties. The administrative autonomy of universities was limited.<sup>217</sup>

The next decade witnessed a similar cycle; extreme ideological polarization among the political elite and the masses, increasing party fragmentation leading to the creation of fringe parties on both sides of the political spectrum, short-lived coalition governments, and deepening of ethnic, religious and sectarian social cleavages.<sup>218</sup> The climate of political instability once again provided the military with legitimizing grounds to stage a third *coup d'état* on 12 September 1980.

### **2.2.2 Post-1980: The Institutionalization of Constitutional Authoritarianism**

The 1980 *coup d'état* was by far the bloodiest and most drastic military intervention in Turkey's history. The junta led by General Kenan Evren abolished the parliament and the government, prohibited any form of political activity, placed the leaders of the two main political parties (CHP and the AP) under house arrest, prosecuted the leaders and members of small parties,<sup>219</sup> suspended civil and political rights, closed down the trade union confederations and declared a state of siege. It resumed the execution of death sentences which had not been carried out since 1972, executing a total of 48 individuals by the end of their rule, extended the period of pre-trial detention to 90 days and arrested over 60,000 individuals on charges of terrorism and illegal political activities.<sup>220</sup> The junta was particularly repressive against the Kurds. While the official number of arrests in the Kurdish region was less than 4,500, the International League of Human Rights claimed that around 81,000 Kurds were detained between September 1980 and September 1982.<sup>221</sup>

---

Istanbul was under the occupation of the Allied Forces, the last Ottoman Sultan effectively abolished the Parliament and ruled the country by decrees. Tanör, *Osmanlı-Türk Anayasal Gelişmeleri*, at p. 229.

<sup>215</sup> 1961 Constitution, at Article 11.

<sup>216</sup> Ibid, at Article 26.

<sup>217</sup> Ibid, at Articles 119 and 120.

<sup>218</sup> Sunar and Sayarı, “Democracy in Turkey”, at pp. 177-182 (emphasizing the role of the non-consensual political culture prevalent among political leaders who refused to find common ground). But see İhsan Dağı, “Democratic Transition in Turkey, 1980–1983: The Impact of European Diplomacy”, *Middle Eastern Studies*, vol. 32, no. 2 (1996), pp. 124–141, at p. 125 (that the military had “squarely placed” the blame of the intervention on the politicians and the 1961 Constitution).

<sup>219</sup> For a list of the charges and sentences against the leaders and members of fringe parties, see Mehmet Semih Gemalmaz, *The Institutionalization Process of the “Turkish Type of Democracy”: A Politico-Juridical Analysis of Human Rights* (Amaç Yayıncılık, 1989), at p. 5.

<sup>220</sup> Dağı, “Democratic Transition in Turkey”, at p. 125.

<sup>221</sup> David McDowall, *A Modern History of the Kurds* (I.B. Tauris, 2004), at p. 416.

Until the transition to civilian rule, the country was governed under what Bülent Tanör has called a “regime of exception”<sup>222</sup> and led by the Council of National Security (*Milli Güvenlik Konseyi-Konsej*) made up of the Chief of Staff and heads of naval, land and air forces, as well as the head of gendarmerie. The *Konsej* gave itself the mandate to change not only laws<sup>223</sup> but also the constitution.<sup>224</sup> It “temporarily” conferred onto itself the duties and powers vested in the Parliament and the President, and rendered its decisions supreme over the Constitution and the laws.<sup>225</sup> Until the parliament reconvened on 7 December 1983, the *Konsej* was engaged in intensive legislative activity, enacting 883 pieces of legislation including 669 laws, 90 decrees with the force of law, 76 decisions and three statements<sup>226</sup> in areas ranging from criminal law to the judiciary, martial law to public order, public broadcasting to education, national intelligence to human rights.

### 2.2.2.1 The Making of a Constitution and the Transition (back) to Civilian Rule

The junta perceived the 1961 Constitution as the cause of all evils, deeming its emphasis on individual rights to have weakened the executive and led to anarchy. The new constitution, in the junta’s opinion, should strengthen state authority and prevent the abuse of rights. In a speech to the AYM, Kenan Evren appealed to the high judges “to uphold as a matter of priority the unity of the State with its land and nation” in conducting constitutional review.<sup>227</sup> Following its earlier precedent, the junta established a bicameral Constituent Assembly<sup>228</sup> made up of itself (*Konsej*) and civilians (Consultative Assembly). The Constituent Assembly was tasked with drafting a new constitution and given law making powers until the parliamentary elections. This time, going “much further than its predecessor” as Ergun Özbudun has noted, the *Konsej* excluded civil society and political parties altogether from constitution making,<sup>229</sup> and directly or indirectly appointed all 160 members of the Consultative Assembly.<sup>230</sup>

The Consultative Assembly submitted its draft on 23 September 1982. The *Konsej* revised the text in secret sessions, adding most importantly a “provisional” article exempting from constitutional review the laws and decrees it adopted, much of which were written into the new

---

<sup>222</sup> Bülent Tanör, “Who’s in Charge in Turkey?” *The Review*, no. 34 (ICJ, 1985), pp. 61-68, at p. 65. Regime of exception refers to “de facto” rules established after an unconstitutional take-over of the government and is thus different from “de jure” states of exception which, while also being extra-ordinary modes of government, have a legal basis in the country’s constitution or the laws. Tanör, “States of Exception in Turkey”, at pp. 311-312.

<sup>223</sup> *Türkiye Cumhuriyeti Milli Güvenlik Konseyi Yasama Görevleri İçtüzüğü* [By-Laws on the Legislative Duties of the Council of National Security of the Turkish Republic], 25 September 1980, Official Gazette, no. 17119, 28 September 1980.

<sup>224</sup> *Anayasa Düzeni Hakkında Kanun* [Law on the Constitutional Order], no. 2324, 27 October 1980, Official Gazette, no. 17145, 28 October 1980.

<sup>225</sup> *Ibid*, at Articles 2, 6 and 3, respectively.

<sup>226</sup> Dissenting opinion of Judge Yılmaz Aliefendioğlu in AYM, E. 1990/32, K. 1990/25, 16 October 1990.

<sup>227</sup> Bülent Tanör and Necmi Yüzbaşıoğlu, *1982 Anayasasına Göre Türk Anayasa Hukuku* [Turkish Constitutional Law under the 1982 Constitution] (Yapı Kredi Yayınları, 2001), at p. 27.

<sup>228</sup> *Kurucu Meclis Hakkında Kanun* [Law on the Constituent Assembly], no. 2485, 29 June 1981, Official Gazette, no. 17386, 30 June 1981.

<sup>229</sup> Ergun Özbudun, “Turkey’s Search for a New Constitution”, *Insight Turkey*, vol. 14, no. 1 (2012), pp. 39-50, at p. 40.

<sup>230</sup> Tanör and Yüzbaşıoğlu, *1982 Anayasasına Göre*, at p. 29.

constitution.<sup>231</sup> Thus, Gemalmaz has argued, the junta created a constitution within the constitution through Provisional Article 15.<sup>232</sup> The final text was approved in a referendum held on 7 November 1982 together with a plebiscite on the election of the *Konsey* leader Kenan Evren, the sole candidate, for the Presidency of the Republic.<sup>233</sup> The 91.37 percent approval rate was achieved in a political context where society was given no time to study and debate the text,<sup>234</sup> prohibited by law from publicly criticising the Constitution<sup>235</sup> and was obliged to vote in transparent envelopes revealing the content of the vote.<sup>236</sup> Evren became the President for a term of seven years and the *Konsey* was transformed into the Council of the Presidency for a period of six years.<sup>237</sup> Thus, in adopting the constitution, the junta not only formed a new regime to its liking, but also shielded itself with constitutional impunity against criminal prosecution and endowed itself with the highest government offices.

Just as it ensured that the constitutional referendum would result in an affirmative vote, the junta did its utmost to control the outcome of the elections held on 6 November 1983. While the MGK authorised the establishment of political parties in May 1983, this was by no means an open invitation; the ban on the leaders of political parties predating the *coup* continued and only those politicians approved by the MGK were allowed to found new parties.<sup>238</sup> The MGK disapproved the founders of the Social Democratic Party and the True Path Party, which were consequently excluded from the elections, and vetoed several candidates of the three parties it had allowed to run in the elections as well as 90 percent of the independent candidates.<sup>239</sup> These three parties were the Nationalist Democracy Party (*Milliyetçi Demokrasi Partisi*-MDP) led by an ex-general, the Populist Party led by a member of the government during the military rule, and the Motherland Party (*Anavatan Partisi*-ANAP) led by Turgut Özal, a former bureaucrat. The election campaign was extremely short – three weeks – and the elections were not fair. One night before the elections, President Kenan Evren – the former head of the junta – endorsed the MDP on public television. Against all odds, ANAP was the unexpected winner of the elections.

Yet, once again, the return to electoral politics did not bring full civilian rule. The ideology of the military junta was passed on to the new political order through institutions such as the MGK and in the person of the junta leader-turned-President Evren. The authoritarian politico-judicial

---

<sup>231</sup> The *Konsey* made use of its legislative authority until the new Parliament became operative on 7 December 1983.

<sup>232</sup> Mehmet Semih Gemalmaz, “State of Emergency Rule in the Turkish Legal System: Perspectives and Texts”, *Turkish Yearbook of Human Rights*, vol. 11-12 (1989-1990), pp. 115-156, at p. 129.

<sup>233</sup> For Gemalmaz, what was officially named a referendum was in fact a plebiscite. *Ibid.*, at p. 118.

<sup>234</sup> The final text of the constitution was announced to the public on 19 October 1982.

<sup>235</sup> *Anayasanın Halk Oylamasına Sunulması Hakkında Kanun* [Law on the Submission of the Constitution to Popular Vote], no. 2707, 24 September 1982, Official Gazette, no. 17823, 25 September 1982.

<sup>236</sup> Notwithstanding the existence of real and credible political pressure on the voters, the high approval rate also speaks to the Turkish society’s support for the ideology represented by the junta.

<sup>237</sup> It was given the tasks of examining the laws adopted by the Parliament transmitted for approval to the President and to conduct studies on issues relating to national security for the President. Tanör, “Who’s in Charge in Turkey?” at pp. 66-67.

<sup>238</sup> Provisional Article 4 of the Law on Political Parties required MGK approval for the qualification of the founding members of new political parties.

<sup>239</sup> Tanör, “Who’s in Charge in Turkey?” at p. 62.

regime created by the junta was inherited and preserved by civilian government(s), despite cosmetic changes introduced in the late 1990s with the hope of gaining candidacy status for EU membership. According to Gemalmaz, the outcome was a “special type of democracy”, recognized and accepted by the international community, including the European institutions.<sup>240</sup>

### 2.2.2.2 “Paradigmatic Authoritarianism”: The 1982 Constitutional Regime

Türküler Işıksel has duly characterized the 1982 Constitution as “a paradigmatic instance of authoritarian constitutionalism”.<sup>241</sup> At first glance, the text was committed to constitutionalism. It enumerated respect for human rights as a fundamental characteristic of the republic and entrusted the state with the “fundamental aim and duty” of removing obstacles to the exercise of rights and liberties.<sup>242</sup> The Constitution contained an equality and anti-discrimination clause<sup>243</sup> and specific provisions on fundamental rights and liberties corresponding to those under the ECHR.<sup>244</sup> At the same time, civil and political rights were subject to extensive restrictions under individual clauses and a general restriction clause. Although the Consultative Assembly claimed to have followed the ECHR, the general restrictions embodied in Article 13 went far beyond the respective restrictions under the Convention.<sup>245</sup> Likewise, unlike the abuse clause of the ECHR which bans activities and acts aimed at the destruction of rights and freedoms,<sup>246</sup> Article 14 of the Constitution also targets opinions.<sup>247</sup> Moreover, while Article 17 of the ECHR is binding on both states and individuals, Article 14 of the Constitution is solely concerned with the abuse of rights and freedoms by individuals.<sup>248</sup>

In reality, the human rights clauses of the new constitution were not more than a lip service to Turkey’s obligations arising from the ECHR. The principal preoccupation of the junta was to protect the state against the individual and to adhere to Turkey’s founding ideology, which was shaped by the fear of Kurdish separatism and political Islam. The object of protection from these perceived enemies was not the democratic order, but the state, prompting constitutional law scholars to argue that one could “swap the perception of ‘militant democracy’ for the

---

<sup>240</sup> Gemalmaz, *The Institutionalization Process of the “Turkish Type of Democracy”*.

<sup>241</sup> Işıksel, “Between Text and Context”, at p. 716.

<sup>242</sup> *Türkiye Cumhuriyeti Anayasası* [The Constitution of the Turkish Republic], no. 2709, 7 November 1982, Official Gazette, no. 17863, 9 November 1982, at Articles 2 and 5, respectively (hereafter “1982 Constitution”).

<sup>243</sup> Article 10(1): “[a]ll individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.” Notably, sexual orientation and ethnic origin were missing among the enumerated grounds.

<sup>244</sup> Articles 17 through 40, protecting individual rights and freedoms including the right to life, liberty and security, property, privacy, and freedoms of expression, association, residence and movement, communication, religion and conscience, thought and opinion.

<sup>245</sup> Article 13, before it was amended in 2001, allowed the restriction of rights and liberties on the grounds, *inter alia*, of “safeguarding the indivisible integrity of the state with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health.”

<sup>246</sup> ECHR, at Article 17.

<sup>247</sup> These disconnects were also identified by the CoE experts who visited Turkey during the drafting process.

Tanör and Yüzbaşıoğlu, *1982 Anayasasına Göre*, at p. 32.

<sup>248</sup> Tanör, *İki Anayasa*, at p. 99.

perception of ‘militant state’” under the new constitution.<sup>249</sup> The constitution subjugated the exercise of the rights and freedoms to a doctrinal hierarchy, whereby the principles of laicism and territorial unity trumped fundamental rights and liberties. This demarcation cut across the letter and spirit of the constitution and was immediately observed in the Preamble, which prohibited activities contrary to the principles of territorial unity and laicism.<sup>250</sup> The Preamble conspicuously failed to pronounce the word “democracy” until the very end where it depicted the Constitution as a trust by “the Turkish nation to the patriotism and nationalism of its democracy-loving sons and daughters.”<sup>251</sup>

Based on their reading of Turkey’s three decades-long experience with polyarchy, the junta was extremely distrustful of politicians and civil society. To limit the role of civilians in politics, the *Konsey* introduced a constitutional provision banning civil society organizations from engaging in political activities.<sup>252</sup> Soon to be established political parties were placed under a strict legal framework based on a long list of “vague” bans.<sup>253</sup> They were, *inter alia*, banned from having statutes or programs in conflict with “the indivisible integrity of the State with its territory and nation,”<sup>254</sup> engaging in activities outside the lines of their statutes and programs,<sup>255</sup> and having any ties with and receiving financial support from civil society organizations.<sup>256</sup>

To keep civilian governments under its tutelage, the *Konsey* put in place constitutionally mandated bureaucratic institutions.<sup>257</sup> The MGK was rejuvenated with enhanced powers and military representation. Article 118 of the Constitution stipulated that the Council of Ministers shall give “priority consideration” to the decisions adopted in the MGK’s monthly meetings on the substance and implementation of Turkey’s security policy and “take the requisite decisions.”<sup>258</sup> The revised MGK composed of the President; the Prime Minister; the Ministers of Defence, Interior and Foreign Affairs; the Head of the Chief of Staff; and the heads of the Land, Navy, Air Force and the Gendarmerie. The secretary of the MGK was also a member of

---

<sup>249</sup> Sultan Tahmazoğlu, Ozan Erözden, Sibel İnceoğlu, Fazıl Sağlam, Oktay Uygun, Mesut Gülmez, Fikret İlkiz, Ayşe Kollu, Ece Öztan, Nihan Yancı, *National Report: Turkey* (Union of Turkish Bar Associations, 2004), at p. 2.

<sup>250</sup> 1982 Constitution, Preamble, at para. 8.

<sup>251</sup> *Ibid*, at para. 3.

<sup>252</sup> Associations and trade unions were banned from pursuing political aims, engaging in political activities, receiving support from or giving support to political parties and taking joint action with other civil society organizations for political purposes. Articles 33 and 52, respectively.

<sup>253</sup> Özbudun, “Turkey’s Search for a New Constitution”, at p. 41.

<sup>254</sup> 1982 Constitution, at Article 68(4).

<sup>255</sup> *Ibid*, at Article 69(1).

<sup>256</sup> *Ibid*, at Article 69(2).

<sup>257</sup> For a view that the Constitution “clearly reflected the authoritarian, statist, and tutelary mentality of its founders”, see Özbudun, “Turkey’s Search for a New Constitution”, at p. 41.

<sup>258</sup> The 2001 constitutional amendments adopted to enhance Turkey’s prospects for the opening of accession negotiations with the EU formally lessened the weight of the MGK’s decisions by stipulating that the Council of Ministers shall “consider” them. *Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Değiştirilmesi Hakkında Kanun* [Law on the Amendment of Certain Provisions of the Constitution of the Republic of Turkey], no. 4709, 3 October 2001, Official Gazette, no. 24556, 17 October 2001, at Article 32 (1) (hereafter “Law no. 4709”).

the military, though he lacked voting rights.<sup>259</sup> New institutions ranging from the Board on Higher Education (*Yüksek Öğretim Kurumu-YÖK*) to the Supreme Council of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu-HSYK*) established the military's grip on virtually all sectors of society. According to Article 159 of the Constitution, HSYK was made up of seven members, including the Minister of Justice, his deputy and representatives of the high courts. It had powers over the admission to the profession, the appointment, transfer, disciplining promotion and dismissal of judges and prosecutors. Its decisions were final and exempt from judicial review.<sup>260</sup>

The President of the Republic was vested with the power to appoint the Chairman and some members of YÖK, the presidents of all public universities,<sup>261</sup> all the judicial members of the HSYK (from among candidates proposed by the high courts), one-fourth of the Council of State (the highest administrative court), the chief Public Prosecutor of the Court of Cassation and his/her deputy from among internally nominated candidates and the judges of the AYM (three of them directly, the remaining eight among candidates nominated by the high courts and YÖK). The holding of the presidential seat by the *Konsey*'s own Kenan Evren ensured the military's control of these key institutions at least until 1989, when the President's term would end. The military vested itself with significant constitutional powers, privileges and immunities "as a price for relinquishing power."<sup>262</sup> Its decisions and acts were exempt from the review of the Court of Accounts<sup>263</sup> and the State Supervisory Council.<sup>264</sup> Finally, as stated earlier, the *Konsey* exempted all laws and decrees it had adopted from the AYM's constitutional review.

According to Işıkse, under the 1982 Constitution, the state of exception, hitherto nominally provisional,<sup>265</sup> became a "constitutionally mandated exemption from constitutional guarantees of basic rights."<sup>266</sup> Articles 119 through 122 govern this regime, providing for four types of state of exception, the first two of which are relevant for this study: state of emergency, state of siege, state of mobilisation and state of war.<sup>267</sup> The executive, subject to the approval of the

---

<sup>259</sup> The 2001 constitutional amendments changed the numerical balance in favour of the civilians by adding the Minister of Justice and Deputies of the Prime Minister among the MGK members. *Ibid*, at Article 32(2).

<sup>260</sup> The composition and powers of the HSYK were significantly revised by the AKP government through constitutional amendments approved in a referendum in 2010. These changes are discussed in Section 2.5.3.

<sup>261</sup> Turkey did not have private universities until the 1990s.

<sup>262</sup> Özbudun, "Turkey's Search for a New Constitution", at p. 43.

<sup>263</sup> Article 160 (3) of the 1982 Constitution (stipulating that the "procedure for auditing, on behalf of the Turkish Grand National Assembly, of State property in possession of the Armed Forces shall be regulated by law in accordance with the principles of secrecy required by National Defence").

<sup>264</sup> Article 108(2) exempts the TSK and all judicial organs from the jurisdiction of the State Supervisory Council which is attached to the Office of the Presidency and tasked, upon authorization by the President, with conducting inquiries, investigations and inspections of all public bodies on their observance of the rule of law.

<sup>265</sup> While the 1961 Constitution enabled the declaration of a state of emergency, this power was not revoked within the period this constitution was in effect. The only state of exception applied before 1980 was the state of siege. Therefore, the AYM's case law on state of exception under the 1961 Constitution was limited to martial law.

<sup>266</sup> Işıkse, "Between Text and Context", at p. 719.

<sup>267</sup> A detailed examination of the martial law regime is beyond the scope of this study. For more on the martial law and its differences from the state of emergency, see Tanör, "Who's in Charge in Turkey?", and Gemalmaz, *The Institutionalization Process of the "Turkish Type of Democracy"*.

legislature, may declare a state of emergency under two strict conditions: in the event of natural disaster, dangerous epidemic diseases or a serious economic crisis<sup>268</sup> or on account of widespread acts of violence aimed at the destruction of the free democratic order or of fundamental rights and freedoms, or the serious deterioration of public order.<sup>269</sup> The Constitution requires the immediate parliamentary approval of a state of emergency, sets the maximum duration of the initial proclamation as six months, allows extensions by the Parliament for a maximum of four months each time and authorizes the executive to issue decrees having the force of law “on matters necessitated by the state of emergency” subject to immediate parliamentary approval.<sup>270</sup> As Sevtap Yokuş has pointed out, the Constitution exempts emergency decrees from the restrictions it imposes on decrees declared by the executive during times of normalcy.<sup>271</sup> Under Article 91, the fundamental rights protected under the Constitution “cannot be regulated by decrees having force of law, except during periods of martial law and states of emergency.” Furthermore, the Constitution precludes the constitutional review of emergency decrees by ruling that “no action shall be brought before the Constitutional Court alleging the unconstitutionality as to the form or substance of decrees having the force of law, issued during a state of emergency, martial law or in time of war”.<sup>272</sup>

The 1982 Constitution also introduced a broad suspension and derogations clause which, according to Gemalmaz, “forms a legal regime by itself.”<sup>273</sup> Under Article 15(1), “in times of war, mobilisation, martial law, or state of emergency the exercise of fundamental rights and freedoms can be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation, which derogate the guarantees embodied in the Constitution, provided that obligations under international law are not violated.” Thus, in addition to derogating from their obligations under the Constitution, the authorities are allowed to suspend fundamental rights and liberties altogether. This extraordinary breadth of executive authority stands in contrast to the ECHR which requires a threat to “the life of the nation” for the revocation of emergency powers and limits derogation powers to measures “*strictly* required by the exigencies of the situation.”<sup>274</sup> The combination of Article 13 concerning the restriction of rights and liberties at times of normalcy and Article 15 concerning their restriction or suspension during emergency rule creates, what Yokuş has named, two “overlapping limitation regimes” within one constitution.<sup>275</sup>

---

<sup>268</sup> 1982 Constitution, at Article 119.

<sup>269</sup> Ibid, at Article 120.

<sup>270</sup> Ibid, at Article 121. The executive’s powers to declare a state of siege (martial law) is laid out in Article 122. Subject to the immediate parliamentary approval, the Council of Ministers can declare a state of siege “in the event of widespread acts of violence which are more dangerous than the cases necessitating a state of emergency and which are aimed at the destruction of the free democratic order or the fundamental rights and freedoms embodied in the Constitution.”

<sup>271</sup> Sevtap Yokuş, *Avrupa İnsan Hakları Sözleşmesi’nin Türkiye’de Olağanüstü Hal Rejimine Etkisi* [The Impact of the European Convention on Human Rights on Turkey’s Emergency Rule Regime] (Beta Basım Yayım, 1996), at pp. 98-99.

<sup>272</sup> 1982 Constitution, at Article 148. This article was among the provisions added in a secret session by the *Konsey* to the draft constitution prepared by the Consultative Assembly. See *Section 2.2.2.1*.

<sup>273</sup> Gemalmaz, “State of Emergency Rule in the Turkish Legal System”, at p. 122.

<sup>274</sup> ECHR, at Article 15(1) (emphasis added).

<sup>275</sup> Yokuş, *Avrupa İnsan Hakları Sözleşmesi’nin*, at p. 9.

A crucial institutional component of the state of exception under the Constitution was the State Security Court (*Devlet Güvenlik Mahkemesi-DGM*)<sup>276</sup> which had jurisdiction over crimes against the state. Original Article 143 conferred on the DGMs jurisdiction over “offences against the indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the State.”<sup>277</sup> The presence of a military judge on the bench of these courts and the suspension of the due process guarantees for defendants in ‘ordinary’ cases created a constitutionally sanctioned dual criminal justice system. While the legal framework for trying future political dissidents was thus laid out in advance, the drafters also shielded state agents from prosecution by inserting into the Constitution an impunity clause.<sup>278</sup>

The 1982 Constitution was by no means the junta’s sole legacy. Before they stepped down, the generals enacted a wide range of special laws to entrench their imprint on Turkey’s politico-legal regime. Making use of authorizations they had placed in the Constitution and not leaving their chances to their civilian successors, the generals adopted a law establishing the DGM in June<sup>279</sup> and a law on emergency rule in October<sup>280</sup> 1983, both of which are discussed in detail in Chapter 3. The generals also enacted a host of legislation to further restrict the human rights they had nominally recognized. In addition to laws specifically targeting the political and cultural rights of the Kurds, which are analysed in Chapter 3, they adopted laws establishing the High Court of Appeals and the HSYK, as well as laws concerning public broadcasting, trade

---

<sup>276</sup> These courts had for the first time been introduced to the Turkish legal system on 11 July 1973, following the 1971 military intervention, through a provision added to the 1961 Constitution. In 1975, the AYM had annulled, on procedural grounds, the law establishing these courts. AYM, E. 1974/35, K. 1975/126, 6 May 1975.

<sup>277</sup> The legislative intent behind this provision demonstrated the drafters’ care in proactively attributing legality to possible deviations from the rule of law in the future: “There may be acts affecting the existence and stability of a State such that when they are committed special jurisdiction is required in order to give judgment expeditiously and appropriately. For such cases it is necessary to set up National Security Courts. According to a principle inherent in our Constitution, it is forbidden to create a special court to [give judgment on] a specific act after it has been committed. For that reason the National Security Courts have been provided for in our Constitution to try cases involving the above-mentioned offences. Given that the special provisions laying down their powers have [thus] been enacted in advance and that the courts have been created before the commission of any offence ... they may not be described as courts set up to deal with this or that offence after the commission of such offence.” The statement of reasons for the establishment of the DGM, as cited at ECtHR, *Incal v. Turkey*, Application no. 41/1997/825/1031, Judgment, 9 June 1998, at para. 26. Here, the ECtHR referred to DGM as National Security Courts.

<sup>278</sup> Article 129(6) provides that “[p]rosecution of public servants and other public officials for alleged offences shall be subject, except in cases prescribed by law, to the permission of the administrative authority designated by law.” For the practice of administrative boards tasked with reviewing human rights complaints brought against civil servants, see Joseph R. Crowley Program, “Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey”, *Fordham International Law Journal*, vol. 22, no. 5 (1998), pp. 2129-2269, at pp. 2176-2183. On the impunity regime created by the practice of these boards, see Chapter 5. On the ECtHR’s jurisprudence on this issue, see Chapter 6.

<sup>279</sup> *Devlet Güvenlik Mahkemelerinin Kuruluş ve Yargılama Usulleri Hakkında Kanun* [Law on the Establishment of State Security Courts and their Adjudication Procedures], no. 2845, 16 June 1983, Official Gazette, no. 18081, 18 June 1983.

<sup>280</sup> *Olağanüstü Hal Kanunu* [State of Emergency Law], no. 2935, 25 October 1983, Official Gazette, no. 18204, 27 October 1983.

unions, associations, the election of members of the Parliament, and freedom of assembly and protest.<sup>281</sup> By the time the junta stepped down from power, they had designed a new constitutional and legislative regime.

### 2.2.3 Turkey's Constitutional Regime and the Jurisprudence of its Constitutional Court

The AYM was established under the 1961 Constitution and became functional on 25 April 1962. It was designed as an independent institution to counter-balance democratic majoritarianism and safeguard the Republican principles on behalf of the bureaucratic and military elite. According to Zühtü Arslan, a former constitutional scholar who presides the AYM since 2015, the Court's establishment was the outcome of "a prevalent perception among the military elite" that the DP "had abused power in an effort to eliminate political opposition and (more importantly) to destroy the basic principles of the republic".<sup>282</sup>

The AYM was designed as an independent body with expansive powers, including to review the constitutionality of laws, to dissolve political parties and to review the Parliament's decision to strip the immunity and seats of deputies.<sup>283</sup> Although it was also authorized to conduct a rights-oriented judicial activism,<sup>284</sup> the AYM has refrained from doing so and has been conservative on civil rights and liberties. In her survey of the AYM's docket during 1962-1982 and a subset of its rulings concerning the Kurdish and Islamist opposition movements in the 1990s, Ceren Belge has demonstrated the Court's "selective activism" in protecting the autonomy of Republican groups (civil service, judiciary, universities) while not upholding the rights of the regime's outsiders (leftists, Islamists, Kurds) and DP members.<sup>285</sup> Contesting the prevalent assumptions about the positive causation between judicial independence and rights protection, she has shown how the independent and powerful AYM selectively used its powers to consolidate Kemalism "as the only permissible political ideology"<sup>286</sup> and did so "regardless of the ups and downs caused by military interventions."<sup>287</sup>

---

<sup>281</sup> For a list of the restrictions introduced by these laws on the rights to associate, strike, assemble and demonstrate, see Gemalmaz, *The Institutionalization Process of the "Turkish Type of Democracy"*, at p. 16.

<sup>282</sup> Zühtü Arslan, "Conflicting Paradigms: Political Rights in the Turkish Constitutional Court", *Critique: Critical Middle Eastern Studies*, vol.11, no.1 (2002), pp. 9-25, at p. 12. Appointed to the AYM in April 2012, Arslan became the President of the Court on 10 February 2015.

<sup>283</sup> Articles 147, 57 and 81 of the 1961 Constitution; Articles 148, 69 and 85 of the 1982 Constitutions.

<sup>284</sup> Particularly under Article 11(2) of the 1961 Constitution, which prohibited the infringement of "the *essence* of any right or liberty not even when it is applied for the purpose of upholding public interest, morals and order, social justice as well as national security" (emphasis added).

<sup>285</sup> Ceren Belge, "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey", *Law and Society Review*, vol. 40, no. 3 (2006), pp. 653-692. The Court's defense of state employees also extended to cases brought by citizens against civil servants engaged in abusive practices. Its biased approach towards rights and liberties of leftist political dissidents was most apparent in a number of annulment cases brought by the Workers Party of Turkey in the 1960s against restrictive provisions of a host of laws including Article 312 of the Penal Law, which the ECtHR found to violate freedom of expression in successive rulings. *Ibid*, at pp. 673-674.

<sup>286</sup> Belge, "Friends of the Court", at p. 671.

<sup>287</sup> *Ibid*, at p. 667.

Belge has shown that it was only shifts in political alliances within the Republican actors, in this case the high courts and the military, which gave rise to rare instances where the AYM adopted a judicial activism for expanding the scope of human rights protection. What had led the AYM to deliver “its most expansive interpretations of civil rights and liberties” was not a rights-oriented approach, but rather a reaction to the military’s curtailing of its review powers under the constitutional amendments of 1971.<sup>288</sup> For example, while in 1970 the AYM had declined, on *ultra vires* grounds, to review the constitutionality of martial law declared by the government,<sup>289</sup> by 1972, it was willing to “take on the military”<sup>290</sup> and review the martial law legislation. The Court struck down the provisions setting up military courts and prolonging detention periods, but upheld the restrictions on freedom of speech and publication. Similarly, in 1975, the AYM struck down the law establishing the DGM in entirety, although solely on procedural grounds.<sup>291</sup>

By the 1980 *coup d’état*, the internal divisions within the state were solved and the AYM had returned to its original self as the guardian of Kemalism or, as its current President Zühtü Arslan has once noted, “a watchdog of the regime.”<sup>292</sup> In a number of instances, the Court had to rule on the constitutionality of Provisional Article 15, which precluded the review of interim laws adopted by the military junta between the 1980 *coup* and the general elections of 7 December 1983. In one case, a lower court asked the AYM to annul a provision of the Penal Law on the basis of its incompatibility with the Constitution,<sup>293</sup> whereas in another a pro-Kurdish party facing dissolution contested the constitutionality of the Law on Political Parties in reference to international conventions that Turkey was a party to.<sup>294</sup> Such contestations provided the AYM with an opportunity to not only annul the legislative legacy of the junta in its entirety, but also overturn a direct challenge to its own authority as the supreme judicial authority of the land. Yet, based on a “pozitivist legal reasoning”,<sup>295</sup> the AYM rejected the claims on the ground that the legislature had the sole competence to amend or repeal the contested laws or Provisional Article 15 itself. Hiding behind the principle of *ultra vires*, the Court sustained the authoritarian legal regime created by the military dictatorship, effectively treating Provisional Article 15 as a permanent constitutional clause.<sup>296</sup> During this period, the AYM disregarded the pleas, including from within the ECtHR, to adopt a “reformist stance” by lifting the restrictions imposed on human rights by laws protected under Provisional Article 15 and thereby remedy the “fundamental disagreements” between itself and Strasbourg.<sup>297</sup>

---

<sup>288</sup> Ibid, at pp. 680-681.

<sup>289</sup> AYM, E. 1970/44, K. 1970/42, 17 November 1970. The judgment “opened the door for an arbitrary regime”. Gemalmaz, “State of Emergency Rule in the Turkish Legal System”, at pp. 130-131.

<sup>290</sup> Belge, “Friends of the Court”, at p. 681.

<sup>291</sup> AYM, E. 1974/35, K. 1975/126, 6 May 1975.

<sup>292</sup> Arslan, “Conflicting Paradigms”, at p. 15.

<sup>293</sup> AYM, E. 1990/32, K. 1990/25, 16 October 1990 (but see the two dissenting opinions questioning the supremacy of the Constitution in a legal system where unconstitutional laws are knowingly excluded from the scope of constitutional review).

<sup>294</sup> AYM, E. 1992/1, K. 1993/1, 14 July 1993 (HEP).

<sup>295</sup> Gemalmaz, “State of Emergency Rule in the Turkish Legal System”, at p. 129.

<sup>296</sup> Provisional Article 15 was finally repealed through a constitutional amendment approved in a national referendum held on 12 September 2010.

<sup>297</sup> Rıza Türmen, “Avrupa İnsan Hakları Sözleşmesi’nin İç Hukukumuzda Etkileri” [The Impact of the European Convention on Human Rights to our Domestic Law], *Anayasa Yargısı*, no. 17 (2000), pp. 32-40, at p. 33 (addressing the AYM in his capacity as the ECtHR judge from Turkey).

Since the 1982 Constitution, in letter and spirit, was much more tuned with the ideological outlook of the high judges than its predecessor,<sup>298</sup> the AYM's endorsement of the suppression of dissent continued unabated. That the core of the problem lay not so much in the letter and spirit of the constitutions but in the partial mind sets of the high court was evident, for instance, in its case law on fundamental rights. The AYM displayed a remarkable judicial activism in restricting political dissent by generously invoking its powers to dissolve political parties advocating the rights of the outsiders of the regime, first and foremost the Kurds and the leftists, but also the Islamists.<sup>299</sup> On the basis of an expansive reading of the constitutional principles of laicism and national unity, the Court closed down 20 political parties since 1983,<sup>300</sup> 13 of which were Kurdish or pro-Kurdish parties.<sup>301</sup> In the words of its current President Arslan, while paying "lip service" to the ECHR as a source of legitimization,<sup>302</sup> the AYM actually followed an "ideology-based paradigm" in its review of political parties.<sup>303</sup>

For a long time, the status of international conventions in the domestic legal order was a matter of contention among constitutional law scholars in Turkey.<sup>304</sup> Before it was amended in 2004, Article 90 of the Constitution read as follows: "International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional." While there have been instances where high courts stressed the supremacy of the ECHR over domestic laws and even the constitution,<sup>305</sup> there was no uniform judicial view or practice with regards to which body of

---

<sup>298</sup> Işıksel, "Between Text and Context", at p. 716.

<sup>299</sup> On the AYM's dissolution of Kurdish and leftist parties on charges of separatism and the Islamist parties on charges of Islamic fundamentalism, see Ödül Celep, "The Political Causes of Party Closures in Turkey", *Parliamentary Affairs*, vol. 67, no. 2 (2014), pp. 371-390; Dicle Koğacıoğlu, "Progress, Unity, and Democracy: Dissolving Political Parties in Turkey", *Law and Society Review*, vol. 38, no. 3 (2004), pp. 433-462; Dicle Koğacıoğlu, "Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain", *International Sociology*, vol. 18, no. 1 (2003), pp. 258-276; Arslan, "Conflicting Paradigms"; Yusuf Şevki Hakyemez and Birol Akgün, "Limitations on the Freedom of Political Parties in Turkey and the Jurisdiction of the European Court of Human Rights", *Mediterranean Politics*, vol.7, no. 2 (2002), pp. 54-78.

<sup>300</sup> The rulings are accessible on the Court's website at <http://www.anayasa.gov.tr/icsayfalar/kararlar/kbb.html>. Since its foundation in 1961, the AYM dissolved a total of 27 political parties. Before the establishment of the highest court, four political parties were closed down by lower courts during the period of 1923-1960. Thus, the total number of parties closed down by the state since the establishment of the Republic is 31. Celep, "The Political Causes of Party Closures in Turkey".

<sup>301</sup> The AYM's judgments concerning the dissolution of Kurdish and pro-Kurdish political parties and the ECtHR's review of this jurisprudence are discussed in Chapter 3.

<sup>302</sup> Arslan, "Conflicting Paradigms".

<sup>303</sup> Ibid, at p. 11 (arguing that this paradigm reflected "a positivist, one-dimensional, monolithic, and authoritarian outlook").

<sup>304</sup> See e.g. Tülay Tuğcu, "Speech Given on the Occasion of the Opening of the Judicial Year", 20 January 2006, in ECtHR, *Annual Report 2005* (Registry of the ECtHR, 2006), pp. 28-34 (hereafter "Opening Address"); Zühtü Arslan, "Avrupa İnsan Hakları Sözleşmesi ve Türk Anayasa Yargısı: Uyum Sorunu ve Öneriler" [European Convention in Human Rights and Turkish Constitutional Jurisprudence: Harmonization Problem and Proposals], *Anayasa Yargısı*, vol. 17 (2000), pp. 274-93; Fazıl Sağlam, "Avrupa İnsan Hakları Mahkemesi'nin Türkiye'de Kapatılan Partilere İlişkin Kararlarının Partiler Hukukuna Etkisi" [The Impact of the European Court of Human Rights' Rulings on Dissolved Parties in Turkey to the Party Laws], *Anayasa Yargısı*, vol. 16 (1999), pp. 189-216.

<sup>305</sup> Council of State [*Danıştay*], 5th Chamber, E. 1986/1723, K. 1991/933, 22 May 1991 (ruling that states are under an obligation to extend to their citizens the rights and liberties guaranteed under international conventions they have ratified and to undertake the necessary arrangements in their domestic legal systems towards that end. Stating in dictum that Article 90 of the Constitution requires the execution of international conventions duly put into effect even where they are in conflict with the constitution.)

law should prevail in case of a conflict.<sup>306</sup> The AYM, according to its former President Tülay Tuğcu, felt it was “not formally bound by the judgments of the Strasbourg Court”<sup>307</sup> and assigned them instead a persuasive authority of interpretation. The AYM’s unwillingness to treat the ECHR as a supra-constitutional norm<sup>308</sup> was apparent in political party dissolution cases. For example, following the ECtHR’s 1998 ruling which found the dissolution of the Turkish United Communist Party to be in violation of freedom of association,<sup>309</sup> the party applied to the AYM for retrial. In a unanimous judgment issued on 16 February 1999, the AYM rejected the request on grounds that Article 11 of the ECHR was not directly applicable.<sup>310</sup>

### 2.3 Turkey’s Human and Minority Rights Policies

During the late Ottoman and early Republican era, the European powers had a partially positive impact by forcing Turkey to recognize minority rights, but limiting their involvement to non-Muslim communities. From the 1878 Treaty of Berlin which obliged the Ottomans to accept a European protectorate over their Christian subjects<sup>311</sup> to the 1923 Treaty of Lausanne which forced the soon-to-be-Republic to grant minority status to Christians and Jews, international treaties imposed by European powers on the Ottoman/Turkish state were blind to the plight of other minorities. At the same time, Turkey has never fully implemented even this limited *de jure* minority protection. From the early 1930s onwards, the rise of fascism in Europe enabled Turkey to complete its interrupted Turkification policy seeking to create a homogenous nation and gave it a free hand in disregarding the minority rights it had been forced to grant under Lausanne.

The post-1945 world gave rise to an international human rights regime under the banner of the UN, followed by a European one under the rubric of the CoE. As war-torn Western European countries oriented themselves towards democracy, and embraced human rights and the rule of law as bedrock principles, the new regional legal order brought to the surface contradictions between Turkey’s foreign policy aspirations and domestic policies. The Turkish state faced a dilemma: how could it remain connected to Europe without altering its domestic policies? Fortunately for it, Turkey’s geostrategic significance for the North Atlantic Treaty Organization (NATO) largely insulated it against external pressure during the Cold War. Notwithstanding

---

<sup>306</sup> For a brief discussion of the three different approaches to the implications of the phrase “having the force of law” for the resolution of a potential conflict between international conventions and domestic law, see Tuğcu, “Opening Address.”

<sup>307</sup> Tuğcu, “Opening Address”, at p. 33.

<sup>308</sup> Arslan, “Avrupa İnsan Hakları”, at p. 274; Tuğcu, “Opening Address”, at p. 33.

<sup>309</sup> ECtHR, *United Communist Party of Turkey and Others v. Turkey*, Application no. 133/1996/752/951, Judgment, 30 January 1998.

<sup>310</sup> Türmen, “Avrupa İnsan Hakları Sözleşmesi’nin”, at p. 33.

<sup>311</sup> Convened after the Ottoman Empire’s loss of the third Russo-Turkish war, the Berlin Congress of June-July 1878 aimed at resolving the ‘Eastern Question’. The Ottoman Empire had lost considerable territory and was forced to sign the Treaty of Berlin on 13 July 1878, which required it to enhance the liberties of its Christian subjects, and entrusted the European powers with the task to protect the Ottoman Armenians in the eastern provinces. On the Eastern Question and the Berlin Congress, see M. Şükrü Hanioglu, *A Brief History of the Late Ottoman Empire* (Princeton, 2008), at pp. 110-123. On the implications of the Treaty for the future of the Armenians leading up to the genocide, see Donald Bloxham, *The Great Game of Genocide: Imperialism, Nationalism, and the Destruction of the Ottoman Armenians* (Oxford University Press, 2005).

the international community's lip service to human rights, sovereignty was the supreme norm governing inter-state affairs, giving the Turkish military and civilian governments a free hand in crushing democratic dissent. The initial weakness of the European human rights system also enabled Turkey to get away with minimal commitments to ensure its membership to the club without subjecting its policies to external oversight. While it was one of the early signatories of the ECHR, Turkey was among the last to recognize the right of individual petition and the very last member state to accept the ECtHR's compulsory jurisdiction.

### 2.3.1 Turkey's Minority Policies: Historical Origins

Modern Turkey was founded on the remnants of a vast empire, which had lost a majority of its territory and population in the course of a series of wars.<sup>312</sup> The republic was established amid feelings of entrapment in a relatively small territory and anxiety over the prospect of continuing European meddling in Turkey's internal affairs with the pretext of protecting its non-Muslim citizens.<sup>313</sup> The losses suffered during the great wars<sup>314</sup> and the misgivings about the loyalty of Christian citizens<sup>315</sup> brought about a defensive impetus to eradicate non-Muslims from Anatolia and to homogenize the population of the new republic. Critical in this process were the genocide of Armenians in 1915<sup>316</sup> and the forced migration of Greeks pursuant to a population exchange agreement in 1923.<sup>317</sup> Notwithstanding, a significant non-Muslim community remained within the borders of the new nation, which subsequently became the object of fierce negotiations at the 1923 Lausanne Peace Conference.<sup>318</sup>

At Lausanne, the republican powers were compelled by the European powers to grant minority status to non-Muslim citizens. While the Turkish delegation eventually gave in to this diplomatic pressure, it was adamant in the non-negotiability of according minority rights to any other group.<sup>319</sup> The official policy confirmed in the Treaty of Lausanne defined minorities solely on the basis of religion and refused to recognize the ethnic, linguistic and denominational

---

<sup>312</sup> Section 2.3.1 draws on my earlier work. Dilek Kurban, "Unraveling a Trade-off: Reconciling Minority Rights and Full Citizenship in Turkey," *European Yearbook of Minority Issues*, vol. 4, no. 2004/5 (2006), pp. 341-372.

<sup>313</sup> The minutes of debates in the Turkish Grand National Assembly in the early 1920s demonstrate how the parliamentarians perceived the elimination of non-Muslim minorities as "an existentialist question for Turkey." Ayhan Aktar, *Varlık Vergisi ve 'Türkleştirme' Politikaları* [The Wealth Tax and 'Turkification' Policies] (İletişim Yayınları, 2000), at pp. 42-43.

<sup>314</sup> During 1912-22, the Ottoman Empire/Turkey was engaged in a series of wars, including the Balkan Wars, World War I and the National Liberation War, only in the last of which it was victorious.

<sup>315</sup> The collaboration of some non-Muslims with the occupying forces against the national liberation movement in the early 1920s gave rise to a deep suspicion of their loyalty to the nation. Aktar, *Varlık Vergisi*, at p. 57.

<sup>316</sup> On the Armenian genocide, see Taner Akçam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (Metropolitan Books, 2006); Bloxham, *The Great Game of Genocide*; Richard G. Hovannisian (ed.), *The Armenian Genocide: History, Politics, Ethics* (St. Martin's Press, 1992); Henry Morgenthau, *Ambassador Morgenthau's Story* (Doubleday, Page & co., 1918).

<sup>317</sup> Under "The Agreement and Protocol on the Exchange of Greek and Turkish Populations" signed in Lausanne on 30 January 1923, Greece and Turkey practically discarded their respective Turkish and Greek minorities, with the exception of Turks living in the Western Thrace region of Greece and Greeks living in Istanbul.

<sup>318</sup> The Treaty of Lausanne was signed between Turkey and the Allies (The British Empire, France, Italy, Japan, Greece, Romania, and the Serb-Croat-Slovene State) on 24 July 1923. Treaty of Peace with Turkey, 24 July 1923, 28 *L.N.T.S.* 11 (1924), at p. 11 (hereafter "Treaty of Lausanne").

<sup>319</sup> Philip Robins, "The Overlord State: Turkish Policy and the Kurdish Issue", *International Affairs*, vol. 69, no. 4 (1993), pp. 657-676, at p. 660.

differences among the majority Muslim population. This novel definition<sup>320</sup> sought, and effectively achieved, the exclusion of ethnic minorities<sup>321</sup> from the scope of Lausanne.

The principal lesson the founders drew at Lausanne was the necessity to design policies to ensure the non-emergence of any other minority to prevent foreign intrusion in Turkey's internal affairs.<sup>322</sup> Portraying minority protection as a once and for all granting of special treatment limited to non-Muslims, the authorities consolidated various ethnic groups who shared the common Muslim identity as 'Turks' and subjected them to homogenization policies. Inherent in this dichotomous legal regime was a trade-off between minority status and full citizenship: non-Muslims have had to pay the high price of 'second-class citizenship' in return for the minority rights they have been accorded, and various ethnic groups have been compelled into an implicit agreement to suppress their cultural differences in return for 'full citizenship'.<sup>323</sup>

In essence, the Treaty of Lausanne was a human rights treaty envisioning full citizenship rights for non-Muslims. It granted them substantial negative as well as positive rights, and conveyed affirmative obligations on the government to ensure the enjoyment of these rights.<sup>324</sup> Yet, Turkey has never fulfilled these imperatives. It restricted the scope of the Treaty to Jews, Armenians and Greek Orthodox, excluding remaining non-Muslim communities, and moreover systematically violated the rights it *de jure* granted these three groups. The Turkish state has interfered in the internal affairs of the three communities, significantly restricted their freedom of religion and systematically confiscated properties belonging to their religious, educational, cultural and charitable foundations.<sup>325</sup> As a result, non-Muslims were left with the least desirable outcome: Not only were they unable to fully enjoy minority rights, but they were also clearly identifiable targets for legal and social discrimination due to the 'minority' label attached to them. While in law they are citizens provided with minority rights, in practice they are neither full citizens nor minorities whose rights are fully protected.

---

<sup>320</sup> Similar minority treaties signed at the time between other defeated nations and the Allies under the auspices of the League of Nations defined minorities on the basis of race, religion and language. See e.g. The Minorities Treaty between the Allies and the Republic of Poland, signed on 28 June 1919, at Article 8.

<sup>321</sup> Turkey's majority Muslim population comprises of dozens of ethnic and linguistic communities, who are further divided along religious and denominational lines with overlapping ethno-denominational identities.

<sup>322</sup> Aktar, *Varlık Vergisi*, at p. 111.

<sup>323</sup> The root of this policy dates back to the *millet* system of the Ottoman Empire, which classified subjects on religious grounds, granting a degree of autonomy to three non-Muslim communities – the Armenians, Greeks, and Jews – and considering Muslim subjects as a homogenous unity regardless of their ethnic and linguistic differences. Kemal Kirişçi and Gareth M. Winrow, *The Kurdish Question and Turkey: An Example of a Trans-State Ethnic Conflict* (Frank Cass, 1997). Accordingly, all Muslims belonged to the "Muslim nation" and were considered to be a part of the "first class majority", whereas non-Muslims were grouped into different *millets* based on their sects and constituted "second class subjects". Baskin Oran, *Türkiye'de Azınlıklar: Kavramlar, Teori, Lozan, İç Mevzuat, İctihat, Uygulama* [Minorities in Turkey: Concepts, Theory, Lozan, Domestic Laws, Precedent, Implementation] (İletişim Yayınları, 2004), at p. 48.

<sup>324</sup> Most notably, the Treaty of Lausanne granted non-Muslims the right to equal protection and non-discrimination (Articles 39 and 40), the right to establish, manage and control their private social, charitable, religious and educational institutions (Article 40), the right to establish private schools and to give education in their own language (Article 40), the conditional entitlement to government funding to receive primary level education in their own language (Article 41), and the right to exercise their religion freely (Article 43).

<sup>325</sup> For a discussion of these policies, see Dilek Kurban, "Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey's Path to the European Union," *Columbia Human Rights Law Review*, vol. 35, no.101 (2003), pp. 151-214; Kurban, "Unraveling a Trade-off".

Moreover, their perception as agents of foreign powers had tremendous repercussions for the safety of Turkey's non-Muslim communities, particularly during the single-party era. In 1934, the Jewish inhabitants of the Thrace region were subject to looting, physical attacks, commercial boycotting and eventually forced expulsion,<sup>326</sup> while in 1942 a disproportionate wealth tax was levied on Turkey's non-Muslim citizens.<sup>327</sup> A total 2,507 non-Muslims who were not able to pay the levy within the prescribed one month-period were sent to labour camps across Turkey, where 21 died.<sup>328</sup> The judicial, political and social harassment of these communities did not end after transition to multi-party politics. On 6-7 September 1955, government-sanctioned violent mobs attacked the non-Muslim population of Istanbul. While the main target were Greeks, Armenians and Jews were also attacked. Within hours, 5,538 shops and houses were damaged; 73 churches, two monasteries and one synagogue were burned down; two Greek cemeteries and eight sacred Greek fountains were completely destroyed.<sup>329</sup> Starting from the 1960s, properties belonging to the non-Muslim communities have been systematically confiscated. Established with the permits of various Ottoman sultans and referred to as "community foundations" (*cemaat vakıfları*), non-Muslim foundations were placed in 1935 under the jurisdiction of the Directorate General of Foundations (*Vakıflar Genel Müdürlüğü-VGM*). The next year, upon the VGM's direction, these foundations declared to the state all the property they owned at the time.<sup>330</sup> Known as the "1936 Declarations", these documents were forgotten in state archives until their rediscovery in the late 1960s with the outbreak of hostilities between Greece and Turkey over Cyprus. The VGM decided that the 1936 Declarations were in effect founding charters and that the community foundations' entitlements were limited to whatever property they had declared in 1936 and any property they had subsequently acquired would be taken away from them.<sup>331</sup> In 1974, the High Court of Appeals upheld the policy on the ground that "legal entities established by non-Turks have been prohibited from owning property" in Turkey, astonishingly equating citizenship with religion and effectively de-nationalizing Turkey's non-Muslim citizens.<sup>332</sup>

What these incidents and policies had in common were the collective targeting of non-Muslims, the state's involvement either directly in the design and implementation of laws and policies or indirectly in the tacit approval of criminal acts, and the presence of triggering international

---

<sup>326</sup> While Bali explains the attacks with the rising anti-Semitism in Europe, Aktar argues that the incidents resulted from a strategic military decision to clean Thrace of all 'foreign elements' against a possible attack by the fascist government in Italy. See Rıfat N. Bali, *Devlet'in Yahudileri ve "Öteki" Yahudi* [The Jews of the State and the "Other" Jew] (İletişim Yayınları, 2004), at p. 199; Aktar, *Varlık Vergisi*, at pp. 71-99.

<sup>327</sup> *Varlık Vergisi Kanunu* [The Wealth Levy Law], no. 4305, 11 November 1942, Official Gazette, no. 5255, 12 November 1942.

<sup>328</sup> Aktar, *Varlık Vergisi*, at pp. 135-153. The policy ended *de facto* in December 1943 with the release of the remaining non-Muslims from the labour camps, and *de jure* with the annulment of the law in 15 March 1944. Ibid.

<sup>329</sup> Ali Tuna Kuyucu, "Ethno-religious 'Unmixing' of 'Turkey': 6-7 September Riots as a Case in Turkish Nationalism", *Nations and Nationalism*, vol. 11, no. 3 (2005), pp. 361-380, at p. 362. See also Dilek Güven, *Cumhuriyet Dönemi Azınlık Politikaları ve Stratejileri Bağlamında 6-7 Eylül Olayları* [The 6-7 September Incidents in the Context of the Minority Policies and Strategies of the Republican Era] (İletişim Yayınları, 2006).

<sup>330</sup> Azınlık Hakları Çalışma Grubu [Working Group on Minority Rights], *Cemaat Vakıfları: Bugünkü Sorunları ve Çözüm Önerileri* [Community Foundations: Current Problems and Proposals for Solutions] (İstanbul Barosu İnsan Hakları Merkezi, 2002).

<sup>331</sup> Ibid.

<sup>332</sup> Oran, *Türkiye'de Azınlıklar*, at pp. 101-102.

events such as the rising anti-Semitism in Europe and the outbreak of hostilities between Greece and Turkey over Cyprus. The events simultaneously achieved for the state two desired outcomes: the flight of tens of thousands of non-Muslims from the country and the ‘nationalization of the economy’ by way of the transfer of wealth from non-Muslims to Muslims.

### 2.3.2 Turkey’s Foreign Policy on Human Rights Treaties: A Selective Engagement

The stability, security and prestige associated with joining the international political order emerging after World War II led Turkey to join the global and regional intergovernmental institutions as a founding member (the UN and the Organisation for Economic Co-Operation and Development (OECD)<sup>333</sup>) or very soon after their foundation (the CoE<sup>334</sup> and NATO<sup>335</sup>). In a Europe divided by the Cold War, Turkey saw its political, economic and military integration with the West as being in its security interest. Foreign policy considerations – in particular the endeavour to uphold a power balance with Greece – also played a role. To complement these political and military alliances with an economic one, Turkey applied for membership to the European Economic Community (EEC) in September 1959.<sup>336</sup>

Turkey’s engagement with the human rights instruments of these international institutions was the product of an instrumentalist foreign policy driven by *realpolitik* considerations.<sup>337</sup> Where Turkey had a leeway, it refrained from making a legal commitment until its political interests required otherwise. This is evident, for example, in the time lag between Turkey’s ratification of the human rights conventions of the CoE and the UN. Although it was among the 50 founding nations which signed the UN Charter in San Francisco on 26 June 1945, Turkey did not sign and ratify the UN’s twin 1966 conventions until 2000.<sup>338</sup> The eventual ratification was solely due to EU pressure. Even then, Turkey followed a policy which sought to ensure that it did not commit itself to obligations that would conflict with its interest in national unity. If the international treaty in question specifically addresses minority rights, Turkey did not sign, as in the case of the CoE’s European Charter for Regional or Minority Languages<sup>339</sup> and the

---

<sup>333</sup> Turkey was among the founding members of the OECD’s predecessor Organization for European Economic Cooperation (OEEC), established on 16 April 1948.

<sup>334</sup> Turkey joined the CoE on 9 August 1949, six days after the organization was founded. It ratified the statute of the CoE on 12 December 1949 through Law no. 5456, which put into effect Turkey’s retrospective membership in the organization as of 8 August 1949.

<sup>335</sup> Turkey joined the US-led NATO on 18 February 1952, three years after the organization was established, though its political and military alliance with the US dates back to the immediate aftermath of World War II. Having belatedly entered the War on the part of the Allies in February 1945, Turkey has not only gained the right to participate in the San Francisco Conference which would lead to the establishment of the UN, but also – together with Greece – benefitted from largescale post-war military and economic US aid under the Marshall Plan in furtherance of the US government’s Truman Doctrine. To enhance its cooperation with the US and increase its chances of acceptance to the NATO, Turkey also participated in the Korean War in 1950.

<sup>336</sup> Turkey’s application came three months after that of Greece in June 1959.

<sup>337</sup> Füsün Türkmen, “Turkey’s Participation in Global and Regional Human Rights Regimes”, in Zehra F. Kabasakal Arat (ed.), *Human Rights in Turkey* (University of Pennsylvania, 2007), pp. 249–261, at p. 252.

<sup>338</sup> Turkey signed both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which were jointly adopted by the UN on 16 December 1966, on 15 August 2000 and ratified them on 23 September 2003.

<sup>339</sup> Opened for signature on 5 November 1992, and entered into force on 3 January 1998.

Framework Convention for the Protection of National Minorities.<sup>340</sup> If the treaty is not on minorities *per se*, but entails provisions granting them certain rights, then the policy is one of signature with reservations with respect to such provisions. Indeed, Turkey entered substantial reservations to Article 27 of the International Covenant on Civil and Political Rights,<sup>341</sup> Articles 13(3)<sup>342</sup> and (4)<sup>343</sup> of the International Covenant on Economic, Social and Cultural Rights and Articles 17, 29 and 30 of the Convention on the Rights of the Child,<sup>344</sup> on the basis of its Constitution<sup>345</sup> and the Treaty of Lausanne. Thus, the combination of the Turkish Constitution and foreign policy is a carefully crafted arrangement that serves a dual purpose. On the one hand, it ensures that Turkey remains in compliance with the Treaty of Lausanne without having to grant constitutional status to the Greek, Armenian, and Jewish minorities. On the other hand, it prevents the widening or deepening of the rights enumerated in Lausanne. In other words, no other sociological minority will get legal minority status *and* the three non-Muslim minorities must be satisfied with the rights already granted to them. As such, these reservations go against the principle laid down by the UN's Human Rights Committee that "[t]he existence of an ethnic, religious or linguistic minority in a given state party does not depend upon a decision by that state party but requires to be established by objective criteria."<sup>346</sup>

In contrast, Turkey signed the ECHR and Protocol No. 1 as early as 1950, and ratified both in 1954.<sup>347</sup> The decision to make a binding commitment to European human rights norms was

---

<sup>340</sup> Opened for signature on 1 February 1995, and entered into force on 1 February 1998.

<sup>341</sup> Article 27 of the ICCPR states that "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

<sup>342</sup> Article 13(3) ICESCR reads: "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions".

<sup>343</sup> Article 13(4) ICESCR reads: "No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."

<sup>344</sup> Articles 17, 29 and 30 of the Convention concern the linguistic, cultural and religious rights of children in minority groups and the rights of their parents to give their children an education in accordance with their cultural identity and language.

<sup>345</sup> In the case of the ICESCR, the reservations specifically cited Articles 3(1), 14(1) and 42(9) of the Constitution. Article 3(1): "The Turkish state, with its territory and nation, is an indivisible entity. Its language is Turkish." Article 14(1): "None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights." Article 42(9): "No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education. Foreign languages to be taught in institutions of training and education and the rules to be followed by schools conducting training and education in a foreign language shall be determined by law. The provisions of international treaties are reserved."

<sup>346</sup> Human Rights Committee, General Comment 23, Article 27 (50<sup>th</sup> session 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1/1994, at p. 38.

<sup>347</sup> *İnsan Haklarını ve Ana Hürriyetleri Koruma Sözleşmesi ve Buna Ek Protokolün Tasdiki Hakkında Kanun* [Law on the Ratification of the Convention on Human Rights and Fundamental Liberties and its Additional Protocol], no. 6366, 10 March 1954, Official Gazette, no. 8662, 19 March 1954. Turkey's ratification was deposited with the CoE on 18 May 1954.

partially related to the weakness of the ECHR system at its inception.<sup>348</sup> The CoE was originally conceived as the regional gatekeeper of democracy and peace rather than a human rights promoter as such. According to Ed Bates, the Western European countries viewed the ECHR “as a basic ‘test of membership’ for the democratic club of European states”<sup>349</sup> and “as a type of ‘alarm bell’” against the re-rise of totalitarianism in the continent.<sup>350</sup> The ECtHR, the only transnational human rights court of its time, was designed as a structurally weak and rather symbolic institution. In accordance with “the compromises of 1950”,<sup>351</sup> the recognition of the right of individual petition and the ECtHR’s jurisdiction was rendered optional for member states which ratified the Convention<sup>352</sup> and the Court would not be created until at least eight member states recognized its jurisdiction. When the Convention entered into force in 1953, the numbers of member states that had accepted the right of individual petition and the jurisdiction of the Court were three and two, respectively.<sup>353</sup> Thus, back in the early 1950s, the prospect of a strong European court scrutinizing member states’ human rights policies, let alone hearing individual complaints, was very distant.

It was not only the weakness of the ECHR system but also, and more so, its aspirations to join the transnational economic and financial institutions established by the Western governments that led Turkey to join the European human rights regime early on.<sup>354</sup> After all, the CoE and the ECHR had emerged from the post-World War II efforts to build a federal Europe based on strong political and economic ties among democratic nations which shared a commitment and to respect for human rights. The Convention was envisioned to be an initial, but crucial, step towards a broader European unity and was expected to be followed by further treaties on political and economic cooperation.<sup>355</sup> Turkey’s joining the CoE and participating in the drafting of the ECHR must be read against this wider political context. For Turkey, the Convention was a bitter pill to be swallowed in its pursuit of joining the emerging European

---

<sup>348</sup> Turkey seems to have spared no effort in ensuring this outcome. The “main Turkish contribution to the establishment of the Convention was in respect of Article 17 of the Convention, with a view to limiting or restricting ... the right of free expression by referring to the Turkish Penal Code.” Gemalmaz, *The Institutionalization Process of the “Turkish Type of Democracy”*, at p. 34.

<sup>349</sup> Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010), at p. 5.

<sup>350</sup> *Ibid.*, at p. 6.

<sup>351</sup> *Ibid.*, at p. 8.

<sup>352</sup> Until the entry into force of Protocol 11 to the ECHR in 1998, the individual petition mechanism and the ECtHR’s jurisdiction remained optional for all CoE member states.

<sup>353</sup> Bates, *The Evolution of the European Convention on Human Rights*, at p. 9. These states were Ireland, Denmark and Sweden; and Ireland and Denmark, respectively.

<sup>354</sup> On Turkey’s motivations for ratifying the ECHR, see Yasemin Özdek and Emine Karacaoğlu, “Turkey”, in Robert Blackburn and Jörg Polakiewicz (eds.), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), pp. 879-914, at p. 879 (that Turkey’s ratification of the ECHR “was clearly related to [its] integration policy ... with the West”); İbrahim Özden Kaboğlu and Stylianos-Ioannis G. Koutnatzis, “The Reception Process in Greece and Turkey”, in Alec Stone Sweet and Helen Keller (eds.), *The Reception of the ECHR in National Legal Orders* (Oxford University Press, 2008), pp. 451-529, at p. 460 (that both Turkey and Greece’s “accession to the CoE and the ECHR was aimed at concealing rule of law deficits and securing their participation in the Western alliance”).

<sup>355</sup> For a detailed overview of the discussions on a European federation led by the European movement, an organisation made up of non-governmental organisations and influential individuals, see Bates, *The Evolution of the European Convention on Human Rights*, at Chapter III.

political and economic cooperation.<sup>356</sup> In fact, Turkey was among the 12 CoE member states which participated in the conference held in Strasbourg for the drafting of the Convention. Here, it was among the seven countries who opposed the creation of a mandatory court and were thus decisive in the establishment of the Court as an optional mechanism.<sup>357</sup>

These low costs and potential high gains associated with engagement offset for Turkey, at least initially, the risks involved in subjugating its domestic policies to international oversight, making it an “unwilling” party of the European human rights regime.<sup>358</sup> At the same time, the risk was there. Therefore, Turkey has for a long time kept its engagement at a minimum. In ratifying the ECHR in 1954, Turkey entered a reservation to the right to education, stating that Article 2 of Protocol no. 1 shall not violate a republican law which bans the establishment of private religious schools.<sup>359</sup> As for the additional protocols to the ECHR, Turkey either did not ratify them or ratified with significant delay. It took Turkey 20 years to sign and ratify the Protocol no. 6 concerning the abolition of the death penalty of 1983,<sup>360</sup> whereas it is yet to ratify the Protocol no. 4 prohibiting the expulsion of nationals and the collective expulsion of aliens of 1963, which it belatedly signed on 19 October 1992. Turkey signed the Protocol no. 7 expanding the rights protected under the Convention and Protocols no. 1, 4 and 6 of 1984 in 1985, but ratified it as late as in 2016, whereas it is yet to ratify the Protocol no. 12, which provides a general prohibition of discrimination, which it signed in 2001.

Notwithstanding its early ratification of the ECHR, Turkey did not recognize the individual right of petition to the EComHR until 28 January 1987. It recognized the ECtHR’s jurisdiction on 22 January 1990, becoming the last CoE member to do so.<sup>361</sup> According to Rıza Türmen, Turkey’s national judge at the ECtHR during 1998-2008 and Ambassador to the CoE before his appointment to the Court, the considerable time lag between Turkey’s ratification of the Convention in 1954 on the one hand and its recognition of the individual right of petition and the Court’s jurisdiction on the other was due to its fear of potentially high number of cases to

---

<sup>356</sup> The sharp divisions among European countries on the issue of sovereignty resulted in the collapse of the European federation project, leading the federalist six (France, Germany, Italy and Benelux countries) to go their own way and establish in 1951 the European Coal and Steel Community, the predecessor of the EU.

<sup>357</sup> Ed Bates, “The Birth of the European Convention on Human Rights – and the European Court of Human Rights”, in Jonas Christoffersen and Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011), pp. 17-42, at p. 28; Bates, *The Evolution of the European Convention on Human Rights*, at pp. 90-91.

<sup>358</sup> Gemalmaz, “State of Emergency Rule in the Turkish Legal System”, at p. 123.

<sup>359</sup> The reservation was based on Law no. 6366 of 10 March 1954, whose Article 3 reads as follows: “Article 2 of the Protocol shall not affect the provisions of Law No. 430 of 3 March 1924 relating to the unification of education.” Reservations and Declarations for Treaty No.009 - Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Turkey, available at: [http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/009/declarations?p\\_auth=FqetRdWJ](http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/009/declarations?p_auth=FqetRdWJ).

<sup>360</sup> Turkey signed the Protocol no. 6 on 15 January 2003 and ratified it on 12 November 2003. Also during the EU process, Turkey signed and ratified the 2002 Protocol no. 13 Concerning the Abolishment of the Death Penalty in All Circumstances in 2004 and 2006, respectively.

<sup>361</sup> Among the relative latecomers were also major Western European democracies such as the UK and France, who did not recognize the individual petition mechanism and the Court’s jurisdiction due to the increasing demands for decolonization in their overseas colonies. While the UK eventually recognized both mechanisms in 1966, it took France until 1974 to ratify the Convention and accept the jurisdiction of the Court and until 1981 to recognize the right of individual petition. Mikael Rask Madsen, “Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence”, in Christoffersen and Madsen, *The European Court of Human Rights*, pp. 43-60, at p. 46.

originate from Cyprus and the Kurdish region.<sup>362</sup> Indeed, the prospect of around 200,000 Cypriot citizens who could not access their immovable properties in northern Cyprus to follow suit led a Turkish constitutional law scholar to warn in 1993 that the right of individual petition presented “an important danger in terms of Turkey’s national interests.”<sup>363</sup> At the same time, the ECtHR was fast evolving from a negligible institution to a strong court<sup>364</sup> and it was becoming increasingly clear that Turkey would not for long be allowed to remain a pseudo-CoE member. Turkey’s prospects for EU membership were also becoming ever more linked to the deepening of its institutional links to the ECtHR; EU institutions were making clear that Turkey’s candidacy for membership would be out of question in the absence of a stronger engagement with the Strasbourg Court.<sup>365</sup>

Turkey’s belated recognition of the right of individual petition less than three months before it applied for EU membership on 14 April 1987 was the outcome of this new regional environment. It was also an attempt to improve Turkey’s tarnished international reputation in the aftermath of the 1980 *coup*. Indeed, rectifying Turkey’s bad image as a country resorting to systematic torture was a source of preoccupation for the government in the late 1980s. It was not a coincidence that Turkey signed both the UN’s<sup>366</sup> and the CoE’s<sup>367</sup> conventions on the prohibition of torture and ill treatment in 1988 and immediately ratified them which, as Özdek and Karacaoğlu have noted, was “in contrast with its traditionally slow ratification policy on international instruments.”<sup>368</sup> According to Cameron, Turkey’s decision to grant its citizens the right of individual petition was also “an indirect result” of the inter-state case brought by a number of CoE member states against Turkey after the 1980 *coup*.<sup>369</sup> However, characteristic of its reluctance to fully engage with international human rights law, Turkey made its recognition subject to stringent territorial (*ratione loci*), personal (*ratione personae*) and subject matter (*ratione materiae*) restrictions to the exercise of the individual right of petition.<sup>370</sup> Turkey thus became the first CoE member state to have entered reservations with respect to the EComHR’s territorial and subject matter jurisdiction.<sup>371</sup> The declaration was not only

---

<sup>362</sup> Interview with Rıza Türmen, Istanbul, 3 December 2015.

<sup>363</sup> Kemal Gözler, “Bireysel Başvuru ve Kıbrıs Sorunu” [Individual Complaint and the Cyprus Problem], *İnsan Hakları Yıllığı*, vol. 15 (1993), pp. 165-174, at p. 165. In fact, soon after Turkey recognized the individual right of petition, several Cypriot citizens filed an application with the Commission, as discussed below in Section 2.4.2.

<sup>364</sup> On the transformation of the ECtHR and its jurisprudence in parallel to the social and political transformations in European societies in the mid-1970s, see Madsen, “Protracted Institutionalization of the Strasbourg Court”.

<sup>365</sup> The European Parliament had made this link clear in 1985, setting Turkey’s recognition of the right of individual petition as a condition for the normalisation of relations. European Parliament, *Resolution on the Human Rights Situation in Turkey*, 23 October 1985.

<sup>366</sup> Turkey signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted by the UN on 10 December 1984 and entered into force on 26 June 1987, on 25 January 1988 and ratified it on 2 August of the same year.

<sup>367</sup> Turkey signed the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which was adopted by the Council of Europe on 26 November 1987 and entered into force on 1 February 1989, on 11 January 1988 and ratified it on 26 February of the same year.

<sup>368</sup> Özdek and Karacaoğlu, “Turkey”, at p. 880.

<sup>369</sup> Iain Cameron, “Turkey and Article 25 of the European Convention on Human Rights”, *International and Comparative Law Quarterly*, vol. 37 (1988), pp. 887-925, at p. 888.

<sup>370</sup> CoE, “Turkey’s Declaration under Article 25 of the Convention”, in *Yearbook of the European Convention on Human Rights: 1991*, vol. 34 (Martinus Nijhoff, 1995), at p. 43 (hereafter “Turkey’s Declaration”).

<sup>371</sup> Cameron, “Turkey and Article 25”, at p. 890.

unprecedented in its breadth but also a cunning attempt to effectively enter a whole range of reservations to the ECHR 33 years after Turkey had ratified it.<sup>372</sup>

The substance of the declaration was not less controversial. Individuals could petition the EComHR only with respect to alleged violations which occurred within the territory to which the Turkish Constitution applied. With lessons learned from Cyprus' use of the inter-state complaint mechanism against Turkey, this territorial restriction aimed at precluding individual petitions concerning human rights violations stemming from Turkey's occupation of northern Cyprus.<sup>373</sup> The EComHR's competence under the declaration would not extend to matters regarding the legal status of the military personnel and in particular, the system of discipline in the armed forces.<sup>374</sup> Most daringly, Turkey required that the EComHR held the Turkish Constitution above the ECHR in its review of the individual petitions filed against Turkey. Specifically, the EComHR should review Turkey's derogations in light of the Turkish constitutional provisions concerning the emergency powers of the executive, interpret the notion of "a democratic society" in Articles 8, 9, 10 and 11 of the Convention in conformity with the principles laid down in the Turkish Constitution and understand the latter's Articles 33, 52 and 135 respectively concerning the freedom of association, activities of labour unions and public professional organizations as being in conformity with Articles 10 and 11 of the Convention protecting freedoms of expression, and assembly and association.<sup>375</sup>

A further way in which Turkey has tried to limit the ECtHR's competence has been through derogations. Between 1970 and 1987, Turkey invoked Article 15<sup>376</sup> of the ECHR "for more than 77 percent of the time, including a continuous stretch of almost seven years from September 1980 to May 1987."<sup>377</sup> The invocation of derogations automatically followed the declaration of a state of exception (in the form of an emergency or siege), which itself was a

---

<sup>372</sup> Indeed, the governments of Greece, Sweden, Luxembourg, Denmark and Norway expressed concerns that the declaration was in effect a reservation which limited the scope of the right of individual petition. The Turkish Government, however, repeatedly insisted that the declaration did not contain any "reservations" in the sense of international treaty law. CoE, "Turkey's Declaration", at pp. 44, 45 and 47.

<sup>373</sup> The text of Turkey's Declaration, at paragraph (i). See also EComHR, *Metropolitan Chrysostomos, Bishop of Kitium v. Turkey*, Application no. 15299/89, *Archimandrite Georgios Papachrysostomou v. Turkey*, Application no. 15300/89, *Titina Loizidou v. Turkey*, Application no. 15318/89, Decision (Admissibility), 4 March 1991, at pp. 8-9. The phrase "within the boundaries of the territory to which the Constitution of the Republic of Turkey is applicable" in the original 1987 declaration under Article 25 was replaced in the declaration of 7 March 1990 with the phrase "within the boundaries of the national territory of the Republic of Turkey." CoE, "Turkey's Declaration", at p. 50. The new phrase was also used in the declaration Turkey made under Article 60 on 22 January 1990 when it recognised the compulsory jurisdiction of the ECtHR. The revised phrase in declarations under Article 25 and 60 was introduced soon after the Turkish government was informed in November 1989 of the first individual petitions filed against its policies in northern Cyprus on 21-22 July 1989. EComHR, *Metropolitan Chrysostomos, Bishop of Kitium v. Turkey*, *Archimandrite Georgios Papachrysostomou v. Turkey*, *Titina Loizidou v. Turkey*.

<sup>374</sup> The text of Turkey's Declaration, at paragraph (iii). See also EComHR, *Metropolitan Chrysostomos, Bishop of Kitium v. Turkey*, *Archimandrite Georgios Papachrysostomou v. Turkey*, *Titina Loizidou v. Turkey*, at p. 9.

<sup>375</sup> *Ibid*, at paragraphs (ii), (iv) and (v). See also EComHR, *Metropolitan Chrysostomos, Bishop of Kitium v. Turkey*, *Archimandrite Georgios Papachrysostomou v. Turkey*, *Titina Loizidou v. Turkey*, at p. 9.

<sup>376</sup> For a detailed discussion of the implications of states' invoking Article 15 and the ECtHR's jurisprudence on derogations, including in Turkey, see Chapter 6.

<sup>377</sup> Angela Hegarty and Siobhan Leonard (eds.), *A Human Rights: An Agenda for the 21<sup>st</sup> Century* (Cavendish Publishing, 1999), at p. 108 (listing the durations of such derogations as follows: from 16 June 1970 to 5 August 1975, from 26 December 1978 to February 1980, and from 12 September 1980 to 25 May 1987).

routine deflection from the rule of law in the domestic context. And yet, a glance at some of the justifications Turkey put forth for declaring a state of exception manifests its abuse of the ECHR's derogations regime under the pretext of maintaining law and order. For example, on 19 June 1970, in notifying the CoE's Secretary General of its derogation for "a limited duration", Turkey cited "demonstrations organised by several groups" in Istanbul and Kocaeli which "have caused damage to public property" and "have in certain places been of an insurrection character" as the grounds for its proclamation of a state of siege.<sup>378</sup> Turkey re-invocation of the derogations clause in 1990, this time in the context of the war with the Kurdistan Workers' Party (*Partiya Karkerên Kurdistan*-PKK), and the ECtHR's response are discussed in Chapter 6.

## 2.4 European Oversight of Turkey during the Cold War

### 2.4.1 Political Institutions: The EU and the CoE

During the Cold War, given the unavailability of effective ECtHR oversight, the only external source of pressure over the Turkish state were European political institutions. The EEC, which had not yet accepted Turkey as a candidate country, reacted to the 1960 *coup* by freezing its relations.<sup>379</sup> Although relations resumed with the Association Agreement of 1963,<sup>380</sup> the TSK's intervention into the democratic process in Turkey and military takeover of northern Cyprus in 1974 led the EEC to continue to defer the Customs Union envisioned in the Agreement. The 1980 *coup d'état* inflicted the greatest damage on Turkey's relations with the EEC.<sup>381</sup> There were heated debates within the EU over the most effective strategy against the junta. While the European Parliament advocated a political approach, pressing for the termination of relations with the junta, the European Council refrained from making the strengthening of its economic ties with Turkey conditional on human rights.<sup>382</sup> While the Council adopted a "policy of wait and see",<sup>383</sup> the European Parliament, under the leadership of the socialists and the liberals,

---

<sup>378</sup> CoE, "Derogations (Article 15 of the Convention): Turkey", in *Yearbook of the European Convention on Human Rights: 1970* (Martinus Nijhoff, 1972), at p. 18.

<sup>379</sup> NATO, which is not the focus of this research, was arguably the best-positioned international institution to exert pressure on Turkey during the Cold War. However, the organization which "was focused more on maintaining allied unity in the face of the Soviet threat than on democratizing its members" did not "eject or even sanction" Turkey in reaction to any of the military interventions including the 1960 *coup d'état* which resulted in the execution of the prime minister and two ministers. Dan Reiter, "Why NATO Enlargement Does Not Spread Democracy", *International Security*, vol. 25, no. 4 (2001), pp. 41-67, at p. 56-57. At the same time, this stance was not limited to Turkey. NATO's response to the 1967 *coup* in Greece was "muted at best". While expressing regrets over the incident, the organisation continued to provide military support to the new regime. Pevehouse, *Democracy from Above*, at p. 177.

<sup>380</sup> Agreement Establishing an Association between the European Economic Community and Turkey, Ankara, 12 September 1963, *Official Journal of the European Communities*, no. L 361/1, 31 December 1977.

<sup>381</sup> While the reaction of individual European governments is beyond the scope of this study, it is noteworthy to point out that the responses varied from blocking the delivery of aid pledged under the OECD (in the case of Western Germany) to engaging in behind the doors diplomacy with the military junta (in the case of the UK). Dağı, "Democratic Transition in Turkey", at p. 126.

<sup>382</sup> For an argument that the European Council's key decisions on Turkey have always been adopted in accordance with the security interests of the Union and its member states, see Ebru Turhan, *The European Council Decisions Related to Turkey's Accession to the EU: Interests v. Norms* (Nomos, 2012).

<sup>383</sup> Dağı, "Democratic Transition in Turkey", at p. 128.

adopted resolutions harshly criticising the conduct of the military authorities<sup>384</sup> and used its – limited but slowly growing – powers to restrain the EEC’s engagement with Turkey. Yet, at the end of the day, the EEC’s leverage on Turkey proved to be limited. When the military junta did not bow down to the pressure to alleviate the human rights situation in Turkey, the EEC, lacking legal enforcement powers, could only decide to stop the implementation of its fourth financial protocol with Turkey.<sup>385</sup>

The CoE, in turn, was conflicted between its obligation to uphold the ECHR and its political unwillingness to alienate Turkey. The only available enforcement mechanism under the system is the suspension of membership in cases of serious violations of human rights and the rule of law pursuant to Article 8 of the Statute of the CoE.<sup>386</sup> In fact, this was suggested very early on by the Parliamentary Assembly of the Council of Europe (PACE) which found the military *coup* in Turkey and the substantial restrictions on human rights to “have given rise to a situation incompatible with Article 3 of the Statute of the Council of Europe.”<sup>387</sup> The problem with applying Article 8 was that it had to be done by the CoM, the CoE’s executive organ made up of the representatives of member states. In the absence of such political will on the part of the CoM, PACE temporarily ended the term of office of Turkey’s parliamentary delegation to the CoE, pending “an elected and properly constituted Turkish delegation.”<sup>388</sup> The Turkish parliamentarians who had been appointed to PACE before the 1980 *coup* continued to hold their seats until the end of their term.<sup>389</sup>

Critical in the CoM’s unwillingness to expel Turkey was the assurances given by the military regime for the holding of general elections and transition back to electoral politics. Even for a junta which toppled democracy and committed gross human rights abuses, Turkey’s expulsion from the CoE was an unwanted consequence to bear. According to Türmen, the CoE was the only “anchor” which united Turkey and the West “on the basis of cultural values”.<sup>390</sup> In the early-1980s, Türmen was a diplomat at the Ministry of Foreign Affairs, covering relations with the CoE. According to him, the Ministry, which maintained its autonomy during the military regime, advised the junta to expeditiously bring an end to its rule and hold elections in order to avoid an expulsion, given the extreme difficulty Turkey would have in re-entering the CoE. The pending inter-state complaint against Turkey was also critical in the junta’s decision to go to elections sooner than later.

---

<sup>384</sup> See e.g., European Parliament, *Resolution on the Events in Turkey*, 18 September 1980; *Resolution on Death Sentence Imposed on 52 Turkish Trade Union Leaders*, 22 June 1982; *Resolution on Political Situation in Turkey*, 8 July 1982.

<sup>385</sup> Dağı, “Democratic Transition in Turkey”, at pp. 129-130.

<sup>386</sup> “Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.” Article 3 of the Statute of the CoE requires member states to “accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.”

<sup>387</sup> PACE, *Situation in Turkey*, Recommendation 904 (1980), 1 October 1980.

<sup>388</sup> PACE, *Term of Office of the Turkish Parliamentary Delegation*, Order 398 (1981), 14 May 1981.

<sup>389</sup> Interview with Rıza Türmen.

<sup>390</sup> *Ibid.*

Between 1982 and 1986, PACE carried out a number of fact-finding visits to Turkey and adopted a series of resolutions calling for the improvement of human rights.<sup>391</sup> What is striking is that as late as mid-1986, three years after transition to civilian rule, PACE was continuing to call for the complete abolishment of martial law and expressing satisfaction that the Turkish Parliament “has ratified no death sentences” that year.<sup>392</sup> The only tangible impact of PACE’s engagement was the earlier mentioned inter-state complaint filed by several CoE member states in response to a call made by the parliamentarians.<sup>393</sup> The outcome of this complaint is discussed in the next section.

#### 2.4.2 Before the Kurdish Cases: The ECtHR’s Early Engagement in Turkey

Throughout the 1960s and the 1970s, the ECtHR’s engagement in Turkey was very limited due initially to the weakness of the Court but principally to the inability of Turkish citizens to file petitions in Strasbourg. The extremely underused inter-state complaint was the only available mechanism to challenge the Turkish government.<sup>394</sup> Until after the 1980 *coup*, the only member state which invoked this mechanism was Cyprus which, however, did not raise the grave human rights breaches committed inside Turkey and limited its complaints to Turkey’s invasion and subsequent occupation of northern Cyprus. In petitions filed in 1974,<sup>395</sup> 1975,<sup>396</sup> 1977,<sup>397</sup> Cyprus accused Turkey of torture, enforced disappearances, indiscriminate killings, arbitrary deprivation of liberty, forced displacement and property destruction in northern Cyprus and of settling its nationals to areas under its occupation.

In its confidential joint report on the first two applications, the EComHR concluded that Turkey violated several ECHR provisions by displacing the Greek Cypriots from their homes in northern Cyprus and refusing to allow their return, unlawfully depriving Greek Cypriot military personnel of their liberty, ill-treating, killing civilians and unlawfully depriving them of their liberty and possessions on a large scale.<sup>398</sup> In its belated report on the third application, adopted in 1983, the EComHR repeated its earlier findings in addition to concluding that Turkey violated Article 5 by failing to account for the fate of the missing persons who it took into

---

<sup>391</sup> PACE, *Situation in Turkey*, Resolution 765 (1982), 28 January 1982; PACE, *Situation in Turkey*, Resolution 786 (1982), 6 October 1982; PACE, *Situation in Turkey*, Resolution 794 (1983), 27 January 1983; PACE, *Situation in Turkey*, Resolution 803 (1983), 30 September 1983; PACE, *Situation in Turkey*, Resolution 822 (1984), 10 May 1984; PACE, *Situation in Turkey*, Resolution 840 (1985), 23 April 1985; PACE, *Situation in Turkey*, Resolution 860 (1986), 24 April 1986.

<sup>392</sup> PACE, Resolution 860 (1986), at para. 3.

<sup>393</sup> PACE, Resolution 765 (1982), at para. 17 (drawing the attention of member states to Article 24 of the Convention which permits the filing of inter-state complaints).

<sup>394</sup> The entire ECHR system was designed with the assumption that interstate complaints were “highly improbable” in a system established by political and military allies. It was this assumption which explains why countries such as Turkey and the UK ratified the Convention although they feared being challenged at the Court for their human rights practices. When, in 1956, Greece filed an interstate complaint against the UK for its practices in Cyprus, at the time still a British colony, “the British strategy of evading the ECHR system by steering free of the Court and individual petition was thereby itself evaded.” Madsen, “Protracted Institutionalization of the Strasbourg Court”, at p. 50. The interstate complaint filed by Cyprus had the same effect on Turkey’s similar strategy.

<sup>395</sup> Cyprus v. Turkey, Application no. 6780/74, filed on 19 September 1974.

<sup>396</sup> Cyprus v. Turkey, Application no. 6950/75, filed on 21 March 1975.

<sup>397</sup> Cyprus v. Turkey, Application no. 8007/77, filed on 6 September 1977.

<sup>398</sup> EComHR, *Cyprus v. Turkey*, Applications nos. 6780/74 and 6950/75, Report, 10 July 1976.

custody in 1974.<sup>399</sup> The CoM's response to the EComHR reports was curious. With regards to the EComHR's report on the first two cases, the CoM passed the ball to the UN, strongly urging Turkey and Cyprus "to resume intercommunal talks under the auspices of the Secretary General" to reach a political solution.<sup>400</sup> The CoM's reaction to the third complaint was even more minimal; making public the EComHR's report without issuing any recommendations or decisions.<sup>401</sup> Cyprus filed its fourth inter-state complaint in 1994,<sup>402</sup> after the end of the Cold War. By then, both Turkey and Cyprus had recognized the Court's jurisdiction, enabling the ECtHR to issue a judgment in 2001.<sup>403</sup>

Meanwhile, Turkey had recognized the individual petition mechanism, with restrictions attached. In its admissibility decision concerning the petitions of several Cypriot citizens, the EComHR reviewed the validity of Turkey's restrictions under the Convention and public international law. The Commission noted that, unlike temporal restrictions, territorial, subject matter and personal restrictions were not expressly authorized under Article 25 of the ECHR. Based on the treaty interpretation rules set out in the Vienna Convention on the Law of Treaties, the Commission considered that the ordinary meaning of Article 25 as well as the practice of member states presupposed total, not partial, recognition of the rights set forth in the ECHR.<sup>404</sup> At the same time, Turkey's recognition of the right of individual petition was still valid because it had "clearly expressed the intention to be bound under Article 25."<sup>405</sup> In its ruling on the preliminary objections in *Loizidou v. Turkey*, the Grand Chamber of the ECtHR shared these conclusions and unequivocally rejected Turkey's argument that disregarding any of the "essential" conditions in its declaration would make the entire declaration void, causing its acceptance of the individual petition mechanism to lapse.<sup>406</sup> Citing consistent state practice concerning the unconditional acceptance of the competence of the Strasbourg institutions, the opinions of the EComHR and the Court in similar prior proceedings, and the reaction of various

---

<sup>399</sup> EComHR, *Cyprus v. Turkey*, Application no. 8007/77, Report, 4 October 1983.

<sup>400</sup> CoM, *Cyprus against Turkey*, Applications nos. 6780/74 and 6950/75, Resolution DH(79), 20 January 1979.

<sup>401</sup> Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006), at p. 27. For a strong criticism of the ECHR system's "disappointing" handling of the three applications against Turkey, which could "only be qualified as a denial of justice", see Menno T. Kamminga, "Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?" *Netherlands Quarterly for Human Rights*, vol. 2 (1994), pp. 153-164, at p. 157.

<sup>402</sup> *Cyprus v. Turkey*, Application no. 25781/94, filed on 22 November 1994.

<sup>403</sup> ECtHR, *Cyprus v. Turkey*, GC, Application no. 25781/94, Judgment (Merits), 10 May 2001 (finding Turkey to have violated several provisions of the Convention on account of its failure to conduct effective investigations into the whereabouts of the disappeared Greek Cypriots, the displacement of Greek Cypriots and their inability to access their properties, and the living conditions of the Greek Cypriots in northern Cyprus). In view of Turkey's non-execution of this judgment, the Grand Chamber issued an Article 41 judgment in 2014 and ordered Turkey to pay Cyprus just satisfaction in the amount of 90 million Euros in respect of the 1,456 missing persons and the Greek Cypriots enclaved in the Karpas peninsula. ECtHR, *Cyprus v. Turkey*, GC, Application no. 25781/94, Judgment (Just Satisfaction), 12 May 2014 (ordering for the first time just satisfaction under Article 41 in an inter-state case).

<sup>404</sup> EComHR, *Metropolitan Chrysostomos, Bishop of Kitium v. Turkey, Archimandrite Georgios Papachrysostomou v. Turkey, Titina Loizidou v. Turkey*.

<sup>405</sup> *Ibid.*, at p. 24.

<sup>406</sup> ECtHR, *Loizidou v. Turkey*, GC, Application no. 15318/89, Judgment (Preliminary Objections), 23 March 1995, at para. 90.

member states to Turkey's declarations, the Grand Chamber concluded that Turkey willingly ran the risk of being bound by an unlimited declaration.<sup>407</sup>

The first inter-state complaint concerning human rights abuses inside Turkey was filed with regard to atrocities committed by the military junta after the 1980 *coup*. In separate complaints they filed with the EComHR on 1 July 1982, France, Norway, Denmark, Sweden and the Netherlands alleged violations of Articles 3, 5, 6, 9, 10, 11 and 15(3) since the *coup d'état* on 12 September 1980. Their allegations concerned "widespread and systematic torture"; the absence of judicial review of the MGK decisions; the lack of fair trial in criminal proceedings before the Martial Courts and the extension of their jurisdiction at the expense of ordinary criminal courts; the arrest and detention of suspects for up to 45 days without judicial review; the dissolution of political parties, the prohibition of their activities and the placing of their leaders under army protection; and the suspension of two trade union confederations, the dissolution of a trade union and the prosecution of thousands of union leaders and members. The five states also contested Turkey's derogation under Article 15, arguing that the situation in the country had significantly improved since the *coup* and that the government measures went beyond what was strictly required by the exigencies of the situation. They also alleged that Turkey did not comply with its obligations under Article 15(3) to duly and promptly notify the CoE about the reasons for and degree of its derogation.

By the time the EComHR declared the complaint admissible,<sup>408</sup> the junta had stepped down, partly as a result of European pressure,<sup>409</sup> and the Turkish Parliament had reconvened. Nonetheless, the EComHR pursued the case. In June 1984, it held a hearing in Strasbourg with victims of torture and in January-February 1985, sent a delegation to Turkey to visit detention centres in Diyarbakır, Istanbul and Ankara.<sup>410</sup> It came as a surprise, therefore, when the EComHR announced on 7 December 1985 that it approved a friendly settlement reached between the applicant governments and the new Turkish government which had come to power in December 1983.<sup>411</sup> The government assured the EComHR that it would ensure the strict observance of Turkey's obligations under Article 3 of the ECHR, present three reports on this matter in 1986, engage in a confidential dialogue with the EComHR on the basis of these reports, and further the ongoing work for the granting of an amnesty or pardon to prisoners. The settlement took note of the changes Turkey had made in a number of laws and decrees mentioned by the applicant states in their petition, the progressive reduction of the territorial scope of martial law and a declaration by the Turkish Prime Minister on 4 April 1985 that he "hope[d] ... to] be able to lift martial law from the remaining provinces within 18 months."<sup>412</sup>

---

<sup>407</sup> Ibid, at para. 95.

<sup>408</sup> EComHR, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, Applications no. 9940-9944/82 (joined), Decision (Admissibility), 6 December 1983.

<sup>409</sup> Dağı, "Democratic Transition in Turkey", at p. 136.

<sup>410</sup> Kamminga, "Is the European Convention on Human Rights Sufficiently Equipped", at p. 158.

<sup>411</sup> EComHR, *France v. Turkey*, Application no. 9940/82, *Norway v. Turkey*, Application no. 9941/82, *Denmark v. Turkey*, Application no. 9942/82, *Sweden v. Turkey*, Application no. 9943/82, *Netherlands v. Turkey*, Application no. 9944/82, Report, 7 December 1985.

<sup>412</sup> Ibid, at p. 9.

Thus, Western European states, who had put forth detailed allegations based on specific cases and facts reported by Amnesty International and victims, settled their complaint on the basis of Turkey's vague and general promises. The settlement completely overlooked the applicant states' allegations concerning the violations of the right to fair trial, freedom of expression and freedom of association, allowing Turkey to keep in place legislation permitting incommunicado detention for up to 45 days, sufficed with vague expressions of the intention to lift martial law without addressing the question of derogations and let Turkey off the hook regarding serious allegations of torture. The applicant governments did not press for the independent documentation of torture in Turkish prisons and detention centres, the prosecution of the perpetrators and the reparation of the victims, giving the impression to Leo Zwaak that they "wanted to back out of the case."<sup>413</sup> In the opinion of Judge Rıza Türmen, just as an inter-state complaint is inherently political, so is the decision to reach a friendly settlement. The five states, which had been pressured by domestic public opinion in their countries to file against Turkey, were alleviated of this pressure once they did so. According to Türmen, while they wanted to ensure Turkey's transition to democracy, these states also had strong relations with Turkey, in areas ranging from security to economy, which they did not want to disrupt. Indeed, Turkey used its trump cards against some of the governments. For example, it threatened not to grant the bid for the construction of a tramway unless Sweden accepted the friendly settlement.<sup>414</sup> Writing in 1994, Kamminga had a complementary account that it was "rumoured at the time that the settlement had been agreed only after strong pressure from the United States Government which had long regarded Turkey with special eyes in view of its strategic position vis-à-vis the Soviet Union and the Middle East."<sup>415</sup>

The EComHR was not legally or politically bound to approve the text of the settlement agreed between the parties. It could have urged Turkey to come up with firm and comprehensive reform commitments to comply with its obligations under the Convention, like it had done in the inter-state complaint filed against Greece after the military intervention in that country.<sup>416</sup> Instead, it approved the settlement,<sup>417</sup> giving what Kamminga has considered to be "a great diplomatic victory" and a "stamp of approval" to Turkey,<sup>418</sup> removing the pressure for reforms and enabling the continuation of "widespread and systematic torture" in this country well into the 1990s.<sup>419</sup> The EComHR's undue deference to Turkey's expression of 'hope' to abolish the

---

<sup>413</sup> Leo Zwaak, "A Friendly Settlement in the European Inter-State Complaints against Turkey", *SIM Newsletter*, no. 13 (1986), pp. 44-48, at p. 47.

<sup>414</sup> Interview with Rıza Türmen.

<sup>415</sup> Kamminga, "Is the European Convention on Human Rights Sufficiently Equipped", at p. 158.

<sup>416</sup> Zwaak, "A Friendly Settlement", at p. 48.

<sup>417</sup> EComHR, *France v. Turkey*, Application no. 9940/82, *Norway v. Turkey*, Application no. 9941/82, *Denmark v. Turkey*, Application no. 9942/82, *Sweden v. Turkey*, Application no. 9943/82, *Netherlands v. Turkey*, Application no. 9944/82, Report, 7 December 1985.

<sup>418</sup> Kamminga, "Is the European Convention on Human Rights Sufficiently Equipped", at p. 158.

<sup>419</sup> *Ibid.*, at p. 159.

martial law<sup>420</sup> would also be observed in the ECtHR's review of the state of emergency regime in the 1990s, as discussed in Chapter 6.

There was something even more fundamentally problematic in the allegations in the inter-state complaint. The member states attributed legitimacy to the junta, whose every law, decree and constitutional amendment, including the proclamation of martial law and the entry of derogations, lacked any legal basis. Arguably, the applicants reached the friendly settlement with the democratically elected Turkish government. However, they did so despite the fact that the legal regime established by the military remained intact, certain to give rise to new gross human rights abuses. In reaching a friendly settlement, the ECHR system extended political recognition and legal legitimacy to an evidently anti-democratic legal regime and set a problematic precedent for the ECtHR's future review of individual petitions.

## 2.5 After the Cold War: The EU's Engagement in Turkey

In 1987, the Turkish government took three critical decisions. In January, it recognized the right of individual petition to the EComHR to enhance the prospects of its accession to the EU. In April, it applied for EC membership and in July it declared a state of emergency in the Kurdish region. These decisions created a paradoxical situation in which the government gave *carte blanche* to its security forces in their counter-terrorism efforts only a few months after subjecting its policies to European oversight. The incompatibility of these domestic and foreign policies became evident when in 1989 the EC, based on the negative opinion of the European Commission,<sup>421</sup> rejected Turkey's membership application on the basis, among others, of its human rights record. Despite this rejection, Turkey recognised the ECtHR's jurisdiction in 1990 to demonstrate its commitment to human rights and in response to mounting international pressure. At the time, Prime Minister Hikmet Çetin infamously boasted that "there were obviously no human rights violations in Turkey, because no one was petitioning."<sup>422</sup> The absence of applications to the ECtHR had misled the Turkish government into thinking that its fears of ECtHR oversight were ungrounded, encouraging it to recklessly commit gross human rights violations in the Kurdish region.

But then came the 1990s, which set Turkey and Europe apart and led them in different directions. The genocide in Former Yugoslavia and the demonstrated inadequacy of international law to protect individuals belonging to minority groups led to the "resurgence" of

---

<sup>420</sup> While martial law was indeed abolished across Turkey on 19 July 1987, it was immediately replaced by a state of emergency in the Kurdish region, which remained in force until 2002.

<sup>421</sup> Commission of the European Communities, *Commission Opinion on Turkey's Request for Accession to the Community*, SEC(89) 2290 final/2, 20 December 1989. The Commission suggested instead the operation of the Association Agreement and the realization of the customs union envisioned under the 1963 Ankara Treaty and the 1970 Additional Protocol. Meltem Müftüleri-Bac, "The Never-Ending Story: Turkey and the European Union", *Middle Eastern Studies*, vol. 34, no. 4 (1998), pp. 240-258, at p. 241.

<sup>422</sup> Michael D. Goldhaber, *A People's History of the European Court of Human Rights* (Rutgers University Press, 2009), at p. 123.

minority rights in Europe.<sup>423</sup> The largely defunct Conference on Security and Co-operation in Europe (CSCE)<sup>424</sup> re-emerged as a regional human rights mechanism with a broadened mandate to monitor the emerging minority issues in the new democracies of Central and Eastern Europe.<sup>425</sup> In 1990, the CSCE adopted the Copenhagen Principles<sup>426</sup> which, *inter alia*, require states to take affirmative actions in order to ensure full equality between minorities and the majority.<sup>427</sup> In 1993, the European Council, the leading political institution of the EU, adopted the Principles as accession criteria for candidate countries. The first “Copenhagen criteria” laid down the political requirements for accession as “the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.<sup>428</sup> The CoE followed course by adopting the European Charter for Regional or Minority Languages<sup>429</sup> and the Framework Convention for the Protection of National Minorities,<sup>430</sup> which the EU required its candidates to ratify.<sup>431</sup> By the mid-1990s, the European political and legal order presented a completely different picture than that of the 1950s, when Turkey initiated its engagement with the EU.

At a time when Europe was moving in the direction of democracy and human rights, Turkey was on a very different trajectory. The intensification of the civil war between the PKK and the TSK strengthened the role and influence of the military in politics. In 1993, following the unexpected death of President Özal while he was reportedly in the process of seeking peace with the PKK, the hardliner Prime Minister Tansu Çiller declared that the resolution of the Kurdish issue was now in the hands of the military. In the name of counter-terrorism, the state

---

<sup>423</sup> James Hughes and Gwendolyn Sasse, “Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEEC’s”, *Journal of Ethnopolitics and Minority Issues in Europe*, no. 1 (2003), pp. 1-36, at p. 4.

<sup>424</sup> Subsequently renamed as the Organization for Security and Co-operation in Europe (OSCE).

<sup>425</sup> Hughes and Sasse, “Monitoring the Monitors”, at pp. 4-5.

<sup>426</sup> For a critical assessment of the Copenhagen Principles and the CSCE/OSCE’s reluctance to be actively involved in Turkey’s Kurdish conflict, see Gülistan Gürbey, “The Kurdish Conflict in Turkey – (not) a Subject for the OSCE?” *Helsinki Monitor*, vol. 12, no. 1 (2001), pp. 7–20.

<sup>427</sup> Conference on Security and Co-operation in Europe, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 29 June 1990.

<sup>428</sup> European Council, *Conclusions of the Presidency – Copenhagen: 21-22 June 1993*, SN 180/1/93 REV 1, at p. 13. On the “endogenous” and “exogenous” processes leading to the entry of minority protection into the EU’s agenda, see Gabriel N. Toggenburg, “Minority Protection in a Supranational Context: Limits and Opportunities”, in Gabriel N. Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward* (Open Society Institute, 2004), pp. 3-36.

<sup>429</sup> On the Convention and its mode of operation, see Robert Dunbar, “The Committee of Experts of the European Charter for Regional or Minority Languages (The CECL)”, in Gauthier de Beco (ed.), *Human Rights Monitoring Mechanisms of the Council of Europe* (Routledge, 2011), pp. 150-170.

<sup>430</sup> On the Convention and its mode of operation, see Gauthier de Beco and Emma Lantschner, “The Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC)”, in de Beco (ed.), *Human Rights Monitoring*, pp. 100-126; Annelies Verstichel, André Alen, Bruno de Witte and Paul Lemmens (eds.), *Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, 2010).

<sup>431</sup> The EU’s exemption of existing member states from the minority protection requirement has frequently been cited as a double standard. For a leading work pointing out the discrepancy between the EU’s internal and external rules, see Bruno de Witte, “Politics versus Law in the EU’s Approach to Ethnic Minorities”, in Jan Zielonka (ed.), *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union* (Routledge, 2002), pp.137-160. De Witte has written that for the EU, minority protection “seems to be primarily an export article and not one for domestic consumption”. *Ibid*, at p. 139.

increasingly resorted to unlawful measures and committed gross human rights abuses in the Kurdish region, discussed in Chapter 5, leading to hundreds of ECtHR judgments against Turkey, analysed in Chapter 6.

At the end of the decade, the paths of Turkey and the EU converged again. Following Turkey's declaration as a candidate for EU membership in 1999, the ECtHR rulings which had started to accumulate since 1996 gained prominence in Turkey's path to accession. The EU's treatment of Turkey's execution of the ECtHR judgments as an accession criterion triggered a reform process initiated by the coalition government in 1999 and furthered by the AKP which came to power in late 2002.

### 2.5.1 The pre-Copenhagen Process

From the outset, the EU sought to craft a balance between its economic and geostrategic interests *vis-à-vis* Turkey and its normative commitment to human rights as part of its enlargement policy.<sup>432</sup> In this respect, there have been differences between the EU organs. Initially, the European Parliament advocated a political approach, pressing for the termination of relations at moments of rupture with democracy and human rights in Turkey. The European Council, on the other hand, refrained from making the strengthening of its economic ties with Turkey conditional on human rights. Over time, the divergence of positions became less apparent with the evolution of the EU into a political union, the strengthening of the role of Parliament and the positive political developments in Turkey.

Long before the EU accepted the Copenhagen political criteria as a *sine qua non* for accession, Turkey's human rights record was on the radar of the European Parliament.<sup>433</sup> However, the Parliament did not specifically address the Kurdish issue until the mass killings committed by the Saddam Hussein regime in 1988,<sup>434</sup> which drew Europe's attention to the plight of Kurds everywhere.<sup>435</sup> Although the European Parliament adopted several resolutions condemning the human rights abuses against the Kurds,<sup>436</sup> its most radical attempt to restrain relations with Turkey came in 1994, when the parliamentary immunities of the deputies from the Democracy Party (*Demokrasi Partisi-DEP*) were lifted, leading to the conviction and imprisonment of

---

<sup>432</sup> Turhan, *The European Council Decisions Related to Turkey's Accession to the EU*.

<sup>433</sup> In the 1980s, the European Parliament adopted numerous resolutions condemning the human rights violations committed by the military regime between 1980 and 1983 and the civilian government thereafter.

<sup>434</sup> In two separate military campaigns (Al Anfal and Halabja) carried out in 1988, the Iraqi government systematically killed tens of thousands of Kurdish civilians through, *inter alia*, the use of chemical weapons.

<sup>435</sup> With the exception of a 1987 resolution over the Armenian genocide, which acknowledged the problem in Turkey's south-east, none of the resolutions adopted during 1984-1989 made a specific reference to the Kurdish issue. Marlies Casier, "The Politics of Solidarity: The Kurdish Question in the European Parliament", in Marlies Casier and Joost Jongerden (eds.), *Nationalisms and Politics in Turkey: Political Islam, Kemalism and the Kurdish Issue* (Routledge, 2011), pp. 197-217, at pp. 199-200.

<sup>436</sup> Of the 16 resolutions on the Kurds adopted by Parliament from 1989 to 1994, five were specifically about the Kurds in Turkey. *Ibid.*

eight.<sup>437</sup> The European Parliament suspended the EU-Turkey Joint Parliamentary Committee<sup>438</sup> and asked the Council to suspend the Customs Union negotiations with Turkey. When that failed, the Parliament used its enhanced powers under the Maastricht Treaty of 1993 and refused to give its consent to the Customs Union unless Turkey improved its human rights record and treatment of the Kurds. In 1995, the European Parliament awarded the imprisoned Kurdish deputy Leyla Zana the Sakharov Prize for Freedom of Thought,<sup>439</sup> marking the beginning of its active involvement with the Kurdish issue.<sup>440</sup>

To overcome the opposition of the European Parliament, Turkey amended several provisions of the Constitution and the Anti-Terror Law, making possible the release of 79 political prisoners. Two of the imprisoned Kurdish deputies were released, and Turkey gave assurances that the cases of those remaining would be heard by the ECtHR.<sup>441</sup> Although these were largely changes on paper and there were strong doubts about Turkey's commitment to democracy and human rights, according to Zanon, the Parliament eventually gave in to the "intensive lobbying by the Council and the Commission" and approved the Customs Union on 13 December 1995.<sup>442</sup>

Although the decision to implement the Customs Union brought about a degree of discursive change and "tactical concessions"<sup>443</sup> on the part of Turkish official circles, widespread abuses and the impunity of perpetrators prevailed, in the Kurdish region and beyond. The EU's rejection of Turkey's candidacy in 1997 was both the consequence and the cause of this phenomenon. When Turkey unilaterally suspended the political dialogue as a protest of what it perceived to be discriminatory treatment, the European Commission was tasked with continuing relations at a technical level. In 1998, the European Commission prepared a European strategy to help Turkey prepare for membership, initiated technical negotiations with Ankara and released its first progress report on Turkey.<sup>444</sup> Based on the positive assessments in the Commission's next report, the European Council declared Turkey as a candidate for accession during its Helsinki summit held in December 1999.

---

<sup>437</sup> For more on this, see Chapter 3.

<sup>438</sup> Established in the 1960s, the Joint Committee resumed in 1996. Christopher Piening, "The European Parliament: Influencing the EU's External Relations", paper presented at the 5th biennial ECSA Conference, Seattle, 30 May 1997.

<sup>439</sup> When she was awarded the prize, Zana was serving a 15-year jail sentence. She personally collected the prize on 14 October 2004, after her release from prison.

<sup>440</sup> Interview with H el ene Flautre, Brussels, 28 June 2013.

<sup>441</sup> Piening, "The European Parliament", at p. 4.

<sup>442</sup> Flavia Zanon, "The European Parliament: An Autonomous Foreign Policy Identity?" in Esth er Barbe and Anna Herranz (eds.), *The Role of Parliaments in European Foreign Policy: Debating on Accountability and Legitimacy* (Fornet, 2005), at p. 5.

<sup>443</sup>  mit Cizre, "The Truth and Fiction about (Turkey's) Human Rights Politics", *Human Rights Review*, vol. 3, no. 1 (2001), pp. 55–77, at pp. 68–69.

<sup>444</sup> For a brief history of the development of EU-Turkey relations, see the Commission's progress reports.

## 2.5.2 From Helsinki to Brussels (2000-2004): The Peak of the EU-Turkey Relations and Human Rights Reforms in Turkey

It was only with its declaration as a candidate for EU membership that Turkey started to adopt meaningful general measures to fulfill the Copenhagen criteria, including the execution of the ECtHR's judgments. From 2000 onwards, human rights bodies were established at the national, provincial and sub-provincial level to accept individual complaints and issue non-binding decisions. However, lacking independence from the executive, the legitimacy of these boards has always been questionable in the eyes of human rights NGOs and the international community. They have been under-utilized since their inception and have had very limited impact on government policies. In 2006, a UN Special Rapporteur reported that he attended a meeting of the provincial human rights board in Diyarbakır, where "the members, in a remarkably frank exchange, expressed their own scepticism towards the board's possibilities to function as an independent and effective human rights mechanism."<sup>445</sup>

In October 2001, the Parliament adopted 34 constitutional amendments,<sup>446</sup> many of them in the area of human rights.<sup>447</sup> The principle of proportionality was introduced to the Constitution to align it with the ECtHR case law. The reforms thus brought the constitution in conformity with the AYM's post-1991 case law that the restrictions brought upon fundamental rights should "not exceed reasonable criteria."<sup>448</sup> The general restrictions on human rights in Article 13, which had allowed the categorical limitation of rights and liberties on the basis of a standard list of enumerated grounds,<sup>449</sup> were replaced by a "differentiated and gradual restriction system"<sup>450</sup> based on right-specific limitations.<sup>451</sup> Contrary to the previously ambiguous intent-

---

<sup>445</sup> UN Human Rights Council, *Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Addendum, Mission to Turkey*, A/HRC/4/26/Add.2, 16 November 2006, at para. 57 (hereafter "Special Rapporteur on Human Rights 2006 Report"). For a critical account of Turkey's human rights institutions, including the province and district based councils, see Kerem Altıparmak, "Türkiye'de İnsan Haklarında Kurumsallaş(ama)ma" [(The Lack of) Institutionalization in Human Rights in Turkey], in Türkiye Barolar Birliği (ed.), *Bürokrasi ve İnsan Hakları* [Bureaucracy and Human Rights] (TBB Yayınları, 2007), pp. 54-111.

<sup>446</sup> Law no. 4709.

<sup>447</sup> Starting with the 2001 constitutional amendments, a series of reforms were also introduced seemingly to lessen the powers of the military in politics, which are beyond the scope of this study. For a critical assessment of these reforms from the perspective of the democratic control of the military, see Ümit Cizre, "Disentangling the Threads of Civil-Military Relations in Turkey: Promises and Perils", *Mediterranean Quarterly*, vol. 22, no. 2 (2011), pp. 57-75.

<sup>448</sup> Law no. 4709, at Article 2. İsmet Giritli, "2001 Anayasa Değişikliklerinin Temel Hak ve Özgürlüklere Yansıması" [The Reflection of the 2001 Constitutional Amendments to Fundamental Rights and Freedoms], *Anayasa Yargısı*, vol. 19 (2002), pp. 88-103, at p. 98. The Court had required that such restrictions conform with the principle of proportionality, which it had defined in a 1991 judgment as follows: "That the means resorted for the restriction or the prevention of the exercise of fundamental rights and liberties are sufficient and necessary to realize the aim, and that the means and the end are proportional to each other." AYM, E. 1990/25, K. 1991/1, 10 January 1991.

<sup>449</sup> The former text of Article 13 allowed restriction on the grounds, *inter alia*, of "safeguarding the indivisible integrity of the state with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health."

<sup>450</sup> Tahmazoğlu *et al.*, *National Report: Turkey*, at p. 8.

<sup>451</sup> For a critique of the restriction grounds introduced for various rights and freedoms, such as the freedom of expression and the right to fair trial, see *Ibid*, at p. 9.

based ban, the abuse clause of the Constitution (Article 14) now contains an act-based prohibition.<sup>452</sup> In 2002-2003, seven “reform packages”<sup>453</sup> containing further constitutional and legislative amendments were adopted, including those enabling retrial in civil and criminal cases where the ECtHR had found a violation of Article 6.<sup>454</sup> In 2002, the State of Emergency was completely ended and the death penalty in peacetime was abolished.

The reform process gained speed when the AKP came to power on a pro-EU platform in late 2002. In recognition of the new government’s political will to continue the reforms, the EU declared that if “the European Council in December 2004, on the basis of a report and a recommendation from the Commission, decides that Turkey fulfils the Copenhagen political criteria”, it would open accession negotiations “without delay”.<sup>455</sup> During the next two years, the AKP-led Turkish Parliament adopted an impressive amount of legal reforms in anticipation of the European Council’s summit in December 2004, expected to result in a decision to open accession negotiations with Turkey. Some of the human rights reforms specifically addressed the Kurdish claims, as discussed in Chapters 3 and 6. Others were of a general nature. In addition to a new Press Law and Law on Associations, a new Penal Law was adopted, replacing its 80-year-old predecessor.<sup>456</sup> Several UN human rights conventions which were signed in earlier decades were ratified<sup>457</sup> and a number of new ones were signed, although a few were ratified with significant delay.<sup>458</sup> The following clause was added to Article 90 of the Constitution in order to establish the supremacy of duly ratified international conventions over domestic law: “In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences

---

<sup>452</sup> Law no. 4709, at Article 3.

<sup>453</sup> The packages involved constitutional and legislative amendments and were adopted on 6 February, 26 March and 3 August 2002, and 2 January, 23 January, 15 July and 30 July 2003.

<sup>454</sup> *Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4771, 3 August 2002, Official Gazette, no. 24841, 9 August 2002, at Articles 6 and 7; *Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4793, 23 January 2003, Official Gazette, no. 25014, 4 February 2003, at Provisional Article 1.

<sup>455</sup> European Council, *Presidency Conclusions – Copenhagen: 12-13 December 2002*, 15917/02, 29 January 2003.

<sup>456</sup> *Türk Ceza Kanunu* [Turkish Penal Code], no. 5237, 26 September 2004, Official Gazette, no. 25611, 12 October 2004.

<sup>457</sup> In addition to the UN’s twin conventions ICCPR and ICESCR mentioned earlier, Turkey ratified the International Convention on the Elimination of All Forms of Racial Discrimination on 16 September 2002 – 30 years after it had signed it on 13 October 1972.

<sup>458</sup> In addition to the conventions listed in Section 2.4.1, Turkey signed and ratified the Optional Protocol to the ICCPR which was adopted by the General Assembly in 1966 and entered into force in 1976 (3 February 2004; 24 November 2006), the Second Optional Protocol to the ICCPR aiming to the Abolition of the Death Penalty which was adopted by the General Assembly in 1989 and entered into force in 1991 (6 April 2004; 2 March 2006), Optional Protocol of the UN Convention against Torture which was adopted by the General Assembly in 2002 and entered into force in 2006 (14 September 2005; 27 September 2011), Protocol no. 14 to the ECHR which was adopted by the CoE in 2004 and entered into force in 2010 (6 October 2004; 2 October 2006), Protocol amending the European Social Charter which was adopted by the CoE in 1991 (6 October 2004; 10 June 2009), and European Social Charter (revised) which was adopted by the CoE in 1996 and entered into force in 1999 (6 October 2004; 27 June 2007).

in provisions on the same matter, the provisions of international agreements shall prevail.”<sup>459</sup> Pursuant to this amendment which gives direct effect to human rights treaties that Turkey is a party to, courts of general jurisdiction are required to enforce the supremacy of the ECHR and the ECtHR case law over domestic laws. At the same time, several reforms were problematic from the start. For example, the repealed Articles 159 and 312 of the old Penal Law were practically re-introduced in Articles 301 and 216 of the new one. Under the infamous Article 301, the denigration of “Turkishness” was made a criminal offence punishable with six months to three years of imprisonment.<sup>460</sup>

Nonetheless, in relative terms, the reforms were so remarkable that, in the words of an EU official, they were “a breakthrough, a revolution in the overall mentality in Turkey”.<sup>461</sup> Caught between the need to acknowledge this progress and the resistance in some member states to Turkey’s accession,<sup>462</sup> the European Commission produced a middle solution, inventing what an EU official has named “a brand new language in the report methodology”.<sup>463</sup> The European Council concluded in its Brussels summit in December 2004 that “Turkey *sufficiently* fulfils the Copenhagen political criteria” and decided to commence the accession process the following year.<sup>464</sup>

### 2.5.3 EU-Turkey Relations in Turbulence and the AKP’s Rollback of Reforms

Almost immediately after it started, the accession process virtually halted due to two mutually reinforcing developments: the EU’s growing lack of commitment to Turkey’s membership and Turkey’s obstinacy concerning the Cyprus question. The institutional overload brought by the EU’s 2004 enlargement triggered a heated internal debate over further enlargement versus deeper integration, causing the EU to consider Turkey’s accession in a new light and to introduce “absorption capacity” as a formal criterion in 2005.<sup>465</sup> Domestic political debates in several member states<sup>466</sup> linked together the discussions over the EU’s future and Turkey’s

---

<sup>459</sup> *Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Değiştirilmesi Hakkında Kanun* [Law on the Amendment of Various Provisions of the Constitution of the Turkish Republic], no. 5170, 7 May 2004, Official Gazette, no. 25469, 22 May 2004.

<sup>460</sup> For more on this, see Dilek Kurban, Ozan Erözden and Haldun Gülalp, *Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: A Case Study of Turkey*, prepared for project titled ‘JURISTRAS: The Strasbourg Court, Democracy and the Human Rights of Individuals and Communities: Patterns of Litigation, Implementation and Domestic Reform’ and funded by the European Commission, October 2008.

<sup>461</sup> Interview with an EU official, Brussels, 11 November 2013.

<sup>462</sup> The resistance was particularly strong in France at the time, causing President Jacques Chirac to approve the opening of accession negotiations with Turkey on the condition of them being open-ended. Turhan, *The European Council Decisions*, at p. 328.

<sup>463</sup> Interview with an EU official, Brussels, 11 November 2013.

<sup>464</sup> European Council, *Presidency Conclusions – Copenhagen: 16-17 December 2004*, 16238/04 REV 1, 1 February 2005 (emphasis added).

<sup>465</sup> Senem Aydın-Düzgit and E. Fuat Keyman, *EU-Turkey Relations and the Stagnation of Turkish Democracy*, working paper no. 2 (Istituto Affari Internazionali, 2012), at p. 3.

<sup>466</sup> In 2005, the EU’s Constitutional Treaty was rejected in popular referenda held in France and the Netherlands, and Angela Merkel, who strongly opposed Turkey’s accession, came to power in Germany.

accession, leading to the European Council's announcement that the negotiations would be "an open-ended process".<sup>467</sup>

In the meantime, Cyprus' accession to the EU and acquisition of veto power over the Union's future enlargement turned the Cyprus conflict into a stumbling block for Turkey's membership. Despite its original commitment, Turkey refused to open its ports and airports to the vessels and flights of the Republic of Cyprus, as required by the Association Agreement and its Additional Protocol of 1970. In response, the EU froze the negotiations of eight chapters in 2006.<sup>468</sup> The next year, following the election of Nicolas Sarkozy, France decided to block five chapters<sup>469</sup> on, what Tocci has named, "the shaky grounds that they were too evidently related to full membership".<sup>470</sup> Such a unilateral decision by a member state was unprecedented. But it provided a precedent for Cyprus, which followed suit two years later and announced that it would block the opening of six chapters, including 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom and Security).<sup>471</sup> Thus, only four years after the start of the accession process, negotiations over more than half of the EU *acquis* chapters were blocked. As a result, merely 14 out of the 35 chapters have been opened since the start of the accession talks, only one of which was provisionally closed.<sup>472</sup> Between July 2010 and October 2013, no new chapter was opened. According to Joost Lagendijk, a former Member of the European Parliament, this process made "it easy for the Turkish Government to say 'whatever we will do will not satisfy the EU' and to cherry pick from the long list of reforms that the EU has demanded those that fitted their political agenda."<sup>473</sup>

The diminishing EU pressure also expanded the AKP's room for manoeuvre in domestic politics, enabling it to appeal to the nationalist votes it needed to secure a second term. The government adopted several laws before the 2007 general elections, effectively reversing many of the human rights reforms it had introduced under EU pressure. The 2006 amendments to the Anti-Terror Law introduced an over-inclusive and intent-based definition of terrorism, a long

---

<sup>467</sup> European Council, *Enlargement: Accession Negotiations with Turkey: General EU Position*, Annex II: Negotiating Framework, 12 October 2005.

<sup>468</sup> These chapters were: 1-Free Movement of Goods, 3-Right of Establishment and Freedom to Provide Services, 9-Financial Services, 11-Agriculture and Rural Development, 13-Fisheries, 14-Transport Policy, 29-Customs Union and 30-External Relations.

<sup>469</sup> These chapters were: 11-Agriculture and Rural Development (one of the chapters also blocked by the European Council), 17-Economic and Monetary Policy, 22-Regional Policy and Coordination of Structural Instruments, 33-Financial and Budgetary Provisions and 34-Institutions. Following the election of François Holland in 2012, France stopped blocking Chapter 22, which was opened for negotiations by the EU in autumn 2013.

<sup>470</sup> Nathalie Tocci, *The Baffling Short-Sightedness in the EU-Turkey-Cyprus Triangle*, Document IAI 1021 (Istituto Affari Internazionali, October 2010), at p. 2.

<sup>471</sup> The remaining four chapters blocked by Cyprus are: 2-Freedom of Movement for Workers, 15-Energy, 26-Education and Culture and 31-Foreign, Security and Defence Policy.

<sup>472</sup> The chapters opened for negotiations are the following: 4-Free Movement of Capital, 6-Company Law, 7-Intellectual Property Law, 10-Information Society and Media, 12-Food Safety, Veterinary and Phytosanitary Policy, 16-Taxation, 18-Statistics, 20-Enterprise and Industrial Policy, 21-Trans-European Networks, 22-Regional Policy and Coordination of Structural Instruments, 25-Science and Research (provisionally closed), 27-Environment, 28-Consumer and Health Protection and 32-Financial Control.

<sup>473</sup> Interview with Joost Lagendijk, Istanbul, 5 October 2013.

list of “terrorist offences” and “offences committed for terrorist purposes”, new restrictions on free speech, and new expression offences such as carrying the emblem or signs of a “terrorist organization” or chanting slogans deemed to support such organization.<sup>474</sup> The revised law criminalized the “praise of terrorist offences and offenders or making propaganda for a terrorist organization”, imposed severe sanctions on the media such as heavy fines for owners and editors of media organs and prison sentences for journalists, and reintroduced the temporary closures of publications without a formal hearing and even at times upon the order of a prosecutor.<sup>475</sup> Changes made in the Law on the Duties and Powers of the Police in June 2007 granted the police new powers to search and seizure without court order and to use excessive force in public demonstrations.<sup>476</sup> The new penal laws allowed political dissidents to be charged with terrorism offences with aggravated sentences, while the enhanced powers given to law enforcement officers led to a drastic increase in the use of disproportionate force by the police against peaceful protestors.<sup>477</sup> Furthermore, the revised Anti-Terror Law and Law on the Duties and Powers of the Police authorized security officials to use lethal force against suspects who do not obey an order to surrender, prompting the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to conclude in 2013 that this legal framework results in “a dangerously large granting of power to use lethal force, and open the way for unlawful killing.”<sup>478</sup>

As the prospects for Turkey’s EU membership diminished, so did the EU’s leverage on the Turkish government. This enabled the AKP to define its own reform agenda. From the late 2000s onwards, the reforms sought two principal goals. The first was to diminish the number of ECtHR judgments against Turkey by creating new domestic remedies which, if found effective by the Court, would lead to inadmissibility decisions in pending cases on the one hand and lower the number of new applications to the ECtHR on the other. This would not only save money in the amounts of compensation the Turkish government would have to pay the applicants, but also bring Turkey down in the list of worst offender member states. Towards this goal, the government adopted three principal measures. First, to win an inadmissibility decision from Strasbourg concerning the forced displacement and property destruction cases filed by Kurdish civilians, the Turkish government adopted a compensation law in July 2004.<sup>479</sup> The goal was to win an ECtHR ruling accepting the new law as an effective remedy under the

---

<sup>474</sup> *Terörle Mücadele Kanununda Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of the Anti-Terror Law], no. 5532, 29 June 2006, Official Gazette, no. 26232, 18 July 2006, at Articles 1(1), 2, 3, 5 and 6.

<sup>475</sup> *Ibid.*, at Articles 5 and 6.

<sup>476</sup> On the reactions of the domestic human rights organizations to these amendments and the law enforcement’s expansive use of these powers, see Kurban, Erözden and Güllalp, *Supranational Rights Litigation*.

<sup>477</sup> The ways in which the security forces have abused their new powers are discussed in Chapter 6.

<sup>478</sup> UN Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, Addendum, Mission to Turkey*, A/HRC/23/47/Add.2, 18 March 2013, at p. 5.

<sup>479</sup> *Terör ve Terörle Mücadeleden Doğan Zararların Karşılanması Hakkında Kanun* [Law on the Compensation of Losses Resulting from Terrorism and the Fight against Terrorism], no. 5233, 17 July 2004, Official Gazette, no. 25535, 27 July 2004.

new pilot judgment mechanism,<sup>480</sup> which would send the pending cases back to Turkey, boost Turkey's tarnished international reputation, save millions of euros in compensation and score a point with the EU. Turkey's enactment and implementation of the compensation law and the ECtHR's response to it are discussed in detail in Chapters 4 and 6.

Second, the Turkish government granted its citizens the right to file a constitutional complaint as part of the constitutional amendments<sup>481</sup> approved by a national referendum on 12 September 2010. Turkish citizens were given the right of petition the AYM against judicial decisions and actions that would have become final on 23 September 2012.<sup>482</sup> That the right was granted with an eye on Strasbourg was evident both in text of the implementing legislation and the scope of the complaint. The drafters were explicit about what the Venice Commission has named "practical consideration"<sup>483</sup> in laying out the legislative intent as follows: "The introduction of constitutional complaint will result in a considerable decrease in the number of files against Turkey brought before the European Court of Human Rights".<sup>484</sup> As the Venice Commission noted, the procedure provided a "limited scope of human rights protection" by restricting the scope of the complaint to rights and liberties protected under the ECHR and its additional protocols, excluding other human rights conventions Turkey is a party to.<sup>485</sup> The constitutional complaint mechanism entered into force in September 2012,<sup>486</sup> adding a new layer of domestic court proceeding to be exhausted before petitioning the ECtHR.<sup>487</sup> On 30 April 2013, in acknowledgment of this new remedy, the ECtHR issued an inadmissibility decision in the case

---

<sup>480</sup> As part of the post-enlargement reform process aimed at alleviating the ECtHR's workload, the pilot judgment procedure emerged from a resolution and a recommendation adopted by the CoM in 2004. The Resolution invited the ECtHR, where possible, to identify "an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications", whereas the Recommendation asked governments to respond to judgments "which point to structural or general deficiencies in national law or practice" by setting up, where necessary, new legal remedies to "avoid repetitive cases being brought before the Court". CoM, *Resolution Res(2004)3 on Judgments Revealing an Underlying Systemic Problem*, 12 May 2004; CoM, *Recommendation Rec(2004)6 to Member States on the Improvement of Domestic Remedies*, 12 May 2004. The ECtHR made immediate use of the new mechanism in a case concerning the post-communist reparation of property rights in Poland. ECtHR, *Broniowski v. Poland*, GC, Application no. 31443/96, Judgment, 22 June 2004. For more on this, see Chapter 6.

<sup>481</sup> *Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun* [Law on the Amendment of Certain Provisions of the Constitution of the Republic of Turkey], no. 5982, 7 May 2010, Official Gazette, no. 27580, 13 May 2010.

<sup>482</sup> A legislation implementing the constitutional amendment laid down the procedures of the constitutional complaint mechanism. *Anayasa Mahkemesinin Kuruluşu ve Yargılama Usulleri Hakkında Kanun* [Law on the Establishment and Adjudication Procedures of the Constitutional Court], no. 6126, 30 March 2011, Official Gazette, no. 27894, 3 April 2011.

<sup>483</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey*, CDL-AD(2011) 040, 18 October 2011, at p. 3.

<sup>484</sup> *Ibid.*

<sup>485</sup> *Ibid.*, at pp. 3-4.

<sup>486</sup> The procedures of the constitutional complaint mechanism were laid down in the revised by-laws of AYM. *Anayasa Mahkemesi İçtüzüğü* [By-Laws of the Constitutional Court], Official Gazette, no. 28351, 12 July 2012.

<sup>487</sup> Where the AYM conducts a review on the merits and finds a violation, it can order retrial (where the violation stems from a court decision) or the payment of compensation to the applicant where there is no need for a retrial. Individuals whose complaint is found inadmissible reserve their right of petition the ECtHR.

of *Uzun v. Turkey* based on the applicant's failure to have filed a constitutional complaint with the AYM.<sup>488</sup>

The third measure adopted towards the first goal was the creation of a new domestic remedy for the bulk of the applications against Turkey pending before Strasbourg.<sup>489</sup> At a time when the ECtHR was facing a docket crisis due to the CoE's eastbound enlargement after the Cold War, the AKP government proved to be a willing partner to help out. In late 2011, it presented to the CoE "an intention letter" declaring that it would take steps "with the purpose of reducing the number of cases pending before the ECtHR [related to the excessive length of proceedings] and taking into considerations the calls made at the Interlaken and Izmir Conferences."<sup>490</sup> Taking note, the ECtHR issued a pilot judgment in *Ümmühan Kaplan*,<sup>491</sup> suspending for one year applications concerning the excessive length of proceedings. In January 2013, Turkey adopted a law establishing an administrative mechanism for the assessment of cases pending before Strasbourg relating to excessive length of proceedings or non-execution, or delayed or partial execution of the ECtHR judgments.<sup>492</sup> Three months later, the ECtHR found inadmissible a case concerning excessive length of proceedings, despite the fact that Turkey's new law had not yet come into force when the applicants had lodged their application.<sup>493</sup> The Court concluded that Turkey had fulfilled its responsibility to resolve the structural problem at the domestic level and that the new mechanism constituted a remedy to be exhausted within meaning of the Convention. The following section of the ruling is demonstrative of the new collaborative relationship between Turkey and the ECtHR: "The main purpose of Law no. 6384 was to allow Turkey to redress breaches of the reasonable time requirement and reduce, or even fully absorb, the number of applications registered on the Court's list of cases."<sup>494</sup>

The AKP government's second goal in the 'judicial reform' process was to consolidate its, more precisely Prime Minister Erdoğan's, power *vis-à-vis* the military and the judiciary by gradually expanding its control over these institutions. The background to this was the "constitutional crisis of 2007-2008."<sup>495</sup> In 2007, first the Chief of Staff and then the AYM made unsuccessful attempts to preclude the election of AKP's candidate Abdullah Gül as the first President of

---

<sup>488</sup> ECtHR, *Uzun v. Turkey*, Application no. 10755/13, Decision (Admissibility), 30 April 2013.

<sup>489</sup> CoM, *Communication from Turkey Concerning the Ormanci and Other Group of Cases against Turkey* (Application no. 24240/07), DH-DD (2014)1468, 2 December 2014, at para. 106 (hereafter "Communication from Turkey").

<sup>490</sup> High level conferences on the future of the ECHR system were convened in Interlaken in 2010, Izmir in 2011 and Brighton in 2012. The declarations are available at: [wcd.coe.int/ViewDoc.jsp?id=1591969](http://wcd.coe.int/ViewDoc.jsp?id=1591969).

<sup>491</sup> ECtHR, *Ümmühan Kaplan v. Turkey*, Application no. 43647/98, Judgment, 20 March 2012.

<sup>492</sup> *Avrupa İnsan Hakları Mahkemesine Yapılmış Bazı Başvuruların Tazminat Ödenmek Suretiyle Çözümüne Dair Kanun* [Law on the Settlement of Some Applications Lodged with the European Court of Human Rights by Means of Paying Compensation], no. 6384, 9 January 2013, Official Gazette, no. 28533, 19 January 2013. The law established a commission to conclude the applications pending before the ECtHR as of 23 March 2013. Communication from Turkey, at para. 104. For more on the working of the Commission, the number of applications it received and concluded, the amount of compensation it paid and the ECtHR's response, see *Ibid*, at paras. 106-121.

<sup>493</sup> ECtHR, *Müdürlük Turgut and Others*, Application no. 4860/09, Decision (Admissibility), 11 April 2013.

<sup>494</sup> *Ibid*, at para. 54. For more on the collaboration between the ECtHR and the AKP government, see Chapters 2 and 6.

<sup>495</sup> Özbudun, "Turkey's Search for a New Constitution", at p. 44.

Turkey coming from the political Islam movement. On 27 April, on the night of the first round of the parliamentary vote, the Chief of Staff posted a statement on its website, expressing its opposition to the election of Gül; an incident since dubbed as the ‘*e-coup*’. Then on 1 May, the AYM annulled the first round of voting which had resulted in Gül’s winning of 357 of the 361 votes. The AYM based its decision on a procedural requirement of super quorum which, as the dissenting judges pointed out, was contrary to the ordinary meaning of the relevant constitutional provision and the past practice in presidential elections.<sup>496</sup> In 2008, the AYM annulled a constitutional amendment passed under the AKP’s leadership to abolish the headscarf ban at universities.<sup>497</sup> This was a very controversial ruling, not least because the AYM lacks the power to review the substance of constitutional amendments enacted by the Parliament.<sup>498</sup> The crisis was exacerbated by the dissolution case initiated against the AKP. On 14 March 2008, the Chief Prosecutor of the High Court of Appeals submitted to the AYM a request for the AKP’s dissolution. The indictment argued that the party had become a “focal point for anti-secular activities”, citing the individual statements of the AKP leaders and the party’s various activities, first and foremost its attempt to introduce constitutional amendments to end the headscarf ban. In a ruling issued on 30 July, the majority of the AYM judges (ten out of eleven) concluded that the AKP was “a focal point for anti-secular activities” and voted for the dissolution of the party (six out of eleven). However, the AYM did not dissolve the AKP because the judges in favour of dissolution were one short of the requisite qualified majority required pursuant to the 2001 amendments made in the Constitution. Instead, the AYM imposed the second most drastic sanction by depriving the AKP of half of the Treasury funds it was entitled to receive.<sup>499</sup>

In response, the AKP government submitted to a national referendum a package of constitutional amendments introducing significant structural changes to the AYM’s composition and powers and the appointment procedures of members of the high courts.<sup>500</sup> The main purpose was to increase the executive’s influence in the composition of the AYM and the HSYK, the centralized body in charge of the nomination, promotion and dismissal of judges and prosecutors at all levels of the judiciary across the country. The amendments increased the

---

<sup>496</sup> For a detailed discussion of the decision, see Aslı Bâli, “Courts and Constitutional Transition: Lessons from the Turkish Case”, *International Journal of Constitutional Law*, vol. 11, no. 3 (2013), pp. 666-701, at pp. 674-677.

<sup>497</sup> AYM, E. 2008/16, K. 2008/116, 5 June 2008.

<sup>498</sup> Özbudun, “Turkey’s Search for a New Constitution”, at p. 46 (characterizing the AYM’s decision of 5 June 2008 as “an extreme example of ‘juristocracy’.”). For a detailed discussion of the majority and dissenting opinions, see Bâli, “Courts and Constitutional Transition”, at pp. 681-688.

<sup>499</sup> AYM, E. 2008/1, K. 2008/2, 30 July 2008. For more on the AYM’s judgment, see Bâli, “Courts and Constitutional Transition”, at pp. 688-690. For the Venice Commission’s opinion on the AYM’s decision on a political party which had received more than 46 percent of the votes as “an excessive intervention with the freedom of political parties” and “as an indication that the composition of the Court does not sufficiently reflect the various tendencies of Turkish society”, see Venice Commission, *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, CDL-AD(2009)006, 13-14 March 2009, at paras. 101 and 87.

<sup>500</sup> The constitutional amendment package was submitted to the Turkish Parliament in March 2010, but failed to receive the requisite two-thirds majority and was therefore submitted to popular referendum. The AKP’s inability to win the requisite support in the Parliament was partially due to the boycott of the vote by the Kurdish political party in protest of the government’s policies on the Kurdish question. For a discussion, see Chapter 3.

number of AYM judges from eleven to 17 and the number of HSYK members from seven to 22 with the stated goal of making it more representative of the legal profession at all levels.<sup>501</sup>

The package also entailed human rights reforms such as the establishment of an Office of the Ombudsman, the above-mentioned constitutional complaint mechanism, the recognition of the principle of affirmative action in the equal protection before the law,<sup>502</sup> the reduction of the military courts' jurisdiction in favour of the civilian courts, the enhancement of the right to privacy and freedom of information, and the expansion of collective rights. Most significantly for the purpose of this study, the amendments also included the annulment of Provisional Article 15, which had provided criminal immunity to the leaders of the 1980 *coup* and had prohibited the constitutional review of all laws and decrees adopted by the military regime. The amendments stirred a heated public debate in Turkey, with the critics accusing the government of court-packing, strategically including liberal reforms merely to win political allies and yet excluding the Kurdish demands<sup>503</sup> for lowering the electoral threshold,<sup>504</sup> while the proponents depicted the changes as the end of judicial tutelage over democracy.<sup>505</sup>

The constitutional amendments would have tremendous implications for Turkey's political future, which became evident to most observers only retrospectively. The first indication was the HSYK elections held in October 2010, which resulted in the victory of the list of candidates endorsed by the AKP government.<sup>506</sup> At the time, dissenting voices within the judicial

---

<sup>501</sup> For a description and discussion of these and other reforms introduced under the package, see Serap Yazıcı (ed.), *A Judicial Conundrum: Opinions and Recommendations on Constitutional Reform on Turkey* (TESEV Publications, 2010).

<sup>502</sup> While not explicitly stating it as such, Article 10, as revised in 2010, introduced the principle of positive action to the Constitution. The equality clause now stipulates that measures to be adopted to ensure equality between men and women as well as measures to be adopted for children, elderly persons, persons with disabilities, widows and orphans of martyrs, ex-soldiers disabled in the war and veterans shall not be considered as violations of the principle of equality.

<sup>503</sup> For these demands and the position adopted by the Kurdish party Peace and Democracy Party (*Barış ve Demokrasi Partisi*-BDP) in the referendum, see Chapter 3.

<sup>504</sup> Haldun Gülalp, "The Battle for Turkey's Constitution", *Guardian*, 4 September 2010 (that the amendments other than those concerning the AYM and the HSYK were "democratic window-dressing", noting that the Office of the Ombudsman was created without a guarantee of autonomy and the right to collective bargaining was not accompanied with the right to strike); Andrew Arato "The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition", *Constellations*, vol. 17, no. 2 (2010), pp. 345-350 (that the AKP government was "following the pattern of other populist and especially authoritarian leaders and governments in attacking the supreme or constitutional courts that stand in their way", at p. 346); Andrew Arato, "Ten Theses on Constitutional Change in Turkey", *Public Seminar*, 4 October 2013, available at: <http://www.publicseminar.org/2013/10/10-theses-on-constitutional-change-in-turkey/#.WMKdGPnyuM8> (that the AKP's initiative constituted the "packing of the AYM, disguised by the large 26 item amendment package").

<sup>505</sup> See e.g. Bâli, "Courts and Constitutional Transition" (that the amendments made the AYM more representative of the Turkish society and ended the "self-perpetuating oligarchy of judges" through changing the composition of the HSYK, at p. 695); Özbudun, "Turkey's Search for a New Constitution" (that the amendments were "perfectly compatible with European standards", at p. 49); Aslı Bâli, "Unpacking Turkey's 'Court-Packing' Referendum", *MERIP*, 5 November 2010, <http://www.merip.org/mero/mero110510> (that the amendments are "liberalizing improvements to a flawed constitution"). For a middle position urging a 'wait and see' approach, see Hootan Shambayati and Güliz Sütçü, "The Turkish Constitutional Court and the Justice and Development Party (2002-09)", *Middle Eastern Studies*, vol. 48, no. 1 (2012), pp. 107-123, at p. 119.

<sup>506</sup> Venice Commission, *Interim Opinion on the Draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey*, CDL-AD(2010)042, 20 December 2010, at para. 37. The then Prime Minister

profession contended that the government wilfully supported candidates belonging to the Fethullah Gülen movement,<sup>507</sup> enabling it to dominate the HSYK. The most outspoken critic was a judge named Orhan Gazi Ertekin who, as the President of an association of judges named Democratic Judiciary, made public statements and wrote a book revealing behind-the-scenes negotiations between the government and members of the Gülen movement in putting together a joint list of candidates for HSYK membership.<sup>508</sup>

Soon after, the AKP and the Gülen movement had a public fallout which started in 2011 and exacerbated with a corruption case launched in late 2013 implicating family members of President Erdoğan and several ministers.<sup>509</sup> Accusing the Gülen movement of seeking to seize power by infiltrating the judiciary and law enforcement to form a ‘parallel state’, President Erdoğan declared war against his former ally, the battleground of which would be the judiciary. According to the International Commission of Jurists, starting from 2014, the AKP government “has asserted an unprecedented degree of control over the judiciary” by re-establishing its control over the HSYK and launching a purge of alleged Gülenist judges and prosecutors through dismissals, involuntary transfers and criminal and disciplinary sanctions.<sup>510</sup> In December 2015, the government classified the Gülen movement as a terrorist organization. Within moments of a *coup* attempt against his government on 15 July 2016, President Erdoğan declared the movement as the culprit and launched a new purge of alleged Gülenists from state institutions, the business sector, media, civil society and beyond. In the judiciary alone, over 4,000 judges and prosecutors were dismissed without cause<sup>511</sup> and over 2,000 were arrested on terrorism charges without due process, including two members of the AYM, 108 members of the High Court of Appeals, 48 members of the Council of State and five members of the HSYK.<sup>512</sup>

Meanwhile, since his election to presidency in August 2014, Erdoğan had been incrementally usurping the constitutional powers belonging to the Parliament and the Prime Minister. As he

---

Erdoğan publicly acknowledged the government’s meddling into the HSYK elections. ICJ, *Turkey: Judicial System in Peril – A Briefing Paper* (2016), at p. 13.

<sup>507</sup> An Islamic preacher by profession, Fethullah Gülen is the leader of a transnational religious movement, the non-transparent structure, composition, operation and goals of which have been a subject of speculation and controversy. The members of the movement gained increasing power and influence in the areas of education, judiciary, business, police and state bureaucracy since the early 1980s and particularly after 2002 thanks to its political alliance with the AKP cadres. For more on the Gülen movement, see Berna Turam, *Between Islam and the State: The Politics of Engagement* (Stanford University Press, 2007).

<sup>508</sup> See e.g. Şenay Yıldız, “Cemaat Endüstriyel bir İktidara Dönüştü” [The Community has Turned into an Industrial Power], *Akşam*, 20 January 2014. For a debate on the 2010 HSYK elections between various factions within the judiciary and legal scholars, see Ali Bayramoğlu (ed.), *The High Council of Judges and Prosecutors in Turkey: Roundtable Discussion on its New Structure and Operations* (TESEV Publications, 2012).

<sup>509</sup> On the rise and fall of the political alliance between the AKP government and the Gülen movement, see Günter Seufert, *Is the Fethullah Gülen Movement Overstretching Itself? A Turkish Religious Community as a National and International Player*, Research Paper (SWP, 2014).

<sup>510</sup> ICJ, *Turkey: Judicial System in Peril*, at p. 10.

<sup>511</sup> Suzy Hansen, “Inside Turkey’s Purge: As the Ruling Party Expands the Ranks of its Enemies, Life in a Fragile Democracy becomes Stranger and Stranger”, *The New York Times Magazine*, 13 April 2017.

<sup>512</sup> Robert Fisk, “The 70,000 post-coup Arrests are now at the Heart of the Turkish Government’s Propaganda War”, *Independent*, 8 October 2016.

had openly declared to an astounded nation on 14 August 2015, Turkey’s system of government had effectively changed and what needed to be done now was “to give a legal framework to this de-facto state with a new constitution”.<sup>513</sup> The principal hurdle was the HDP’s presence in the Parliament. Having run on an election platform to bar Erdoğan from achieving this objective, the Kurdish party HDP had a historic win in the June 2015 parliamentary elections by securing 80 seats which deprived the AKP not only of the two-thirds majority it needed to change the constitution or at least the three-fifths majority to call a referendum on the issue, but even the simple majority it needed to continue its single-party rule. Erdoğan’s next goal was to repeat the elections. Towards that, he followed a two-prong strategy by blocking the coalition negotiations between the political parties represented at the Parliament on the one hand and resuming war against the PKK in Turkey’s Kurdish region and in northern Iraq to attract the Turkish nationalist votes the AKP needed to regain its parliamentary majority on the other.<sup>514</sup> Erdoğan’s strategy worked; he used the hung Parliament’s ‘inability’ to produce a coalition government as a pretext to call for repeat elections in November and the AKP won back some of the nationalist votes by running on a law and order platform. Though still short of the two-thirds majority to call for a referendum on its own, the snap elections in November 2015 brought the AKP its fourth single-party rule.

Erdoğan took advantage of the heightened security atmosphere after the failed *coup* to initiate the legal process for transitioning to a “Turkish-style” presidency.<sup>515</sup> The constitutional amendment package, jointly presented by the AKP and the MHP on 10 December 2016, was adopted by the Parliament on 21 January 2017, signed by President Erdoğan on 10 February, and approved by 51.41 percent of the votes in a referendum held on 16 April.<sup>516</sup> Throughout this process, the country was governed by a state of emergency, demonstrations against the package were banned or partially restricted and around ten HDP deputies were held in pre-trial detention.<sup>517</sup> Under the changes, which will enter into force after synchronized parliamentary and presidential elections in 2019, the President has the unsupervised executive powers to, *inter alia*, appoint and dismiss ministers and all the high officials, dissolve the Parliament on any grounds whatsoever, issue presidential decrees not subject to the AYM’s oversight and declare a state of emergency.<sup>518</sup> These changes are, in the words of the CoE’s Venice Commission, a

---

<sup>513</sup> *The Guardian*, “Defiant Erdogan vows to Press for New Turkey Constitution”, 14 August 2015.

<sup>514</sup> Ümit Cizre, “Introduction: The Politics of Redressing Grievances – The AK Party and its Leader”, in Ümit Cizre (ed.), *The Turkish AK Party and its Leader: Criticism, Opposition and Dissent* (Routledge, 2016), pp. 1-19.

<sup>515</sup> This is a term coined by Erdoğan and other AKP leaders in reference to their intention to create a unique presidential system to address Turkey’s special needs. Venice Commission, *Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017*, CDL-AD(2017)005, 13 March 2017, at paras. 17, 43 and 126 (hereafter “Opinion on Constitutional Amendments”).

<sup>516</sup> *Türkiye Cumhuriyeti Anayasasında Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of the Constitution of the Republic of Turkey], no. 6771, 21 January 2017, Official Gazette, no. 29976, 11 February 2017.

<sup>517</sup> On the process leading to the imprisonment of the HDP deputies, see Chapter 3.

<sup>518</sup> Venice Commission, *Opinion on Constitutional Amendments*, at para. 127.

decisive move “towards an authoritarian and personal regime”,<sup>519</sup> wiping out any remains of democracy and the rule of law in Turkey.

## 2.6 Conclusion

What has been the impact of the European institutions in the advancement of democracy and human rights in Turkey? Have their engagement and impact varied across time? If so, what accounts for this variation? Is it only a matter of external dynamics? If not, which domestic factors explain Turkey’s poor human rights and democracy record?

In his comparative study of the impact of regional organizations in the human rights policies of member states, Pevehouse had named the Turkish case “an intriguing puzzle” which illustrates the limits of the effectiveness of the European institutions.<sup>520</sup> While raising the right question, in concluding that the European organizations were effective in “encouraging redemocratization” but failed “in assisting in the consolidation of democracy”,<sup>521</sup> he has given an incomplete answer. Certainly, as Pevehouse pointed out, the European institutions upheld their security interests over human rights norms by failing to sanction Turkey in response to repeated military interventions, most notably in 1980. However, as demonstrated in this chapter, Turkey’s democracy problem cannot be solely explained by military interventions into politics. Neither has the transition back to civilian politics, as in 1983, meant “redemocratization”. While the generals did step down largely due to European pressure, the politico-legal regime they created has survived to this day. The equation of polyarchy under civilian rule with democracy, as O’Donnell noted, misses the crux of authoritarianism. Finally, as in other authoritarian contexts, a failed case of democracy can never be solely or predominantly explained by external factors. Many times, and certainly in Turkey, it is the outcome of the interplay of complex domestic and external factors.

At the domestic level, Turkey’s transition to polyarchy has never translated into democratization. This is not only because rule by elected governments has been frequently interrupted by direct or indirect military interventions, but because the basic elements of substantive democracy and constitutionalism, first and foremost the equal protection of minorities, the effective guarantee of civil and political rights, the separation of powers, an independent and rights-conscious judiciary and the guarantee of media freedom, have always lacked in Turkey’s politico-legal regime. Social and political factors, including the survival of the institutions of the single party rule after the transition to multiparty politics, the authoritarianism embedded in the political culture which deems democracy to mean majoritarian rule and transforms opposition groups to autocrats once in power, and the submissive and politically conservative nature of society prevented the emergence of a

---

<sup>519</sup> Ibid, at para. 133.

<sup>520</sup> Pevehouse, *Democracy from Above*, at p. 112.

<sup>521</sup> Ibid, at p. 111.

democratic system.<sup>522</sup> Turkey has a long tradition of a centralized and strong state immune to the *sine qua non* internal checks of a democratic order; namely, an ideologically neutral and institutionally independent judiciary, independent and free media,<sup>523</sup> a parliament vested with effective oversight powers over the executive, and an organized and strong civil society.

In light of these limited socio-political dynamics, any progress towards democracy, human rights protection and minority rights in Turkey has principally resulted from external pressure. The main source of such pressure has been Western European countries and, after the end of World War II, European institutions, in particular the CoE and the EU. Yet, despite its long engagement with these regional organisations, Turkey remains an authoritarian regime which seems to be in a perpetual transition to democracy. Turkey's over two centuries-long desire of political and economic integration with Europe, combined with the West's geostrategic and trade interests in Turkey has resulted in a rather unhappy political marriage. While eager to deepen its security and financial relationships with Europe, the Turkish state has been a reluctant recipient of the legal norms and political values that European institutions attached to their relationships with Turkey.

This uneasy relationship stemmed from various factors. The first concerns the increasingly divergent routes the two sides had followed since the beginning of their relationship. The Europe that the Turkish state had wanted to integrate into after World War II rapidly changed from the authoritarian regimes of the 1930s to democratic countries tied initially with a single economic market and increasingly with common values of human rights, democracy and the rule of law. The second concerns the discrepancy between the democratic values upheld by the European institutions and the economic and security interests of individual European states, particularly during the Cold War. For European member states, a nominally democratic and politically stable Turkey was seemingly sufficient. Where the values of European institutions collided with their individual interests, member states did not hesitate to follow the latter. The CoE member states' failure to suspend Turkey's membership and the EU member states' reluctance to terminate relations with Turkey after the 1980 *coup d'état* or in the 1990s, and the terms of the settlement of the inter-state ECtHR complaint against Turkey are some of the instances where individual member states let their political, economic and/or security interests prevail over shared European values. At other times, member state self-interests closed the door on Turkey, precisely when it had deserved encouragement. Thus, after the EU decided to open accession talks with Turkey in December 2004, Cyprus and France blocked several chapters. Individual EU member states' unilateral blocking of negotiations was an unprecedented treatment of an accession country. The EU let itself be driven by the political interests of individual members, this time France and Germany, in publicly foreclosing Turkey's prospects

---

<sup>522</sup> Sunar and Sayarı, "Democracy in Turkey", at pp. 171-173.

<sup>523</sup> On Turkey's media policies and press freedom in Turkey, see Dilek Kurban and Esra Elmas, "Turkish Media Policy in National Context," in Evangelia Psychogiopoulou (ed.), *Understanding Media Policies: A European Perspective* (Palgrave Macmillan, 2012), pp. 214-229; Dilek Kurban and Ceren Sözeri, *Caught in the Wheels of Power: The Political, Legal and Economic Constraints on Independent Media and Freedom of the Press in Turkey* (TESEV Publications, 2012).

for eventual accession at a critical and rare moment in history when the country was actually making progress in the areas of human rights and the rule of law.

The uneasy relationship between Turkey and Europe stems from a fundamental paradox. Turkey joined the European institutions at an early stage of their development. To the surprise of their founders, the EU and the CoE, in particular their respective courts the European Court of Justice and the ECtHR, evolved into powerful institutions with strong human rights mandates.<sup>524</sup> And Turkey was *there* from the beginning – a rather ill-suited partner (EU) or member (CoE) which was too costly to leave out and, for the EU, to fully integrate. During the Cold War, the disconnect between the authoritarian politico-legal regime in Turkey and democratic states in Western Europe was tolerated because of mutual security interests. This enabled Turkey to keep its engagement with the ECtHR at a minimum, by not recognizing the right of individual petition and the Court’s compulsory jurisdiction as long as it could. With the end of the Cold War, everything has changed. The European re-unification project entailed the eastward and intertwined enlargements of the CoE and the EU. Accession to the former, including the ECtHR, had become a prerequisite to that to the latter. The rapidly changing political climate in Europe caught Turkey rather unprepared at a time when the war between the Kurdish insurgency and the military had just started. Turkey’s geostrategic and economic interests still lay in further integration with the EU, rendering it a reluctant recipient of the ECtHR oversight.

Certainly, nation states have never been the sole actors in this relationship. Turkey’s prospective (EU) and actual (CoE) membership to European institutions enabled its civil society to trigger the available external political and legal mechanisms to bring external pressure on the government. The Kurds, the largest and most contentious minority in Turkey, would be the first to mobilize these mechanisms by simultaneously lobbying the European political institutions, first and foremost the European Parliament, filing complaints with the non-judicial human rights mechanisms of the CoE and, most importantly, petitioning the ECtHR. The rest of this thesis tells this story.

---

<sup>524</sup> On the evolution of the European Court of Justice and the ECtHR into “effective” supranational courts, see Laurence R. Helfer and Anne-Marie Slaughter, “Toward a Theory of Effective Supranational Adjudication”, *The Yale Law Journal*, vol. 107, no. 2 (1997), pp. 273-391.

---

## The Kurdish Question in Historical Context

### 3.1 Introduction

Turkey belongs to Guillermo O'Donnell's "brown" countries where the state "complexly mixes, functionally and territorially, important democratic and authoritarian characteristics" and the "components of democratic legality (...) fade away at the frontiers of various regions and class, gender and ethnic relations."<sup>525</sup> Nowhere has the relative nature of legality and democracy in Turkey been as apparent as in the state's treatment of its Kurdish citizens, where the frontiers separating the lawful from the unlawful and the democratic from the authoritarian have run along both regional and ethnic lines. The sudden and dramatic loss of imperial territories and population had led the Ottoman regime to consolidate its rule in the remaining lands, which challenged the Kurds' long lasting autonomy in their region and gave rise to armed revolts against the state. The Republic continued its predecessor's attempts at centralization, this time complementing them with assimilationist policies, arguably inspired by the *Zeitgeist* of the 1930s, seeking ethnic homogenization in the name of preserving the unity of the new nation. The republican policies, too, met Kurdish resistance, in the form of armed uprisings during the single-party era and democratic opposition after the transition to multiparty politics. The response of the regime, whether imperial or republican, to various forms and phases of Kurdish political mobilization has been repressive: forced displacement, states of exception, special criminal tribunals and legal persecution.

What renders Turkey "brown" is also the fact that state repression has not occurred across the board. Rather, it has been territorially limited to the Kurdish region and, elsewhere in the country, has targeted ethnically conscious and politically mobilized Kurds who demanded equal treatment and cultural recognition for the Kurds and autonomy for the Kurdish region. Neither has discrimination been explicit. Being Kurdish, as such, has never been an impediment to the exercise of fundamental freedoms or political participation and representation. Rather, there has been a tacit understanding between the state and the Kurds that equal treatment was contingent on 'voluntary' assimilation. Kurds who mobilized on the basis of their ethnicity and demanded

---

<sup>525</sup> Guillermo O'Donnell, "On the State, Democratization and Some Conceptual Problems: A Latin American View with Glances at Some Post-Communist Countries", *World Development*, vol. 21, no. 8 (1993), pp. 1355-1369, at pp. 1360-1361.

political, linguistic and cultural rights have been systematically targeted through prosecution, forced exile, imprisonment and deprivation of political rights. Others who did not publicly assert their identity or make identity-based claims have been integrated into the mainstream political and civil life. At the same time, when it came to setting the ‘identity’ of the nation, Turkey’s laws have never been blind. The Kurds, irrespective of where they lived, have been targeted by assimilationist laws aimed at eliminating Kurdish culture and identity. Ethnically non-blind laws banned or restricted the expression or use of the Kurdish language in person and place names, broadcasting, cultural life, education and politics. Certainly, this has not been a uniform practice across time, place or state actors. Rather, the degree of legal restrictions has varied in accordance with domestic and external political developments, and among and between various government actors at the national and local levels.

The most notable policy changes occurred during the tenure of ‘reform-minded’ governments, which came to power with the ambition of integrating Turkey with the EU: in the late 1980s the Motherland Party (*Anavatan Partisi*-ANAP) and in the early 2000s the Justice and Development Party (*Adalet ve Kalkınma Partisi*-AKP). The heads of these governments, Turgut Özal and Recep Tayyip Erdoğan, initiated legal reforms which gradually, but in a limited fashion, enhanced Kurdish cultural rights. While claiming to be great reformists who would advance Turkey’s EU integration project, both made a clear distinction between the Kurds’ cultural and political rights claims, subjecting the latter to the realm of criminal and counter-terrorism laws. They criminalized the political use of the Kurdish language, the advocacy of Kurdish rights, the criticism of state policies on the Kurdish conflict and the proposal of alternative solutions, leading to the dissolution of one party after another and the imprisonment of the Kurds’ political representatives. The ANAP and AKP governments created and expanded a dual criminal justice system which subjected crimes against national security to the jurisdiction of special courts, where Kurdish politicians and activists were prosecuted on terrorism charges with virtually no due process guarantees. They also kept in place Europe’s highest electoral threshold of 10 percent to preclude the representation of the Kurdish national movement in the Turkish Parliament. The exclusion of the Kurdish parties has been particularly beneficial for the AKP, enabling it to gain disproportionate number of parliamentary seats and form single-party governments.

At the same time, their pro-European rhetoric and policies created a fundamental paradox for the ANAP and AKP governments. Since the 1970s, the EU had gone through a tremendous transformation from a single market to a political union based on values of human rights, democracy and the rule of law. Özal’s tactical decision to recognize the right of individual petition to the ECtHR to secure Turkey’s EU candidacy would have a “boomerang effect” on the state’s policies on the Kurdish question when the Kurds carried their grievances to the ECtHR and the EU treated the Court’s rulings as benchmarks for assessing Turkey’s progress towards accession.<sup>526</sup> Özal’s application for EU membership also opened a new era in Kurdish political mobilization, enabling Kurdish politicians to lobby European institutions and petition the ECtHR in defence against the dissolution of their parties and the criminalization of their participation in the democratic process. As Turkey advanced from application to candidacy and

---

<sup>526</sup> Margaret E. Keck and Kathryn A. Sikkink, *Activists beyond Borders* (Cornell University Press, 1998).

subsequently to accession status, the reforms it had to undertake to fulfil the EU's accession criteria had an empowering effect on Kurdish political mobilization in Turkey. The Kurdish national movement circumvented the electoral threshold through strategies ranging from pre-election coalitions to running with independent candidates and succeeded to enter the Parliament through the back door, increasing the number of their seats in every election. Meanwhile, the absence of a threshold in municipal elections enabled Kurdish parties to establish their hegemony in the Kurdish region and engage in civil disobedience against the legal bans on the use of the Kurdish language in public life and in access to public services. The Kurdish national movement pushed the boundaries of the AKP's EU-induced reform project and increased the bar for the political solution of the Kurdish question by demanding collective rights for the Kurds and autonomy for the Kurdish region.

This chapter proceeds as follows: Section 3.2 provides a historical account of the evolution of late Ottoman and early Republican policies in the Kurdish region and of the Kurdish response to forced assimilation and centralization policies through armed uprisings. Section 3.3 shows how, after Turkey's transition to polyarchy, the Kurdish movement re-emerged in the 1950s and made use of the individual rights granted under the 1961 Constitution to demand cultural recognition, political rights and regional autonomy for the Kurds. I then discuss how the state responded to the Kurds' democratic and peaceful opposition by criminalizing it. Section 3.4 analyses the constitutional regime adopted by the junta after the 1980 *coup* as it pertains to the Kurdish question. It shows how the 1982 Constitution not only continued the earlier policies of cultural assimilation and political repression, but also developed an emergency regime to tackle non-violent Kurdish opposition in the realm of counter-terrorism. Section 3.5 looks into Kurdish political mobilization in the shadow of the war between the PKK and the Turkish state. It shows how the Kurdish movement has tried to overcome the structural barriers to its electoral mobilization by resorting to various strategies and has used its growing power in local politics to pursue linguistic policies in defiance of the legal bans on the use of Kurdish. I then show how all three branches of the state have engaged in concerted efforts to suppress this mobilization by, among others, dissolving Kurdish political parties and imprisoning the elected representatives of the Kurds. Section 3.6 discusses the EU-induced reforms in the areas of linguistic and political rights and the AKP government's short-lived efforts to find a peaceful solution to the conflict. Finally, Section 3.7 analyzes the ECtHR's jurisprudence on the Kurds' political participation and cultural rights claims.

### **3.2 From the Empire to the Republic: The Tackling of the Kurdish Demands**

The Kurdish 'problem' featured high among the challenges facing the collapsing Ottoman Empire and the new-born Republic. Amidst considerable territorial loss and demographic shrinking, the imperial and the republican regime sought to control the remaining territories through centralizing military and administrative power. Refusing to give up the long-standing autonomy of their region, the Kurds took up arms, which in turn led the state to resort to repression by displacing civilians from the Kurdish region and resettling them to Turkish

majority areas, ruling the Kurdish region by state of exception and setting up special criminal tribunals vested with extraordinary powers to silence Kurdish dissent.

Since the late Ottoman era, the co-existence of the lawful and the unlawful and of the peaceful and the violent have been a characteristic feature of Kurdish political mobilization. The Kurds sought, and briefly achieved, democratic representation in the institutions of the late Ottoman and early Republican state. At the same time, particularly when their non-violent democratic opposition failed, the Kurds resorted to armed struggle. On the other hand, the relationship between the state and the Kurds has not necessarily been linear. The state's cooperation with some of the Kurds against defined common enemies (externally the Allies and internally the Armenians) co-existed with its confrontation with others. Simultaneously or consecutively, the state co-opted 'loyal' Kurdish tribes against remaining Kurds by setting up the Hamidiye Cavalry in late 19<sup>th</sup> century and the village guard system a century later.

### 3.2.1 The Ottoman Legacy

The origins of the conflict between the state and the Kurds date back to the commencement of Turkey's modernization project, the principal components of which were centralization, secularization and nationalism.<sup>527</sup> Until the mid-19<sup>th</sup> century, the Ottoman Empire was governed by a decentralized administrative system which conferred a great deal of autonomy to Kurdish emirates and tribes.<sup>528</sup> The situation changed dramatically from the late 19<sup>th</sup> century onwards with the reforms undertaken to reverse the empire's military, economic and political decline. Administrative centralization, a principal element of these modernization efforts, posed a fundamental challenge to Kurdish autonomy and gave rise to counter resistance by the semi-independent emirates.<sup>529</sup> While these uprisings were eventually suppressed, the disappearance of the emirates created a political vacuum and led to the emergence of religious sheikhs as the new Kurdish national leaders.<sup>530</sup>

After its defeat in the Russo-Turkish war, the Ottoman Empire was forced to sign the Treaty of Berlin on 13 July 1878. The Treaty not only required the Ottomans to enhance the liberties of its Christian subjects, but also entrusted the European powers with protecting the Armenian community against their Kurdish neighbours in the eastern provinces, as discussed in Chapter 2. The post-1878 order gave rise to an Armenian independence movement, backed by the British and the Russians who had a growing influence in the eastern Ottoman region. In 1891, Sultan Abdulhamid established the Hamidiye Cavalry made up of select Sunni Kurdish tribes

---

<sup>527</sup> Mesut Yeğen, *Devlet Söyleminde Kürt Sorunu* [The Kurdish Question in State Rhetoric] (İletişim Yayınları, 1999).

<sup>528</sup> On the gradual evolution of the Ottoman imperial policies from extending legal and political protection to hereditary Kurdish tribes to the selective breaking up and forced settlement of dissident tribes in the context of the post-17<sup>th</sup> century centralization efforts, see Reşat Kasaba, "Do States Always Favor Stasis? The Changing Status of Tribes in the Ottoman Empire", in Joel S. Migdal (ed.), *Boundaries and Belonging: States and Societies in the Struggle to Shape Identities and Local Practices* (Cambridge University Press, 2004), pp. 27-48.

<sup>529</sup> In the late 1870s and the early 1880s, Sheikh Ubaydallah led the first Kurdish uprising to establish an independent Kurdistan. Robert Olson, *The Emergence of Kurdish Nationalism and the Sheikh Said Rebellion, 1880-1925* (University of Texas Press, 1989); David McDowall, *A Modern History of the Kurds* (I.B. Tauris, 2004), at pp. 53-59.

<sup>530</sup> McDowall, *A Modern History of the Kurds*, at pp. 49-50.

ostensibly to create a bulwark against the Russians.<sup>531</sup> Taking advantage of the Kurds' religious ties to the Caliphate, tribal manpower and fear of an Armenian state in the region they co-inhabited,<sup>532</sup> Abdulhamid provided training, arms and money to loyal tribes and had them fight against the Armenians, the British and the Russians. The Hamidiye Cavalry, commonly known as the "Hamidiye Regiments", played an important role in the 1894-1896 massacres of over 100,000 Armenians.<sup>533</sup> The Sultan also sought to establish his authority in the eastern provinces, reduce the power of the Kurdish sheikhs and prevent a Kurdish nationalist movement by playing into the tribal and religious divisions among the Kurds.<sup>534</sup> Indeed, some of the Hamidiye Kurds used their military strength and power to attack the non-Hamidiye Kurdish tribes, including the Alevis,<sup>535</sup> and confiscate their lands and possessions.<sup>536</sup> At the same time, the experience exposed the Hamidiye Kurds to national movements in Europe and equipped them with military training and experience.<sup>537</sup>

Abdulhamid's reign was brought to an end by the Young Turks movement, officially named the Committee of Union and Progress (CUP), which seized power in 1908 with the goal of turning the empire into a modern and secular European power. The CUP's reinstatement of the suspended 1876 constitution<sup>538</sup> created a relatively liberal political order, enabling the establishment in Istanbul in 1908 of the first Kurdish political organization, Kurdish Society of Mutual Aid and Progress (*Kürdistan Teavün ve Terakki Cemiyeti-KTCC*).<sup>539</sup> Soon after the KTCC's establishment in the imperial capital, similar organizations emerged across Kurdistan which were linked to, but independent from, the KTCC. While the KTCC was set up by Kurdish intellectuals who advocated modernization reforms to strengthen the Ottoman Empire, the provincial organizations were made up of Kurdish tribal chiefs who were worried that the CUP would put an end to the privileges they had enjoyed under three decades of Abdulhamid rule

---

<sup>531</sup> Ibid.

<sup>532</sup> The Kurds read the Treaty of Berlin's reference to a protected status for the Ottoman Armenians as a signal for the emergence of an independent Armenian state in their co-habited region. McDowall, *A Modern History of the Kurds*, at pp. 56-57.

<sup>533</sup> Donald Bloxham, *The Great Game of Genocide: Imperialism, Nationalism, and the Destruction of the Ottoman Armenians* (Oxford University Press, 2005), at p. 51.

<sup>534</sup> Olson, *The Emergence of Kurdish Nationalism*, at p. 8.

<sup>535</sup> Alevi is a blanket term used for a large number of heterodox Muslim Shi'a communities who differ among themselves in their beliefs and practices. They constitute the largest religious minority in Turkey and differ considerably from the Sunni Muslim majority in their interpretation and practice of Islam. Linguistically they consist of four groups: Azerbaijani Turkish, Arabic, Turkish and Kurdish (the latter further divided into Kirmanji and Zaza speakers). While the majority of the Kurds in Turkey are Sunni Muslims, a significant number of them are Alevis. For more on Alevis, see Martin van Bruinessen, "Kurds, Turks and the Alevi Revival in Turkey", *Middle East Report*, no. 200 (1996), pp. 7-10.

<sup>536</sup> McDowall, *A Modern History of the Kurds*, at pp. 60-62.

<sup>537</sup> Olson, *The Emergence of Kurdish Nationalism*, at p. 11 (that the Cavalry consisted of around 50,000 well-armed Kurds, some of whom later fought in the Balkan Wars).

<sup>538</sup> The European-inspired "Tanzimat" reform period (1826-1876) aimed at re-organizing the declining Ottoman Empire had culminated in the adoption of a constitution in 1876 but was abruptly ended with the coming to power of Sultan Abdulhamid.

<sup>539</sup> KTCC was closed down by the CUP the next year, but was succeeded by another in 1912. Olson, *The Emergence of Kurdish Nationalism*, p. 15.

and advocated return to the pre-CUP status quo.<sup>540</sup> During the CUP's short rule, the Kurds sent ten representatives to the Ottoman Parliament.<sup>541</sup>

In the meantime, the Ottomans suffered a heavy defeat in the Balkan Wars and lost nearly all territories in Europe, resulting in the Turks to become the dominant ethnic group in the Empire.<sup>542</sup> Convened amidst this political climate, the CUP's 1913 party congress endorsed the principles of administrative centralization and Turkification and decided to resettle the nomadic Kurdish tribes.<sup>543</sup> A decree issued in April 1916 ordered the Kurds' deportation into central and western Anatolia, on the condition that the settlers would not exceed 5 percent of the local populations in any given place, and their replacement with Albanian and Bosnian refugees who had fled the Balkans.<sup>544</sup> At the same time, the CUP rule did not change the relations between the loyal Kurdish tribes and the regime. While the Hamidiye Cavalry-turned-tribal regiments revolted after Balkan Wars for regional autonomy and language rights, World War I and the Armenian genocide of 1915-1916<sup>545</sup> led many Kurdish tribes, religious sheiks and urban elite to form a new alliance with the CUP government.<sup>546</sup>

The Ottomans' defeat in World War I resulted in an immense territorial loss and the Allied occupation of much of the remaining territories, which provoked a liberation movement under the leadership of Mustafa Kemal, a military officer in the Ottoman army. The Sultan, who was still formally the head of the government, was forced by the Allies to sign the Treaty of Sèvres, which envisioned the creation of a Kurdish (and Armenian) state if a majority of the people in the region requested so.<sup>547</sup> Many members of the Ottoman Parliament who opposed Sèvres joined ranks with the Kemalists and left Istanbul for Ankara to join the Grand National Assembly which had become the *de facto* Turkish government.<sup>548</sup> In the meantime, some Kurdish tribes were demanding a Kurdish state in accordance with Sèvres. The rebellion led by the Koçgiri tribe in the eastern Dersim region, with the support of the Istanbul-based Society for the Rise of Kurdistan, broke out against this background.<sup>549</sup> Kemalists were able to crush the uprising by playing into the Sunni-Alevi divisions among the Kurds and portraying the

---

<sup>540</sup> Janet Klein, "Kurdish Nationalists and non-Nationalist Kurdistans: Rethinking Minority Nationalism and the Dissolution of the Ottoman Empire, 1908-1909", *Nations and Nationalism*, vol. 13, no.1 (2007), pp. 135-153, at p. 140.

<sup>541</sup> Henri J. Barkey and Graham E. Fuller, *Turkey's Kurdish Question* (Rowman & Littlefield, 1998).

<sup>542</sup> Yeğen, *Devlet Söyleminde*, at p. 73.

<sup>543</sup> *Ibid.*, at pp. 73-74.

<sup>544</sup> Uğur Ümit Üngör, "Geographies of Nationalism and Violence: Rethinking Young Turk 'Social Engineering'", *European Journal of Turkish Studies* [Online], vol. 7 (2008), available at: <http://ejts.revues.org/2583>, at paras. 25-26.

<sup>545</sup> On the Armenian genocide, see Taner Akçam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (Metropolitan Books, 2006); Bloxham, *The Great Game of Genocide*; Richard G. Hovannisian (ed.), *The Armenian Genocide: History, Politics, Ethics* (St. Martin's Press, 1992); Henry Morgenthau, *Ambassador Morgenthau's Story* (Doubleday, Page & co., 1918).

<sup>546</sup> Hamit Bozarslan, "Kurds and the Turkish State", in Reşat Kasaba, *The Cambridge History of Turkey, Volume 4* (Cambridge University Press, 2008), pp. 333-356, at p. 337.

<sup>547</sup> The Treaty of Sèvres was signed between Turkey and the Allies on 10 August 1920.

<sup>548</sup> On the establishment of the Grand National Assembly, the founding of the Republic and the enactment of the founding constitution of Turkey during 1919-1923, see Bülent Tanör, *Osmanlı-Türk Anayasal Gelişmeleri: 1789-1980* [Ottoman-Turkish Constitutional Developments: 1789-1980] (Yapı Kredi Yayınları, 2015), at pp. 231-289.

<sup>549</sup> McDowall, *A Modern History of the Kurds*, at pp. 184-186; David Romano, *The Kurdish Nationalist Movement: Opportunity, Mobilization, and Identity* (Cambridge University Press, 2006), at pp. 28-31.

rebels as traitors taking advantage of the national liberation war. Eventually, Mustafa Kemal overthrew the Ottoman Sultan and Sèvres, never ratified, became obsolete.

The majority of the Kurdish tribes did not join the Koçgiri uprising led by the Alevi Kurds, who constituted a minority within the Kurdish population. For the Sunni Kurds, who feared the establishment of an Armenian state in the eastern territories and a possible Armenian retribution for their complicity in the 1915 genocide, an alliance with the government sounded more beneficial.<sup>550</sup> They relied on the vision of Kemalists who framed the resistance as a new political union between the Turks and the Kurds to protect the Caliphate against Christians.<sup>551</sup> The parliamentary debates on the Kurdish question, the statements of Mustafa Kemal himself and the “Kurdistan policy” adopted by the government in 1921 assured the Kurds that the post-war political order would bring them autonomy and collective rights.<sup>552</sup> All of these conditions would very soon change following the establishment of the Republic.

### 3.2.2 The Republican Foundation

Having won the war against the Allies, the Greeks and the Armenians, the Kemalists turned their attention to nation building. At the initial stages of state formation, the founding leaders had envisioned a binational entity, with the Turks and the Kurds as the constitutive peoples of the new republic. It soon became clear, however, that the nation would be built upon the twin pillars of Turkishness and secularism rather than a multi-ethnic Islamic union promised to the Kurdish tribes in return for their support for the national liberation war. The Kemalist regime abolished the Sultanate in 1922 and declared a republic the next year.

Also in 1923, the Kemalist founders signed the Treaty of Lausanne which formally replaced Sèvres and established the legal framework of Turkey’s minority regime.<sup>553</sup> Lausanne defined minorities solely on the basis of religion, excluding linguistic and ethnic minorities. In the context of the 1920s, immediately after the Armenian genocide and the defeat of the Greeks, the republican founders insisted on limiting the scope of the minority regime to non-Muslims and not extending it to non-Turkish groups.<sup>554</sup> The exclusive recognition of non-Muslims as minorities was a legacy of the Ottoman *millet* system which defined nationalities in terms of their religion rather than ethnicity<sup>555</sup> and afforded a degree of self-government to Armenians, Greeks and Jews but considered Muslims to be part of the “nation of Islam.”<sup>556</sup> Consequently, unlike the minority treaties imposed by the Allies on other defeated nations, Lausanne did not

---

<sup>550</sup> Romano, *The Kurdish Nationalist Movement*, at pp. 29-30.

<sup>551</sup> Barkey and Fuller, *Turkey’s Kurdish Question*; Yeğen, *Devlet Söyleminde*; Romano, *The Kurdish Nationalist Movement*.

<sup>552</sup> Mesut Yeğen, “‘Prospective Turks’ or ‘Pseudo-Citizens’: Kurds in Turkey,” *Middle East Journal*, vol. 63, no. 4 (2009), pp. 597-615, at pp. 598-599.

<sup>553</sup> The Treaty of Lausanne was signed between Turkey and the Allies on 24 July 1923. Treaty of Peace with Turkey, 24 July 1923, 28 *L.N.T.S. II* (1924) (hereinafter “Treaty of Lausanne”).

<sup>554</sup> Philip Robins, “The Overlord State: Turkish Policy and the Kurdish Issue,” *International Affairs*, vol. 69, no. 4 (1993), pp. 657-676, at p. 660.

<sup>555</sup> Doğu Ergil, “The Kurdish Question in Turkey,” *Journal of Democracy*, vol. 11, no. 3 (2000), pp. 122-135, at p. 123.

<sup>556</sup> Kemal Kirişçi and Gareth M. Winrow, *The Kurdish Question and Turkey: An Example of a Trans-State Ethnic Conflict* (Frank Cass, 1997), at p. 1.

contain the standard phrase “racial, linguistic and religious minorities.”<sup>557</sup> The memoirs of Dr. Rıza Nur, Turkey’s representative at the negotiations in Lausanne, reveal the political basis of this categorization:

The French have three concepts of minorities: racial minorities, linguistic minorities, and religious minorities. This is very alarming for us, a great danger. It is amazing how deep and well these men are able to think when it comes to acting against us. . . . With racial, they will group the Circassians, the Abkhaz, the Bosnian and the Kurd together with the Greek and the Armenian. With language, they will include those who are Muslim but speak another language. . . . Thereby they will tear us apart. . . . Lesson to be learned: The most real, just and urgent task awaiting us is to make sure that there remains no one belonging to another race, language and religion in our country.<sup>558</sup>

These words also signalled the Kemalists’ approaching ideological shift from Ottomanism to Turkish nationalism which, according to Hamit Bozarslan, “would become the country’s official and hegemonic ideology.”<sup>559</sup> The regime started to pursue a combination of assimilationist and colonial policies towards the Kurds, irrespective of their degree of loyalty to the state.<sup>560</sup> Denial and suppression were simultaneous processes; the state denied the existence of Kurdish as a distinct language on the one hand and engaged in what Martin van Bruinessen has named “ethnocide” to eliminate the visible traces of this identity on the other.<sup>561</sup> It did not allow Kurdish deputies to visit their constituencies before the 1923 elections; defined Turkish as the only official language and prohibited the use of Kurdish in courts, schools and other public offices; removed references to Kurdistan from all texts including school books; started to substitute the Kurdish names of geographical places with Turkish ones; appointed Turks to senior government positions in the Kurdish region and loyal Kurds to lower bureaucratic positions; and conducted military raids on Kurdish villages.<sup>562</sup> The constitution adopted in 1924 made no reference to Kurdish identity and defined citizenship as follows: “Everyone in Turkey, regardless of their religion or race, is, in terms of citizenship, called a ‘Turk’.”<sup>563</sup> According to Mesut Yeğen, the phrase “in terms of citizenship” alludes to an ethnic rather than a political-territorial definition of citizenship.<sup>564</sup> Also in 1924, the Kemalists abolished the Caliphate, severing “another bond that united” the Turks and the Kurds.<sup>565</sup>

---

<sup>557</sup> See e.g. The Minorities Treaty between the Allies and the Republic of Poland, 28 June 1919, Article 8: “Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals.”

<sup>558</sup> Ayhan Aktar, *Varlık Vergisi ve ‘Türkleştirme’ Politikaları* [The Wealth Tax and ‘Turkification’ Policies] (İletişim Yayınları, 2000), at pp. 111-112 (my translation).

<sup>559</sup> Bozarslan, “Kurds and the Turkish State”, at p. 338.

<sup>560</sup> McDowall, *A Modern History of the Kurds*, at pp. 190-192.

<sup>561</sup> Martin van Bruinessen, “Constructions of Ethnic Identity in the Late Ottoman Empire and Republican Turkey: The Kurds and their Others”, paper presented at the workshop “Social Identities in the Late Ottoman Empire”, Department of Middle Eastern Studies, New York University, 8 March 1997, at p. 12.

<sup>562</sup> Yeğen, *Devlet Söyleminde*; McDowall, *A Modern History of the Kurds*; Olson, *The Emergence of Kurdish Nationalism*.

<sup>563</sup> Article 88.

<sup>564</sup> Mesut Yeğen, “Citizenship and Ethnicity in Turkey”, *Middle Eastern Studies*, vol. 40, no. 6 (2004), pp. 51-66.

<sup>565</sup> Barkey and Fuller, *Turkey’s Kurdish Question*, at p. 10.

Throughout the 1920s and 1930s, the Kurds unsuccessfully resisted the regime's policies of centralization and assimilation through armed uprisings.<sup>566</sup> The most notable was the Sheikh Said rebellion, a nationalist uprising in religious garb which broke out in February 1925.<sup>567</sup> Said, an influential and revered religious leader, publicly condemned the Kemalist regime for destroying religion and incited rebellion to end the 'blasphemy.' Said was the 'face' of the uprising, but the brain was the Azadi, a nationalist secular organization of Kurdish intellectuals and military officers established in 1921.<sup>568</sup> While the objective was an independent Kurdistan, or at least autonomy, the leadership used a religious language to arouse the followers.<sup>569</sup> The government quickly and forcefully responded, characterizing the uprising as 'reactionary'. A state of siege proclaimed in all eastern provinces on 25 February 1925 declared that the supporters of the rebellion would be charged with treason. The Law on the Restoration of Order (*Takriri Sükun Kanunu*) of 4 March<sup>570</sup> was the first exceptional legal regime adopted by the Republic, which would set a powerful precedent for many more to come. It authorized the establishment of "Courts of Independence" (*İstiklâl Mahkemeleri*)<sup>571</sup> to prosecute individuals charged with acts aimed at disrupting law and order and execute those found guilty.<sup>572</sup> A second law adopted on 31 March authorized the military authorities to approve and immediately execute the death sentences.<sup>573</sup> The government took advantage of this law not only to crush the Sheikh Said rebellion but also to silence political dissent more broadly. Two tribunals were established: one in Diyarbakır to prosecute the rebels and another in Ankara to prosecute the opponents of the government.<sup>574</sup> The defendants were denied basic due protection guarantees and were effectively summarily executed. In addition to Sheikh Said and his collaborators, hundreds of Kurdish notables were executed.<sup>575</sup>

---

<sup>566</sup> Among these was the Ağrı (Ararat) rebellion of 1927-1930 by rural Kurdish forces including the remnants of the Hamidiye Cavalry and the tribes who had formerly cooperated with the Kemalist forces. The uprising was crushed by a massive and destructive military operation with the aid of Iran, Iraq and the Soviet Union. Bozarslan, "Kurds and the Turkish State", at p. 340.

<sup>567</sup> Olson, *The Emergence of Kurdish Nationalism*, at p. 153.

<sup>568</sup> Ibid.

<sup>569</sup> Martin van Bruinessen, *Agha, Shaikh and State* (Zed Books, 1991); Mete Tunçay, *Türkiye Cumhuriyeti'nde Tek Parti Yönetiminin Kurulması (1923-1931)* [The Establishment of Single Party Rule in the Republic of Turkey (1923-1931)] (Yurt Yayınları, 1981).

<sup>570</sup> *Takriri Sükun Kanunu* [Law on the Restoration of Order], no. 578, 4 March 1925, Official Gazette, no. 87, 4 March 1925.

<sup>571</sup> The history of special courts vested with extraordinary powers dates back to 1876, when Sultan Abdulhamid the Second established the "Yıldız Court" to prosecute military, civilian and religious leaders charged with the killing of his predecessor Sultan Abdulaziz. Bülent Tanör, *Türkiye'nin İnsan Hakları Sorunu* [Turkey's Human Rights Problem] (BDS Yayınları, 1994), at p. 222. See also Gemalmaz, "Historical Roots of Martial Law within the Turkish Legal System". Likewise, the pre-Republican Turkish Parliament, established on 23 April 1920 under the leadership of Mustafa Kemal, adopted the Law on Treachery to the Homeland to restore law and order and subdue internal revolts across the country. On 18 September 1920, the Parliament decided to establish seven Courts of Independence across Turkey to prosecute men evading military conscription. The jurisdiction of these courts was expanded to include offences of treason and espionage.

<sup>572</sup> The Law on the Restoration of Order remained in force until 4 March 1929, while the Courts of Independence were not abolished until 4 May 1949. The Grand National Assembly of Turkey (*Türkiye Büyük Millet Meclisi-TBMM*), *İstiklâl Mahkemeleri: Kanun, Gerekçe ve Genel Kurul Tutanakları* [Courts of Independence: Law, Justification and General Assembly Minutes], vol. 1 (TBMM Basın, Yayın ve Halkla İlişkiler Başkanlığı Basımevi, 2015), at p. XII.

<sup>573</sup> İsmail Beşikçi, *Tunceli Kanunu (1935) ve Dersim Jenosidi* [Tunceli Law (1935) and the Dersim Genocide] (İsmail Beşikçi Vakfı Yayınları, 2013), at p. 55.

<sup>574</sup> Olson, *The Emergence of Kurdish Nationalism*, at p. 124.

<sup>575</sup> Ibid, at pp. 124-125.

The Skeikh Said incident revealed the Kemalist regime's perception of an intimate connection between the Kurdish and Islamic threats, prompting it to further secularization and Turkish nationalism. The government adopted the Swiss Civil Law to replace the Islamic civil law inherited from the Ottoman Empire, passed the 1925 Hat Law (introducing Western style hats, making it compulsory for civil servants to wear them and banning all men from wearing the fez and turban in public places), the 1928 Alphabet Law (introducing a new alphabet written in Latin script to replace the previously used Perso-Arabic script and making it compulsory in official and public correspondence) and the 1934 Dress Law (banning religious clothing such as the veil and turban and promoting western-style clothing) and outlawed all religious orders, lodges and shrines.<sup>576</sup> In September 1925, Mustafa Kemal established the Reform Council for the East (*Şark Islahat Encümeni*) to advise the government on solving the Kurdish question. The Council's Reform Plan recommended, *inter alia*, the establishment of Inspectorates-General, the declaration of a state of siege in the eastern provinces, the settlement of emigrants from the Balkans and the Caucasus to lands in Kurdistan vacated from Armenians and the removal of the Kurds from these lands, the compulsory resettlement of select Kurds deemed to pose a threat to the state, the prohibition of Kurdish (and other non-Turkish languages), the ban on the employment of Kurds in public offices and the Turkification of Kurdish pupils through enrolment in boarding schools.<sup>577</sup> These recommendations guided government policies in the following decades. In 1927, 1,500 Kurdish individuals and 80 families were deported to western provinces.<sup>578</sup> On 1 January 1928, the first General Inspectorate was established in the Kurdish province of Diyarbakır.<sup>579</sup> The intelligence reports of this office promoted the forced deportation of affluent and influential Kurdish families deemed to be disloyal to Ankara. Some were settled in western Turkey and others were expelled to Syria.<sup>580</sup>

Thus, from the mid-1920s on, the regime turned Turkishness, originally only a formal-legalistic concept of citizenship, into an ethno-linguistic category and denied the existence of any ethnic identity other than Turkish. This, in effect, meant that the largest minority in Turkey, the Kurds, officially ceased to exist. The Surname Law of June 1934 prohibited the use of Kurdish and tribal names and surnames.<sup>581</sup> The ban on the use of Kurdish in persons' names was also extended to the names of places, administrative and geographical units alike. From the mid-1930s onwards, the state removed all references to Kurdistan (and to Armenia and Lazistan) in the maps and changed the Kurdish names of administrative and geographical territories with

---

<sup>576</sup> Olson, *The Emergence of Kurdish Nationalism*, at pp.158-159; Tunçay, *Türkiye Cumhuriyeti'nde*, at pp.149-173.

<sup>577</sup> Mehmet Bayrak, *Kürtler ve Ulusal-Demokratik Mücadeleleri: Gizli Belgeler-Araştırmalar-Notlar* [The Kurds and their National-Democratic Struggle: Secret Documents-Studies-Notes] (Özge, 1993), at pp. 481-489.

<sup>578</sup> Yeğen, "Prospective Turks' or 'Pseudo-Citizens'", at p. 603.

<sup>579</sup> The General Inspectorates were established pursuant to a law adopted in 1927 with the stated purpose of achieving coherence in government policies across the country. In fact, the real intent was to establish central authority over the Kurds. Beşikçi, *Tunceli Kanunu*, at p. 56 (citing the Minister of the Interior of the time, who stated that the General Inspectorates were established in response to the Skeikh Said rebellion). Three of the four General Inspectorates were established in the Kurdish region. They were abolished in 1948.

<sup>580</sup> Üngör, "Geographies of Nationalism and Violence", at para. 40.

<sup>581</sup> Senem Aslan, "Incoherent State: The Controversy over Kurdish Naming in Turkey", *European Journal of Turkish Studies* [Online], vol. 10 (2009), available at: <https://ejts.revues.org/4142>, at para. 9.

Turkish ones. This policy continued with interruptions well into the 1980s through a series of mechanisms such as special commissions tasked with topographical renaming.<sup>582</sup>

According to Mesut Yeğen, while the forced relocation of the Kurds was initiated under the 1926 Settlement Law,<sup>583</sup> displacement as a systematic policy targeting the Kurdish masses started in 1934 with the adoption of another settlement law<sup>584</sup> aimed at ethnic demographic reorganization by settling the Turks in Kurdish areas and the Kurds in Turkish ones.<sup>585</sup> In identifying the objects of resettlement as those “whose mother tongue is not Turkish”,<sup>586</sup> who are “not tied to the Turkish culture”<sup>587</sup> or “who are not of the Turkish race”,<sup>588</sup> the law implicitly referred to the Kurds.<sup>589</sup> It divided Turkey’s territories into three: those where individuals “with Turkish culture” would be moved from, those where individuals “with Turkish culture” would be resettled to and those where any settlement or residence was prohibited.<sup>590</sup> According to İsmail Beşikçi, the uprooting of the Kurds, their dispersed resettlement across the country and their prohibition from living in groups in their new places of residence<sup>591</sup> sought to “whittle away” the Kurds,<sup>592</sup> as, in fact, explicitly stated in the legislative intent of the law.<sup>593</sup> Between 1934 and 1947, a total of 25,831 individuals were displaced from the region and resettled in the western Turkey.<sup>594</sup> The state provided the displaced with housing and financial assistance to enable them to rebuild their lives in their new places of residence. Following the containment of the Kurdish rebellions, the 1934 law was abrogated in 1947 and the displaced were given the right to return, leading to the return of 22,526 Kurds.<sup>595</sup>

---

<sup>582</sup> Kerem Öktem, “The Nation’s Imprint: Demographic Engineering and the Change of Toponymes in Republican Turkey”, *European Journal of Turkish Studies* [Online], vol. 7 (2008), available at <http://ejts.revues.org/2243>.

<sup>583</sup> *İskân Kanunu* [Settlement Law], no. 885, 31 May 1926, Official Gazette, no. 409, 1 July 1926.

<sup>584</sup> *İskân Kanunu* [Settlement Law], no. 2510, 14 June 1934, Official Gazette, no. 2733, 21 June 1934 (hereafter “Law no. 2510”).

<sup>585</sup> Yeğen, “‘Prospective Turks’ or ‘Pseudo-Citizens’”, at p. 603. On forced displacement and resettlement as a state policy against minorities under the Ottoman Empire and the Turkish Republic, see Fikret Babuş, *Osmanlı’dan Günümüze Etnik ve Sosyal Politikalar Çerçevesinde Göç ve İskan Siyaseti ve Uygulamaları* [Migration and Settlement Policies and Practices within the Framework of Ethnic and Social Policies from the Ottoman Era to Today] (Ozan Yayıncılık, 2006).

<sup>586</sup> Law no. 2510, at Article 11(a).

<sup>587</sup> *Ibid.*, at Articles 10(ç), 11(b), 12(a).

<sup>588</sup> *Ibid.*, at Article 12(e).

<sup>589</sup> Such implicit references to the Kurdish identity and language have been a feature of the Turkish legal system, even after EU-induced reforms granting Kurds limited linguistic rights. See in this chapter Section 3.6.1.

<sup>590</sup> Law no. 2510, at Article 2. The implicit reference in the first two categories was to the western parts of Turkey, which were predominantly populated by the Turks and the Kurdish region, respectively. The third category referred to specific provinces and towns within the Kurdish region, including Tunceli and parts of Diyarbakır. İsmail Beşikçi, *Kürtlerin Mecburi İskânı* [The Forced Settlement of the Kurds] (İsmail Beşikçi Vakfı Yayınları, 2013), at p. 111.

<sup>591</sup> Article 11(a) banned the rebuilding of collective settlements made up of “those whose mother tongue is not Turkish.”

<sup>592</sup> Beşikçi, *Kürtlerin Mecburi İskânı*, at p. 114.

<sup>593</sup> *Ibid.*, at p. 132 (citing the legislative intent of Law no. 2510).

<sup>594</sup> İlhan Tekeli, “Osmanlı İmparatorluğu’ndan Günümüze Nüfusun Zorunlu Yer Değiştirmesi” [The Forced Relocation of Populations from the Ottoman Empire to Present Day], *Toplum ve Bilim*, no. 50 (1990), pp. 49-71, at p. 64.

<sup>595</sup> Mesut Yeğen, *Müstakbel Türk’ten Sözde Vatandaşa: Cumhuriyet ve Kürtler* [From Prospective Turk to So-Called Citizen: The Republic and the Kurds] (İletişim Yayınları, 2006), at p. 66.

As the physical aspects of Kurdishness were erased from territories, maps, history books and official documents, complementary assimilation policies aimed at Kurdish cultural and ethnic identity. Being Turkish, at times bluntly expressed as “being of the Turkish race,” became a precondition for becoming a civil servant and for enrolment in student dormitories.<sup>596</sup> While those who ‘insisted to be Kurdish’ were effectively excluded from citizenship, masses who did not have an ethnic consciousness were invited to Turkishness. According to Senem Aslan, the People’s Houses (*Halkevleri*) were founded across Turkey in 1932 not only to “educate and civilize the masses” in accordance with “Western values, lifestyles, and habits” but also assimilate the Kurds through educational, cultural and sports programs.<sup>597</sup> Local bureaucrats rigidly implemented the national policies in the Kurdish region, banning the use of Kurdish on the streets and spying on whether people spoke Turkish in their homes.<sup>598</sup>

Noteworthy among the special legal regimes targeting the Kurds is the 1935 Tunceli Law,<sup>599</sup> adopted to establish the state’s control over Dersim, a remote mountainous region populated by the Alevi Kurds and perceived to be a particular challenge due to its autonomous history and reputation for lawlessness induced by tribal feuds. In fact, at the date of the adoption of the law, a province under the name of Tunceli did not exist. A separate law which created within the greater Dersim region a new province named ‘Tunceli’ would be adopted on 4 January 1936. According to Beşikçi, the adoption of these two laws *before* the outbreak of the Dersim resistance in 1937 shows not only that the government was preparing to introduce a state of exception but also that the resistance was a reaction to these extraordinary legal measures.<sup>600</sup> The law established the office of the Governor of Tunceli and appointed to it a military commander with extraordinary powers. He had the powers to change the internal borders of the province as he deemed necessary (Article 2), forcefully relocate individuals and entire families within the provincial boundaries or ban their residence in Tunceli (Article 31), postpone the execution of sentences (Article 32), and order the execution of death sentences given by the courts (Article 33). The courts and the executive in Tunceli were given the power to prosecute individuals living in six neighbouring provinces<sup>601</sup> who were found to be linked to offences committed in Tunceli.<sup>602</sup> The law was retroactively applicable<sup>603</sup> and the suspects were not

---

<sup>596</sup> Mesut Yeğen, “‘Jewish Kurds’ or the new frontiers of Turkishness,” *Patterns of Prejudice*, vol. 41, no. 1 (2007), pp. 1-20, at pp. 10-11.

<sup>597</sup> Senem Aslan, “Everyday Forms of State Power and the Kurds in the Early Turkish Republic,” *International Journal of Middle East Studies*, vol. 43, no. 1 (2011), pp. 75-93, at p. 79.

<sup>598</sup> *Ibid.*, at p. 82.

<sup>599</sup> *Tunceli Vilayetine İdaresi Hakkında Kanun* [Law on the Administration of the Province of Tunceli], no. 2884, 25 December 1935, Official Gazette, no. 3195, 2 January 1936 (hereafter “Law no. 2884”). The law was annulled on 1 January 1947. For an analysis of the legislative intent, substance and implementation of the law, see Beşikçi, *Tunceli Kanunu*.

<sup>600</sup> *Ibid.*, at pp. 41-42.

<sup>601</sup> These provinces were Elazığ, Malatya, Sivas, Erzincan, Erzurum, Gümüşhane and Bingöl.

<sup>602</sup> Law no. 2884, at Article 34. The Martial Law (no. 1402) adopted on 13 May 1971 would adopt a similar provision enabling individuals living across Turkey to be brought to Diyarbakır for prosecution before the Martial Court. Beşikçi, *Tunceli Kanunu*, at p. 37.

<sup>603</sup> Law no. 2884, at Article 35.

granted due process rights, including the right to be notified of the charges,<sup>604</sup> the right to an effective legal defence<sup>605</sup> and the right to appeal.<sup>606</sup>

The resistance to these policies by a handful of Dersim tribes in the leadership of an old Alevi religious leader named Seyit Rıza was crushed in September 1937, followed by the summary execution of seven rebels including Rıza. Determined to end lawlessness and crimes, the military commenced the second Tunceli operation this time against the general population.<sup>607</sup> During a brutal operation which would be recalled by survivors as the ‘Dersim massacre’, civilians who sought refuge in caves were brutally shot, bombed and gassed (“annihilated” in the words of the military authorities), villages were burned down and remaining inhabitants were sent to forced exile in western Turkey.<sup>608</sup> According to the Chief of Staff, by the end of 17 days, “7,954 individuals were killed or burned alive.”<sup>609</sup>

Throughout the 1920s and 1930s, the lack of national leadership, the absence of political unity and internal divisions arising from tribal and religious differences caused the Kurdish uprisings to fail. At the same time, while the state was partially successful in assimilating emigrant Kurds, the Kurdish language and culture survived in the Kurdish region. Moreover, the assimilationist policies gave birth to a slowly evolving Kurdish national consciousness.<sup>610</sup> But this was, indeed, going to be a very slow process.

### 3.3 Kurdish Political Mobilization in the Multiparty Era (1950-1980)

Contrary to expectations, the reign of Turkey’s first democratically elected government did not result in enhanced rights and liberties for the Kurds nor did it bring an end to the Turkification policies. The Democrat Party (*Demokrat Parti*-DP) government continued its predecessor’s policies<sup>611</sup> and introduced novel forms of repression, such as the judicial harassment of Kurdish activists and intellectuals. At the same time, after decades of dormancy, the Kurdish movement was awakening. Unlike in the 1930s when religious and tribal Kurdish leaders had led the revolts, the new opposition was led by Kurdish intellectuals and university students who had emigrated to urban centres in western Turkey as a result of economic development, urbanization and the spread of education. The means of expressing dissent had also changed; instead of revolting against the army, the Kurds made use of the relatively liberal 1961 Constitution to engage in peaceful democratic opposition. The state responded with mass trials targeting writers

---

<sup>604</sup> Ibid, at Article 18: “The indictment shall not be communicated to the defendant.”

<sup>605</sup> Article 24 required the trial to start within five days after the submission of the indictment and the completion of the trial at the first hearing, unless exigencies required a delay. Article 28 allowed the court to grant the defendant and his counsel two days for the preparation of their legal defence. Ibid.

<sup>606</sup> Ibid, at Article 29.

<sup>607</sup> Nicole Watts, “Relocating Dersim: Turkish State-Building and Kurdish Resistance, 1931-1938”, *New Perspectives on Turkey*, vol. 23 (2000), pp. 5-30, at p. 25 (quoting Turkish military sources).

<sup>608</sup> Beşikçi, *Tunceli Kanunu*, at p. 125 (citing an official publication of the Chief of Staff titled *Uprisings in the Turkish Republic (1924-1938)* and published in 1972).

<sup>609</sup> Ibid.

<sup>610</sup> Barkey and Fuller, *Turkey’s Kurdish Question*, at p. 13.

<sup>611</sup> Öktem, “The Nation’s Imprint”, at para. 27 (that the DP government started “the most systematic phase of the renaming of villages and topography”).

and publishers of Kurdish and advocates of cultural recognition, political rights and regional autonomy for the Kurds.<sup>612</sup>

Judicial harassment started with the criminalization of *İleri Yurd*, a newspaper published in Diyarbakır. The paper had become a symbol of the Kurds' defiance of the official ban on the Kurdish language and became very popular, particularly among university students. In 1958-1959, the prosecution of chief columnist Musa Anter<sup>613</sup> for every daily column he wrote in Kurdish mobilized Kurdish intellectuals, lawyers and students who attended his trials in the hundreds and organized protests in Istanbul and Ankara.<sup>614</sup> While Anter was acquitted from every case, the re-emergence of Kurdish political consciousness after decades of silence at a time when the Kurds of Iraq were gaining political power across the border<sup>615</sup> deeply disturbed the government. An intelligence report prepared by the police, which was leaked after the 1960 *coup d'état*, advised the DP government to "eliminate 1,000 Kurdish intellectuals" to silence the growing movement.<sup>616</sup> The report advised charging selected Kurds with communism to prevent the general Kurdish population to rally around the defendants.<sup>617</sup> Prime Minister Adnan Menderes followed up on this recommendation by arresting the Kurds in groups of 50 to be executed by court order. The outcome was a mass trial known as "the 49'ers incident".<sup>618</sup> The defendants were students and activists randomly selected by the police<sup>619</sup> based on a blank court warrant for the arrest of any 50 individuals. Detained on 17 December 1959, the defendants were prosecuted on charges of separatism and communism, held in "death cells" for 195 days<sup>620</sup> and were eventually acquitted after years of trial. The 49'ers was the first high profile mass trial criminalizing the Kurdish democratic opposition, but would not be the last.

The 1960 military *coup* and its aftermath, too, had a dual effect on the Kurds. On the one hand, enhanced liberties under the 1961 Constitution gave rise to what McDowall has named "the Kurdish national revival."<sup>621</sup> Based within the broader socialist movement, the new Kurdish mobilisation depicted the Kurdish question as a product of socio-economic underdevelopment

---

<sup>612</sup> For examples of high-profile criminal cases throughout the 1960s and 1970s, see Derya Bayır, "Representation of the Kurds by the Turkish Judiciary", *Human Rights Quarterly*, vol. 35, no. 1 (2013), pp. 116-142; Cengiz Güneş, *The Kurdish National Movement in Turkey: From Protest to Resistance* (Routledge, 2012); Nicole F. Watts, *Activists in Office: Kurdish Politics and Protest in Turkey* (University of Washington Press, 2010).

<sup>613</sup> In the following years and decades, Anter would become a leading Kurdish author, poet, journalist and politician. His life ended with his extrajudicial execution, making Anter the most high profile victim of this state practice in the 1990s. See Chapter 5.

<sup>614</sup> Musa Anter, *Hatıralarım* [My Memoirs] (Aram Yayınları, 2013), at pp. 147-151.

<sup>615</sup> Mostafa Barzani, the leader of the Iraqi Kurds, who had been allowed to return from exile in the Soviet Union following the 1958 military coup in Iraq, started a revolt in 1961.

<sup>616</sup> According to Anter, the report was authored by Ergun Gökdeniz, the Intelligence Agency specialist on the Kurdish question, and discussed at a high level meeting. The only objection to the report's recommendation was voiced by the Minister of Foreign Affairs. Anter, *Hatıralarım*, at pp. 154-155.

<sup>617</sup> The choice of communism as the alleged offence was a characteristic policy in many NATO allies during the Cold War.

<sup>618</sup> This is in reference to the number of defendants which was originally 50 but went down to 49 following one's death in detention. Anter, *Hatıralarım*, at p. 155.

<sup>619</sup> Among the detainees were a group of university students in Ankara who had petitioned the Parliament in protest of Anter's prosecution for a poem he published in Kurdish.

<sup>620</sup> Anter, *Hatıralarım*, at p. 169.

<sup>621</sup> McDowall, *A Modern History of the Kurds*, at p. 397.

caused by deliberate state neglect<sup>622</sup> and engaged in the peaceful advocacy of constitutional recognition, linguistic rights and development. The Workers Party of Turkey (*Türkiye İşçi Partisi-TİP*) was a significant actor in the political alliance between Turkish and Kurdish leftists during the 1960s. Of the 15 TİP deputies elected to the national parliament in 1965, four were Kurdish.<sup>623</sup> TİP's mass rallies in main Kurdish cities in 1967 received support from ordinary Kurds<sup>624</sup> and marked a turning point in Kurdish political mobilisation.

At the same time, Kurdish activists operated under the constant threat of legal persecution. Dozens were sentenced to imprisonment merely for criticizing government policies.<sup>625</sup> While all political prisoners across the country were released by the junta in the aftermath of the *coup*, the "49'ers" were excluded from amnesty.<sup>626</sup> State oppression continued in the Kurdish region as well. Right after the *coup*, as part of its broader campaign against the "nouveaux riches" who had socially and financially benefitted from the DP rule, the junta arrested 240 individuals it referred to as 'the landlords' of eastern Turkey and placed them into an internment camp in Sivas.<sup>627</sup> Six months later, all but 55 were released.<sup>628</sup> The remaining prisoners were sent into exile pursuant to an addendum to the 1934 Settlement Law.<sup>629</sup> Forced assimilation policies, too, continued; "the use of any foreign word for which a Turkish equivalent existed" (read 'Kurdish') was banned in 1961<sup>630</sup> and remaining Kurdish place names were replaced with Turkish ones.<sup>631</sup>

By the late 1960s, Kurdish political mobilisation had become radicalized within the broader left movement which had commenced an urban guerrilla warfare.<sup>632</sup> Disillusioned with Turkish socialists' characterization of the Kurdish question solely in socio-economic terms, Kurdish socialists parted ways and formed their own movement.<sup>633</sup> Organizing unprecedented public gatherings in Kurdish cities with the participation of tens of thousands of people, they articulated and voiced Kurdish demands for economic development, cultural recognition and democratic rights. For McDowall, these 'Eastern Meetings' were "the first mass *urban* Kurdish challenge to the republic."<sup>634</sup> Within few years, countless Kurdish revolutionary groups and parties emerged within this movement, including the Revolutionary Eastern Cultural Hearths (*Devrimci Doğu Kültür Ocakları-DDKO*) and *Ala Rızgari*.<sup>635</sup> Adopting an anti-imperialist discourse, they characterized the Turkish state as a 'colonial power' oppressing the Kurdish

---

<sup>622</sup> Güneş, *The Kurdish National Movement in Turkey*, at p. 54.

<sup>623</sup> McDowall, *A Modern History of the Kurds*, at p. 409.

<sup>624</sup> Güneş, *The Kurdish National Movement in Turkey*, at p. 61.

<sup>625</sup> Watts, *Activists in Office*, at p. 42.

<sup>626</sup> Anter, *Hatıralarım*, at p. 169; Beşikçi, *Kürtlerin Mecburi İskânı*, at p. 172.

<sup>627</sup> Kemal Karpat, "The Military and Politics in Turkey, 1960-1964: A Socio-Cultural Analysis of a Revolution", *The American Historical Review*, vol. 75, no. 6 (1970), pp. 1654-1683, at p. 1674. Beşikçi reports the number of the interns, all of whom were Kurdish, as 485. Beşikçi, *Kürtlerin Mecburi İskânı*, at p. 173.

<sup>628</sup> Karpat, "The Military and Politics in Turkey", at 1674.

<sup>629</sup> *2510 Sayılı İskân Kanununa Ek Kanun* [Supplementary Law to the Law on Settlement no. 2510], no. 105, 19 October 1960, Official Gazette, no. 10638, 25 October 1960.

<sup>630</sup> Öktem, "The Nation's Imprint", at para. 30, citing Geoffrey L. Lewis, *The Turkish Language Reform: A Catastrophic Success* (Oxford University Press, 1999), at p. 157.

<sup>631</sup> Beşikçi, *Kürtlerin Mecburi İskânı*, at p. 172.

<sup>632</sup> Bozarlan, "Kurds and the Turkish State", at p. 347.

<sup>633</sup> Güneş, *The Kurdish National Movement in Turkey*, at pp. 65-80.

<sup>634</sup> McDowall, *A Modern History of the Kurds*, at p. 410.

<sup>635</sup> Romano, *The Kurdish Nationalist Movement*, at p. 47.

nation and called for Kurdish independence or autonomy. In October 1970, DDKO leaders were arrested and put on trial. Among them were Musa Anter and İsmail Beşikçi, who led the group in authoring their historical 150-pages defence of Kurdish cultural and political rights, narrating the Kurds' history, language, culture and society.<sup>636</sup> Unsurprisingly, DDKO was banned.

The 1971 *coup d'état* crushed the Kurdish national movement, leading to the arrest of thousands of Kurdish activists. Small underground Kurdish parties such as the Socialist Party of Kurdistan were formed in this period. Many of the Kurdish socialists lost faith in constitutional democracy and opted for violence.<sup>637</sup> There was rampant urban and rural violence between the rightist Turkish nationalists and the leftists, especially in the Kurdish region, in addition to widespread state-tolerated violence by extreme right wing groups targeting Kurdish and Alevi communities across Turkey.<sup>638</sup> Also notable in this period was the election of Mehdi Zana, an independent candidate with working class background, as the mayor of Diyarbakır in the 1977 municipal elections. Zana served in this position until the 1980 *coup*, after which he was imprisoned for eleven years.<sup>639</sup> The regime's intolerance to dissent, the increasing ideological polarization in Turkey and the lack of prospects for a democratic order led some Kurds to see secession as the only cure against repression. The PKK was born out of this frustration as the first armed secessionist Kurdish movement in Turkey. It was founded in 1978 with the objective of establishing an independent state through armed struggle. It emerged from within the revolutionary left as a Kurdish Marxist-Leninist organization under the leadership of Abdullah Öcalan.<sup>640</sup> When the 1980 *coup* crushed all political parties and organizations across the spectrum in Turkey, the PKK survived, largely due to Öcalan's decision to move his organisation to Syria right before the intervention. The military regime's systematic torture of political prisoners, including PKK militants, in the infamous Diyarbakır prison led to a rapid increase in PKK recruitment, turning the sole surviving Kurdish political organization into a grassroots movement.<sup>641</sup>

---

<sup>636</sup> McDowall, *A Modern History of the Kurds*, at p. 412.

<sup>637</sup> Bozarlan, "Kurds and the Turkish State", at p. 348.

<sup>638</sup> For details, see McDowall, *A Modern History of the Kurds*, at pp. 414-415.

<sup>639</sup> In the 1990s, his wife Leyla Zana would rise as another political symbol of the Kurdish national movement. On implications of Mehdi Zana's historic win for future Kurdish electoral mobilization, see Gilles Dorronsoro and Nicole F. Watts, "Toward Kurdish Distinctiveness in Electoral Politics: The 1977 Local Elections in Diyarbakır", *International Journal of Middle Eastern Studies*, vol. 41 (2009), pp. 457-478.

<sup>640</sup> On the ideological and political circumstances giving rise to the PKK, see Joost Jongerden and Ahmet Hamdi Akkaya, "The Kurdistan Workers Party and a New Left in Turkey: Analysis of the Revolutionary Movement in Turkey through the PKK's Memorial Text on Haki Karer", *European Journal of Turkish Studies* [Online], vol. 14 (2012), available at: <https://ejts.revues.org/4613>.

<sup>641</sup> For more on the PKK, see Ahmet Hamdi Akkaya and Joost Jongerden, "Reassembling the Political: The PKK and the Project of Radical Democracy", *European Journal of Turkish Studies* [Online], vol. 14 (2012), available at: <https://ejts.revues.org/4615>; Güneş, *The Kurdish National Movement in Turkey*; Aliza Marcus, *Blood and Belief: The PKK and the Kurdish Fight for Independence* (New York University Press, 2007); Romano, *The Kurdish Nationalist Movement*; Martin van Bruinessen, "Between Guerrilla War and Political Murder: The Workers' Party of Kurdistan", *MERIP Middle East Report*, no. 153 (1988), pp. 40-46.

### 3.4 Law is not Blind: The Exceptionalization of the Kurds under the 1980 Legal Regime

The junta which governed Turkey between September 1980 and December 1983 created an elaborate constitutional and legislative regime which on the one hand continued the policies of cultural assimilation towards the Kurds and on the other expanded the restrictions on Kurdish political participation. Also in continuation with historical policies, the junta developed a new emergency regime. These general and special laws were implemented and expanded by elected governments which have governed Turkey since 1983, rendering the distinction made between the military and civilian rule futile in understanding the country's policies on human rights and the Kurdish question. The remainder of this section provides an overview of the enactment and implementation of the laws designed to restrict Kurdish political and linguistic rights or that had a disproportionate impact on their fundamental rights and liberties.

#### 3.4.1 Denial and Suppression of Kurdish Linguistic and Political Rights

The constitutional order established after the 1980 *coup* continued Turkey's historical policies towards Kurdish identity. The 1982 Constitution prohibited the expression of opinions<sup>642</sup> and broadcasting<sup>643</sup> "in any language prohibited by the law". A law adopted in 1983 expanded the scope of this ban to daily speech and prohibited using "any language other than Turkish" as mother tongue,<sup>644</sup> as written or audio-visual materials of assemblies and demonstrations<sup>645</sup> and in the "expression, dissemination and publication of thoughts".<sup>646</sup> In order to ban Kurdish without formally recognizing it, the law described the prohibited languages as "any language other than the first official language of states recognized by the Turkish state."<sup>647</sup> As Baskın Oran has pointed out, this ingenious formulation was based on the fact that Kurdish was at the time the second official language of Iraq and on the possibility of the establishment of an independent Kurdish state, which Turkey would not recognize.<sup>648</sup> The violation of the law was a criminal offence punishable with six months to three years imprisonment and a monetary fine.<sup>649</sup>

The Constitution provided for the permanent dissolution of political parties which violated "the indivisible integrity of the State with its territory and nation, human rights, national sovereignty, and the principles of the democratic and secular republic".<sup>650</sup> In addition, the Law on Political Parties (LPP) banned political parties from aiming to change the indivisible territorial integrity

---

<sup>642</sup> Former Article 26.

<sup>643</sup> Former Article 28.

<sup>644</sup> *Türkçeden Başka Dillerde Yapılacak Yayınlar Hakkında Kanun* [Law on Broadcasting in Languages Other than Turkish], no. 2932, 19 October 1983, Official Gazette, no. 18199, 22 October 1983, at Article 3(a) (hereafter "Law no. 2932").

<sup>645</sup> *Ibid.*, at Article 3(b).

<sup>646</sup> *Ibid.*, at Article 2(1).

<sup>647</sup> *Ibid.*

<sup>648</sup> Baskın Oran, *Türkiye'de Azınlıklar: Kavramlar, Teori, Lozan, İç Mevzuat, İçtihat, Uygulama* [Minorities in Turkey: Concepts, Theory, Lozan, Domestic Laws, Precedent, Implementation] (İletişim Yayınları, 2004), at p. 85.

<sup>649</sup> Law no. 2932, at Article 4.

<sup>650</sup> Former Article 68(4).

the State and the unity of the nation,<sup>651</sup> asserting the existence of national minorities in Turkey,<sup>652</sup> “proposing, on the pretext of protecting, promoting or disseminating a non-Turkish language or culture, to create minorities on the territory of the Turkish Republic or to engage in similar activities,”<sup>653</sup> and using minority languages in their statutes, programs and propaganda.<sup>654</sup> Another piece of legislation, also adopted in 1983, introduced a 10 percent electoral threshold in parliamentary elections.<sup>655</sup> The principal target of these constitutional and legislative provisions were Kurdish and the Kurds, although they did not make any reference to the Kurds or the Kurdish language.

There have been occasional instances of inconsistency in Turkey’s policies toward its Kurdish citizens. One was in 1991 when President Turgut Özal unexpectedly announced that he was half-Kurdish and that the ban on the use of the Kurdish language ought come to an end, as a result of which the ban in the areas of broadcasting and expression was lifted. At the same time, a draconian counter-terrorism law was introduced in the very same text.<sup>656</sup> A directive issued by the Minister of Justice authorized the celebration of the Kurdish New Year, *Newroz*, across Turkey.<sup>657</sup> While books, newspapers, music albums in Kurdish flourished in the 1990s, criminal restrictions on its use in political activities were preserved, enabling the continued prosecution of politicians merely for speaking Kurdish in their campaigns. The tension between allowing the use of Kurdish in the cultural, and later education, domain while criminalizing its use in political activities would remain a characteristic feature of future reforms.

### 3.4.2 Emergency Rule in the Context of Counter-Terrorism

Though designed to be applicable across the country, the laws governing emergency rule, the State Security Courts (*Devlet Güvenlik Mahkemesi*-DGM) and counter-terrorism have been critical in the unleashing of state violence in the Kurdish region after the outbreak of the war with the PKK. Emboldened by a counter-terrorism law in 1991, this body of law enabled and legitimized the gross human rights abuses committed by the security forces discussed in Chapter 5.

#### 3.4.2.1 State Security Courts

Several months before they stepped down, the junta acted on the provision it had inserted in the Constitution for the re-introduction of the DGMs<sup>658</sup> by enacting a special legislation.<sup>659</sup> The

---

<sup>651</sup> *Siyasi Partiler Kanunu* [Law on Political Parties], no. 2820, 22 April 1983, Official Gazette, no. 18027, 24 April 1983, Article 78(a).

<sup>652</sup> *Ibid.*, at Article 81 (a).

<sup>653</sup> *Ibid.*, at Article 81 (b).

<sup>654</sup> *Ibid.*, at Article 81 (c).

<sup>655</sup> *Milletvekili Seçim Kanunu* [Law on the Election of Members of the Parliament], no. 2839, 10 June 1983, Official Gazette, no. 18076, 13 June 1983, Article 33 (hereafter “Law no. 2839”). Like all other laws adopted by the junta after the coup, the law was exempt from constitutional review.

<sup>656</sup> *Terörle Mücadele Kanunu* [Law on Combatting Terrorism], no. 3713, 12 April 1991, Official Gazette, no. 20843, 12 April 1991, Article 23(e) (abolishing Law no. 2932) (hereafter “Law no. 3713”).

<sup>657</sup> Aslan, “Incoherent State”, at para. 17.

<sup>658</sup> These courts had been introduced following the 1971 military intervention, but were annulled by the AYM in 1975. See Chapter 2.

<sup>659</sup> *Devlet Güvenlik Mahkemelerinin Kuruluş ve Yargılama Usulleri Hakkında Kanun* [Law on the Establishment of State Security Courts and their Adjudication Procedures], no. 2845, 16 June 1983, Official Gazette, no. 18081, 18 June 1983.

DGMs were special courts with exclusive jurisdiction over terrorism offences. They had special judges, including a military judge appointed by the Chief of Staff. The laws provided for longer periods of detention without judicial control of individuals prosecuted in the DGMs than those tried in regular criminal courts. According to Article 128 of the Law of Criminal Procedure, the period of detention without judicial oversight in ordinary courts was 24 hours for individual offences and four days for collective ones. The corresponding periods of incommunicado detention in the proceedings before the DGMs were 48 hours and 15 days.<sup>660</sup> The DGMs had special prosecutors who relied heavily on security forces in collecting evidence, conducting investigations and preparing indictments.<sup>661</sup> Thus, a constitutionally sanctioned dual criminal justice system was created.

On 1 May 1984, the DGMs began to operate in eight provinces, including two in the Kurdish region.<sup>662</sup> Not substantially different from military courts<sup>663</sup> which operated during the state of siege, the DGMs quickly turned into instruments of state repression.<sup>664</sup> In addition to the above-cited differences from regular courts, there was also a differentiation *within* the DGM regime; the permissible period of incommunicado detention was twice as long in the State of Emergency region as elsewhere. An individual arrested in connection with a DGM case in Istanbul could be held in incommunicado detention for up to 48 hours in an individual offence and 15 days in a collective one. In a similar case in the Diyarbakır DGM, the permissible periods were four days and 30 days, respectively.<sup>665</sup> In 1996, a UN Special Rapporteur concluded that lengthy incommunicado detention periods enabled security forces to use torture “to extract ‘confessions’, to elicit names of members of illegal organizations, to intimidate detainees into becoming police informants, to inflict informal punishment for assumed support of illegal organizations and to force villagers in the south-east to become village guards.”<sup>666</sup> In almost all cases, confessions obtained through torture were accepted by the DGM judges as valid evidence even in the presence of forensic evidence documenting torture and they often constituted the sole legal basis for the prosecution of defendants.<sup>667</sup>

---

<sup>660</sup> *Ceza Muhakemeleri Usulü Kanunu ile Devlet Güvenlik Mahkemelerinin Kuruluş ve Yargılama Usulleri Hakkında Kanunun Bazı Maddelerinde Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of Certain Provisions of the Law of Criminal Procedure and the Law on the Establishment and Trial Procedures of the State Security Courts], no. 3842, 18 November 1992, Official Gazette, no. 21422, 1 December 1992, Article 30 (hereafter “Law no. 3842”).

<sup>661</sup> Joseph R. Crowley Program, “Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey”, *Fordham International Law Journal*, vol. 22, no. 5 (1998), pp. 2129-2269, at pp. 2149-2152.

<sup>662</sup> The DGMs were located in Ankara, İstanbul, İzmir, Diyarbakır, Adana, Konya, Trabzon and Van.

<sup>663</sup> Amnesty International, *Justice Delayed and Denied: The Persistence of Protracted and Unfair Trials for Those Charged under Anti-Terrorism Legislation*, AI Index: EUR/44/013/2006 (2006), at p. 3.

<sup>664</sup> Joseph R. Crowley Program, “Justice on Trial”, at p. 2142 (providing an analysis of the law and practice of the DGMs based on empirical data collected through trial observations and interviews with legal professionals).

<sup>665</sup> Law no. 3842, at Article 30.

<sup>666</sup> UN Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37, E/CN.4/1996/35*, 9 January 1996, at p. 38.

<sup>667</sup> Joseph R. Crowley Program, “Justice on Trial”, at p. 2153. See also UN Commission on Human Rights, Civil and Political Rights, Including the Questions of: Torture and Detention, *Report of the Special Rapporteur: Sir Nigel Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37, E/CN.4/1999/61/Add.1*, 27 January 1999, at paras. 42-43. For more, see Chapter 5.

### 3.4.2.2 State of Emergency

Once again acting on a provision they had inserted into the Constitution, the generals adopted an emergency legislation two months before they stepped down.<sup>668</sup> The State of Emergency Law authorized the cabinet to declare, subject to the approval of the Parliament, emergency rule in “one or more parts of the country” in response to “widespread acts of violence” undermining the public order and to indefinitely extend it.<sup>669</sup> Once the emergency rule was declared, the Regional Governorship of the State of Emergency had the unilateral and unequivocal power, not subject to judicial review, to suspend all civil and political rights.

When the state of siege was brought to an end across Turkey in 1987, a state of emergency was declared in several Kurdish provinces. The measure was a response to the PKK’s attacks on the Turkish military on 15 August 1984, which marked the beginning of the war. Emergency rule was declared in the provinces of Bingöl, Diyarbakır, Elazığ, Hakkari, Mardin, Siirt, Tunceli and Van. As Sevtap Yokuş has noted, it was expanded in violation of the State of Emergency Law to the “contiguous” provinces of Muş, Adıyaman and Bitlis where emergency had not been formally declared.<sup>670</sup> Meant to be provisional, the state of emergency was extended every four months for a total of 46 times until it was gradually phased out after 1996 and completely abolished on 30 November 2002 under EU pressure.<sup>671</sup>

As Yokuş has pointed out, most of the amendments to the State of Emergency Law were made through executive decrees, effectively usurping the powers vested to the Turkish Parliament under the Constitution.<sup>672</sup> Perhaps the most dramatic instance of such usurpation was Decree no. 285, which established the Regional Governorship of the State of Emergency.<sup>673</sup> The Regional Governor was vested with special powers including the transfer out of the emergency region of public officials and employees deemed to be harmful to public security (except for judges and prosecutors and non-gendarmes military personnel)<sup>674</sup> and the evacuation of settlements in rural areas.<sup>675</sup> All private and public law enforcement officers serving in the emergency region were given civil servant status and placed under the authority and command of the Regional Governor.<sup>676</sup> The acts of the Regional Governor were exempted from judicial

---

<sup>668</sup> *Olağanüstü Hal Kanunu* [State of Emergency Law], no. 2935, 25 October 1983, Official Gazette, no. 18204, 27 October 1983, at Article 3(b).

<sup>669</sup> *Ibid.*

<sup>670</sup> Sevtap Yokuş, *Avrupa İnsan Hakları Sözleşmesi'nin Türkiye'de Olağanüstü Hal Rejimine Etkisi* [The Impact of the European Convention on Human Rights on Turkey's Emergency Rule Regime] (Beta Basım Yayım, 1996), at p. 107. When the districts of Batman (previously in Diyarbakır) and Şırnak (previously in Siirt) were given provincial status in the mid-1990s, the number of provinces *de jure* and *de facto* governed by emergency rose to 13.

<sup>671</sup> Thierry Balzacq and Yılmaz Ensaroğlu, *Human Rights and Security: Turkey, England and France* (TESEV Publications, 2008), at p. 11.

<sup>672</sup> Yokuş, *Avrupa İnsan Hakları Sözleşmesi'nin*, at p. 105.

<sup>673</sup> *Olağanüstü Hal Bölge Valiliği İhdası Hakkında Kanun Hükmünde Kararname* [Decree with the Force of Law Establishing the Regional Governorship of the State of Emergency], no. 285, 10 July 1987, Official Gazette, no. 19517, 14 July 1987.

<sup>674</sup> *Ibid.*, at Article 4(g).

<sup>675</sup> *Ibid.*, at Article 4(h): “Regional Governor of the State of Emergency can order the temporary or permanent evacuation, change of place, regrouping of villages, hamlets, grazing fields and similar residential areas for reasons of public security.”

<sup>676</sup> *Ibid.*, at Article 4(b) and (i). This meant to shield law enforcement officers serving in the emergency region against criminal accountability. Under the Law on the Prosecution of Civil Servants, prosecutors were required

review,<sup>677</sup> although this was not envisioned in the State of Emergency Law. Thereby, Decree no. 285 moved the entire emergency rule outside the realm of the rule of law.<sup>678</sup>

Decree no. 424 not only reinforced the powers of the Regional Governor, but also extended them to contiguous provinces.<sup>679</sup> The Regional Governor was empowered to ban the print media,<sup>680</sup> temporarily expel from the region individuals deemed to threaten the public order,<sup>681</sup> transfer out of the emergency region hitherto protected judges and prosecutors,<sup>682</sup> and restrict or ban union activities.<sup>683</sup> Decree no. 424 granted executive authorities full immunity: “No legal claims of criminal, pecuniary or legal nature can be brought against, nor can any legal steps be taken with the judicial authority for this purpose in respect of any decision taken or any act performed by the Minister of the Interior, the Governor of the Emergency Region and provincial governors” in the exercise of their powers.<sup>684</sup>

Soon after, Decree no. 424 was replaced by Decree no. 430,<sup>685</sup> which somewhat restricted the powers of the Regional Governor of the State of Emergency but left the basic emergency regime intact.<sup>686</sup> The Minister of the Interior was now required to issue a warning before banning print media, a maximum period of one month was set for the closure of publishing houses,<sup>687</sup> persons expelled from the state of emergency region were “free to choose”<sup>688</sup> their place of residence outside the region unless they requested state financial aid,<sup>689</sup> the authorities’ power to restrict or ban union activities were limited to emergency provinces and no longer applied to contiguous ones,<sup>690</sup> and persons who suffered “losses for no reason” were granted the right to claim compensation from the state.<sup>691</sup> Otherwise, the authorities retained their extra-ordinary powers in the emergency region and were still immune to stays of execution as well as legal, financial and criminal liability.

---

to obtain executive authorization before commencing investigations into complaints against civil servants. For more, see Chapter 5.

<sup>677</sup> Ibid, at Article 7: “The suit of nullity cannot be filed against administrative acts performed by the Regional Governor of the State of Emergency in relation to his exercise of the powers given to him under this Decree Having Force of Law.”

<sup>678</sup> Yokuş, *Avrupa İnsan Hakları Sözleşmesi'nin*, at p. 107.

<sup>679</sup> *Şiddet Olaylarının Yaygınlaşması ve Kamu Düzeninin Ciddi Şekilde Bozulması Sebebine Dayalı Olağanüstü Halin Devamı Sürecince Alınacak İlave Tedbirlere İlişkin Kanun Hükmünde Kararname* [Decree with the Force of Law Regarding Additional Measures to be Adopted during the Continuation of the State of Emergency due to the Spreading of Violent Incidents and the Serious Disruption of the Public Order], no. 424, 9 May 1990, Official Gazette, no. 20514, 10 May 1990.

<sup>680</sup> Ibid, at Article 1(a).

<sup>681</sup> Ibid, at Article 1(b).

<sup>682</sup> Ibid, at Article 3.

<sup>683</sup> Ibid, at Article 1(c).

<sup>684</sup> Ibid, at Article 10.

<sup>685</sup> *Olağanüstü Hal Bölge Valiliği ve Olağanüstü Halin Devamı Sürecince Alınacak İlave Tedbirler Hakkında Kanun Hükmünde Kararname* [Decree with the Force of Law Regarding the Regional Governorship of the State of Emergency and the Additional Measures to be adopted during the Continuation of the State of Emergency], no. 430, 15 December 1990, Official Gazette, no. 20727, 16 December 1990 (hereafter “Decree no. 430”).

<sup>686</sup> ECtHR, *Demir and Others v. Turkey*, Application no.71/1997/855/1062-1064, Judgment, 23 September 1998, at para. 25.

<sup>687</sup> Decree no. 430, at Article 1(a).

<sup>688</sup> ECtHR, *Demir and Others v. Turkey*, at para. 25(4).

<sup>689</sup> Decree no. 430, at Article 1(b).

<sup>690</sup> Ibid, at Article 2.

<sup>691</sup> Ibid, at Article 8.

The *carte blanche* given to the authorities opened a new era in the Kurdish conflict. In addition to gross violations discussed in Chapter 5, the government systematically violated social, economic and political rights of individuals living in the emergency region. Under the pretext of counter-terrorism, the authorities banned publications, shut down media and suspended the right to strike.<sup>692</sup> Kurdish human rights lawyers, activists and politicians were particularly vulnerable. Those holding civil servant status were reassigned to jobs outside the emergency region. An ECtHR applicant raised this issue before the Court, claiming that she and her late husband had been repeatedly reassigned to jobs out of the emergency region due to their trade union activism.<sup>693</sup> Others were exiled on the ground that they ‘disrupted the public order’. For example, on 3 September 1989, Zübeyir Aydar, the chairman of the İHD’s Siirt branch and the former chairman of the Siirt branch of the Social Democratic People’s Party (*Sosyal Demokrat Halkçı Parti-SHP*), received an official letter as follows: “It has been identified that you engaged in acts which are disruptive of the public order pursuant to the State of Emergency Law. Therefore, you will leave the eight provinces which are within the mandate of the State of Emergency Governorship and the three contiguous provinces within 48 hours.”<sup>694</sup> Aydar was exiled for three months and remained under constant government pressure for his human rights work.<sup>695</sup> In a striking testimony before the EComHR, the Chief Public Prosecutor of Diyarbakır DGM explained how transferring political dissidents having civil servant status out of the region was a means of last resort when efforts to convict them failed. The Court’s ruling summarized the prosecutor’s relevant statement as follows: “His office would sometimes receive intelligence indicating that certain civil servants had been in contact with members of the PKK. In such circumstances, and when he was unable to obtain any evidence to indict such civil servants, he would ensure their transfer to other cities.”<sup>696</sup>

Like all laws adopted by the military regime, the State of Emergency Law enjoyed immunity from constitutional review under Provisional Article 15. Executive decrees adopted during a state of emergency were also exempt from constitutional review.<sup>697</sup> The constitutionality of several decrees adopted as part of the emergency rule in the Kurdish region were contested by the SHP and the AYM asserted its powers by ruling that it nonetheless had the mandate to review whether the contested decrees fell within the scope of the ban on judicial review under Article 148.<sup>698</sup> The AYM stated that it “could not consider itself bound by the name given to the text” it was asked to review and was “obliged” to determine the legal attribution of measures

---

<sup>692</sup> İbrahim Özden Kaboğlu and Stylianos-Ioannis G. Koutnatzis, “The Reception Process in Greece and Turkey”, in Alec Stone Sweet and Helen Keller (eds.), *The Reception of the ECHR in National Legal Orders* (Oxford University Press, 2008), pp. 451-529, at p. 459.

<sup>693</sup> ECtHR, *Süheyla Aydın v. Turkey*, Application no. 25660/94, Judgment, 24 May 2005, at para. 75. On the ECtHR’s response, see Chapter 6. Mahmut Şakar, a former chairman of the İHD’s Diyarbakır branch and a teacher by profession, was also exiled due to his human rights work. Interview with Mahmut Şakar, Cologne, 13 November 2015.

<sup>694</sup> A. Osman Ölmez, *Türkiye Siyasetinde DEP Depremi: “Legal Kürt Mücadelesi”* [DEP Earthquake in Politics in Turkey: “Legal Kurdish Struggle”] (Doruk, 1995), at p. 98.

<sup>695</sup> Human Rights Watch, *Destroying Ethnic Identity: The Kurds of Turkey – An Update* (1990), at pp. 35-36.

<sup>696</sup> ECtHR, *Süheyla Aydın*, at para. 107.

<sup>697</sup> Article 148 of the Constitution: “no action shall be brought before the Constitutional Court alleging the unconstitutionality of the form or substance of decrees having the force of law, issued during a state of emergency, martial law or in time of war”.

<sup>698</sup> AYM, E. 1990/25, K. 1991/1, 10 January 1991 (regarding several provisions of the decrees no. 424 and 425); AYM, E. 1991/6, K. 1991/20, 3 July 1991 (regarding several provisions of the decree no. 430).

adopted by the executive or legislative branches to see whether they were indeed emergency decrees exempted from review under the Constitution.<sup>699</sup> In precedent-setting rulings on the constitutionality of executive decrees adopted during the state of emergency, the AYM developed a four-prong test. First, emergency decrees must be based on emergency rule declared beforehand by the Parliament under Articles 119 and 120 of the Constitution.<sup>700</sup> Second, their geographical scope shall not exceed that of the emergency rule; where emergency rule is restricted to a particular part of the country, emergency measures adopted under the decrees shall be restricted to that region.<sup>701</sup> Third, their temporal scope shall not exceed that of the emergency rule.<sup>702</sup> Once the emergency rule ends, so does the life of the emergency measures adopted by decrees. Fourth, their material scope shall be limited to “matters necessitated by the state of emergency” as required by Article 121(3) of the Constitution. Emergency measures must be limited to the reason and purpose of the emergency rule and, thus, the executive cannot adopt measures not necessitated by the state of emergency.<sup>703</sup> Thus, the “emergency decrees which are exempted from constitutional review under Article 148 are only those which are adopted to be implemented during the state of emergency, in areas where the state of emergency was declared and in matters necessitated by the state of emergency.”<sup>704</sup> If the executive wishes to adopt measures in geographical areas which fall outside the emergency rule or after the expiration of the state of emergency, then it must adopt new legislation since such measures cannot be “matters necessitated by the state of emergency.”<sup>705</sup>

Based on this “narrow interpretation” limiting the scope of Article 148,<sup>706</sup> the AYM repealed, *inter alia*, Article 5 of Decree no. 430, which widened the geographical scope of the emergency rule to “contiguous” provinces.<sup>707</sup> However, citing lack of powers, it did not repeal Article 4(g) of Decree no. 285, which allowed the transfer out of the emergency region of civil servants deemed to be harmful to public security.<sup>708</sup> According to Merih Öden, the AYM’s failure to review the executive’s exile powers showed its reluctance to interfere into the executive realm in matters concerning the emergency rule.<sup>709</sup> Furthermore, as Sevtap Yokuş has pointed out, provisions under Decree no. 285, which were similar to Article 5 of Decree no. 430 but were not contested before the AYM remained, enabling the executive to undertake emergency measures in “contiguous” provinces.<sup>710</sup>

---

<sup>699</sup> AYM, E. 1990/25, at para. IV(A)(3)(c); AYM, E. 1991/6, at para. IV(A)(3)(c).

<sup>700</sup> Ibid, at para. IV(A)(3).

<sup>701</sup> Ibid, at para. IV(A)(3) (b).

<sup>702</sup> Ibid.

<sup>703</sup> Ibid, at para. IV(A)(3)(a).

<sup>704</sup> Ibid, at para. IV(A)(3)(b).

<sup>705</sup> Ibid.

<sup>706</sup> Merih Öden, “Anayasa Mahkemesi ve Olağanüstü Hal ve Sıkıyönetim Kanun Hükmünde Kararnamelerinin Anayasaya Uygunluğunun Yargısal Denetimi” [The Constitutional Court and the Judicial Review of the Constitutionality of Decrees Having the Force of Law Issued during a State of Emergency and Martial Law], *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, vol. 58, no. 3 (2009), pp. 659-691, at p. 668.

<sup>707</sup> AYM, E. 1991/6, at para. IV(C)(5).

<sup>708</sup> AYM, E. 1990/25, at para. IV(B)(2)(dd).

<sup>709</sup> Öden, “Anayasa Mahkemesi ve Olağanüstü Hal”, at p. 676.

<sup>710</sup> Yokuş, *Avrupa İnsan Hakları Sözleşmesi’nin*, at p. 110.

### 3.4.2.3 Anti-Terror Law

With the adoption of the Anti-Terror Law, crimes against the security of the state now fell under two separate laws; the new counter-terrorism legislation and the Penal Code. This enabled the courts to convict individuals for the same act twice, under two separate laws. According to the UN Human Rights Council, defining terrorism mainly with regard to its aims rather than acts and considering an individual a terrorist offender merely by virtue of his/her membership of an organization that aims changing Turkey's "political, legal, social, secular and economic system"<sup>711</sup> even if s/he had not committed a serious offence, the law allowed an "overly broad application" of the terms terrorism and terrorist.<sup>712</sup> In practice, judicial authorities have expansively interpreted the concept of terrorism to curtail peaceful Kurdish opposition, censor the Kurdish press, and ban Kurdish and pro-Kurdish parties.<sup>713</sup>

In a case brought by the SHP, the AYM struck down several provisions of the Anti-Terror Law, including Article 15(3) which required administration authorization for the initiation of criminal investigations against security officials accused of committing crimes. Yet, the AYM upheld the law's wide definition of terrorism.<sup>714</sup> Despite several amendments made under EU pressure in the 2000s, the Anti-Terror Law remains the main legal basis of human rights violations against Kurdish activists.

## 3.5 Kurdish Political Mobilization in the Era of Counter-Terrorism

Starting from the late 1980s, the Kurds who opted for democratic opposition challenged the state through both legal mobilisation and electoral participation at a time when the PKK was engaged in an armed struggle against the Turkish state. While lawyers in the Kurdish region contested the state in domestic courts and the ECtHR,<sup>715</sup> Kurdish politicians mobilized at the national and local level, though this time through their own political party. What started in 1987 with a handful of Kurdish politicians entering the Turkish Parliament with the SHP gave rise to the People's Labour Party (*Halkın Emek Partisi*-HEP) in 1990. Though established by Turkish and Kurdish leftist politicians, HEP was the outcome of a political split within the SHP when the latter expelled seven Kurdish deputies solely for having participated in a conference on the Kurdish question in Paris.<sup>716</sup> Within a year of its founding, HEP became rapidly 'Kurdified' in

---

<sup>711</sup> Law no. 3713, at Article 1.

<sup>712</sup> UN Human Rights Council, *Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Addendum, Mission to Turkey*, A/HRC/4/26/Add.2, 16 November 2006, at para 14.

<sup>713</sup> I use the admittedly broad phrases of "Kurdish" and "pro-Kurdish" political parties simply to differentiate those which were part of the Kurdish national movement and established predominantly by the Kurds for the Kurds from those which were not part of the Kurdish national movement and whose membership and leadership base were not predominantly Kurdish. The latter group constitutes of communist and socialist parties which advocated the Kurds' equality with the Turks, upheld the Kurds' right to self-determination and called for a democratic solution to the Kurdish question, but whose primary political focus was not the Kurdish conflict.

<sup>714</sup> AYM, E. 1991/18, K. 1992/20, 31 March 1992.

<sup>715</sup> The legal mobilization of Kurdish human rights lawyers before the ECtHR is the focus of Chapter 4.

<sup>716</sup> Ölmez, *Türkiye Siyasetinde DEP Depremi*, at pp. 50-90.

terms of membership and support base.<sup>717</sup> The events leading to this were HEP's official celebration of the Kurdish New Year *Newroz* in March 1991 (which attracted 15,000 Kurds), the extrajudicial execution of its Diyarbakır branch chairman Vedat Aydın,<sup>718</sup> and the departure from the party of high-profile Turkish social democrats in reaction to these events.<sup>719</sup> Although HEP was not established by the PKK, from then on they shared the same sociological base and similar ideological/political leanings, a legacy to be inherited by HEP's successors. Kurdish political parties would be subject to PKK influence or coercion, with varying frequency and degree, depending on the prevalent political climate in Turkey and the region.<sup>720</sup>

From the outset, the Kurds' electoral mobilization faced two principal legal obstacles: LPP and the 10 percent national electoral threshold,<sup>721</sup> both of which were legacies of the junta.<sup>722</sup> Widely interpreting the LPP's provisions which banned claiming the existence of minorities in Turkey and advocating their rights, the AYM dissolved five Kurdish<sup>723</sup> and seven pro-Kurdish<sup>724</sup> parties. In the most extreme case facing dissolution ten days after being founded,<sup>725</sup> these parties were charged with violating the principle of territorial unity and being linked to the PKK on the basis of their programs and their members' statements.<sup>726</sup> Among the evidence cited by the prosecutors were references to Kurds as a minority, nation or people, statements advocating Kurdish minority rights, and calls for a democratic solution to the Kurdish problem through, *inter alia*, federalism.

---

<sup>717</sup> In this sense, HEP's story closely resembles that of the İHD, discussed in Chapter 4.

<sup>718</sup> On Vedat Aydın, the first high-profile victim of extrajudicial executions in the Kurdish region, see Chapter 4.

<sup>719</sup> Ölmez, *Türkiye Siyasetinde DEP Depremi*, at pp. 119-138.

<sup>720</sup> For more on the dynamics of the relationship between the PKK and the Kurdish political parties, see Watts, *Activists in Office*.

<sup>721</sup> Law no. 2839, at Article 33. This law, like all other laws and decrees adopted by the military junta, was exempt from constitutional review.

<sup>722</sup> HEP had not faced the second obstacle by virtue of the fact that it emerged from within a political party which was already represented in the Turkish Parliament.

<sup>723</sup> The names and years of closure of these parties are: HEP, 1993; Freedom and Democracy Party (*Özgürlük ve Demokrasi Partisi*-ÖZDEP), 1993; DEP, 1994; People's Democracy Party (*Halkın Demokrasi Partisi*-HADEP), 2003; and Democratic Society Party (*Demokratik Toplum Partisi*-DTP), 2009.

<sup>724</sup> The names and years of closure of these parties are: United Communist Party of Turkey (*Türkiye Birleşik Komünist Partisi*), 1991; Socialist Party (*Sosyalist Parti*), 1992; Socialist Turkey Party (*Sosyalist Türkiye Partisi*), 1993; Socialist Unity Party (*Sosyalist Birlik Partisi*), 1995; Democracy and Change Party (*Demokrasi ve Değişim Partisi*), 1996; Labour Party (*Emek Partisi*), 1997; Democratic Mass Party (*Demokratik Kitle Partisi*), 1999.

<sup>725</sup> This was the case of the United Communist Party of Turkey.

<sup>726</sup> On AYM's jurisprudence on the political party dissolutions, see Ödül Celep, "The Political Causes of Party Closures in Turkey", *Parliamentary Affairs*, vol. 67, no. 2 (2014), pp. 371-390; Dicle Koğacıoğlu, "Progress, Unity, and Democracy: Dissolving Political Parties in Turkey", *Law and Society Review*, vol. 38, no. 3 (2004), pp. 433-462; Dicle Koğacıoğlu, "Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain", *International Sociology*, vol. 18, no. 1 (2003), pp. 258-276; Zühtü Arslan, "Conflicting Paradigms: Political Rights in the Turkish Constitutional Court", *Critique: Critical Middle Eastern Studies*, vol. 11, no. 1 (2002), pp. 9-25; Yusuf Şevki Hakyemez and Birol Akgün, "Limitations on the Freedom of Political Parties in Turkey and the Jurisdiction of the European Court of Human Rights", *Mediterranean Politics*, vol.7, no. 2 (2002), pp. 54-78.

Starting with the HEP's closure in 1993, the Kurdish national movement<sup>727</sup> and the AYM have played a cat-and-mouse game, the former establishing a “spare party”<sup>728</sup> before the latter had the chance to dissolve the previous one. As Koğacioğlu has noted, the judicial authorities quickly noticed this “strategy of reemergence”, as evident in the initiation of a dissolution case against Democratic People's Party (*Demokratik Halk Partisi-DEHAP*) the day its predecessor People's Democracy Party (*Halkın Demokrasi Partisi-HADEP*) was dissolved.<sup>729</sup> In closing the Kurdish parties, the AYM not only ended their legal personality, but also liquidated them and transferred their assets to the Treasury. More drastically, dissolution decisions often entailed a ban on the senior members of these parties, including their chairs and deputies, from becoming members to another political party for five years. In the most extreme cases, the deputies of these parties were stripped of their immunities and imprisoned, as in the case of DEP, or of their parliamentary seats, as in the case of the co-chairs of the Democratic Society Party (*Demokratik Toplum Partisi-DTP*). The LPP was also used to prosecute the members of Kurdish political parties. To communicate with their constituency, many of whom did not speak Turkish, Kurdish politicians frequently spoke Kurdish in their election campaigns. The sociological reality that many of the electorate in the region, particularly the elderly women, do not speak Turkish has also prompted Kurdish politicians from mainstream parties, including the AKP, to use Kurdish in their election campaigns. Yet, there is no example of criminal investigation initiated against such politicians. Elected politicians from Kurdish political parties also used Kurdish in their written correspondence both to promote and advance the Kurdish language and to engage in civil disobedience against the state. These acts of defiance led to systematic prosecutions and convictions since the early 1990s.<sup>730</sup>

HEP's successor was DEP, which entered the 1991 general elections through a pre-election coalition with the SHP in order to circumvent the threshold. To mark their presence in the Parliament, some of the DEP deputies wore Kurdish national colors. They protested what they considered to be an assimilationist text by reading the parliamentary oath in Kurdish and adding phrases indicating their disagreement.<sup>731</sup> The DGM prosecutor in Ankara immediately called on the Parliament to lift the immunity of DEP deputies to allow their prosecution, repeating his call until July 1993.<sup>732</sup> On 4 September 1993, DEP deputy Mehmet Sincar was extra-judicially executed by unidentified individuals.<sup>733</sup> In December 1993, a dissolution case was opened

---

<sup>727</sup> In using this term, I refer to the broader political movement comprised of both illegal armed groups such as the PKK and political parties pursuing non-violent resistance, including those currently represented by the HDP. What makes this wide range of actors part of the same movement are their common rights claims, such as state-funded education in Kurdish, political autonomy in the Kurdish region, the constitutional recognition of the Kurdish identity and the removal of structural barriers to the Kurds' participation in the democratic system. In no way do I ignore the historical, ideological and political differences between various actors, first and foremost their positions with regard to the use of violence in the pursuit of these goals, and their relations with the PKK.

<sup>728</sup> Koğacioğlu, “Progress, Unity, and Democracy”, at p. 440.

<sup>729</sup> Ibid.

<sup>730</sup> For select examples of the conviction of Kurdish politicians during 2006-2007, see Dilek Kurban, *A Quest for Equality: Minorities in Turkey* (Minority Rights Group International, 2007), at pp. 24-25.

<sup>731</sup> On the background of the SHP-DEP pre-election coalition and the ‘oath crisis’ at the Parliament, see Ölmez, *Türkiye Siyasetinde DEP Depremi*, at pp. 145-167.

<sup>732</sup> The applications were made on 27 November 1991, 16 December 1992, 25 May 1993 and 2 July 1993, accusing the DEP MPs of treason under Article 125 of the Penal Code. ECtHR, *Sadak and Others v. Turkey* (no. 1), Application nos. 29900/96, 29901/96, 29902/96 and 29903/96, Judgment, 17 July 2001, at para. 8.

<sup>733</sup> On Sincar's execution and the official reaction, see Ölmez, *Türkiye Siyasetinde DEP Depremi*, at pp. 285-302. For more, see also Chapter 5.

against DEP. On 18 February 1994, eight buildings belonging to the party were bombed, DEP's General Secretary survived a nearly fatal attack and the two sons of a DEP mayor in Diyarbakır were murdered. These incidents prompted DEP to boycott the local elections,<sup>734</sup> due also to the PKK's pressure.<sup>735</sup> Finally, on 2 March 1994, the Parliament stripped seven DEP deputies of their immunities and on 16 June, the AYM removed the immunity of the remaining seven when it dissolved DEP. Dropped into the domain of criminal law with the concerted efforts of all three branches of the state, eight of the DEP deputies were sentenced to up to 15 years of imprisonment, five of whom served a ten-year term. The remaining six deputies fled to Europe, where they have been living since.

It had become very difficult for Kurdish parties to re-enter the Parliament. The combination of the DEP experience which made pre-election coalition with a mainstream party virtually impossible and a seemingly neutral election law which precluded the Kurdish parties from entering the Parliament has effectively disenfranchised the constituency of these parties. In 1995 general elections, HADEP received 4.17 percent of the total votes. In 2002, DEHAP increased the nationwide votes to 6.2 percent, but still fell short of the threshold, though it received up to 56 percent of the votes in the Kurdish region. On the other hand, the threshold did not apply to municipal elections. Since their first participation in local elections in 1999, Kurdish political parties progressively increased the number of municipalities under their control in the Kurdish region. In 1999, HADEP won 37 municipalities (seven of which were provincial); in 2004, while experiencing a fall in its overall votes and losing four provinces to the AKP, DEHAP won 56 municipalities (including five provincial); in 2009, the DTP won 98 municipalities (including eight provincial and 50 district); and finally in March 2014, the Peace and Democracy Party (*Barış ve Demokrasi Partisi*-BDP) won around 100 municipalities. During the movement's absence in the Parliament, Kurdish mayors effectively served as parliamentarians and presented their constituency at the national and international level.<sup>736</sup>

Until the mid-2000s, the Kurds' rights demands were principally of an individual nature and were articulated by human rights organisations. By the end of the decade the DTP mayors, more experienced in their second term, became the main spokespeople. The expansion of the political and legal space during Turkey's EU accession process enabled these politicians to push the boundaries of the democratization reforms by pressing for collective rights and to more openly align themselves to the PKK leader Abdullah Öcalan's ideas for the solution of the Kurdish question. The DTP, and later the BDP, aggressively pursued Öcalan's democratic confederalism project<sup>737</sup> by engaging in civil disobedience campaigns and rendered futile the

---

<sup>734</sup> *Bianet*, "1990'dan Bugüne, HEP'ten DTP'ye Kürtlerin Zorlu Siyaset Mücadelesi" [From 1990 to Today, from HEP to DTP, the Kurds' Formidable Political Struggle], 12 December 2009.

<sup>735</sup> Watts, *Activists in Office*, at pp. 107-108.

<sup>736</sup> Watts, *Activists in Office*, at p. 82.

<sup>737</sup> Developed by Öcalan in prison as part of his legal defence, democratic confederalism seeks "democratic self-government" by the Kurds through local councils, parliaments and congresses to be established across Kurdistan. Ahmet Hamdi Akkaya and Joost Jongerden, "The PKK in the 2000s: Continuity through Breaks?" in Marlies Casier and Joost Jongerden (eds.), *Nationalisms and Politics in Turkey: Political Islam, Kemalism and the Kurdish Issue* (Routledge, 2011), pp. 143-161, at pp. 152-153. It is the ideological and political basis of the DTP/BDP's "democratic autonomy project", which advocates the radical decentralisation of governance in Turkey and the transfer of competences in certain areas, such as education and culture, from the central government to elected regional assemblies.

government's attempts to define the contours of the reforms. In defiance of the laws banning the official use of Kurdish, the DTP/BDP mayors provided municipal services in Kurdish and restored the old Kurdish names of places. They used their resources for the development and spread of the Kurdish culture and language by opening kindergartens providing education in Kurdish, organising Kurdish conferences and festivals, offering free Kurdish language courses, publishing dictionaries and children's books in Kurdish, and organizing mass-scale *Newroz* celebrations. In protest of the Directorate of Religious Affairs' (*Diyanet İşleri Başkanlığı*) refusal to provide religious services in Kurdish, the DTP/BDP organized mass Friday prayers in public squares of the Kurdish region.

Once they went beyond the formal limits of their mandate and voiced the political demands of their constituencies, the mayors and municipal officials became the new targets of judicial repression. In addition to the bureaucratic obstruction of their day-to-day work, they faced prosecution.<sup>738</sup> The peak of the judicial harassment came with the arrest in Diyarbakır of 53 Kurds, including on-duty mayors, on 14 April 2009, two weeks after the local elections in which the DTP had swept the elections in the region. The indictments were based on various provisions of the Anti-Terror Law and Penal Law, as amended in 2005 and 2006.<sup>739</sup> They accused the defendants of leadership or membership of the Union of Communities in Kurdistan/Turkey Assembly (*Koma Ciwakên Kurdistan/Türkiye Meclisi-KCK/TM*), the alleged urban branch of "an international project" controlled by the PKK and comprised of sister parties in Iraq, Syria and Iran that seeks to establish "an independent state structure".<sup>740</sup> Prosecutors charged Kurdish activists, lawyers and municipal officials with terrorism for their non-violent demand of mother tongue education and autonomy and even petitioning the ECtHR. The evidence cited against these individuals included participating in *Newroz* celebrations, attending peaceful demonstrations on World's Women's Day and Human Rights Day and citing in their news articles the PKK's written materials. Virtually every active member of the Kurdish national movement, with the exception of parliamentarians protected by immunity, was placed behind bars in the name of counter-terrorism. Within weeks, the number of defendants in pre-trial detention reached thousands.<sup>741</sup> It was only on 9 June 2010, when the indictment was issued, that defendants were formally informed of the charges against them.<sup>742</sup> They applied to the ECtHR, where their case has been pending since March 2010.<sup>743</sup> According

---

<sup>738</sup> Watts, *Activists in Office*.

<sup>739</sup> See in this chapter Section 3.6.2.

<sup>740</sup> KCK indictment, cited in Fikret İlkiz, "KCK Cases and the Judiciary Mechanism", *Perspectives-Political Analysis and Commentary from Turkey*, no. 2 (2012), pp. 41–45. The KCK was indeed established by the PKK to put into effect Öcalan's concept of "democratic confederalism". It brings together political parties, civil society organisations and armed groups affiliated with the PKK in Turkey, Iraq, Iran and Syria. "In the PKK party complex, the KCK can be considered the executive body." Akkaya and Jongerden, "The PKK in the 2000s", at p. 159.

<sup>741</sup> On 14 April 2009, in response to a parliamentary query, the Minister of Justice stated that in 113 cases launched as part of the KCK investigation across the country, a total of 2,146 defendants were being tried, 992 of whom were held in pre-trial detention. İlkiz, "KCK Cases and the Judiciary Mechanism", at p.43.

<sup>742</sup> In October 2010, there were ten separate but related KCK cases in the following provinces: Diyarbakır (hosting the principal KCK case), Batman (hosting two separate cases), Şırnak, Mardin, Van, Adana (hosting two separate cases), Mersin and Gaziantep. Information based on the legal brief presented by defendants' counsel to the Diyarbakır Sixth Heavy Penal Court with Special Powers, 18 October 2010 (on file with the author).

<sup>743</sup> The first petition was filed on 19 March on behalf of 53 defendants. On 5 June, a second petition was filed on behalf of 50 more defendants.

to the applicants' lawyer Reyhan Yalçındağ, as of 15 August 2017, the Court has for the forth time granted the Turkish government extended time for the submission of its written pleadings.<sup>744</sup>

In 2007, the Kurdish national movement returned to the Turkish Parliament after 13 years of absence. This time, the DTP had decided to run through independent candidates, for whom the electoral threshold does not apply. This strategic decision paid off: 20 candidates supported by the DTP were elected and formed their own political group as soon as they entered the parliament (a 21st deputy not affiliated with the DTP joined them after the elections). The movement's re-entry to the Parliament, with twice as many deputies, intensified the vicious circle of a strengthened movement making bolder demands; intensified judicial and bureaucratic harassment; heightened police brutality during demonstrations in the region; increased PKK violence; and government policies oscillating between a reformist rhetoric occasionally supported by concrete steps in the area of linguistic rights and the repression of Kurdish political participation and representation. In December 2009, the AYM dissolved yet another Kurdish party, the DTP.<sup>745</sup> By then, the DTP's successor BDP had already been established.

The AKP government's mishaps, particularly the KCK case and its exclusion of the BDP from discussions of the 'Kurdish opening' it launched in 2009,<sup>746</sup> led the Kurdish national movement to increase the stakes for a democratic solution. Mother tongue education, the revision of the Anti-Terror Law and the Penal Code, the lowering of the electoral threshold, a fair distribution of state financial assistance to political parties and constitutional guarantees for cultural rights were no longer sufficient; all KCK prisoners should be released and the Kurds should be granted "democratic autonomy" as an assurance of self-rule in virtually all spheres of public life, with the exception of foreign policy, economy and national defense. The AKP's categorical refusal to negotiate over these demands led the BDP to vote against the constitutional reform package submitted to the Parliament, which failed to receive the requisite qualified majority and was therefore submitted to popular referendum on 12 September 2010.<sup>747</sup> To show its political cloud, the BDP called on its constituencies to boycott the referendum. Though the package was approved by 57 per cent of the votes, a significant portion of the electorate in the Kurdish region did not participate in the referendum.<sup>748</sup>

In the run-up to the 2011 elections, the BDP resorted to the same strategy as the DTP and ran with independent candidates. This led the authorities to resort to bureaucratic tactics to hamper the BDP campaign. Most strikingly, the Supreme Election Board unlawfully vetoed seven of the BDP-endorsed independent candidates due to their past convictions on terrorism charges. The mounting protests caused the Board to reverse its decision. The movement re-entered the Parliament, this time with 36 deputies, and soon after started a new civil disobedience campaign in protest of the deadlock in the KCK cases due to the courts' refusal to allow the defendants to

---

<sup>744</sup> Information received via-email from KCK defendants' co-counsel Reyhan Yalçındağ, 15 August 2017.

<sup>745</sup> See in this chapter Section 3.7.1.

<sup>746</sup> On the 'Kurdish opening', see in this chapter Section 3.6.2.

<sup>747</sup> On the content of the constitutional amendments, see Chapter 2.

<sup>748</sup> The turnout rate in some of the Kurdish cities was: Hakkari, 9.1 percent; Diyarbakır, 35.2 percent; Batman, 40.3 percent; Şırnak, 22.5 percent; Van, 43.6 percent. The nationwide turnout average was 77.4 percent.

conduct their legal defense in Kurdish. One of the largest hunger strikes in Turkey's history was initiated by 63 prisoners on 12 September 2012. By early November, the number of hunger strikers had reached 682.<sup>749</sup> They had three demands: the alleviation of Öcalan's prison conditions, the right to education in Kurdish and the right to use Kurdish in courts. The duration of the strike and the participation of BDP deputies increased its public profile, forcing the government to take action. Soon after the Minister of Justice announced the preparation of a new law granting the use of Kurdish in courts, Öcalan made a call from his cell for an immediate end to the strikes.<sup>750</sup> In response, the strikes abruptly ended on 18 November. The incident was interpreted by many as a proof of the strength of the Kurdish national movement and Öcalan's omnipotence over it. The announced new law, on the other hand, allowed defendants to use "another language" in their oral defence only at the first hearing and in the end when the final deliberations are made.<sup>751</sup> Moreover, defendants are required to bear the interpretation costs themselves.<sup>752</sup>

As earlier in history, the judicial and executive repression of Kurdish political mobilization was not a linear process. Rather, it was affected and determined by the political climate at the material time. For instance, following the initiation in December 2012 of talks between the government and the PKK's imprisoned leader Öcalan,<sup>753</sup> the courts, seemingly instructed by the Ministry of Justice, released several Kurdish mayors in March 2013. However, the majority remained in prison. In November 2013, the BDP had six parliamentarians, 21 mayors and 91 members of municipal councils in prisons. In addition to these elected officials, six central executive committee members, two deputy co-chairpersons, 57 party assembly members and around 200 party executives were also in pre-trial detention.<sup>754</sup> Following the collapse of the peace talks between the AKP and the PKK, many KCK defendants were rearrested under new investigations.<sup>755</sup> For example, Fırat Anlı was the mayor of the Yenişehir district of Diyarbakır when he was arrested in March 2009. After serving four years in pre-trial detention, he was released in March 2013. Elected as the co-mayor of the Diyarbakır Metropolitan Municipality

---

<sup>749</sup> The number is based on the announcement made by the Ministry of Justice on 2 November 2012.

<sup>750</sup> In its progress report to the European Commission, the Turkish government stated that the enactment of the law was foreseen in its 2023 Vision Document and that a draft of the law had been submitted to the Turkish Parliament in November 2012. Turkey, Ministry of Justice, *State of Play Regarding the Legislative Work on Judiciary and Fundamental Rights (Chapter 23) in Turkey* (undated), at p. 2 (unpublished document; on file with the author). Yet, what triggered the enactment of the law were the hunger strikes.

<sup>751</sup> Previously, the right to use non-official languages was limited to cases where the defendant could not sufficiently understand or speak Turkish to express himself/herself.

<sup>752</sup> *Ceza Muhakemesi Kanunu ile Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanunda Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of Law on Criminal Procedure and the Execution of Sentences and Security Measures], no. 6411, 24 January 2013, Official Gazette, no. 28545, 31 January 2013, at Article 1. The government defended this requirement on the grounds that Article 6(3) of the ECHR grants defendants the right to the free assistance of an interpreter only if s/he cannot understand or speak the language used in the court. Ministry of Justice, *State of Play*, at p. 2. For a critique of the law, see Mehmet Şerif Derince, "A Break or Continuity? Turkey's Politics of Kurdish Language in the New Millennium", *Dialect Anthropol.*, vol. 37 (2013), pp. 145-162.

<sup>753</sup> See in this chapter Section 3.6.2.

<sup>754</sup> Information received via e-mail from BDP, November 2013.

<sup>755</sup> E-mail communication with human rights lawyer and İHD member Reyhan Yalçındağ, 4 September 2016. Yalçındağ represented the KCK defendants in domestic courts and filed the ECtHR petition.

in March 2014, Anlı was rearrested on separate charges in October 2016. He is still in prison, without conviction, awaiting the outcome of both cases.

Meanwhile, in October 2013, in an effort to transform itself from a Kurdish political party to an umbrella movement representing various ethnic, religious and denominational groups and “marginalized and oppressed” social classes, the BDP formed an alliance with various political factions within the left under the rubric of the Peoples’ Democratic Party (*Halkların Demokratik Partisi*-HDP). In April 2014, the entire parliamentary caucus of the BDP joined the HDP. In June 2015, the Kurdish movement dared, for the first time ever, to participate in the general elections under the rubric of their own party rather than running through independent candidates. In a historic win, the HDP passed Europe’s highest threshold with a record 13.1 percent of the votes, more than doubling the 6.4 percent of the votes the BDP’s independent candidates had received in 2011, and gained 80 seats in the Parliament. With this historic achievement resulting in a hung parliament, the HDP deprived the AKP not only of the qualified majority it needed to change the political system into a presidential regime but also the simple majority to continue its single-party rule. Erdoğan’s response was to call for repeat elections, as discussed in Chapter 2.<sup>756</sup>

The period between the June and November elections witnessed the resurgence of the armed conflict after the collapse of the two-year long peace talks between the PKK leader Öcalan and the government. The Turkish military’s security operations in the Kurdish region resulted in the destruction of lives, homes and towns, as discussed in Chapter 1. The snap elections resulted in a victory for the AKP which received nearly half of the votes and formed a single-party government. While the HDP still passed the threshold, its vote was down to 10.7 percent, corresponding to 59 parliamentary seats. This was the first time in Turkey’s history that a Kurdish political party has not only entered the Parliament but did so as the third largest party after the AKP and the Republican People’s Party (*Cumhuriyet Halk Partisi*-CHP).

The response of the establishment would be commensurate. As discussed in Chapter 2, President Erdoğan has long desired a “Turkish-style” presidential system, for which he needed the support of the Nationalist Movement Party (*Milliyetçi Hareket Partisi*-MHP) – in the Parliament and in the referendum. The terms of the deal were clear. In exchange for giving Erdoğan the presidency, the MHP wanted to oust the Kurdish deputies from the Parliament. This was 1994 all over again, only in a different format. Back then, the Turkish Parliament had removed the immunities of DEP deputies pursuant to the procedure laid out in Articles 83(2)<sup>757</sup> and 85<sup>758</sup> of the Constitution which preclude the arrest, detention and prosecution of deputies without the case-by-case authorization of the Parliament and give deputies whose immunities are thus lifted the right to appeal to the AYM for the annulment of the decision. This time

---

<sup>756</sup> President Erdoğan used the AKP’s seemingly failed efforts to form a coalition as a pretext to call for repeat elections in November 2015 with the hope that the party he had founded and led for 12 years before he ran for the presidential office would regain the single party rule.

<sup>757</sup> Article 83(2): “A deputy who is alleged to have committed an offence before or after the election shall not be detained, interrogated, arrested or tried unless the Assembly decides otherwise.”

<sup>758</sup> Article 85: “If the Turkish Grand National Assembly decides to waive the parliamentary immunity of a member or disqualify him from membership, the member concerned or any member of the Turkish Grand National Assembly may, within a week of the decision, appeal to the Constitutional Court for the decision to be annulled on the grounds that it is contrary to the Constitution or to the Rules of Procedure of the Assembly.”

around, the AKP government resorted to a different strategy. On 12 April 2016, it presented to the Parliament a law<sup>759</sup> introducing a one-time exception to the constitutional immunity regime by allowing a blanket vote on all dossiers awaiting legislative authorization as of 20 May, when the law would be put to vote. For one time only, the law bypassed the regular procedure and guarantees requiring the Plenary to review the dossiers before the voting and granting the affected deputies the right to defend themselves before the preparatory committee, the joint parliamentary commission and the Plenary.<sup>760</sup> It empowered an AKP-led joint parliamentary committee to authorize the prosecution of deputies whose immunities would be collectively lifted. Any dossier that would reach the Parliament after 20 May would again be subject to the regular constitutional immunity regime.

While seemingly affecting all similarly situated members of the Parliament, the amendments specifically targeted the HDP deputies. This was evident from the concerted campaign which President Erdoğan had launched immediately after the June 2015 general elections. On 28 July 2015, Erdoğan called on the Parliament to strip the HDP deputies of their immunity to make them “pay the price” for supporting terrorism.<sup>761</sup> On 2 January 2016, he explicitly targeted the HDP co-chairs Selahattin Demirtaş and Figen Yüksekdağ, claiming that their calls for autonomy constituted “constitutional crimes” and calling on the Parliament to lift their immunities “in the name of counter-terrorism”.<sup>762</sup> On 20 May, only hours before the vote in the Parliament, Erdoğan noted that the highest number of dossiers were against “the party supported by the separatist terrorist organization”, meaning the HDP, and expressed his hope for a favorable outcome to enable the immediate prosecution of such members of the parliament.<sup>763</sup>

The message was taken by all three branches of the state. The MHP bloc and several CHP deputies voted for the amendment, although the latter’s leader admitted that it was unconstitutional.<sup>764</sup> Prosecutors hastily prepared new dossiers to ensure the prosecution of the highest number of HDP deputies in a maximum number of criminal cases. Of the 468 new immunity dossiers sent by the prosecutors to the Parliament between Erdoğan’s call on 2 January and the law’s entry into force on 8 June, 368 were against the HDP deputies, 154 of which were prepared between 21 April and 20 May alone.<sup>765</sup> That the real target was the HDP deputies is also evident in the law’s disproportionate impact. As opposed to 27 of 317 of de-immunized AKP deputies, 55 out of 59 HDP parliamentarians lost their immunities. There was

---

<sup>759</sup> *Türkiye Cumhuriyeti Anayasasında Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of the Constitution of the Republic of Turkey], no. 6718, 20 May 2016, Official Gazette, no. 29736, 8 June 2016.

<sup>760</sup> For a detailed discussion of Turkey’s constitutional regime governing parliamentary immunities and the provisional changes introduced to this regime by law amending the constitution, see Venice Commission, *Turkey: Opinion on the Suspension of the Second Paragraph of Article 83 of the Constitution (Parliamentary Inviolability)*, CDL-AD(2016)027, 14 October 2016 (hereafter “Opinion on Parliamentary Inviolability”).

<sup>761</sup> *Hürriyet Daily News*, “Turkey’s Erdoğan Demands Lifting of HDP Deputies’ Immunity”, 28 July 2015.

<sup>762</sup> *Ajans Haber*, “Cumhurbaşkanı Erdoğan’dan HDPliler için ‘Dokunulmazlık’ Çağrısı” [President Erdoğan Makes an ‘Immunity Call’ Regarding the HDP Deputies], 2 January 2016.

<sup>763</sup> *Diken*, “Erdoğan’a göre HDP’liler Zaten Yargılanacak: Bu İşten Kaçış Yok” [According to Erdoğan, the HDP Deputies will be Prosecuted Anyhow: There is no Escape], 20 May 2016.

<sup>764</sup> The Venice Commission was informed that the “CHP voted for the amendment to avoid any accusation of wishing to protect persons supporting terrorist activities”. Venice Commission, *Opinion on Parliamentary Inviolability*, at para. 36.

<sup>765</sup> HDP, *The Lifting of Legislative Immunities at the Parliament of Turkey: An Assessment Report*, 13 June 2016, at p. 5.

also a striking difference in terms of the nature of the charges against the members of the parliament. While virtually all de-immunized AKP deputies were charged with the misuse of their immunities to make personal material gains or to escape criminal liability for common crimes, virtually all de-immunized HDP deputies were charged for their political statements and activities. Among the crimes attributed to them were using the terms “Kurds” and “Kurdistan”, mediating between the AKP government and Öcalan during peace talks, calling for “democratic autonomy” as part of a solution to the Kurdish question and “insulting the president” by criticizing Erdoğan’s role in the high-profile conviction of two journalists for unearthing the arms transfer made by the AKP government to jihadist groups in Syria.<sup>766</sup>

As in 1994, the AYM also got the message. On 3 June 2016, it unanimously rejected the constitutional complaint filed by all HDP and several CHP deputies for the annulment of the law.<sup>767</sup> The deputies had based their petition on the argument that the law was a parliamentary decision subject to the AYM’s oversight under Article 85 rather than a constitutional amendment whose substance it is not authorized to review. They argued that the law violated the non-violability and non-liability of members of the parliament by enabling their prosecution for political acts and statements protected by freedom of speech, assembly and association, deprived the affected deputies of their constitutional right to defend themselves during the lifting of their immunities and stripped their immunities on a collective instead of the constitutionally prescribed individual basis. They further argued that the law violated equal treatment by keeping intact the immunities of those deputies who committed the same acts before the amendment but not yet faced criminal investigation as well as those who will conduct them in the future. The AYM responded that while it is authorized to review the parliamentary decisions stripping deputies of their immunities, what was at issue in this particular case was a “special process” which had all the formal elements of a constitutional amendment and gave rise to “special legal consequences”.<sup>768</sup> The AYM noted that its powers were limited to reviewing the *procedure* adopting the constitutional amendment, had a request for annulment been brought by one-fifth of the members of the Parliament. Thus, by inventing a new rule, the AYM refrained from fulfilling its constitutional obligation to review the lifting of parliamentary immunities and legitimized what the CoE’s Venice Commission found to be a “misuse of the constitutional amendment procedure”.<sup>769</sup>

In November 2016, 13 de-immunized HDP deputies including Demirtaş and Yüksekdağ were arrested. Placed in pre-trial detention, they will be prosecuted on multiple charges in several cases, facing hundreds years of jail time. So, history repeated itself yet again and the Kurds’ elected representatives were taken from the Parliament and put into prison with the concerted efforts of three branches of the state.

---

<sup>766</sup> Ibid, at pp. 7-14.

<sup>767</sup> AYM, E. 2016/54, K. 2016/117, 3 June 2016. Lacking the minimum threshold for asking for abstract review, a total of 70 HDP and CHP deputies filed a collective constitutional complaint.

<sup>768</sup> Ibid, at para. 11.

<sup>769</sup> Venice Commission, *Opinion on Parliamentary Inviolability*, at para. 73. The Venice Commission found the temporary, *ad hoc* and *ad homines* nature of the constitutional amendment to contradict the principles of proportionality and equality. Ibid, at paras. 68-76.

### 3.6 Turkey's EU Process and its Impact on the Kurdish Question

Paradoxically, Turkey's decision to grant its citizens the right to petition the EComHR preceded by six months its declaration of a state of emergency in the Kurdish region on 19 July 1987. In hindsight, the tension between these decisions is evident. At the time, the government in all likelihood did not perceive the EComHR/ECtHR as a credible threat to its sovereignty nor did it predict "the boomerang effect"<sup>770</sup> its decision to recognize the individual petition mechanism would have on its Kurdish policies. By submitting itself to European oversight, Turkey exposed its gross abuses in the emergency region to international scrutiny. With the Kurdish lawyers' effective use of the right to individual petition, the Kurdish question would become the greatest source of problems for Turkey vis-à-vis the ECtHR and subsequently the EU.

In early 1999, Öcalan was abducted in Kenya and brought to Turkey for prosecution. In December of the same year, Turkey was given a candidate status for EU membership and put under greater international pressure to revise its mode of dealing with Kurdish demands. This entailed executing the ECtHR rulings on the Kurdish question<sup>771</sup> and fulfilling the EU's human rights conditionality. The latter required, among others, the removal of legal restrictions on Kurdish political participation and, more contentiously, the recognition of minority rights.

Caught between the conflicting goals of complying with the EU's minority protection conditionality and maintaining its cultural assimilation policies, Turkey chose to engage in an unattainable effort to achieve both. The EU's pressure to ensure the Kurds' free participation to the electoral process raised different dilemmas for the ruling governments, particularly the one led by the AKP. In November 2002 elections, several political parties, including those on the mainstream right and left, failed to pass the 10 percent hurdle, leaving 45 percent of the electorate unrepresented in the Parliament. As a result, AKP was able to form a single-party government with only 34 percent of the votes. Easing the restrictions on Kurdish political participation, including lowering the threshold, would undermine the AKP's ability to continue to govern alone. At the same time, the party needed the EU, not least to consolidate its power domestically vis-à-vis the Turkish military.

The EU reforms started in 2001, before the AKP came to power, and continued intensively until the mid-2000s. Thereafter, they were rolled back with the effective halting of the accession process and the AKP's consolidation of its political power in Turkey. The reforms adopted in the area of human rights protection more broadly were discussed in Chapter 2. The remainder of this section focuses on reforms in the area of Kurdish political and linguistic rights.

#### 3.6.1 The EU Process: The Age of Legal Reforms

Turkey's declaration as a candidate for EU membership in 1999 led to an unprecedented reform process, initiated by the coalition government in power at the time and continued by the AKP after it came to power.

---

<sup>770</sup> Keck and Sikkink, *Activists beyond Borders*.

<sup>771</sup> The ECtHR's jurisprudence on gross human rights abuses in the Kurdish region and Turkey's execution of these rulings are discussed in detail in Chapter 6.

The 2001 constitutional amendments<sup>772</sup> raised the threshold for the dissolution of political parties. Pursuant to revised Article 69, the “permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Article 68.” The AYM may not issue such a judgment unless it concludes that the party has become “the centre of activities”<sup>773</sup> against the principles laid out in Article 68.<sup>774</sup> Revised Article 69(6) introduced a two-part test for this threshold: The actions must be “carried out intensively by the members of that party” and be shared implicitly or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of that party or by the group’s general meeting or group executive board in the parliament. The amendments also introduced alternative penal measures less drastic than dissolution, such as the partial or complete deprivation of political parties from state financial aid.<sup>775</sup> Amendments made in 2002 and 2003 aligned the LPP with the revised constitutional provisions.<sup>776</sup> At the same time, the LPP’s provisions banning political parties from “claiming” the existence of minorities, promoting minority languages and cultures, and using minority languages in their written materials, activities and statements were not changed. The LPP’s ban on the use of the word “communist” in the name of a political party was also retained,<sup>777</sup> despite the ECtHR’s ruling in *The United Communist Party of Turkey* that a party’s choice of name (“communist”) cannot justify a measure as drastic as its dissolution. The CoE’s expectation that after these reforms it would “be much more difficult to ban political parties”<sup>778</sup> was immediately proven to be unrealistic by the AYM’s March 2003 ruling against HADEP.<sup>779</sup> Furthermore, only one hour after HADEP’s dissolution, the public prosecutor initiated a dissolution case against its successor DEHAP.<sup>780</sup>

The reforms in the area of language rights started with the removal of several restrictions. The 2001 constitutional amendments lifted the ban on the use of “languages prohibited by law” in the expression and dissemination of thought and in broadcasting.<sup>781</sup> In 2002, the broadcasting law was amended to allow for “broadcasting in different languages and dialects Turkish citizens

---

<sup>772</sup> *Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Değiştirilmesi Hakkında Kanun* [Law on the Amendment of Certain Provisions of Constitution of the Republic of Turkey], no. 4709, 3 October 2001, Official Gazette, no. 24556, 17 October 2001 (hereafter “Law no. 4709”).

<sup>773</sup> 1982 Constitution, at Article 69(6), as amended by Law no. 4709.

<sup>774</sup> *Ibid.*, at Article 68(4): “The statutes and programs, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.”

<sup>775</sup> *Ibid.*, at Article 69 (7), as amended by Law no. 4709.

<sup>776</sup> *Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4748, 26 March 2002, Official Gazette, no. 24721, 9 April 2002; *Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4778, 2 January 2003, Official Gazette, no. 24990, 11 January 2003.

<sup>777</sup> Article 96(3) prohibits the use of “[c]ommunist, anarchist, fascist, theocratic, national socialist, religion, language, race, denomination or regional names”.

<sup>778</sup> PACE, *Restrictions on Political Parties in the Council of Europe Member States*, Doc. 9526, Explanatory Memorandum by the Rapporteur, 17 July 2002, at para. 21.

<sup>779</sup> Adnan Keskin, “HADEP Kapatıldı” [HADEP is Dissolved], *Radikal*, 14 March 2003.

<sup>780</sup> *Radikal*, “DEHAP’a da Dava Açıldı” [DEHAP, too, Faces Dissolution], 14 March 2003. Unlike other Kurdish parties dissolved on the basis of the principle of territorial integrity, DEHAP was closed on the basis of election laws.

<sup>781</sup> Law no. 4709, at Articles 9 and 10 (amending Articles 26 and 28 of the Constitution).

traditionally use in their daily lives.”<sup>782</sup> After it came to power, the AKP amended the same law to enable private broadcasting.<sup>783</sup> Yet, the exercise of these rights were subject to strict content restrictions.<sup>784</sup> In the area of education, the reforms allowed the opening of private courses for teaching minority languages,<sup>785</sup> and the teaching of such languages in existing courses,<sup>786</sup> subject, again, to the requirement that such instruction does not violate the “indivisible integrity of the state”.<sup>787</sup> The legislature explicitly made it clear that this by no means suggested teaching “Turkish citizens as mother tongue any language other than Turkish.”<sup>788</sup>

The initial reforms in the area of language rights were quite limited. Only a handful of minority languages unilaterally decided by the government were allowed to enjoy from the new laws. The state did not assume any positive obligations, keeping intact the unequal treatment of Turkish – fully financed by public resources in all walks of life – and the remaining languages. The stringent bureaucratic conditions attached to these rights rendered their exercise very difficult and led to frequent suspensions of broadcasting licences of the minority media and, combined with lack of funding, closures of private Kurdish language courses.<sup>789</sup> Furthermore, the new laws did not explicitly refer to the Kurds or their language – or any other minority group who were granted the same limited rights. Characteristic of Turkey’s policy of regulating the Kurds without acknowledging their existence, the right-bearers were rendered obscure and left to the discretion of the executive.

In its 2004 progress report, the European Commission assessed reforms in the area of cultural rights as follows: “While such progress is significant, there are still considerable restrictions on the exercise of cultural rights, including in the areas of broadcasting and education.”<sup>790</sup> As for political participation, the Commission noted that the 10 percent threshold made it difficult for minorities to be represented in the Parliament and reported on the prosecution and conviction of Kurdish politicians for speaking Kurdish in local election campaigns.<sup>791</sup> Yet, for reasons discussed in Chapter 2, the European Commission concluded that Turkey “sufficiently fulfilled” the accession criteria, leading to the European Council’s decision to initiate the accession process and removing pressure off the shoulders of the AKP government.

---

<sup>782</sup> *Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4771, 3 August 2002, Official Gazette, no. 24841, 9 August 2002, at Article 8(a)(2) (hereafter “Law no. 4771”). The carefully drafted title and text of the law do not explicitly recognize the minority languages. For a critique of this wording, see Dilek Kurban, “Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey’s Path to the European Union”, *Columbia Human Rights Law Review*, vol. 35, no. 1 (2003), pp. 151–214.

<sup>783</sup> *Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4928, 15 July 2003, Official Gazette, no. 25173, 19 July 2003, at Article 14(2) (hereafter “Law no. 4928”).

<sup>784</sup> Law no. 4771, at Article 8(a)(2) (banning broadcasts “contradict[ing] the fundamental principles of the Turkish Republic and the indivisible integrity of the state.”)

<sup>785</sup> *Ibid.*, at Article 11.

<sup>786</sup> *Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4963, 30 July 2003, Official Gazette, no. 25192, 7 August 2003 (hereafter “Law no. 4963”).

<sup>787</sup> Law no. 4771, at Article 11(c)(2).

<sup>788</sup> Law no. 4963, at Article 23(a).

<sup>789</sup> For examples, see Kurban, *A Quest for Equality*, at pp. 16-17.

<sup>790</sup> European Commission, *2004 Regular Report on Turkey’s Progress towards Accession*, SEC(2004)1201, 6 October 2004, at p. 18.

<sup>791</sup> *Ibid.*, at p. 50.

### 3.6.2 When the EU Withdraws: Seeking a Solution to the Kurdish Conflict in the Shadow of War

The EU's decision to open the accession negotiations in 2005 alleviated the external pressure on the Turkish government and enabled it to turn its focus on domestic politics. As discussed in Chapter 2, the EU's ambivalent approach and the opposition of several member states to Turkey's accession also played a role in diminishing the AKP government's political will and ability to continue the reform process. From then on, the AKP oscillated between a rhetorical commitment to a democratic solution to the Kurdish issue and a law and order approach, using all available means to crush the Kurdish national movement. Meanwhile, a – if not *the* – principal actor of the Kurdish conflict had become the PKK, whose presence loomed large over Kurdish political parties and the Turkish government. The PKK's resumption of fighting upon the expiration in June 2004 of the ceasefire it had declared following Öcalan's capture opened a new era in the conflict.<sup>792</sup> The funerals of young Turkish soldiers killed in fighting with the PKK turned into platforms for anti-AKP protests. Capitalising on this social unrest, the Turkish armed forces and the opposition parties accused the AKP of conceding to the PKK. In response – and in account of the upcoming general elections – the government adopted a hard line to attract the Turkish nationalist votes.<sup>793</sup> That the Kurdish region entered an era of lawlessness and state violence reminiscent of the 1990s became evident in 2005 with the fatal bombing of a bookstore in the Kurdish town of Şemdinli. The perpetrators, who were caught red-handed by the local community, were a PKK member-turned-confessor on the payroll of the Gendarmerie and two noncommissioned officers who had driven to the crime scene in a car belonging to the Gendarmerie.<sup>794</sup>

Funerals of PKK militants also witnessed political protests. On 28-29 March 2006, mass demonstrations took place in Diyarbakır after the funeral of 14 PKK fighters killed by the security forces. In riots which quickly spread to neighboring cities, the security forces used excessive force, killing ten civilians.<sup>795</sup> The demonstrations witnessed a new phenomenon – the

---

<sup>792</sup> The reasons for the PKK's resumption of violence at the peak of the EU-induced reforms in Turkey are not entirely clear. Some studies argue that amidst internal developments (DEHAP's loss of votes in the 2004 local elections) and external developments (the autonomous Kurdish region in Iraq made possible by the US invasion in 2003), the PKK's military wing wanted to make itself relevant once again as a key political actor. Akkaya and Jongerden, "The PKK in the 2000s", at p. 154. Others cite the PKK's frustration amid the Turkish government's "complacency toward reaching a negotiated settlement". International Crisis Group, *Turkey: Ending the PKK Insurgency* (2011), at p. 4.

<sup>793</sup> During a collaborative fieldwork research conducted in the province of Hakkari in summer 2005, my colleagues and I observed the rapid deterioration of the security situation in the Kurdish region. Local human rights advocates reported that after the killing of two non-commissioned officers by a car-bomb in the city centre in July, 'special squads' wearing snow masks and carrying Kalashnikov rifles engaged in kidnappings, extrajudicial killings, and midnight house raids and searches without court orders. Dilek Kurban, "Internal Displacement and Reparative Justice: Implementation of the Compensation Law in the Province of Hakkari", in Dilek Kurban, Deniz Yüксеker, Ayşe Betül Çelik, Turgay Ünalın and A. Tamer Aker, *Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey* (TESEV Publications, 2007), pp. 291-311, at pp. 307-309.

<sup>794</sup> Following a long judicial process entailing vertical and horizontal back-and-forth between lower courts and the High Court of Appeals and between civilian and military courts, the case ended in January 2012 with the conviction of all three defendants to over 39 years of imprisonment. For an analysis of this case, see Güneş Murat Tezcür, "Judicial Activism in Perilous Times: The Turkish Case", *Law and Society Review*, vol. 43, no. 2 (2009), pp. 305-336.

<sup>795</sup> On the progress of judicial investigations into these killings, see Chapter 6.

mass mobilization of Kurdish minors – and expedited the adoption of a draft law amending the Anti-Terror Law.<sup>796</sup> The revised Anti-Terror Law treated minors over the age of 15 as adults, requiring their prosecution in heavy penal courts with special powers (which had replaced the DGMs) instead of juvenile courts. This had dire consequences for Kurdish minors; thousands were arrested and put on trial for participating in pro-PKK demonstrations or celebrations. In 2006 alone, 304 minors were taken into custody on grounds of having committed “crimes of terrorism” and 719 were prosecuted by heavy penal courts with special powers.<sup>797</sup> In response to domestic and international protests, a law passed in 2010 limited the applicability of the Anti-Terror Law, requiring the prosecution of all minors at juvenile courts and allowing the postponement or reduction of their sentences.

The government’s hard line approach had paid off, bringing the AKP a second term of single-party rule in 2007. In early 2009, on the eve of municipal elections, the government launched a ‘Kurdish opening’ with the goal of bringing a democratic solution to the conflict. The strategy was based on a deliberative process where the Minister of the Interior consulted, in closed sessions, academics, civil society members, experts and, in rare cases, independent Kurdish politicians and opinion leaders. The Kurdish national movement, including the DTP, was not invited.<sup>798</sup> The Kurdish political party, then the DTP, nonetheless swept the votes in the Kurdish region, increasing the number of municipalities in its control from 64 to 98. Two weeks later, several newly elected mayors and municipal officials were arrested as part of the KCK case. By 2011, the ‘Kurdish opening’ had by and large withered, leaving behind expanded linguistic rights as its primary durable output: a public television channel dedicated to Kurdish broadcasting<sup>799</sup> and institutes and departments for the teaching and research of the Kurdish language and literature at select public universities.<sup>800</sup> In 2012, on-demand elective courses in “living languages and dialects” were introduced in secondary schools.<sup>801</sup> In September 2013, the official news agency of Turkey started broadcasting in Kurdish (in addition to Arabic,

---

<sup>796</sup> *Terörle Mücadele Kanununda Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of the Anti-Terror Law], no. 5532, 29 June 2006, Official Gazette, no. 26232, 18 July 2006. On international concerns over the amendments, UN Human Rights Council, *Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Addendum, Mission to Turkey*, A/HRC/4/26/Add.2, 16 November 2006, at para 75.

<sup>797</sup> UNICEF, *Field Visit Report on Children Deemed to be Terrorist Offenders for Participating in Demonstrations* (2010), at p. 6.

<sup>798</sup> The government changed the name of the initiative to ‘Democratic Opening’ and later to ‘National Unity and Brotherhood Project’.

<sup>799</sup> TRT Şeş was inaugurated on 1 January 2009 by Prime Minister Erdoğan. For an argument that the launching of a state-sponsored Kurdish channel in Turkey was a direct response to ROJ-TV, a Kurdish satellite TV station in Europe established by the Kurdish diaspora organizations which the Turkish state had failed to have shut down, see Bilgin Ayata, “Turkish Transnational Politics and Turkey’s Changing Kurdish Policy: The Journey of Kurdish Broadcasting from Europe to Turkey”, *Journal of Contemporary European Studies*, vol. 19, no. 4 (2011), pp. 523-533. ROJ-TV is the successor of MED-TV which was established in Europe in 1995 as the first-ever Kurdish broadcasting station. On MED-TV, see Nicole F. Watts, “Institutionalizing Virtual Kurdistan West: Transnational Networks and Ethnic Contention in International Affairs”, in Joel S. Migdal (ed.), *Boundaries and Belonging: States and Societies in the Struggle to Shape Identities and Local Practices* (Cambridge University Press, 2004), pp. 121-147.

<sup>800</sup> In 2009, “The Institute of Living Languages” was opened at Mardin Artuklu University, followed by the establishment of the Department of Kurdish Language and Literature at the same university.

<sup>801</sup> European Commission, *Turkey: 2012 Progress Report*, SWD(2012) 336, 10 October 2012, at p. 32. In addition to the Kurmanji and Zazaki dialects of Kurdish, the Adige and Abkhaz dialects of Circassian and the Laz language were taught.

Bosnian, Croatian, Serbian, Russian and English).<sup>802</sup> In 2014, the establishment of private secondary schools to provide education in minority languages was allowed,<sup>803</sup> with the condition that history, Atatürkism, geography, social sciences, religion and ethics courses can only be taught in Turkish.<sup>804</sup>

Once again, there was a significant time lag between the expression of Kurdish demands and the state's adaptation of its policies.<sup>805</sup> The introduction of elective Kurdish courses would have been a radical reform in the 1990s, following the lifting of the ban on Kurdish, or even in the early 2000s, when university students organized a nationwide campaign demanding such courses.<sup>806</sup> By 2012, the Kurds were no longer demanding elective courses, but public education in Kurdish from pre-school all the way to university level.

Another output of the 'Kurdish opening' was the gradual lifting of several restrictions on the use of Kurdish in political activities. In 2010, the blanket ban on the use of minority languages in election campaigns was replaced by a provision requiring candidates and political parties to "primarily use Turkish".<sup>807</sup> In 2014, the same provision was further amended to read that "political parties and candidates can make any kind of propaganda in different languages and dialects other than Turkish."<sup>808</sup> Article 43 of the LPP was amended to remove a similar ban in primary elections.<sup>809</sup> However, characteristic of the piecemeal nature of reform making, the ban in Article 81(c) of the LPP on the political parties' use of "any language other than Turkish" in their statutes, programs, congresses, meetings, propagandas or materials remains.

The most radical and potentially far reaching political outcome of the 'Kurdish opening' was the voluntary return of eight PKK militants<sup>810</sup> from Iraqi Kurdistan to Turkey in support for the government's new initiative and on the basis of assurances from the authorities that they would not be arrested. However, the welcoming of the group by tens of thousands of Kurds caused a

---

<sup>802</sup> UN Committee on the Elimination of Racial Discrimination (CERD), *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Combined Fourth to Sixth Periodic Reports of States Parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014, at p. 25.

<sup>803</sup> *Temel Hak ve Hürriyetlerin Geliştirilmesi Amacıyla Çeşitli Kanunlarda Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of Certain Laws for the Purpose of Advancing Fundamental Rights and Liberties], no. 6529, 2 March 2014, Official Gazette, no. 28940, 13 March 2014, at Article 11 (hereafter "Law no. 6529"), amending *Yabancı Dil Eğitimi ve Öğretimi ile Türk Vatandaşlarının Farklı Dil ve Lehçelerinin Öğrenilmesi Hakkında Kanun* [Law on the Teaching of and Education in Foreign Languages and the Learning of Different Languages and Dialects by Turkish Citizens], no. 2923, 14 October 1983, Official Gazette, no. 18196, 19 October 1983, Article 2(a).

<sup>804</sup> Law no. 2923, at Article 2(b).

<sup>805</sup> Derince, "A Break or Continuity?", at p. 146.

<sup>806</sup> The response of the university administrations and judicial authorities to the campaign was very heavy-handed. See in this chapter Section 3.7.2.1.

<sup>807</sup> *Seçimlerin Temel Hükümleri ve Seçmen Kütükleri Hakkında Kanun ile Milletvekili Seçimi Kanununda Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of the Law on the Fundamental Provisions Governing Elections and Voter Registration and the Law on Members of the Parliament], no. 5980, 8 April 2010, Official Gazette, no. 27548, 10 April 2010, at Article 7, amending *Seçimlerin Temel Hükümleri ve Seçmen Kütükleri Hakkında Kanun* [Law on the Amendment of the Law on the Fundamental Provisions Governing Elections and Voter Registration and the Law on Members of the Parliament], no. 298, 26 April 1961, Official Gazette, no. 10796, 2 May 1961, at Article 58 ("...it shall be forbidden to use any language or script other than Turkish in campaigning for election on radio or television or by other means").

<sup>808</sup> Law no. 6529, at Article 1.

<sup>809</sup> Ibid, at Article 16(b).

<sup>810</sup> Accompanying the PKK militants were 26 Kurdish civilians who had been living at the Mahmour refugee camp since their forced displacement in the 1990s.

nationalist backlash and the opposition parties accused the AKP of ‘giving in to terrorism’. Amid these protests, the government effectively ended the ‘Kurdish opening’ and arrested some of the PKK militants who had laid down their arms.<sup>811</sup> The PKK reciprocated with fatal attacks against military targets and the conflict entered one of its deadliest phases.

The re-escalation of the fighting led to a growing realisation within the AKP government of the futility of a law and order approach. The Kurdish question posed a credible threat to Erdoğan’s plans of ruling Turkey under a presidential system. The regional developments also made a peaceful resolution necessary. The power vacuum created by the civil war in Syria gave rise to Kurdish self-rule in the north (Western Kurdistan or *Rojava*) under the leadership of the Democratic Union Party (*Partiya Yekîtiya Demokrat*-PYD), which is ideologically, politically and militarily linked to the PKK. Meanwhile, Öcalan had demonstrated his omnipotence within the Kurdish national movement by bringing the largest hunger strike in Turkey’s prisons in history to an end, as discussed earlier.

Against this background, the government commenced direct talks with Öcalan, who was – and is still – in prison.<sup>812</sup> The unofficial talks bore their first fruit when Öcalan delivered his historic announcement on 31 March 2013 that the armed insurrection was over. The PKK responded by announcing an indefinite ceasefire and commencing the withdrawal of its fighters beyond Turkey’s borders. Despite this promising start, it soon became clear that the two parties had divergent expectations. For the government, the aim was the cessation of the armed conflict and the PKK’s laying down its arms. For the PKK and the BDP, the goal was a political settlement based on structural legal reforms that granted the Kurds political status and, in the longer term, the disarmament and reintegration of PKK militants. The government responded to the PKK’s ceasefire declaration with a ‘democratisation package’ which, though expanding linguistic rights, failed to meet key Kurdish demands, such as public education in Kurdish, the lowering of the electoral threshold and the abolishment or revision of the Anti-Terror Law.<sup>813</sup>

The talks between the AKP and Öcalan became *the* platform where the Kurds’ long-standing human rights claims – along with their more recent political demands – were being negotiated. Thus, once linked to the EU process, recognition of the Kurds’ democratic demands had become contingent on the progress of informal and unstructured peace talks, whose future remained obscure amidst volatile political situations in Turkey and the wider Middle East. Once prepared

---

<sup>811</sup> In 2010, only months after their return, four PKK militants and six refugees were detained on remand on charges of “acting on behalf of a terrorist organization.” The remaining 24 individuals subsequently crossed the border back and returned to Iraqi Kurdistan. Cengiz Çandar, *‘Leaving the Mountain’: How may the PKK Lay down Arms? Freeing the Kurdish Question from Violence* (TESEV Publications, 2012).

<sup>812</sup> On policy literature on the ‘peace process’, see Michael Werz and Max Hoffman, *The United States, Turkey, and the Kurdish Regions: The Peace Process in Context* (Center for American Progress, 2014); International Crisis Group, *Crying “Wolf”: Why Turkish Fears Need Not Block Kurdish Reform* (2013); Dilek Kurban, *To Europe and Back: The Three Decades of Kurdish Struggle in Turkey*, Global Turkey in Europe Policy Briefs (Stiftung Mercator, Istanbul Policy Center and Istituto Affari Internazionali, 2013); Kevin Matthees and Günter Seufert, *Erdoğan and Öcalan Begin Talks: A Paradigm Shift in Turkey’s Kurdish Policy and a New Strategy of the PKK*, SWP Comments 13/2013 (2013).

<sup>813</sup> For an analysis of the package from the perspective of the Kurdish demands, see Dilek Kurban, *Not a Roadmap for Peace: Erdoğan’s Democratisation Package Defies Kurdish Expectations*, SWP Comments 35/2013 (2013).

under the guidance of the European Commission's progress reports and the ECtHR rulings, the reforms were now tuned to the progress made in the negotiations with Öcalan.

### 3.7 The ECtHR on Kurdish Political and Linguistic Rights

As a human rights court, the ECtHR's mandate is limited to the protection of *individual* rights and liberties and does not extend to group rights. At the same time, the Convention prohibits the criminalization of the use of minority languages in the exercise of individual rights it protects. In other words, while the Convention does not impose on member states positive duties in the protection and development of minority languages, it does not tolerate the imposition of criminal sanctions on their use in the exercise of civil and political rights. Among the rights protected under the Convention which are most relevant for minority groups are the freedom of association, which the ECtHR had ruled to also apply to political parties, and the right to respect for one's private and family life, which the Court had found to include the right to a name.<sup>814</sup>

The trajectory of the Kurdish claims before the ECtHR in the areas of political and linguistic rights followed the above-discussed progress of the conflict between the Kurds and the state. The Kurds started with contesting the dissolution of their political parties and the criminal sanctions imposed on their politicians. These were 'easy' cases since Kurdish and pro-Kurdish parties were dissolved on the basis of their programs and/or statements of their leaders and members, which the ECtHR found not to constitute a threat to democracy. As Kurdish political parties enhanced their power at the local and national level and the political space in Turkey expanded with the initiation of the EU process, the Kurdish national movement started to push the boundaries of the ECHR's individual rights framework by claiming group rights in the exercise of political rights, specifically the right to vote and stand for elections under Article 3 of Protocol no. 1,<sup>815</sup> and what de Witte calls "ancillary" linguistic rights.<sup>816</sup> Winning these claims in Strasbourg proved to be very difficult.

---

<sup>814</sup> On the evolution of the ECtHR's jurisprudence on minority rights, see Gaetano Pentassuglia, "The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?" *International Journal on Minority and Group Rights*, vol. 19 (2012), pp. 1-23. For an overview of the Court's early case law relating to minority rights, see Geoff Gilbert, "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights", *Human Rights Quarterly*, vol. 24 (2002), pp. 736-780.

<sup>815</sup> Article 3 of Protocol no. 1, adopted in 1952, reads as follows: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." On the ECtHR's limited yet slowly evolving case law on this article, see Hans-Martien ten Napel, "The European Court of Human Rights and Political Rights: The Need for more Guidance", *European Constitutional Law Review*, vol. 5 (2009), pp. 464-480.

<sup>816</sup> Bruno de Witte, "Linguistic Minorities in Western Europe: Expansion of Rights Without (Much) Litigation?", in Dia Anagnostou (ed.), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System* (Hart Publishing, 2014), pp. 27-52, at p. 29 (defining ancillary rights as those necessary for the exercise of the "core linguistic right" to speak one's language and giving the examples of the right to be understood by the public authorities, the right to a translation or interpretation and the right to learn one's language).

### 3.7.1 Cases Concerning Kurdish Political Representation

#### 3.7.1.1 Political Party Dissolutions

In its jurisprudence on the Kurdish question, the Court's most coherent and consistent case law concerns the political party dissolutions. The ECtHR unanimously found an Article 11 violation in all of the Kurdish<sup>817</sup> and pro-Kurdish<sup>818</sup> political party dissolutions it reviewed.

Many of the pro-Kurdish and Kurdish parties had been dissolved solely on the basis of their programs and shortly after their establishment without having had a chance to engage in any activities. The AYM had found that in referring in their programs to a separate Kurdish "people" or "nation" and to their right to self-determination, advocating a political solution to the Kurdish question and supporting Kurdish cultural rights, these parties aimed to create minorities and establish a federal system in breach of the principles of territorial integrity and national unity. According to the AYM, the references to two nations were unacceptable because there was only one nation, i.e. the Turkish nation. The AYM had also found the party officials' depiction of the conflict between the PKK and the TSK as war and of the PKK militants as freedom fighters to constitute attempts to establish a separate state for the Kurds and incitement to insurrection because it resonated the position of terrorist organizations.<sup>819</sup>

In *United Communist Party of Turkey and Socialist Party and Others*, the ECtHR established legal standards on the freedom of association of political parties.<sup>820</sup> With respect to the AYM's conclusion that the distinction between the Turkish and Kurdish nations advocated separatism and creation of minorities, the ECtHR held that mere reference to Kurdish "nation", "people" or "citizens" did not advocate secession.<sup>821</sup> The ECtHR considered that a party program which aims the establishment, in accordance with democratic rules, of a federal system based on the equal representation of Turks and Kurds and refers to the right to self-determination of the "Kurdish nation" is not incompatible with the fundamental principles of democracy, even if it is considered to be incompatible with the principles and structures of the Turkish state.<sup>822</sup> After

---

<sup>817</sup> ECtHR, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Application no. 23885/94, Judgment, 12 August 1999; *Yazar and Others v. Turkey*, Application no. 22723/93, 22724/93 and 22725/93, Judgment, April 2002; *Dicle for the Democracy Party (DEP) of Turkey v. Turkey*, Application no. 25141/94, Judgment, 10 December 2002; *HADEP and Demir v. Turkey*, Application no. 28003/03, Judgment, 14 December 2010; *Party for a Democratic Society (DTP) and Others v. Turkey*, Application nos. 3870/10, 3870/10, 3878/10, 15616/10, 21919/10, 39118/10 and 37272/10, Judgment, 12 January 2016.

<sup>818</sup> ECtHR, *United Communist Party of Turkey and Others v. Turkey*, Application no. 133/1996/752/951, Judgment, 30 January 1998; *Socialist Party and Others v. Turkey*, Application no. 20/1997/804/1007, Judgment, 25 May 1998; *Democracy and Change Party*, Application no. 39210/98, 39974/98, Judgment, 21 April 2005; *Emek Party and Şenol v. Turkey*, Application no. 39434/98, Judgment, 31 May 2005.

<sup>819</sup> AYM, E. 1992/1, K. 1993/1, 14 July 1993 (HEP); AYM, E. 1993/1, K. 1993/2, 23 November 1993 (ÖZDEP); AYM, E. 1993/3, K. 1994/2, 16 June 1994 (DEP); AYM, E. 1999/1, K. 2003/1, 13 March 2003 (HADEP); AYM, E. 2007/1, K. 2009/4, 11 December 2009 (DTP). On the AYM's reasoning in these cases, see Bayır, "Representation of the Kurds by the Turkish Judiciary". For an analysis of the AYM's HEP judgment, see Koğacıoğlu, "Progress, Unity, and Democracy."

<sup>820</sup> The Court concluded that political parties are a form of association essential for the functioning of democracy and fall within the scope of Article 11. For a brief review of these ECtHR rulings, see Hakyemez and Akgün, "Limitations on the Freedom of Political Parties in Turkey", at pp. 71-72.

<sup>821</sup> ECtHR, *United Communist Party of Turkey and Others*, at para. 59.

<sup>822</sup> ECtHR, *Socialist Party and Others*, at para. 47.

its ruling in *Refah Partisi (Welfare Party) and Others*,<sup>823</sup> the ECtHR stressed that the programs of pro-Kurdish political parties did not advocate goals incompatible with democratic principles and did not advocate the use of violence to achieve these goals.<sup>824</sup> For the ECtHR, Kurdish party officials' severe criticisms of the counter-terrorism methods of the Turkish military were not sufficient to equate these parties with the PKK, as long as they did not advocate any policy that could undermine the democratic regime or urge or justify the use of force.<sup>825</sup>

Two important distinctions need to be made between the AYM's rulings on the dissolutions of ÖZDEP, DEP and HEP on the one hand, and HADEP and DTP on the other. First, the AYM issued the latter group of rulings after the ECtHR had released its judgments on the former. Secondly, the former group predates the 2001 constitutional amendments intended to raise the legal threshold for party dissolutions, whereas the latter group succeeded them. In fact, in the latter group, the AYM applied the new constitutional standard which requires a finding that a political party has become the "centre" of illegal activities to justify their dissolution. The AYM's decisions to nonetheless dissolve HADEP and DTP has showed that as far as Kurdish parties are concerned, the EU and the ECtHR had made no impact on Turkey's highest court. Not only did the AYM apply the most drastic measure of dissolving the two parties and transferring their assets to the Treasury, it also banned 46 HADEP and 37 DTP members from politics for five years and forfeited the two co-chairs of DTP of their parliamentary seats.

In *HADEP*, neither the public prosecutor nor the AYM considered the party's program to be incompatible with Article 68(4) of the Constitution.<sup>826</sup> In making a "centre of activities" assessment under Article 69(6), the AYM based its decisions on the activities and statements of party members as well as non-party members.<sup>827</sup> The ECtHR took issue with this in several regards. First, the dissolution penalized the party for the alleged illegal activities of its members.<sup>828</sup> Second, Article 69(6) explicitly required such activities to be carried out "by the members of that party" (emphasis added). The ECtHR found the AYM's attribution of responsibility to HADEP for a masked man's replacement of the Turkish flag with the PKK flag at a party congress and its reliance on this incident as proof of links between HADEP and the PKK to contravene this constitutional provision.<sup>829</sup> Third, concluded the ECtHR, the party members' severe criticisms of the government and the Turkish military did not encourage violence, armed resistance or insurrection.<sup>830</sup>

The DTP was dissolved on 11 December 2009, after the ECtHR's judgment in *Herri Batasuna and Batasuna v. Spain*, which found that the conducts and statements of the applicant parties implicitly supported ETA's terrorist activities, considerably threatened Spanish democracy and

---

<sup>823</sup> ECtHR, *Refah Partisi (Welfare Party) and Others v. Turkey*, Application nos. 41340-44/98, Judgment, 31 July 2001.

<sup>824</sup> ECtHR, *Democracy and Change Party; Emek Party and Şenol*.

<sup>825</sup> ECtHR, *Yazar and Others; Dicle for the Democracy Party (DEP) of Turkey; HADEP and Demir; DTP*.

<sup>826</sup> ECtHR, *HADEP and Demir*, at para. 67 (noting, to the contrary, that the party's program condemned violence and advocated peaceful and democratic political solutions to the conflict).

<sup>827</sup> *Ibid*, at para. 66.

<sup>828</sup> *Ibid*, at para. 68.

<sup>829</sup> *Ibid*, at para. 74.

<sup>830</sup> *Ibid*, at para. 70.

therefore justified their dissolution.<sup>831</sup> By then, the ECtHR had not yet issued its ruling in *HADEP*. The *Batasuna* ruling gave the AYM the legitimation it sought to close yet another Kurdish political party. In fact, the AYM's then President Haşim Kılıç expressed his strong conviction that their decision to dissolve the DTP was in accordance with ECtHR jurisprudence, in particular the *Batasuna* ruling.<sup>832</sup> Based on speeches by the DTP's co-leaders and the activities of the party and its members, the AYM concluded that the DTP had the same political goals as the PKK, had become an instrument of the PKK's terrorist strategy and was linked to that organization. The AYM found particularly problematic the DTP's co-chairs' expression of satisfaction at the role played by Öcalan in the withdrawal of the PKK militias and in Turkey's candidacy for the EU, of concern about Öcalan's detention conditions and criticism of the conduct of the Turkish security forces in the Kurdish region. It considered the DTP's failure to openly distance itself from the PKK to show its support for this organization and decided to close the party. The AYM's unanimous decision to dissolve the DTP contrasted its sharply divided 2008 ruling in the case against the governing AKP, where only six out of eleven judges voted favourably, falling short of the qualified majority needed for a dissolution.<sup>833</sup>

The ECtHR was not convinced by the AYM's attempts to create an analogy between the DTP and the *Batasuna*.<sup>834</sup> The Court held that the DTP's program condemned violence and put forward democratic solutions to the Kurdish question, the party's leaders advocated a peaceful solution to the armed conflict and called on the PKK to disarm, and any parallels between the principles supported by the PKK and the DTP was insufficient to conclude that the latter approved the use of force to implement them.<sup>835</sup> Surprisingly, the ECtHR adopted a contextual approach in assessing the AYM's decision to dissolve the DTP. With respect to the AYM's emphasis on the DTP's failure to condemn the PKK, the party's co-chair Ahmet Türk argued before the ECtHR that such a statement would have resulted in his loss of all influence over the electorate. The Court deferred to this argument and concluded that the DTP's stance could not be regarded as an indirect support for terrorism in light of the "historical and political context" of the speeches of its co-chairs and the DTP's desire to "play a mediatory role to bring an end to the violence in Turkey".<sup>836</sup> At the same time, the ECtHR was also sympathetic to the AYM's argument that the DTP's failure to openly distance itself from the PKK could be seen as a tacit support for terrorism, rendering the measures taken against the party to correspond to a pressing social need. The problem for the Court was the severity of the measure of dissolution, with an ancillary penalty of stripping the co-chairs of their parliamentary seats and banning 37 members of the party from politics, and the AYM's failure to consider a lighter sentence such as the partial or complete deprivation of state financial aid. In addition to an Article 11 violation, the ECtHR also found Turkey to have violated the co-chairs' rights to be elected and the sovereign

---

<sup>831</sup> ECtHR, *Herri Batasuna and Batasuna v. Spain*, Application nos. 25803/04 and 25817/04, Judgment, 30 June 2009. On the dissolution of *Batasuna* by the Spanish court, see Olgun Akbulut, "Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties", *Fordham International Law Journal*, vol. 34, no. 1 (2010), pp. 46-77.

<sup>832</sup> NTV, "DTP Kapatıldı" [DTP is Dissolved], 11 December 2009.

<sup>833</sup> For more on this, see Celep, "The Political Causes of Party Closures in Turkey"; Akbulut, "Criteria Developed by the European Court of Human Rights".

<sup>834</sup> ECtHR Registrar, "Dissolution of the Political Party DTP was in Breach of the Convention", Press Release, ECHR 009 (2016), 12 January 2016 (hereafter "DTP Press Release").

<sup>835</sup> *Ibid.*

<sup>836</sup> ECtHR Registrar, "DTP Press Release", at p. 4.

power of the DTP's electorate under Article 3 of Protocol 1. In this latter sense, this finding constituted a first in the Court's jurisprudence on party dissolutions in Turkey.

At the same time, the ECtHR's conclusion is nonetheless problematic for two reasons. Despite its emphasis on the need for a contextual reading of the DTP's unique function, in the end the Court agreed with the AYM on the need to sanction the party, but differed on the means of doing that. This conclusion is at odds with the Court's reasoning where it found that the party's program and the statements of its members did not contradict the fundamental principles of democracy. Second, as the ECtHR itself had noted in *HADEP*, the only less drastic measure available under Article 69(7) of the Constitution is the partial or complete deprivation of state aid, which was not applicable to *HADEP* because it did not receive such aid. The same was true for the DTP. The Turkish Constitution does not provide any measure short of dissolution for political parties which do not receive state funding, where the AYM finds them to be centre of illegal activities.

### **3.7.1.2 Electoral Threshold**

On 8 July 2008, the ECtHR's Grand Chamber issued a ruling concerning Turkey's 10 percent electoral threshold. In a case brought by two Kurdish politicians who argued that the threshold interfered with the free expression of the opinion of the people in the choice of the legislature, the Court did not find a violation of Article 3 of Protocol No. 1.<sup>837</sup> The Grand Chamber's non-contextual analysis, which treated the case as an electoral dispute rather than the contestation of a discriminatory law, effectively condoned the deprivation of the majority of the electorate in the Kurdish region from political representation in the Parliament.

The case and the Grand Chamber's judgment merit detailed analysis. The applicants ran in the 2002 general elections as DEHAP candidates in the Kurdish province of Şırnak, where they received 45.95 percent of the votes. Having received 6.2 percent of the votes nationwide, DEHAP could not enter the Parliament due to its inability to pass the threshold. As a result, the three parliamentary seats allocated to Şırnak were distributed between the AKP (which got two seats though it polled only 14.05 percent) and an independent candidate who polled 9.69 percent. The applicants also pointed to the democratic deficit the threshold had caused more broadly, leaving 45 percent of the electorate unrepresented nationwide. In Alkin's words, in what is "widely considered [to be] the least representative" election in Turkey's history,<sup>838</sup> of the 18 parties which took part in the 2002 elections, only two, which received a total of 55 percent of the votes, could enter the Parliament. The AKP was one of the two; reaping the benefits of the electoral threshold, it acquired 65 percent of the parliamentary seats although it received a mere 34 percent of the votes.

---

<sup>837</sup> ECtHR, *Yumak and Sadak v. Turkey*, GC, Application no. 10226/03, 8 July 2008 (upholding the Chamber judgment of 30 January 2007).

<sup>838</sup> Sinan Alkin, "Underrepresentative Democracy: Why Turkey should Abandon Europe's Highest Electoral Threshold", *Washington University Global Studies Law Review*, vol. 10, no. 2 (2011), pp. 347-369, at p. 354.

While considering “in general” a 10 percent threshold to be “excessive” and concurring with those CoE organs which had stressed the threshold to be exceptionally high and recommended that it be lowered, the Grand Chamber nonetheless concluded as follows:

In the present case, however, the Court is not persuaded that, when assessed in the light of the specific political context of the elections in question, and attended as it is by correctives and other guarantees which have limited its effects in practice, the threshold has had the effect of impairing in their essence the rights secured to the applicants.<sup>839</sup>

What was the specific political context and the correctives and other guarantees that the Court was referring to? The Grand Chamber began its reasoning by reminding that member states have a wide margin of appreciation owing to the political nature of electoral rights and the lack of a common European standard. With respect to Turkey, the law was the “choice made by the legislature”<sup>840</sup> to avoid excessive parliamentary fragmentation and strengthen political stability, the threshold was a general rule applicable to all parties without distinction, and the Turkish electoral system was based on the “context of a unitary State” which requires parliamentarians to represent the whole nation and not a particular region. In its proportionality assessment, the Court stated that the Turkish electoral system had “correctives ... to counterbalance the threshold’s negative effects”, namely the possibility to run as an independent candidate or to join the list of another party likely to pass the threshold. Although conceding that the system “compels political parties to make use of stratagems which do not contribute to the transparency of the electoral process”,<sup>841</sup> the Court, in political pragmatism *par excellence*, pointed to examples of both of these correctives at work. In the 1991 elections, reminded the ECtHR, some HEP candidates had been elected to the parliament from the lists of another party and in the 2007 elections 20 DTP candidates entered the Parliament as independent deputies and formed a parliamentary group.<sup>842</sup>

This assessment, particularly the emphasis on correctives, is astonishing from the perspective of democracy. The Court unquestionably deferred to the government’s argument that the 2002 elections were held in a unique context of social and political instability which rendered the risk of political fragmentation too costly, overlooking the fact that the threshold had been introduced in 1983 and applied to all elections prior to and after 2002, as the dissenting judges noted. The emphasis on the principle of unity not only suggests that the Court approves an electoral system which renders the representation of regional minority parties impossible, but also ignores how the same principle had led to the dissolution of Kurdish parties which the ECtHR itself had time and again found to be in violation of the Convention.

As the dissenting judges noted, the Grand Chamber’s endorsement of “stratagems” not only encourages candidates into “playing ‘hide and seek’ with the voters” and raises “an obvious problem of political morality,”<sup>843</sup> but also rests on a distorted reading of the legal and political context in Turkey. First, as the applicants noted, the competition between political parties and

---

<sup>839</sup> ECtHR, *Yumak and Sadak v. Turkey*, GC, at para. 147.

<sup>840</sup> *Ibid*, at para. 124.

<sup>841</sup> *Ibid*, at para. 147.

<sup>842</sup> *Ibid*, at paras. 97-99.

<sup>843</sup> Joint dissenting opinion of Judges Tulkens, Vajic, Jaeger and Sikuta, at para. 4.

independent candidates is structurally unfair. Independent candidates cannot receive votes from constituents living abroad who are entitled to vote in parliamentary elections in Turkey,<sup>844</sup> must individually bear a very high financial cost to stand for elections,<sup>845</sup> are not allowed to make electoral broadcasts although each political party is allocated an air time on public television and radio,<sup>846</sup> and need more votes than a political party to gain the same parliamentary seat they are competing for.

Second, the Grand Chamber's legalistic argument does not take into account the specific political context Kurdish parties operate in. While the candidates of HEP had indeed entered the parliament from the SHP lists in 1991, this was hardly a happy marriage, as discussed earlier. Within months of their election, most HEP deputies were expelled from the SHP upon the nationalistic frenzy caused by their presence in the Parliament. And yet, the Grand Chamber was oblivious to this "historical and political context"<sup>847</sup> in assuming that Kurdish politicians can form alliances with mainstream Turkish parties.

The Grand Chamber's analysis disregarded the essential and unique role of *political parties* in democratic societies, which it had emphasized since its judgment in *United Communist Party*. When one considers that the ECtHR would one year later not hesitate from rejecting the terms of an international peace agreement which ended the violent conflict in Former Yugoslavia on the ground that it excluded members of minority groups from the electoral process,<sup>848</sup> its failure to show any sensitivity to the political participation rights of Turkey's largest minority group is all the more striking.

### 3.7.1.3 Local Political Representation

Kurdish politicians also contested in Strasbourg the suppression of their political representation at the local level. In a petition filed in 2008, the Court was asked to rule on the dismissal and dissolution of the elected Mayor and Municipal Council of Sur,<sup>849</sup> a district of Diyarbakır, in retaliation for their decision to provide municipal services in Kurdish, Armenian, Syriac, English and Arabic, in addition to Turkish. The Municipal Council based its majority decision on the results of a needs-assessment survey which had shown that 72 percent of Sur residents spoke Kurdish in their daily lives and 69 percent of them were illiterate. The decision was limited to the oral use of minority languages (and English) and did not change the exclusive use of Turkish in official documents. The Ministry of the Interior launched an investigation against Sur Municipality and went to court. On 22 May 2007, the administrative court decided to dissolve the Municipal Council and dismiss Mayor Abdullah Demirbaş under the Law on Municipal Authorities which prohibits municipalities from deciding on "political matters"

---

<sup>844</sup> Alkin, "Underrepresentative Democracy", at p. 356.

<sup>845</sup> Independent candidates are required to deposit a sum equivalent to the gross monthly salary of a civil servant of the highest rank. The money is non-refundable in case of failure to be elected. Law no. 2839, at Articles 21(2) and 41(1), respectively.

<sup>846</sup> Alkin, "Underrepresentative Democracy", at p. 356.

<sup>847</sup> ECtHR Registrar, "DTP Press Release", at p. 4.

<sup>848</sup> ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, GC, Application nos. 27996/06 and 34836/06, Judgment, 22 December 2009.

<sup>849</sup> The mayor, Abdullah Demirbaş belonged to the DTP. The members of the Municipal Council, also elected by popular will, belonged to various political parties, including the DTP and the governing AKP.

outside their mandates.<sup>850</sup> On the basis of this decision and without waiting for the outcome of the appeal, the Diyarbakır Governorship (the provincial representative of the national government) dismissed the Mayor and dissolved the Municipal Council. The Ministry of the Interior replaced the elected mayor with an appointed bureaucrat, who held the position for two years, although the law requires new elections within six months in such circumstances. On 19 November 2007, the Council of State approved the judgment.

In his application to the ECtHR,<sup>851</sup> Demirbaş contested his dismissal on a number of procedural grounds. He pointed out that the Governorship dismissed him and members of the Municipal Council by an executive order prior to the finalization of the judicial process, the Council of State did not substantiate the “political matters” within the meaning of the law, the authorities intentionally distorted the decision of the Municipal Council by wrongfully alleging that the official language Turkish would no longer be used by the Municipality, and the dismissal also affected the dissenting members of the Municipal Council. Demirbaş claimed that the dismissal violated his freedom of expression, right to a fair trial, right to property and right to be free from discrimination. Curiously, he did not raise Article 3 of Protocol 1.

In a majority decision issued on 9 November 2010, the ECtHR rejected the combined petitions of Demirbaş and members of the Municipal Council on the basis of lack of standing.<sup>852</sup> In reference to its well-established principle that “decentralised authorities exercising public functions could not bring an application because, regardless of their degree of autonomy, they shared in the exercise of public authority and, accordingly, their acts or omissions engaged the responsibility of the State under the Convention”,<sup>853</sup> the Court held that the rights and freedoms relied by the applicants did not concern them individually or even as a group of individuals, but concerned a legal entity – the municipality. The applicants had taken the decision to provide multilingual municipal services in their capacity as a mayor and members of a Municipal Council exercising public authority and not as individuals exercising freedom of expression. Finally, the applicants “had not been prevented by law, personally and as individuals, from publishing brochures in non-official languages” as evident in Demirbaş’ acquittal from the criminal case brought against him, and “had not been prohibited from taking part in political activities”, as evident from the fact that Demirbaş and seven members of the Municipal Council were re-elected to their position in the next municipal elections held in 2009.<sup>854</sup>

The ECtHR’s decision in the Sur municipality case suffers from the same depoliticized and non-contextual analysis as its judgment in *Yumak and Sadak*. While municipalities may well be part and parcel of the state structure and public authority in democracies, in the case of Turkey, this is not the case as far as municipalities run by Kurdish parties are concerned. Demirbaş, elected to office as a member of the DTP, belongs to the same political tradition as the leaders and members of Kurdish parties who had successfully litigated in Strasbourg for the violation

---

<sup>850</sup> *Belediye Kanunu* [Law on Municipalities], no. 5393, 3 July 2005, Official Gazette, no. 25874, 13 July 2005, at Articles 30 and 44.

<sup>851</sup> The petition of *Abdullah Demirbaş*, received by the ECtHR on 7 January 2008 (on file with the author).

<sup>852</sup> ECtHR, *Abdullah Demirbaş and Others v. Turkey*, Application no. 1093/08, 301/08, 303/08 et al., Decision (Admissibility), 9 November 2010.

<sup>853</sup> ECtHR Registrar, “The Members of a Dissolved Municipal Council did not have Standing before the Court”, Press Release, no. 921, 1 December 2010, at p. 2 (hereafter “Sur Press Release”).

<sup>854</sup> *Ibid*, at p. 3.

of their political representation rights. He is one of many Kurdish politicians who have been subject to legal persecution for communicating in Kurdish with a constituency which involves a high number of individuals who do not speak Turkish. In fact, as discussed in the next section, in a 2013 judgment concerning the conviction of five DEHAP politicians for having spoken Kurdish in their election campaigns, the Court would find the blanket prohibition of the use of unofficial languages in campaigns coupled with criminal sanctions to be in violation of freedom of expression.

The Turkish state has based the judicial harassment of Kurdish politicians on several pieces of legislation, ranging from penal laws to electoral laws, all of which pursue the same goal: the restriction of Kurdish political participation and representation. In this case, the politician was a mayor and the law in question governs municipal authorities. As noted earlier, the DTP mayors were particularly targeted between the 2004 local elections when they won a high number of municipalities in the Kurdish region and the 2007 general elections when the DTP-supported independent candidates entered the Parliament. The authorities used the ban on the use of letters x, q and w (which do not exist in the Turkish alphabet) to prosecute DTP mayors for using the Kurdish alphabet in their official correspondence.<sup>855</sup> Osman Baydemir, the DTP Mayor of the Metropolitan Municipality of Diyarbakır at the time, alone faced 28 court cases between 2004 and 2008 for, *inter alia*, publishing children's books in Kurdish, organizing events on the Kurdish question within the premises of the Municipality and speaking Kurdish with his constituency.<sup>856</sup>

For the ECtHR to claim, despite its jurisprudence on the legal persecution of Kurdish political representatives in Turkey, this to be a dispute within the administration runs afoul democratic freedoms. It is puzzling that the Court, while conceding the applicants' dismissals from their elected offices, did not see the case as a matter of individual freedoms. The applicants' failure to raise this claim in their petition enabled the Court to evade addressing the core fundamental rights at stake in this case: the right to stand for elections and the right to vote. Arguably, had the Court chosen to raise the issue on its own motion, it would have had to address whether municipal councils constitute "legislature" within the meaning of Article 3 of Protocol no. 1 and perhaps even expand its narrow interpretation of this term to include local governments.<sup>857</sup> Furthermore, although noting the criminal proceedings against Demirbaş, the ECtHR found his acquittal to be a "clear" indication that he and the other applicants were not "targeted ... personally" by their dismissal.<sup>858</sup> It seems that for the ECtHR, the criminal prosecution of an individual does not target him/her personally, as long as the case does not result in conviction.

Finally, by pointing out that the applicants could and successfully did run in the next elections, the Court essentially legitimized an anti-democratic intervention to democratic rights. Not only did the applicants have to wait for two years to be re-elected, but also the central government unlawfully confiscated Demirbaş' seat in violation of Turkish laws. Furthermore, completely

---

<sup>855</sup> Interview with Fırat Anlı, Diyarbakır, 2 October 2013.

<sup>856</sup> Watts, *Activists in Office*, at p. 115.

<sup>857</sup> The ECtHR's jurisprudence is not entirely clear on whether local governments in non-federal member states have "the necessary autonomy to constitute the legislature". Robin C.A. White and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (Oxford University Press, 2010), at p. 522.

<sup>858</sup> ECtHR, "Sur Press Release", at p. 3.

absent in the Court's decision was a consideration of the democratic rights of the electorate who had voted for Demirbaş, a Kurdish politician from DTP, but were governed for two years by a bureaucrat appointed by the AKP, the political adversary who had lost the municipal elections in Sur and elsewhere in Diyarbakır to the DTP.

### 3.7.2 Linguistic Rights

Several cases were filed with the ECtHR concerning restrictions on the use of the Kurdish language in official documents, correspondence and electoral activities, and on demanding linguistic rights. Cases concerning the state's interference with fundamental rights on grounds of the use or demand of the use of Kurdish were relatively straightforward, since they concerned the imposition of criminal penalties on individuals making democratic claims through peaceful means. Cases concerning the Kurds' demands to learn their language and to use Kurdish names in official documents were more challenging since the ECHR does not govern linguistic freedom as such and does not *per se* guarantee the right to use a particular language in official communications with public authorities or to receive information in a language of one's choice.<sup>859</sup> The ECHR is also silent on the right to one's name.<sup>860</sup> While the Court ruled in its early jurisprudence that the name of a person falls within the ambit of the right to private life protected under Article 8,<sup>861</sup> it tended not to take a clear position on the official recognition of minority names in the name of its margin of appreciation doctrine.<sup>862</sup>

#### 3.7.2.1 In Education: Kurdish Linguistic Rights Demands

The EU's minority protection conditionality and the ensuing expansion of the legal and political space in Turkey, particularly with the 2001 constitutional amendments which lifted the ban on the use of minority languages in broadcasting and dissemination of ideas, encouraged the Kurds to publicly assert linguistic rights claims, including the teaching of Kurdish in higher education. In a campaign led by Kurdish students at Istanbul University, 16,000 university students across Turkey petitioned their administrations demanding optional Kurdish language courses during the 2001-2002 academic year.<sup>863</sup> The response was severe; 95 students were expelled; 1,350

---

<sup>859</sup> The sole ECHR provisions granting linguistic rights are Articles 5(2) (the right to be informed promptly, in a language which one understands, of the reasons for his or her arrest) and 6(3)(a) and (e) (the right to be informed promptly, in a language which one understands, of the nature and cause of the accusation against him or her and the right to have the assistance of an interpreter if he or she cannot understand or speak the language used in court). ECtHR Research Division, *Cultural Rights in the Case-Law of the European Court of Human Rights* (Council of Europe/European Court of Human Rights, 2011), at p. 13. According to one view, the right to an interpreter may also be extended to civil cases in accordance with the principle of fair hearing. Roberta Medda-Windischer, "The European Court of Human Rights and Minority Rights", *Journal of European Integration*, vol. 25, no. 3 (2003), pp. 249-271, at p. 257.

<sup>860</sup> On the evolution of the right to one's name in international human rights law and the contrast between the ECHR, which was drafted at a time when there was no consensus among states on the issue, and later human rights treaties which recognized the right to "a" name as well as the CoE's minority rights treaties which explicitly recognize the right of minorities to have "the" name of their choice, and the jurisprudence of treaty bodies, see Fernand de Varennes and Elżbieta Kuzborska, "Human Rights and a Person's Name: Legal Trends and Challenges", *Human Rights Quarterly*, vol. 37 (2015), pp. 977-1023.

<sup>861</sup> ECtHR, *Burghartz v. Switzerland*, Application no. 16213/90, Judgment, 22 February 1994.

<sup>862</sup> Varennes and Kuzborska, "Human Rights and a Person's Name", at p. 1012.

<sup>863</sup> *Bianet*, "Kürtçe için Okuldan Atılanlar Geri Dönecek" [Those Dismissed from School for Demanding Kurdish will Return], 23 August 2002.

were suspended for up to one academic year; and 2,414 were investigated on terrorism charges (aiding and abetting the PKK), 76 of whom were arrested.<sup>864</sup>

18 students from Afyon Kocatepe University challenged their suspension before the ECtHR under, *inter alia*, Article 10 and Article 2 of Protocol 1 of the ECHR, guaranteeing freedom of expression and the right to education. The Court decided, without any explanation, to examine the case solely under Article 2 of Protocol 1, although it noted that “the applicants were sanctioned because of the views expressed in their petitions”<sup>865</sup> on the need for Kurdish language education.<sup>866</sup> The ECtHR found the applicants’ suspension to constitute a disproportionate infringement on their right to education. Although the sanctions were subsequently annulled by the Turkish administrative courts, the Court noted that by then the applicants had already missed one or two terms of their studies.

### 3.7.2.2 In Official Documents: The Use of the Kurdish Alphabet

In *Güzel Erdagöz v. Turkey*,<sup>867</sup> the applicant complained that the Turkish courts refused her request for rectification of the spelling of her forename according to its Kurdish pronunciation (her name was “Gözel”, not “Güzel”), in violation of Article 8 of the ECHR. She also claimed that the “Turkification” of her name violated the prohibition of discrimination under Article 14, taken together with the right to privacy guaranteed under Article 8. The ECtHR noted that owing to their great historical, linguistic, religious and cultural diversity and the absence of a common European standard, member states have a wide margin of appreciation in the spelling of surnames and forenames according to minority languages. In the earlier rulings the Court had found the phonetic transcription of a foreign surname<sup>868</sup> and the refusal to register a forename chosen by the parents of a baby<sup>869</sup> not to infringe on the right to respect for private and family life. In *Güzel Erdagöz*, the Court noted that the Turkish courts’ refusal to rectify the spelling of the applicant’s name, which was not based on a clear legal rule but on an expert opinion that the applicant’s name was not included in the Turkish dictionary, was not adequately justified and thus violated Article 8.<sup>870</sup> While the Court thus adopted a favourable approach to the minorities’ right to have their names and to the official spelling of their names in their own language, *Güzel Erdagöz* seems to be an exception rather than the rule in the ECtHR case law.<sup>871</sup>

Indeed, in the more recent ruling of *Kemal Taşkın and Others v. Turkey*, the ECtHR upheld Turkey’s ban on the official use of the Kurdish letters x, q and w, finding the requirement to transliterate Kurdish forenames to the Turkish alphabet not to violate the ECHR.<sup>872</sup> The Court

---

<sup>864</sup> Ibid.

<sup>865</sup> ECtHR, *İrfan Temel and Others v. Turkey*, Application no. 36458/02, Judgment, 3 March 2009, at para. 44.

<sup>866</sup> Ibid, at para. 43.

<sup>867</sup> ECtHR, *Güzel Erdagöz v. Turkey*, Application no. 37483/02, Judgment, 21 October 2008.

<sup>868</sup> ECtHR, *Mentzen v. Latvia*, Application no. 71074/01, Decision, 7 December 2004.

<sup>869</sup> ECtHR, *Guillot v. France*, Application no. 22500/93, Judgment, 24 October 1993.

<sup>870</sup> The Court did not address the applicant’s discrimination claim.

<sup>871</sup> Varennes and Kuzborska, “Human Rights and a Person’s Name”, at p. 1013 (that the ECtHR often defers to the governments’ arguments that not allowing minorities to use their own names pursues the legitimate interest of the protection of the official language or the majority’s “subjective rights” to use the official language).

<sup>872</sup> ECtHR, *Kemal Taşkın and Others v. Turkey*, Application no. 30206/04, 37038/04, 43681/04, 45376/04, 12881/05, 28697/05, 32797/05 and 45609/05, Judgment, 2 February 2010.

noted that the Turkish courts' refusal to allow the applicants to change their forenames was based on a domestic law which requires the use of the Turkish alphabet in official documents. For the ECtHR, the interference with the applicants' Article 8 rights pursued the legitimate aims of preventing disorder and protecting the rights of others and was not disproportionate. As for the Article 14 claims, the ECtHR noted that the applicants were allowed to use Kurdish forenames and surnames, but only required to spell them using the Turkish alphabet, and that there was nothing to suggest that the Turkish courts would have ruled differently had the requests been made by persons of non-Kurdish origin.

As Varennes and Kuzborska noted, the ECtHR was incorrect in treating the issue as one of transliteration rather than transcription.<sup>873</sup> Kurdish and Turkish use the same Latin alphabet and the letters of x, q and w do exist in the Latin alphabet. In fact, these "nonexistent" letters have long been used in Turkey, by broadcasters (e.g. Show TV), and commercial (e.g. Xuma Beach Club) and touristic (e.g. Q Hotel Istanbul) establishments, which are registered under Turkish laws. The Turkish officials themselves use the letter "w" on a daily basis every time they enter the Internet ("www"). In other words, these letters "are used everywhere by everyone in Turkey even though officially they did not exist."<sup>874</sup> The only exception has been the ban to use these letters in registering Kurdish names.<sup>875</sup> In deferring without any reservation to the government, the Court has not made clear how allowing the use of three additional letters in official documents would cause disorder and disrupt the rights of others, particularly when these letters are used on a daily basis in Turkey.

Most importantly, the Court's reasoning lacked a contextual approach. Turkey's ban on the use of the three letters in Kurdish names is the residue of a historical policy which, at its peak, banned the Kurdish language in its entirety and in every walk of life, including on the street.<sup>876</sup>

### **3.7.2.3 In Prisons: The Right to Correspond in Kurdish**

*Mehmet Nuri Özen and Others* was a potentially interesting case which could have raised the state's positive obligations in the protection of the prisoners' exercise of their freedom of communication. The case concerned eleven Kurdish prisoners in high security prisons who claimed that the prison authorities' refusal to dispatch their letters written in Kurdish and the Turkish courts' refusal to review these decisions infringed on their right to freedom of correspondence under Article 8 of the Convention.<sup>877</sup>

---

<sup>873</sup> Varennes and Kuzborska, "Human Rights and a Person's Name", at pp. 1002-1004. According to Varennes and Kuzborska, the ECtHR was also incorrect in interpreting and applying Article 2 of the Berne Convention for the Protection of Literary and Artistic Works. Since both Turkish and Kurdish use the same alphabet, the Court should have referred to "the literal and not phonetic approach". Ibid, at p. 1006.

<sup>874</sup> Ibid, at p. 1003.

<sup>875</sup> Ibid.

<sup>876</sup> On the evolution of Turkey's policies on the Kurdish names and language, see Aslan, "Incoherent State" and Bayır, "Representation of the Kurds by the Turkish Judiciary". For an analysis of the Kurdish question in the laws and court decisions of the Ottoman Empire and the Republic of Turkey, see also Derya Bayır, *Minorities and Nationalism in Turkish Law* (Ashgate, 2013).

<sup>877</sup> ECtHR, *Mehmet Nuri Özen and Others v. Turkey*, Application nos. 15672/08, 24462/08, 27559/08, 28302/08, 28312/08, 34823/08, 40738/08, 41124/08, 43197/08, 51938/08 and 58170/08, Judgment, 11 January 2011.

The Turkish government cited prison regulations prohibiting correspondence which, *inter alia*, constituted a threat to the order and security in prisons and facilitated communication between terrorist or criminal organizations. Unable to verify their content and not obliged under the Convention to cover the costs of translation into Turkish, argued the government, prison authorities decided not to forward the letters to their recipients.<sup>878</sup> The ECtHR did not engage in a proportionality review, since it found the authorities' decision not to be based on any of the grounds enumerated in prison regulations and, thus, not to be in accordance with the law.<sup>879</sup> The Court noted that the rules and regulations did not even envisage the possibility of prisoners to correspond in a language other than Turkish and were silent on the issue. In the absence of a ban, restriction or permission of correspondence in non-official languages, the matter was left to the discretion of prison authorities, who developed the practice of such correspondence to be translated into Turkish at the prisoners' expense. The Court found this to be incompatible with Article 8 "because it automatically excludes from the protection afforded by that provision an entire category of private correspondence which prisoners might wish to use."<sup>880</sup>

The Court's conclusion that the practice was not prescribed by domestic law enabled it to avoid a proportionality analysis, which arguably would have required the entertainment of Turkey's argument that the Convention does not require member states to cover the costs of translating the private correspondence of prisoners. Whether this was intentional or not, such an analysis would have called for a discussion of the positive obligations of member states in the effective protection of individual rights protected under the Convention.

#### **3.7.2.4 In Politics: The Use of Kurdish in Electoral Campaigns**

The ban on the use of Kurdish in electoral campaigns is a more straightforward issue since it involves drastic criminal penalties and infringes on rights and freedoms which are the bread and butter of the ECHR. The Court's 2013 ruling in *Şükran Aydın and Others* concerned the conviction of five politicians for having spoken Kurdish while running as independent or political party candidates for the 2002 general elections.<sup>881</sup> The applicants relied on several articles, Article 10 being the only one they all raised. The ECtHR limited its analysis to freedom of expression, although three of the five applicants also relied on Article 3 of Protocol 1 and the case raised interesting issues concerning the right to free elections.

At the outset, the ECtHR noted the lack of a common European standard on linguistic rights owing to the historical, linguistic, religious and cultural diversity of member states, who enjoyed a "particularly wide" margin of appreciation in this area. In recognition of this fact, the Court had earlier ruled that the ECHR does not guarantee the right to use a particular language

---

<sup>878</sup> Ibid, at paras. 43-44.

<sup>879</sup> Ibid, at para. 58.

<sup>880</sup> Ibid, at para. 59.

<sup>881</sup> ECtHR, *Şükran Aydın and Others v. Turkey*, Applications nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, Judgment, 22 January 2013.

in communications with public authorities for electoral purposes.<sup>882</sup> The Court distinguished the present case from earlier ones because

it does not concern the use of unofficial language in the context of communications with public authorities or before official institutions. Rather, the case concerns a linguistic restriction imposed on persons in their relations with other private individuals, albeit in the context of public meetings during election campaigns.<sup>883</sup>

For the Court, this case was about the use of “language as a medium of expression [which] undoubtedly deserves protection under Article 10.”<sup>884</sup> Turkish courts had based their rulings on the Law on the Fundamental Provisions Governing Elections and Voter Registration (no. 298), which at the material time contained an absolute ban on the use of any language other than Turkish in election campaigning and deprived domestic courts of judicial review. Furthermore, the law imposed criminal sanctions ranging from six months to one year as well as a fine. Accepting, in principle, that states are entitled to regulate the use of languages during election campaigns, the Court found a total prohibition on the use of unofficial languages coupled with criminal sanctions not to be compatible with freedom of expression. It underlined that the language used by the applicants constituted their mother tongue and the mother tongue of the population which they addressed, where many persons, notably the elderly and women, did not understand Turkish.

The judgment is a fascinating example of the ECtHR taking pains to evade the central legal issue arguably to avoid having to take a position on a contentious political question, namely the use of minority languages in political activities. The real problem here was not two private individuals being sanctioned by the government for speaking an unofficial language. Rather, it was one of the many discriminatory provisions under Turkish law enacted and implemented to suppress Kurdish political participation *and* representation. As in *Abdullah Demirbaş*, this case concerned the prosecution of Kurdish politicians for communicating with their electorate in Kurdish – while running for office or after they had been elected. The ECtHR also avoided addressing the flip side of the coin; the elderly and female Kurds who do not speak Turkish continue to exist in the Kurdish region, as demonstrated by the survey conducted by the Sur Municipal Council. Their inability to communicate in Turkish is not limited to election campaigns, but extends to all walks of life, including access to public services and civil and political rights.

### 3.8 Conclusion

Fionnuala Ní Aoláin argues that transitional justice is not limited to shifts from an authoritarian state structure to democracy, but also concerns democratic states experiencing internal armed conflicts and “have routinized and institutionalized emergency measures within their ordinary

---

<sup>882</sup> *Şükran Aydın and Others*, at para. 50 (citing EComHR, *Fryske Nasjonale Partij and Others v. The Netherlands*, Application no. 11100/84, Decision, 12 December 1985 and EComHR, *Association “Andecha Astur” v. Spain*, Application no. 34184/96, Decision, 7 July 1997).

<sup>883</sup> *Ibid.*, at para. 52.

<sup>884</sup> *Ibid.*

legal system”.<sup>885</sup> While its democratic credentials are suspect, to say the least, Turkey is certainly a case where a legal regime justified by the exigencies of an emergency has become “entrenched”.<sup>886</sup> This regime has not been limited to the state of emergency declared in 1987, but has comprised a whole range of laws and policies, some of which are confined to the Kurdish region (such as emergency rule) while others have operated across the country but have disproportionately targeted the Kurds (such as the DGMs and the Anti-Terror Law). Though introduced as temporary measures, virtually every component of this emergency rule has survived, either formally as in the case of the Anti-Terror Law or effectively as in the case of the DGMs which, while formally abolished under EU pressure, have survived under different names.

Though justified in the name of counter-terrorism, Turkey’s emergency regime predates the outbreak of the armed conflict with the PKK and is based on a state policy dating back to the founding years of the Republic. Moreover, it constitutes only one element of a discriminatory legal regime which denies the Kurds equal political rights and democratic representation. The Turkish state has resorted to overlapping strategies to preclude the political representation of the Kurds, both at the national and local levels. While keeping intact the 10 percent electoral threshold to exclude Kurdish parties from the Parliament, it banned successive Kurdish parties, convicted Kurdish politicians and activists for non-violent advocacy of political and cultural rights, and stripped Kurdish deputies of their parliamentary seats and mayors from their office on the basis of unjust laws. Utilising the distinct but complementary components of an authoritarian legal regime, the state has not only deprived the political representatives of the Kurds of what Schmitter has named “the effective capacity to govern”,<sup>887</sup> but also an entire Kurdish constituency of the right to be represented by the politicians and parties of their choice.

In her seminal work on political party dissolutions in Turkey, Dicle Koğacıoğlu had argued that a “rather arbitrary boundary between the political and cultural domains” informed the AYM’s ruling concerning the dissolution of HEP – the first in a long series of dissolution cases against Kurdish parties.<sup>888</sup> This demarcation between the cultural and the political has also been a defining aspect of the EU-induced reforms in the area of Kurdish linguistic rights. While the right to use Kurdish in various aspects of public life has been gradually expanded, this has been an *ad hoc*, piecemeal and inconsistent process. Moreover, laws criminalizing the use of Kurdish and the advocacy of Kurdish cultural rights in the political domain still exist and are vigorously enforced. The Turkish judicial authorities have not only selectively enforced the laws to restrict Kurdish political participation and representation, but also resisted to implement the limited reforms made in this area, as evident in the AYM’s decision to dissolve the DTP in 2009.

While Turkey continues to systematically deny the Kurds their basic political freedoms and to subjugate them to what O’Donnell named a “low-intensity civil citizenship”,<sup>889</sup> the EU process

---

<sup>885</sup> Fionnuala Ní Aoláin, “Transitional Emergency Jurisprudence: Derogation and Transition”, in Buyse and Hamilton, *Transitional Jurisprudence and the ECHR*, pp. 24-51, at p. 28.

<sup>886</sup> *Ibid*, at p. 37.

<sup>887</sup> Philippe C. Schmitter, “Dangers and Dilemmas of Democracy”, *Journal of Democracy*, vol. 5, no. 2 (1994), pp. 57-74, at p. 59.

<sup>888</sup> Koğacıoğlu, “Progress, Unity, and Democracy”, at p. 433.

<sup>889</sup> Guillermo A. O’Donnell, “Democracy, Law and Comparative Politics”, *Studies in Comparative International Development*, vol. 36, no. 1 (2001), pp. 7-36, at p. 27.

has changed the dynamics between the state and the Kurdish national movement. Kurdish political parties have progressively increased the number of municipalities in their rule since their first participation in local elections in 1999 and their return to the Parliament in 2007, after 13 years of absence. The democratization process and the halt of the armed conflict between 1999 (when Turkey was declared an EU candidate and the PKK declared a ceasefire) and 2005 (when the AKP government started to reverse the reforms and the PKK re-started the fighting) empowered the Kurdish national movement vis-à-vis the state. Inspired by the EU's minority protection conditionality and empowered by their increasing hegemony in the Kurdish region, Kurdish political parties started to increase the stakes for a democratic solution to the conflict by articulating group rights, such as public education in mother tongue and administrative autonomy for the Kurdish region.

Some of these new claims were also voiced before the ECtHR, pushing the boundaries of the ECHR's individual rights framework. While issuing precedent-setting judgments upholding the Kurdish political parties' right to exist and to advocate democratic solutions to the Kurdish conflict, the ECtHR has avoided to address the Kurds' group rights claims even where it had some room for manoeuvre. It incorrectly framed the central legal issue, as in *Şükran Aydın and Others*, did not make use of an opportunity to address member states' positive obligations, as in *Mehmet Nuri Özen and Others*, treated the systematic exclusion of Kurdish political parties from the Parliament as a democratic nation's decision over its electoral system, as in *Yumak and Sadak*, depicted the executive confiscation of elected office as an intra-administration dispute, as in *Abdullah Demirbaş*, and avoided to address an assimilationist policy towards a minority culture, as in *Kemal Taşkın and Others*. While the ECtHR duly found the stripping of the DTP's co-chairs of their parliamentary seats to have violated their rights to be elected and their electorate's sovereign power under Article 3 of Protocol 1, it did not even review whether the dismissal of an elected mayor from the same political tradition raised the same legal issues. While the Court spoke out against Turkey's assimilationist policy in *Şükran Aydın and Others* by noting that many elderly and female Kurdish voters do not speak Turkish, it did not take that fact into account in declining to review the dissolution of a municipal council for deciding to provide municipal services in Kurdish in a district where the majority of residents do not speak Turkish. The inadmissibility decision in *Abdullah Demirbaş* also showed that when it comes to Turkey's centralization policies, the ECtHR had not much to say.

De Witte draws attention to the need “for a differentiated account of the respective roles of political and legal-judicial mobilization in the formulation and implementation of new rights,” pointing out that the expansion of linguistic rights of historical minorities in Western Europe “has taken place mainly through the domestic political process, with little or no role for the courts.”<sup>890</sup> The Kurds' gradual but limited gains in the area of linguistic rights have been the result of a similar process. Unlike their counterparts in Western Europe, they had not been able to activate the CoE's soft minority protection mechanisms due to Turkey's failure to sign these instruments. Nonetheless, the Kurds adopted these norms as their reference point in framing their linguistic rights claims vis-à-vis the Turkish state. Despite intensive emigration to western Turkey since the 1950s, Kurds are still the predominant majority in much of the Kurdish region.

---

<sup>890</sup> De Witte, “Linguistic Minorities in Western Europe”, at p. 27.

Their demographic advantage, coupled with the absence of an electoral threshold in local elections and the political space opened up with the EU accession process, has enabled the Kurdish political parties to use the institutional, legal and financial resources of municipalities to *de facto* expand linguistic rights through civil disobedience campaigns. While continuing to be subject to state repression and judicial harassment in the exercise of their political rights, the Kurdish national movement did make significant gains in the area of linguistic rights – simply by acting.



## **Part II:**

# **Kurdish Legal Mobilization against State Violence and the ECtHR's Response to and Impact on Turkey's Policies**



## 4

---

# From the Grassroots to the Transnational: Kurdish Legal Mobilization before the ECtHR

## 4.1 Introduction

The Kurdish human rights lawyers in Turkey are part of a broader resistance whose struggle against the state has spanned across time and place. Since Turkey's transition to the multiparty system in 1950, Kurdish resistance simultaneously operated "inside" and "outside" the system, domestically and transnationally.<sup>891</sup> The movement coordinated legal and political "tactics"<sup>892</sup> by both engaging and boycotting electoral politics, lobbying foreign governments and intergovernmental institutions, activating supranational judicial and non-judicial mechanisms, organizing "symbolic protests"<sup>893</sup> by way of silent vigils, hunger strikes, demonstrations and civil disobedience, and engaging in violence within and outside Turkey. This chapter is about one of these resistance repertoires employed by one of the actors within the movement – ECtHR litigation by Kurdish human rights lawyers.

Until the ECtHR entered the picture, Turkey's legal landscape lacked the basic ingredients for access to justice, disabling Kurdish victims of state violence to mobilize the law. Justiciable rights under the Constitution were subject to significant *de jure* restrictions; the judiciary – as part and parcel of the power structure – was extremely unreceptive to rights claims; the civil society was very weak and disorganized; and the institutional and socio-cultural infrastructure for human rights litigation was absent. The Kurds lacked access to a "support structure" in the absence of government or private funding for litigation, rights-advocacy organizations and lawyers or any form of pro-bono legal assistance. However, Turkey's recognition of the

---

<sup>891</sup> Paul Burstein, "Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity", *American Journal of Sociology*, vol. 96, no. 5 (1991), pp. 1201-1225.

<sup>892</sup> Michael McCann, "Law and Social Movements: Contemporary Perspectives", *Annual Review of Law and Social Science*, vol. 2 (2006), pp. 17-38, at p. 23.

<sup>893</sup> Alison Brysk, "From Above and Below: Social Movements, the International System, and Human Rights in Argentina", *Comparative Political Studies*, vol. 26, no. 3 (1993), pp. 259-285.

ECtHR's oversight equipped the Kurds with a resource they had lacked at home.<sup>894</sup> Grabbing onto the opportunity, Kurdish human rights lawyers pioneered ECtHR litigation in Turkey owing to their historically embedded rights consciousness, relatively high level of organization and experience in resistance, and the sheer scale and density of state violence. From the early 1990s onwards, the Kurds became the top litigant group in Strasbourg in terms of both the number of petitions they filed and the precedent-setting judgments they won.

At least initially, the Kurdish lawyers found a receptive supranational court willing to tolerate amateurish mistakes and ease its procedural rules to give victims their day in court. As discussed in detail in Chapter 6, the Court's rulings broke new ground by, *inter alia*, holding that unacknowledged detention is a "complete negation" of the right to liberty;<sup>895</sup> that close relatives of the disappeared may themselves be subject to inhuman and degrading treatment;<sup>896</sup> that enforced disappearance is a substantive violation of the right to life;<sup>897</sup> that the rape of a detainee by a state official constitutes torture;<sup>898</sup> and that the deliberate destruction of homes by the security forces may constitute ill treatment.<sup>899</sup> At a first glance, all the ingredients for a textbook case of legal mobilization impact were present in the Kurds' litigation in Strasbourg. Yet, after hundreds of ECtHR rulings, state violence against the Kurds continues and rights defenders still face intimidation and persecution for their advocacy around the Kurdish cause, including for their ECtHR litigation. So, what went wrong?

Despite the empirical richness of the case, research on the Kurds' legal mobilization at the ECtHR is surprisingly scarce. The few existing studies are temporally limited to what I name as the 'Golden Age' of Kurdish litigation, materially restricted to the role of transnational actors in the emergence and progress of Kurdish legal mobilization, methodologically biased in their exclusive focus on judgments and oversight of the Court's inadmissibility and strike-out decisions, and unduly positive on the ECtHR's receptivity to Kurdish claims. In reality, the ECtHR's jurisprudence on the Kurdish conflict consists of cycles. Its acclaimed rulings in the 1990s were only the beginning of its long engagement, which has fluctuated in response to the post-Cold War order in Europe. I argue that a methodologically sound and theoretically meaningful approach requires a longitudinal analysis, looking at the impact of the broader political developments on the ECtHR's receptiveness to Kurdish claims. Only such an approach can show that the Court's jurisprudence displays not only judicial flexibility but also rigidity, and that the CoE's enlargement and the improvement of Turkey-EU relations have reinforced each other in curtailing the Kurds' access to the ECtHR.<sup>900</sup>

---

<sup>894</sup> This is similar, in the US context, to the empowering effect of the enactment of Title VII of the Civil Rights Act in 1964 for women and several minority communities in their struggle for equal employment opportunity. Burstein, "Legal Mobilization as a Social Movement Tactic", at p. 1205.

<sup>895</sup> ECtHR, *Çiçek v Turkey*, Application no. 25704/94, Judgment, 27 February 2001.

<sup>896</sup> ECtHR, *Timurtaş v. Turkey*, Application no. 23531/94, Judgment, 13 June 2000; *İpek v. Turkey*, Application no. 25760/94, Judgment, 17 February 2004.

<sup>897</sup> ECtHR, *Çakıcı v. Turkey*, Application no. 23657/94, Judgment, 8 July 1999; *Timurtaş v Turkey*.

<sup>898</sup> ECtHR, *Aydın v. Turkey*, GC, Application no. 57/1996/676/866, Judgment, 25 September 1997.

<sup>899</sup> ECtHR, *Selçuk and Asker v. Turkey*, Application no. 12/1997/796/998-999, Judgment, 24 April 1998; *Ayder and Others v. Turkey*, Application no. 23656/94, Judgment, 8 January 2004.

<sup>900</sup> Dilek Kurban, "Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations", *Human Rights Law Review*, vol. 16, no. 4 (2016), pp. 731-769.

My research differs from earlier work on the Kurdish movement in Turkey by focusing on the Kurdish human rights lawyers instead of the PKK<sup>901</sup> or the (pro) Kurdish political parties;<sup>902</sup> from work on Kurdish transnational activism by focusing on transnational legal mobilization by Kurdish lawyers in Turkey rather than transnational pro-Kurdish political and cultural advocacy networks;<sup>903</sup> from studies on legal mobilization at the ECtHR by going beyond the conventional focus on judgments and including in the analysis the Court’s decisions, as well as by looking into litigation by individual lawyers in addition to those acting under the rubric of an organization;<sup>904</sup> and from studies on *Kurdish* legal mobilization in Strasbourg by focusing on domestic human rights lawyers – the real behind-the-scenes actors.<sup>905</sup> I adopt a “process-based approach” by looking at the activities and relationships surrounding Kurdish litigation in Strasbourg<sup>906</sup> and analysing the impact of the ECtHR rulings on Kurdish legal mobilization. Drawing on the law and society literature, particularly the legal mobilization scholarship, and adopting a “bottom up” view of Kurdish legal mobilization,<sup>907</sup> I show how a small group of lawyers at the Diyarbakır branch of the Human Rights Association (*İnsan Hakları Derneği-İHD*), a national NGO in Turkey, used the ECtHR’s individual petition mechanism to resist state violence within the emergency context.

---

<sup>901</sup> See e.g. Cengiz Güneş, *The Kurdish National Movement in Turkey: From Protest to Resistance* (Routledge, 2012); Ahmet Hamdi Akkaya and Joost Jongerden, “The PKK in the 2000s: Continuity through Breaks?” in Marlies Casier and Joost Jongerden (eds.), *Nationalisms and Politics in Turkey: Political Islam, Kemalism and the Kurdish Issue* (Routledge, 2011), pp. 143–161; Aliza Marcus, *Blood and Belief: The PKK and the Kurdish Fight for Independence* (New York University Press, 2007); Güneş Murat Tezcür, “When Democratization Radicalizes: The Kurdish Nationalist Movement in Turkey”, *Journal of Peace Research*, vol. 47, no. 6 (2010), pp. 775–789; David Romano, *The Kurdish Nationalist Movement: Opportunity, Mobilization, and Identity* (Cambridge University Press, 2006); Martin van Bruinessen, “Between Guerrilla War and Political Murder: The Workers’ Party of Kurdistan”, *MERIP Middle East Report*, no. 153 (1988), pp. 40–46.

<sup>902</sup> Nicole F. Watts, *Activists in Office: Kurdish Politics and Protest in Turkey* (University of Washington Press, 2010); Gilles Dorransoro and Nicole F. Watts, “Toward Kurdish Distinctiveness in Electoral Politics: The 1977 Local Elections in Diyarbakır”, *International Journal of Middle East Studies*, vol. 41 (2009), pp. 457–478; Gilles Dorransoro, “The Autonomy of the Political Field: The Resources of the Deputies of Diyarbakır (Turkey): 1920–2002”, *European Journal of Turkish Studies* [Online], vol. 3 (2005), available at: <https://ejts.revues.org/477>.

<sup>903</sup> Nicole F. Watts, “Institutionalizing Virtual Kurdistan West: Transnational Networks and Ethnic Contention in International Affairs”, in Joel S. Migdal (ed.), *Boundaries and Belonging: States and Societies in the Struggle to Shape Identities and Local Practices* (Cambridge University Press, 2004), pp. 121–147. Although Watts discusses the advocacy of Kurdish rights before the ECtHR by a transnational legal advocacy network, her analysis is very brief, exclusively based on the international relations literature and focused on the Kurdish Human Rights Project (KHRP) as the central player in this network. Watts problematically includes the ECtHR as a member of the network “working together” for a “pro-Kurdish agenda”. *Ibid.*, at pp. 130–131. Ayata has similarly depicted the KHRP as the principal agent of Kurdish litigation before the ECtHR and credited the KHRP’s transnational network of British human rights lawyers for the success of the Kurdish cases. Bilgin Ayata, “The Politics of Displacement: A Transnational Analysis of the Forced Migration of Kurds in Turkey and Europe”, unpublished PhD thesis, Johns Hopkins University, Department of Political Science (2011).

<sup>904</sup> Rachel A. Cichowski, “Civil Society and the European Court of Human Rights”, in Jonas Christoffersen and Mikael Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011), pp. 77–97, at p. 86.

<sup>905</sup> Dia Anagnostou, “From Belfast to Diyarbakır and Grozny via Strasbourg: Transnational Legal Mobilisation against State Violations in Contexts of Armed Conflict”, in Dia Anagnostou (ed.), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System* (Hart Publishing, 2014), pp. 157–218; Loveday Hodson, *NGOs and Litigation before the European Court of Human Rights* (Hart Publishing, 2011).

<sup>906</sup> Michael McCann, “Litigation and Legal Mobilization”, in Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008), pp. 522–540, at p. 524.

<sup>907</sup> McCann, “Litigation and Legal Mobilization”, at p. 524.

## 4.2 The Emergence of the Kurdish Human Rights Movement

It was the 1980 *coup d'état*, which gave birth to Turkey's modern human rights movement.<sup>908</sup> The emergence of a human rights struggle in response to military rule is of course not unique to Turkey; the Latin American experience attests to this phenomenon.<sup>909</sup> However, unlike the latter case where victims' families rapidly organized and formed resistance movements *during* the dictatorship,<sup>910</sup> in Turkey the first civic response to the military regime was only possible *after* the junta left power and it took three years after transition to civilian rule for the institutionalization of this movement. In the end, the democratic maturity and tradition of civil society in a country matter a great deal in the speed, effectiveness and longevity of civil society response to state repression. Unlike in Chile, where “[c]ivilian rule and civic tradition had been the norms” until the military rule,<sup>911</sup> Turkey has had a long history of direct and indirect military intervention in politics and a tradition of an extremely strong state against a virtually non-existent civil society.

Once they were institutionalized, Turkey's human rights activists faced tremendous obstacles to political mobilization, including lack of material, human and informational resources. Lack of foreign language skills was a major barrier in forming alliances with the international human rights community. That, too, was an important difference with the Latin American experience. It was the presence of Turkish-speaking German activists working with Amnesty International, which enabled the İHD founders to establish their initial transnational networks. The presence of a large Turkish guest worker community in Germany since the late 1950s had aroused German activists' and public intellectuals' familiarity and curiosity with Turkey. The arrival of Turkish and Kurdish leftist refugees in the 1980s further enhanced the German civil society's engagement with the political situation in Turkey. Many volunteered to work with Amnesty International to monitor political trials and conduct fact-finding missions in Turkey. Their frequent visits and prolonged stays in Turkey and their knowledge of Turkish enabled them to build long-lasting collaborations with the İHD activists.

---

<sup>908</sup> The first human rights association in Turkey was established by the government in 1946 in response to the UN General Assembly's call to member states to facilitate the establishment of human rights organizations. Presided by a marshal, it lasted three months. The second was established in 1962 by a group of intellectuals and was closed down by the government soon afterwards. The İHD is Turkey's first genuine, grassroots and nationwide non-governmental human rights organization. Nevzat Helvacı, *Karanlıkta Yol Aramak* [Searching for the Light in the Dark] (İmge Kitabevi, 2013), at pp. 149-150. On the early human rights NGOs in Turkey, see also Başak Çalı, “Human Rights Discourse and Domestic Human Rights NGOs”, in Zehra F. Kabasakal Arat (ed.), *Human Rights in Turkey* (University of Pennsylvania Press, 2007), pp. 217-232.

<sup>909</sup> See e.g. Jeffrey Davis, *Seeking Justice in Latin America: Truth, Extra-Territorial Courts, and the Process of Justice* (Cambridge University Press, 2014); Edward L. Cleary, *The Struggle for Human Rights in Latin America* (Praeger Publishers, 1997); Brysk, “From Above and Below”. *Grupo de Apoyo Mutuo* (GAM), established by the families of the disappeared, “became the first human rights organization to establish a permanent presence in [Guatemala]”, like the İHD in Turkey. Juan E. Méndez and José Miguel Vivanco, “Disappearances and the Inter-American Court: Reflections on a Litigation Experience”, *Hamline Law Review*, vol. 13, no. 3 (1990), pp. 507-578, at p. 509.

<sup>910</sup> In Chile, the speed of social organization was impressive. Organizing “[w]ithin days” after the coup, the Chileans established their pivotal human rights organization three weeks after the *coup d'état*. Cleary, *The Struggle for Human Rights*, at p. 3.

<sup>911</sup> Cleary, *The Struggle for Human Rights*, at p. 1.

While linkages with transnational human rights networks were thus formed in the mid-1980s, the ability of *Kurdish* İHD members to form alliances with transnational *justice* networks would only be possible in the early 1990s. The opportunity presented itself with Turkey's recognition of the ECtHR's oversight, whereas material, human and informational resources would arise after a series of chance encounters which linked Kurdish human rights lawyers in Turkey with their British counterparts through the "brokerage"<sup>912</sup> of a Kurdish activist in exile.

#### 4.2.1 The İHD: A People's Movement

At its origins, the İHD is a "movement of the aggrieved"<sup>913</sup> which emerged in response to state violence against political prisoners following the *coup*.<sup>914</sup> During the military rule, when political parties, trade unions and associations were shut down and civil society virtually vanished, former left-revolutionary prisoners and the families of those still in prisons had no place to turn for legal and political support. In Latin America, by contrast, religious institutions had played a critical role in providing "protected political space" for political dissidents, enabling them to relatively freely organize and mobilize without government intervention.<sup>915</sup>

After transition to civilian rule, the informal gatherings of survivors and victims' families in front of prisons evolved into a solidarity movement. At the same time, prominent intellectuals led by novelist Aziz Nesin organized against Martial Law and restrictions on academic freedom and human rights. In 1984, they collected over 1,300 signatures for "the Petition of Intellectuals," the first civil objection to the residues of the military regime, calling for the abolishment of the death penalty, the ending of torture, the lifting of barriers on the freedom of association and the establishment of a democratic order.<sup>916</sup> The junta leader-turned-President Kenan Evren accused the petitioners of "treason" and had 59 of them who refused to withdraw their signature prosecuted for violating the Martial Law. Nesin and others were eventually acquitted following a two-year trial process.<sup>917</sup> Somewhere along the way, the prisoners' families crossed paths with Nesin and his comrades. House gatherings in Istanbul and Ankara resulted in 98 individuals to establish the İHD on 17 July 1986, electing Nevzat Helvacı as the first president.<sup>918</sup>

The İHD's founding objectives were the abolishment of the death penalty, amnesty for political prisoners and the recognition of the right of individual petition to the EComHR. Following Turkey's recognition of the individual petition mechanism in 1987, the İHD organized a panel

---

<sup>912</sup> Doug McAdam, Sidney Tarrow and Charles Tilly, *Dynamics of Contention* (Cambridge University Press, 2001), at p. 26 (for definition).

<sup>913</sup> Interview with Hüsni Öndül, Ankara, 2 December 2015. Öndül served as the İHD's third President during 1992-1996 and Honorary President during 1996-1998. He presided the İHD again during 1999-2004 and 2007-2008. Since 2010, he has been serving as the President of the İHD's Human Rights Academy.

<sup>914</sup> See also Çalı, "Human Rights Discourse and Domestic Human Rights NGOs", at p. 221 (that the İHD's establishment was a response to "the sociopolitical trauma" caused by the brutality of the military regime).

<sup>915</sup> Cleary, *The Struggle for Human Rights*, at p. 4.

<sup>916</sup> Dated 15 March 1984, the petition was titled "Observations and Requests Pertaining to the Democratic Order in Turkey" and submitted to the Turkish President and the Parliament. Its full text in Turkish is available at: [http://www.nesinvakfi.org/aziz\\_nesin\\_aydinlar\\_dilekcesi.html](http://www.nesinvakfi.org/aziz_nesin_aydinlar_dilekcesi.html).

<sup>917</sup> Haluk Kalafat, "Aziz Nesin, Kenan Evren, Değişmeyen Türkiye" [Aziz Nesin, Kenan Evren, the Turkey that never Changes], *Bianet*, 9 February 2013.

<sup>918</sup> For Helvacı's own account of the İHD's establishment, see Helvacı, *Karanlıkta Yol Aramak*, at pp. 150-154.

discussion and published a booklet on this new mechanism, and translated into Turkish the form of application to the ECtHR.<sup>919</sup> Yet, the İHD members knew little to nothing about international human rights mechanisms, including the ECtHR. At the time, not only did the curricula at law faculties not contain a human rights course, but also coursebooks on public international law did not refer to human rights or at best mentioned them in passing.<sup>920</sup> Until 1990, there were only two monographs in Turkish on the ECHR.<sup>921</sup> This scarcity obliged the activists to teach themselves human rights, effectively turning the İHD into a legal academy.

A spontaneous decision born out of chance encounters led the İHD to work on international humanitarian law in addition to human rights. In September 1991, Amnesty International had adopted the Yokohama Decisions, expanding its mandate to abuses by opposition groups in armed conflicts.<sup>922</sup> Intrigued by a public criticism of the İHD for oblivion to the Decisions and failure to hold the PKK accountable for its violations of humanitarian law,<sup>923</sup> Hüsni Öndül, recently elected as the İHD's third President, turned to Helmut Oberdiek, a German human rights activist living in Turkey.<sup>924</sup> As in future occasions, lack of language skills impeded the İHD activists' ability to use international law without support from international colleagues.

During its fourth annual General Council meeting on 24 October 1992, the İHD declared that there was a "war" in Southeast Turkey, called on the parties to the conflict to abide by the laws of war and decided to expand its mandate to international humanitarian law.<sup>925</sup> Once again, the organization faced resource problems; none of the İHD lawyers had any knowledge about this body of law and there were no sources available in Turkish. Again, Öndül resorted to self-help. Having heard that the Geneva Conventions had been published at the Official Gazette, he

---

<sup>919</sup> İHD, *1. Olağan Genel Kurulu Çalışma Raporu* [Working Report of the 1st Regular General Meeting] (1987), at pp. 12 and 23.

<sup>920</sup> Prof. Semih Gemalmaz of Istanbul University was the first academic to introduce a mandatory human rights course into the undergraduate curriculum at law faculties in the early 1990s. The first academic initiative to study human rights in Turkey dates back to the establishment of a human rights centre at Istanbul University Faculty of Law during the World War II years. It was short lived and its sole activity was to publish a brochure on human rights. Helvacı, *Karanlıkta Yol Aramak*, at p. 149. Turkey's first functioning human rights centre was established at Ankara University Faculty of Political Science in 1978. Its activities were interrupted with the dismissal of many of its staff by the junta after the 1980 *coup*. The Centre resumed its work in 1989. For more on the Centre, see [http://www.ihmpolitics.org/?page\\_id=410](http://www.ihmpolitics.org/?page_id=410).

<sup>921</sup> Kemal Fikret Arık, *Avrupa İnsan Hakları Sözleşmesi Üzerine bir İnceleme: Esaslar-Teşkilat-İçtihat* [An Analysis of the European Convention on Human Rights: Rudiments-Organization-Jurisprudence] (Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları, 1965); Ömer Madra, *Avrupa İnsan Hakları Sözleşmesi ve Bireysel Başvuru Hakkı* [The European Convention on Human Rights and the Right to Individual Petition] (Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları, 1981).

<sup>922</sup> Amnesty International, *Annual Report 1992 (covering the period January-December 1991)*, AI Index: POL 10/0001/1992 (1992), at pp. 10-13.

<sup>923</sup> The criticism was voiced by Uğur Mumcu, an investigative journalist working for the daily *Cumhuriyet*.

<sup>924</sup> Oberdiek was a teacher who had long been interested and involved in Turkey through his encounters with Turkish guest workers and political refugees in Germany. Following the 1980 *coup d'état*, he resigned from civil service in Germany and started to engage in human rights in Turkey. He spent the 1980s observing political trials in Turkey and raising public awareness in Germany. In 1986, he became the head of Amnesty International's Turkey desk in London. In 1990, he participated in the founding of the Human Rights Foundation of Turkey (*Türkiye İnsan Hakları Vakfı-TİHV*), where he worked at the Documentation Centre – the first professional work on documenting human rights violations in Turkey. In 1995, he was declared a *persona non grata* by the Turkish government and deported. He published his vast archive on Turkey's human rights abuses on a website, which serves as an invaluable documentation site (<http://ob.nubati.net/>). Oberdiek died in Germany on 26 April 2016.

<sup>925</sup> Interview with Hüsni Öndül. See also Çalı, "Human Rights Discourse and Domestic Human Rights NGOs", at p. 223.

obtained a copy from the Turkish Parliament and led the İHD members in learning about the applicability of Common Article 3 to armed conflicts of a non-international nature. The first opportunity to translate words into deeds presented itself on 24 May 1993, with the PKK's execution of 33 unarmed conscripts who had completed their military service and were on their ways home.<sup>926</sup> The İHD issued a press statement, condemning the PKK for executing non-combatant ex-military recruits in violation of Common Article 3 of the Geneva Conventions. This was the İHD's first, but by no means the last, public position against the PKK. From then on, it condemned all PKK actions targeting civilians, bearing negative reactions from both the PKK and the state (for having treated the PKK as a warring party rather than a terrorist organization).

By the early 1990s, the atrocities occurring in the Kurdish region further stretched thin the İHD's scarce resources. At a time when Kurdish civilians and İHD members were routinely disappeared, tortured and extra-judicially killed, as discussed in Chapter 5, working on general human rights issues was not possible. As far as women, particularly Kurdish women, were concerned, the organization also faced internal ideological barriers to specialization. Rooted in the radical left movement of the 1960s and 1970s, the İHD was numerically and ideologically dominated by men. For Kurdish political activists who came from a much more traditional and conservative society than their Turkish counterparts, domestic and sexual violence against women – at the hands of their families or the authorities – was a particular taboo. The stigma attached to sexual offences against women in the patriarchal Kurdish society had also silenced the victims of these offences.

While aware of the use of sexual violence as an instrument of torture against female political prisoners, human rights lawyers did not document or litigate these crimes well into the late 1990s. Once again, systematic legal work around this issue started with a chance encounter. In 1995, while serving jail time for a newspaper article she wrote on the Kurdish issue, the İHD leader Eren Keskin was confided by a fellow prisoner who had been raped in detention.<sup>927</sup> In the remainder of her stay in prison, Keskin found out that every single female political detainee had been subject to some form of sexual harassment, including rape, though many refrained from speaking about it. Following her release, she got in touch with Jutta Hermanns, a German lawyer investigating human rights abuses against defence lawyers in Turkey. Like Oberdiek, Hermanns was fluent in Turkish, enabling her and Keskin to engage in professional collaboration. The two women founded the Legal Aid Office for Victims of Sexual Harassment and Rape under Detention in 1997 and started filing criminal cases on behalf of women in the Kurdish region.<sup>928</sup> While around 500 women applied to the Legal Aid Office since its establishment, Keskin believes that this is far below the actual number of victims. In its

---

<sup>926</sup> The execution took place on Bingöl-Elazığ highway where “as many as 150 PKK members” stopped the buses transporting the recently released ex-recruits and executed them on the spot. The incident also marked the end of the PKK's unilettel ceasefire. US Department of State, *Turkey Human Rights Practices, 1993* (1994).

<sup>927</sup> Interview with Eren Keskin, Istanbul, 4 December 2015. Keskin joined the İHD in 1989, entered its executive board in 1990 and served as the head of its Istanbul branch during 1997-2001 and 2002-2005. Currently, she is a member of the İHD Executive Board.

<sup>928</sup> Later, the Office also represented the Roma and Trans women who were sexually abused in detention.

publications, the Office framed the rape of Kurdish women by security officers in the Kurdish region as state policy and an instrument of war.<sup>929</sup>

#### 4.2.2 Solitary Advocates: The Kurdification of the İHD

As the first civic organization established after the *coup*, the İHD's significance goes beyond being Turkey's first national human rights organization. At a time when there were no political parties, trade unions or any NGOs, the İHD provided a platform to dissidents of all ideologies, ethnic identities and political backgrounds.<sup>930</sup> During its initial years, it received a great deal of respect, attention and reward from the public, media, and the international community.<sup>931</sup> To Akın Birdal, it seemed "as if everyone had been awaiting the establishment of such an organization."<sup>932</sup>

An unprecedented act of civil disobedience by a Kurdish delegate changed everything. On 28 October 1990, Vedat Aydın, a founding member of the İHD's Diyarbakır branch, addressed the annual general assembly meeting in Kurdish.<sup>933</sup> He was the first individual to make a public speech in Kurdish in Turkey, despite a legal ban.<sup>934</sup> The speech, which was also radical in content in denouncing the security forces' torture of the bodies of dead PKK militants, was the collective decision of Kurdish delegates,<sup>935</sup> but caught the rest of the İHD by surprise. While some of the delegates cheered in support, others were furious at Aydın for jeopardizing the organization. At the time, Articles 5 and 6 of Law on Associations (no. 2908) prohibited associations from using any language other than Turkish in their meetings, statements and publications and the sanction for the violation of the ban was permanent dissolution. Kurdish delegate Mustafa Özer protested the protestors and shouted that as Kurds, they would speak their mother tongue and "pay the price".<sup>936</sup> As the police raided the stage, the president recessed the session. Most of the delegates, the Presidium and the Board of Directors left in protest,

---

<sup>929</sup> Eren Keskin and Leman Yurtsever, *Hepsi Gerçek: Devlet Kaynaklı Cinsel Şiddet* [It's All True: Sexual Violence Stemming from the State] (Punto, 2006).

<sup>930</sup> The political space the İHD provided for all dissidents, irrespective of their ideology, resembles the openness of religious institutions in Latin America to all anti-regime activists, including atheists and agnostics.

<sup>931</sup> Helvacı, *Karanlıkta Yol Aramak*, at p. 153.

<sup>932</sup> Interview with Akın Birdal, Istanbul, 3 December 2015. This initial "incredible dynamism" faded over the years when "everyone returned to their homes." Birdal is a founding member of the İHD, its first Secretary General (1986-1992) and second president (1992-1999). During 2002-2007, he served for three consecutive terms as the Deputy President of the Paris-based International Federation for Human Rights Leagues (FIDH). In 2007, he was elected to the Turkish Parliament as an independent candidate supported by the Democratic Society Party (*Demokratik Toplum Partisi-DTP*).

<sup>933</sup> Whether the İHD leadership had prior knowledge and consent of this speech is not clear. My İHD interlocutors who were present at that meeting differed in their recollection of this issue.

<sup>934</sup> *Türkçeden Başka Dillerle Yapılacak Yayınlar Hakkında Kanun* [Law on Broadcasting in Languages Other than Turkish], no. 2932, 19 October 1983, *Official Gazette*, no. 18199, 22 October 1983 (prohibiting the public use of any language other than Turkish). The law was repealed with the enactment of the anti-terror law on 13 April 1991, marking the abolishment of the *de jure* ban on speaking Kurdish in public. Bans on the use of Kurdish in publishing and the media remained until the EU-induced constitutional amendments in 2002. See Chapter 3.

<sup>935</sup> Mehmet Emin Aktar, "Vedat Aydın: Yokluğu ile Hepimizi Eksik Bırakan Kahraman" [Vedat Aydın: The Hero whose Absence has Lessened us all], *Hür Bakış*, 10 July 2015.

<sup>936</sup> Aktar, "Vedat Aydın".

while Aydın continued his speech, translated into Turkish by Kurdish delegate Ahmet Zeki Okçuoğlu to the applause and cheers of the remaining (overwhelmingly Kurdish) delegates.

Aydın's bravery had immense consequences for himself and the İHD. Overnight, in the eyes of the public the İHD had turned into a 'separatist' organization advocating the use of terrorism. The incident also caused an internal rift, leading many non-Kurdish delegates to part ways with the İHD in protest of the majority's endorsement of Aydın. This was not an ethnic division, but essentially a political split over the Kurdish question.<sup>937</sup> The rift would deepen with the İHD's growing involvement in the rapidly evolving civil war in the Kurdish region.

Vedat Aydın, Ahmet Zeki Okçuoğlu and Mustafa Özer were arrested by the police on the spot and prosecuted by the State Security Courts (*Devlet Güvenlik Mahkemesi-DGM*) for terrorist propaganda. While Aydın and Okçuoğlu were detained pending trial, Özer was released after days of interrogation. All three furthered their civil disobedience during the trial, addressing the court in Kurdish in defiance of the presiding judge's repeated warnings. Following his release from a nine-month imprisonment in June 1991, Vedat Aydın was elected as the President of the Diyarbakır branch of People's Labour Party (*Halkın Emek Partisi-HEP*). On 5 July, he was abducted from his home by several men who introduced themselves as police officers and disappeared. Two days later, his bullet-ridden body was found outside Diyarbakır. In his death, as in his life, Aydın became a pioneer as the first Kurdish activist and politician to be extra-judicially killed in Turkey's dirty war.<sup>938</sup> Over the years, 21 other İHD members were executed by 'unknown perpetrators' across Turkey.<sup>939</sup> The vast majority of the victims were İHD activists based in the Kurdish region.

The second split occurred over the İHD's fact-finding report about the Cizre events of 1992.<sup>940</sup> Some members of the Board of Directors, "having adopted the rhetoric of the State", argued that the responsibility for civilian deaths should be attributed to the PKK for its use of women and children as human shields.<sup>941</sup> They unsuccessfully bid for leadership at the annual congress in October and left the organization upon Akın Birdal's election to the presidency.<sup>942</sup> Thereafter, recalls Birdal, "the İHD entered a new phase. The Kurdish question became our priority and as a result we became very isolated."<sup>943</sup>

---

<sup>937</sup> Many of the remaining delegates in western Turkey, including Hüsnü Öndül and Akın Birdal are not Kurdish.

<sup>938</sup> On Vedat Aydın and other extrajudicial executions in the Kurdish region in the 1990s, see Chapter 5.

<sup>939</sup> İHD, "İHD'ye Yönelik Algı Operasyonlarına Son Verin" [Put an End to the Psychological Operations against the İHD], press statement, 16 March 2016. An İHD report published on the occasion of the organization's 15<sup>th</sup> anniversary lists the name of its 14 members and executives murdered between 1986 and 2001, starting with Vedat Aydın. İHD, *Kuruluşundan Bugüne İHD* [İHD from its Foundation to Today] (2001), at p. 36.

<sup>940</sup> See in this chapter Section 4.2.4.

<sup>941</sup> Interview with Akın Birdal.

<sup>942</sup> The disintegrating impact of the violence in the Kurdish conflict on the İHD bears close resemblance to that of the Bloody Sunday events on the civil rights organizations in Northern Ireland. On the latter, see Anagnostou, "From Belfast to Diyarbakir and Grozny via Strasbourg", at p. 165.

<sup>943</sup> In his memoirs, Nevzat Helvacı expresses his discontent and disapproval of this new direction. Due to the existence of "political factions who wanted to use the association for their political goals", Helvacı decided not to run for re-election in the 1992 annual congress. When Birdal's group won the elections, delegates "with Kurdish origin dominated the new leadership [which] concentrated on the Kurdish question, and almost solely channelled its work on this issue." A number of members from the academic circles left the İHD "due to this one-sided view", which undermined the respectability of the organization in Turkey and lessened its impact on the public opinion. Helvacı, *Karanlıkta Yol Aramak*, at pp. 241-242.

That isolation would have dire consequences. Among the leadership in western Turkey, Eren Keskin and Akın Birdal were particularly targeted by officially orchestrated and/or tolerated attacks. Ethnically non-Kurdish<sup>944</sup> and socio-economically of middle class background, they symbolized the ‘self-hating Turk’ in the eyes of Turkish nationalists and the regime. They routinely received death threats over the phone, seemingly from the same individual who had a mechanic voice, and on several occasions escaped death. During a fact-finding mission in Diyarbakır, Keskin and her colleagues were fired at close range from a minibus. In 2001, a man raided the İHD Istanbul office and opened fire at the staff, including Keskin. The perpetrator was arrested and turned over to the police, put on trial but was ‘released by mistake.’<sup>945</sup>

According to McCann, the mass media can play an enhancing role in social movement building, particularly around “rights claims and litigation campaigns for social justice”.<sup>946</sup> Where claims are raised in the context of a deeply divisive ethno-political conflict and in contestation of the official ideology, it is not only very difficult to mobilize public support through the mass media, but the latter can itself turn into an instrument of state violence. This has been the experience of the İHD activists from the moment they mobilized against the atrocities in the Kurdish region. In 1998, Birdal miraculously survived an assassination attempt which left him partially paralysed. He had been the target of a media campaign portraying him as ‘a pro-Kurd and a mouthpiece of the PKK’ due to two separate incidents which deeply unnerved the authorities. The first concerned Birdal’s role in rescuing eight Turkish soldiers held captive by the PKK since July 1995. In his words:

The families had not been able to find anyone to bring back the soldiers. Having nowhere else to seek help, they came to the İHD. On 27 August 1996, İhsan Arslan, the President of MAZLUMDER<sup>947</sup>; Fethullah Erbaş, a member of the Parliament from Welfare Party (*Refah Partisi*); and myself went over [to the PKK’s camp base in northern Iraq] and brought back the eight soldiers. We thus became the first people to have dealt with the PKK as an interlocutor. There was a hand-over ceremony, signatures and all that... Thereafter our names were marked.<sup>948</sup>

The second incident, which led to Birdal’s branding as a PKK agent, was his participation in *Newroz* celebrations – a domain hitherto capitalized by the Kurdish national movement as a symbol of political resistance against the Turkish state. As Birdal recalls,

---

<sup>944</sup> While Keskin’s father is Kurdish, born and raised in Western Turkey, namely outside the Kurdish region, her half-Kurdish identity is not information that the general public is aware of.

<sup>945</sup> Interview with Eren Keskin.

<sup>946</sup> McCann, “Law and Social Movements”, at p. 26.

<sup>947</sup> The Organisation for Human Rights and Solidarity for Oppressed People (*İnsan Hakları ve Mazlumlar için Dayanışma Derneği*-MAZLUMDER).

<sup>948</sup> Interview with Akın Birdal. All three subsequently faced terrorism charges. Birdal and Arslan were eventually acquitted by the Ankara DGM, while Erbaş was shielded from prosecution thanks to his parliamentary immunity. *Hürriyet Daily News*, “DGM Wants RP Deputy’s Political Immunity Lifted”, 25 December 1996.

Upon the arrest of all HADEP<sup>949</sup> executives, we formed a delegation and participated in *Newroz* on 21 March 1998 to stand in solidarity with the Kurdish people. We did not leave them alone. This resulted in the second cross [over my name].

The campaign against Birdal was launched already before *Newroz* by the Chief of General Staff's public statement in February 1998 that "human rights were partial and operated as a wing of armed organizations."<sup>950</sup> From then on, daily *Hürriyet* and *Sabah* started to portray Birdal as a PKK agent, making use of images of him at the PKK camp in northern Iraq. These allegations were based on fictitious news leaked by the Chief of Staff allegedly based on the testimony of Şemdin Sakık, a PKK commander-turned-informant.<sup>951</sup> Birdal shares the widely held view by the domestic and international human rights community<sup>952</sup> that this concerted media campaign led to the assassination attempt against him on 12 May 1998 at the İHD headquarters.<sup>953</sup> That the news reports were based on false documents fabricated by General Çevik Bir, the second in command of the Chief of Staff, would be unearthed years later when Şemdin Sakık denied the testimony attributed to him.<sup>954</sup> Turkish Vengeance Brigade (*Türk İntikam Tugayı-TİT*),<sup>955</sup> a group believed in the left and human rights circles to have the backing of the National Intelligence Organization (*Milli İstihbarat Teşkilatı-MİT*), claimed the attack.<sup>956</sup>

Reflecting back on these times when they lived with fear of death, Eren Keskin recalls how "solitary and vulnerable" the İHD members were. They desperately tried to recruit high profile Turks to join the İHD's fact-finding missions to mobilize public opinion on state violence in the Kurdish region. The support of famous Turks was also essential for the safety of İHD activists at a time when the state had given a blank check to military and paramilitary forces in intimidating the advocates of the Kurdish people. Far from causing a public outcry, İHD reports

---

<sup>949</sup> People's Democracy Party (*Halkın Demokrasi Partisi-HADEP*).

<sup>950</sup> Human Rights Watch, "Turkey: Human Rights Developments", in *World Report 2000* (2000).

<sup>951</sup> Once a senior PKK commander, Sakık is the most high-profile confessor who worked for the Turkish state. On Turkey's use of confessors in counter-terrorism, see Chapter 5.

<sup>952</sup> The attack "followed a reckless campaign in the mainstream press against Birdal and several liberal columnists." Human Rights Watch, "Turkey: Human Rights Developments".

<sup>953</sup> Repeatedly shot at his chest by two gunmen, Birdal miraculously survived. He was not the only target of the media campaign. Cengiz Çandar and Mehmet Ali Birand, two well-known Turkish journalists working for mainstream Turkish daily *Sabah*, were also labelled as 'PKK agents' due to their critical coverage of the war between the military and the PKK. First Birand and later Çandar were fired by their media patrons in national daily *Sabah*. Esra Elmas and Dilek Kurban, *Communicating Democracy—Democratizing Communication: Media in Turkey: Legislation, Policies, Actors* (TESEV Publications, 2011).

<sup>954</sup> For Çandar's detailed account of this process which he names "Turkey's Dreyfus Affair" and known in Turkey as the 'Memorandum Incident', see Hasan Cemal, *Türkiye'nin Asker Sorunu: Ey Asker Siyasete Karışma!* [Turkey's Military Problem: Hey Soldier, Stay away from Politics!] (Doğan Kitap, 2010), at pp. 292-303.

<sup>955</sup> Cem Ersever, a former member of the Turkish military, and several other individuals were charged with attempted murder. In his court testimony, Ersever said that he founded TİT in 1996 and ordered his men to abduct Birdal to give him a "warning" for his pro-PKK activities. While Ersever denied that he gave an order to kill, he threatened both Birdal and his lawyers with death in the courtroom. *Hürriyet*, "Cüretin Böylesi" [What a Dare], 4 August 1998. Since the late 1970s, TİT was implicated in a number of attacks and threats against leftist activists and was recently implicated in *Ergenekon* trials. Upon the court's request for information, MİT, the Turkish police and the Turkish gendarmerie gave conflicting accounts to a court about TİT. *NTV*, "MİT: Türk İntikam Tugayı Adında bir Örgüt Yok" [MİT: There is no such Organization named Turkish Vengeance Brigade], 15 January 2010. For more on Ersever and his revelations, see Chapter 5. On the *Ergenekon* case, see Chapter 6.

<sup>956</sup> Nine individuals, including TİT's alleged founder, were given jail terms of 10 months to 19 years. İHD, *Kuruluşundan Bugüne İHD*, at p. 37.

documenting grave human rights abuses received no attention from the mainstream media and politics.<sup>957</sup> Among the numerous autopsies she observed at the time, Keskin recalls the bodies of PKK militants dragged on the streets after having being killed by the military and the mutilated bodies of female PKK militants raped by the soldiers following their arrest: “nobody has heard any of these.” There was a stark duality in the ‘truth’ as it was known in the Kurdish region and the rest of Turkey. The violations committed by the security officers were exclusively reported by the Kurdish news outlets such as daily *Özgür Gündem* and *MedTV*, which the Turks, even liberals sympathetic to the Kurds, were not following.<sup>958</sup>

#### 4.2.3 “Living at Gunpoint”: Life and Death at İHD Diyarbakır

Following Istanbul and Ankara, the İHD opened its third branch in Diyarbakır in 1988, one year after the government declared a state of emergency in the Kurdish region and accepted the right of individual petition to the EComHR. The initial leadership of the new İHD branch were individuals with political experience, such as Hatip Dicle – a well-known Kurdish activist in his late thirties.<sup>959</sup> However, soon after his election to the Presidency in 1990, Dicle ran for political office and was elected to the Parliament as a deputy from HEP.<sup>960</sup> This marked the beginning of a new phase where the İHD Diyarbakır was successively led by inexperienced lawyers in their early 20s, who lacked the financial, human and intellectual resources the task required.<sup>961</sup> What drew them to the job was their interest in human rights, left-leaning political ideologies and/or moral responsibility to ‘do something’ for the Kurdish people they belonged to.

Dicle’s immediate successor was Fevzi Veznedaroğlu, who had joined İHD Diyarbakır as a member of the executive board in 1989, two years after graduating from the Law Faculty of Dicle University. His wife Sevtap Yokuş, a graduate of the same faculty, was pursuing a PhD in law at Istanbul University, while working as a teaching assistant at Dicle University. When he was elected to succeed Dicle in 1991, Veznedaroğlu was in his mid-twenties and the town was in turmoil. On 18 June, an explosive device detonated in the parked car of İHD board member Mustafa Özer.<sup>962</sup> On 25 June, a bomb exploded inside the İHD office, collapsing one

---

<sup>957</sup> Nathalie Tocci and Alper Kaliber, “Human Rights, Civil Society and Conflict in Turkey's Kurdish Question”, in Raffaele Marchetti and Nathalie Tocci (eds.), *Civil Society, Conflicts and the Politicisation of Human Rights* (United Nations University Press, 2011), pp. 139-160.

<sup>958</sup> On MED-TV, established in Europe in 1995 as the first-ever Kurdish broadcasting station, see Watts, “Institutionalizing Virtual Kurdistan West”. On MED-TV’s successor ROJ-TV, see Bilgin Ayata, “Turkish Transnational Politics and Turkey’s Changing Kurdish Policy: The Journey of Kurdish Broadcasting from Europe to Turkey”, *Journal of Contemporary European Studies*, vol. 19, no. 4 (2011), pp. 523-533.

<sup>959</sup> Dicle was a member of the Revolutionary Eastern Cultural Association (*Devrimci Doğu Kültür Derneği-DDKD*) in the 1970s and was arrested for his political activities in 1984. On the rise and fall of the DDKD and its predecessor Revolutionary Eastern Cultural Hearths (*Devrimci Doğu Kültür Ocakları-DDKO*) in the 1960s and 1970s, see the section on Kurdish political mobilization in Chapter 3.

<sup>960</sup> HEP is the first pro-Kurdish party established on 7 June 1990 by a group of Turkish and Kurdish deputies who resigned from the Social Democratic People’s Party (*Sosyal Demokrat Halkçı Parti-SHP*) in protest over its decision to expel seven Kurdish parliamentarians for having participated in a Kurdish conference organised in Paris in 1989. For more on HEP and subsequent Kurdish parties, see Chapter 3.

<sup>961</sup> Presiding over the Diyarbakır branch also meant being one of İHD’s two vice-presidents at the national level (together with the head of the Istanbul branch) and representing the other İHD branches in the Kurdish region vis-à-vis the headquarters in Ankara.

<sup>962</sup> Özer was also the former president of the Diyarbakır Bar Association and the former president of the Diyarbakır branch of HEP.

wall and badly damaging the interior. On 5 July, Vedat Aydın was disappeared and subsequently murdered. All of a sudden, working at İHD Diyarbakır gained an entirely new meaning.<sup>963</sup> By 1992, the situation had become “unbearable” for Veznedaroğlu. İHD activists were “constantly collecting bodies from the streets” of Diyarbakır, where unresolved political killings had become “a daily reality.”<sup>964</sup> Even walking on the streets in broad daylight had become fatally dangerous. Lawyers representing Kurdish defendants before the DGMs, first and foremost Veznedaroğlu, were particularly targeted with death threats by “both the State and the Hizbullah<sup>965</sup>.” In one case, Veznedaroğlu escaped extrajudicial execution by Hizbullah due to the diligence of the shopkeepers around the İHD office. “I found out years later that they intended to execute me there that day.”

Forced to choose between his life and work, Veznedaroğlu left Diyarbakır in 1992 and moved to Europe. Veznedaroğlu moved to Germany, while his wife Sevtap Yokuş completed her PhD at Istanbul University. Upon coming back to Turkey in 1993, Veznedaroğlu did not return to Diyarbakır. He settled in Istanbul and continued his legal practice there. After his return to Turkey, Veznedaroğlu was back in Diyarbakır for a hearing in a case where he was charged with PKK membership:

After the judge released me, police officers were not letting me go. I started to be scared because in the past people had been picked up from the DGM and killed. Yes, the President of Diyarbakır Bar Association, other lawyers, my wife were there. But still, I could not help but be worried. We found out that the prosecutor had ordered the police not to let me go even if the judge would release me. They held me there for nearly an hour while they tried to reach the prosecutor. Eventually, with the intervention of colleagues who had come from Ankara out of solidarity, the police released me. My colleagues took me to the airport in the escort of a convoy. I left Diyarbakır right away and returned to Istanbul.

Life would not be any different for his successor Sedat Aslantaş. Upon graduating from Dicle University Law Faculty in 1990, Aslantaş had moved to Ankara for his legal traineeship. When his school mate Veznedaroğlu urged him to move back to Diyarbakır and work with him at the İHD, Aslantaş did not need much persuasion as someone “who came from the socialist tradition” and had a history of political activism.<sup>966</sup> He abruptly moved back and joined the İHD as the Branch Secretary in 1991. The team’s plans to professionalize the branch were soon disrupted by Vedat Aydın’s murder and Veznedaroğlu’s departure. In his early twenties and

---

<sup>963</sup> İHD activists and offices in other parts of the Kurdish region were also attacked in the summer of 1991. For example, a bomb was detonated in the parked car of Sıddık Tan, a board member of the İHD branch in the Batman province, badly wounding Tan, his 10-year-old son and a pedestrian walking by. TİHV, *Örneklerle Türkiye İnsan Hakları Raporu 1991* [Turkey’s Human Rights Report with Examples-1991] (1992), at pp. 30-32.

<sup>964</sup> Interview with Fevzi Veznedaroğlu, İstanbul, 20 January 2016.

<sup>965</sup> Unrelated to its Shia namesake in Lebanon, Turkey’s Hizbullah is an illegal radical Islamist organization adhering to the Sunni denomination of Islam. Founded in 1979 in the Kurdish province of Batman, Hizbullah was implicated in the extrajudicial executions against Kurdish dissidents. For more, see Chapter 5.

<sup>966</sup> In 1984, during his high school years, Aslantaş was arrested for a minor offence, held in solitary confinement for 28 days, prosecuted by a martial court and served a six months-sentence at the Diyarbakır military prison

lacking experience, Aslantaş found himself leading the İHD Diyarbakır and living under the shadow of death.

I had to watch my back while walking on the street. I could not do anything, not even buy a shirt for myself. If I needed anything, I had to ask someone to bring it to the office. We were literally living at gunpoint. We had even forgotten to be scared. Not that we were heroes or anything. We were simply drifting through life.<sup>967</sup>

In one occasion, when he noticed that he was being followed, Aslantaş sought refuge in a nearby prison and did not leave until he was escorted out by a large group of friends and family. Aslantaş had every reason to fear for his life after the extrajudicial killing of two colleagues on 21 February 1993. Lawyer Metin Can and medical doctor Hasan Kaya, the president and board member of the İHD's Elazığ branch, were disappeared after they were seen leaving Can's house with two men. Six days later, their tortured bodies were found under a bridge near a gendarme station in the Tunceli province.<sup>968</sup> What had apparently allured Metin Can to get into the car with strangers was an alleged note he was handed from Aslantaş. It was clear that remaining in Diyarbakır meant death. Aslantaş moved back to Ankara, where he later served an eleven month prison term, as discussed below. Upon his release, Aslantaş remained in Ankara, working for the İHD headquarters and in later years for the Human Rights Foundation of Turkey (*Türkiye İnsan Hakları Vakfı-TİHV*).

Following the brief term of Halit Temli, the next branch president was Mahmut Şakar. When elected to the task, Şakar was a fresh graduate of Dicle University Law Faculty and still pursuing his legal traineeship. Though aspiring to be a professional unionist in the education sector,<sup>969</sup> Şakar felt morally obliged to take over the İHD because “people were being murdered on the streets everyday” and the branch was “emptied” with the detention or departure of its members.<sup>970</sup> In his early twenties and lacking any experience, he “had no idea where to start from” when he was handed the keys of the office. One day, an old Kurdish woman asked for his help in finding her disappeared son, prompting Şakar to “learn by doing.” He formally assumed the presidency when he was qualified as a lawyer in 1994.

Like his predecessors, Şakar pursued a lonely, isolated and vulnerable life, subject to constant police harassment and facing imminent death. It was not only him, but also members of his immediate family who were at risk; one of Şakar's brothers was insulted and beaten by the police while another was left tied to an electricity pole.

I do not remember being out on the streets at all. I had almost forgotten how to walk. My friends and family would drop me to the office and pick me up in the evening. When I went to Ankara for İHD meetings, friends would ask where I would like to go. I would tell them I only wanted to walk, fearlessly walk.

---

<sup>967</sup> Interview with Sedat Aslantaş, Ankara, 1 December 2015.

<sup>968</sup> The murder of Kaya and Can were among the dozens of extrajudicial killing cases which reached the ECtHR. For more on the case and the ECtHR's ruling, see Chapters 5 and 6.

<sup>969</sup> Şakar had a dual degree in education and law. He was also involved in the establishment of Diyarbakır branch of Eğitim-Sen, a left-leaning national teachers' union.

<sup>970</sup> Interview with Mahmut Şakar, Cologne, 13 November 2015.

Şakar was imprisoned during his presidency. Arrested for PKK membership in November 1994 for an İHD publication on the State of Emergency, he was held in pre-trial detention for half a year. Şakar was acquitted from this case “much later” after he left Diyarbakır and faced “tens of other criminal cases” over the years. The criminalization of human rights work was a systematic policy, facilitated by the broad definition of terrorism under the Anti-Terror Law.<sup>971</sup> Virtually every Kurdish advocate who escaped execution or disappearance faced the lesser evil of unlawful detention, torture and/or imprisonment. Those working at or associated with the İHD Diyarbakır and involved in the ECtHR litigation were particularly vulnerable. In 1994, Sevtap Yokuş was arrested on suspicion of PKK membership and held in custody for eleven days. Married to Veznedaroğlu and an academic at Dicle Law Faculty, she was targeted for her key role in the ECtHR litigation (details of which are discussed below). Interrogated by around 15 policemen, she was tortured, threatened with death and rape, and forced to sign documents which stated that the marks on her body were due to a fall.<sup>972</sup>

I was asked how come I complained against the state in Europe, while at the same time I received a salary from it.<sup>973</sup> I was subjected to intensive torture for 15 days, accused of allegations which had nothing to do with me. Under interrogation, they told me that they surveilled me very closely and knew that I had not committed a crime, but all the same deserved torture because of my activities.<sup>974</sup>

The peak of the intimidation of Kurdish defenders occurred in November-December 1993, with the arrest of 25 criminal defence lawyers involved in the DGM cases and ECtHR litigation, “almost ten percent of Diyarbakır Bar Association and close to half of the lawyers practicing before the DGM at the time.”<sup>975</sup> Mesut Beştaş was among them:

The investigation commenced at a time when extrajudicial killings were rampant. Defence lawyers were a bother for the state and needed to be taken care of. If this case was not launched, a few lawyers would have been killed. It was the collective silencing of defence lawyers.<sup>976</sup>

Rounded up from courthouses and their homes and offices, they were held in incommunicado detention in the Diyarbakır provincial gendarmerie command for up to 25 days and subjected to ill treatment and torture.<sup>977</sup> The building was known to belong to Gendarmerie Intelligence and Counter-Terrorism (*Jandarma İstihbarat ve Terörle Mücadele-JİTEM*), whose existence was denied by the government for decades.<sup>978</sup> Neither at the time of their arrest nor during

---

<sup>971</sup> On Anti-Terror Law, see Chapter 3.

<sup>972</sup> ECtHR, *Sevtap Veznedaroğlu v. Turkey*, Application no. 32357/96, Judgment, 11 April 2000, at para. 12.

<sup>973</sup> Academics at public universities have civil servant status in Turkey.

<sup>974</sup> E-mail communication with Sevtap Yokuş, 5 October 2016.

<sup>975</sup> Joseph R. Crowley Program, “Justice on Trial”, at p. 2213.

<sup>976</sup> Interview with Mesut Beştaş, Diyarbakır, 1 April 2015.

<sup>977</sup> For a detailed account of the torture and severe ill-treatment of lawyers Tahir Elçi and Meral Daniş Beştaş, who were among the applicants in this case, see also UN Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32, E/CN.4/1995/34*, 12 January 1995, at pp. 145-146. See also Chapter 5.

<sup>978</sup> On JİTEM, see Chapter 5.

detention were they charged. It was only after their release that the lawyers were charged with terrorism and put on trial. The official grounds for the indictments were the fabrications of a PKK militant-turned-confessor who sought legal protection under the Repentance Law in exchange for information. He alleged that the lawyers were PKK couriers carrying messages, weapons and drugs between various prisons where PKK members were kept, providing free or inexpensive legal representation to PKK members, and making financial donations to the PKK.<sup>979</sup> In reality, the lawyers were targeted for their criminal defence and human rights work. They also faced backlash from their peers. Judges, prosecutors as well as attorneys who did not engage in criminal defence widely perceived lawyers representing defendants in DGM cases as PKK agents who used their profession as a shield for aiding and abetting terrorism.<sup>980</sup> In prosecuting their colleagues on fabricated evidence, DGM prosecutors and judges did not take any steps to investigate their unlawful detention, ill treatment and torture. The case turned some of Diyarbakır's finest attorneys into DGM defendants and ECtHR litigants, resulting in a strong Strasbourg ruling against Turkey.<sup>981</sup>

Upon his release from prison, Şakar was re-elected to lead the İHD Diyarbakır. To devote his time to administration and representation, he handed the ECtHR litigation project over to a young lawyer named Osman Baydemir who had entered the executive board in 1995. In May 1997, Şakar moved to Istanbul and joined HADEP, becoming yet another lawyer-turned-Kurdish politician. He was the last of the first generation Kurdish lawyers who led the Branch during a period of political turbulence. His successor Baydemir would serve for five years, a remarkably long period in relation to his predecessors, at a time of relative stability and peace in the Kurdish region. While human rights violations and the intimidation of the activists continued, the worst of state violence seemed to be over. In 1999, Öcalan was arrested, the PKK unilaterally declared a ceasefire, and the EU declared Turkey a candidate for accession, prompting domestic legal reforms to fulfil the Copenhagen criteria, including the execution of ECtHR judgments. These favourable domestic and international conditions enabled the beginning of a new phase at the İHD Diyarbakır.

#### **4.2.4 The Price of Attestation: Investigating Human Rights under Fire**

In the early 1990s, the İHD delegates in western Turkey were not immune from government intimidation or persecution. Physical presence in the Kurdish region, no matter how brief, was particularly dangerous, even for high profile individuals holding public office. At one time, an İHD delegation consisting of Akın Birdal, Tarik Ziya Ekinci, a 70-year-old prominent former Kurdish parliamentarian,<sup>982</sup> and Zübeyir Aydar, a parliamentarian at the time, was beaten up by

---

<sup>979</sup> ECtHR, *Elci and Others v. Turkey*, Applications no. 23145/93 and 25091/94, Judgment, 13 November 2003, at para. 535. The lawyers were initially charged with PKK membership in violation of Article 168 of the Penal Law. The charges against most of them were later reduced to aiding and abetting the PKK in violation of Article 169. Crowley Program, "Justice on Trial", at p. 2213. On how confessors often fabricated allegations against Kurdish dissidents to benefit from the Repentance Law, see Chapter 5.

<sup>980</sup> Joseph R. Crowley Program, "Justice on Trial", at p. 2160 (quoting the then Chief Prosecutor of Ankara DGM Cevdet Yılmaz).

<sup>981</sup> ECtHR, *Elci and Others* (finding a violation of Article 3 (both procedurally and substantively), 5(1) and 8 of the ECHR).

<sup>982</sup> Ekinci served as a Member of the Parliament in the 1960s as part of the legendary political party Workers Party of Turkey (*Türkiye İşçi Partisi-TİP*). On TİP, see Chapter 3.

soldiers and guards during their visit to a village near Diyarbakır where the security forces had displaced the residents for their refusal to join the village guard force. In another occasion, the military stopped a mission on its way to a village located between Cizre and Şırnak provinces, which had been burned down by the soldiers. The delegates were told they were not allowed to visit the village due to landmines, but the sight of the passengers of an approaching car showed what the authorities were trying to hide. The car was packed with women and children, who had burns on their faces and bodies. Eren Keskin vividly recalls the sight of an old woman who showed through the window her severely burned hands with fingers leaking.

In March 1992, the İHD visited Cizre to participate in the *Newroz* festivities, relying on the assurances by Prime Minister Süleyman Demirel that non-violent celebrations would be permitted. Akın Birdal recalls the sight of the town on the day of *Newroz*:

Women, youth, children had gathered in the town square in front of the hotel. Half an hour later, we saw men carrying long-range rifles stationed on the roofs of the buildings surrounding the square. Their faces were covered. With three colleagues, I ran out and spoke with the district governor, the police chief and the prosecutor, drawing their attention to the dangerous situation and reminding them of the Prime Minister's assurances. They said there was nothing they could do and that 'the orders were given from Ankara.' As we were returning back to the hotel, the men on the roofs started to spray bullets on the crowd. They belonged to either JITEM or the Special Operations.<sup>983</sup> It all happened in front of our eyes. We saw women and children being killed. They shot at us, too. We threw ourselves on the ground. Later, they continued shooting us in our hotel room. In the afternoon, after the shooting stopped, we went to the hospital to identify the dead and the wounded. When we left the hospital, we were sprayed with bullets by the same men. The prosecutor escorted us out of the area. That night, at the hotel, we were under heavy shelling once again. I called the İHD's Deputy President in Ankara and had him listen to the sounds of bullets, asking him to help. He said he would try to reach the Minister of the Interior. One hour later, I called him again. I was lying on the floor in the dark, unable to stand for fear of being shot by bullets raining on us. The next morning, we hung white sheet-turned-flags on the antennas of our vehicles and left Cizre. When we arrived in Nusaybin, our cars were stopped. When we told the security officers that we were human rights advocates, we were insulted, kicked and beaten. We were only allowed to leave when I told them that we had an official permit from the Minister of the Interior.

In what has come to be known as the 'Lice events', the Turkish military conducted a brutal operation in this town on 22-23 October 1993, killing 30 and wounding hundreds of civilians, burning down hundreds of houses and businesses. What had prompted the operation was the killing of Brigadier General Bahtiyar Aydın, the Regional Commander of the Gendarmerie in Diyarbakır, which the military attributed to the PKK without evidence. After Lice was burnt down, the military blocked the entrance of the town and prevented Members of the Parliament from the opposition CHP, including its Chairman, from entering Lice to conduct fact-finding. An İHD delegation led by vice-presidents Eren Keskin and Mahmut Şakar had also arrived and,

---

<sup>983</sup> On the Office of Special Operations, see Chapter 5.

to their surprise, was given access. Lice was reputable for its refusal to bow down to the military's pressure to join the village guards. When the delegates entered the town, they found out that the male residents were being tortured inside the military station while women were anxiously waiting outside. A lieutenant brought the detainees outside to let the lawyers verify his claim that they had volunteered to join the guard force. He soon grew impatient with the İHD delegation asking villagers questions and taking photos of the burnt houses. He told the delegation to line up, made Şakar, Keskin and a third lawyer step forward and ordered his soldiers to shoot. "We thought we were dead" recalls Keskin.

The İHD was under constant police surveillance and its members were routinely charged with terrorism.<sup>984</sup> Sedat Aslantaş was convicted due to a speech he made at the İHD's congress in 1992 about the state's resort to "new special war practices against the people of Kurdistan." The DGM found references to "Kurdistan" and "Kurds" to violate Article 8 of the Anti-Terror Law,<sup>985</sup> and named Aslantaş a "grief-stricken individual who has not benefitted from the eternal flame of Turkishness."<sup>986</sup> Though the minimum sentence for this offence was one year, the judge sentenced Aslantaş to three years-imprisonment and, against established practice, ordered his immediate arrest without waiting for the outcome of his appeal. The EComHR found Aslantaş' conviction to be in violation of Article 10.<sup>987</sup> Eren Keskin was also convicted under Article 8 to a prison sentence of two and a half years for her reference to "Kurdistan" in an op-ed published in *Özgür Gündem*. The op-ed was based on the speech Keskin was planning to make at the Norwegian Parliament but could not deliver due to a travel ban imposed on her by the Turkish authorities. Pursuant to an amendment in Anti-Terror Law, she was released from prison after having served six months of her sentence.

### 4.3 Kurdish Legal Mobilization in Strasbourg: Setting Precedents for Europe

Turkey's recognition of the right of individual petition to the EComHR, application for EU membership and declaration of a state of emergency in the Kurdish region, respectively in January, April and July of 1987 marked the beginning of an era of "cohabitation" of transitions and emergency.<sup>988</sup> The government deemed its recognition of the ECtHR's oversight as a strategic move to enhance Turkey's prospects for EU accession.<sup>989</sup> Much to its disillusionment,

---

<sup>984</sup> For a sample of the judicial harassment of the İHD and its members in the year 1997 alone, see US Department of State, *Turkey Country Report on Human Rights Practices for 1997* (1998).

<sup>985</sup> Article 8 banned "written and oral propaganda ... aimed at undermining the territorial integrity of the state of the Republic of Turkey with its land and nation."

<sup>986</sup> Interview with Sedat Aslantaş (quoting the Court judgment in his personal file).

<sup>987</sup> EComHR, *Aslantas v. Turkey*, Application no. 25658/94, Report, 1 March 1999. The conviction was subsequently erased upon pressure exerted on the Turkish government by the CoM.

<sup>988</sup> Fionnuala Ní Aoláin, "Transitional Emergency Jurisprudence: Derogation and Transition", in Antoine Buyse and Michael Hamilton (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge University Press, 2011), pp. 24-51, at p. 25.

<sup>989</sup> The European Parliament had made this link clear in 1985, setting Turkey's recognition of the right to individual petition as a condition for the normalisation of relations. European Parliament, *Resolution on the Human Rights Situation in Turkey: 23 October 1985*, *Official Journal of the European Communities*, no. C 343/61, 31 December 1985.

Turkey would be declared an EU candidate only in 1999, leaving it a cynical recipient of the ECtHR oversight during the period in between.

Soon after Turkey recognized the ECtHR's compulsory jurisdiction in 1990, Prime Minister Hikmet Çetin "was boasting that there were obviously no human rights violations in Turkey, because no one was petitioning."<sup>990</sup> The absence of applications to Strasbourg had misled the government into thinking that its fears of ECtHR oversight were ungrounded and encouraged it to recklessly commit gross human rights abuses in the Kurdish region. Little did Çetin know that his remarks were partially decisive in the decision of a small group of Kurdish lawyers to challenge the Turkish government in Strasbourg.<sup>991</sup>

#### 4.3.1 Early Beginnings, Converging Paths: Kurdish Advocates Meet the ECtHR

Chris Hilson has drawn attention to the "crucial need to distinguish between movements as a whole and particular groups within the various movements", arguing that while the strategy choices of conventional groups may be influenced by available political and legal opportunities, others who pursue identity politics and hold radical ideas may never resort to litigation "whatever the opportunities."<sup>992</sup> Based on the İHD experience, one can take this argument further and suggest that where a movement contains heterogeneous groups divided over identity politics, disagreements on strategy choices may exist *within* the group.

The İHD was what Ruud Koopmans has named a "countercultural movement"<sup>993</sup> whose members largely held radical political views, perceiving both the Turkish state and the European institutions as antithetical to their socialist ideology. Therefore, recalls Eren Keskin, the ECtHR did not initially capture the interest and imagination of the İHD lawyers in western Turkey "due to an anti-imperialist attitude originating from leftist activism." In contrast, Kurdish activists within the organization immediately embraced the ECtHR at the moment the opportunity arose. While many, if not most, Kurdish İHD members were also inspired by socialism, what distinguished them was their ethnic identity. By virtue of being Kurdish, living in the Kurdish region and facing death on a daily basis, they had no choice but embrace the ECtHR as the single available venue able to bring an end to state violence. For Kurdish lawyers, petitioning Strasbourg was not a matter of 'strategy choice', but an existential act to save lives – both their clients' and their own.

The pioneers of legal mobilization before the ECtHR in Turkey were Fevzi Veznedaroğlu and his wife Sevtap Yokuş.<sup>994</sup> The latter started her PhD in law at Istanbul University in 1990, the

---

<sup>990</sup> Michael D. Goldhaber, *A People's History of the European Court of Human Rights* (Rutgers University Press, 2009), at p. 123.

<sup>991</sup> Interview with Sedat Aslantaş.

<sup>992</sup> Chris Hilson, "New Social Movements: The Role of Legal Opportunity", *Journal of European Public Policy*, vol. 9, no. 2 (2002), pp. 238-255, at pp. 250-251.

<sup>993</sup> Ruud Koopmans, *Democracy from Below: New Social Movements and the Political System in West Germany* (Westview Press, 1995).

<sup>994</sup> A note of caution is due here. As mentioned earlier, the first individual complaint concerning state violence in the Kurdish region was filed by a 'lone lawyer'. Hasip Kaplan, who had a private practice in his hometown of Cizre, a small town in the Kurdish region, petitioned the ECtHR regarding an incident which shook the public opinion in Turkey at the time. In January 1989, during a military operation in the Yeşilyurt village of Cizre, the security forces gathered the residents in the village square, forced most men to lay down on the ground, beat

year when Turkey accepted the ECtHR's compulsory jurisdiction. Motivated by the desire to "do something" against the human rights abuses in the Kurdish region, Yokuş decided to write her thesis on the ECtHR's individual petition mechanism under the supervision of Prof. Semih Gemalmaz.<sup>995</sup> Meanwhile, at the İHD, Veznedaroğlu was feeling "extremely helpless" amidst the Turkish courts' silence against state violence and searching for ways to obtain relief for victims. Her proximity to Veznedaroğlu enabled Yokuş to apply her newly gained legal knowledge on the ECtHR system. Despite constant police harassment, the two began to "amateurishly" gather evidence, prepare legal complaints and file cases with the EComHR.<sup>996</sup> In 1991, Sedat Aslantaş joined the team.

As Veznedaroğlu and his team were engaged in their nascent ECtHR litigation work, a Kurdish political refugee in the UK was contemplating on how to raise awareness about the plight of his brethren. Like most asylum seekers from Turkey at the time, Kerim Yıldız was eager to continue his political activities in the UK though he did not speak a word of English when he arrived in 1985. He joined the Turkish Solidarity Campaign established by political refugees belonging to various leftist factions in Turkey. Upon discovering the lack of familiarity with the Kurds in the UK, Yıldız focused his activism on the Kurdish question. Having concluded that political protests "would not bring anything", he decided to do human rights work.<sup>997</sup> In a remarkable story of self-advancement, within a matter of a few years, Yıldız learned English, studied law and pursued a master's in human rights at the University of Essex.

During his studies, Yıldız realized that the Kurds had not used any of the international human rights mechanisms. This void, and the absence of an institution to represent the Kurds in the UK, led Yıldız and a few others to form a group named the "Kurdish Intellectuals". They started off with sending to the Kurdish region trial observation and fact-finding missions made up of high profile Brits. But it was the graduate courses he took with Professors Kevin Boyle and Françoise Hampson at the University of Essex that shaped Yıldız's future work on behalf of the Kurds. Boyle<sup>998</sup> and Hampson<sup>999</sup> were internationally renowned for their work on human rights and humanitarian law. Earlier in his career, Boyle had been involved in the civil rights movement in his native Northern Ireland and litigated before the ECtHR on behalf of the

---

them up and forced several of them to eat human excrement. Kaplan applied to the ECtHR on 10 May 1989. The case resulted in a friendly settlement approved by the EComHR in October 1993. EComHR, *Gürdoğan, Müştak, Müştak and Müştak v. Turkey*. For Kaplan's account of the case and his litigation in Strasbourg, see Hasip Kaplan, *Bir Onur Kavgası: Cizre'den Strasbourg'a Yeşilyurt Dışı Yedirme Davası* [A Struggle for Dignity: The Yeşilyurt Excrement Case from Cizre to Strasbourg] (Belge Yayınları, 1996).

<sup>995</sup> Interview with Sevtap Yokuş, skype, 21 October 2016.

<sup>996</sup> Interview with Fevzi Veznedaroğlu.

<sup>997</sup> Interview with Kerim Yıldız, London, 23 June 2016.

<sup>998</sup> Among others, Boyle served as the founder of the Irish Centre for Human Rights, the founding director of Article 19, the director of the Human Rights Centre at Essex University, the Chair of Minority Rights Group International, law professor at University College Galway and University of Essex. He participated in fact-finding missions for Amnesty International, initiated a high-profile international campaign in defense of free speech for Salman Rushdie and worked as Senior Adviser for Mary Robinson, the UN High Commissioner for Human Rights. He died of cancer at the age of 67 in December 2010. Nigel Rodley, "Kevin Boyle Obituary: Internationally Respected Human rights Lawyer and Academic", *The Guardian*, 2 January 2011.

<sup>999</sup> Hampson served as an independent expert member of the UN Sub-Commission on the Promotion and Protection of Human Rights and a consultant to the International Committee of the Red Cross, contributing to its study on Customary International Humanitarian Law. For Hampson's biography, see <https://www.essex.ac.uk/law/staff/profile.aspx?ID=823>.

Northern Irish victims of gross human rights abuses.<sup>1000</sup> Boyle and Hampson taught their students about the ECHR system, inspiring Yıldız to contemplate filing petitions on behalf of the Kurds.

The Kurdish Human Rights Project (KHRP) was born out of Yıldız's encounters with Boyle and Hampson. Two decades and a great deal of personal and professional fallout later, there are different accounts on the ownership of the organization. According to Bill Bowring, a British attorney who was involved in the establishment of the KHRP, this was Hampson's and Boyle's project; "they established the KHRP and initially supported Yıldız as the director."<sup>1001</sup> Yıldız says that the decision to establish an organization to litigate for the Kurds at the ECtHR was made over dinner by himself and Boyle during a work trip to Strasbourg.<sup>1002</sup> Regardless of who founded the KHRP, what made it possible and successful was the coming together of a Kurdish graduate student and two British law professors, each of whom made unique and irreplaceable contributions. While lacking the professional qualifications and skills to file petitions with the ECtHR, Yıldız was a driven Kurd willing to devote his full time and energy to the KHRP and able to form transnational links with the Kurdish lawyers in Turkey. Boyle and Hampson complemented Yıldız with their expertise on human rights law and the ECtHR's individual petition mechanism. With his ethnic roots and exposure to the conflict in Northern Ireland, combined with his litigation experience in Strasbourg, Boyle in particular was the ideal international expert to help the Kurds.<sup>1003</sup>

From the outset, it was clear to the KHRP team that they needed a local partner to bring cases on behalf of the Kurds. Yıldız's inquiries among the diaspora pointed at Fevzi Veznedaroğlu as the undisputed choice. At a time when Yıldız was not allowed to enter Turkey, information technology was limited, and Kurdish lawyers were under police surveillance, establishing contacts was itself a challenge. After a failed attempt over the phone, Yıldız managed to meet

---

<sup>1000</sup> Among others, Boyle co-litigated the seminal case of *Donnelly and Others*, where the EComHR applied to individual applications the "administrative practice" exception to the exhaustion of domestic remedies rule which it had developed in inter-state cases. EComHR, *Donnelly and Six Others v. United Kingdom*, Application no. 5577-5583/72, Second Decision, 15 December 1975. Kevin Boyle and Hurst Hannum, "Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice: The Donnelly Case", *The American Journal of International Law*, vol. 68, no. 3 (1974), pp. 440-453; Hurst Hannum and Kevin Boyle, "The Donnelly Case, Administrative Practice and Domestic Remedies under the European Convention: One Step Forward and Two Steps Back", *The American Journal of International Law*, vol. 71, no. 2 (1977), pp. 316-321.

<sup>1001</sup> Interviews with Bill Bowring, London, 27 March 2015; New Orleans, 4 June 2016.

<sup>1002</sup> Originally incorporated under the name of Kurdistan Human Rights Project, the KHRP acquired its new name in 1996. Carla Buckley, *Turkey and the European Convention on Human Rights: A Report on the Litigation Programme of the Kurdish Human Rights Project* (KHRP, 2000), at p. 2. While initially focusing on the Kurdish region in Turkey, the KHRP's mandate was soon after expanded to cover the remaining parts of Kurdistan in Iran, Iraq, Syria and the countries of the former Soviet Union, in particular Armenia and Azerbaijan. As in its work on Turkey, the KHRP simultaneously engaged in ECtHR litigation, training of human rights lawyers, trial observations and fact-finding missions in these countries. They filed the first cases on behalf of the Kurds in Azerbaijan and in Armenia. ECtHR, *Sargsyan v. Azerbaijan*, Application no. 40167/06, Judgment, 16 June 2015; *Chiragov and Others v. Armenia*, Application no. 13216/05, Judgment, 16 June 2015. For more on the KHRP's work and mandate, see <http://www.khrp.org/about-khrp/what-we-do.html>.

<sup>1003</sup> Boyle had written expansively on human rights abuses arising from the emergency regime in Northern Ireland and the inability of the civil rights campaign to seek and achieve legal redress in domestic courts. Kevin Boyle, "Human Rights and Political Resolution in Northern Ireland", *The Yale Journal of World Public Order*, vol. 9 (1982), pp. 156-177; Kevin Boyle, Tom Hadden and Paddy Hillyard, *Law and State: The Case of Northern Ireland* (Martin Robertson, 1975).

Veznedaroğlu during the latter's visit to Europe in 1992.<sup>1004</sup> They agreed to collaborate to systematically litigate the Kurdish cases in Strasbourg. Meanwhile, serendipitously, the paths of their wives had also crossed when Yıldız's wife Bridget Hughes, a medical doctor, visited Diyarbakır on a fact-finding mission with Doctors without Borders (*Médecins Sans Frontières*) and met Sevtap Yokuş. Soon after, upon Hughes' invitation, Yokuş went to London and met with Kevin Boyle, who told her about Yıldız's nascent work on Turkey. Thus, personal and professional relations between the KHRP and the İHD were built on multiple tracks.<sup>1005</sup> The "turning point" was Yokuş's 1992 visit to London, where she and Yıldız spent days designing the institutional and operational structure of the KHRP-İHD network on the one hand and setting up a small office space for the project on the other.<sup>1006</sup> They also met with Boyle and Hampson to discuss the division of labour between the İHD, University of Essex and the KHRP.

When the KHRP got involved, the İHD Diyarbakır had already filed a number of ECtHR petitions concerning gross human rights abuses. The partnership continued during Sedat Aslantaş' term and was expanded under Mahmut Şakar. However, this was not an institutional partnership between an international organization and a domestic NGO. While the KHRP proposed the İHD headquarters an institutional partnership, the national leadership declined on the ground that the İHD was precluded by its statute and Turkish laws from providing direct legal services.<sup>1007</sup> At the same time, the national leadership did not preclude its members in Diyarbakır from offering legal representation in their individual capacity.<sup>1008</sup> Thus, this was a rather hybrid and unique transnational network. While Kurdish victims of state violence filed their complaints with the İHD Diyarbakır, their litigation in Strasbourg was made possible by the individual efforts of lawyers working under the rubric of the organization.

#### 4.3.2 London-Diyarbakır: A Novel Model of Transnational Legal Mobilization

The transnational legal network faced structural barriers from the outset. First, there was the communication problem. Kurdish lawyers did not speak English and lacked expertise on the ECtHR. Much of their communication with British experts took place through Kerim Yıldız, a source of frustration for those who did not feel in full command and comprehension of the litigation process. While Kurdish lawyers felt a great deal of gratitude for Kevin Boyle's and Françoise Hampson's contributions to their professional development and to the Kurds' quest for justice, there was also a degree of uneasiness over their role as "kind of a secretariat" collecting documents rather than as lawyers on equal terms with their British counterparts.<sup>1009</sup> The British lawyers faced challenges of their own. While they had substantive expertise on the ECtHR, they lacked knowledge about domestic law in Turkey, did not speak Turkish and lacked access to victims/potential applicants without an intermediary actor.

---

<sup>1004</sup> Veznedaroğlu recalls having met in 1992 in London, where he gave a public talk. Yıldız recalls having gone to Frankfurt where Veznedaroğlu gave a talk.

<sup>1005</sup> Interview with Sevtap Yokuş.

<sup>1006</sup> Ibid.

<sup>1007</sup> Present at the meeting were Yıldız, Boyle, Hampson, Öndül, Birdal and the president of İHD Diyarbakır, who at the time was Şakar or Aslantaş. Interview with Hüsnü Öndül.

<sup>1008</sup> The Diyarbakır members recall with fondness the solidarity and support they received from the headquarters under Birdal's leadership.

<sup>1009</sup> Interview with Sedat Aslantaş.

There was a broader communication barrier: information technology had not yet developed and the only means of information sharing was through mail, fax or telephone. The latter was costly and at any rate not safe since the İHD's phones were wiretapped. A more significant barrier was political. Judicial harassment, police repression, physical attacks and death threats disrupted staff continuity at the İHD Diyarbakır. The branch changed leadership multiple times within a few years, without being able to ensure transition between outgoing and incoming cadres. As the authorities became aware of the cases piling up in Strasbourg, the İHD lawyers faced increasing police raids of their offices and confiscation of their files.

These structural barriers rendered the brokerage of Kerim Yıldız critical for the survival of the project. According to Sevtap Yokuş, at least during her involvement in the KHRP-İHD network until 1994, Yıldız was doing the actual, day-to-day work in the UK; "he was in the kitchen, doing the main work". In hindsight, Mahmut Şakar views Yıldız as the "bridge" between British and Kurdish lawyers. For Yıldız himself, he was hardly the third party bridging the local and the international, but the extension of the local in the diaspora. He was, metaphorically speaking, 'Diyarbakır in exile':

At the time, we – as Kurds – did not have the knowledge or skills we needed to be able to carry the weight of these cases. We learned by doing. But, we were motivated by our strong belief that there was no justice for us domestically in Turkey and that there was no mechanism or source other than the ECHR that could bring us justice.

As much as he was a Kurd, Yıldız was in exile, far from the victims he wanted to help. He was also not a lawyer, neither did he have any ties to Diyarbakır. He, too, needed an intermediary to gain access to potential applicants. That actor, in turn, was the İHD Diyarbakır. Set up by the families of prisoners, many of whom were Kurdish, the İHD was a grassroots organization, which the Kurds, particularly in the state of emergency region, felt they owned.

The KHRP also faced internal problems. Having started without any financial resources, the organization grew big and fast due to its pioneering work as well as the scale and gravity of state violence in Turkey. Yıldız created a large network of predominantly British lawyers,<sup>1010</sup> employed in-house legal experts and launched institutional cooperation with the Bar Human Rights Committee of England and Wales.<sup>1011</sup> However, as early as 1993, the harmonious working relationship between Yıldız, Boyle and Hampson started to disintegrate. According to Yıldız, what brought the KHRP "to a point of collapse" was a rift between on the one hand Boyle and Hampson, "who had their own institution, and more resources, knowledge, experience, and money", and the larger team who had little of everything, on the other. Essentially, this was a "conflict of interest" over ownership.<sup>1012</sup> In the end, in 1996, the KHRP parted ways with Boyle and Hampson, who continued their ECtHR litigation on behalf of the

---

<sup>1010</sup> For the full list of lawyers in England and in Norway that the KHRP worked with, see Buckley, *Turkey and the European Convention on Human Rights*, at p. 2.

<sup>1011</sup> Over time, the KHRP widened its institutional partnerships in Turkey, the UK and the rest of Europe, collaborating with, among others, the Law Society of England and Wales, the Human Rights Committee of the Norwegian Bar Association, and the Foundation for Society and Legal Studies (*Toplumsal Hukuk Araştırmaları Vakfı -TOHAV*) and MAZLUMDER in Turkey.

<sup>1012</sup> For Yıldız, this was "an equally beneficial partnership" for everyone, where "the Kurds sat in the driver's seat" and the British lawyers offered their professional services.

Kurds at the Human Rights Centre at University of Essex, which Boyle had been directing since 1990. The rest of the British lawyers stayed with the KHRP and continued to work with Yıldız.<sup>1013</sup> Thus, the network's scarce financial, human and intellectual resources were split very early on.

In light of these barriers and challenges, how did this transnational legal network operate? The İHD lawyers did all the work on the ground; conducting fact-finding, gathering testimonies, collecting evidence, corresponding with the Turkish authorities, filing cases in domestic courts and preparing draft case files. The KHRP processed these files, translating relevant ones into English, identifying the missing information and communicating this to the İHD for further document collection. Initially, there was a long back and forth until the complaint was finalized. Soon after, with the intensification of police raids on their offices, the İHD lawyers started to send every single document they had produced directly to London to avoid their confiscation. The KHRP effectively turned into a Kurdish archive in exile.

McCann defines legal mobilization by marginalized groups as a process where “they often gain sophistication and confidence in their capacity to mobilize legal conventions to name wrongs, to direct blame, to frame demands, and to advance their cause.”<sup>1014</sup> The KHRP-İHD network, on both ends, was cognizant of its limited capacity in framing their legal claims and demands. They were aware of the challenge of establishing the culpability of a denialist state before a supranational tribunal with high evidentiary standards. Kevin Boyle was particularly concerned about the requirement of the exhaustion of domestic remedies in a country whose legal system he did not know. Here, the academic expertise of Sevtap Yokuş proved invaluable. Based on the knowledge she acquired on the ECtHR system during her PhD studies and her familiarity with the domestic legal system, Yokuş prepared a memo laying out the inadequacy of domestic remedies, which formed the basis of the argument that the network made before the ECtHR.

There still remained the challenge of overcoming the ECtHR's “beyond a reasonable doubt” evidentiary threshold. To overcome this challenge, the KHRP formed an in-house research team and an external network of medical, forensic and ballistic experts who assessed the evidence submitted by the government or forwarded by the İHD in accordance with international scientific standards. The KHRP relied on these expert reports in contesting the government's counter-claims before the ECtHR. “We did not want to give the Turkish state any excuse in refuting the applicants' claims” says Yıldız. Where the ECtHR's evidentiary rules were not clear, the KHRP team convinced the Court to be flexible particularly in regard of the exceptional domestic circumstances. For example, in light of the hardship for illiterate and impoverished civilians in remote villages to obtain official documents from the notaries, the Court accepted the applicants' handwritten or fingerprinted notes as powers of attorney.

---

<sup>1013</sup> The ins and outs of the fallout within the KHRP are nearly impossible to establish due to the passage of time, the passing away of Boyle and the emotional weight of the conflict for everyone involved. Neither are they relevant for this research.

<sup>1014</sup> McCann, “Law and Social Movements”, at p. 26.

In this learning process, the KHRP team also reached out to other transnational networks to enhance their legal mobilization capacity.<sup>1015</sup> To strengthen their chances of success in Strasbourg, the KHRP team pursued a multifaceted advocacy strategy. It lodged urgent action appeals and submissions with the UN<sup>1016</sup> and the OSCE to put pressure on the Turkish government. To generate credible data on Turkey's legal system, the KHRP sent teams of trial observers and fact-finding missions to investigate fair trial procedures in the DGMs and state practices in the State of Emergency region. The KHRP deemed these findings critical to demonstrate to the ECtHR that legal remedies effectively did not exist in the State of Emergency region and to lobby the EU to put pressure on the Turkish government via the accession process.

This was also a learning process for the İHD lawyers, who were mainly driven by the very act of filing cases rather than the prospect of winning them. In collecting witness testimonies, photographs, medical reports, autopsy results and ballistic reports to document the state's atrocities against the Kurds, they perceived themselves more as chroniclers of history rather than as legal practitioners. For the Kurdish activists such as Mahmut Şakar, the ECtHR was first and foremost "a site of memory."<sup>1017</sup> In reality, they were before a court of law with strict admissibility rules and rigid evidentiary standards. The pressure to meet these standards without proper legal training or expertise was high. Şakar recalls how he "would put [him]self in the shoes of the Court and try to imagine the kind of information it would need", asking illiterate clients repeated questions to help them substantiate their claims. On occasions, the Kurdish advocates' zeal in helping their clients frame their legal claims was disapprovingly noted by the Commission: "There appears a tendency to embroider allegations or, in seeking to draw out applicants' complaints, insufficient care appears to be taken to avoid suggesting to applicants possible details, which are then adopted by applicants or taken in the wrong context."<sup>1018</sup> Therefore, the EComHR treated the statements taken by the İHD "with caution", concluding that they had "evidentiary value" in so far as they corroborated the testimony it received from the applicants during the hearings.<sup>1019</sup> This cautionary attitude was blown out of proportion by a Turkish legal scholar who claimed that "the Commission clearly criticised the manipulation of the [İHD]."<sup>1020</sup>

#### **4.3.3 Paying the Price without Getting Full Credit**

Every actor involved in the KHRP-İHD partnership agrees that it was the Kurdish lawyers who carried out the most indispensable work for the litigation at the expense of risking their lives.

---

<sup>1015</sup> For example, Center for Justice and International Law (CEJIL), an NGO representing victims of human rights abuses before the Inter-American system, prepared written comments on enforced disappearance cases for submission to the ECtHR in the Kurdish cases. For the text of CEJIL's comments, see KHRP, *Timurtaş v. Turkey & Ertak v. Turkey: State Responsibility in 'Disappearances'* (2001).

<sup>1016</sup> Specifically, the UN Working Group on Enforced or Involuntary Disappearances, the UN Committee against Torture and the UN Secretary General's Special Rapporteur on Torture.

<sup>1017</sup> Interview with Mahmut Şakar.

<sup>1018</sup> EComHR, *Koçeri Kurt v. Turkey*, Application no. 14276/94, Report, 5 December 1996, at para. 170 (citing also EComHR, *Mentes v. Turkey*, Application no. 23186/93, Report, 7 March 1996, at para 145).

<sup>1019</sup> Ibid.

<sup>1020</sup> Kerem Altıparmak, "Turkish Cases Relating to Terrorism before the European Court of Human Rights: Procedural Issues", *Journal of Civil Liberties*, vol. 5 (2000), pp. 30-48, at p. 40.

Without their “inexplicably great and yet invisible contribution”, acknowledges Yıldız, the KHRP’s work “would have been impossible.”

Invisible they were, indeed. The ECtHR rulings and EComHR reports in cases filed by the KHRP-İHD partnership referred to Kurdish lawyers among the applicants’ representatives only where they participated in oral and fact-finding hearings.<sup>1021</sup> In most cases, the rulings named as the applicants’ legal representatives the KHRP-backed British lawyers who submitted and argued the cases, leading to Cichowski’s erroneous conclusion that the NGOs in Turkey “played a lesser direct role in the litigation.”<sup>1022</sup> This contrasted with the reality where the vast majority of the applicants had never met the British attorneys<sup>1023</sup> and considered the Kurdish lawyers in İHD Diyarbakır as their attorneys. Neither did it reflect the collective work carried out by the British and Kurdish lawyers.<sup>1024</sup>

While not receiving the full credit for their work, the Kurdish lawyers, and in some cases their clients, bore the entire personal risk. As in cases of state violence in Central America,<sup>1025</sup> Kurdish lawyers, victims and victims’ families faced backlash by way of death threats, imprisonment, torture and even death. Yıldız recalls how his partners in Diyarbakır faced mounting pressure once their partnership came to the attention of the authorities.

I still get goose bumps when I think of how our friends there never took a step back and how they faced up to everything. They were arrested, tortured and yet never gave up on their collaboration with the KHRP. They were shown [by their interrogators] the transcripts of our wiretapped phone conversations in torture chambers.

Here, Yıldız was referring to Nebahat Akkoç, a union activist and teacher who petitioned the ECtHR in November 1993 for the extrajudicial execution of her husband by members of the Turkish security forces. Akkoç was detained on three separate occasions and subjected to torture, including sexual abuse. Her interrogators asked Akkoç about her ECtHR petition and made her listen to her wiretapped telephone conversations with Kerim Yıldız. The ECtHR

---

<sup>1021</sup> For example, Osman Baydemir’s role is acknowledged in the disappearance case of *Kurt v. Turkey*, though he is referred to as counsel in the Commission report while an “adviser” in the Court judgment. EComHR, *Koçeri Kurt*; ECtHR, *Kurt v. Turkey*, Application no. 15/1997/799/1002, Judgment, 25 May 1998.

<sup>1022</sup> Cichowski, “Civil Society and the European Court of Human Rights”, at p. 91.

<sup>1023</sup> Exceptions were cases involving fact-finding hearings in Turkey, where applicants and their witnesses were invited to testify before a three-judge ECtHR panel, as well as cases where the Kurdish lawyers working with the KHRP and British lawyers were themselves the applicants.

<sup>1024</sup> Although her field work did not extend to the Kurdish lawyers in Turkey, based on her KHRP interlocutors, Hodson briefly refers to the fact that the İHD lawyers did most of the fact-finding and evidence gathering. She also notes that the British lawyers and the KHRP did not “appear to have had frequent contacts with applicants.” Hodson, *NGOs and Litigation*, at p. 75.

<sup>1025</sup> In the most dramatic instance, the president of Guatemala’s Constitutional Court was assassinated in 1994 as the Court was considering the case of Myrna Mack, an anthropologist assassinated by a military death squad while researching the displacement of indigenous communities. Earlier, an investigator who had publicly linked Mack’s killing to Guatemalan security forces was assassinated. Later, several judges, prosecutors and witnesses involved in the case received death threats, leading many to leave the country. Jeffrey Davis and Edward H. Warner, “Reaching Beyond the State: Judicial Independence, the Inter-American Court of Human Rights and Accountability in Guatemala”, *Journal of Human Rights*, vol. 6, no. 2 (2007), pp. 233-255.

found Turkey to have violated, *inter alia*, Article 25 of the Convention for having unduly interfered with the applicant's right of individual petition.<sup>1026</sup>

The lawyers were not spared of retaliation. Mahmut Şakar, for example, faced prosecution for the ECtHR petition he filed on behalf of the 66-year-old Koçeri Kurt, an illiterate Kurdish woman whose son was disappeared by the authorities. In November 1993, Kurt's son Üzeyir was detained by a group of soldiers and village guards during a military operation and was never seen again. Having lost another son in torture under detention two years earlier, Kurt feared for Üzeyir's life and desperately sought help from the authorities. She was told by the public prosecutor, the district gendarme command and the DGM that her son was never detained but instead kidnapped by the PKK. Helpless, she turned to the İHD Diyarbakır. Şakar forwarded Kurt's testimony to the KHRP, which petitioned the ECtHR on 11 May 1994. In November, Koçeri Kurt was called in by the Diyarbakır DGM Chief Prosecutor and questioned about her statement to the İHD and her application to the ECtHR. In December, she was made to sign a statement – which she could neither write nor read – that her petitions were written by the PKK and used for terrorist propaganda. In January 1995, she was taken to a notary in the company of a soldier where she signed a statement to the effect that she withdrew her earlier statement. In August, she was again accompanied to the notary to sign a statement that she withdrew her ECtHR petition.<sup>1027</sup> Soon after, Şakar was called in by the DGM prosecutor, asked about his ECtHR petition on behalf of Kurt and was charged with PKK membership.<sup>1028</sup> Şakar immediately informed the KHRP, upon which the legal team added to Kurt's ECtHR petition an Article 25 claim,<sup>1029</sup> alleging that the intimidation of the applicant and her lawyer interfered with her right of petition. The ECtHR agreed, ruling that the authorities' "indirect and improper pressure" on the applicant to make statements in respect of her application to Strasbourg and their attempt to institute criminal proceedings against her lawyer constituted an interference with the free exercise of her right of individual petition.<sup>1030</sup>

*Kurt* was not the first case where Turkey was found to have violated Article 25. The ECtHR addressed the issue in its first judgment on the Kurdish question, *Akdivar v. Turkey* issued on 16 September 1996.<sup>1031</sup> The Grand Chamber held that the effective exercise of the right of individual petition required that "applicants or potential applicants are able to communicate freely with the [ECHR bodies] without being subjected to any form of pressure from the authorities to withdraw or modify their complaints."<sup>1032</sup> In *Kurt*, the Court elaborated that "any form of pressure" entailed "not only direct coercion and flagrant acts of intimidation ... but also other improper indirect acts or contacts designed to dissuade or discourage [the applicants or potential applicants] from pursuing a Convention remedy."<sup>1033</sup> The ECtHR took into account "the vulnerable position of the applicant villagers and the reality that in South-East Turkey

---

<sup>1026</sup> ECtHR, *Akkoç v. Turkey*, Applications nos. 22947/93 and 22948/93, Judgment, 10 October 2000.

<sup>1027</sup> Facts as presented to the Commission by the applicant. EComHR, *Koçeri Kurt*, at paras. 32-42.

<sup>1028</sup> The government appears to have subsequently dropped the charges against Şakar. *Ibid*, at paras. 252-254.

<sup>1029</sup> Former Article 25 and current Article 34 of the Convention imposes on the member states the obligation "not to hinder in any way the effective exercise" of the individuals' right to petition the ECtHR.

<sup>1030</sup> ECtHR, *Kurt*.

<sup>1031</sup> ECtHR, *Akdivar and Others v. Turkey*, GC, Application no. 21893/93, Judgment, 16 September 1996.

<sup>1032</sup> *Ibid*, at para. 105.

<sup>1033</sup> ECtHR, *Kurt*, at para. 160.

complaints against the authorities might well give rise to a legitimate fear of reprisals”,<sup>1034</sup> finding the authorities’ questioning of applicants about their petitions to “amount to a form of illicit and unacceptable pressure on the applicants to withdraw their application.”<sup>1035</sup>

In *Aksoy*, the most dramatic instance of government intimidation of an ECtHR applicant, the Court drew the boundaries of its contextual reading in Article 25 claims. Zeki Aksoy, a metal worker from Kızıltepe, Mardin, petitioned the ECtHR in 1993 for the torture he had suffered in police custody.<sup>1036</sup> Aksoy’s initial testimony was taken by Sevtap Yokuş at Dicle University Medical Faculty, where he was receiving intensive physical therapy on his partially paralysed legs and arms.<sup>1037</sup> Soon after the ECtHR notified the Turkish authorities about the case, Aksoy started to receive anonymous death threats telling him to withdraw his petition. He refused to do so, though he was advised by both Kerim Yıldız and Mahmut Şakar, who had recently taken over Aksoy’s legal representation, to withdraw his petition. To this day, Yıldız vividly recalls Aksoy’s unequivocal response over the phone: “If I withdraw, he withdraws, everyone withdraws, who will bring justice?” Şakar’s memory is also haunted by the guilt and anguish he felt upon learning of Aksoy’s murder, which prompted him to write an angry letter to the ECtHR, calling upon the Court to hold the Turkish government accountable.<sup>1038</sup> Zeki Aksoy also informed Yokuş about the death threats during a visit he paid to her. While telling Aksoy that the decision was his to make, Yokuş advised him to take the threats seriously.<sup>1039</sup>

On 16 April 1994, two days after his phone conversation with Şakar, Zeki Aksoy was shot to death on his way home. Thereupon, his father Şerif Aksoy continued his son’s ECtHR case, for which he too was reprimanded. He was held in incommunicado detention and tortured on multiple occasions, threatened by the police with murder unless he dropped the case, ordered by security forces to leave town with his family and convicted on terrorism charges.<sup>1040</sup> His father and lawyers had no doubt that Zeki Aksoy was killed because of his petition. Yet, while feeling “deeply concerned” about this allegation, the ECtHR was “unable to find any evidence” to show such a link or government interference with Aksoy’s right of individual petition. While otherwise issuing a precedent-setting ruling,<sup>1041</sup> the Court failed to uphold Article 25 in a case

---

<sup>1034</sup> ECtHR, *Akdivar and Others*, at para. 105.

<sup>1035</sup> Ibid. See also ECtHR, *Akkoç v. Turkey*; *Tanrıkulu v. Turkey*, Application no. 23763/94, Judgment, 8 July 1999; *Orhan v. Turkey*, Application no. 25656/94, Judgment, 18 June 2002 (finding the authorities’ entry into direct contact with the applicants to question the authenticity of their powers of attorney to constitute an attempt of intimidation).

<sup>1036</sup> Arrested on suspicion of PKK membership on 24 November 1992, Aksoy was kept in incommunicado detention for over 14 days. During a four-day torture session, he was stripped naked and blindfolded, subjected to “Palestinian hanging”, beaten and electrocuted from his genitals. Upon his release, he was diagnosed with bilateral radial paralysis. Aksoy petitioned the ECtHR on 20 May 1993. ECtHR, *Aksoy v. Turkey*, Application no. 21987/93, Judgment, 18 December 1996.

<sup>1037</sup> Interview with Sevtap Yokuş.

<sup>1038</sup> See also Goldhaber, *A People’s History*, at p. 125.

<sup>1039</sup> E-mail communication with Sevtap Yokuş.

<sup>1040</sup> Goldhaber, *A People’s History*, at pp. 126-219. The elder Aksoy decided not to file his own case in Strasbourg partially out of fear for the safety of his remaining sons.

<sup>1041</sup> In *Aksoy*, the ECtHR found for the first time that a member state had committed torture.

where the applicant was murdered in retaliation for his exercise of the right of individual petition.<sup>1042</sup>

Another instance where the ECtHR did not fully take into account the context in the Kurdish region in its interpretation of Article 25 was the above-mentioned ‘25 Lawyers Case’. Under interrogation, the lawyers were asked why they took village eviction cases, represented defendants before the DGMs, worked for the İHD, prepared human rights reports, and made applications against Turkey to European institutions including the ECtHR. The lawyers were charged with, *inter alia*, “drawing up documents belittling the Turkish State and faxing them to human rights organisations in European countries.”<sup>1043</sup> For Strasbourg, these references were not specific enough to suggest that the authorities were alluding to the applicants’ ECtHR litigation and did not warrant a finding of Article 25 violation.

#### 4.3.4 The Growing Visibility of the ECtHR among the Kurdish Lawyers

Individual lawyers who represented defendants in criminal cases before the DGM were initially not involved in the ECtHR litigation, primarily due to the personal risk associated with “the perception of complaining against Turkey abroad.”<sup>1044</sup> Lack of knowledge on the ECtHR was another barrier. For a few, this was a matter of principle; cases concerning gross human rights violations were of public interest and should therefore be referred to the İHD.<sup>1045</sup> Having said that, there were a few lawyers in Diyarbakır such as Sezgin Tanrikulu<sup>1046</sup> and in neighboring provinces such as Hasip Kaplan and Tahir Elçi<sup>1047</sup> who had started to litigate at the ECtHR on their own in the late 1980s and early 1990s.

From 1993 onwards, multiple actors engaged in training projects on the ECtHR mechanism, some of which targeted lawyers across the country, while others were limited to the Kurdish region. From mid-1993 onwards, the KHRP organized conferences and training seminars in Turkey and in London in collaboration with the Bar Human Rights Committee of England and Wales.<sup>1048</sup> At around the same time, the national İHD leadership started to provide training to

---

<sup>1042</sup> Other Kurdish cases where the ECtHR did find a violation of Article 25 prompted Goldhaber to reach the following conclusion: “[t]he evidence of retaliation seems no stronger in these cases than in *Aksoy*, but the forms of retaliation were much milder. Perhaps state gangsterism is so grave a charge that, in practice, it demands a higher standard of evidence.” *A People’s History*, at p. 127.

<sup>1043</sup> ECtHR, *Elci and Others*, at para. 25.

<sup>1044</sup> Interview with Cihan Aydın.

<sup>1045</sup> Interview with Mesut Beştaş.

<sup>1046</sup> On 30 September 1991, Sezgin Tanrikulu, who in later years became the President of Diyarbakır Bar Association, filed an Article 10 case on behalf of Mehdi Zana, the legendary former mayor of Diyarbakır who was sentenced to 12 months-imprisonment by the DGM for a press interview he gave while he was serving several sentences in a military prison. The application resulted in a precedent-setting judgment where the Grand Chamber drew the boundaries of freedom of expression, not finding a violation of Article 10 due to the high-profile of the applicant, his statements in support of “the PKK national liberation movement” which killed women and children “by mistake” and the fact that the interview appeared in a major national newspaper at a time when the PKK was attacking the Turkish military. ECtHR, *Zana*.

<sup>1047</sup> Tahir Elçi, who started his legal practice in his home town of Cizre in the province of Şırnak, filed a petition with the EComHR on 1 October 1992 on behalf of an applicant whose son had been disappeared under detention. ECtHR, *Ertak v. Turkey*, Application no. 20764/92, Judgment, 9 May 2000 (finding a procedural and substantive violation of the right to life protected under Article 2). On Hasip Kaplan, see Section 4.3.1.

<sup>1048</sup> As soon as he was allowed to travel abroad, Mahmut Şakar organized one such training trip to London for himself and his colleagues in 1997.

lawyers across Turkey. In 1993, Hüsni Öndül successfully submitted to the representation of the EU Commission in Turkey a training project on the individual petition mechanism.<sup>1049</sup> Under the supervision of Prof. Semih Gemalmaz and with the support of several national human rights NGOs,<sup>1050</sup> the İHD provided training to around 500 lawyers on the ECHR and its protocols, mechanisms and principal rulings. Following the completion of the training projects, the İHD published the principal international human rights documents and the main EComHR rulings, as translated into Turkish by Gemalmaz. These books constituted the first comprehensive literature on the ECtHR judgments in Turkish.<sup>1051</sup> Diyarbakır was among the selected provinces for the project.<sup>1052</sup> In the mid-1990s, the Diyarbakır Bar Association took leadership in the training of Kurdish lawyers, including in neighbouring provinces. Its training projects included visits to Strasbourg, where Kurdish lawyers were briefed about the rules of procedure governing the individual petition mechanism and met with ECtHR Registry and judges. Thereafter, the ECtHR litigation in Diyarbakır was carried out along two separate tracks, in the leadership of the Bar and the İHD.

Meanwhile, a group of Kurdish lawyers in Istanbul established the Foundation for Society and Legal Studies (*Toplumsal Hukuk Araştırmaları Vakfı-TOHAV*) in October 1994.<sup>1053</sup> In filing petitions to the ECtHR, they decided to act collectively and in collaboration with the KHRP due to their lack of prior experience. In hindsight, Eren Keskin, a founding member, believes that this decision inadvertently prevented TOHAV lawyers from developing their own capacity during the early years of their ECtHR litigation.

As a result, by the mid to late 1990s, the ECtHR litigation in Turkey started to be carried out in a de-centralized and individual fashion, though still predominantly by Kurdish lawyers.

#### **4.3.5 1993-2001: The Golden Age of Kurdish Legal Mobilization in Strasbourg**

The first Kurdish petition was filed on 3 May 1993 in the case of *Akdıvar v. Turkey*. From then until 26 June 2001, when the ECtHR invoked a hitherto unused procedure to strike out the case of *Akman v. Turkey*, Kurdish lawyers had their Golden Age in Strasbourg. The KHRP-İHD network, and to a lesser but growing extent individual lawyers in the Kurdish region, expanded

---

<sup>1049</sup> This was long before bar associations or law faculties got interested and involved in the ECHR system.

<sup>1050</sup> Progressive Lawyers Association (*Çağdaş Hukukçular Derneği-ÇHD*), TİHV and several bar associations made significant contributions to the project. Interview with Semih Gemalmaz, Istanbul, 21 January 2016.

<sup>1051</sup> Mehmet Semih Gemalmaz, *Temel Belgelerde İnsan Hakları – Usul Hukuku I* [Human Rights in Fundamental Texts – Procedural Law I] (İHD, 1994); Mehmet Semih Gemalmaz, *Temel Belgelerde İnsan Hakları – Usul Hukuku II* [Human Rights in Fundamental Texts – Procedural Law II] (İHD, 1995); Mehmet Semih Gemalmaz, *Avrupa İnsan Hakları Mahkemesi Kararları (1)* [The Judgments of the European Court of Human Rights (1)] (İHD, 1995); Mehmet Semih Gemalmaz, *Avrupa İnsan Hakları Mahkemesi Kararları (2)* [The Judgments of the European Court of Human Rights (2)] (İHD, 1996); Mehmet Semih Gemalmaz, *Avrupa İnsan Hakları Mahkemesi Kararları (3)* [The Judgments of the European Court of Human Rights (3)] (İHD, 1996).

<sup>1052</sup> Across the country, the project leaders were inhibited by the police in various ways: trying to prevent the trainings on grounds that they were unauthorized political activities, placing video cameras in meeting rooms where trainings were conducted, entering or trying to enter the rooms to observe the trainings, and conducting identity checks at the entrance of the rooms. Interviews with Semih Gemalmaz and Hüsni Öndül.

<sup>1053</sup> The tipping point of the political rift over the Kurdish issue among lawyers in western Turkey which led to the establishment of TOHAV was the extrajudicial execution of a Kurdish lawyer named Medet Serhat. For more information, see <http://www.tohav.org/>.

the procedural and substantive boundaries of the Convention and won historic judgments, which set precedents not only for Turkey but for the entire ECHR system.<sup>1054</sup>

For their first petition with the ECtHR, the KHRP team wanted to prioritize forced eviction and village burning cases. Raising multiple rights violations and demonstrating the brutality of state violence and the impunity of security forces in Turkey, these were ideal ‘test cases’ to convince the ECtHR to alleviate the applicants from the burden to exhaust domestic legal remedies. This was also an obvious choice for the İHD, which was already working on these cases when they started to collaborate with the KHRP. Among them was the Kelekçi village in Diyarbakır province, which was evacuated and set on fire by the counter-terrorism teams on 10 November 1992 and where “some houses were still on fire” when Sedat Aslantaş arrived for fact-finding.<sup>1055</sup> The petition was filed on behalf of eight applicants under the name of *Akdıvar and Others*. The government categorically denied the allegations, counter-claiming that the houses were burned by the PKK.

In light of the seriousness of the allegations and factual disputes, the ECtHR held four hearings in this case; a pre-admissibility hearing in Strasbourg, two fact-finding hearings in Turkey and a conclusion hearing in Strasbourg.<sup>1056</sup> In its ruling on 16 September 1996, the Grand Chamber absolved the applicants from the burden to exhaust domestic remedies due to the general context in the region (the presence of an emergency regime and the authorities’ reluctance to investigate the allegations against the security forces) and the particular circumstances of the case (the applicants’ ‘insecurity and vulnerability’ due to the destruction of their properties and the risk of reprisals). On the merits, the Court found Turkey to have violated Article 8 and Article 1 of Protocol 1.<sup>1057</sup>

*Akdıvar* was an unprecedented success. The transnational network won an exceptional ruling where the Court exempted the applicants from its established admissibility rule concerning the exhaustion of domestic remedies. Much to the rightful pride of Kurdish lawyers, they had a key role in building the legal argument that convinced the Court to waive the requirement for the applicants. As much as the Court took pains to emphasize that this was not a general ruling and it would continue to assess similar requests on a case-by-case basis, it effectively opened its doors to thousands of Kurdish victims of gross human rights abuses. The judgment had a “catalyzing” effect on Kurdish litigation.<sup>1058</sup>

---

<sup>1054</sup> As of June 2001, the KHRP had submitted nearly 300 cases to the ECtHR and obtained judgment in 33 of them. For the full list of these judgments, see KHRP, *Timurtaş v. Turkey & Ertak v. Turkey: State Responsibility in ‘Disappearances’* (2001), at Appendix G.

<sup>1055</sup> At the time, the authorities’ unawareness of the İHD’s nascent ECtHR litigation enabled lawyers to access destroyed villages.

<sup>1056</sup> The pre-admissibility hearing took place on 18 October 1994, jointly with the cases of ECtHR, *Akkum and Others v. Turkey*, Application no. 21894/93, Judgment, 24 March 2005 and *Aksoy*. The fact-finding hearings were held in Diyarbakır on 13-14 March 1995 and Ankara on 12-14 April 1995. Finally, the hearing of conclusions was held on 3 July 1995, at which point the Court had disjoined *Akdıvar* from the other two cases.

<sup>1057</sup> For details of this and other ECtHR rulings on gross abuses, see Chapter 6.

<sup>1058</sup> Michael W. McCann, *Rights at Work: Pay Equality Reform and the Politics of Legal Mobilization* (University of Chicago Press, 1994), at p. 13.

For a time, the ECtHR became a court of first instance for us. When we received a complaint, we would go directly to the ECtHR. We were no longer doing anything domestically. Not go to prosecutors, not go to courts. None of that.<sup>1059</sup>

But before the Strasbourg Court, it was the KHRP on which the cases rained. Kerim Yıldız recalls:

Sitting comfortably in our offices [in London], we were not in a position to tell [İHD Diyarbakır] ‘send us such and such cases.’ Neither did the İHD have the chance to turn down the applicants. We suddenly found ourselves in the midst of all the cases.

It had become clear that strategic litigation in the sense of cherry picking cases most suitable to set precedent would not be possible.<sup>1060</sup> Identical cases raising multiple allegations of torture, extrajudicial killings, disappearances, village burnings and forced displacement kept coming from Diyarbakır to London. According to Françoise Hampson, if there was any ‘strategy’ to their litigation, it was by way of submitting to the ECtHR so many and similar cases that they could demonstrate the existence of an administrative practice of enforced disappearances, torture, extrajudicial killings and forced displacement. In fact, according to Sevtap Yokuş, she and Kerim Yıldız decided to pursue this strategy during their brainstorming sessions in London in 1992.<sup>1061</sup> In face of the gravity and scale of the abuses and the government’s categorical denial of any wrongdoing, a ruling that Turkey pursued a systematic policy would free the lawyers from the burden to exhaust domestic remedies. In the words of Hampson, the strategy worked in terms of creating a significant number of judgments so that “Turkey could no longer pretend in the Council of Europe that there wasn’t a human rights problem,” but less so in getting the ECtHR “to recognize the scale of the problem” and find an administrative practice at work in the Kurdish region.<sup>1062</sup>

As discussed in detail in Chapter 6, in its earlier jurisprudence, the ECtHR had established that proving an administrative practice required showing “repetition of acts and official tolerance”.<sup>1063</sup> The Court defined repetition as “an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system”,<sup>1064</sup> whereas official tolerance was present when “the superiors of those immediately responsible, though cognisant of [plainly illegal] acts, take no action to punish them or to prevent their repetition; or that higher authority, in face of

---

<sup>1059</sup> Interview with Mahmut Şakar.

<sup>1060</sup> This paragraph partly draws on Dilek Kurban, Ozan Erözden and Haldun Gülalp, *Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: A Case Study of Turkey*, prepared for project titled “JURISTRAS: The Strasbourg Court, Democracy and the Human Rights of Individuals and Communities: Patterns of Litigation, Implementation and Domestic Reform” and funded by the European Commission, October 2008, at p. 5.

<sup>1061</sup> Interview with Sevtap Yokuş.

<sup>1062</sup> Interview with Françoise Hampson, Ankara, 9 March 2008 (together with Ozan Erözden and Haldun Gülalp).

<sup>1063</sup> ECtHR, *Ireland v. United Kingdom*, Application no. 5310/71, Judgment, 18 January 1978, at para. 159.

<sup>1064</sup> Ibid.

numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity – or that in judicial proceedings a fair hearing of such complaints is denied”.<sup>1065</sup>

The applicants in *Akdivar* pleaded that there was a policy in the Kurdish region which was “tolerated, condoned and possibly ordered by the highest authorities in the State”, rendering domestic remedies in the Kurdish region “illusory, inadequate and ineffective”.<sup>1066</sup> Turkey’s inability to show a single court judgment awarding compensation to victims, they argued, pointed to “a *systematic* failure to provide domestic remedies”.<sup>1067</sup> To substantiate, the lawyers submitted the finding by the CoE’s European Committee for the Prevention of Torture of a systematic practice of torture and unreliable custody records in detention centres in Turkey.<sup>1068</sup>

While willing to take into account the political and legal context in the Kurdish region as far as admissibility was concerned, the Court was reluctant to find an administrative practice of gross human rights abuses, prompting Reidy, Hampson and Boyle to wonder how many cases raising similar issues were necessary for such a finding.<sup>1069</sup> In its 1999 ruling in the case of *Bottazzi*, the ECtHR held that 65 judgments against Italy showed “an accumulation of identical breaches which are sufficiently numerous to amount not merely to isolated incidents”<sup>1070</sup> and an administrative practice of excessive length of judicial proceedings. And yet, it did not change its stance in the Kurdish cases even after *Bottazzi*, leading Sardaro to conclude that “political expediency plays a greater role than purely legal arguments”.<sup>1071</sup>

The ECtHR was also reluctant to address the applicants’ claims of ethnic discrimination, who argued that enforced disappearances, village evictions, house destructions and extrajudicial killings primarily affected persons of Kurdish origin. The Court either found no violation due to lack of sufficient evidence<sup>1072</sup> or deemed it “not necessary” to address Article 14 claims without explaining why the security forces’ acts did not raise to the level of discrimination.<sup>1073</sup> While the Court’s argument was a general characteristic of its jurisprudence on Article 14, where it, according to Sardaro, used “the ‘dogma’ of the proof ‘beyond reasonable doubt’ for avoiding pronouncing on politically sensitive issues”,<sup>1074</sup> it was all the more striking in the Kurdish cases.

---

<sup>1065</sup> EComHR, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, Applications no. 9940-9944/82 (joined), Decision, 6 December 1983, at para. 19.

<sup>1066</sup> ECtHR, *Akdivar and Others*, at para. 60.

<sup>1067</sup> Aisling Reidy, Françoise Hampson and Kevin Boyle, “Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey”, *Netherlands Quarterly of Human Rights*, vol. 15, no. 2 (1997), pp. 161-173, at p. 165.

<sup>1068</sup> Reidy, Hampson and Boyle, “Gross Violations of Human Rights”, at p. 171.

<sup>1069</sup> *Ibid*, at pp. 165-166.

<sup>1070</sup> ECtHR, *Bottazzi v Italy*, Application no. 34884/97, Judgment, 28 July 1999, at para. 22.

<sup>1071</sup> Pietro Sardaro, “*Jus Non Dicere* for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court”, *European Human Rights Law Review*, vol. 6 (2003), pp. 601-630, at p. 616 (noting that the Court displayed a similar reluctance in the Northern Ireland cases where it refused, “on the basis largely of statistical information and selective evidence” to determine whether the security forces had a practice of using disproportionate force).

<sup>1072</sup> ECtHR, *Kurt v Turkey; Akdivar and Others; Tanrikulu v Turkey*.

<sup>1073</sup> ECtHR, *Yaşa v Turkey*, Application no. 63/1997/847/1054, Judgment, 2 September 1998 (unlawful killing).

<sup>1074</sup> Sardaro, “*Jus Non Dicere*”, at p. 618.

It was particularly difficult to meet the Court's evidentiary rules amidst government denial. In case after case, Turkey disputed the facts stated by the applicants and denied any wrongdoing. Where applicants alleged their relatives had been disappeared by the authorities, the government claimed there had been no detention to begin with and that the victim had been kidnapped by the PKK. Claims of torture under detention were countered with custody logs showing the applicants had never been taken in. Where the applicants alleged that the security forces conducted forced evictions and house destructions, the government counter-claimed that the perpetrator was the PKK.

According to Leach and his colleagues, the factual disputes, coupled with the absence of any findings of fact by domestic courts, obliged the ECtHR to act "as a *de facto* court of first instance" to establish the facts itself.<sup>1075</sup> By the early 2000s, the number of fact-finding hearings the EComHR conducted in Turkey reached 60, two-thirds of the total number of fact-finding missions since 1957.<sup>1076</sup> In a hitherto unseen case of government non-cooperation in the ECHR system, the Turkish government did not produce the documents the Court had requested or send key government witnesses whose testimonies were critical to establish the facts, and continued to flatly deny wrongdoing.<sup>1077</sup> Nonetheless, the Commission's findings corroborated the applicants' allegations.<sup>1078</sup>

Despite their shortcomings, the ECtHR's judgments were ground breaking for Turkey and the entire ECHR system. In case after case, the Court stressed that effective remedy under Article 13 "entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible".<sup>1079</sup> Turkey was under an obligation not only to compensate the harm and injury it caused to the victims, but also to do its utmost to establish the truth as to who caused the injury and where the disappeared were, as well as to prosecute the perpetrator(s).

In sum, even during the period when Kurdish legal mobilization had its highest impact on the ECtHR, the Court's receptiveness to Kurdish claims varied significantly. While the Court was highly receptive to procedural claims concerning admissibility, it showed an incrementally increasing receptiveness to substantive claims under Articles 2 and 3,<sup>1080</sup> but remained closed

---

<sup>1075</sup> Philip Leach, Costas Paraskeva and Gordana Uzelac, *International Human Rights and Fact-Finding: An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights* (London Metropolitan University, 2009), at p. 26. The Commission also referred to itself as "a first instance tribunal of fact." EComHR, *Koçeri Kurt v. Turkey*, at para. 159.

<sup>1076</sup> Between 1957 and the early 2000s, the ECtHR conducted 92 fact-finding missions (in the form of fact-finding hearings and/or on-the-spot investigations) against 16 member states. Leach, Paraskeva and Uzelac, *International Human Rights and Fact-Finding*, at p. 24.

<sup>1077</sup> This attitude has led the EComHR to conclude that the government violated its duties under Article 38. See Chapter 6.

<sup>1078</sup> EComHR, *Sukran Aydin* (corroborating the allegations of a young Kurdish woman that she was raped by military officers in detention).

<sup>1079</sup> ECtHR, *Aksoy; Selçuk and Asker*.

<sup>1080</sup> Most significantly, the Court's case law evolved from its treatment of disappearances exclusively in the context of the right to liberty on the ground that there was not enough "concrete evidence" to assume that the disappeared had died (*Kurt*) to its conclusion that disappearances following unacknowledged detention can be "life-threatening" in the context of the situation in southeast Turkey and constitute a substantive violation of Article 2 (*Timurtaş*). The Court's evolving jurisprudence on the four types of gross abuses is discussed in detail in Chapter 6.

to the claims concerning the existence of an administrative practice and discrimination. This variety renders problematic quantitative analyses which conclude legal mobilization to have been effective where the ECtHR finds at least one Convention article to have been violated.<sup>1081</sup>

#### 4.4 The Second Phase: A Less Receptive Court

Socio-legal scholars have long stressed that whether legal mobilization disempowers or empowers individuals “depends on the complex, often changing dynamics of the context in which struggles occur.”<sup>1082</sup> The progress of Kurdish litigation at the ECtHR reflects the impact of political developments in Europe on the Court’s receptiveness to Kurdish claims and the Kurdish advocates’ ability to mobilize the Court. Initially, the “disparity in power”<sup>1083</sup> between the Kurdish lawyers and the Turkish government derived from structural obstacles. The KHRP-İHD network overcame this by enhancing their resources and with the support of a receptive ECtHR, which showed flexibility in its admissibility rules, shifted the burden of proof to the government and often took on the functions of a first instance court by holding fact-finding hearings.

At the same time, as McCann noted, the “constitutive capacity of the law” is not limited to social movements, but can also “encourage...officials to circumvent, defy, and even initiate counter-reform efforts to alter court rulings.”<sup>1084</sup> By the early 2000s, the Turkish government started to resort to counter-tactics to reduce the ECtHR’s involvement in the Kurdish conflict. While Kurdish lawyers, particularly through their collaboration with the KHRP and British lawyers, had become “repeat players” before the ECtHR,<sup>1085</sup> so had the Turkish government. Having gone through its own learning process, and eager to improve its tarnished international reputation and enhance its chances for EU membership, the government adapted to the new situation and initiated “counter-reforms.” The early signs of this policy change came in 2001, when Turkey started to issue unilateral declarations, seemingly to acknowledge its wrongdoings and offer the applicants compensation. Driven by a strong self-interest to ease its workload, the ECtHR endorsed this policy and penalized those applicants who rejected the government’s settlement offers. This brief phase came to an end with the Grand Chamber’s intervention in 2003.

The next opportunity for the ECtHR to reduce its Turkish docket presented itself when the AKP government commenced an ambitious reform process to fulfil the EU’s accession criteria, including the execution of the ECtHR rulings. The dramatic shift from defiance to cooperation in Turkey’s policy vis-à-vis the ECtHR had a tremendous impact on its jurisprudence in the Kurdish cases. Prone – or obliged – to resort to “shortcuts”,<sup>1086</sup> the ECtHR became less willing

---

<sup>1081</sup> Cichowski, “Civil Society and the European Court of Human Rights”.

<sup>1082</sup> McCann, “Law and Social Movements”, at p. 19.

<sup>1083</sup> Marc Galanter, “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change”, *Law and Society Review*, vol. 9 (1974), pp. 95-160.

<sup>1084</sup> Michael McCann, “Reform Litigation on Trial”, *Law and Social Inquiry*, vol. 17, no. 4 (1992), pp. 715-743, at p. 733.

<sup>1085</sup> Galanter, “Why the ‘Haves’ Come out Ahead.”

<sup>1086</sup> Goldhaber, *A People’s History*, at p. 7.

to admit new cases and more eager to defer the resolution of pending ones to Turkish courts in the name of subsidiarity. Another consequence of the EU-induced reforms in Turkey was that it became much more difficult to mobilize the international community on the Kurdish cause in comparison to the 1990s when there was systematic state violence.<sup>1087</sup> Although human rights abuses continued, Turkey was going through a democratic transition, as part of which the emergency regime in the Kurdish region was lifted. The combination of the docket crisis and Turkey's cooperativeness weakened the contingent factor of Kurdish legal mobilization; the Court's receptiveness.

#### **4.4.1 Turkey's Counter-Tactics: Winning Strike-Outs with Unilateral Declarations**

The first sign of the ECtHR's diminishing receptiveness came in 2001. In *Akman v. Turkey*,<sup>1088</sup> the ECtHR struck out a case on the basis of the government's unilateral declaration, despite the applicant's insistence for the examination of his case.<sup>1089</sup> The applicant claimed that his son was unlawfully killed by the security forces. On the night of 19 January 1997, the security forces raided the applicant's house in the centre of Savur, Mardin, at about 6 a.m. and wanted to see his son. When the applicant's son came out of a room holding his identity card, one of the officers looked at the card, threw it on the floor and shot at him with an automatic rifle, killing him on the spot.<sup>1090</sup> According to the government, a group of terrorists had attacked the police, gendarme, a school staff house and the houses of civil servants in Savur, killing and wounding security officers and civilians. Upon coming under fire from the town, the security forces conducted house searches, including the applicant's. When they were fired at from a bedroom, they returned fire. After the shooting stopped, they found the body of the applicant's son with a loaded Kalashnikov close to his right hand.

Based on the nature of claims, factual disputes and the absence of domestic investigations,<sup>1091</sup> *Akman* was familiar territory. It was the government's response that was the first novelty in the case. Initially, due to the factual dispute between the parties, the Court had decided to hold a fact-finding hearing in Ankara. However, a few days before the mission was due to commence, the Court received a request from the Turkish government to strike out the case of its list<sup>1092</sup> on the basis of the following unilateral declaration:

---

<sup>1087</sup> For a similar argument that the transition to democracy faded the international community to lose interest in Argentina and move its attention to other countries where there was state violence, see Brysk, "From Above and Below", at p. 280.

<sup>1088</sup> ECtHR, *Akman v. Turkey*, Application no. 37453/97, Decision, 26 June 2001.

<sup>1089</sup> Article 37 of the ECHR authorizes the Court to "at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that (a) the applicant does not intend to pursue his application; or (b) the matter has been resolved; or (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

<sup>1090</sup> ECtHR, *Akman*, at paras. 9-16.

<sup>1091</sup> For example, no ballistic analysis was conducted on the rifle which the government alleged to have belonged to the applicant's son, making it probable that the security forces planted the weapon near the body of the deceased.

<sup>1092</sup> Sardaro, "*Jus Non Dicere*", at p. 621.

1. The Government regrets the occurrence of individual cases of death resulting from the use of excessive force as in the circumstances of Murat Akman's death...
2. It is accepted that the use of excessive or disproportionate force resulting in death constitutes a violation of Article 2 of the Convention and the Government undertakes to issue appropriate instructions and adopt all necessary measures to ensure that the right to life –including the obligation to carry out effective investigations – is respected in the future. It is noted in this connection that new legal and administrative measures have been adopted which have resulted in a reduction in the occurrence of deaths in circumstances similar to those of the instant application as well as more effective investigations.
3. ...
4. The government considers that the supervision by the Committee of Ministers of the execution of Court judgments concerning Turkey in this and similar cases is an appropriate mechanism for ensuring that improvements will continue to be made in this context...<sup>1093</sup>

Turkey offered to pay the applicant *ex gratia* 85,000 British Pounds if the Court would strike out the case. Despite the applicant's opposition, the ECtHR unanimously accepted the request of the government. Invoking Article 37(1)(c), the Court said it saw no need to continue its examination in light of the "nature of the admissions contained in the declaration as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed."<sup>1094</sup> The Court was "satisfied that respect for human rights" did not require a reverse conclusion.<sup>1095</sup>

The Court's striking out a right-to-life case sent shockwaves to Diyarbakır. For Cihan Aydın, the applicant's lawyer at the İHD, *Akman* was "a breaking point" in his trust in the ECtHR.<sup>1096</sup>

This was the first time we even heard about the strike-out mechanism. We asked for legal support from British lawyers<sup>1097</sup> because this was a whole new procedure and we were worried about making mistakes. We had a long dispute with the Court. We told them "you might indeed have issued rulings on this issue in the past, but there are still no preventive mechanisms in Turkey." They did not respond at all. It felt as if we were speaking to a wall.

It soon became clear that *Akman* was not an isolated case. The ECtHR struck out at least three more cases concerning enforced disappearances, unlawful killings and village burnings, based on nearly identical unilateral declarations.<sup>1098</sup> It did so despite the existence of substantial

---

<sup>1093</sup> ECtHR, *Akman*, at paras. 23-24.

<sup>1094</sup> *Ibid*, at para. 30.

<sup>1095</sup> *Ibid*, at para. 31.

<sup>1096</sup> Interview with Cihan Aydın, who worked at the İHD Diyarbakır during 1998-2004 under Osman Baydemir's leadership.

<sup>1097</sup> The lawyer who represented the applicant before the ECtHR was Philip Leach of the KHRP.

<sup>1098</sup> ECtHR, *Haran v. Turkey*, Application no. 25754/94, Decision, 26 March 2002 (concerning unacknowledged forceful eviction, property destruction and unlawful killing by security forces); *T.A. v. Turkey*, Application no. 26307/95, Decision, 9 April 2002 (concerning disappearance following unacknowledged detention by security

factual disputes and the applicants' insistence for their cases to be heard. In these decisions, the Court went against its established principles on effective remedy. As Judge Loucaides pointed out in his dissents,<sup>1099</sup> Turkey's unilateral declarations did not entail the acceptance of responsibility, while its assurances to instruct security forces and to carry out investigations were existing obligations under the Convention. He expressed "fear that the solution adopted may encourage a practice by States – especially those facing serious or numerous applications – of 'buying off' complaints for violations of human rights."<sup>1100</sup> Elsewhere, the Court was accused of letting Turkey "get away with murder."<sup>1101</sup>

The ECtHR's new practice was interrupted in 2003 by the Grand Chamber's ruling in *Tahsin Acar v. Turkey*, which limited the Court's discretionary powers in the strike-out procedure.<sup>1102</sup> Despite the Chamber's refusal to relinquish jurisdiction, the Grand Chamber accepted the applicant's request for referral in an apparent response to growing internal and external criticism of the strike-out mechanism. The Grand Chamber ruled that while it might be appropriate under certain circumstances to strike out an application on the basis of a unilateral government declaration, the Court was required to consider, *inter alia*, the nature of the complaints, the nature and scopes of government measures adopted to execute prior ECtHR judgments in similar cases, the factual disputes and the government admissions in relation to the alleged violations.<sup>1103</sup> The Grand Chamber next reviewed *Tahsin Acar* in light of these new criteria. Pointing out that there was substantial factual dispute between the parties and that the government failed to admit responsibility for the violations or to undertake an investigation into the incidents, the Grand Chamber concluded that respect for human rights required the examination of the case.<sup>1104</sup>

Did this mean that *Akman*, *Haran* and *Toğcu* were no longer good law? Possibly feeling restrained by *stare decisis*, the Grand Chamber distinguished *Akman* and *Tahsin Acar* "in a number of crucial respects."<sup>1105</sup> The parties in *Akman* did not dispute that the security forces killed the applicant's son, but disagreed as to whether they acted in self-defense or used

---

forces); *Toğcu v. Turkey*, Application no. 27601/95, Decision, 9 April 2002 (concerning disappearance following unacknowledged detention by security forces). One difference between the declarations concerned the reference to the incident which gave rise to the alleged violation. In *Akman* and *Haran*, the government referred to "the use of excessive or disproportionate force" and "death resulting from the use of unjustified force" respectively, acknowledging that the victims had been killed by the security forces. In subsequent unilateral declarations, the government referred instead to "unrecorded deprivations of liberty" (*T.A.*, *Toğcu*). The compensation offers made by the Turkish government in these cases were also similar to that in *Akman*, ranging between 68,000 and 80,000 British Pounds.

<sup>1099</sup> Judge Loucaides dissented in both of the two cases where he was on the bench and wrote identical dissenting opinions. *T.A.*; *Toğcu*.

<sup>1100</sup> Judge Loucaides' opinion in *Toğcu*, at p.13

<sup>1101</sup> Matthew Happold, "Letting States get away with murder", *New Law Journal*, vol. 151 (2001), p.1323 (that the "unarticulated reasons" for the decision was the ECtHR's increasing caseload which at the time was already unmanageable). For a critique of the ECtHR's strike-out decisions, see also Sardaro, "*Jus Non Dicere*".

<sup>1102</sup> ECtHR, *Tahsin Acar v. Turkey*, GC, Application no. 26307/95, Judgment (Preliminary Issue), 6 May 2003 (designated by his initials in the proceedings before the Chamber, the applicant (T.A.) subsequently agreed to the disclosure of his name).

<sup>1103</sup> *Ibid*, at para. 76.

<sup>1104</sup> *Ibid*, at paras. 78-86. The Grand Chamber issued its judgment on the merits in 2004, finding a procedural, but not substantive, violation of Article 2 and not finding a violation of any other ECHR provision. ECtHR, *Tahsin Acar v. Turkey*, GC Application no. 26307/95, Judgment (Merits), 8 April 2004.

<sup>1105</sup> ECtHR, *Tahsin Acar*, Judgment (Preliminary Issue), at para. 80.

excessive force. Secondly, the government undertook to instruct its security forces to ensure that the right to life would be respected in the future and to pay the applicant 85,000 British Pounds. Finally,

as the Court had already specified the nature and extent of the obligations arising under the Convention for the respondent State in cases of alleged unlawful killings by security forces in various other applications it had previously decided, it could be satisfied that respect for human rights as defined in the Convention did not warrant a continuation of the examination of the application.<sup>1106</sup>

*Tahsin Acar* concerned “the unresolved disappearance of a person after an abduction allegedly by, or with the alleged connivance of, State agents”, while further investigations were “less pressing in [*Akman*] as the respondent State had already assumed liability for the killing.”<sup>1107</sup>

The Grand Chamber’s reasoning is unconvincing on many levels. In *Akman*, there *was* a dispute between the applicant, who claimed that the security forces had unlawfully executed his son and planted an automatic rifle next to his body, and the government which claimed that the deceased was armed and attacked the security forces. The government’s concession that the security forces used excessive force did not correspond to the applicant’s claim that his unarmed son was shot point blank and without cause. Second, as Judge Loucaides pointed out, Turkey’s assurances to give appropriate instructions to its security forces and to carry out investigations were already existing obligations under the Convention. Moreover, these assurances concerned *future* cases, not *Akman*. It is not easy to see why the investigation of a father’s claim that the security forces summarily executed his son should be less pressing from another’s claim that they disappeared his son. The ECtHR, which had time and again stressed that compensation without truth and justice cannot constitute adequate remedy, was now letting Turkey to buy-off the claimants of serious human rights abuses. Finally, that the ECtHR had ruled on similar cases in the past did not alter the fact that Turkey did not execute those judgments *and* still engaged in unlawful killings. The above-cited paragraph in the Grand Chamber’s reasoning was effectively a declaration that the Court should no longer be expected to provide individual justice in every ‘repetitive case’, even if it concerned the right to life; a declaration preceding the CoE’s political decision to that effect in its authorization of the pilot judgment mechanism.

A few weeks after its *Tahsin Acar* judgment, the Grand Chamber sent *Toğcu* back to the Chamber to decide whether to restore the application to the Court’s list of cases under Article 37(2).<sup>1108</sup> On 1 March 2005, the Chamber decided to do so and on 31 May issued its judgment finding, *inter alia*, a procedural violation of Article 2 on account of Turkey’s failure to conduct an effective investigation into the disappearance of the applicant’s son following his unacknowledged detention by security forces.<sup>1109</sup> The outcome of *Toğcu* demonstrates not only how wrong the earlier strike-out decision in the same case was, but also casts further doubt on

---

<sup>1106</sup> Ibid, at para. 81.

<sup>1107</sup> Ibid, at para. 82.

<sup>1108</sup> Under Article 37(2), the Court “may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.”

<sup>1109</sup> ECtHR, *Toğcu v. Turkey*, Application no. 27601/95, Judgment, 31 May 2005 (finding Turkey to also have failed to fulfil its obligation under Article 38 to provide the Court with copies of the detention records where the applicant’s son had been detained and the complete investigation file).

the Grand Chamber's above-discussed reasoning with regard to *Akman* and its failure to send *Haran* back to the Chamber for consideration to be restored back to the list.

#### 4.4.2 “Counter-Reforms”: Turkey Wins a Pilot Judgment in Strasbourg<sup>1110</sup>

After *Tahsin Acar*, the ECtHR ceased what Goldhaber has named “cutting corners”<sup>1111</sup> in the Kurdish cases. Or at least, until post-enlargement reforms<sup>1112</sup> entrusted the Court with a new procedure enabling it to dispense thousands of applications with one inadmissibility decision.

Developed by the CoM to address clone/repetitive cases,<sup>1113</sup> the pilot judgment mechanism<sup>1114</sup> is based on a new power sharing between the ECtHR and the contracting parties.<sup>1115</sup> Where the ECtHR identifies a structural deficiency in national law or practice which has given rise to or is likely to give rise to repetitive cases, it can issue a pilot judgment and ask the respondent government to develop new remedies to avoid similar applications to Strasbourg. Grounded on the subsidiarity principle and justified with the need for “a reduction in the Court’s workload”,<sup>1116</sup> the mechanism allows the ECtHR to reject pending cases arising from the same structural problem where it finds a domestic remedy developed by the respondent government in response to a pilot judgment to be adequate and effective. The ECtHR issued its first pilot judgment in *Broniowski v. Poland*, a case concerning the compensation of displaced citizens following the redrawing of Poland’s eastern borders after the World War II.<sup>1117</sup> Due to a fault in the law, 80,000 individuals were excluded from the compensation plan. Finding this to be a structural problem arising from a “malfunctioning” law and giving rise to repetitive cases, the

---

<sup>1110</sup> Section 4.4.2 partly draws from Kurban, “Forsaking Individual Justice”.

<sup>1111</sup> Goldhaber, *A People’s History*, at p. 7.

<sup>1112</sup> Initiated with the adoption of Protocol 11 in 1998, which turned the ECtHR into a full-time body with the exclusive mandate to adjudicate cases, the post-enlargement reforms gained speed with the adoption of Protocol 14 in 2004, which could only enter into force in 2010 due to Russia’s single-handed blockage. On the reform of the Convention system, see Luzius Wildhaber, “Consequences for the European Court of Human Rights of Protocol No. 14 and the Resolution on Judgments Revealing an Underlying Systemic Problem – Practical steps of implementation and challenges”, *Applying and Supervising the ECHR: Reform of the European Human Rights System*, Proceedings of the high-level seminar, Oslo, 18 October 2004; Lucius Caflisch, “The Reform of the European Court of Human Rights: Protocol No 14 and Beyond”, *Human Rights Law Review*, vol. 6, no. 2 (2006), pp. 403-415.

<sup>1113</sup> Steering Committee for Human Rights (CDDH) had defined repetitive or clone cases as those “concerning a specific piece of legislation or a specific practice that the Court has already pronounced itself on in a judgment”. CDDH, *Guaranteeing the long-term effectiveness of the European Court of Human Rights*, Interim Report to be submitted to the Committee of Ministers, CDDH(22 2002)016 Addendum, 14 October 2002, at para. 68. The Court’s Registrar later defined repetitive cases as those that “involve routine application of well-established case law, where it is quite clear from the outset that a violation has occurred”. Paul Mahoney, “New Challenges for the European Court of Human Rights Resulting from the Expanding Caseload and Membership”, *Penn State International Law Review*, vol. 21 (2002), pp. 101-114, at p. 110.

<sup>1114</sup> For the origins of the conception of the pilot judgment mechanism, see Philip Leach, Helen Hardman, Svetlana Stephenson and Brad K. Blitz, *Responding to Systemic Human Rights Violations: An Analysis of ‘Pilot Judgments’ of the European Court of Human Rights and their Impact at National Level* (Intersentia, 2010), at pp. 9-12.

<sup>1115</sup> The procedure emerged from a resolution and a recommendation adopted by the CoM in 2004. CoM, *Resolution Res(2004)3 on Judgments Revealing an Underlying Systemic Problem*, 12 May 2004; CoM, *Recommendation Rec(2004)6 to Member States on the Improvement of Domestic Remedies*, 12 May 2004.

<sup>1116</sup> CoM, *Recommendation Rec(2004)6*.

<sup>1117</sup> ECtHR, *Broniowski v Poland*, GC, Application no. 31443/96, Judgment, 22 June 2004.

Court instructed Poland to amend its law to offer redress to the applicant and the remaining claimants and adjourned the 167 similar pending cases.<sup>1118</sup>

On 29 June 2004, one week after *Broniowski*, the ECtHR issued its second pilot judgment in *Doğan and Others v. Turkey*<sup>1119</sup> concerning the forced eviction of 15 Kurdish peasants and the destruction of their properties.<sup>1120</sup> In *Doğan*, the ECtHR drew attention to “the situation of the internally displaced persons” in Turkey, belatedly naming a protracted issue it had been adjudicating since *Akdivar*.<sup>1121</sup> The recognition of the collective nature of the problem was a novelty, considering the Court’s hitherto reluctance to find an administrative practice in the Kurdish region. So, why the rhetorical change?

Turkey’s declaration as an EU candidate in 1999 had opened a new chapter in its dealings with the international community. To fulfil the accession criteria, Turkey was now obliged, among other things, to cooperate with the UN. This new context enabled Francis Deng, the UN Secretary General’s Special Representative for the Internally Displaced Persons,<sup>1122</sup> to receive an official invitation to conduct the fact-finding mission he had been requesting for a decade.<sup>1123</sup> By virtue of his mandate, the scope of Deng’s 2002 visit did not extend to Kurdish civilians who were tortured, raped, and/or had family members unlawfully killed or disappeared, but were not displaced. As for the displaced, adopting what Ayata and Yüksekler have named a “depoliticized policy discourse”,<sup>1124</sup> Deng limited his recommendations to the compensation of their financial losses, the improvement of their integration in urban centres and the facilitation of their return to villages.<sup>1125</sup> He did not address the displaced Kurds’ demands for the identification of the whereabouts of the disappeared and the prosecution of the perpetrators.<sup>1126</sup>

---

<sup>1118</sup> Since *Broniowski*, the Court applied the mechanism to similar reparation schemes in other post-communist contexts, non-enforcement of domestic court judgments, excessive length of judicial proceedings, overcrowded prisons and detention centres, prisoners’ right to vote and property disputes arising from the Cyprus conflict. For an overview, see Leach *et al.*, *Responding to Systemic Human Rights Violation*; Antoine Buyse, “The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges”, *Nomiko Vima (The Greek Law Journal)* [Online], vol. 57 (2009), pp. 78-90, available at: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1514441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1514441), at p. 86.

<sup>1119</sup> ECtHR, *Doğan and Others v. Turkey*, Applications no. 8803-8811/02, 8813/02 and 8815-8819/02, Judgment, 29 June 2004.

<sup>1120</sup> For an analysis of the ECtHR’s application of the pilot judgment mechanism to the Kurdish cases and its adverse consequences in Turkey’s law and practice, see Kurban, “Forsaking Individual Justice”.

<sup>1121</sup> ECtHR, *Doğan and Others*, at para. 154.

<sup>1122</sup> The name of this office was subsequently changed to the “Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons.”

<sup>1123</sup> Deng’s prior attempts had been persistently overturned by the government on the grounds that “Turkey did not have a displacement issue.” Francis Deng, former Representative of the UN Secretary General for Internally Displaced Persons, keynote speech at international conference titled “Internal Displacement in Turkey and Abroad: International Principles, Experiences and Policy Proposals”, Turkish Economic and Social Studies Foundation (TESEV), Istanbul, 4-5 December 2006.

<sup>1124</sup> Bilgin Ayata and Deniz Yüksekler, “A Belated Awakening: National and International Responses to the Internal Displacement of Kurds in Turkey”, *New Perspectives on Turkey*, vol. 32 (2005), pp. 5-42, at p. 6.

<sup>1125</sup> UN Commission on Human Rights, Specific Groups and Individuals Mass Exoduses and Displaced Persons, *Report of the Representative of the Secretary-General on internally displaced persons, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 2002/56*, E/CN.4/2003/86/Add.2, 27 November 2002 (hereafter “Deng Report”).

<sup>1126</sup> For a report noting this shortcoming, see Dilek Kurban, Ayşe Betül Çelik and Deniz Yüksekler, ‘*Overcoming a Legacy of Mistrust: Towards Reconciliation between the State and the Displaced*’ – Update on the Implementation of the Recommendations Made by the UN Secretary-General’s Representative on Internally Displaced Persons Following his Visit to Turkey (TESEV and NRC/IDMC Publications, 2006).

Deng's report led Turkey to half-heartedly admit the existence of internal displacement<sup>1127</sup> since his solution framework provided an easy escape; the prosecution of perpetrators was no longer necessary. At any rate, neither the UN nor the EU was pressing Turkey to develop a human rights approach based on truth, accountability and apology.

It was with reference to Deng's report that the ECtHR named internal displacement as the structural problem giving rise to mass claims against Turkey. By the time *Doğan* was issued, Turkey's adherence to Deng's recommendations had become an EU accession criteria,<sup>1128</sup> hundreds of forced displacement and property destruction cases were pending in Strasbourg, whose execution was yet another accession criteria, the ECtHR was buried under an unmanageable docket and the Turkish government was working on a draft law to provide compensation to the displaced Kurds.<sup>1129</sup> Suddenly, the Kurdish cases pending before the ECtHR gained a new prominence. If accepted by the ECtHR as an effective remedy under the pilot judgment mechanism, a compensation law could undo *Akdıvar*, boost Turkey's tarnished international reputation, save millions of euros in compensation and score a point with the EU.<sup>1130</sup> Thus, to win an inadmissibility decision, the Parliament adopted a compensation law on 17 July 2004, only 18 days after *Doğan*.<sup>1131</sup>

Once the Compensation Law was adopted, it was clear that the Court's next ruling on forced displacement would assess whether this new remedy merited an inadmissibility decision. The ECtHR's docket crisis rendered the effective implementation of the law in its interest, a fact which did not escape Turkey's attention. The national government and its representatives in the Kurdish region and in Strasbourg engaged in concerted efforts to make an exemplary implementation of the law. The Ministry of Foreign Affairs (MFA) representing Turkey vis-à-vis the Court sent a "very urgent" note to the Ministry of the Interior, asking for the "swift presentation of sufficient satisfactory examples" of decisions to "prevent the possibility of an early negative decision by the ECtHR regarding the Damage Assessment Commissions."<sup>1132</sup> The MFA urged the commissions tasked with implementation to be "as flexible as possible" in

---

<sup>1127</sup> References to "internal displacement" and "internally displaced persons" as a collateral consequence of counter-terrorism were for the first time made in a low-profile cabinet decree which has by and large escaped public attention. Turkey, Bakanlar Komitesi [Council of Ministers], "Yerinden Olmuş Kişiler Sorunu ile Köye Dönüş ve Rehabilitasyon Projesine Yönelik Tedbirler" [Measures on the Issue of IDPs and the Return to Villages and Rehabilitation Project], Decision of Principle, 17 August 2005. See also Ayata and Yüksek, "A Belated Awakening".

<sup>1128</sup> European Commission, *2003 Regular Report on Turkey's Progress towards Accession* (2003), at p. 40 (referring for the first time to the "situation of internally displaced persons", which it found to be "still critical").

<sup>1129</sup> The AKP government's National Program for 2003 stated that the law would enter into force in 2004.

<sup>1130</sup> The statements made at the parliament by members of the governing party as well as the opposition show that both the legislative and the executive sought to prepare a compensatory scheme for the displaced in order to win an inadmissibility decision in Strasbourg. Dilek Kurban and Mesut Yeğen, *Adaletin Kıyısında: 'Zorunlu' Göç Sonrasında Devlet ve Kürtler – 5233 Sayılı Tazminat Yasası'nın bir Değerlendirmesi – Van örneği* [On the Verge of Justice: The State and the Kurds after Forced Migration – An Assessment of the Compensation Law no. 5233 – the case of Van] (TESEV Yayınları, 2012), at p. 91. The EU Council's upcoming summit, which was expected to make a final decision on opening accession negotiations with Turkey, was another motivating factor.

<sup>1131</sup> *Terör ve Terörle Mücadeleden Doğan Zararların Karşılanması Hakkında Kanun* [Law on the Compensation of Losses Resulting from Terrorism and the Fight against Terrorism], no. 5233, 17 July 2004, Official Gazette, no. 25535, 27 July 2004 (hereafter "Compensation Law").

<sup>1132</sup> Turkey, Ministry of Foreign Affairs, Deputy Directorate General for the Council of Europe and Human Rights, written communication numbered AKGY-6 40 and titled '*Doğan and others* Judgment and return to village applications', 7 January 2005 (on file with the author).

assessing the compensation amounts and even try to reward compensation for non-pecuniary damages to prevent the applicants from seeking higher compensation amounts in Strasbourg.<sup>1133</sup> In effect, the MFA was asking the commissions to go beyond the material scope of the law, which excludes compensation for emotional pain and suffering. So worried were the Turkish diplomats in Strasbourg that, unconventionally, they contacted deputy governors in the Kurdish region directly rather than through the inter-ministerial bureaucratic process, asking for the prioritization of applications from Tunceli and Diyarbakır which had produced the highest number of applications to Strasbourg.<sup>1134</sup>

The officials were right; *İçyer v. Turkey*<sup>1135</sup> originated from Tunceli. It concerned an applicant who was forcibly evicted from his village and had his property destroyed by the security forces. The authorities did not carry out an investigation on the ground that “the perpetrators of the alleged acts could not be identified” and “no house had been burnt down by the security forces in the region”, an assessment based on the local gendarmerie command implicated in the applicant’s allegations.<sup>1136</sup> The resemblance of the facts in *Doğan and Others* and *İçyer* hardly escapes attention. In both cases, the incidents occurred in Tunceli in October 1994, the security forces evicted the applicants and destroyed their properties, and the authorities did not carry out any investigations. The applicants in both cases pointed out the inadequacy of domestic remedies, where victims could, at best, receive monetary compensation based on the no-fault responsibility of the state. In both cases, the applicants requested the Court to follow *Akdivar* and reject the government’s objection on the basis of the non-exhaustion of domestic remedies. In *Doğan and Others*, that is precisely what the ECtHR did:

in the cases referred to by the Government, the administrative courts awarded compensation on the basis of the doctrine of social risk, which is not dependent on the proof of fault. Thus, under Turkish law, an administrative law action is a remedy based on the strict liability of the State, in particular for the illegal acts of its agents, whose identification is not, by definition, a prerequisite to bringing an action of this nature. For the Court, however, when an individual formulates an arguable claim in respect of forced eviction and destruction of property involving the responsibility of the State, the notion of an ‘effective remedy’, in the sense of Article 13 of the Convention entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible.<sup>1137</sup>

In *İçyer*, too, the ECtHR dismissed the government’s non-exhaustion objection.<sup>1138</sup> Yet, while in *Doğan and Others* it found a violation and awarded the applicants just satisfaction, it found *İçyer* inadmissible. What changed the ECtHR’s mind was, of course, the Compensation Law. The government impressed the Court with statistics showing 170,000 applications nationwide

---

<sup>1133</sup> Ibid.

<sup>1134</sup> Interview with a deputy governor, Kurdish region, 10 May 2006. See also Sedat Güneç, “Terör Tazminatında öncelik Tunceli ve Diyarbakır’da” [Priority in the Compensation of Terrorism lies with Tunceli and Diyarbakır], *Zaman*, 6 October 2005.

<sup>1135</sup> ECtHR, *İçyer v. Turkey*, Application no. 1888/02, Decision (Admissibility), 12 January 2006.

<sup>1136</sup> Ibid, at para. 7.

<sup>1137</sup> ECtHR, *Doğan and Others*, at paras. 105-106.

<sup>1138</sup> ECtHR, *İçyer*, at para. 73.

and a “substantial number of sample decisions”, issued mostly by the Tunceli and Diyarbakır commissions, awarding up to 31,000 Euros per applicant, which led the Court to conclude that the remedy was accessible and provided “reasonable prospects of success”.<sup>1139</sup> What the Court did not note was that the government did not present statistics on rejected applications or the ratio of the sample decisions to the total number of applications.<sup>1140</sup> As of May 2006 – 22 months after the adoption of the Law and three months after *İçyer* –, a mere 27,011 of the 195,463 applications nationwide were concluded during the nearly two years since the law had entered into force. Of these, 15,112 (more than half) were rejected.<sup>1141</sup>

Something more fundamental was missing in the Court’s analysis in *İçyer*. While concluding that administrative action under the Turkish system does not entail “the identification and punishment” of perpetrators and is therefore ineffective, the ECtHR evaded addressing the core question of whether the Compensation Law filled this accountability gap. Instead, it noted, with approval, that the applicant could claim compensation for damages he sustained due to his eviction<sup>1142</sup> and concluded that the government “can be deemed to have fulfilled their duty to review the systemic situation at issue and to introduce an effective remedy.”<sup>1143</sup> Yet, as discussed in Chapter 6, the Compensation Law carried all the faulty characteristics that the Court had identified in Turkey’s legal system in *Doğan and Others*.

#### 4.4.3 The End of the KHRP, the End of an Era

The İHD lawyers in Diyarbakır litigated at the ECtHR through the KHRP for one simple reason: their lack of knowledge. By the early 2000s, having acquired the requisite knowledge and skills, they started to litigate on their own. The improvement of the security situation in the Kurdish region and the political freedoms brought by the EU-induced reforms enabled the Kurdish lawyers to relatively freely litigate at the ECtHR. Another factor leading to direct legal mobilization was their growing unease about doing the “actual” work despite substantial risks and yet remaining invisible.<sup>1144</sup> Career ambitions and financial interests also played a role in the rapid expansion of individual practice on ECtHR litigation.

At the same time, some of the British lawyers started to withdraw from the Kurdish cases to channel their resources to the Chechen cases. Russia’s acceptance of the ECtHR’s jurisdiction in 1998 and the start of the second Chechen war in 1999 led to the emergence of an unexplored fertile territory to engage in strategic litigation in Strasbourg.<sup>1145</sup> One such lawyer was Bill Bowring, who began in 2000 to assist the Russian human rights lawyers in representing Chechen applicants. In 2003, he established the European Human Rights Advocacy Centre (EHRAC) in partnership with the Moscow-based Russian NGO Memorial to assist in strategic

---

<sup>1139</sup> Ibid, at para. 83.

<sup>1140</sup> Dilek Kurban, Deniz Yüksek, Ayşe Betül Çelik, Turgay Ünal and A. Tamer Aker, *Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey* (TESEV Publications, 2007).

<sup>1141</sup> Ibid, at pp. 94-95.

<sup>1142</sup> ECtHR, *İçyer*, at para. 75.

<sup>1143</sup> Ibid, at para. 83.

<sup>1144</sup> Interview with Eren Keskin.

<sup>1145</sup> Ole Solvang, “Chechnya and the European Court of Human Rights: The Merits of Strategic Litigation”, *Security and Human Rights*, no. 3 (2008), pp. 208-219.

litigation on behalf of the Chechen and other victims in the North Caucasus<sup>1146</sup> and recruited the KHRP's Legal Director Philip Leach and Project Manager Tina Devadasan.<sup>1147</sup> According to Yıldız, the departure of Bowring and Leach did not adversely affect the work of the KHRP, which continued to work on the Kurdish cases in collaboration with other British lawyers.<sup>1148</sup> Nonetheless, the KHRP gradually phased down its litigation on the Kurdish conflict and closed in 2010.<sup>1149</sup>

In theory, the gradual withdrawal of the British lawyers and the KHRP should not have had an adverse impact on Kurdish legal mobilization. In fact, Kerim Yıldız's decision to close down the KHRP was based on his conclusion that "there was no longer a need for the European lawyers to do the job for the Kurds." Bowring, too, believed that local lawyers were "doing a perfectly good job" when he and other British lawyers withdrew from the KHRP and the Kurdish cases. Yet, by the time the attorneys in Turkey gained the capacity to litigate on their own, two external developments started to have an adverse impact on their legal mobilization: the ECtHR's docket crisis and Turkey's EU accession process. The former rendered the Court less able and willing to review every individual application, even if those concerning gross violations. The latter led to domestic reforms aimed at creating new legal remedies to lessen the number of applications to the ECtHR. The combination of these two factors made the ECtHR willing to cooperate with Turkey, evident in its rejection of "almost 1,500" pending cases for their resolution under the Compensation Law.<sup>1150</sup> As a result, by the time the Kurdish lawyers had become self-sufficient, the structural conditions that had enabled their earlier success in Strasbourg had changed drastically.

According to the İHD Diyarbakır lawyers, the Court pursued a "policy of forcing friendly settlements upon litigants," penalizing those who declined Turkey's unilateral declarations by rejecting their cases or awarding them compensation amounts lower than those offered by the government.<sup>1151</sup> This latter point was also raised by Judge Bonello in *Tahsin Acar*, the above-discussed case concerning the disappearance of an individual following his abduction by plain-clothes police officers, who criticized the Court for letting the government, which had offered the applicant 70,000 British Pounds, to "get away with giving a hand-out of 10,000 euros, the fair market price, it seems, for the life of a man who never was."<sup>1152</sup>

---

<sup>1146</sup> The financial support of the European Commission was critical in this process. Bowring secured a grant of 1 Million Euros, which he used for establishing EHRAC.

<sup>1147</sup> Interviews with Bill Bowring.

<sup>1148</sup> E-mail correspondence in December 2017 and January 2018.

<sup>1149</sup> Yıldız reached his decision on the basis of an independent feasibility study he had commissioned, which concluded that the KHRP fulfilled its mandate of building the Kurdish lawyers' capacity to litigate at the ECtHR without external assistance. He established a new organization in the name of Democratic Progress Institute (DPI) to work on conflict resolution and democratic advancement. Yıldız and his colleagues formed the London Legal Group to engage in selective strategic ECtHR litigation to represent the Kurdish human rights victims in Turkey, Armenia and Azerbaijan. Interview with Kerim Yıldız.

<sup>1150</sup> ECtHR, *Doğan and Others v. Turkey*, Applications no. 8803-8811/02, 8813/02 and 8815-8819/02, Judgment (Just Satisfaction), 13 July 2006, at para 6.

<sup>1151</sup> Reyhan Yalçındağ, group interview with Diyarbakır Bar Association lawyers, Diyarbakır, 16 February 2008. Cited at Kurban, Erözden and Gülalp, *Supranational Rights Litigation*, at p. 45. For examples of such inadmissibility decisions, see the discussion earlier on the Court's use of the strike-out procedure in *Akman*, *Haran* and *T.A.*

<sup>1152</sup> Judge Bonello's concurring opinion in ECtHR, *Tahsin Acar*, Judgment (Merits), at para. 14.

Where the ECtHR's strike-out decisions undermined its moral authority in the eyes of only those few Kurdish lawyers following the cases, *İçyer* shattered its credibility and legitimacy vis-à-vis the entire Kurdish human rights community. No other ECtHR ruling since *Akdıvar* had such a tremendous impact on Kurdish lawyers' perception of the ECtHR and legal mobilization in Strasbourg. Once redeemed as an impartial provider of justice which bended its procedural rules for human rights victims, the Court came to be widely viewed as a politicized institution engaged in behind the doors bargains with governments in order to alleviate its workload.<sup>1153</sup>

From the mid-2000s onwards, the Kurdish lawyers grew increasingly critical of the ECtHR for discontinuing fact-finding hearings, hastily writing poor quality opinions, taking too long in adjudicating cases, lowering the compensation amounts, rigidly applying the rule of exhaustion of domestic remedies and becoming increasingly intolerant of procedural mistakes made by inexperienced lawyers.<sup>1154</sup> While the Kurdish lawyers attribute these shortcomings principally to the ECtHR's docket crisis, they believe that the EU process also played a role. They particularly regard *İçyer* as a "nice gesture for [Turkey's] EU membership process"<sup>1155</sup> by the ECtHR to "give Turkey a chance"<sup>1156</sup> and "facilitate [its] political relations [with] the EU."<sup>1157</sup> It also seemed to the Kurdish lawyers that the Court had grown weary of repetitive Kurdish cases and lost its jurisprudential appetite. According to Ruhşen Doğan of TOHAV:

In the 1990s, Turkey was a laboratory for the ECtHR, which built most of its jurisprudence through the judgments it issued against Turkey. Now that repeat cases are brought before the Court, Turkey lost its appeal.<sup>1158</sup>

At the same time, despite its drawbacks, the ECtHR was still the only forum to seek justice for victims of gross violations. While Turkey had made progress in eradicating torture under detention and by and large ceased other gross abuses, its impunity policy continued unabated. While no longer as trustful, enthusiastic and hopeful as they were in the 1990s, Kurdish lawyers continued to apply to Strasbourg out of habit rather than conviction. Petitioning the ECtHR had become, in the words of Meral Danış Beştaş, "somewhat like appealing to the High Court of Appeals."<sup>1159</sup>

While the bulk of the ECtHR litigation still consisted of serious human rights abuses, there were institutional and individual efforts by Kurdish lawyers to also raise group rights claims in Strasbourg.<sup>1160</sup> In 2003, Tahir Elçi in Diyarbakır filed a petition on behalf of two Kurdish politicians who unsuccessfully stood for parliamentary elections in 2002, claiming that Turkey's national electoral threshold violated the right to free elections under Article 3 of

---

<sup>1153</sup> Among the grounds of criticism of *İçyer* were its prematurity, its conflict with the Court's established case law on effective remedies, the Court's unwillingness to delay judgment on the compensation law pending the conclusion of the work of the damage assessment commissions or to issue guidelines for the domestic implementation of the law in accordance with its jurisprudence.

<sup>1154</sup> This paragraph is taken from Kurban, Erözden and Güllalp, *Supranational Rights Litigation*, at p. 44.

<sup>1155</sup> Yaşar Aydın, group interview with TOHAV lawyers, Istanbul, 17 October 2007.

<sup>1156</sup> Ruhşen Doğan, group interview with TOHAV lawyers.

<sup>1157</sup> Mesut Beştaş and Tahir Elçi, group interview with Diyarbakır Bar Association lawyers.

<sup>1158</sup> Ruhşen Doğan, group interview with TOHAV lawyers.

<sup>1159</sup> Interview with Meral Danış Beştaş, Diyarbakır, 1 October 2013.

<sup>1160</sup> This paragraph is partly taken from Kurban, Erözden and Güllalp, *Supranational Rights Litigation*.

Protocol no. 1. In 2004 and 2005, a group of TOHAV and İHD Diyarbakır lawyers filed petitions against Turkey's ban on the use of three letters contained in the Kurdish alphabet. In contrast to the nearly accidental way in which Kurdish lawyers started litigating in Strasbourg in early 1990s, TOHAV's litigation was strategic; they identified gaps in Turkey's legal framework, sought potential litigants, and filed test cases at domestic courts with the eventual goal of petitioning the ECtHR. They decided to challenge the ban on the Kurdish letters due to its incompatibility with the newly adopted EU reform laws,<sup>1161</sup> the presence of favorable ECtHR case law and the Turkish authorities' rejection of "hundreds and perhaps thousands of petitions" by parents to give their children names containing the three letters.<sup>1162</sup> In their endeavor, TOHAV lawyers received support from the London-based Minority Rights Group International.

It soon became evident, however, that asking the ECtHR to condemn extrajudicial killings was one thing, pushing the boundaries of the individual rights protected under the Convention to gain recognition for group and cultural rights was another. While acknowledging that Turkey's 10 percent threshold was the highest in Europe, the Court held that contracting parties have a wide margin of appreciation on electoral rights owing to the political nature of the issue and the lack of a common European standard.<sup>1163</sup> The ECtHR also upheld Turkey's ban on the official use of the Kurdish letters x, q and w, finding the requirement to transliterate Kurdish names to the Turkish alphabet not to be a violation of the Convention.<sup>1164</sup> Both rulings are discussed in detail in Chapter 3.

#### **4.4.4 Internal and External Obstacles to Legal Mobilization**

The atmosphere of relative normalization in the late 1990s brought a degree of physical safety for human rights activists, in the Kurdish region and beyond. Village evictions, enforced disappearances and extrajudicial killings had by and large come to an end, while torture and ill treatment in custody had substantially decreased. Human rights defenders no longer had to fear for their lives for litigating in Strasbourg or representing defendants in terrorism cases.<sup>1165</sup> However, intimidation did not end. Instead, its form and subject changed from physical violence in the hands of military and paramilitary forces to systematic criminalization of human rights work.

Once again, there were phases. Between 1999, when the EU accepted Turkey as a candidate for membership and the PKK declared a unilateral ceasefire, and the initiation of EU-induced constitutional reforms in 2001, there was a systematic effort to criminalize democratic dissent and remove human rights advocates from public space. Article 312 of the Penal Law was one

---

<sup>1161</sup> While recently introduced EU-induced reforms allowed the use of Kurdish names, the MoI issued a circular prohibiting the use of the letters x, w and q, which are not present in the Turkish alphabet but are relatively common in Kurdish names.

<sup>1162</sup> Ruşen Doğan, group interview with TOHAV lawyers.

<sup>1163</sup> ECtHR, *Yumak and Sadak*.

<sup>1164</sup> ECtHR, *Kemal Taşkın and Others v. Turkey*, Application nos. 30206/04, 37038/04, 43681/04, 45376/04, 12881/05, 28697/05, 32797/05 and 45609/05, Judgment, 2 February 2010.

<sup>1165</sup> On the other hand, at no point in time did gross human rights violations completely come to an end, evident in the enforced disappearance in 2001 of two local Kurdish politicians in Silopi, following their detention by the provincial gendarmerie. For details of the case and the ECtHR's relevant judgment, see Chapters 5 and 6.

of the tools used for this purpose. At the time, Article 312(2) made arousing “hatred and hostility in society on the basis of a distinction between social classes, races or religions, or one based on allegiance to a particular denomination or region” punishable by one to three years imprisonment, subject to increase by one third to one half where such incitement was done “in a manner likely to endanger public safety.” Conviction under this provision automatically led to a permanent ban from participating in civil society or politics.<sup>1166</sup> In 1999, while he was the İHD’s President, Akin Birdal was sentenced to two one-year prison terms for inciting hatred and hostility on the basis of race and region for a speech he had made on the World Peace Day in 1995. In his speech, Birdal had condemned the “unjust and dirty war” which killed “20,000 people”, burned “118 villages” and threw Kurdish people off their lands. The conviction obliged Birdal to forfeit both his leadership and membership of the İHD.<sup>1167</sup> He was put in prison though he was undergoing medical treatment for the partial paralysis caused by the assassination attempt he had survived a year before, which was discussed earlier. On 25 September, nearly four months into Birdal’s imprisonment, the execution of his remaining sentence was postponed for six months on health grounds. According to Human Rights Watch, his release at the time “was widely viewed as a manoeuvre to avoid official embarrassment during the Istanbul OSCE Summit in November and the E.U. Helsinki Summit in December”.<sup>1168</sup> Indeed, upon the expiry of six months in March 2000, Birdal was re-imprisoned and released on 23 September following the suspension of the remainder of his sentence on health grounds. Upon the amendment of Article 312 of the Penal Law in 2002, Birdal requested re-trial and was eventually acquitted in 2005. His request for compensation for the time he had spent in prison was denied by the Turkish courts. The ECtHR found Birdal’s prosecution and conviction to be in violation of his rights to fair trial and freedom of expression.<sup>1169</sup>

During this period, the İHD offices were not spared from judicial harassment. Several branches were repeatedly closed under the Law of Associations. In 2000 alone, three İHD branches were closed indefinitely on grounds that they possessed a banned publication (Malatya) and initiated hunger strikes in protest of prison conditions (Gaziantep and Van).<sup>1170</sup>

During the peak of reforms leading up to the EU’s December 2004 decision to open accession negotiations with Turkey, the number of human rights NGOs and lawyers engaged in ECtHR litigation proliferated. At the same time, the multiplicity of individual lawyers engaged in solo legal practice also had adverse consequences in that it inhibited collective efforts to engage in strategic litigation. The diffused, individualized and non-systematic nature of the ECtHR litigation practice arguably enhanced the government’s ability to convince the Court regarding the effectiveness of the Compensation Law. There was a 20-month period between the Court’s pilot judgment in *Doğan and Others* and its inadmissibility decision in *İçyer*, during which time it was evident that the Court would pick one of the pending cases to rule on the effectiveness

---

<sup>1166</sup> Article 4 of the Law on Associations (banning individuals convicted under Article 312 of the Penal Law from membership to a civil society organization) and Article 81 of the Law on Political Parties (introducing a lifetime ban on such individuals from standing for any political office or even joining a political party).

<sup>1167</sup> In response, the İHD elected Birdal as its Honorary President.

<sup>1168</sup> Human Rights Watch, *Turkey: Human Rights and the European Union Accession Partnership* (2000).

<sup>1169</sup> ECtHR, *Birdal v. Turkey*, Application no. 53047/99, Judgment, 2 October 2007.

<sup>1170</sup> For the full list of temporary and permanent closures of the İHD branches during 1986-2001, see İHD, *Kuruluşundan Bugüne İHD*, at pp. 41-44.

of Turkey's new law. During this critical period, one would have expected the bar associations, particularly those in the Kurdish region, to lead a collective initiative to gather statistics on the law's implementation and prepare a common legal strategy to be pursued in whichever case the ECtHR would pick. There was ample data to show the non-uniform implementation of the law across the country, the high number of arbitrary inadmissibility decisions, the low amounts of compensation and the prohibitively high evidentiary burdens imposed on the applicants. And yet, lawyers whose petitions were pending in Strasbourg were not able and/or willing to work collaboratively and systematically in information sharing, data gathering and pleading,<sup>1171</sup> which arguably enhanced the government's chances to convince the Court regarding the effectiveness of the compensation law mechanism.

The environment of political normalcy which enabled human rights defenders to work freely on the Kurdish issue was short-lived. The EU's premature decision in December 2004 to open accession negotiations with Turkey alleviated the reform pressure on the government. When the accession process effectively halted in 2006 with the European Council's decision to freeze the negotiations of eight chapters due to the Cyprus conflict, the EU lost its leverage on the Turkish government and the latter its drive for further reforms. During 2005-2006, Turkey rolled back many of the earlier reforms by adopting a new Penal Code, and amending the Anti-Terror Law and the Law on the Duties and Authority of the Police. These revisions, particularly those in the Anti-Terror Law which considered advocating the same demands as the PKK as terrorist propaganda or even membership of the PKK, had tremendous repercussions for Kurdish human rights defenders. In what became to be known as the "KCK cases", scores of Kurdish lawyers and advocates were charged with PKK membership without any evidence suggesting their support of or participation in the use of violence.<sup>1172</sup> Among the imprisoned were Muharrem Erbey, Roza Erdede and Arslan Özdemir, then President and board members of İHD Diyarbakır, respectively.<sup>1173</sup> The indictment cited the following grounds for Erbey's prosecution: financing the terrorist organization through project funds received from an EU member state, trying to denigrate the Turkish state by giving speeches at the Swedish, British and Belgian Parliaments, being the legal representative of the Mayor of Metropolitan Municipality of Diyarbakır Osman Baydemir,<sup>1174</sup> providing pro bono services to defendants charged with terrorism, speaking to the Europe-based Kurdish broadcaster ROJ-TV, and participating in press meetings, mass protests and civil society activities.<sup>1175</sup> Erbey was also

---

<sup>1171</sup> My first fieldwork on the compensation law, as part of a collaborative research project, was conducted between February-September 2005, a period coinciding to the middle of the 20 months between the ECtHR's two critical rulings on the Compensation Law. Our findings corresponded to those of domestic and international organizations, pointing out serious deficiencies in the implementation of the law. See Kurban *et al.*, *Coming to Terms*; Kurban, Çelik and Yüksek, *Overcoming a Legacy of Mistrust*; Human Rights Watch, *Unjust, Restrictive, and Inconsistent: The Impact of Turkey's Compensation Law with Respect to Internally Displaced People* (2006); Diyarbakır Bar Association, Ağrı Bar Association, TOHAV, Göç-Der and İHD "5233 Sayılı Yasa Adil Değildir" [Law no. 5233 Is Unjust], Press Statement, 25 February 2006; Diyarbakır Bar Association "5233 Sayılı Yasanın ve Zarar Tespit Komisyonlarının Değerlendirilmesi Toplantısı Sonuçları" [Conclusions of the Meeting to Evaluate Law No. 5233 and the Damage Assessment Commissions], 2 February 2006.

<sup>1172</sup> For more on the KCK case, see Chapter 3.

<sup>1173</sup> Human Rights Joint Platform (*İnsan Hakları Ortak Platformu-İHOP*), *Yargı Gözlem Raporu: Diyarbakır KCK Davası* [Judicial Monitoring Report: Diyarbakır KCK Case] (2011), at pp. 23-25.

<sup>1174</sup> Erbey's predecessor as the President of the İHD Diyarbakır, Osman Baydemir was also prosecuted under the KCK case, but unlike the vast majority of his co-defendants he was not held in pre-trial detention.

<sup>1175</sup> İHOP, *Yargı Gözlem Raporu*, at p. 25.

‘accused’ of petitioning the ECtHR, although he had actually not done so.<sup>1176</sup> Imprisoned for nearly four and a half years without conviction, Erbey became the longest detained İHD member in its history.<sup>1177</sup>

The KCK cases showed that the intimidation of human rights activists remained a government policy, notwithstanding a brief break in the early 2000s due to the improvement in Turkey’s relations with the EU. As in the 1990s, daring to ‘complain against the Turkish state in Strasbourg’, providing legal services to individuals charged with terrorism and expressing non-violent dissent on government’s policies put Kurdish lawyers at serious personal risk. The only improvement seemed to be that instead of being disappeared or summarily executed, they were now rounded up in the hundreds and put behind the bars. The KCK cases also showed the changing tides in Strasbourg. Although the defendants expeditiously applied to the ECtHR on 5 June 2010, claiming violations of Articles 3, 5, 6 and 14 of the Convention, the Court did not consider the case as a matter of urgency despite the fact that majority of the 103 applicants were held in detention without trial.<sup>1178</sup> As of July 2017, the Court is yet to issue its ruling.

#### **4.5 Conclusion: The Legacy of Kurdish Legal Mobilization**

Top-down approaches to legal mobilization take the court rulings as their point of analysis and scrutinize their judicial impact on government policies. This chapter adopted the alternative, bottom-up, approach to the study of legal mobilization by social movements by trying to understand and explain the impact of Kurdish litigation at the ECtHR on the human rights movements in Turkey and Europe and the on the Court’s practice on state violence. McCann refers to “the legacy phase” of legal mobilization “for people, relationships, and institutions throughout society.” Such legacy constitutes not only of gains in targeted policy reforms (e.g., a wage increase), but also “far more general or unintended implications” (e.g., workplace empowerment, increased rights consciousness and new demands). He notes, however, that the legacy of legal mobilization can also be negative (e.g., deterioration in workplace conditions) or mixed (as in the aftermath of the black civil rights movement in the United States).<sup>1179</sup> Within this framework, what can be concluded about the legacy of Kurdish legal mobilization at the ECtHR?

As the most organized and mobilized group in Turkey, the Kurds have a long tradition of resistance to state violence, assimilation and discrimination, and did not need the ECtHR litigation to gain rights consciousness. Their expectation was, as Sheingold has put it, the Court’s “judicial intervention [to] lend political significance to [their] grievances – in the first

---

<sup>1176</sup> Information received via email from Erbey’s lawyer Reyhan Yalçındağ, 5 September 2016.

<sup>1177</sup> Erbey was arrested in December 2009 and released in April 2014. *Yüksekova Haber*, “Muharrem Erbey: Mücadeleye Kaldığımız Yerden Devam Edeceğiz” [Muharrem Erbey: We will Continue the Struggle from Where we Left], 19 April 2014.

<sup>1178</sup> As of June 2017, there were no defendants left in pre-trial detention in the KCK cases, although their prosecution continued in the Turkish courts. Moreover, as mentioned in Chapter 3, many of the KCK defendants have in the past years been re-arrested on terrorism charges in separate cases and are being held in pre-trial detention.

<sup>1179</sup> McCann, “Litigation and Legal Mobilization”, at p. 34.

instance, simply by *officially* acknowledging their existence.”<sup>1180</sup> In petitioning the ECtHR, Kurdish lawyers sought to document atrocities under the emergency regime, create international public opinion and save lives. Indeed, the immediate impact of this litigation was that the ECtHR assumed a truth revelation function.<sup>1181</sup> The Court’s fact-findings and rulings put on record what had until then remained oral, creating a juridical history of state violence in the Kurdish region.

Collaboration with the KHRP and British lawyers equipped the Kurdish lawyers in Diyarbakır with the resources they lacked at home, enabling them to frame their claims in the language of the ECHR system. They knew, better than anyone, that the Turkish state aimed at eradicating the physical presence in rural areas of Kurdish civilians who refused to join the village guards and the very existence of Kurdish opinion leaders. The “rights consciousness” that Kurdish lawyers gained was one which enabled them to frame their language in the ECtHR jargon, by, for example, claiming the existence of an “administrative practice”. Beyond that, Kurdish legal mobilization also “had for more general or unintended consequences”; it generated new Kurdish demands (collective rights) and encouraged other minorities to follow suit. For example, Turkey’s tiny Greek Orthodox Christian community filed a petition with the ECtHR for the return of their confiscated properties.<sup>1182</sup>

Yet another unforeseen legacy of Kurdish legal mobilization was the inspiration it provided for strategic litigation on behalf of victims of state violence in other ethno-political conflicts in Europe.<sup>1183</sup> British lawyers who had litigated in the Kurdish cases applied the KHRP/ İHD model to build a similar network with human rights groups in Russia (EHRAC/Memorial), which in turn inspired other transnational alliances.<sup>1184</sup> Due to the time lag between Turkey’s and Russia’s acceptance of the Court’s jurisdiction,<sup>1185</sup> by the time the first cases were filed on behalf of Chechen victims in the early 2000s, the ECtHR had built a sizeable jurisprudence in the Kurdish cases. As a result, legal mobilization against Russia took off with some of the resources that were lacking at the beginning of Kurdish litigation: established standards for the supranational juridical review of gross abuses in the context of an armed conflict, and legal

---

<sup>1180</sup> Scheingold, *The Politics of Rights*, at p. 137 (commenting on the role played by the US Supreme Court vis-à-vis the grievances of the black community in the US).

<sup>1181</sup> Başak Çalı, “The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996-2006”, *Law and Social Inquiry*, vol. 35, no. 2 (2010), pp. 311-338, at p. 319; Sezgin Tanrikulu, “Bir Hakikat Komisyonu Olarak İnsan Hakları Avrupa Mahkemesi” [The European Court of Human Rights as a Truth Commission], in Kerem Altıparmak (ed.), *Fifty Years of the European Court of Human Rights: Failure or Success* (Ankara Barosu Yayınları, 2009), pp. 222-232.

<sup>1182</sup> See further Kurban, Erözden and Gülalp, *Supranational Rights Litigation*, (showing the impact of Kurdish litigation on the legal mobilization of the Armenian, Greek Orthodox and Alevi minorities in Turkey).

<sup>1183</sup> Anagnostou, “From Belfast to Diyarbakır and Grozny via Strasbourg”; Solvang, “Chechnya and the European Court of Human Rights”; Freek van der Vet, “Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights”, *Human Rights Review*, vol. 13 (2012), pp. 303-325.

<sup>1184</sup> The Stichting Russian Justice Initiative (SRJI) was founded in 2001 by human rights lawyers in the Moscow branch of Human Rights Watch, with the support of Dutch human rights organizations. Together with EHRAC, it accounts “for the majority of applications with the ECtHR concerning disappearances.” Van der Vet, “Seeking Life, Finding Justice”, at pp. 304-305.

<sup>1185</sup> Turkey accepted the right to individual petition in 1987 and the Court’s jurisdiction in 1990, whereas Russia accepted both in 1998.

experts with not only extensive knowledge on the ECHR system but also experience in litigating specific legal issues arising from such violations.

Much has been written about the KHRP's role in the success of Kurdish legal mobilization. The KHRP was indeed a novel project, which enabled the strategic litigation of cases initiated by the İHD lawyers in Diyarbakır. On the other hand, its resources and organizational scale were miniscule when compared with similar initiatives in Latin America. Perhaps the closest analogy to the KHRP in the inter-American system is the Center for Justice and International Law (CEJIL), which has been engaged in most cases before the IACtHR.<sup>1186</sup> Founded in 1991 to capitalize on the momentum generated by the Court's first contentious judgment in *Velásquez Rodríguez v. Honduras*, CEJIL has from the outset engaged in strategic litigation by seeking cases "emblematic of a wider set of violations." It works in more than 20 countries in the Americas and has offices in "distinct corners of the hemisphere", reflecting its "strategic need to be in close contact with those countries in the region and to maintain a close working relationship with local partners"<sup>1187</sup> – 380 rights defenders and organizations.<sup>1188</sup> This scale of geographical and institutional organization could only be possible with access to generous institutional funding, and a shared language and history among the members of the transnational network, which facilitates communication and enables a contextual understanding of the complex issues surrounding state violence.

The KHRP's founder Kerim Yıldız faced a number of structural barriers his Latin American counterparts do not seem to have. Like most of the exiled Kurdish activists in Europe, he initially lacked some of the essential resources for mobilization, such as fluency in English, familiarity with the political and legal system in Europe, as well as social capital. Latin American exiles in the US, particularly those from the Southern Cone, were highly-educated individuals of middle class background. The presence of a significant Spanish-speaking Latino community in the US arguably lessened the communication barriers for diaspora activists who did not speak English. Furthermore, the KHRP was never institutionalized. Yıldız's extraordinary zeal and motivation which gave rise to the foundation and growth of the KHRP was also a handicap due to the organization's association with and dominance by what Charles Epp has named a "charismatic leader."<sup>1189</sup> The physical distance and lack of a common language led the British and Kurdish lawyers to rely heavily on the intermediary role of Yıldız, rendering the transnational network vulnerable to personal and professional fallout.

Legal mobilization literature draws a boundary between the resourceful lawyer/organization litigating, and their citizen and social movement clients.<sup>1190</sup> Kurdish lawyers in Turkey were a world apart from the profile of legal experts in the Anglo-American cases or Russian human rights lawyers who "operate[d] in the middle" between the ECtHR and their clients.<sup>1191</sup> The

---

<sup>1186</sup> Davis and Warner, "Reaching Beyond the State", at p. 249.

<sup>1187</sup> CEJIL's website, <https://www.cejil.org/en/cejils-offices-0>.

<sup>1188</sup> Ibid.

<sup>1189</sup> Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998), at p. 98 (citing the domination of Indian rights-advocacy groups by charismatic leaders as one of the reasons for the weakness of the support structure for legal mobilization in the country).

<sup>1190</sup> McCann, "Law and Social Movements"; Epp, *The Rights Revolution*.

<sup>1191</sup> Van der Vet, "Seeking Life, Finding Justice".

first generation Kurdish lawyers lacked any knowledge of the Convention system or litigation experience, did not speak English, had never been outside Turkey, were not connected to the international community, were themselves victims of state violence and their “own... client”<sup>1192</sup> before the ECtHR. The “middle” players between the Kurdish lawyers/victims and the Court were the British lawyers and the KHRP. By the time the latter withdrew in the early 2000s, the Kurdish lawyers had acquired the capacity to engage in repeat litigation, but were still ill-equipped to respond to counter-strategies on the part of the Court (strike-out decisions and pilot judgments) or the government (unilateral declarations and the Compensation Law). The KHRP’s withdrawal rescinded the resources they had benefitted from in the absence of a domestic support structure. While Turkey’s EU candidacy generated funds for human rights activists, acquiring them required resources such as English proficiency, know-how in writing applications, human personnel and time. Successful bidders faced difficulties in executing their projects owing to the EU’s stringent and bureaucratic grant management and reporting rules which, again, required skills that the Kurdish lawyers and their associations lacked. Furthermore, the *ad hoc* nature of the EU’s project-based funds did not meet the substantial financial and human resources that transnational litigation requires.

In the absence of sustained and programmatic financial support for strategic litigation, the ECtHR work is carried out by individual lawyers, who moreover operate within the context of the highly divisive and polarizing Kurdish conflict. The PKK’s presence still looms large, exacerbating the marginalization of Kurdish activists and preventing them from enjoying the public support they need to pressure the state from below.<sup>1193</sup> Not immune from the “structural weaknesses” of the legal profession in Turkey, where lawyers work in a “highly fragmented and individualized” fashion and do not engage in collaborative work, Kurdish lawyers failed to develop a practice of proactive and strategic litigation.<sup>1194</sup> With the exception of handful cases, such as that concerning the official use of prohibited Kurdish letters, the vast majority of ECtHR litigation was carried out by individual lawyers without engaging in information sharing or collaborative thinking.

Kurdish legal mobilization’s legacy for the Court itself has also been mixed. Even during the Golden Age of Kurdish litigation, while the Court was receptive to procedural claims on admissibility and incrementally receptive to substantive claims in right-to-life and torture cases, it was persistently unreceptive to claims regarding administrative practice and ethnic discrimination. With regard to Article 25 claims, which were raised not only by victims of the original violations giving rise to the case but also by their lawyers who faced intimidation from the authorities, the Court was unduly formalistic, expecting the applicants to prove a direct link between their ECtHR litigation and the conduct of the Turkish authorities. There was also a temporal factor at work in the impact of Kurdish legal mobilization, which significantly

---

<sup>1192</sup> Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (The University of Michigan Press, 2005), at p. 2 (that Lambda Legal Defense and Education Fund became its own first client when it successfully sued against a court decision denying its petition for incorporation as a public interest law firm dedicated to the advancement of gay rights).

<sup>1193</sup> Epp, *The Rights Revolution*.

<sup>1194</sup> Ibid, at p. 100. The legal profession in Turkey bears close resemblance to that in India, which has a weak and fragmented support structure for legal mobilization, explaining the lack of a “rights revolution” despite the existence of constitutional bill of rights and an activist Supreme Court. Ibid, at pp. 90-110.

lessened over time due to the ECtHR's docket crisis and the progress of EU-Turkey relations, as discussed in Chapter 6.

This chapter has addressed the ECtHR's response to the legal mobilization of Kurdish lawyers against state violence. How the Court has addressed their legal claims and to what extent its judgments on disappearances, torture, extrajudicial killings, and forced evictions/property destructions affected Turkey's policies is the subject of Chapter 6. But before that, the next chapter draws a picture of the state violence contested in the ECtHR cases on the basis of its actors, acts and victims.

---

## Violence as State Policy: Actors, Acts and Victims

### 5.1 Introduction: Definitions, Terminology and Methodology

The purpose of the chapter is to lay out the acts, actors and victims of what I argue has been a deliberate and systematic state policy put in place to criminalize non-violent opposition and intimidate the local population considered to be the PKK's support base. Deeming any means to be legitimate for eradicating actual and potential Kurdish dissent, Turkish government agents engaged in a concerted effort to commit and/or tolerate criminal acts against civilians and Kurdish dissidents. Claiming political legitimacy and legality from an emergency regime put in place in the name of counter-terrorism, the government encouraged, enabled and rewarded its official and unofficial agents to engage in atrocities against an entire Kurdish population it considered to be suspect citizens unworthy of the protection of the Turkish Constitution. The *de jure* impunity regime shielding government agents from criminal accountability was sustained by judicial complicity, leaving Kurdish civilians without any protection against state violence.

From the late 1980s until the early 2000s, Turkish officials and their collaborators engaged in four types of atrocities against the Kurds: enforced disappearance, torture, extrajudicial execution and mass-scale forced displacement coupled with property destructions. This chapter interchangeably refers to these acts as state violence, state crimes, and gross human rights abuses. The first three practices have long been considered as both criminal offenses and grave human rights violations.<sup>1195</sup> In reference to López-Rey, Rodley described them as “criminal violations of human rights” due to their “deliberate assaults on the personality and corporal integrity of a person whether by the State or by an individual.”<sup>1196</sup> According to Green and Ward, these practices also constitute state crimes or state violence due to the “overlap between two distinct phenomena: (1) violations of human rights and (2) state organizational

---

<sup>1195</sup> Nigel S. Rodley, “Torture, Extra-Legal Execution and ‘Disappearance’ as Crimes under International Law”, in Petro R. David (ed.), *Crime and Criminal Policy: Papers in Honour of Manuel López-Rey y Arrojo*, Publication No. 25 (United Nations Social Defence Research Institute, 1985); International Commission of Jurists (ICJ), *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction: A Practitioners Guide* (2015).

<sup>1196</sup> Rodley, “Torture, Extra-Legal Execution and ‘Disappearance’”, at p. 587 (citing Manuel López-Rey, “Crime and Human Rights”, *Federal Probation*, no. 42 (1978), pp. 10-15, at p. 13).

deviance.”<sup>1197</sup> The mass-scale displacement of Kurdish civilians in Turkey’s emergency region, in most cases coupled with village burnings and property destructions, also falls within this category due to the fact that they gave rise to multiple violations. In human rights parlance, these state practices constitute gross and, when committed with temporal intensity and geographical concentration, systematic violations. Gross (or egregious, grave, flagrant, serious) violations refer to those that “stand out from other violations for the particularly serious threat they pose to the very essence of the protection of human rights as a whole”.<sup>1198</sup> The term “systematic” adds an aggravating factor, consisting in the repetition of the same kind of violation within a given territory and period of time, with the acquiescence – or even under the auspices – of the Government.<sup>1199</sup>

The overarching legal framework which enabled the authorities to commit these crimes was constituted by the overlapping emergency and counter-terrorism laws and regulations. While the former was restricted to 12 Kurdish provinces and the latter was applicable in the entire country, it was their combination in the Kurdish region which provided a *carte blanche* to military and civilian authorities and gave rise to state violence on a massive scale. While Turkey’s laws, policies and practices under the emergency regime rest on a historical legacy,<sup>1200</sup> the scale and nature of state violence against Kurds in the 1990s was unprecedented. Equipped with extraordinary powers under both general (Anti-Terror Law, Penal Law) and special (State of Emergency Law) legislations and shielded by *de jure* and *de facto* impunity, security forces, paramilitaries and clandestine groups within the military committed atrocities against Kurdish civilians, journalists, lawyers, doctors, activists and politicians.

I use the terms “Kurdish region” and “emergency region” interchangeably for the sake of simplicity. Certainly, not every province in the Kurdish region was ruled by a state of emergency and the dates of declaration and durations of emergency rule differed among the provinces which were governed by this regime.<sup>1201</sup> Neither is the term “Kurdish region” a claim that its native population consisted exclusively of people of Kurdish origin. Rather, it refers to a region which has historically been the homeland of the Kurds, along with Armenians, Syriacs, Yezidis and many other minority communities.

This chapter proceeds with a section mapping out the principal actors of state violence in the emergency region. While I briefly describe the mandates of regular security forces operating under the auspices of the Turkish Armed Forces (*Türk Silahlı Kuvvetleri*-TSK) or the General Directorate of Security (the Police Department) which were involved in gross human rights abuses, the focus of Section 5.2 is the four agents of state violence whose mandate, operational powers, entitlements and relations with official authorities blurred the boundary between

---

<sup>1197</sup> Penny J. Green and Tony Ward, “State Crime, Human Rights, and the Limits of Criminology”, *Social Justice*, vol. 27, no. 1 (2000), pp. 101-115, at p. 110.

<sup>1198</sup> Pietro Sardaro, “*Jus Non Dicere* for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court”, *European Human Rights Law Review*, vol. 6 (2003), pp. 601-630, at p. 601.

<sup>1199</sup> *Ibid*, at p. 602.

<sup>1200</sup> For example, the forced displacement of Kurdish civilians resembled the resettlement policies of the 1930s, while the extrajudicial execution of political dissidents dates back to the late Ottoman era. For more on these historical precedents, see Chapter 3 and 2, respectively.

<sup>1201</sup> For the names of provinces ruled under a state of emergency, see Chapter 3.

legality and illegality, and therefore need to be described in detail. Based on Turkish Parliament reports, secondary sources and interviews with Kurdish human rights lawyers, I demonstrate how these agents who operated in the grey zone between counter-terrorism and criminality were integral parts of the state structure in the emergency region. Section 5.3 lays out the *modus operandi* of four types of gross human rights abuses committed by both regular and irregular security forces. This section heavily draws on the fact-finding reports and official statements of the UN and the CoE treaty bodies to support the principal argument that these atrocities were the outputs of a systematic and discriminatory state practice targeting the entire local population in the Kurdish region and select Kurdish groups elsewhere in Turkey. In terms of domestic sources, the section relies on various *ad hoc* committees established by the Turkish Parliament to investigate extrajudicial executions, the state's involvement in organized crime and the discovery of a burial site containing the bones of disappeared Kurdish peasants. While these committees did not exhaust their powers to fully unearth the state's involvement in gross human rights abuses and to hold the perpetrators accountable, they played a crucial role in mapping out the acts, actors and victims of state violence in the Kurdish region. Sections 5.2 and 5.3 also draw on select ECtHR rulings concerning enforced disappearances, torture, extrajudicial executions and forced displacement, briefly describing the relevant facts of these cases to demonstrate the discriminatory and systematic nature of these crimes. Section 5.4 focuses on yet another official policy, the judicial cover-up of state violence, by laying out the *de jure* and *de facto* elements of the impunity regime shielding government agents against criminal accountability. Against this background, Section 5.5 focuses on the victims to demonstrate the workings of the official policies laid out in earlier sections. In an effort to highlight the names and stories behind the statistics, the section presents the factual summaries of four cases which had resulted in a ruling by the ECtHR based on a fact-finding report by the EComHR.

## 5.2 Actors Involved in State Violence

The actors engaged in gross human rights abuses in the Kurdish region were gendarmes, the Office of Special Operations, the Bolu Commando Brigade, village guards, confessors, Gendarmerie Intelligence and Counter-Terrorism (*Jandarma İstihbarat ve Terörle Mücadele-JİTEM*) and Hizbullah. The first three are security forces operating under the auspices of the TSK or the Police Department. The General Command of Gendarmerie (*Jandarma Genel Komutanlığı-JGK*) is a military security force seemingly operating under the auspices of the Ministry of Interior (MoI) in times of peace and of the TSK in times of war. In practice, it operates exclusively under the TSK's command structure.<sup>1202</sup> The Office of Special Operations was established in 1983 as Special Operation Police Teams and was given its current name in 1993. Its forces are specially trained units who are used in sensitive operations such as counter-terrorism and hostage rescue and who are employed across the country, including in the Kurdish

---

<sup>1202</sup> The JGK's performance of police duties in rural areas without being subject to the MoI's civil authority has been one of the security sector reform issues in Turkey's bid for EU accession. Lale Sariibrahimoğlu, "Gendarmerie", in Ümit Cizre (ed.), *Almanac Turkey 2005: Security Sector and Democratic Oversight* (TESEV Publications, 2006), pp. 100-111, at p. 100. See also Murat Aksoy, "The Gendarmerie", in Ahmet İnsel and Ali Bayramoğlu (eds), *Almanac Turkey 2006-2008: Security Sector and Democratic Oversight* (TESEV Publications, 2010), pp. 172-187.

region. The special operations units were implicated in various criminal activities conducted in the 1990s with the knowledge and acquiescence of the government, including the extrajudicial execution of Kurdish businessmen alleged to have funded the PKK.<sup>1203</sup> For instance, on 4 November 1993, after a National Security Council (*Milli Güvenlik Kurulu-MGK*) meeting, Prime Minister Tansu Çiller publicly stated that the government had the list of around 60 businessmen providing support to the PKK and that the state would “fight in all forms against [them], just like it fights against the PKK.”<sup>1204</sup> The murder of several Kurdish businessmen in western Turkey in 1994, starting with Behçet Cantürk on 14 January, has widely been linked to this statement.<sup>1205</sup> Finally, the Bolu Commando Brigade is an elite TSK unit made up of highly trained commandos. According to Human Rights Watch, these commandos were “expected to engage in closer contact with PKK fighters and with civilians suspected of supporting the guerrillas” and in the 1990s “were considered by soldiers and civilians alike to be far more abusive of the civilian population than the regular Army.”<sup>1206</sup> Massive military operations carried out with helicopters were the signature of the Bolu Commando Brigade, located near Istanbul. While there were anti-guerrilla combat units permanently stationed in the Kurdish region, the commandos from Bolu were flown in to the emergency region during the village destruction campaigns in spring-summer 1994.<sup>1207</sup>

The remaining four actors of state violence are irregular forces, whose mandates, operational powers and relations with formal military and civilian authorities have blurred the boundaries between legality and illegality. It is due to the unconventional nature of these four actors that I devote this section to describing the historical background of their existence, the legal framework governing their mandates (in the case of village guards and confessors), their formal and informal relations with the state, and their political and ordinary criminal activities. Otherwise, security forces operating under the auspices of the TSK and the Police Department were not only also involved in but were the mastermind of state violence against Kurdish civilians in the emergency region. In terms of their respective roles, while regular security forces, JİTEM, confessors and to a lesser extent village guards were engaged in all four types of gross abuses in both city centres and rural areas, Hizbullah was known for torturing and executing Kurdish political dissidents in urban areas.

### 5.2.1 JİTEM

Perhaps no force other than JİTEM has symbolized state violence in the Kurdish region in the 1990s. Its existence persistently denied by the authorities, JİTEM was the big open secret of the

---

<sup>1203</sup> Ertan Beşe, “Office of Special Operations” in Cizre (ed.), *Almanac Turkey 2005*, pp. 118-127.

<sup>1204</sup> See e.g. Doğan Akın, “20 Soruda Tansu Çiller Türkiye’sinin Karanlığında İşlenen o Cinayetler” [In Twenty Questions, those Murders Committed in the Darkness of Tansu Çiller’s Turkey], *T24*, 11 July 2014.

<sup>1205</sup> Ibid. These murders were also mentioned in the Turkish Parliament’s report on extrajudicial executions. TBMM, *Ülkemizin Çeşitli Yörelerinde İşlenmiş Faili Meçhul Siyasi Cinayetler Konusunda Meclis Araştırma Komisyonu Raporu* [Report of the Parliamentary Investigation Commission on Unresolved Political Killings in Various Regions of Our Country], 12 October 1995, at p. 146 (hereafter “Parliamentary Commission on Unresolved Killings Report”).

<sup>1206</sup> Human Rights Watch Arms Project, *Weapons Transfers and Violations of the Laws of War in Turkey* (1995), at p. 47.

<sup>1207</sup> The involvement of the Bolu Commando Brigade in the village destructions was documented in several ECtHR judgments discussed in Section 5.3.3.

state of exception. From political activists to ordinary villagers, virtually everyone in the region knew JİTEM, recognizing it by its *modus operandi* and the mannerisms of its agents.<sup>1208</sup>

JİTEM was publicly mentioned for the first time in a series of interviews published in the newspaper *Aydınlık*. The interviews were conducted in June 1993 by journalist Soner Yalçın with Cem Ersever, a former major who had served in the Kurdish region.<sup>1209</sup> *Aydınlık* named Ersever for the first time in January 1994, a few months after he had been murdered. The alleged perpetrator of an unknown number of extrajudicial executions and enforced disappearances, Cem Ersever himself disappeared on 25 October 1993, a day before he was scheduled to appear before a military court in Ankara on charges of disclosing military secrets to the press. On 5 November, his body was found on a roadside outside the city, in an area falling under the jurisdiction of the gendarmerie. His hands were tied behind his body and he was shot twice from close range on his head. The way he was executed and the location where his body was found reflected the *modus operandi* of JİTEM.<sup>1210</sup>

According to *Aydınlık* and the book Yalçın wrote based on his interviews,<sup>1211</sup> Cem Ersever had resigned from the JGK in March 1993 over his disagreement with the government's search for a political solution to the Kurdish question. Ersever claimed to be JİTEM's founder and leader until his resignation from the TSK.<sup>1212</sup> He claimed that all extrajudicial executions around Elazığ, Bingöl and Tunceli provinces were the works of a police chief and JİTEM leader known variously as Mahmut Yıldırım, Ahmet Demir, 'Yeşil' and 'Sakallı'.<sup>1213</sup> In this context, Ersever specifically mentioned the extrajudicial execution of lawyer Metin Can and medical doctor Hasan Kaya, the respective President and member of the Elazığ branch of Human Rights Association (*İnsan Hakları Derneği-İHD*), whose bodies were found in Tunceli several days after they had disappeared on 21 February 1993.<sup>1214</sup> Ersever did not respond to questions regarding his own involvement in extrajudicial executions, including that of Vedat Aydın, the President of the Diyarbakır branch of the People's Labour Party (*Halkın Emek Partisi-HEP*). The first high profile victim of extrajudicial executions in the Kurdish region, Aydın had been abducted on 5 July 1991 by several men who introduced themselves as police officers and his bullet-ridden body was found outside Diyarbakır several days later.<sup>1215</sup> In addition to Ersever, Yalçın interviewed several unnamed gendarme officers, who described JİTEM forces as special teams of individuals speaking fluent Kurdish, dressed like PKK militants, driving around towns and villages in private vehicles, working closely with village guards and informants, receiving

---

<sup>1208</sup> For a detailed and informative account on JİTEM, see Ertan Beşe, "Intelligence Activities of the Gendarmerie Corps (JİTEM & JİT)", in Cizre (ed.), *Almanac Turkey 2005*, pp. 172-189, at p. 173.

<sup>1209</sup> The interviews were published on 25-26 August 1993.

<sup>1210</sup> Soner Yalçın, *Binbaşı Ersever'in İtirafı* [The Confessions of Major Cem Ersever] (Doğan Kitap, 2003), at p. 198. At the time of his death, Ersever was allegedly preparing to establish a civilian organization to fight against the PKK. Çetin Ağaç, *Cem Ersever ve JİTEM Gerçeği* [Cem Ersever and the JİTEM Reality] (Pencere Yayınları, 1998).

<sup>1211</sup> Yalçın, *Binbaşı Ersever'in İtirafı*.

<sup>1212</sup> *Ibid*, at p. 52.

<sup>1213</sup> Yalçın, *Binbaşı Ersever'in İtirafı*, at p. 145.

<sup>1214</sup> This case is analysed in detail in Section 5.5.3.

<sup>1215</sup> For more on Vedat Aydın, see Chapter 4.

high income from unaccounted budgets and making significant profits from drug and weapon smuggling.<sup>1216</sup>

A commission of the Turkish Parliament established to investigate extrajudicial executions was the first official body to verify the existence of this clandestine organization, concluding in its 1995 report that it “could not understand what kind of activities JİTEM conducted in the region.”<sup>1217</sup> Referring to the testimony of a lieutenant that gendarmerie teams were tasked with collecting intelligence on terrorism, drugs and arms smuggling in the emergency region, the Parliamentary Commission for the Investigation of Unresolved Political Killings (Parliamentary Commission on Unresolved Killings) expressed puzzlement over the creation of new units within the state to perform tasks which were within the exclusive constitutional mandate of the National Intelligence Organization (*Milli İstihbarat Teşkilatı-MİT*).<sup>1218</sup>

The existence of JİTEM was publicly confirmed by a Turkish state official for the first time in 1997. In his testimony to the Parliamentary Investigation Commission Established for the Purpose of Bringing to Light the Links of Illegal Organizations to the State and the Accident in Susurluk and the Relations Behind it (Parliamentary Commission on Susurluk) established to investigate the state’s involvement in organized crime,<sup>1219</sup> Hanefi Avcı, the Vice President of the Police Intelligence Department, revealed the existence of independent covert networks established within MİT, the Police Department and JGK by security officials who believed that the PKK could only be defeated by extra-legal means. JİTEM was the network established within the JGK. These groups engaged in the kidnapping, racketeering and extrajudicial execution of Kurdish businessmen accused of financing the PKK via drug smuggling.<sup>1220</sup> The Parliamentary Commission on Susurluk concluded in its report that covert intelligence

---

<sup>1216</sup> Yalçın, *Binbaşı Ersever’in İtirafı*, at pp. 27-35.

<sup>1217</sup> TBMM, “Parliamentary Commission on Unresolved Killings Report”, at p. 57.

<sup>1218</sup> Ibid.

<sup>1219</sup> What triggered the establishment of this second commission was a scandal which erupted with a car crash on 3 November 1996 near the town of Susurluk in western Turkey. A truck collided with a car carrying the deputy chief of the Istanbul Police Department (and a former member of Office of Special Operations), a Member of the Parliament (MP) from the centre-right True Path Party which at the time was the senior partner of the coalition government, an ultranationalist contract killer on Interpol's Red List and a former beauty queen who was reportedly the lover of the latter. The clash resulted in the killing of everyone but the MP, who was also the leader of a powerful Kurdish tribe fighting with the state against the PKK as part of the village guard force. Evidence seized from the car included government-approved official identity card, weapon permit and driver’s licence issued to the contract killer under a false name, weapons, listening devices, narcotics and cash. The incident unravelled what has since come to be known as ‘the deep state’, caused a public outrage and eventually resulted in the resignation of the Minister of Interior Mehmet Ağar and Prime Minister Tansu Çiller, both of whom were implicated in the relations between the government and organized crime. While the MP who survived the accident was briefly imprisoned, no one was criminally held accountable until Ağar was finally put on trial eleven years after the incident and sentenced to five years-imprisonment. After having served one year, he benefitted from early release pursuant to legal reforms adopted in 2013. Gülşah Kurt, *Cezasızlık Sorunu: Soruşturma Süreci* [The Impunity Problem: Investigation Process] (Hakikat Adalet Hafıza Merkezi, 2014), at p. 14. On the historical roots of the ‘deep state’ in Turkey and its “symbiotic relationship with organized crime and low-intensity warfare” in the Kurdish region, see Mehtap Söyler, “Informal Institutions, Forms of State and Democracy: The Turkish Deep State”, *Democratization* [Online], DOI:10.1080/13510347.2011.650915 (2012).

<sup>1220</sup> TBMM, *Yasadışı Örgütlerin Devletle Olan Bağlantıları ile Susurluk’ta Meydana Gelen Kaza Olayının ve Arkasındaki İlişkilerin Aydınliğa Kavuşturulması Amacıyla Kurulan Meclis Araştırma Komisyonu Raporu* [Report of the Parliamentary Investigation Commission Established for the Purpose of Bringing to Light the Links of Illegal Organizations to the State and the Accident in Susurluk and the Relations Behind it], 3 April 1997, pp. 169-170 (hereafter “Parliamentary Commission on Susurluk Report”).

organizations operated outside their official mandates, which rendered it difficult to oversee whether they engaged in unlawful activities and impossible to know whether they acted in accordance with legal regulations governing their conduct.<sup>1221</sup>

It is understood that multiple intelligence organizations established within the state had lack of coordination and contention among themselves. In fact, it has not been possible to find out what exactly JİTEM's function is. But, while debating JİTEM's existence, it has emerged that its activities were an undisputed reality.<sup>1222</sup>

Several members dissented, criticizing the majority for bowing to internal and external pressures and not making full use of its mandate to investigate the extrajudicial executions. Opposition MPs accused the President of the Commission, a Member of Parliament (MP) from the governing True-Path Party (*Doğru Yol Partisi*) whose leader Prime Minister Tansu Çiller herself was implicated in the scandal, with obstructing a fact-finding visit to the Kurdish region.<sup>1223</sup>

Every interested party witnessed the intensive [killings by] unidentified perpetrators from Istanbul to the Southeast by [JİTEM]. One remembers how victims were often presented immediately after such incidents as PKK financiers or PKK affiliated or a settling of accounts within the mafia. If the murdered did not fit any of these criteria, s/he was either silently buried in the dark or were accused with various adjectives added to their names to divert public attention.<sup>1224</sup>

In January 1998, an investigative committee established by the Prime Ministry<sup>1225</sup> issued its own Susurluk report,<sup>1226</sup> which found a connection between counter-terrorism in the Kurdish region and the formation of illicit relations between politicians, government institutions and clandestine groups. The report found that JİTEM was established within the JGK and that it used large numbers of protectors and confessors.<sup>1227</sup> With respect to 'Yeşil', it concluded that his "activities and presence were known both by the police and MİT", but found it "difficult to explain the collaboration of the public authorities with this individual".<sup>1228</sup> Based on the testimony of a confessor, the report cited the murder of Musa Anter among the executions

---

<sup>1221</sup> Ibid, at p. 311.

<sup>1222</sup> Ibid, at p. 315.

<sup>1223</sup> See dissenting opinions of Izmir MP Metin Öney and Sinop MP Yaşar Topçu (joint opinion), Aydın MP Sema Pişkinsüt and İçel MP Fikri Sağlar. Ibid, at pp. 320-368.

<sup>1224</sup> Joint dissenting opinion of Öney and Topçu. Ibid, at p. 331.

<sup>1225</sup> The report was commissioned by Prime Minister Mesut Yılmaz, who took office on 30 June 1997 following the resignation of Prime Minister Necmettin Erbakan, the leader of the Welfare Party (*Refah Partisi*). Erbakan was pressured to resign by the military-dominated MGK due to his Islamist policies and rhetoric. This indirect military intervention has been named the 'February 28<sup>th</sup> Process' after the date of the MGK meeting leading to Erbakan's resignation. Thereupon, President Süleyman Demirel appointed Yılmaz, the leader of Motherland Party (*Anavatan Partisi*), as the new prime minister instead of Erbakan's coalition partner Tansu Çiller.

<sup>1226</sup> Commonly named after its author Kutlu Savaş, the Vice-President of the Board of Inspectors of the Prime Minister's Office, the report was publicly released by the government but not officially published. The full text is available on various internet sources, including

[https://tr.wikisource.org/wiki/Susurluk\\_Raporu\\_\(Kutlu\\_Sava%C5%9F\)](https://tr.wikisource.org/wiki/Susurluk_Raporu_(Kutlu_Sava%C5%9F)).

<sup>1227</sup> ECtHR, *Mahmut Kaya v. Turkey*, Application no. 22535/93, Judgment, 28 March 2000, at para. 57 (citing page 27 of the Kutlu Savaş report).

<sup>1228</sup> Ibid (citing pages 26-27 of the Kutlu Savaş report).

planned and carried out by ‘Yeşil’.<sup>1229</sup> Known affectionately within the Kurdish society as ‘Apê Musa’ (Uncle Musa), Anter was a prominent journalist, poet and writer who was among the early leaders of the Kurdish national movement and a symbol of the non-violent Kurdish dissent since the 1950s.<sup>1230</sup> He was 72 years old when he was executed in Diyarbakır on 20 September 1992. The pages containing detailed information about these executions as well as the names of journalists JİTEM had murdered were withheld on grounds of ‘state secrets’ when the report was released to the public.<sup>1231</sup>

Despite these official reports, civilian and military authorities continued to deny the existence of JİTEM. The UN Working Group on Enforced or Involuntary Disappearances (UNWG) reported in 1998 that the Turkish authorities “strongly denied the existence of JİTEM and the participation of security forces in clandestine units or death squads.”<sup>1232</sup> That said, this was not a consistent denial. In its report regarding the extrajudicial execution of Metin Can and Hasan Kaya, the EComHR noted in 1998 that it was “undisputed that Major Cem Ersever was a gendarme officer in JİTEM, who served in the south-eastern region for a considerable time.”<sup>1233</sup> The phrase “undisputed” suggests that this conclusion was not contested by government agents present during the EComHR fact-finding hearings held in Turkey. At the same time, this did not imply public acknowledgement. Indeed, as late as in 2006, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism noted that the Turkish authorities “remained ambiguous about the existence or mandate of JİTEM”.<sup>1234</sup>

In the mid-late 2000s, several JİTEM insiders made public revelations about the organization. Abdülkadir Aygan, a PKK-militant-turned-confessor who was one of JİTEM’s seven founding members along with Cem Ersever, identified 29 individuals executed by JİTEM, including Musa Anter and Vedat Aydın. Aygan made these revelations for the first time in 2004 in an interview with the pro-Kurdish daily *Ülkede Özgür Gündem* and in his memoirs.<sup>1235</sup> The information he gave led to the discovery of the remains of a disappeared man.<sup>1236</sup> However, it

---

<sup>1229</sup> ECtHR, *Mahmut Kaya*, at para. 57 (citing page 37 of the Kutlu Savaş report).

<sup>1230</sup> For more on Anter, see Chapter 3.

<sup>1231</sup> The government declined the EComHR’s request of the missing pages and annexes on the grounds that sharing the confidential report might impede the proper progress of ongoing investigations. EComHR, *Mahmut Kaya v. Turkey*, Application No. 22535/93, Report, 23 October 1998, at para. 173; EComHR, *Cemil Kılıç v. Turkey*, Application No. 22492/93, Report, 23 October 1998, at para. 1117. The censored pages were later published in the Turkish media. Ecevit Kılıç, “JİTEM’in Öyküsü” [The Story of JİTEM], in Ali Bayramoğlu and Ahmet İnel (eds.), *Almanak Türkiye: 2006-2008: Güvenlik Sektörü ve Demokratik Gözetim* [Almanac Turkey 2006-2008: Security Sector and Democratic Oversight] (TESEV Yayınları, 2009), pp. 220-229, at pp. 220-221.

<sup>1232</sup> UN Commission on Human Rights, Civil and Political Rights, Including Questions of Disappearances and Summary Executions: Addendum, *Report on the Visit to Turkey by two Members of the Working Group on Enforced or Involuntary Disappearances (20-26 September 1998)*, E/CN.4/1999/62/Add.2, 28 December 1998, at p. 12 (hereafter “UNWG 1998 Report”).

<sup>1233</sup> EComHR, *Mahmut Kaya*, at para. 324.

<sup>1234</sup> UN Human Rights Council, *Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Addendum, Mission to Turkey*, A/HRC/4/26/Add.2, 16 November 2006, at para. 52.

<sup>1235</sup> Timur Şahan and Uğur Balık, *İtirafçı: Bir JİTEM’ci Anlattı* [The Confessor: A JİTEM Member has Spoken Out] (*Aram Yayıncılık*, 2004).

<sup>1236</sup> Based on the information Aygan provided about the kidnapping, torture and execution of Murat Aslan on 10 June 1994, Aslan’s family sought help from the İHD Diyarbakır, which petitioned the prosecutor to order an excavation in the place Aygan described the body to have been buried. The excavation resulted in the discovery

was the interview he gave in 2009 to daily *Taraf*<sup>1237</sup> that triggered a national public debate. In his book, Aygan provided official documents showing his recruitment as a civil servant under the name of Aziz Turan and JİTEM salary rolls for that name, showing that the institution whose existence the authorities vehemently denied was employing staff with civil-servant status.<sup>1238</sup> Aygan accounted how JİTEM members were entitled to the same rights as other state employees, including pension.<sup>1239</sup>

In 2011, Colonel Arif Doğan claimed to be the real founder of JİTEM.<sup>1240</sup> According to him, initially named the Gendarmerie Intelligence Group Command, JİTEM was renamed in 1987 and redesigned as the central organization for counter-terrorism with operational autonomy and immunity from judicial or administrative oversight.<sup>1241</sup> It was only after prosecutors launched an investigation into Doğan's revelations and requested information from the MoI that the Turkish government officially acknowledged JİTEM's existence. In 2011, the MoI told the prosecutors that the JGK established JİTEM on its own initiative, without obtaining the approval of the MoI and the opinion of the TSK.<sup>1242</sup>

## 5.2.2 Village Guards

Reminiscent of the Hamidiye Regiments of the late Ottoman era,<sup>1243</sup> the village guards are a paramilitary force made up of Kurdish peasants armed and paid by the state, operating under the command of the military. While their introduction dates back to the early Republican era,<sup>1244</sup> their use in the fight against the PKK is based on a law adopted in 1985<sup>1245</sup> in response to the PKK's attacks on 15 August 1984, which started the armed conflict.<sup>1246</sup> Making immediate use of this authorization, the government set up the provisional village guard system in June 1985.<sup>1247</sup> The establishment of a paramilitary force derived from the need for locals familiar with the mountainous terrain and fluent in Kurdish to locate the PKK camps in the area and intercept the PKK's internal communications. In recruiting civilians, the military also aimed to

---

of bones concluded by forensic experts to belong to Aslan. Burhan Ekinci, "İşte İtiraf, İşte Ceset! Sorumlular Nerede?" [Here is the Confession, Here is the Body! Where are those Responsible?], *Bianet*, 2 February 2005.  
<sup>1237</sup> Neşe Düzel, "JİTEM İtirafçısı Abdülkadir Aygan Anlatıyor" [JİTEM Confessor Abdülkadir Aygan is Telling it All], *Taraf*, 26-29 January 2009.

<sup>1238</sup> Beşe, "Intelligence Activities", at p. 173. In 2009, daily *Zaman* published a confidential document dated 11 November 1993 and signed by the JGK, showing that JİTEM was established with that name on 27 August 1987. *Zaman*, "İşte JİTEM'in Belgesi" [Here is the JİTEM Document], 12 March 2009. Similarly, the 1994 phone directory of the JGK published in a book contained the numbers of JİTEM units in each province they were located. Ağaç, *Cem Ersever ve JİTEM Gerçeği*, at Appendix.

<sup>1239</sup> Düzel, "JİTEM İtirafçısı Abdülkadir Aygan Anlatıyor."

<sup>1240</sup> The classified pages of the Kutlu Savaş report also concluded that JİTEM was set up by Colonel Arif Doğan who worked for the Gendarmerie Intelligence General Directorate. Kılıç, "JİTEM'in Öyküsü", at pp. 220-221.

<sup>1241</sup> Arif Doğan, "*JİTEM'i Ben Kurdum*" ["I Founded JİTEM"] (Timaş, 2011).

<sup>1242</sup> *Radikal*, "Ve Devlet JİTEM'i Resmen Kabul Etti" [And the State Finally Acknowledged JİTEM], 3 July 2011.

<sup>1243</sup> On the Hamidiye Regiments, see Chapter 3.

<sup>1244</sup> *Köy Kanunu* [Village Law], no. 442, 18 March 1924, Official Gazette, no. 68, 7 April 1924.

<sup>1245</sup> *Köy Kanunu'nun 74üncü Maddesine İki Fıkra Eklenmesine Dair Kanun* [Law on the Addition of two Paragraphs to Article 74 of the Village Law], no. 3175, 26 June 1985, Official Gazette, no. 18715, 4 April 1985.

<sup>1246</sup> Nesrin Uçarlar, "Establishment, Construction and Preservation of the Village Guard System in the Meeting Minutes of the Turkish National Assembly and in the Turkish Press", in Şemsa Özar, Nesrin Uçarlar and Osman Aytar (eds.), *From Past to Present a Paramilitary Organization in Turkey: Village Guard System* (Diyarbakır Institute for Political and Social Research-DİSA, 2013), at p. 40.

<sup>1247</sup> Turkey, Bakanlar Komitesi [Council of Ministers], Decision no. 9632, 27 June 1985.

disrupt logistical support and recruitment to the PKK. Though meant to be “provisional”, the village guard system has been one of the fundamental pillars of Turkey’s military strategy against the PKK and remains in force more than three decades after its introduction.

The Village Law, as amended in 1985, authorizes the employment of a “sufficient number” of provisional village guards upon the proposal of the governor and approval of the MoI where there are “serious indications of reasons and violent activities requiring the declaration of a state of emergency, or an increase for whatever reason in assaults against villagers’ lives and properties.”<sup>1248</sup> By failing to put forth legal criteria for determining “serious indications” of violent activities or the kind and degree of increase in assaults to necessitate the deployment of village guards, the legislative gave the executive unlimited powers in the recruitment of these forces and refrained from assuming an oversight function in the process.

The system started with the recruitment of *provisional* village guards in 22 provinces and expanded to an additional 13 provinces with the recruitment of *voluntary* village guards in 1993.<sup>1249</sup> While the legal basis of both is the Village Law, the two forces differ in their mandates, recruitment processes and legal entitlements. Provisional guards are recruited at the proposal of the relevant governor, with the approval of the MoI, by the decision of the Council of Ministers.<sup>1250</sup> They are subordinate to the gendarme commander responsible for the village where they are employed. The qualifications for a provisional village guard are, *inter alia*, not to be younger than 22 and older than 60 years old, not to have a criminal record, being a resident of the village where he is employed, not to have participated in destructive, separatist, or reactionary activities, and to be physically and mentally fit.<sup>1251</sup> Provisional guards are responsible for, *inter alia*, identifying, pursuing and apprehending individuals who attack villages.<sup>1252</sup> They are armed by the state and paid a monthly salary. In the event they are injured, disabled or killed on duty, they or their families receive monetary compensation and a monthly salary from the state.<sup>1253</sup>

Voluntary guards are also armed by the state and deployed in the fight against the PKK. They do not receive a salary and are only allowed to carry arms within their own village. The Village Law sets forth the legal basis for the recruitment of voluntary village guards:

In the event that raiders and brigands emerge during harvest times, in order to protect the village inhabitants from looting, the village headman and the village council allocates the necessary number of village guards from among villagers who are able to use arms and submit the list of names to the district governor. When permitted by the district governor, these voluntary village guards protect the village and the villagers from raiders and brigands alongside the main village guards.<sup>1254</sup>

---

<sup>1248</sup> Village Law, at Article 74(2).

<sup>1249</sup> Ertan Beşe, “Temporary Village Guards” in Cizre (ed.), *Almanac Turkey* 2005, pp. 138-147, at pp. 139-140.

<sup>1250</sup> *Ibid.*

<sup>1251</sup> The qualifications of provisional village guards were laid out in a regulation adopted on 24 October 1986 and amended several times since. The relevant provisions have been preserved. *Köy Korucuları Yönetmeliği* [Regulation on Village Guards], Official Gazette, no. 24096, 1 July 2000, Article 5.

<sup>1252</sup> *Ibid.*, at Article 9.

<sup>1253</sup> *Ibid.*, at Article 13(2).

<sup>1254</sup> Village Law, at Article 74(1).

In light of the political, military, geographic and social circumstances of the 1920s, it is clear that the legislative purpose was to control Kurdish rebels who had taken up arms against the new Republic which did not yet have a professional army.<sup>1255</sup> The use of voluntary guards *in the fight against the PKK*, however, is clearly not authorized by the Village Law. Appointed by provincial public administrators, voluntary guards are exempt from the oversight of not only the Parliament but, unlike provisional guards, also the central government. Individuals who express concern for their own or their families' security, do not have a criminal record and have the approval of the local gendarme commander are eligible to be voluntary guards.<sup>1256</sup>

The Parliamentary Commission on Unresolved Killings revealed a hitherto unknown third category: "secret provisional village guards".<sup>1257</sup> The Commission concluded that the existence of such a force, the recruitment of individuals with criminal records and PKK militant-turned-confessors and the assignment of these guards to urban centres violated the Village Law.<sup>1258</sup> At the same time, the Commission was criticized by two members of the Parliamentary Commission on Susurluk for "failing to conduct a serious investigation" on these secret guards.<sup>1259</sup>

The 'voluntariness' of the village guard system was, however, doubtful, to say the least. Kurds who refused to join the village guard force were severely penalized by the security forces. As documented by an academic survey commissioned by the MoI, nearly half of the displaced had received "eviction orders" from the military, mainly due to their "unwillingness to become village guards".<sup>1260</sup> This punitive aspect of displacement was also verified in a Turkish high court ruling, which, in a case concerning the compensation claim of a displaced Kurd, stated that villagers who accepted to join the force remained whereas others emigrated "because they did not accept to become village guards".<sup>1261</sup> Such villagers also faced detention, ill treatment and torture.<sup>1262</sup> In extreme cases, families who did not bow down to pressure were punished with the sexual assault of their young girls. One of the most notorious of such incidents is the torture and rape in detention of the 17-year-old Şükran Aydın in retaliation for her family members' refusal to join the village guard force.<sup>1263</sup> The collective punishment of Kurdish communities was not limited to the rural areas. Lice, a district of Diyarbakır, the residents of

---

<sup>1255</sup> On Kurdish rebellions during the early Republican era, see Chapter 3.

<sup>1256</sup> This information was gathered in interviews my colleagues and I made with provincial public administrators, village guards and gendarme officials in the Sason district of Batman province as part of a collaborative research project in 2005. Ayşe Betül Çelik, "Evaluation of Fieldwork Conducted in the Province of Batman: The Socio-Economic Consequences of Internal Displacement and Obstacles to Return", in Dilek Kurban, Deniz Yüksek, Ayşe Betül Çelik, Turgay Ünal and A. Tamer Aker, *Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey* (TESEV Publications, 2007), pp. 205-227.

<sup>1257</sup> Parliamentary Commission on Unresolved Killings Report, at p. 46.

<sup>1258</sup> Ibid.

<sup>1259</sup> Joint dissenting opinion of Öney and Topçu. Parliamentary Commission on Susurluk Report, at p. 339.

<sup>1260</sup> Hacettepe Üniversitesi Nüfus Etütleri Enstitüsü [Hacettepe University Institution of Population Studies], *Türkiye'de Göç ve Yerinden Olmuş Nüfus Araştırması* [Turkey Migration and Internally Displaced Population Survey] (Hacettepe Üniversitesi, 2006), at pp. 98 and 129 (hereafter "Hacettepe Study").

<sup>1261</sup> Council of State, E. 2008/6679, K. 2009/1227, 20 February 2009.

<sup>1262</sup> On 25 January 1990, Amnesty International issued an urgent action regarding the detention, torture and arrest of villagers in Çukurca district of Hakkari who refused to take up arms. Human Rights Watch, *Destroying Ethnic Identity: The Kurds of Turkey – An Update* (1990), at p. 26.

<sup>1263</sup> ECtHR, *Aydın v. Turkey*, GC, Application no. 57/1996/676/866, Judgment, 25 September 1997. This case is analysed in detail in Section 5.5.2.

which refused to become village guards,<sup>1264</sup> was “burned, destroyed, bombed, shelled” on three different occasions on 22-23 October 1993, 4 August 1994 and 20 August 1994.<sup>1265</sup> In December 1996, the entire male population of Lice was detained in the gendarmerie station, where they were ill-treated and tortured for weeks. The incident was documented by an İHD delegation, whose report prompted the Turkish Parliament to form an inter-party delegation to visit Lice. While the MPs announced their intention to publish a public report of their findings, they never did. Around half of the 112 detainees were released after they ‘volunteered’ to become village guards.<sup>1266</sup> On the other hand, violent pressure was also exerted by the other side. The PKK regarded Kurds who joined the village guard system as traitors and retaliated with summary executions and massacres targeting not only the guards themselves but also their wives and children.<sup>1267</sup>

Many Kurds who joined the force – voluntarily or not – abused their status for personal gains and criminal activities, including kidnapping and sexually assaulting young women and girls. One reported case concerning the rape of a six-year-old girl by a village guard resulted in acquittal.<sup>1268</sup> Another case concerned the gang rape of a 17-year-old woman by three village guards, resulting in an unwanted pregnancy. Upon proof of paternity, one of the perpetrators was convicted of the lesser crime of “consented rape” and given a prison sentence of 16 months while the other two were acquitted.<sup>1269</sup> The Parliamentary Commission on Unresolved Killings found that the vast majority of village guards were individuals who participated in the force to gain the upper hand against their enemies. The Commission also reached findings about the village guards’ support for the PKK and involvement in organized crime:

Some village guards have assisted illegal organizations, out of fear or unwillingly, while also receiving their monthly salaries from the state. Some have made use of their identity as village guards to conduct arms and drugs trafficking, confident that they would avoid being searched. The majority of the region’s arms and drugs trafficking is currently under the control of village guards.<sup>1270</sup>

---

<sup>1264</sup> As the birthplace of the PKK and a district which has always voted overwhelmingly for pro-Kurdish parties, Lice was also an abhorred political symbol for the authorities.

<sup>1265</sup> Celal Başlangıç, *Korku Tapınağı: Güçlükonak-Silopi-Lice-Tunceli* [The Temple of Fear: Güçlükonak-Silopi-Lice-Tunceli] (İletişim, 2001), at pp. 202-209. Known for his investigative journalism in the Kurdish region in the 1990s, Başlangıç gave the toll of these incidents as around 30 deaths, hundreds of injuries and hundreds of destroyed houses and businesses.

<sup>1266</sup> Başlangıç, *Korku Tapınağı*, at pp. 223-243. On the ‘Lice events’ of 22-23 October 1993, see Chapter 4.

<sup>1267</sup> Human Rights Watch, *Displaced and Disregarded: Turkey’s Failing Village Return Program* (2002), at p. 12.

<sup>1268</sup> Joseph R. Crowley Program, “Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey”, *Fordham International Law Journal*, vol. 22, no. 5 (1998), pp. 2129-2269, at pp. 2205-2206.

<sup>1269</sup> Eren Keskin, *Adli Tıp Raporlarının Dava Dosyalarına Etkisi* [The Impact of the Council of Forensic Medicine on Court Cases] (Gözültünde Cinsel Taciz ve Tecavüze Karşı Hukuki Yardım Bürosu, undated), at pp. 17-18.

<sup>1270</sup> Parliamentary Commission on Unresolved Killings Report, at p. 45.

The criminal intentions of these individuals collided with the official policy of executing<sup>1271</sup> and disappearing<sup>1272</sup> those Kurdish civilians who refused to join the village guards, were perceived to be PKK sympathizers or militias, or whose family members had joined the PKK.

Influential people in the region have used the village guard system as a basis for their dominance, and clan chiefs employed as chief village guards have been able to flout the law more than before, cruelly subjecting their opponents to oppression and denouncing them as PKK members to the security forces. Some village guards have even murdered villagers with whom they had blood feuds, claiming that they were PKK members, or have oppressed them and forced them to abandon their villages.<sup>1273</sup>

The first publicly known example occurred in May-June 1989, when three male residents of the Ormaniçi village of Siirt disappeared after they had been handed over to village guards by the gendarmerie. One of the victims was the brother of a PKK militant and according to his family the three were killed by a village guard named Bahattin Aktuğ in retaliation for the PKK's killing of his nephew.<sup>1274</sup> Another high profile victim was Şerif Avşar, whose brother had killed the brother and uncle of a village guard. On 22 April 1994, the guard in question mobilized a group of others, a confessor and a gendarme to kidnap and execute Avşar in the presence and under the orders of the gendarmerie.<sup>1275</sup> This incident would result in an ECtHR ruling finding both a substantive and a procedural violation of the right to life protected under Article 2.<sup>1276</sup> It is among the very few cases known to have resulted in the prosecution of perpetrators by a Turkish court thanks to the ability of the victim's family to identify the names of the suspects. However, accountability was limited to the village guards and a confessor, and did not extend to the gendarme officer(s) alleged to have taken part in the crime.<sup>1277</sup>

While the Parliamentary Commission on Unresolved Killings listed a sample of crimes by the village guards and the confessors,<sup>1278</sup> official statistics on the total number and breakdown of crimes and the result of any investigations into them are lacking. The available data is limited to sporadic information released by the MoI in response to requests by opposition MPs. In April 2006, the MoI reported the breakdown of crimes committed by 5,139 provisional guards since 1985 as follows: 2,391 crimes of terrorism, 1,341 crimes against individuals, 964 crimes against

---

<sup>1271</sup> See e.g. ECtHR, *Seyfettin Acar v Turkey*, Application no. 30742/03, Judgment, 6 October 2009.

<sup>1272</sup> See e.g. ECtHR, *Kurt v. Turkey*, Application no. 15/1997/799/1002, Judgment, 25 May 1998; *Çakıcı v. Turkey*, Application no. 23657/94, Judgment, 8 July 1999.

<sup>1273</sup> Parliamentary Commission on Unresolved Killings Report, at p. 45.

<sup>1274</sup> Amnesty International, *Turkey: Extrajudicial Executions*, AI Index: EUR 44/45/90 (1990), at pp. 5-6. Ahmet Savun, whose brother was also disappeared, later testified that when he inquired about his brother's whereabouts, he was warned by the gendarmerie major "to go home or otherwise be killed by Bahattin Aktuğ and the other guards accompanying him." Savun immediately left the village with his family and filed a criminal complaint. No investigation was carried out into this incident. Hakikat Adalet Hafıza Merkezi, *Zorla Kaybedilenler Veritabanı: Ömer Savun'un Zorla Kaybedilmesi* [Database on Enforced Disappearances: The Enforced Disappearance of Ömer Savun], available at: <http://www.zorlakaybetmeler.org/victim.php?id=HAH/person/606>.

<sup>1275</sup> Parliamentary Commission on Unresolved Killings Report, at pp. 48-49.

<sup>1276</sup> ECtHR, *Avşar v. Turkey*, Application no. 25657/94, Judgment, 10 July 2001.

<sup>1277</sup> Gökçen Alpkaya, "Kayıp'lar Sorunu ve Türkiye" [The Problem of the Missing and Turkey] [online] (1995), available at: [http://www.politics.ankara.edu.tr/dergi/pdf/50/3/8\\_gokcen\\_alpkaya.pdf](http://www.politics.ankara.edu.tr/dergi/pdf/50/3/8_gokcen_alpkaya.pdf), at pp. 49-50.

<sup>1278</sup> *Ibid.*, at pp. 47-53.

property, and 443 crimes of smuggling.<sup>1279</sup> Only 868 of the 5,139 perpetrators had been arrested.<sup>1280</sup> Some official data also exists on crimes committed by voluntary guards. As of 2003, of the 12,279 voluntary guards on active service, 264 had been convicted for “murder and attempted murder, opposition to Law No. 6136, opening fire in residential areas, and trafficking of forestry products and weapons” and 78 for aiding and abetting the PKK.<sup>1281</sup> According to the İHD, the breakdown of the crimes committed by village guards during 1990-2009 is as follows: village burnings (38), forced evictions (14), harassment and rape (12), kidnapping (22), armed attacks (294), murder (183), wounding (259), enforced disappearance (2), execution (50), robbery (70), torture and ill treatment (562), arbitrary detention (59), incitement to suicide (9), and forest burning (17).<sup>1282</sup>

There are no publicly available data on the total number of provisional, voluntary village and secret guards employed since 1985. In 1997, in response to a request from the Parliamentary Commission on Susurluk, the Regional Governorship of the State of Emergency gave the number of provisional and voluntary village guards at the time as 49,669 and 10,500, respectively. In 2003, in response to a parliamentary motion, the MoI reported over 57,000 provisional and over 12,000 voluntary guards as of that date.<sup>1283</sup> In 2014, the respective numbers were reported in the press as 47,000 and 25,000.<sup>1284</sup> With respect to the “secret” provisional guards, the Governorship denied their existence in its response to a query by the EComHR.<sup>1285</sup>

### 5.2.3 Hizbullah

Unrelated to its Shia namesake in Lebanon, Turkey’s Hizbullah is an illegal radical Islamist organization adhering to the Sunni denomination of Islam. Its membership consists almost entirely of the Kurdish followers of the Shafiite school<sup>1286</sup> of jurisprudence within the Sunni faith.<sup>1287</sup> It was founded in 1979 in Batman during the politically turbulent period between the

---

<sup>1279</sup> Dilek Kurban, Ayşe Betül Çelik and Deniz Yüksek, ‘*Overcoming a Legacy of Mistrust: Towards Reconciliation between the State and the Displaced*’ – Update on the Implementation of the Recommendations Made by the UN Secretary-General’s Representative on Internally Displaced Persons Following his Visit to Turkey, (TESEV and NRC/IDMC, 2006), at p. 21 (in reference to information given to the authors by the MoI and to the MoI’s response to the query of an opposition MP).

<sup>1280</sup> Ibid.

<sup>1281</sup> Turkey, MoI, Toplumla İlişkiler Daire Başkanlığı [Social Relations Department], Yazılı Soru Önergesine Yanıt [Response to a Written Motion], no. B050Tİb00000001/538, 24 December 2003, available at: <http://www2.tbmm.gov.tr/d22/7/7-1471c.pdf>.

<sup>1282</sup> İHD, *Ocak 1990-Mart 2009 Döneminde Köy Korucuları Tarafından Gerçekleştirilen İnsan Hakları İhlallerine İlişkin Özel Rapor* [Special Report concerning Human Rights Violations by Village Guards in the Period January 1990 – March 2009] (2009).

<sup>1283</sup> Dilek Kurban, “The Village Guard System as a ‘Security’ Policy”, in İnşel and Bayramoğlu (eds), *Almanac Turkey 2006-2008*, pp. 203-210, at pp. 205-206.

<sup>1284</sup> *Sabah*, “Türkiye’de kaç tane Köy Korucusu var? Köy Korucularının Görevleri Nelerdir?” [How many Village Guards are there in Turkey? What are the Duties of Village Guards?], 17 May 2016.

<sup>1285</sup> Parliamentary Commission on Susurluk Report, at p. 339.

<sup>1286</sup> The Shafiite school is “more conservative and orthodox” in relation to its Sunni counterpart and “is especially known for its highly restrictive rules for women.” Ruşen Çakır, “The Reemergence of Hizbullah in Turkey”, *Policy Focus*, no. 74 (2007), at p. 4.

<sup>1287</sup> Mehmet Kurt, *Din, Şiddet ve Aidiyet: Türkiye’de Hizbullah* [Religion, Violence and Belonging: Hizbullah in Turkey] (İletişim, 2015), at p. 22.

Islamic Revolution in Iran and the *coup d'état* in Turkey.<sup>1288</sup> As elsewhere in the country, the Kurdish region was witnessing the rise of political Islam and polarized along ideological lines, with numerous left-wing and Islamist groups competing for political influence.<sup>1289</sup> After the *coup*, similar to the PKK's emergence as the hegemon within the Kurdish left, Hizbullah established its domination over the Kurdish Islamist sphere by eliminating its competitors, including those who refused violence as a means of resistance.<sup>1290</sup> In the 1990s, Hizbullah moved its base to Diyarbakır and engaged in grassroots organizing in houses, mosques, high schools, student boarding houses and bookstores.<sup>1291</sup> During this period, its members reportedly received ideological and military training in Iran to establish an Islamic state in Turkey and engaged in massive violence against rival Kurdish Islamist groups and clerics.<sup>1292</sup>

In May 1991, the PKK assassinated a leading Hizbullah member,<sup>1293</sup> starting a war which lasted into the mid-1990s and killed around 500 PKK and 200 Hizbullah militants/sympathizers.<sup>1294</sup> Hizbullah was implicated in the wave of extrajudicial executions against Kurdish dissidents it deemed to be affiliated with the PKK.<sup>1295</sup> According to Human Rights Watch, Hizbullah mainly operated in the urban centres and “repeatedly targeted people with a history of being harassed, detained, ill-treated, and tortured by the police.”<sup>1296</sup> Its signature was executions carried out through single shots in the back of the head, often in daylight and on the streets of Kurdish cities. Journalists who attempted to uncover Hizbullah's executions and its collision with the security forces became victims themselves. Halit Güngen, the Diyarbakır bureau chief of newsweekly *2000'e Doğru*, was shot with a single bullet on 8 February 1992, after having written about the training of Hizbullah militants in the Diyarbakır headquarters of the Office of Special Operations.<sup>1297</sup> The Committee to Protect Journalists concluded that “the circumstances implicate the state.”<sup>1298</sup> On 8 June, Hafız Akdemir, a reporter in the Diyarbakır bureau of *Özgür*

---

<sup>1288</sup> The organization was founded under the name of *Cemaata Ulemayên Islâmî* (Community of Islamic Scholars) and subsequently endorsed the name Hizbullah attributed to it by Turkish security forces, the media and other Islamist groups. Ibid, at pp. 46-47; Çakır, *The Reemergence of Hizbullah*, at p. 1.

<sup>1289</sup> Kurt, *Din, Şiddet ve Aidiyet*, at pp. 40-45 (that the PKK and the Hizbullah were also similar in that both were founded by individuals, Abdullah Öcalan and Hüseyin Velioğlu, who had parted their ways with nationwide political organizations predominantly made up of Turkish left and Islamism, respectively).

<sup>1290</sup> Ibid, at p. 41.

<sup>1291</sup> Ibid, at pp. 49-52. The development of the Syrian Muslim Brotherhood's Kurdish branch and the Syrian regime's massacre of the supporters of this group in Hama in 1982 are also believed to have contributed to the growth of Hizbullah in Turkey. Ibid, at pp. 53-54; Mustafa Gürbüz, *Rival Kurdish Movements in Turkey: Transforming Ethnic Conflict* (Amsterdam University Press, 2016), at p. 36. On the role of mosques in the Kurdish region “both as organizational hubs and as platforms for the dissemination of propaganda”, see Gareth Jenkins, *Political Islam in Turkey: Running West, Heading East?* (Palgrave Macmillan, 2008), at p. 188.

<sup>1292</sup> Çakır, *The Reemergence of Hizbullah*, at p. 11 (citing the confessions of a captured senior Hizbullah militant and information and documents captured by the police during the 2000 raid discussed below); Kurt, *Din, Şiddet ve Aidiyet*, at pp. 51-57; Jenkins, *Political Islam in Turkey*, at p. 187 (that although Iran provided ideological and military training to Hizbullah militants, there was no evidence that Tehran had any influence over Velioğlu's strategic plans).

<sup>1293</sup> Jenkins, *Political Islam in Turkey*, at p. 190 (that the PKK assassinated Şerif Karaaslan, a leading Hizbullah member, on 8 May 1991 in the town of İdil). But see Kurt, *Din, Şiddet ve Aidiyet*, at p. 61 (marking the PKK's killing of Karaaslan's parents on 17 May 1991 as the start of the war between the two organizations).

<sup>1294</sup> Çakır, *The Reemergence of Hizbullah*, at p. 7.

<sup>1295</sup> Yalçın, *Binbaşı Ersever'in İtirafı*, at p. 136.

<sup>1296</sup> Human Rights Watch, *What is Turkey's Hizbullah? A Human Rights Watch Backgrounder* (2000), at p. 1.

<sup>1297</sup> Yalçın, *Binbaşı Ersever'in İtirafı*, at p. 136; Human Rights Watch, “What is Turkey's Hizbullah?” at p. 2.

<sup>1298</sup> Committee to Protect Journalists (CPJ), *Journalists Killed: Turkey – Halit Gungen: 2000'e Doğru*, available at: <https://cpj.org/killed/1992/halit-gungen.php>.

*Gündem* was shot with a single bullet in his head on his way home. He had been receiving death threats due to the articles he had written about the links between Hizbullah and the state.<sup>1299</sup> On 20 November, Namık Tarancı, who had reported on Hizbullah in newsweekly *Gerçek*, was shot on the street in Diyarbakır.<sup>1300</sup> The most high-profile victim of the Hizbullah was a Kurdish MP for Mardin, Mehmet Sincar, who was shot on a street of Batman on 4 September 1993. He was part of a parliamentary delegation from the pro-Kurdish Democracy Party (*Demokrasi Partisi-DEP*) conducting fact-finding on political killings.<sup>1301</sup>

While both Hizbullah and the state have denied accusations that the latter cooperated with and even created the former to fight against the PKK, according to Jenkins, “there is considerable evidence to suggest that in the early 1990s there was a measure of low-level collusion.”<sup>1302</sup> As privately admitted by the security forces, adds Jenkins, this collusion “often went beyond wilful ignorance” and extended to providing Hizbullah “intelligence – including identifying targets for assassination – and weapons training.”<sup>1303</sup> None of the murders attributed to Hizbullah was effectively investigated, prompting Amnesty International to give further credence to evidence suggesting “that security forces had been colluding in these murders.”<sup>1304</sup> In December 1993, in reply to Amnesty International’s repeated appeals for information, Turkey’s Embassy in Madrid stated that a number of suspects detained in connection to the execution of MP Sincar and “presumed to be members of ... Hizbullah” confessed to have participated in the killing.<sup>1305</sup> An International Parliamentary Union delegation was told by the Turkish Ministry of Justice that although Sincar’s killing “was established to have been committed by Hizbullah, all those originally detained for the killing were acquitted for lack of evidence in November 1994.”<sup>1306</sup>

Until the mid-1990s, Hizbullah’s violence was limited to the Kurdish region and principally targeted PKK militants and Kurdish politicians, activists and journalists it deemed to be PKK sympathizers.<sup>1307</sup> It was only after 1998 when Hizbullah started to target high-profile Islamists across Turkey and photographic and video images of the torture, mutilation and execution of these individuals had been seized during a police raid in 2000 that the public and the authorities started to pay real attention.<sup>1308</sup> As Ruşen Çakır showed based on official statistics, security forces went after Hizbullah more aggressively only after it started to kidnap and execute

---

<sup>1299</sup> CPJ, *Journalists Killed: Turkey – Hafız Akdemir*, available at: <https://www.cpj.org/killed/1992/hafiz-akdemir.php>.

<sup>1300</sup> CPJ, *Journalists Killed: Turkey – Namık Tarancı: Gerçek*, available at: <https://cpj.org/killed/1992/namik-taranci.php>.

<sup>1301</sup> On Sincar’s execution, see A. Osman Ölmez, *Türkiye Siyasetinde DEP Depremi: ‘Legal Kürt Mücadelesi’* [DEP Earthquake in Politics in Turkey: “Legal Kurdish Struggle”] (Doruk, 1995), at pp. 285-302.

<sup>1302</sup> Jenkins, *Political Islam in Turkey*, at p. 191.

<sup>1303</sup> Ibid.

<sup>1304</sup> Amnesty International, *Turkey: Unfulfilled Promise of Reform*, AI Index: 44/87/95 (1995), p. 10.

<sup>1305</sup> Ibid.

<sup>1306</sup> Ibid.

<sup>1307</sup> A lesser, yet significant, target of Hizbullah’s violence was members of rival Islamist organizations in the Kurdish region. Çakır, *The Reemergence of Hizbullah*, at pp. 7-9. The number of such victims is estimated to be over 100. Kurt, *Din, Şiddet ve Aidiyet*, at p. 255. Jenkins, *Political Islam in Turkey*, at p. 192.

<sup>1308</sup> Hizbullah resorted to kidnappings and ransom as a source of revenue generation. Among the victims were a vocal Islamist feminist, the leader of a small Kurdish Islamist group and a Muslim cleric who belonged to a respected Kurdish Islamist family. Hizbullah also summarily executed own members it accused of espionage. Kurt, *Din, Şiddet ve Aidiyet*, at pp. 258-266; Çakır, *The Reemergence of Hizbullah*, at pp. 8-9; Jenkins, *Political Islam in Turkey*, at pp. 193-195.

Islamists.<sup>1309</sup> In the two years after the 2000 police raid, in which Hizbullah's leader Hüseyin Velioglu was killed, over 4,000 suspected militants were arrested, half of whom were released under a general amnesty declared in 2003.<sup>1310</sup> Thereafter, Hizbullah started to break its secrecy by using the media<sup>1311</sup> to stage its "comeback" in the Kurdish region. The demonstrations organized by Hizbullah in Diyarbakır in February and April 2006 attracted 100,000 people in a city of one million.<sup>1312</sup> From the mid-2000s onwards, it became increasingly visible through charitable organizations<sup>1313</sup> and a political party (*Hür Dava Partisi*-Hüda Par) to compete with the NGOs and political parties associated with the Kurdish national movement. In 2015 general elections, independent candidates supported by *Hüda Par* received 5.39 and 3.33 percent of the votes in Batman and Diyarbakır, respectively.<sup>1314</sup>

The only official body which made a serious attempt to investigate Hizbullah was the Parliamentary Commission on Unresolved Killings, which found this organization to be "a greater danger than the PKK".<sup>1315</sup> The Commission drew attention to the official suppression of information about the collusion between Hizbullah and the gendarmerie, citing testimonies of the Chief of Batman Police and the Deputy Governor of Batman province that there was a Hizbullah camp within their jurisdiction where militants received training from the gendarme forces.<sup>1316</sup> The Commission followed up on these allegations by raising them with the JGK, which denied the existence of such camps. That said, the Commission's insinuation of the involvement of the security forces in extrajudicial killings did not go any further. According to Amnesty International:

The report is an unusual document that seeks to exonerate the security forces from any involvement in political killings (in some cases, in the face of rather strong evidence), while describing a context of deeply questionable practices on the part of almost all authorities in the emergency region.<sup>1317</sup>

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions also mentioned Hizbullah in her 2001 report, noting that the organisation "abducted and killed people with impunity."<sup>1318</sup>

---

<sup>1309</sup> Çakır, *The Reemergence of Hizbullah*, at pp. 9-10.

<sup>1310</sup> Jenkins, *Political Islam in Turkey*, at p. 195.

<sup>1311</sup> The organization disseminated its message through what is deemed to be its official website, <http://huseynisevda.biz/news.php>.

<sup>1312</sup> Çakır, *The Reemergence of Hizbullah*, at p. 1.

<sup>1313</sup> The Association for Human Rights and Solidarity with the Oppressed (*Mustazaflarla Dayanışma Derneği*-Mustaza-Der) is the most high-profile charitable organization which provides social assistance to poor communities in ways reminiscent of Lebanon's Hizbullah.

<sup>1314</sup> *Timeturk*, "Hüda-Par'ın Bağımsızları ne Kadar Oy Aldı?" [How many Votes did the Independent Candidates of Hüda-Par Receive?], 8 June 2015.

<sup>1315</sup> Parliamentary Commission on Unresolved Killings Report, at p. 3.

<sup>1316</sup> *Ibid*, at p. 34 (regretting the removal of the Chief of Police from his duty shortly after he testified to the Commission, after which several public officials refused to give information to the Commission and provided data and documents with long delays).

<sup>1317</sup> Amnesty International, *Turkey: Unfulfilled Promise of Reform*, at p. 12.

<sup>1318</sup> UN Commission on Human Rights, Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights Resolution 2001/45, Addendum: Mission to Turkey*, E/CN.4/2002/74/Add.1, 18 December 2001, at para 41 (hereafter "Jahangir 2001 Report").

## 5.2.4 Confessors/Informants

In 1988, the Turkish Parliament adopted a law granting criminal immunity or reduced prison sentences to PKK militants in exchange for their expression of remorse and provision of useful intelligence to law enforcement.<sup>1319</sup> This incentive led many confessors to falsely accuse of PKK membership or support individuals against whom they held personal grudges. For example, Journalist Celal Başlangıç reported that a confessor named Engin Karadağ had singularly provided a list of over 300 residents of Lice, Diyarbakır, including virtually all trade unionists, the representatives of center-right and center-left political parties in town, businessmen and ordinary individuals. The police operations based on this list led only to the arrest of the union activists, showing that the law enforcement not only unquestionably relied on the confessors, but also selectively used the information they provided to suppress left-wing and Kurdish political dissent.<sup>1320</sup> Abdülkadir Aygan claimed that every individual reported by confessors to be PKK militants or sympathizers was executed by JİTEM, without checking the accuracy of the information.<sup>1321</sup> According to Cem Ersever, not only did JİTEM heavily recruit confessors but it also provided Hizbullah with confessors who turned into assassins.<sup>1322</sup> While confessors were initially “very effective” in intelligence gathering, said Ersever, they became a liability over time due to their engagement in extortions, blackmail, drug smuggling and even swindling the state.<sup>1323</sup>

The Parliamentary Commission on Unresolved Killings echoed some of Ersever’s allegations, concluding that the security officers expansively and inaccurately interpreted the Repentance Law by giving legal protection to individuals who did not surrender but were arrested or who held personal or political grudges against the PKK leadership. These individuals abused their status to engage in drug and arms smuggling and unlawful killings, some of which were covered up by the authorities.<sup>1324</sup> The Commission found that confessors routinely committed murder, kidnapping, extortion, ransom, arms smuggling, fraud, and even aided and abetted the PKK, which they were armed and paid to fight against.<sup>1325</sup> It confirmed that at least one confessor, on eleven different occasions during 1991-1993, was illegally released from prison by the order of Diyarbakır State Security Court (*Devlet Güvenlik Mahkemesi-DGM*) to accompany security forces in operations.<sup>1326</sup> Based on a former JİTEM informant, a Turkish journalist reported that imprisoned confessors were kept in ‘confessor wards’ to facilitate their intermittent release for intelligence gathering or operational work and spent most of their jail time in military barracks.<sup>1327</sup>

---

<sup>1319</sup> *Bazı Suç Failleri Hakkında Uygulanacak Hükümlere Dair Kanun* [Law on the Provisions to be Applied to the Perpetrators of Certain Crimes], no. 3419, 25 March 1988, Official Gazette, no. 19770, 30 March 1988, at Article 1. In 2003, the law was repealed by another similar legislation. *Topluma Kazandırma Kanunu* [Law for Gaining Citizens to Society], no. 4959, 29 July 2003, Official Gazette, no. 25191, 6 August 2003.

<sup>1320</sup> Başlangıç, *Korku Tapınağı*, at pp. 220-223.

<sup>1321</sup> Düzel, “JİTEM İtirafçısı Abdülkadir Aygan Anlatıyor”.

<sup>1322</sup> Yalçın, *Binbaşı Ersever’in İtirafları*, at pp. 161-162.

<sup>1323</sup> *Ibid*, at p. 161.

<sup>1324</sup> Parliamentary Commission on Unresolved Killings Report, at pp. 42-43.

<sup>1325</sup> For a sample of crimes committed by these groups in the Kurdish region, see *Ibid*, at pp. 47-53.

<sup>1326</sup> *Ibid*, at p. 44.

<sup>1327</sup> Kılıç, “JİTEM’in Öyküsü”, at p. 221.

The Parliamentary Commission on Susurluk gathered credible information from politicians, civil servants, military officers, courts, government agencies and the TSK on the confessors in the Kurdish region. One striking example concerned a criminal network of high ranking military personnel, confessors, village guards and local politicians in the Yüksekova district of Hakkari, which was implicated in the extrajudicial execution of 16 Kurdish civilians.<sup>1328</sup> According to local courts investigating the ‘Yüksekova Gang’ and military officers who had with first-hand knowledge, this network used confessors and village guards dressed like PKK militants to kidnap civilians for ransom.<sup>1329</sup> While the Parliamentary Commission on Susurluk concluded that confessors abused their status to engage in smuggling, racketeering, kidnapping and murder, it limited its recommendations to the termination of official links with them. Dissenting MPs were critical of the majority’s unwillingness to scrutinize the local authorities’ use of imprisoned confessors for criminal activities and to conduct its own investigation.<sup>1330</sup> MP Fikri Sağlar found it “meaningful that intelligence and security officials did not make attempts” to arrest several confessors who had publicly stated that they were the perpetrators of Musa Anter and many other unresolved political killings.<sup>1331</sup>

The Prime Ministry’s Susurluk report also contained what the EComHR named “a remarkable analysis”<sup>1332</sup> of the relations between MİT, JİTEM, confessors, village guards and the Special Warfare Department in organized crime in the Kurdish region, concluding that JİTEM used confessors to carry out extortions, kidnappings, rape, torture and executions.<sup>1333</sup>

### 5.3 The Acts of State Violence

Throughout the 1990s, human rights abuses characteristic of military dictatorships in Latin America were daily occurrences in the Kurdish region at a time when Turkey was nominally a democracy. In urban centres of the Kurdish region, civilians were dragged into cars in broad daylight, never to be seen again. At best, their bullet ridden bodies were found dead on the side of a road, prompting human rights activists to relabel the incidents as extrajudicial executions instead of enforced disappearances. Kurdish opinion leaders, activists, journalists and doctors were summarily executed on the streets of Kurdish towns. According to Amnesty International, remote Kurdish villages had become “the scene of most violations”.<sup>1334</sup> Villagers were forced to become paramilitaries or else face forced displacement, torture, disappearance or execution.

---

<sup>1328</sup> *Haber7com*, “Yüksekova Çetesi Mağdurları Umutlandı” [The Victims of the Yüksekova Gang have Gained Hope], 13 August 2010. The families of several victims eventually petitioned the ECtHR for relief. ECtHR, *Canan v. Turkey*, Application no. 39436/98, Judgment, 26 June 2007 (finding procedural and substantive violations of Article 2 and substantive violation of Article 3); ECtHR, *Yurtseven and Others v. Turkey*, Application no. 31730/96, Friendly Settlement, 18 December 2003.

<sup>1329</sup> On information provided to the Commission about the ‘Yüksekova Gang’, see Parliamentary Commission on Susurluk Report, at pp. 117-132.

<sup>1330</sup> Joint dissenting opinion of Öney and Topçu, Parliamentary Commission on Susurluk Report, at p. 343 (drawing attention to revelations that a confessor wanted by judicial authorities had been employed by the military for several years).

<sup>1331</sup> Dissenting opinion of Sağlar, Parliamentary Commission on Susurluk Report, at p. 365.

<sup>1332</sup> EComHR, *Mahmut Kaya*, at para. 333.

<sup>1333</sup> *Ibid.*

<sup>1334</sup> Amnesty International, *Turkey: Unfulfilled Promise of Reform*, at p. 1.

Entire villages were set on fire, at times with animals and humans inside the burning buildings. Over a million peasants were evicted from their homes and villages, on suspicion of supporting the PKK or for refusing to take up arms. Human rights lawyers, political dissidents and journalists who dared to speak up were subjected to forced exile, arrest, detention and torture or were disappeared or executed.

### 5.3.1 Enforced Disappearances

Commonly known in Turkey as “missing” (*kayıp*) or “missing in custody” (*gözetiminde kayıp*),<sup>1335</sup> enforced disappearance is defined under international law as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”<sup>1336</sup>

The history of enforced disappearances in Turkey did not commence in the Kurdish region. At the very least, they date back to the junta regime established after the 1980 *coup*, during which an unknown number of individuals were disappeared.<sup>1337</sup> What is particular about the 1990s is that these crimes, along with extrajudicial executions, were common occurrences in the Kurdish region. According to Gemalmaz, this had turned Turkey into a virtual “small prototype” of Latin American dictatorships.<sup>1338</sup> In an early study, Alpkaya treated enforced disappearances and extrajudicial executions as conceptually the same crimes, irrespective of the recovery of the body, and put forth a typology of victims based on the 136 cases she identified during 1991-1994.<sup>1339</sup> Of the four types of victims she identified, two consisted of Kurdish political dissidents and businessmen living in urban centers across Turkey (26 of 136 cases) and Kurds living in the emergency region (79 of 136).<sup>1340</sup>

Like extrajudicial executions, enforced disappearances occurred disproportionately in the Kurdish region, within the context of the emergency rule, and almost exclusively targeted the

---

<sup>1335</sup> See e.g. İHD, *17-30 Mayıs: Kayıplar Haftası – Kayıpları Unutmadık* [17-30 May: The Week of the Missing – We did not Forget the Missing] (2003); Alpkaya, “‘Kayıp’lar Sorunu”. In recent years, NGOs started to use the term “enforced disappearance” (“zorla kaybetme” or “zorla kaybedilme”). Özgür Sevgi Göröl, Ayhan Işık and Özlem Kaya, *Konuşulmayan Gerçek: Zorla Kaybetmeler* [The Unspoken Reality: Enforced Disappearances] (Hakikat Adalet Hafıza Merkezi, 2013).

<sup>1336</sup> International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UN on 20 December 2006 and entered into force on 23 December 2010, at Article 2. On the long process leading to the codification of this definition in a binding treaty, see ICJ, *Enforced Disappearance and Extrajudicial Execution*.

<sup>1337</sup> Alpkaya, “‘Kayıp’lar Sorunu”, at p. 41 (that the İHD data claiming that 13 individuals had been disappeared during 1980-1991 is possibly an underestimation).

<sup>1338</sup> Mehmet Semih Gemalmaz, “1991 Türkiye’inde İnsan Hakları” [Human Rights in 1991’s Turkey], in *Örneklerle Türkiye İnsan Hakları Raporu 1991* [Turkey Human Rights Report with Examples 1991] (TİHV, 1991), at p. 15.

<sup>1339</sup> Alpkaya, “‘Kayıp’lar Sorunu”. For a typology of enforced disappearances, see also Tahir Elçi, “Türkiye’de Gözetiminde Kayıplar” [Disappearances in Detention in Turkey], *Diyalog* (September-October 2009), pp. 91-97.

<sup>1340</sup> Alpkaya, “‘Kayıp’lar Sorunu”, at pp. 45-46 (noting that two individuals in the last category were Syriac Christians). The other two categories are leaders and members of illegal left-wing groups engaged in armed struggle against the government and all other cases which did not fall in one of the three categories and consisted largely of ethnic Kurds living outside the emergency region. *Ibid.*

victims because of their ethnicity and, in some cases, actual or assumed political opinion. The UNWG pointed out that of the 181 cases reported to it nationwide, the majority “were alleged to have occurred in south-eastern Turkey, in areas where a state of emergency was in force, and concerned members of the Kurdish minority.”<sup>1341</sup> The temporal peak was 1994, which witnessed almost half (55) of the 116 reported cases the UNWG transmitted to the Turkish government between 1990 and 1998.<sup>1342</sup> As the UNWG noted with “particular concern”, 1994 is also the year when the highest number of alleged enforced disappearance cases globally was reported from Turkey.<sup>1343</sup>

The number of enforced disappearance cases is unknown and highly contested. National human rights associations claim the number to be around 500, while Kurdish lawyers believe the actual number to be “much higher.”<sup>1344</sup> Göral, Işık and Kaya, who treated enforced disappearances and extrajudicial executions as conceptually the same, identified a total of 1,353 such cases across Turkey between 1980 and 2013.<sup>1345</sup> The crimes occurred intensively during 1993-1996, the peak being the year 1994 with 518 cases, and geographically concentrated in the emergency regime, where Diyarbakır, Şırnak and Mardin alone accounted for a total of 777 cases.<sup>1346</sup>

The UNWG noted that most of the reported cases followed the same pattern: the missing person had allegedly been taken to the police station, but their detention was denied by the authorities or individuals were disappeared during village raids undertaken by the gendarmes accompanied at times by village guards. In some cases, the disappeared were dissident politicians or journalists.<sup>1347</sup> In terms of methods (again, in some cases resulting in the discovery of the body which I consider in this study as extrajudicial executions), Alpkaya identified the following groups: the abduction/detention of individuals from their homes in villages and urban centres, from their workplaces, from public places including inter-city roads and city streets, and from courthouses following their release by the judge.<sup>1348</sup>

While arguably the tip of the iceberg, enforced disappearance cases that reached Strasbourg, particularly those where the EComHR and the ECtHR conducted their own investigations, provide ample empirical data to substantiate the typology of enforced disappearances in the emergency region. In the rural areas, villagers were disappeared following their detention by gendarmes, JITEM, village guards and/or Special Operations teams during military raids. For example, *Orhan v. Turkey* concerned the disappearance of three peasants after a military raid conducted in the Deveboyu hamlet in the Kulp district of the Diyarbakır province in May 1994.

---

<sup>1341</sup> UN Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”, *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/4/41, 25 January 2007, at p. 90.

<sup>1342</sup> In 1998, the UNWG updated the number of enforced disappearances to have occurred in Turkey in 1994 to be 72. UN Commission on Human Rights, *UNWG 1998 Report*, at p. 3.

<sup>1343</sup> UN Commission on Human Rights, Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment: Question of Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1995/36, 30 December 1994, at pp. 74-75 (hereafter “UNWG 1994 Report”).

<sup>1344</sup> Elçi, “Türkiye’de Gözaltında Kayıplar”, at p. 96.

<sup>1345</sup> Göral, Işık and Kaya, *Konuşulmayan Gerçek*, at p. 22.

<sup>1346</sup> Ibid.

<sup>1347</sup> See e.g. UN Commission on Human Rights, *UNWG 1994 Report*, at p. 74.

<sup>1348</sup> Alpkaya, “‘Kayıp’lar Sorunu”, at p. 47.

A large military convoy had burned the mosque and the houses in a village and ordered the residents to leave in three days. The applicant and his family obtained permission from the gendarmes to stay until they harvested their crops and set up tents near their burned houses. 18 days later, the soldiers came back and took along the applicant's two brothers and son to accompany them as guides. The ECtHR established that the disappeared were last seen alive in the hands of the security forces.<sup>1349</sup> In some cases, individuals were disappeared following their abduction by men dressed in plain clothes who were perceived or known to be security forces. For example, in *Tahsin Acar v. Turkey*, the applicant's father was a farmer who was disappeared following his abduction by two armed men in plain clothes claiming to be police officers and driving a Renault without registration plates. In addition to his son and another farmer who witnessed the abduction from the cotton field, another villager saw him being taken to the riverbank, blindfolded, mouth taped, hands and feet tied and then driven off in the company of another car.<sup>1350</sup>

In the urban centres, in some cases, individuals were disappeared following their detention by security forces dressed in official uniforms. For instance, in *Ertak v. Turkey*, the applicant's son was detained by police officers at a checkpoint on his way home from work, when police and gendarmes carried out operations in the province of Şırnak following clashes with the PKK. While the government admitted that nearly 100 people had been taken into police custody during identity checks carried out at the entrance to the town, the provincial governor, the police and the TSK denied that the applicant's son was among them, although six different eyewitnesses, including a lawyer, told the applicant that they saw his son while in custody. Some of the eyewitnesses shared the same cell with the applicant's son and witnessed that he was severely tortured. The EComHR concluded that the victim had been detained, tortured and met his death at the hands of the security forces. The ECtHR upheld this finding.<sup>1351</sup> In other cases, victims were abducted from streets or their workplaces by plainclothes men often arriving in a white Renault, carrying two-way radios and introducing themselves as police officers. For example, in *Kaya and Others v. Turkey*, the victim, while walking with two friends on the street in Diyarbakır in broad daylight, was approached by three men in civilian clothes and carrying walkie-talkies who introduced themselves as police officers carrying out an identity check. He was forced to get into the car purportedly to go to the police station and was never seen again.<sup>1352</sup> In *Özgen and Others v. Turkey*, a 73-year-old man was disappeared following his abduction on the street in Diyarbakır by four plainclothes men who stopped him for an identity check and forced him to get into a white Renault carrying a license plate.<sup>1353</sup> In *Osmanoğlu v. Turkey*, the applicant's son was disappeared after he had been picked up from his shop by two armed

---

<sup>1349</sup> ECtHR, *Orhan v. Turkey*, Application no. 25656/94, Judgment, 18 June 2002. In *Kurt v. Turkey*, the applicant's son was detained by a group of soldiers and village guards during a military operation in November 1993. The district gendarme commander denied that the individual had been detained and alleged that he had been kidnapped by the PKK. The EComHR concluded that the last time the applicant's son was seen, he was surrounded by soldiers and village guards. The ECtHR upheld this fact-finding. For similar cases, see ECtHR, *Çicek v. Turkey*, Application no. 25704/94, Judgment, 27 February 2001; ECtHR, *Ipek v. Turkey*, Application no. 25760/94, Judgment, 17 February 2004; ECtHR, *Er and Others v. Turkey*, Application no. 23016/04, Judgment, 31 July 2012.

<sup>1350</sup> ECtHR, *Tahsin Acar v Turkey*, GC, Application No 26307/95, Judgment (Preliminary Issue), 6 May 2003.

<sup>1351</sup> ECtHR, *Ertak v. Turkey*, Judgment, Application no. 20764/92, Judgment, 9 May 2000.

<sup>1352</sup> ECtHR, *Kaya and Others v. Turkey*, Application no. 4451/02, Judgment, 24 October 2006.

<sup>1353</sup> ECtHR, *Özgen and Others v. Turkey*, Application no. 38607/97, Judgment, 20 September 2005.

plainclothes men carrying walkie-talkies who introduced themselves as police officers purportedly to take him to the station to bid for a procurement contract to provide canteen services at police headquarters.<sup>1354</sup>

In some cases, the cars carrying the victims had licence plates belonging to law enforcement and/or were driven straight into police or gendarme stations. For example, in *Avşar v. Turkey*, the victim was taken from his business premises by several men who introduced themselves as security officers and village guards and was taken away in a white Renault car. His brothers followed the car and saw it entering into the central provincial gendarme station.<sup>1355</sup> In other cases, individuals were disappeared after they were last seen entering the gendarmerie stations. The most high-profile such case concerned the disappearance of Serdar Tanış and Ebubekir Deniz, the respective President and Secretary of the Silopi branch of the pro-Kurdish People's Democracy Party (*Halkın Demokrasi Partisi-HADEP*), in January 2001 after they were summoned by the commanding officer to the central gendarmerie station.<sup>1356</sup>

As in all other state crimes, families of the disappeared encountered official denial and impunity in their quests for truth and justice.<sup>1357</sup> For example, in *Timurtaş v Turkey*, the applicant's son was disappeared following his detention, along with a friend, by soldiers attached to central gendarmerie headquarters. Despite multiple eye witnesses, including the headmen of surrounding villages who had been called to the gendarmerie headquarters to see whether they recognised the two detainees, the applicant was told that his son had not been detained but had possibly joined the PKK. The EComHR concluded that the applicant's son had been apprehended by the security forces, possibly for his alleged involvement with the PKK.<sup>1358</sup> Denial was impenetrable even if the eyewitnesses were lawyers such as Fevzi Veznedaroğlu:

We would see with our own eyes men picking up people from the streets, rushing them into cars and then driving to courthouses or police stations. We would file complaints right away, but to no avail. No one would get arrested.<sup>1359</sup>

During her 2001 fact-finding mission in Turkey, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions noted that while “the number of incidents of extrajudicial killings has fallen sharply, (...) the phenomenon has by no means disappeared.”<sup>1360</sup> For the

---

<sup>1354</sup> See e.g. ECtHR, *Osmanoğlu v. Turkey*, Application no. 48804/99, Judgment, 24 January 2008.

<sup>1355</sup> See e.g. ECtHR, *Avşar v. Turkey*.

<sup>1356</sup> ECtHR, *Tanış and Others v. Turkey*, Application no. 65899/01, Judgment, 2 August 2005. Earlier in the day, three people in a car purporting to be police officers attempted to force Tanış to get into the car. Tanış told them he would go to the central gendarmerie station only if he received an official summons. Upon receiving a call on his cell phone from the commander of the gendarmerie station a few hours later, he went to the station accompanied by Deniz. Multiple eyewitnesses saw them entering the station.

<sup>1357</sup> UN Commission on Human Rights, *UNWG 1994 Report*, at p. 74.

<sup>1358</sup> ECtHR, *Timurtaş v Turkey*, Application no. 23531/94, Judgment, 13 June 2000. For another example, see Başlangıç, *Korku Tapınağı*, at p. 215 (citing the criminal complaint filed with the Diyarbakır public prosecutor by Ali Kusun, the brother of the missing person as follows: “On 29 November 1996, at around 14.00, my brother Teyfik was on duty as watchman at the construction site of 500 Evler in the Seyrantepe neighbourhood of Diyarbakır located on the Şanlıurfa road. Four civil policemen reportedly arrived to his work with a Toros station car with the licence plate 72 AN 958 and detained him. Eyewitnesses followed the car until Diyarbakır Police Headquarters. When I applied to the Police Directorate, they told me no such person had been detained.”)

<sup>1359</sup> Interview with Fevzi Veznedaroğlu.

<sup>1360</sup> UN Commission on Human Rights, *Jahangir 2001 Report*, at p. 12.

UNWG, the decline in the number of reported cases was sufficient to conclude in 1998 that “enforced disappearances in Turkey should not be evaluated as a massive or systematic practice of governmental agencies”.<sup>1361</sup> In doing so, the UNWG failed to take into account that the impunity regime, the pillar of state violence which had enabled the gross abuses in the first place, continued unabated.

### 5.3.2 Extrajudicial Executions

What constitutes an extrajudicial execution<sup>1362</sup> and how it differs from a summary execution or an illegal execution is not very clear.<sup>1363</sup> Furthermore, as Alpkaya has noted, given that enforced disappearance “has become almost entirely a form of unacknowledged [extra-judicial execution]”,<sup>1364</sup> the two are at times considered as conceptually the same crimes.<sup>1365</sup> The relevant UN Principles refer to extrajudicial, summary and arbitrary executions together and do not explain how they differ from each other.<sup>1366</sup> The diversity of state practice seems to have prompted the UN to put forth examples rather than definitions.<sup>1367</sup> In 2010, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions referred to extrajudicial executions as “killings that violate international human rights or humanitarian law” and listed under this broad definition examples, including killings by “non-State actors that operate at the behest of the Government or with its knowledge or acquiescence” and gave as examples paramilitary groups and private militias controlled and at times ordered by the government to kill political opponents.<sup>1368</sup>

Political assassinations, or “unresolved political killings”,<sup>1369</sup> are not new in Turkey’s history. Since the late Ottoman era, intellectuals, politicians and journalists holding critical views of

---

<sup>1361</sup> UN Commission on Human Rights, Civil and Political Rights, Including Questions of Disappearances and Summary Executions: Addendum, *Report on the Visit to Turkey by two Members of the Working Group on Enforced or Involuntary Disappearances (20-26 September 1998)*, E/CN.4/1999/62/Add.2, 28 December 1998, at p. 13.

<sup>1362</sup> For various definitions, see e.g. Rodley, “Torture, Extra-Legal Execution and ‘Disappearance’”, at p. 589 (defining extra-legal executions as “killings committed by public officials other than by way of lawfully-prescribed capital punishment or by way of necessary and proportionate measures incidental to legitimate law enforcement objectives or by way of the conduct of armed conflict in accordance with the rules of international humanitarian law”); Edy Kaufman and Patricia Weiss Fagen, “Extrajudicial Executions: An Insight into the Global Dimensions of a Human Rights Violation”, *Human Rights Quarterly*, vol. 3, no. 4 (1981), pp. 81-100, at pp. 81 and 84 (defining an extrajudicial execution as “the taking of a person’s life without minimal guarantees of due process of law”, such killings being “political in motivation and ... carried out with official involvement”).

<sup>1363</sup> Kaufman and Weiss Fagen, “Extrajudicial Executions”, at pp. 82-83.

<sup>1364</sup> *Ibid.*, at p. 83. See also Rodley, “Torture, Extra-Legal Execution and ‘Disappearance’”, at p. 591 (citing a resolution on extrajudicial execution adopted by the 6<sup>th</sup> UN Congress in 1980).

<sup>1365</sup> See e.g. Alpkaya, “‘Kayıp’lar Sorunu”; Göral, Işık and Kaya, *Konuşulmayan Gerçek*.

<sup>1366</sup> UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989, available at: <http://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf>.

<sup>1367</sup> The Minnesota Protocol supplementing the UN Principles refer to the following among such examples: political assassinations, deaths resulting from enforced disappearances and executions without due process. UN Office at Vienna, Centre for Social Development and Humanitarian Affairs, *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (UN, 1991), at p. 3.

<sup>1368</sup> UN Human Rights Council, *Report of the Special Rapporteur Extrajudicial, Summary or Arbitrary Executions, Philip Alston, A/HRC/14/24*, 20 May 2010, at paras. 4 and 46(a) respectively.

<sup>1369</sup> The Parliamentary Commission defined a political killing as a “politically motivated killing or the killing of an individual due to his/her political opinions.” Parliamentary Commission on Unresolved Killings, at p. 12.

Turkish nationalism or Islamic fundamentalism have been the targets of killings by unnamed perpetrators believed to be ordered, instigated or tolerated by the authorities.<sup>1370</sup> In the 1990s, the targeted assassinations of political dissidents was a phenomenon not limited to the Kurdish region or to Kurdish individuals. After all, it was the high profile killings of Turkish journalists and intellectuals known for their secular worldviews which led to the establishment of the Parliamentary Commission on Unresolved Killings. Uğur Mumcu, a journalist known for his secular worldview and investigative reporting on Islamic fundamentalism, was assassinated on 24 January 1993. This was preceded by the assassinations of secular and Kemalist lawyer Muammer Aksoy on 31 January 1990, journalist Çetin Emeç on 6 March 1990, writer and Muslim preacher-turned Islam critique Turan Dursun on 4 September 1990 and liberal theologian Bahriye Uçok on 6 October 1990. The assassinations of Emeç and Dursun were carried out by the Islamic Movement Organization (*İslami Hareket Örgütü*), founded in 1987 by yet another Islamist Kurd from Batman, whose leadership received ideological and military training as well as arms and money from the Iranian intelligence. The remaining three were the works of the Jerusalem Warriors (*Kudüs Savaşçıları*), which “were more an extension of the Iranian [intelligence] than an organization in their own right.”<sup>1371</sup>

At the same time, extrajudicial executions in the emergency region were distinct in terms of their sheer numbers, victim profile and psychological impact on the local population. As elsewhere in Turkey, victims were politicians, journalists and activists. More than 100 pro-Kurdish party members and activists alone were killed by unidentified perpetrators in the 1990s.<sup>1372</sup> 27 reporters, editors and distributors of the Kurdish-owned *Özgür Gündem* were killed in the Kurdish region during its short publication life between May 1992 and April 1994.<sup>1373</sup> Individuals affiliated as journalists, distributors or sellers with *Özgür Gündem* and its successors *Özgür Ülke*, *Yeni Politika* etc., said Amnesty International, were “murdered under circumstances suggesting security forces involvement”, disappeared or tortured.<sup>1374</sup> 21 members of the İHD alone were executed by ‘unknown perpetrators’.<sup>1375</sup> Sometimes, victims had multiple affiliations, rendering them all the more vulnerable. For example, in *Tepe v. Turkey*, the victim was a reporter for *Özgür Gündem* and the son of the chairman of the Kurdish party DEP in the Bitlis province. He was abducted from a schoolyard by a man known to be a policeman and driven away by a white Renault which was spotted the next day near a police station. His dead body was found a week later. The disappearance occurred a few days after an army general publicly threatened the victim’s father with killing his children during a heated

---

<sup>1370</sup> Amnesty International, *Turkey: Extrajudicial Executions*.

<sup>1371</sup> Jenkins, *Political Islam in Turkey*, at p. 198. For more on these two organizations and their assassinations of leading Turkish secular scholars, see *Ibid*, at pp. 195-200.

<sup>1372</sup> Nicole F. Watts, *Activists in Office: Kurdish Politics and Protest in Turkey* (University of Washington Press, 2010), at pp. 100–101 (giving this figure for the time period 1990-2007). See also Amnesty International, *Turkey: Unfulfilled Promise of Reform*, at p. 10 (giving the same figure for the time period 1992-1995).

<sup>1373</sup> Şenay Aydemir, “İki Yılda 27 Çalışanı Öldürüldü” [27 Employees Murdered in Two Years], *Radikal*, 18 March 2011.

<sup>1374</sup> Amnesty International, *Turkey: Unfulfilled Promise of Reform*, at p. 8. In 1996, Amnesty reported the number of such individuals to be 21. *Turkey: No Security without Human Rights*, at p. 13.

<sup>1375</sup> İHD, “İHD’ye Yönelik Algı Operasyonlarına Son Verin” [Put an End to the Psychological Operations against the İHD], press statement, 16 March 2016. For the name of the 14 members and executives murdered between 1986 and 2001, starting with Vedat Aydın, see İHD, *Kuruluşundan Bugüne İHD* [İHD from its Foundation to Today] (2001), at p. 36.

political discussion on the Kurdish question. This was one of the extrajudicial killings Cem Ersever attributed to ‘*Yeşil*’.<sup>1376</sup> Unlike anywhere else, ordinary people were also targeted by virtue of their ethnicity, residence, alleged sympathy or support for the PKK, or family ties to PKK militants.<sup>1377</sup> Indeed, the first victims in the Kurdish region were six peasants living in the Derebaşı village of Silopi who were executed by soldiers in September 1989, leading, according to Amnesty International, to a public debate “as to whether the security forces were not only hunting guerrillas, but also deliberately killing civilians.”<sup>1378</sup> Villagers who refused to join the village guard force were particular targets.<sup>1379</sup>

While they were among the perpetrators, village guards were at times victims themselves. In an infamous case known as the “Güçlükonak massacre”, eleven Kurdish men, including four village guards, were extrajudicially executed by the security forces on 15 January 1996. The Chief of Staff claimed that the minibus carrying the men was ambushed by the PKK near the Güçlükonak village of Şırnak and hit by rocket-prepalled grenades, causing the passengers to burn to death without the guards having had the chance to fire back. However, a fact-finding mission by an international civil initiative<sup>1380</sup> concluded that the “massacre” was not conducted by the PKK, but by the security forces. The initiative noted that none of the identity cards of the deceased handed by the gendarmes to the families was exposed to fire although the victims had been severely burned, that the site of the incident was located between a gendarmes station and a military unit, each of which a few kilometers away, and that the victims had not made any attempt to defend themselves or flee the burning vehicle.<sup>1381</sup> It found that six of the victims had been detained, interrogated and tortured by gendarmes for several days leading up to the incident on suspicion of arms smuggling and aiding the PKK and that the village guards had been called for duty on the morning of the incident to transfer the detainees to another detention facility. The authorities did not take any steps to inquire into these serious allegations and instead prosecuted three members of the initiative for “insulting the security forces”.<sup>1382</sup>

JİTEM was among the primary perpetrators of extrajudicial executions. According to Aygan, every single individual detained by JİTEM was tortured and executed, even where they provided information under interrogation. As he put it, “no one who entered the JİTEM

---

<sup>1376</sup> ECtHR, *Tepe v. Turkey*, Application no. 27244 /95, Judgment, 9 May 2003.

<sup>1377</sup> See e.g. ECtHR, *Çakıcı v. Turkey* (The applicant’s brother was detained during a military operation carried out by gendarmes and village guards in November 1993. The applicant alleged, based on multiple eyewitnesses, that his brother had been detained in Diyarbakır provincial gendarmerie headquarters for 85 days, and was kept in other detention facilities for intervals of several weeks and months. The authorities denied the allegations and claimed that the applicant’s brother was a PKK militant who was killed in fighting in February 1995. The EComHR concluded that the applicant’s brother was the victim of an unacknowledged detention and serious ill treatment in Diyarbakır gendarmerie headquarters, as a result of which he died. The ECtHR upheld this finding).

<sup>1378</sup> Amnesty International, *Turkey: Extrajudicial Executions*, at p. 9. The government claimed that the victims were terrorists killed in a clash with the security forces.

<sup>1379</sup> See e.g. Amnesty International, *Turkey: Unfulfilled Promise of Reform*, at p. 9.

<sup>1380</sup> Naming themselves “Together for Peace”, the group was made up of Turkish and Kurdish journalists, human rights defenders, writers and politicians. It also included Cem Özdemir, a member of the German Parliament, and Bernice Rubins, the Deputy President of British PEN. Başlangıç, *Korku Tapınağı*, at p. 12.

<sup>1381</sup> Ibid, at pp. 9-72. See also UN Commission on Human Rights, *Jahangir 2001 Report*, at p. 17.

<sup>1382</sup> Başlangıç, *Korku Tapınağı*, at p. 69. The lower court’s conviction of each of the three defendants to ten months imprisonment on 3 February 1998 was overruled by the High Court of Appeals. Upon retrial, all three were acquitted. Ibid, at pp. 69-70.

premises left alive.”<sup>1383</sup> In some cases, victims were executed on the spot.<sup>1384</sup> As in enforced disappearance cases, the authorities denied any involvement or responsibility and in some cases blamed the PKK.<sup>1385</sup> Reflecting back to a time when several people were executed in his city nearly on a daily basis, Fevzi Veznedaroğlu recalls an incident during his tenure as the President of the İHD Diyarbakır:

One day, two individuals walking on the street were shot at from a car driving by. They died right there. The families applied to the İHD and gave us the names of the eyewitnesses and the license plate number of the car. We went to the police, but they did not give us any information. We then saw the car in front of the police station. It turned out that it belonged to the police. We informed the prosecutor, but he did not do anything. In desperation, we issued a press statement. Ramazan Er, the Chief of Police in Diyarbakır at the time, called me into his office. He did not threaten me directly, but implicitly. He asked me why I spoke against the state.<sup>1386</sup>

The number of extrajudicial executions is unknown. While the Kurdish national movement claims the toll to be 15,000, this number has never been substantiated. The Parliamentary Commission on Unresolved Killings identified 908 killings nationwide during 1975-1994.<sup>1387</sup> A commission established by the Istanbul Bar Association to substantively and temporally complement this finding identified the total number of unresolved political killings *and* disappearances during 1975-2000 to be 2,435.<sup>1388</sup> The temporal and geographical breakdown of the cases identified by the Parliamentary Commission reveals that extrajudicial executions were an official policy in the emergency region. Of the 908 killings, 630 were committed in 1992-1993 alone. The provincial breakdown was: Diyarbakır (259), Batman (125) and Mardin (155).<sup>1389</sup> In 2005, in response to a parliamentary query, the Ministry of Justice reported that 1,248 unresolved killings were committed in the emergency region during 1987-2003.<sup>1390</sup> According to Human Rights Watch, over a 1,000 Kurdish political leaders, journalists and activists were killed in the urban centers of the Kurdish region during 1991-1994 alone.<sup>1391</sup> Abdülkadir Aygan claimed that JİTEM had committed 600-700 executions in the Diyarbakır region alone (including provinces of Elazığ, Van, Batman and Mardin) during 1990-1999.<sup>1392</sup>

---

<sup>1383</sup> Düzcel, “JİTEM İtirafçısı Abdülkadir Aygan Anlatıyor.”

<sup>1384</sup> See e.g. ECtHR, *Tanrıkulu v. Turkey*, Application no. 23763/94, Judgment, 8 July 1999.

<sup>1385</sup> See e.g. *Tepe v. Turkey* (The MoI denied that the applicant’s son had been taken into custody, claimed instead that he was a PKK member and must have been killed by the PKK in an internal settling of scores).

<sup>1386</sup> Interview with Fevzi Veznedaroğlu. For a similar case of extrajudicial execution following the abduction of the victim by a car which turned out to belong to the police, see Alpkaya, “‘Kayıp’lar Sorunu”, at p. 48.

<sup>1387</sup> The Commission noted the absence of accurate official information on the number of unresolved political killings, owing partly to the absence of specialized data collection units within the Ministries of Justice and Interior, and to the inconsistency between statistics provided by these ministries, both of which were well below the numbers identified by the Commission. Parliamentary Commission on Unresolved Killings Report, at p. 16.

<sup>1388</sup> Information provided by lawyer Mehmet Uçum, the coordinator of the commission.

<sup>1389</sup> Parliamentary Commission on Unresolved Killings Report, at p. 161.

<sup>1390</sup> Ministry of Justice, written reply to a parliamentary query, 23 May 2005.

<sup>1391</sup> Human Rights Watch, *Displaced and Disregarded*, at p. 13.

<sup>1392</sup> Düzcel, “JİTEM İtirafçısı Abdülkadir Aygan Anlatıyor.”

### 5.3.3 Forced Evictions, Village Burnings and Property Destructions

As I discussed in Chapter 3, the forced eviction of Kurdish civilians rests on a historical legacy dating back to the early republican era. At the same time, forced displacement in the 1990s was a novel phenomenon in several ways. In the 1930s, displacement was carried out pursuant to a legal framework and, though also involuntary, accompanied by a resettlement program which provided the displaced Kurds with accommodation and financial assistance. Following the containment of the Kurdish rebellions, the government granted the displaced the right of return. By contrast, the forced displacement in the 1990s took place outside the realm of law. Although the State of Emergency Law conferred on the Regional Governorship the power to evacuate residential areas and transfer their inhabitants,<sup>1393</sup> displacement was carried out by the military authorities over several years<sup>1394</sup> and without any legal basis. The informality of forced displacement freed the authorities of legal obligations which would arise from a resettlement program. The displaced did not receive any humanitarian assistance,<sup>1395</sup> were not provided with housing or financial assistance and were not granted the right of return.<sup>1396</sup> Uprooted from their lands and deprived of their livelihoods, they turned overnight into homeless and jobless urban poor masses, living in abject poverty.<sup>1397</sup>

Forced displacement in the emergency region was part of a counter-terrorism strategy.<sup>1398</sup> Perceiving Kurdish peasants who refused to become village guards as PKK sympathizers, the military sought to eradicate actual or potential logistical support and recruitment to the PKK. The authorities expansively interpreted the notion of logistical support, which they translated into legal parlance as “aiding and abetting” under the Anti-Terror Law. According to Tahir Elçi, a prominent human rights lawyer in Diyarbakır whose family members had been evicted from

---

<sup>1393</sup> *Olağanüstü Hal Bölge Valiliği İhdası Hakkında Kanun Hükmünde Kararname* [Decree with the Force of Law Establishing the Regional Governorship of the State of Emergency], no. 285, 10 July 1987, Official Gazette, no. 19517, 14 July 1987, Article 4(h) (hereafter “Decree no. 285”).

<sup>1394</sup> Bilgin Ayata, “The Politics of Displacement: A Transnational Analysis of the Forced Migration of Kurds in Turkey and Europe”, unpublished PhD thesis, Johns Hopkins University, Department of Political Science (2011), at p. 100 (that one reason why the Kurds were evicted gradually might be related to the authorities’ willingness to avoid the kind of international attention that the mass exodus of Iraqi Kurds had sparked in 1991).

<sup>1395</sup> One documented exception is village guard-turned-displaced Kurds who were placed in makeshift houses built by the government in Van province and forgotten thereafter. Dilek Kurban and Deniz Yüksek, *A Permanent Solution to Internal Displacement? An Assessment of the Van Action Plan for IDPs* (TESEV Publications, 2009). In some cases, the displaced were provided with housing or humanitarian aid by the local authorities. Bilgin Ayata and Deniz Yüksek, “A Belated Awakening: National and International Responses to the Internal Displacement of Kurds in Turkey”, *New Perspectives on Turkey*, no. 32 (2005), pp. 5-42, at p. 16.

<sup>1396</sup> It was as late as in 1999 that the government started to implement the Return to Village and Rehabilitation Project (*Köye Dönüş ve Rehabilitasyon Projesi-KDRP*), which provides limited in-kind aid to those who wish to return to their villages. Rather than being a law granting the right of return, it is an executive project whose purpose, budget and scope are not transparent. For findings of a field study on the failure of the KDRP, see Human Rights Watch, *Displaced and Disregarded*. According to a government-commissioned survey, half of the displaced were not aware of the aid distributed by the state under KDRP, while 88.5 percent of those who have returned to their villages have not received any assistance from the state. Hacettepe Study, at pp. 90 and 93.

<sup>1397</sup> On field research findings documenting the post-displacement socio-economic hardships in urban areas, see Human Rights Watch, *Displaced and Disregarded*; Kurban et al., *Coming to Terms*.

<sup>1398</sup> Joost Jongerden, *The Settlement Issue in Turkey and the Kurds: An Analysis of Spatial Policies, Modernity and War* (Brill, 2007) (that depopulation through forced displacement sought to enable the Turkish military to maintain “field domination” in the rural areas of the Kurdish region).

their village in the Şırnak province in 1992, ‘aiding and abetting’ often meant providing the PKK militants food and shelter, a common practice during the armed conflict:

Our village was on the outskirts of the Cudi Mountain. There are PKK members in Cudi. Everyone knows this. The state knows it, so do the villagers. From time to time, they [PKK militants] used to come to the village to receive aid. What I mean by ‘aid’ is bread and water. This was a reality of this region. It was a practice in all villages. There were also villagers who aided the PKK voluntarily.<sup>1399</sup>

Forced displacement was not only a war strategy, but also a punitive measure against Kurdish peasants considered to be untrustworthy. Entire families and villages were expelled from their lands because of their refusal to join the village guard force. Such unwillingness was not always due to ideological or political factors. In the words of a displaced Kurd:

Fighting started in 1994. We had planted our tobacco, and were about to harvest it. The state told us that we had to leave our village. We said: “We did not support the PKK, where should we go?” The state responded: “In that case, you will either become village guards or leave.” But, we were not in sufficient numbers to become village guards. We would have become village guards, but we were too weak. We were only five or six people. It was beyond our power.<sup>1400</sup>

Although Kurdish villagers had to earn their property rights by proving their allegiance to the state, such proof did not necessarily shield them against displacement; peasant-turned-guards who did not actively fight against the PKK were subsequently removed from the force and eventually evicted from their villages.<sup>1401</sup>

In many cases, the authorities displaced the villagers in retaliation for PKK attacks. Forced evictions were carried out without advance notice, in a swift and often brutal manner. Civilians were ordered to (immediately or within a very short time) leave their villages, many saw their houses burned down and properties destroyed and some had family members disappeared<sup>1402</sup> and summarily executed.<sup>1403</sup> In the words of a 67-year-old displaced Kurdish woman:

There were continuous military operations. The gendarmerie and village guards were torturing [villagers], even the underage. Sometimes village guards would come alone... When people started to get killed, everyone got scared and started to emigrate... 200 out of the 250 houses were burned down. My cousin got killed. The grandchild of my uncle was killed. My aunt’s husband screamed: “Do not burn my house! Kill me

---

<sup>1399</sup> Interview with Tahir Elçi, Diyarbakır, 9 May 2006.

<sup>1400</sup> Interview with a displaced Kurd as part of a collaborative research project, a village of Batman, 25 June 2005. See Kurban *et al.*, *Coming to Terms with Forced Migration*.

<sup>1401</sup> On this little known group within the Kurdish displaced, see Dilek Kurban and Mesut Yeğen, *Adaletin Kıyısında: ‘Zorunlu’ Göç Sonrasında Devlet ve Kürtler – 5233 Sayılı Tazminat Yasası’nın bir Değerlendirmesi – Van Örneği* [On the Verge of Justice: The State and the Kurds in the Aftermath of Forced Migration – An Assessment of the Compensation Law no. 5233 – The Case of Van] (TESEV Yayınları, 2012), at p. 91.

<sup>1402</sup> See e.g. ECtHR, *İpek v. Turkey* Application, no. 25760/94, Judgment, 17 February 2004; *Akdeniz v. Turkey*, Application no. 25165/94, Judgment, 31 May 2005.

<sup>1403</sup> See e.g. ECtHR, *Meryem Çelik and Others v. Turkey*, Application no. 3598/03, Judgment, 16 April 2013.

instead!” They threw him into the barn and set the barn on fire. And then they burned down the house.<sup>1404</sup>

Another displaced Kurd:

They raided the village with bulldozers and destroyed our fields. The PKK had attacked a location near the village guards’ patrol. The state came and asked us about this. They said ‘if this repeats itself, we will not ask any more questions and simply destroy your houses. If another incident takes place, leave immediately or we will come and burn your houses’ ... We told them we did not support the PKK, but they did not believe us... Then came another attack by the PKK. And the soldiers came back. They took everyone out of their homes. They evicted everyone, including children. They told us to go to Sason. They burned all the houses.<sup>1405</sup>

Human Rights Watch described the *modus operandi* of forced displacement as follows:

Rather than simply harass and threaten villagers who refused to join the village guard system, [security forces] methodically destroyed recalcitrant settlements. Helicopters, armored vehicles, troops, and village guards surrounded village after village. They burned stored produce, agricultural equipment, crops, orchards, forests, and livestock. They set fire to houses, often giving the inhabitants no opportunity to retrieve their possessions. During the course of such operations, security forces frequently abused and humiliated villagers, stole their property and cash, and ill-treated and tortured them before herding them onto the roads and away from their homes. There were many “disappearances” and extrajudicial executions.<sup>1406</sup>

Massive military operations carried out with helicopters were the signature of the Bolu Commando Brigade. Their crimes were the subject of several ECtHR cases. Concerning a raid in a village of Diyarbakır on 18 May 1994, during which the soldiers set the houses on fire, destroyed the belongings and livestock of the inhabitants and detained randomly selected six young men from the village to assist them in carrying their gears, the ECtHR concluded that:

This operation was not an isolated one. During that period other hamlets and villages suffered the same fate, with soldiers, again possibly from the Bolu brigade, backed up by military helicopters and vehicles, combing the area.<sup>1407</sup>

One of the revelations of the fact-finding hearings was the Turkish government’s reluctant acknowledgment, after persistent denials, that the Bolu Commando Brigade had indeed conducted a military operation in a village of Diyarbakır and its revelation that the commander at the material time was a general named Yavuz Ertürk.<sup>1408</sup>

---

<sup>1404</sup> Interview, Diyarbakır city centre, 8 May 2006.

<sup>1405</sup> Interview as part of a collaborative research project with a displaced Kurd, a village of Batman, 25 June 2005. See Kurban *et al.*, *Coming to Terms with Forced Migration*.

<sup>1406</sup> Human Rights Watch, *Displaced and Disregarded*, at p. 13.

<sup>1407</sup> See e.g. ECtHR, *Ipek v. Turkey*, at para. 155.

<sup>1408</sup> ECtHR, *Orhan v. Turkey*, at para. 270.

Until the early 2000s, the government vehemently denied that it displaced Kurdish villagers. To the extent that the authorities acknowledged any forced displacement, they attributed it to the PKK.<sup>1409</sup> Once again, the only state institution which put forth an alternative narrative was the Turkish Parliament which belatedly addressed the issue by establishing an investigation commission in 1997.<sup>1410</sup> In the words of the Human Rights Watch, in a “diplomatically phrased and carefully balanced” report published in 1998, the Parliamentary Commission on Migration “put the nightmare squarely on the official record”<sup>1411</sup> by concluding that some of the displaced were evicted by security forces for their refusal to become village guards or for their alleged support to the PKK.<sup>1412</sup> The Commission noted that “this practice was not based on a legal framework, but was *de facto* undertaken by the security forces”, preventing the displaced to benefit from government resettlement programs.<sup>1413</sup> It identified three groups of displaced: those who were obliged to leave their villages due to inability to make a living and access public services in a situation of armed conflict, those who were evicted by the PKK for having joined the village guard force and those who were evacuated by security forces for security reasons.<sup>1414</sup>

In 1995, Amnesty International had reported that “the ‘programme’ of emptying and burning villages which refused to join the village guard system is now to a large extent complete.”<sup>1415</sup> In reality, displacement continued into the 2000s.<sup>1416</sup> The number of depopulated settlements remained a matter of uncertainty and speculation.<sup>1417</sup> Arguably the biggest contribution of the Parliamentary Commission on Migration was its revelation of “an official figure for the village destruction campaign”.<sup>1418</sup> Based on the Regional Governor of the State of Emergency, the Commission reported that 378,335 villagers had been displaced from 820 villages and 2,345 hamlets within the emergency region.<sup>1419</sup> Based on information from nine provinces in the Kurdish region which were not under emergency rule, the Commission added to this number 85 villages and 178 hamlets, concluding that a total of 905 villages and 2,523 hamlets had been

---

<sup>1409</sup> US Committee for Refugees, *The Wall of Denial: Internal Displacement in Turkey* (1999), at p. 13. In 1994, when confronted with reports of village burnings by the security forces, the Minister of Interior claimed that the villagers were burning their own homes and that the perpetrators were PKK militants dressed as gendarmes. Amnesty International, *Turkey: No Security without Human Rights*, at p. 4.

<sup>1410</sup> The Commission, set up to investigate the effects of emigration on urban areas, was able “with some difficulty” to have its mandate extended to forced displacement in the Kurdish region. Human Rights Watch, *Displaced and Disregarded*, at p. 14.

<sup>1411</sup> *Ibid.*

<sup>1412</sup> TBMM, *Doğu ve Güneydoğu Anadolu’da Boşaltılan Yerleşim Birimleri Nedeniyle Göç Eden Yurttaşlarımızın Sorunlarının Araştırılarak Alınması Gereken Tedbirlerin Tespit Edilmesi Amacıyla Kurulan Meclis Araştırma Komisyonu* [Report of the Parliamentary Investigation Commission Established with the Aim of Investigating the Problems of our Citizens who Migrated due to the Eviction of Settlements in East and Southeast Anatolia and to Assess the Measures that Need to be Taken], 14 January 1998, at p. 31 (hereafter “Parliamentary Commission on Migration Report”).

<sup>1413</sup> *Ibid.*

<sup>1414</sup> *Ibid.*

<sup>1415</sup> Amnesty International, *Turkey: Unfulfilled Promise of Reform*, at p. 1.

<sup>1416</sup> Human Rights Watch reported that forced displacements “occurred as recently as 2001.” *Displaced and Disregarded*, at p. 4. The survey conducted by Hacettepe University covered the period 1986–2005.

<sup>1417</sup> The estimates of international sources ranged between around 400,000 and 1 million, whereas NGOs in Turkey put forth numbers ranging 3–4 million. Turgay Ünalın, “Internally Displaced Persons Concepts and Situation in the World”, presentation made for the launch of the Hacettepe Study, 4 March 2005, available at: <http://www.hips.hacettepe.edu.tr/eng/InternallyDisplacedPersonsConceptsandSituationintheWorld.pdf>.

<sup>1418</sup> Human Rights Watch, *Displaced and Disregarded*, at p. 14.

<sup>1419</sup> TBMM, Parliamentary Commission on Migration Report, at pp. 11–13.

depopulated.<sup>1420</sup> While the Commission did not provide a timeline, it noted that evictions occurred “intensively” in 1993 and 1994.

The number of individuals displaced from these settlements remains contentious. The survey conducted by Hacettepe University – the only statistically representative study – has found the number of individuals “that migrated from 14 provinces for security reasons” during 1986-2005 to be between 953,680 and 1,201,200.<sup>1421</sup> Yet, the government has never endorsed these findings and continues to claim that the number of the displaced ranges between 350,000 and 390,000.<sup>1422</sup>

### 5.3.4 Torture

The disconnect between Turkey’s formal commitments to international human rights law and policies has been nowhere as apparent in the case of torture. In the 1990s, Turkey was already a party to the UN’s and the CoE’s torture conventions.<sup>1423</sup> Its constitutional and legislative regime had numerous legal provisions prohibiting torture and making it a punishable offence.<sup>1424</sup> Yet, torture and ill-treatment were systematically exercised in detention facilities across the country, against political and ordinary suspects alike. Among political suspects, pro-Kurdish/Kurdish dissidents, Kurdish advocates, journalists working for Kurdish media and Kurdish civilians were particularly vulnerable. In 1993 alone, the UN issued urgent appeals on behalf of 16 lawyers in Diyarbakır and 41 staff of the newspaper *Özgür Gündem*.<sup>1425</sup>

Among the enabling factors were the impunity extended to perpetrators,<sup>1426</sup> prolonged incommunicado detention periods, a political culture which not only tolerated but also prescribed the use of violence against detainees, and the intimidation of medical doctors and lawyers assisting the victims. In the case of sexual assault, applied in particular to female

---

<sup>1420</sup> Ibid. In 2006, the MoI reported the number of depopulated villages and hamlets respectively as 945 and 2,021. Turgay Ünalın, Ayşe Betül Çelik and Dilek Kurban, “Internal Displacement in Turkey: The Issue, Policies, and Implementation”, in Kurban *et al.*, *Coming to Terms with Forced Migration*, pp. 79-105, at p. 83.

<sup>1421</sup> The study shows that 80 percent were displaced from rural areas and the remaining 20 percent from urban centres. The 14 provinces refer to those governed by emergency rule. Hacettepe Study, at p. 61.

<sup>1422</sup> In 2006 and 2009 respectively, after the release of the Hacettepe Study, two separate officials from the Turkish MoI claimed the number of displaced to be 358,335 and 386,30. Bekir Sıtkı Dağ, “Mevcut Gelişmeler. Türkiye ve Yerinden Olmuş Kişiler” [Current Developments, Turkey and Internally Displaced Persons], presented at conference titled *Yerinden Olmuş Kişiler* [Internally Displaced Persons], UNDP, Ankara, 23 February 2006; Yılmaz Doruk, “Türkiye’de Yerinden Edilmişlik Olgusu” [The Phenomenon of Internal Displacement in Turkey], presented at conference titled *Türkiye’de Zorunlu Göç: Hükümet Politikaları* [Internal Displacement in Turkey: Government Policies] (TESEV Yayınları, 2010), at p. 46.

<sup>1423</sup> For Turkey’s foreign policy on human rights, see Chapter 2.

<sup>1424</sup> Among others, the Constitution, the Penal Law and the Law on Criminal Procedure banned torture. The latter prohibited the use of information extracted through torture as incriminating evidence in prosecutions.

<sup>1425</sup> UN Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32, E/CN.4/1995/34*, 12 January 1995, paras. 757-779 (hereafter “Rodley 1995 Report”).

<sup>1426</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment found it “questionable whether the penalties formally provided for and/or applied in practice are fully commensurate with the seriousness of these offences.” Council of Europe, *Report to the Turkish Government on the Visit to Turkey by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 21 September 1990*, CPT/Inf(2007)1, 11 January 2007, at para. 41 (hereafter “CPT 1990 Report”).

detainees, a further enabling factor was judicial interpretation. The High Court of Appeals defined rape exclusively as forced intercourse between male and female sexual organs, ruling out anal or oral rape with the male sexual organ as well as with objects such as batons. Furthermore, the Penal Law did not include sexual harassment as a crime and the authorities required rape victims, including women with children, to go through virginity tests which, according to attorney Eren Keskin, “in and of itself was rape.”<sup>1427</sup>

According to the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur on Torture), lengthy incommunicado detention periods “provide[d] a fertile context for the infliction of torture”<sup>1428</sup> and enabled security forces to use torture “to extract ‘confessions’, to elicit names of members of illegal organizations, to intimidate detainees into becoming police informants, to inflict informal punishment for assumed support of illegal organizations and to force villagers in the south-east to become village guards.”<sup>1429</sup> An independent fact-finding mission conducted by U.S. legal scholars under the auspices of Fordham Law School concluded that in almost all cases, DGM judges accepted such confessions as valid evidence even in the presence of forensic evidence reports documenting torture and they “often serve[d] as the sole basis for prosecution.”<sup>1430</sup> In fact, the chief prosecutor of a DGM confirmed this practice to the Special Rapporteur on Torture in his “candid comments” that “most charges of aiding and abetting terrorist activities are based primarily on statements made by accused, because there tends to be no corroborative evidence in such cases” and that “a confession statement is still admissible, even if obtained under torture, if there exists corroborative evidence.”<sup>1431</sup>

The absence or insufficiency of procedural safeguards in detention was another aggravating factor. Defence lawyers were frequently denied access to their clients and their files during pre-trial detention. In 1992, the right of terrorism suspects to see a lawyer, routinely denied in practice, was formally withdrawn. From then until 1997, such detainees had no *de jure* right of access to a lawyer. While thereafter granted that right upon the judge’s extension of the custody period beyond four days, in practice detainees were pressured by the security forces not to request a lawyer and defence lawyers were unable to locate or reluctant to visit their clients.<sup>1432</sup>

---

<sup>1427</sup> Interview with Eren Keskin, Istanbul, 4 December 2015.

<sup>1428</sup> UN Commission on Human Rights, *Rodley 1995 Report*, at para. 826.

<sup>1429</sup> UN Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37, E/CN.4/1996/35*, 9 January 1996, at p. 38.

<sup>1430</sup> Joseph R. Crowley Program, “Justice on Trial”, at p. 2153.

<sup>1431</sup> UN Commission on Human Rights, Civil and Political Rights, Including the Questions of: Torture and Detention, *Report of the Special Rapporteur: Sir Nigel Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37, E/CN.4/1999/61/Add.1*, 27 January 1999, at paras. 42-43 (hereafter “Rodley 1999 Report”).

<sup>1432</sup> In the climate of fear prevalent in the emergency region, the primary hurdle for defence attorneys was to physically locate their clients whose detention would often be denied by security forces or whose whereabouts would not be revealed. If and when attorneys could overcome this obstacle, they would often not visit their clients “for fear of harassment by police” who were always present in meetings between attorneys and their clients. Joseph R. Crowley Program, “Justice on Trial”, at p. 2157.

On rare occasions where lawyers obtained access to their clients in custody, meetings took place in the presence of security officers.<sup>1433</sup>

According to the Special Rapporteur on Torture, the medical profession had an “especially pivotal role”.<sup>1434</sup> The Council of Forensic Medicine (CFM), a state institution operating under the auspices of the Ministry of Justice, has played a key role in the government’s ability to deny the existence of torture and in sustaining the impunity of security officers. Torture victims were required to present a medical report or an eye witness testimony for prosecutors to open an investigation. Detainees were not given the right to be examined by a doctor of their choice but were taken by security officers, “very often, the alleged perpetrators themselves” to doctors whom they knew would not issue accurate reports.<sup>1435</sup> In most cases, state-employed doctors made cursory visual examinations in the company of security officers and issued false reports indicating that the victim was in good health.<sup>1436</sup> Where they did describe injuries in their reports, doctors refrained from referring to torture or severe ill-treatment as possible causes.<sup>1437</sup> To obtain a psychiatric report to document post-traumatic stress was extremely difficult and independent medical reports were not accepted. Even after the ECtHR’s ruling in *Şükran Aydın*<sup>1438</sup> which raised serious questions regarding the CFM, Turkish courts rejected independent reports issued by university departments of forensic medicine and required victims to present CFM reports.<sup>1439</sup>

Throughout the 1990s, the UN and CoE monitoring bodies found systematic torture in Turkey. The reports and public statements of the European Committee for the Prevention of Torture and Unhuman or Degrading Treatment of Punishment (CPT), which carried out 16 *ad hoc* and periodic visits to Turkey during 1990-2002, provide a fascinating read on torture as a policy. During visits to detention facilities in the Kurdish region and elsewhere, CPT delegates met individuals displaying marks of torture on their bodies and found instruments of torture.<sup>1440</sup> In 1990, the CPT concluded that “torture and other forms of severe ill-treatment are important characteristics of police custody in Turkey.”<sup>1441</sup> Having found no progress in subsequent visits, on 15 December 1992 the CPT unconventionally issued a public statement that “the practice of torture and other forms of severe ill-treatment of persons in police custody remains widespread in Turkey” which “applied to both ordinary criminal suspects and persons held under anti-

---

<sup>1433</sup> Council of Europe, *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 29 September to 7 October 1991*, CPT/Inf(2007)3, 11 January 2007, at para. 32.

<sup>1434</sup> UN Commission on Human Rights, *Rodley 1999 Report*, at para. 53.

<sup>1435</sup> *Ibid*, at para. 61.

<sup>1436</sup> Amnesty International, *Turkey: No Security without Human Rights*, at p. 31.

<sup>1437</sup> UN Commission on Human Rights, *Rodley 1999 Report*, at para. 61.

<sup>1438</sup> The facts of the case are summarized below in Section 5.5.2 and the ECtHR ruling is discussed in Chapter 6.

<sup>1439</sup> Keskin, *Adli Tıp Raporlarının*, at p. 19.

<sup>1440</sup> Council of Europe, *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 28 October 1994*, CPT/Inf(2007)7, 11 January 2007, Appendix I, at para. 3 (hereafter “CPT 1994 Report”).

<sup>1441</sup> Council of Europe, *CPT 1990 Report*, at para. 178.

terrorism provisions.”<sup>1442</sup> The CPT reiterated this finding in 1994<sup>1443</sup> and issued another public statement in 1996 that it “once again found clear evidence of the practice of torture and other forms of severe ill-treatment by the Turkish police.”<sup>1444</sup> The UN Committee against Torture (CAT) and Special Rapporteur on Torture respectively concluded in 1993 and 1995 that “the existence of systematic torture in Turkey cannot be denied”<sup>1445</sup> and “torture of detainees ... continues to be systematic”.<sup>1446</sup>

Initially, the government responded to these findings with categorical denial and counter-blame. It rejected torture allegations on the basis that they were voiced by politicized and partial NGOs and dismissed the testimonies of torture survivors on the ground that they were “persons presumed to be terrorists who, in line with their strategy, had every reason to claim that they had been tortured.”<sup>1447</sup> The authorities retaliated against lawyers representing the victims with criminal investigation, detention and torture. For example, Eren Keskin and her colleagues who had launched a legal aid project to assist female victims of sexual assault in detention, were investigated, at the behest of the Police Chief of Istanbul. They were accused of having filed “criminal complaints on the basis of their own fantasies in order to create an impression that the state was raping women.”<sup>1448</sup> As I discussed in Chapter 4, the peak of the intimidation of human rights defenders representing Kurdish victims occurred in November-December 1993, with the arrest of 25 criminal defence lawyers involved in the DGM cases and ECtHR litigation. The lawyers were held in incommunicado detention for up to 25 days in the Diyarbakır gendarmerie command, in a building known to belong to JITEM. In 2003, the ECtHR issued its judgment concerning this case concluding, among others, that the “physical and mental violence at the hands of the gendarmerie” that four of the lawyers had been subjected to amounted to torture. The Court found five others to have been subjected to ill treatment.<sup>1449</sup> Among the tortured were Tahir Elçi and Meral Daniş Beştaş. In his 1995 report, the UN Special Rapporteur on Torture summarized their accounts of their experience as follows:

---

<sup>1442</sup> Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Public Statement on Turkey (Adopted on 15 December 1992)*, CPT/Inf(93)1, at para. 21. The statement was “one of the most damning reports ever issued by a human rights body”. Menno T. Kamminga, “Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?” *Netherlands Quarterly for Human Rights*, vol. 2 (1994), pp. 153-164, at p. 159.

<sup>1443</sup> Council of Europe, *CPT 1994 Report*, at para. 36 (noting that “it would be quite misleading to present the problem of torture and ill-treatment as simply being an unfortunate consequence of the scale of terrorist activity in Turkey”). See also Amnesty International, *Turkey: No Security without Human Rights*.

<sup>1444</sup> Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Public Statement on Turkey (issued on 6 December 1996)*, CPT/Inf(96)34, at para.2 (hereafter “1996 Public Statement”).

<sup>1445</sup> UN General Assembly, *Report of the Committee against Torture: Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey*, 15 November 1993, A/48/44/Add.1, at para. 38 (hereafter “CAT 1993 Report”).

<sup>1446</sup> UN Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32, E/CN.4/1995/34*, 12 January 1995, at p. 157.

<sup>1447</sup> UN General Assembly, CAT 1993 Report, at para. 37. See also Amnesty International, *Turkey: Walls of Glass*, AI Index: EUR 44/75/92 (1992).

<sup>1448</sup> Interview with Eren Keskin, Istanbul.

<sup>1449</sup> ECtHR, *Elci and Others v. Turkey*, Applications no. 23145/93 and 25091/94, Judgment, 13 November 2003.

Tahir Elçi ... was blindfolded, put in a small dark cell at the Security Directorate and later brought into an interrogation room and threatened by his interrogators with death should he 'look into human rights violations'. He was then allegedly slapped around, stripped naked and his testicles were squeezed violently. After being kept blindfolded at Cizre District Gendarmerie Command for two days in a basement, he was taken to Diyarbakir Gendarmerie Intelligence Interrogation Centre, where he was allegedly forced to lie on a concrete floor blindfolded and tortured... He was then reportedly placed in a military vehicle and told he was going to be taken to the country and shot under a bridge. He was allegedly removed from the vehicle and forced to lie blindfolded on the ground, where a gun barrel was forced into his mouth, he was kicked several times and was abused with foul language. When he refused to admit to the accusations, the officers allegedly fired a dozen shots around him. One week later, after refusing to sign statements, he was allegedly stripped naked, tortured with high pressurized water and has his testicles squeezed...<sup>1450</sup>

Meral Daniş Beştaş was ... taken to gendarmerie headquarters and blindfolded. [She] was interrogated for four days about her work for the Human Rights Association (IHD), during which she was allegedly slapped, kicked, deprived of sleep and subjected to insults, including those of a crudely sexual nature. On 9 December she was asked while blindfolded to sign a prepared statement. When she said she could not sign anything she could not see, she allegedly was threatened with torture, whereafter she was stripped of her clothes, and soaked for an hour with freezing water. An hour later she allegedly was kicked, beaten and subjected to hosing with ice cold water for 60 to 90 minutes. Two days later, upon examination, she received a medical report indicating that she had contracted pneumonia.<sup>1451</sup>

Doctors who issued accurate reports documenting torture also faced various forms of pressure, ranging from non-promotion and forced exile from the emergency region to more pervasive methods such as prosecution, detention and torture.<sup>1452</sup> Kurdish doctors serving in the emergency region were particularly vulnerable to retribution which in extreme cases took the form of extrajudicial executions. In addition to Hasan Kaya, whose case is discussed in Section 5.5.3, another Kurdish doctor whose killing was a matter of controversy before the ECtHR was Zeki Tanrıkulu. Executed by unidentified individuals on a street of Silvan, Diyarbakır, on 2 September 1993, Tanrıkulu was known for issuing accurate medical reports for torture victims. He had been questioned by the police several months before his death on the basis of allegations that he was sheltering a PKK militant, and his name was rumoured to be on a hit list. In her application to the ECtHR, Tanrıkulu's wife alleged that her husband had been killed either by the security forces or with their connivance.<sup>1453</sup> In the late 1990s, in spirit of the new policy of cooperation with the international community, government officials started to admit and

---

<sup>1450</sup> UN Commission on Human Rights, *Rodley 1995 Report*, at para. 761.

<sup>1451</sup> *Ibid*, at para. 762.

<sup>1452</sup> UN Commission on Human Rights, *Rodley 1999 Report*, at paras. 62-64. See also Keskin, *Adli Tıp Raporlarının*; Amnesty International, *Turkey: No Security without Human Rights*, at pp. 31-32.

<sup>1453</sup> ECtHR, *Tanrıkulu v. Turkey*.

condemn ‘isolated’ incidents of torture, though continuing to deny a widespread and systematic practice.<sup>1454</sup>

There are no available statistics on the number of torture and severe ill-treatment cases in the emergency region. According to Human Rights Watch, nearly 500 detainees had died of torture under interrogation during 1980-2000, most of whom were Kurdish villagers in the southeast.<sup>1455</sup>

## 5.4 Impunity

In 1999, the Special Rapporteur on Torture made the following assessment about the practice of impunity in Turkey: “[l]egal proceedings are rarely initiated against law enforcement officers committing torture, even more rarely result in the conviction of the perpetrators and, in the exceptional cases in which an enforcement officer is sentenced, the sentences tend to be lenient.”<sup>1456</sup> In her 2001 report, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions reported that “systematic” impunity enabled state agents to continue to commit abuses with the knowledge that they would not be investigated or prosecuted.<sup>1457</sup> While noting the decrease in grave human rights abuses, she noted that large numbers of extrajudicial killings remained unresolved.<sup>1458</sup>

The *de jure* basis of impunity was the Ottoman era Law on the Prosecution of Civil Servants (*Memurun Muhakemati Kanunu*) of 1914 which required the administration to authorize the investigation of crimes committed by the security forces. Administrative councils, made up of civil servants and chaired by provincial and district governors, were tasked with the power to decide whether security forces accused of any offence other than intentional killing should be prosecuted.<sup>1459</sup> It was only upon their positive decision that the prosecutor could initiate an investigation, whereas a negative decision was automatically appealed to the Supreme Administrative Court. The 1982 Constitution endorsed this law by requiring that “[p]rosecution of public servants and other public officials for alleged offences shall be subject, except in cases prescribed by law, to the permission of the administrative authority designated by law.”<sup>1460</sup>

The regime was all the more impenetrable in the emergency region. The State of Emergency Law and its decrees granted the Regional Governor extensive powers exempt from judicial review.<sup>1461</sup> The Anti-Terrorism Law provided that police officers and other public servants accused of offences, with the exception of homicide or attempted homicide, during the

---

<sup>1454</sup> UN Commission on Human Rights, *Rodley 1999 Report*, at para. 8.

<sup>1455</sup> Human Rights Watch, *Displaced and Disregarded*, at p. 12.

<sup>1456</sup> UN Commission on Human Rights, *Rodley 1999 Report*, at para. 9.

<sup>1457</sup> UN Commission on Human Rights, *Jahangir 2001 Report*, at pp. 20 and 25.

<sup>1458</sup> *Ibid.*, at p. 25.

<sup>1459</sup> The councils held secret hearings where complainants and their lawyers were not allowed to participate. For the practice of these councils, see Amnesty International, *Turkey: No Security without Human Rights*, at p. 33-34; Amnesty International, *Turkey: Extrajudicial Executions*, at p. 10; Joseph R. Crowley Program, “Justice on Trial”, at pp. 2176-2183.

<sup>1460</sup> Article 129(6).

<sup>1461</sup> For an analysis of the impunity regime sustained by the State of Emergency Law and decrees, see Chapter 3.

“performance of duties relating to the suppression of terrorism” were subject to the Law on the Prosecution of Civil Servants.<sup>1462</sup>

The limited legal basis for criminal accountability was further restricted by a judicial practice. According to the CPT, prosecutors “displayed no interest” in complaints of torture and ill-treatment under detention.<sup>1463</sup> This was the case even where victims were lawyers.<sup>1464</sup> Amnesty International reported that judges often failed to include torture allegations in the record and when they did, it was “extremely rare for them to initiate investigations into those allegations, even when supported by medical evidence.”<sup>1465</sup> In the majority of gross rights abuses, particularly in enforced disappearances, the judicial practice was one of omission, as explained by lawyer Cihan Aydın, who worked at the İHD Diyarbakır’s ECtHR litigation project during 1998-2004:

When an individual was disappeared, we would routinely write a petition describing the incident and immediately go to the DGM prosecutor’s office. They would take a look at the detention lists provided to them on a daily basis by the gendarmes and the police and immediately write down on our petition that ‘the aforementioned individual is not under detention.’ At the time, courts did not even need to decline jurisdiction simply because prosecutors did not open investigations to begin with. Until the 2000s, there were no investigations, particularly in disappearance cases.

In instances where prosecutors did open investigations, the cases were typically shuttled back and forth between regular courts and the DGM. The decision over the identity of the defendant (security forces, as alleged by the survivors or victims’ families, or the PKK, as too often concluded by prosecutors without any evidence) was critical in establishing which court had jurisdiction to hear the case (regular courts or the DGMs, respectively). The official policy of denial obliged prosecutors to attribute the alleged abuses on the PKK.

## 5.5 Victims of State Violence: Four Stories

The names and stories of Kurdish victims of state violence in the emergency region are buried behind statistics. While there are dozens of ECtHR rulings on the four types of gross abuses, cases which resulted in judgments are a fraction of the thousands of petitions filed in Strasbourg, some of which resulted in friendly settlements, the majority was found inadmissible and others are still pending.<sup>1466</sup> Furthermore, even a conservative account shows that the majority of gross human rights abuses did not even reach Strasbourg, rendering ECtHR rulings the tip of the

---

<sup>1462</sup> *Terörle Mücadele Kanunu* [Law on Combatting Terrorism], no. 3713, 12 April 1991, Official Gazette no. 20843, 12 April 1991, at Article 15(3). This provision was repealed during the EU accession process.

<sup>1463</sup> Council of Europe, *CPT 1996 Public Statement*, at para. 7 (that some prosecutors it met displayed “a tendency to seek to defend the police rather than to view objectively the matter under consideration”).

<sup>1464</sup> ECtHR, *Elci and Others*; UN Commission on Human Rights, *Rodley 1999 Report*, at para. 44.

<sup>1465</sup> Amnesty International, *Turkey: No Security without Human Rights*, at p. 33.

<sup>1466</sup> I discuss the ECtHR’s judgments and decisions in Chapter 6.

iceberg. Yet, these rulings, particularly those backed by fact-finding hearings, remain the main credible source of truth concerning the 1990s.<sup>1467</sup>

This section puts names and faces to four of these cases by summarizing their facts based on the EComHR reports, the ECtHR judgments and, where available, Turkish Parliament reports. One case per each type of gross abuse has been selected from those that resulted in an ECtHR ruling against Turkey and where the Court or the EComHR has held a fact-finding hearing. The selected cases reflect the diversity of crimes (extrajudicial execution, enforced disappearance, torture and village destruction), victims (from illiterate Kurdish peasants to Kurdish doctors), places (urban and rural areas) and perpetrators (JITEM, village guards, Hizbullah, confessors and the TSK's regular forces such as gendarmes, the Bolu Commando Brigade and the Office of Special Operations). They also display how various actors ranging from judicial authorities to medical doctors played their distinct roles in the official cover-up of the truth and in the denial of justice.

### 5.5.1 Enforced Disappearances: 'The Missing of Kulp'

In October 1993, eleven Kurdish men went missing. They were villagers rounded up by the military during a massive operation and were disappeared soon after. The story of their enforced disappearance, as established by the EComHR in 1998<sup>1468</sup> and the Turkish Parliament Human Rights Commission in December 2004,<sup>1469</sup> is as follows.<sup>1470</sup>

Turan Demir (34, married with three children), Nusreddin Yerlikaya (40, married with nine children), Behçet Tutuş (44, married with seven children), Mehmet Salih Akdeniz (68, married with children), Mehmet Şerif Avar (24, married with six children), Hasan Avar (45, married with eight children), Celil Aydoğdu (52, married with eight children), Bahri Şimşek (41, married with nine children), Mehmet Şah Atala (24, married with one child) and Abdo Yamuk (48, married to two women, had children) were living in dispersed hamlets and plateaus in and around Alaca(kaya) and Kayalısü villages. Administratively, the former village belonged to the Kulp district of Diyarbakır and the latter to the province of Muş. The eleventh person, Ümit Taş (16), was not from either village and was a stranger to the inhabitants of the area. He had been

---

<sup>1467</sup> Among other limited sources of victims' stories are Michael D. Goldhaber, *A People's History of the European Court of Human Rights* (Rutgers University Press, 2009) (focusing on the torture cases of *Aydın v. Turkey*, *Aksoy v. Turkey* and *Akkoc v. Turkey*); Hakikat Adalet Hafıza Merkezi, *Zorla Kaybedilenler Veritabanı* [Database on Enforced Disappearances], available at: <http://www.zorlakaybetmeler.org/>; and the İHD website, reports and campaigns.

<sup>1468</sup> The EComHR established based on fact-finding hearings it had held in Ankara from 30 September to 4 October 1997 and on 4 and 9 May 1998. EComHR, *Mehmet Emin Akdeniz and Others v. Turkey*, Application no. 23954/94, Report, 10 September 1999. The ECtHR upheld these findings in its ruling. ECtHR, *Akdeniz and Others v. Turkey*, Application no. 23954/94, Judgment, 31 May 2001, at paras. 7-56.

<sup>1469</sup> Upon the discovery of a mass grave in the vicinity of the area where the eleven had been disappeared, a delegation of the Turkish Parliament's Human Rights Commission conducted an investigation on 2-3 December 2004 and prepared an undated report. TBMM, *Diyarbakır'ın Kulp İlçesi Alaca Köyü Kepir Bölgesinde Bulunan Toplu Mezar Hakkında Rapor* [Report on the Mass Grave Discovered in the Kepir Region of the Alaca Village of the Kulp District of Diyarbakır] (undated), available at: [https://www.tbmm.gov.tr/komisyon/insanhaklari/belge/kr\\_22DiyarbakirKulp.pdf](https://www.tbmm.gov.tr/komisyon/insanhaklari/belge/kr_22DiyarbakirKulp.pdf) (hereafter "Parliamentary Report on Kulp").

<sup>1470</sup> Unless explicitly referred to the Parliamentary Commission, the information below is based on the EComHR.

detained by the police earlier in Kulp. The EComHR concluded that the detainee that the villagers were not able to identify must have been Taş, who had gone missing since his release from detention on 30 September.

Between 8 and 24-25 October 1993, the Bolu Commando Brigade, assisted by local gendarmes, undertook a massive military operation in the mountainous region between Kulp, Muş and Lice, including the area where the missing lived. According to Yavuz Ertürk who commanded the gendarmes, the operation involved 2,500 soldiers and helicopters and targeted the area because it was “the backbone of the PKK activities.”<sup>1471</sup> According to an undated military operation report, the PKK enjoyed support from 90 percent of villages and hamlets in the region.<sup>1472</sup>

Soon after the operation started, the military started to round up villagers to use them as guides to locate the PKK shelters. Some of the disappeared were picked up from their homes, while others were detained on the road while on their way home. Ümit Taş was reportedly handed by the police to the Bolu Commando Brigade. According to eye witnesses, dozens of villagers were detained in different groups in several camps across the mountainous terrain. Several of them were flown with a helicopter to the province of Muş, where they spent eight days in a basement together with over 100 people before they were released. The group of eleven was held at a camp in Kepir, near the Şenyayla plateau. Pembe and Zühre Akdeniz, the respective wife and daughter-in-law of Mehmet Salih Akdeniz, were the only eyewitnesses who saw the group detained in Kepir. In addition to Mehmet Salih, the two women identified Turan Demir, Behçet Tutuş and Celil Aydoğdu whom they personally knew.<sup>1473</sup> They brought food to detainees for several days, until they had been told by Mehmet Salih not to come anymore because he believed that they would be “taken away.”<sup>1474</sup> All but Mehmet Salih were tied up during the duration of their detention, were kept outside during day and night, had gone cold, hungry and thirsty for a week and were questioned about their involvement with the PKK.<sup>1475</sup> By about 16-17 October, all but eleven detainees at Kepir were released. The eleven were never seen again.

The families spent the following days, weeks and months approaching various administrative, judicial and political authorities in the region and in Ankara. Not being given any information about the military unit which detained and kept their relatives, they sought help from anyone and everyone. Individually and in groups, they repeatedly petitioned prosecutors in Kulp, Muş, Bingöl, Elazığ and Kayseri (in central Turkey) and the DGM prosecutor in Diyarbakır, went to district and provincial governors of Kulp, Diyarbakır and Muş, checked prisons in several provinces, inquired with the gendarmerie headquarters in Kulp and Diyarbakır and police and commando units across the region. One family member went all the way to Bolu with the hope of talking to General Yavuz Ertürk. Another went to Ankara, where he met with the Prime

---

<sup>1471</sup> EComHR, *Mehmet Akdeniz and Others*, at para. 347.

<sup>1472</sup> *Ibid.*, at paras. 242-245.

<sup>1473</sup> TBMM, *Parliamentary Report on Kulp*, at p. 5.

<sup>1474</sup> *Ibid.* The exact number of days when the two women brought food to the detainees is uncertain. Testifying eleven years after the incident, Pembe Akdeniz and other family members differed in their recollections.

<sup>1475</sup> EComHR, *Mehmet Akdeniz and Others*, at para. 452.

Minister and the Minister for Human Rights and contacted the Minister of the Interior. Yet another petitioned the Minister of Justice.

Throughout this process, the only response they received was the lack of any official record of detention, with the exception of Ümit Taş, who was reportedly released on 30 September. The sole ‘effort’ made by prosecutors, ministries and provincial government officials was to inquire with gendarme, police or prison authorities as to whether the names of missing individuals had been registered in their records. In other words, instead of carrying out their own investigations, the authorities relied on the alleged perpetrators. Notwithstanding allegations that the eleven had last been seen in the custody of the soldiers, the prosecutor in Kulp concluded, based on the information he received from the security forces, that the missing had been kidnapped by the PKK. Following a back-and-forth between various courts, the DGM Chief Prosecutor in Diyarbakır established his jurisdiction over the case in January 1994 and instructed the military and judicial authorities in Kulp and Diyarbakır to report to him every three months on any new information concerning the case. Letters continued to circulate between district and provincial gendarme commands, prosecutors of regular courts and DGMs, local and national government offices, where inquiries into the case would receive the same reply that the men had not been detained. On 5 April, the families petitioned the ECtHR.

It was only on 12 August 1994, after the government was informed of the ECtHR petition, that the DGM Chief Prosecutor, “on prompting from Ankara”, asked that the prosecutor in Kulp take witness statements.<sup>1476</sup> It took the authorities nearly three years to gather the testimonies. Two critical witnesses who claimed to have seen the missing men taken away by the security forces were contacted for the first time in May 1996, by which date one had died. By the time the testimonies were collected in April 1997, the Diyarbakır DGM withdrew its jurisdiction due to lack of sufficient evidence to establish the culpability of the PKK. Instead, concluded the Chief Prosecutor, the allegations concerned disappearance in custody, implicating the security forces, and sent the case back to the prosecutor in Kulp. No progress was made after then.

On 2 November 2003, ten years after the incidents, villagers who had recently returned back to their village following the improvement of the security situation and the normalization of the political climate came across a few bones and pieces of clothing in Kepir. They immediately contacted lawyers at the İHD Diyarbakır, who made visual documentation of the remains and notified the prosecutor in Kulp about the identification of a possible mass grave. Once again, the prosecutor did not conduct an on-site investigation. Instead, he asked the İHD lawyers and, when they declined, the villagers to collect and submit to him the discovered material. The villagers obliged, putting the remains in a sack and handing them over to the prosecutor. It was only after the İHD brought the incident to public attention that the prosecutor went to the site.<sup>1477</sup>

In December 2004, The Turkish Parliament’s Human Rights Commission tasked a delegation of two Members of the Parliament (MP) from the governing AKP and one MP from the main opposition CHP with investigating whether the discovered remains belonged to the missing eleven. On 2-3 December 2004, they met with the district governor, the prosecutor investigating

---

<sup>1476</sup> ECtHR, *Akdeniz and Others*, at para. 51.

<sup>1477</sup> TBMM, *Parliamentary Report on Kulp*, at p. 10.

the case and victims' families in Kulp. They also spoke on the phone with the İHD officials. The delegation concluded that the missing were civilians who had no connection to the PKK and "disappeared after being detained" during an operation conducted by the Bolu Commando Brigade under the command of General Ertürk. The delegation noted that the prosecutor "did not show sufficient care in collecting the evidence, did not go to the incident site after having been notified of the event, asked the villagers to collect and bring bones and other belongings of the deceased and went to the site of the incident after the villagers brought to him the evidence in sacks and in the company of the national press."<sup>1478</sup> They noted that based on the analysis of the bones and the DNA samples, the CFM concluded that the remains belonged to at least nine of the missing eleven, two of whom were identified as Mehmet Salih Akdeniz and Behçet Tutuş.

The MPs concluded by noting that conducting an effective criminal investigation into the disappearance of the eleven was indispensable for the non-repetition of such crimes. Yet, as in the 1990s, the prosecutor issued lack of jurisdiction on the ground that the alleged perpetrators were military personnel belonging to the Bolu Commando Brigade falling under the jurisdiction of military courts. He referred the file to the military prosecutor in Diyarbakır, who did not take any further steps to follow up on the investigation.<sup>1479</sup>

Even now, 24 years after the events, no one has been held accountable by the Turkish courts for the disappearance of the eleven men. In 2013, for unexpected political circumstances I will discuss in detail in Chapter 6, a court in Diyarbakır opened a new investigation and charged retired Brigadier Yavuz Ertürk with criminal offences in connection to the incidents in 1993. As of June 2017, the case has not been finalized and, for reasons I will also discuss in Chapter 6, is expected to result in acquittal. The only justice that the families have received to this date is financial compensation given by the Turkish government upon the ECtHR's 2001 ruling which held, among others, that Turkey was liable for the death of the missing eleven in violation of Article 2.<sup>1480</sup>

### **5.5.2 Torture: Rape as a Punitive Instrument against Kurdish Resistance**

Şükran was 17 when she was taken from her village, which she had never left before. She did not speak any Turkish, had never been to school and was illiterate. She was a virgin. The story

---

<sup>1478</sup> Ibid, at p. 14.

<sup>1479</sup> İHOP, "Gözaltında Kaybedilme: Kulp-Alacaköy Kayıpları" [Disappearance under Detention: The Missing of Kulp-Alacaköy], 3 April 2015, available at: <http://www.ihop.org.tr/2015/04/03/gozaltinda-kaybedilme-kulp-alacakoy-kayiplari/>.

<sup>1480</sup> In addition, the Court found a procedural violation of Article 2 due to the authorities' failure to conduct an effective investigation into the disappearance of the eleven men, a violation of Article 3 in respect of both the missing eleven and their families, a violation of Article 13 due to the fact that the authorities denied the applicants effective domestic remedies, and a violation of the applicants' right of individual petition under Article 25 due to the authorities' interference with their petition to the ECHR organs. ECtHR, *Akdeniz and Others*.

of her rape and torture in detention, as established by the EComHR in 1996,<sup>1481</sup> narrated to me<sup>1482</sup> and to Goldhaber<sup>1483</sup> by her legal advocates is as follows.<sup>1484</sup>

On the early morning of 29 June 1993, a group of gendarme officials and village guards arrived at the village of Taşıt in the Derik township of Mardin. Four of them went to Şükran's parents' house to question the family about the alleged visits of PKK militants to their house. After being threatened and insulted, the family was taken to the village square where they were joined by the rest of villagers. Şükran, her father Seydo and sister-in-law Ferahdiba were singled out from the rest, blindfolded and driven away to the gendarme headquarters in Derik, which were under the command of Musa Çitil. They were kept blindfolded and in separate rooms for three days. During interrogation, Şükran was asked about the hiding places of the PKK militants. She was beaten, stripped naked, placed inside a tyre and spun round, and hosed with high pressure ice cold water. She was then taken to another room, where an individual in military clothing raped her, leaving her in severe pain and blood. She was ordered to get dressed, only to be beaten more by several people, who told her not to tell anyone what they had done to her.

On or about 2 July, the security forces drove Şükran, Seydo and Ferahdiba to the mountains to question them about the location of the PKK shelters. They were released separately the same day and made their own ways to the village. At home, Şükran's father found out from his wife that his daughter had been raped. In addition to the severe physical and psychological pain and suffering, her rape inflicted shame on Şükran. Soon after the incident, she was married to her cousin, Abit, whom she had been promised before the events.<sup>1485</sup>

On 8 July, Şükran, Seydo and Ferahdiba went to the prosecutor in Derik to file a complaint. Şükran reported that she had been beaten and raped, whereas Seydo and Ferahdiba both said that they had been tortured. The prosecutor referred all three to a doctor at Derik State Hospital. With respect to Şükran, the prosecutor asked the doctor to establish whether she was a virgin and whether there was any mark of physical violence or injury. The doctor reported that Şükran's hymen was torn and there was widespread bruising around the insides of her thighs. Not having dealt with a rape case before, he was unable to establish when the hymen had been torn nor the reason for the bruising. The next day, on 9 July, the prosecutor referred Şükran to a second doctor, this time at Mardin State Hospital, with a request to establish whether she had lost her virginity and, if so, since when. The doctor, a gynaecologist, reported that defloration had occurred more than a week before the examination. He did not comment on the bruises on Şükran's inner thighs. Nor did he make any reference to Şükran's own account. On 12 August, after Şükran was married to Abit, the prosecutor referred her to yet another doctor, this time in

---

<sup>1481</sup> The EComHR established these facts based on fact-finding hearings it had held in Ankara from 12 to 14 July 1995 and in Strasbourg on 18-19 October 1995. EComHR, *Sukran Aydin v. Turkey*, Application no. 23178/94, Report, 7 March 1996. The ECtHR upheld these findings in its ruling. ECtHR, *Aydin v. Turkey*, GC, Application no. 57/1996/676/866, Judgment, 25 September 1997.

<sup>1482</sup> My interviews with Mahmut Şakar and Kerim Yıldız.

<sup>1483</sup> Goldhaber, *A People's History*, at pp. 135-141 (based on his interviews with Kerim Yıldız of the KHRP and Nazmi Gür of the İHD headquarters in Ankara).

<sup>1484</sup> Unless explicitly attributed to other sources, the information below is based on the EComHR's report.

<sup>1485</sup> Goldhaber, *A People's History*, at p. 136.

Diyarbakır Maternity Hospital, requesting, once again, an examination to establish whether she had lost her virginity and, if so, since when. The third medical report confirmed the second one.

In the meantime, Şükran was also dealing with the psychological burden of her experience. The stigma associated with a single woman's loss of her virginity, albeit as a result of rape, was too high in the conservative and patriarchal Kurdish society. Şükran was impregnated soon after she was married and, although Abit's paternity was medically established, the villagers held on to their doubts that the baby resulted from rape.<sup>1486</sup> Şükran and Abit left the village and moved to Derik.

In terms of investigating whether the applicants had been held in custody and, if so, when, by whom and for how long, the prosecutor inquired with Derik gendarme headquarters on 13 July. The reply, signed by the commander Musa Çitil was negative. Showing the custody records which contained no entries for the months of June-July and only six for the entire year of 1993, Çitil denied the detentions. While he made no attempts to take statements from gendarmes, village guards or other villagers, the prosecutor had Şükran, Seydo and Ferahdiba brought in for further questioning. In 1994, he questioned Seydo twice more and repeatedly asked him for Şükran's new address. By then, unable to bear the constant harassment of the security forces particularly after the Commission had invited Şükran for oral evidence,<sup>1487</sup> Şükran and Abit had escaped Derik for an undisclosed location. The only other individual the prosecutor interviewed was Harun Aca, a confessor who alleged that the PKK members used Seydo's house as a shelter and Şükran was having a sexual relationship with two PKK members. It was only on 25 May 1995, after the EComHR admitted the case, that another prosecutor took a statement from Ali Kocaman, the commander of Derik gendarme station at the time, who claimed to suffer from memory loss due to a car accident and to have no recollection of alleged rape or torture.

When three Strasbourg judges arrived in Ankara for fact-finding on 12-14 July 1995, Şükran and Abit had gone into hiding and no one, including her lawyers, knew their whereabouts. The authorities claimed that Şükran had never been raped, was a PKK militant using the ECtHR for propaganda purpose, had a sexual affair with two PKK militants and joined the PKK. These claims, combined with Şükran's failure to attend the hearing, led the EComHR to demand a letter affirming that she wanted to continue with her case. After several weeks of search, İHD member Nazmi Gür located Şükran and Abit in early August. Despite the objections of Abit, who feared for his family's lives, Şükran was determined to continue with her case.<sup>1488</sup>

In September 1995, Şükran and Abit returned to Derik to obtain a passport for Şükran to attend the EComHR hearing in Strasbourg. Thereafter, they were subject to constant official harassment and intimidation. They were repeatedly called to the police station for no reason, questioned about Şükran's petition to Strasbourg and were subjected to house searches. Şükran was made to sign a paper, which she could not read. On two separate occasions, Abit was taken into custody and severely beaten by three police officers. In January 1996, Şükran, Abit and both of their fathers were taken by the police, this time to appear before a prosecutor, who asked

---

<sup>1486</sup> Ibid, at p. 136.

<sup>1487</sup> Şükran and Abit were repeatedly called into the police station for questioning about her application to Strasbourg and their house was raided and searched several times.

<sup>1488</sup> For the fascinating story of Gür's search for Şükran, see Goldhaber, *A People's History*, at pp. 137-139.

them whether they were intimidated by the police, to which they responded affirmatively. Judicial authorities did not conduct any further investigation into the case.

Even now, 24 years after the events, no one has been held accountable for what has been done to Şükran. In 2012, for unexpected political developments I will discuss in Chapter 6, a court in Mardin launched an investigation into separate incidents which occurred in Derik during 1992-1994 and charged Musa Çitil, the commander of Derik gendarmerie headquarters during that period, with multiple murders in connection to several extrajudicial executions and enforced disappearances. The investigation was not extended to Şükran's case, although the ECtHR's 1997 judgment had implicated Çitil for her rape and torture under his command. Not only was Çitil acquitted in November 2015, but three months later he was promoted by the AKP government to the rank of major general to head the regional command of the military police in Diyarbakır, as I will discuss in Chapter 6. The only justice Şükran has received was financial compensation given by the Turkish government upon the ECtHR's ruling which held, among others, that Turkey was liable for "the acts of physical and mental violence" "and the especially cruel act of rape" inflicted on Şükran in violation of Article 3.<sup>1489</sup>

### **5.5.3 Extrajudicial Killings: The Targeting of Kurdish Intellectuals and Dissidents**

Metin Can and Hasan Kaya were long-time friends. Metin, a lawyer, was the founder and President of the İHD's provincial branch. Hasan was a medical doctor and an İHD member. They were living in Elazığ under emergency rule. Between November 1990 and May 1992, Hasan had lived in Şırnak, where he had treated civilians injured in clashes with the security forces during *Newroz* celebrations, after which he had been transferred to Elazığ. During 1990-1991, Metin had lived in Kars, where he was among the founders of the provincial branch of HEP, for which he came under police pressure and had to leave the city. In Elazığ, he was known for his criminal defence work on behalf of those accused of PKK membership. He had published a report about torture in the city prison and filed a lawsuit against its administration.

According to their families and colleagues, Metin and Hasan had received death threats. In February 1992, the head of the Şırnak police told Hasan that he would end up like his friend Halit Güngen, a journalist executed in Diyarbakır on 8 February 1992.<sup>1490</sup> Hasan was detained and threatened for treating civilians wounded in *Newroz*. Metin received threats after he had founded the İHD branch and even more so after he uncovered torture in prison and caused officers to be disciplined. The İHD Elazığ offices were searched by the police. In December 1992, Bira Zordağ, who had lived in Elazığ until a few months earlier, was detained and interrogated about the PKK. He was asked whether Hasan had been treating PKK militants and was told that Hasan would be punished. He was also asked about Metin. Upon release, Bira informed both Metin and Şerafettin Özcan, the Secretary of the İHD branch. The same month, Hasan told his brother that he was under police surveillance and feared for his life. Metin had

---

<sup>1489</sup> ECtHR, *Aydın v. Turkey*, at para. 86. In addition, the Court found a violation of Article 13 due to the authorities' failure to conduct thorough and effective investigation into the events, denying the applicant effective domestic remedies.

<sup>1490</sup> See Section 5.2.3 on Hizbullah.

told Hasan's brother and a colleague that he was under surveillance and that his flat had been searched when he was not home.

On the evening of 20 February 1993, Metin received a phone call from two men who wished to meet him, which he declined. He told them to come to his office the next day. On 21 February, he received another call from the same men, whom he arranged to meet at a cafe in the company of Şerafettin. The men introduced themselves as PKK militants, gave the reference of someone in Diyarbakır and said that a wounded PKK member needed medical assistance. Metin took the men to his flat, where his wife Fatma was present. He asked Şerafettin to call Diyarbakır to verify that the men were sent by the person they had referred to. Şerafettin went to the post office to make the call, but was unable to reach the person.<sup>1491</sup> Meanwhile Metin sent a message to Hasan, asked him to join them. When Hasan arrived, they agreed that the two men would take the wounded PKK militant to nearby Yazıkönak village and call when they were ready. At about 7 p.m., Metin received a call, after which he left with Hasan who was carrying his medical bag. Metin told Fatma they would be back soon. They drove off in Hasan's brother's car.

At about noon the next day, Metin's wife received a call from a man who said that Hasan and Metin had been killed. Fatma and Şerafettin immediately reported to the police that Hasan and Metin were missing and notified the prosecutor. They did not mention the encounter with the two men to the police or the prosecutor for fear that the authorities would attribute responsibility to the PKK and any protection the missing men might have had would be lost.

Later in the evening, the car driven by Metin and Hasan was found abandoned in Yazıkönak. During the next few days, both families received mysterious calls, including several consisting of sounds of torture. On 23 February, Fatma and Şerafettin went to Ankara to meet with İsmet Sezgin, the Minister of Interior. In her testimony to the EComHR, Fatma said that the Minister told her that her husband was alive and that anti-terror squads told him that Metin would return home.<sup>1492</sup> On 24 February, Metin's shoes were found in a bag outside the building of the Social Democratic People's Party (*Sosyal Demokrat Halkçı Parti-SHP*) in Elazığ. Three days later, Metin and Hasan were found dead under a bridge near a gendarme station outside Tunceli, a province around 130 km. away from Elazığ. The bodies had their hands bound behind their back and a single bullet wound to the head. Hasan had bruising on his forehead and under the fingernails of his hands, and his feet were frozen due to exposure to water or snow. Metin had been subject to strangulation and had bruising on his forehead, nose, eyelid and temple.

The investigation into the disappearance and killing of Metin and Hasan changed four hands in 14 months. The Elazığ prosecutor started the investigation and transferred the case to Tunceli when the bodies were found. Upon his conclusion, without evidence, that the PKK was responsible for the killings,<sup>1493</sup> the Tunceli prosecutor ceded jurisdiction to the Kayseri

---

<sup>1491</sup> Neither the EComHR nor the ECtHR mentions the name of the person in Diyarbakır. He must be Sedat Aslantaş, the President of the İHD Diyarbakır at the time, who later found out that the two men had given his name as reference to lure Metin into following them. Interview with Sedat Aslantaş. For Aslantaş' account of the incident, see Chapter 4.

<sup>1492</sup> EComHR, *Mahmut Kaya*, at para. 211.

<sup>1493</sup> In his testimony to the EComHR, the Tunceli prosecutor said that the PKK "used to kidnap and kill people" and there were "rumours at the time that [Metin and Hasan] had betrayed the PKK who had kidnapped and killed them." Ibid, at paras. 225-226.

DGM.<sup>1494</sup> Soon after, the investigation was transferred to Erzincan DGM and from there to Malatya DGM. Two autopsies were conducted. The ECtHR concluded that the first was “ cursory and included the remarkable statement that there were no marks of ill-treatment on the bodies.”<sup>1495</sup> While the second was “ more detailed and did record marks on both bodies”, it did not provide any explanations or conclusions with regard to them.<sup>1496</sup> The authorities did not carry out a forensic examination of the scene, make any investigation to establish where the victims were killed and how they had been transported from Tunceli to Elazığ through the only available road which required stopping at several official checkpoints and did not take statements from potential eyewitnesses at Yazıkonak, where the car was found.

The EComHR found it remarkable<sup>1497</sup> and the ECtHR “noticeable”<sup>1498</sup> that the only lead in the investigation derived from information provided by the victims’ relatives, local lawyers and press sources. On 18 March 1993, Hasan’s brother provided the Tunceli prosecutor with hearsay evidence that Metin and Hasan were seen forced into a vehicle by plainclothes police officers with walkie-talkies in Yazıkonak on the evening of 21 February, that the vehicle stopped at a petrol station outside the village where the officers were heard saying they were taking the lawyer and the doctor for interrogation and that a police officer told a judge and a lawyer in Tunceli that Hasan and Metin had been taken to the Security Directorate. On 19 March, Hasan’s brother informed various prosecutors with hearsay evidence that in a beerhouse in Pertek a man named Yusuf Geyik and known as “Bozo” announced that “they” killed Hasan and Metin. Upon being attacked by the people in the beerhouse, he pulled out a gun, called for help in his walkie-talkie and was rescued by gendarmes. On 3 September, the President of İHD Tunceli sent the prosecutor a copy of an article in the 26 August issue of *Aydınlık* which alleged that a Special Operations officer identified JİTEM members Mahmut Yıldırım (a.k.a. ‘Yeşil’) and Mehmet Yazıcıoğulları as the killers. On 31 January 1994, the editor of *Aydınlık* filed a petition with the Istanbul prosecutor, accusing Yıldırım of the murder of Hasan and Metin based on information provided by Major Cem Ersever. On 14 February 1994, Hasan’s brother petitioned the prosecutor in Elazığ, referring to media reports and Soner Yalçın’s recently published book that Yıldırım was the perpetrator. He informed the prosecutor that Yıldırım had been a public servant for thirty years and thus easy to locate. On 21 February, Metin’s father filed a complaint against Yıldırım, whose home and work address he indicated in his petition. The prosecutors took what the EComHR has considered to be “often limited and superficial”<sup>1499</sup> steps, relying on the police and the gendarmes in locating alleged perpetrators and taking witness testimonies, and, according to the EComHR, “rarely initiated their own lines of enquiry.”<sup>1500</sup> No further progress was made in the domestic judicial process.

To this date, 25 years after the events, no one has been held accountable by the Turkish courts for the killings of Hasan and Metin. While Mahmut Yıldırım was listed as a suspect in a criminal investigation conducted in the late 2009s concerning the extrajudicial execution of Musa Anter

---

<sup>1494</sup> The transfer to Kayseri was due to a recent earthquake in Erzincan, which disrupted the work of the DGM.

<sup>1495</sup> ECtHR, *Mahmut Kaya*, at para. 104.

<sup>1496</sup> Ibid.

<sup>1497</sup> EComHR, *Mahmut Kaya*, at para. 298.

<sup>1498</sup> ECtHR, *Mahmut Kaya*, at para. 105.

<sup>1499</sup> Ibid, at para. 105.

<sup>1500</sup> EComHR, *Mahmut Kaya*, at para. 365.

and several others (see Chapter 6), he was never arrested. In fact, the authorities have never tried to identify his whereabouts, which remain a mystery. The only justice that Hasan's family has received is financial compensation given by the Turkish government upon the ECtHR's 2000 ruling which held, among others, that Turkey was liable for Hasan's death in violation of Article 2.<sup>1501</sup>

#### **5.5.4 Forced evictions and property destructions**

It was a cold early February morning when they arrived. Villagers were still asleep or had just woken up, preparing for morning prayers. Dressed in camouflage gear and uniforms, they opened fire at the village and raided the houses one by one. They threw a bomb into one of the houses, severely injuring Mevlüde Ekin's six-year-old daughter Abide. They ordered entire families out of their houses and into the village square. There was snow on the ground and it was cold. Yet, they did not let many of the villagers to put on something warm or even their shoes. They made adolescent and adult men lie face down in the snow, blindfolded. They beat, stepped over from head to toe and kicked the villagers lying on the ground. They made everyone wait in the cold until sunset. In the meantime, they set the houses on fire, one by one. They did not spare the animals, shooting the ones wondering out in the open, burning the ones in stables. Before sunset, they put nine men and Mevlüde's other daughter Halime into a helicopter to be placed in custody in a far-away province. They roped together the remaining 33 men, forced them to walk blindfolded for seven kilometres in the snow without proper clothing and, in most cases, shoes. During the walk, they beat the villagers with truncheons and sticks.

*They were Turkish military forces and gendarmes. The date was 20 February 1993. The place was Ormaniçi, a 33-household village locate in the Güçlükönak district of the Şırnak province, a remote village accessible only on foot. It was thanks to the EComHR delegation who went to Turkey to hear the survivors, victims' families and eyewitnesses that the world has come to hear what happened in that remote Kurdish region in 1993.*<sup>1502</sup>

After a two and a half hour march in the snow and dark, the detainees were brought to a construction site in the Güçlükönak township. They were left there for days, sitting in a bare, cold, concrete room, whose floor held water up to 10 cm depth. They were not given clothing, heating or food, had to wet themselves because they were not allowed to go to the toilet and were "systematically tortured" for days on end by way of "electric shock treatment, burning with hot metal bars, beatings, and anal rape with a truncheon and with bottles."<sup>1503</sup> Blindfolded, they were made to fingerprint ready-made statements which were never read to them. On or about 5 March 1993, they were put on a helicopter and taken to Şırnak, where they were further beaten, still blindfolded. They were accused of being members or supporters of the PKK and forced to sign new statements. While under detention in Şırnak, they received some medical

---

<sup>1501</sup> In addition, the Court found a procedural violation of Article 2 due to the authorities' failure to conduct an effective investigation into Hasan's death, a violation of Article 3 in respect of Hasan's having been subjected to inhuman and degrading treatment before he was murdered and a violation of Article 13 due to the fact that the authorities denied the applicant effective domestic remedies. ECtHR, *Mahmut Kaya*.

<sup>1502</sup> Three EComHR delegates took evidence in Ankara during 2-4 April and 5-10 October from 25 applicants, eight witnesses and 15 officials.

<sup>1503</sup> ECtHR, *Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, Judgment, 6 April 2004, at para. 17 (the applicants' submissions on the facts).

treatment on their feet, still blindfolded. Some of the detainees were hospitalized, first in Şırnak and subsequently in Mardin and Diyarbakır. They were cuffed to their hospital beds, blindfolded. The long march from the village and the detention conditions were so harsh that many suffered severe gangrene injuries caused by frostbite and several had their toes or feet amputated.<sup>1504</sup> Among the detained was the 13-year-old Fahrettin Özkan. Another was İbrahim Ekinci, who made the long walk barefoot and died of pneumonia in a hospital bed on 16 March. Most of the detained villagers were released on 9 or 16 March, while two of them were held in detention for five and at least eleven years more (see below).

Meanwhile, back on 20 February, women and children were left alone in the village together with the 80-year-old Ahmet Özkan, the only man left behind. Those whose houses were burned spent the night in the mosque, in the houses that were still intact and in nearby caves. On 21 February, the security forces were back, burning more houses and killing more animals. Six-year-old Abide died from her injuries. A few days later, six-year-old Ali Yıldırım was killed due to the explosion of a mortar bomb or grenade he found in the village.

Between March and summer/autumn 1993, the injured men gradually recovered while they rebuilt their destroyed homes. Villagers harvested the crops. In late summer/early autumn, the security forces were back. They assembled all villagers near the school, took two women into the school, where they punched and questioned them about the whereabouts of their husbands. They destroyed all the harvested crops and burned the houses they had left untouched in earlier instances. They ordered the villagers to leave within three days. Many of the villagers left to nearby caves and continued to cultivate their land. In Spring 1994, several of them returned to their homes. In or about May 1994, soldiers were back in Ormaniçi, killing four villagers and three alleged PKK militants and claiming to have killed seven terrorists. They ordered all villagers to leave Ormaniçi within three days or face death. After this final incident, all the villagers left. These were the facts, as accounted by the 32 villagers who petitioned the ECtHR on 8 April 1993.

The government, in turn, claimed that on 20 February 1993, the security forces came under fire from the village as they were approaching to carry out a search in the valley. While the roofs of some houses caught fire during the ensuing clash, the security forces did not deliberately set any house on fire or killed any livestock. Apart from a soldier who was killed during house searches, no one was killed or injured on that day. Contrary to the claims of the village headman Mehmet Aslan, the soldier was shot by the terrorists and not by another soldier. Villagers who were subsequently detained were not blindfolded during their walk to Güçlükonak. While the gendarme commander in charge of the operation, Celal Çürek, denied that the detainees had been tied, the commander of the first gendarme commando team, Hasan Yeşilyurt, confirmed that they had been tied in small groups to prevent their escape. The villagers were not ill-treated during their detention; they were warmly dressed, provided with blankets and shoes and fed three meals a day with choices of several dishes. The injuries which caused the amputation of

---

<sup>1504</sup> The ECtHR established that the amputation and skin transplant operations directly resulted from the walk and detention conditions. The following detainees underwent amputation: Resul Aslan (both feet), Fahrettin Özkan (both feet), Abdulselam Demir (several toes), Nevaf Özkan (several toes), Hüseyin Yıldırım (one toe). Ahmet Arslan and Mehmet Seyit Erden received skin transplant for their gangrene injuries. The ECtHR found the claims that Mehmet Tahir Çetin's both feet were amputated unsubstantiated.

the toes of four villagers were due to frostbites, for which the injured received medical attention. One villager died of natural causes at a hospital, following an epilepsy attack he suffered during detention. This was what happened, as narrated by the Turkish government.

In its 375-pages-ruling, based on the testimonies obtained by the EComHR<sup>1505</sup> and documentary evidence submitted by the parties, the ECtHR noted that at the material time, the PKK was active in the region around Ormaniçi, with occasional presence and regular activity in and around the village. Ormaniçi had refused to accept the village guard system. The military operation on 20 February was triggered by the killing of a village guard the day before in the nearby village of Boyuncuk and by intelligence reports concerning the PKK presence in the village. The operation was carried out by 102 gendarmes including 85 commandos who used an “impressive” quantity and quality of ammunition during the raid.<sup>1506</sup> While approaching the village, the security forces noticed two persons running towards the river and fired warning shots, upon which the two men ran in the direction of the village. The security forces were fired back from the village to which they responded with “massive firing”.<sup>1507</sup> When the firing started, most of the villagers were at home and those who were outside immediately went inside. Once they gained control of the village, the security forces found three Kalashnikov rifles and 35 empty cartridges near the mosque and in front of a house. While some individuals in the village owned weapons, the ownership of the discovered guns was not established. The government’s argument that the deceased soldier was killed by terrorists was not convincing whereas a villager’s claim that the soldier was accidentally killed by another was also unsubstantiated. The group of ten villagers who were taken by a helicopter to Şırnak were detained on the basis of being identified as linked to the PKK by a confessor flown into the village during the operation. 13 houses were destroyed by fire as a result of the activities of the security forces, two of which were deliberately set on fire. On 21 and 23 February, the security forces came back to the village for further house searches.<sup>1508</sup> While the young boy Ali Yıldırım died as the result of the explosion of a hand grenade he was playing with, it could not be established with sufficient certainty who left the grenade behind.<sup>1509</sup>

Two investigations were carried out by the Turkish judicial authorities in relation to the Ormaniçi villagers. One concerned the terrorism charges brought against the 42 detained villagers. While the Diyarbakır DGM prosecutor released 25 detainees for lack of evidence, he indicted the remaining 17 on charges of carrying out armed activities on behalf of the PKK, membership to the PKK and/or aiding and abetting the PKK. At the time of the EComHR’s second hearing in October 1998, Mehmet Nuri Özkan and Ali Erbek were still under detention. While Özkan was released thereafter, Erbek was still in custody when the ECtHR issued its ruling in 2004, more than eleven years after his detention. With respect to the death, injury and ill-treatment of the villagers and the destruction of the village, separate investigations conducted in 1994-1995 by various prosecutors in Diyarbakır, Siirt and Eruh resulted in decisions of non-

---

<sup>1505</sup> Three delegates appointed by the EComHR on took evidence in Ankara during 2-4 April and 5-10 October from 25 applicants, eight other villagers as witnesses and 15 officials.

<sup>1506</sup> ECtHR, *Ahmet Özkan and Others*, at para. 92.

<sup>1507</sup> *Ibid*, at para. 104.

<sup>1508</sup> The ECtHR did not address the applicants’ claims that the security forces burned the remaining houses on 21 February.

<sup>1509</sup> ECtHR, *Ahmet Özkan and Others*, at paras 85-273.

prosecution or lack of jurisdiction. Prosecutors concluded that İbrahim Ekin died of pneumonia, whereas PKK terrorists caused the death of two children, Abide Ekin and Ali Yıldırım, by leaving explosive devices in Ormaniçi after the incident on 20 February 1993. The investigation into the death of the two children was reopened in July 1995 only to result in the issuance of regular reports that the search for the perpetrators (PKK terrorists) continued. By the date of the ECtHR judgment in 2004, the last report had been issued on 3 June 1998. As to the outcome of the investigation into the destruction of the village, no information was submitted to the ECtHR.

To this date, 24 years after the events, no one has been held accountable by the Turkish courts. The only justice that many of the victims have received is financial compensation given by the Turkish government upon the ECtHR's 2004 ruling. The Court held, among others, that Turkey was liable for the deaths of İbrahim Ekin and six-year-old Abide Ekin in violation of Article 2, but not that of six-year-old Ali Yıldırım, and that the security forces' treatment of villagers held in the village square and the manner in which the apprehended villagers were taken to Güçlükonak and the conditions of their detention constituted inhuman and degrading treatment in violation of Article 3.<sup>1510</sup>

## 5.6 Conclusion

The Turkish state has a long history of violence against political dissidents and minorities. In fact, state violence was a founding pillar of nation-building. When the late Ottoman and soon-to-be-Republican-founding rulers targeted the Armenian people, from their deputies at the Parliament in Istanbul to illiterate peasants in remote Anatolian villages, and conducted the first genocide on European soil, they also set the tone for how the emerging state would treat the remaining minorities, particularly those who spoke up. In this sense, modern Turkey's treatment of the Kurds, particularly those in the emergency region, was not a novelty. What is exceptional and remarkable is that these atrocities occurred at a time when Turkey was a nominally democratic regime which had formally committed itself to human rights.

The near contemporaneity of Turkey's declaration of emergency rule in the Kurdish region, application for EU membership and recognition of the ECtHR's individual petition mechanism may not be as paradoxical as it seemed. Perhaps, it was guided by an arguably well-placed assumption that the Turkish state would, once again, get away with murdering, torturing and disappearing its citizens, largely due to its geo-strategic importance for Western democracies. Furthermore, the presence of an armed separatist group engaged in acts of terrorism provided an additional argument. The Turkish state believed that international law's pillar principle of state sovereignty and the ECHR's derogation regime provided political legitimacy and legality

---

<sup>1510</sup> In addition, the Court found a procedural violation of Article 3 due to the authorities' failure to conduct an effective investigation into the manner and conditions of detentions, a violation of Article 5 as regards the detention of the apprehended villagers and a violation of Article 8 on account of the destruction of the homes of several applicants. *Ibid.*

to a state of exception which removed the entire population of a region and suspect Kurds elsewhere in Turkey from the realm of the rule of law.

What the state seems not to have foreseen was the enabling effect of the global human rights regime, transnational advocacy networks and communications technology for victims. The ability of the İHD activists to mobilize international support by documenting and reporting the atrocities in the Kurdish region was a game changer. The information flow between human rights advocates in Turkey and Europe enabled international NGOs such as Human Rights Watch and Amnesty International to not only issue damning reports and statements against the Turkish state, but also feed the UN's and CoE's treaty bodies. The engagement of these international actors from very early on, several years before the ECtHR issued its first ruling, set in motion the documentation of state violence in the Kurdish region, leaving no doubt that Turkey was systematically disappearing, murdering, torturing and displacing the Kurds. The Turkish Parliament's participation to this process in the mid-1990s is also noteworthy. Though exercising extreme caution in not attributing responsibility to the military and civilian state officials and bowing to political pressure by shying from making full use of its limited powers, the Parliament nonetheless documented the crimes committed and/or tolerated by Turkish state officials against the Kurds. In the end, as much as Turkey continued to deny its criminal policies, the truth, at least partially, was documented.

The problem, however, was that the mounting international pressure did not bring results. Turkey continued to engage in gross abuses and to refuse to cooperate with the international community. The UN, the CoE and the Turkish Parliament lacked binding powers vis-à-vis the Turkish government. It was only after Kurdish human rights lawyers successfully engaged the ECtHR in the Kurdish conflict that the real potential for effective international oversight of was possible. Furthermore, as a court of law, the ECtHR had the mandate to provide relief to individual victims and to oblige the Turkish state to take individual measures. The presence of a monitoring mechanism (CoM) entrusted with the power to require broader reforms for the execution of ECtHR rulings particularly rendered the ECHR system an effective external source of pressure.

Did the ECtHR and the CoE rise up to this challenge? How did the Court address the complex and novel procedural and substantive legal issues raised by the Kurdish cases? How did the CoM follow up in its monitoring of Turkey's execution of the ECtHR rulings? What has been the impact of the ECtHR's involvement on Turkey's policies in the Kurdish region? I will address questions in Chapter 6.

---

## When the ECtHR Speaks: The Impact of Transnational Judicial Oversight on State Violence in Turkey

### 6.1 Introduction: The ECtHR's Impact in State Parties

In 1995, Fionnuala Ní Aoláin had remarked that the ECtHR's depiction as a guarantor of human rights "has pervaded much of the commentary on the system, notwithstanding the critiques of individual decisions handed down by the Court and the Commission".<sup>1511</sup> Indeed, over a decade and numerous criticized decisions later, the Court was still declared as "the world's most effective international human rights tribunal"<sup>1512</sup> upholding individual rights while tackling politically sensitive and socially contested issues. It was praised for having "transcended rights minimalism"<sup>1513</sup> in its jurisprudence. To the extent that lack of meaningful progress in some state parties has been acknowledged, it has been depicted as a compliance issue and attributed to such governments' lack of will and/or ability to comply with ECtHR judgments. Scholars have been generous in understanding the Court's inability to "fully compensate for the failure of state cooperation", particularly in cases concerning gross human rights abuses in countries where the rule of law and democracy are not embedded.<sup>1514</sup> Thus, the conventional scholarly consensus has been to uncritically endorse the ECtHR's interpretation of the Convention and attribute systemic human rights abuses to compliance failure by recalcitrant governments.

The ECtHR's widespread recognition as an effective regional tribunal which has championed human rights protection has also set the tone of ongoing academic and policy discussions on

---

<sup>1511</sup> Fionnuala Ní Aoláin, "The Emergence of Diversity: Differences in Human Rights Jurisprudence", *Fordham International Law Journal*, vol. 19, no. 1 (1995), pp. 101-142, at pp. 108-109.

<sup>1512</sup> Laurence R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", *The European Journal of International Law*, vol. 19, no. 1 (2008), pp. 125-159, at p. 126.

<sup>1513</sup> Alec Stone Sweet, "A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe", *Journal of Global Constitutionalism*, vol. 1, no. 1 (2012), pp. 53-90, at p. 54.

<sup>1514</sup> Hellen Keller and Corina Heri, "Enforced Disappearance and the European Court of Human Rights: A 'Wall of Silence', Fact-Finding Difficulties and States as 'Subversive Objectors'", *Journal of International Criminal Justice*, vol. 12 (2014), pp. 735-750, at p. 735.

the reform of the ECHR system. The third wave of constitutional and democratic transitions in post-communist Central and Eastern European countries and their accession to the ECHR has reignited an old debate<sup>1515</sup> on the true function of the ECtHR. Should the Court continue to provide individual justice or should it evolve into a quasi-constitutional entity?<sup>1516</sup> The constitutionalists rested their position on the challenge Mahoney has identified in the expansion of the ECtHR's mission from "fine-tuning sophisticated national democratic engines" to consolidating democracy and the rule of law in new member states;<sup>1517</sup> and what Wildhaber has named as the urgent need to relieve the Court of "routine, manifestly well-founded cases ... [where] the issue of principle has already been resolved".<sup>1518</sup> According to Sadurski, in relation to the past where the Court had "operated to some extent at the margins of the human rights problematique", cases filed from post-communist countries were "of greater importance, both in terms of the severity of the violations and the systemic nature of the challenged deficiencies".<sup>1519</sup> The Court, it was argued, should be spared from having to issue identical judgments in repetitive cases and be empowered instead to guide the domestic courts on issues of constitutional importance.

As discussed in the introductory chapter, this constitutionalist argument rests on a dichotomy between established Western European democracies whose legal systems need only "fine tuning" and post-communist nations which need structural guidance in consolidating their constitutional and legal regimes while transitioning to democracy. Yet, despite being one of the oldest contracting parties which participated in drafting the ECHR, as we have seen in previous chapters, Turkey has been engaging in severe human rights abuses since the 1970s and has always had an authoritarian legal regime. Evidently, the responsibility for the shortage of democracy and the rule of law in any country cannot and should not be primarily attributed to a transnational human rights mechanism. In the case of Turkey, its "defective"<sup>1520</sup> democracy and extremely poor human rights record derive from complex historical, political and sociological factors and is sustained by embedded institutional and legal structures, as discussed in Chapters 2 and 3. That said, the ECtHR's share in this outcome must also be addressed, particularly in light of a vast social science and legal literature attributing to the Court a positively transformative role. While it has indeed "issued strong rulings on...the Kurdish conflict",<sup>1521</sup> this was not always the case across time and issues. Even during the Golden Age

---

<sup>1515</sup> Paul Mahoney, "New Challenges for the European Court of Human Rights Resulting from the Expanding Caseload and Membership", *Penn State International Law Review*, vol. 21 (2002), pp. 101-114, at p. 104 (that in the 1950s, the drafters of the Convention debated whether the purpose of the right of individual petition was to promote individual or constitutional justice).

<sup>1516</sup> Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy", *West European Politics*, vol. 25, no. 1 (2002), pp. 77-100.

<sup>1517</sup> Mahoney, "New Challenges for the European Court of Human Rights", at p. 104.

<sup>1518</sup> Luzius Wildhaber, "The Role of the European Court of Human Rights: An Evaluation", *Mediterranean Journal of Human Rights*, vol. 8, no. 1 (2004), pp. 9-32, at p. 26.

<sup>1519</sup> Wojciech Sadurski, "Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments", *Human Rights Law Review*, vol. 9, no. 3 (2009), pp. 397-453, at pp. 401-402 (acknowledging, however, that Turkey "generated a number of cases of dramatic urgency" prior to the enlargement).

<sup>1520</sup> Aurel Croissant and Wolfgang Merkel, "Introduction: Democratization in the Early Twenty-First Century", *Democratization*, vol. 11, no. 5 (2004), pp. 1-9, at p.1.

<sup>1521</sup> Eva Brems, "Transitional Justice in the Case Law of the European Court of Human Rights", *The International Journal of Transitional Justice*, vol. 5 (2011), pp. 282-303, at p. 284. For a favourable assessment of the Convention institutions' balancing of the governments' pursuit of counter-terrorism and the protection of

of its engagement in the Kurdish cases, the ECtHR has never questioned Turkey's emergency regime and refused to address the claims that there was a policy of violence targeting the Kurds because of their ethnicity and/or (perceived) political opinions. Furthermore, as argued in this chapter, the Court's oversight of gross human rights abuses has varied in accordance with broader political developments in Turkey and in Europe.

This chapter seeks to achieve the dual purpose of improving the understanding of the Turkish case by looking through the ECtHR lens, and, conversely, of the ECHR system through the Turkish lens. In discussing the ECtHR's impact on Turkey's laws and policies, it builds on a scholarship which has demonstrated the Court's inability to penetrate structural human rights violations such as state violence in the Kurdish region,<sup>1522</sup> political party dissolutions,<sup>1523</sup> and the rights of individuals belonging to minorities.<sup>1524</sup> The analysis in this chapter temporally complements studies which have examined the ECtHR's engagement in state violence in the Kurdish region until the mid-2000s. Building on prior work, it provides an up-to-date analysis of the incremental development of the ECtHR's jurisprudence on the state crimes described in Chapter 5. In doing so, I argue that a meaningful scrutiny of the ECtHR's judicial impact on the Kurdish conflict requires not only analyzing whether and how Turkey has executed its judgments but also asking whether the Court has actually used all the jurisprudential means

---

human rights to achieve "a fair decision" in "all cases" concerning the Northern Irish and Kurdish conflicts, see Onder Bakircioglu and Brice Dickson, "The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey", *International and Comparative Law Quarterly*, vol. 22 (2017), pp. 263-294, at p. 264.

<sup>1522</sup> Menno T. Kamminga, "Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?" *Netherlands Quarterly for Human Rights*, vol. 2 (1994), pp. 153-164, at 158-159; Aisling Reidy, Françoise Hampson and Kevin Boyle, "Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey", *Netherlands Quarterly of Human Rights*, vol. 15, no. 2 (1997), pp. 161-173, at p. 165; Carla Buckley, *Turkey and the European Convention on Human Rights: A Report on the Litigation Programme of the Kurdish Human Rights Project* (KHRP, 2000); Carla Buckley, "The European Convention on Human Rights and the Right to Life in Turkey", *Human Rights Law Review*, vol. 1, no. 1 (2001), pp. 35-65; Pietro Sardaro, "Jus Non Dicere for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court", *European Human Rights Law Review*, vol. 6 (2003), pp. 601-630; Başak Çalı, "The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996-2006", *Law and Social Inquiry*, vol. 35, no. 2 (2010), pp. 311-338; Keller and Heri, "Enforced Disappearance and the European Court of Human Rights".

<sup>1523</sup> Zühtü Arslan, "Conflicting Paradigms: Political Rights in the Turkish Constitutional Court", *Critique: Critical Middle Eastern Studies*, vol. 11, no. 1 (2002), pp. 9-25; Yusuf Şevki Hakyemez and Birol Akgün, "Limitations on the Freedom of Political Parties in Turkey and the Jurisdiction of the European Court of Human Rights", *Mediterranean Politics*, vol. 7, no. 2 (2002), pp. 54-78; Olgun Akbulut, "Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties", *Fordham International Law Journal*, vol. 34, no. 1 (2010).

<sup>1524</sup> Dilek Kurban, Ozan Erözden and Haldun Gülalp, *Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: A Case Study of Turkey*, prepared for project titled "JURISTRAS: The Strasbourg Court, Democracy and the Human Rights of Individuals and Communities: Patterns of Litigation, Implementation and Domestic Reform" and funded by the European Commission, October 2008; Dia Anagnostou and Yonko Grozev, "Human Rights Litigation and Restrictive State Implementation of Strasbourg Court Judgments: The Case of Ethnic Minorities from Southeast Europe", *European Public Law*, vol. 16, no. 3 (2010), pp. 401-418; Nicholas Sitaropoulos, "Implementation of the European Court of Human Rights' Judgments Concerning National Minorities or Why Declaratory Adjudication does not Help", European Society of International Law, Conference Paper Series no. 4/2011, Tallinn Research Forum, 26-28 May 2011; Dilek Kurban and Haldun Gülalp, "A Complicated Affair: Turkey's Kurds and the European Court of Human Rights", in Dia Anagnostou (ed.), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (Edinburgh University Press, 2013), pp. 166-187.

available to it in its oversight of state violence. On the basis of a process-oriented analysis, I discuss how the ECtHR's response to Kurdish legal mobilization has evolved over time, with its acquisition of expertise on Turkey's legal system, and has been affected by new internal and external political circumstances. I show how the combination of the reforms in the ECHR system to address the Court's post-enlargement docket crisis and the legal reforms in Turkey to qualify for EU accession status have adversely affected Strasbourg's oversight of Turkey's gross human rights abuses in the Kurdish region.

The rest of this chapter is structured as follows: Section 6.2 looks into the evolution of the ECtHR's case law on state violence in Turkey's emergency region until the early 2000s. It discusses how the Court adjusted its procedural rules concerning admissibility and establishment of facts in light of the particular challenges posed by the Kurdish cases and expanded its substantive doctrine at a time when the Turkish government flatly denied the allegations and refused to cooperate with Strasbourg. Section 6.3 concerns how the ECtHR's engagement in the Kurdish cases has been affected by significant developments in Turkey (progress in the EU accession process) and at the ECHR system (the Court's post-enlargement docket crisis) and entered a new phase. While adopting general measures to execute the ECtHR's existing judgments and thus fulfill the EU's accession criteria on the one hand, the Turkish government tried to minimize further judgments by developing new domestic remedies to win wholesale inadmissibility decisions in Strasbourg. This section, which covers roughly the 2000s, also discusses a brief period when unexpected political developments in Turkey made homegrown transitional justice seem possible at a time when the ECtHR had effectively withdrawn from overseeing the Kurdish cases. Finally, Section 6.4 looks into the resumption of state violence in the Kurdish region in the mid-2000s, immediately after the opening of the EU accession process. It discusses how, this time in the absence of formal emergency rule, Turkey started to engage in old and new forms of gross human rights abuses at the same time as it continued to shield its security forces from accountability – for the crimes of the 1990s and the new ones. It then looks into the ECtHR's reluctant but forceful comeback in the 2010s, equipped with new jurisprudential tools and an apparent awareness that Turkey had not changed after all.

## **6.2 The Golden Age: The First Phase of the ECtHR's Review of State Violence in Turkey**

Throughout the 1990s, Turkey pursued a policy of non-cooperation vis-a-vis the international community.<sup>1525</sup> It either did not respond to or denied the official requests by the UN's non-judicial mechanisms to conduct human rights monitoring in Turkey. The repeated requests of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,<sup>1526</sup> the UN

---

<sup>1525</sup> On Turkey's "grudging cooperation, or downright refusal to cooperate" with the UN expert bodies, see Amnesty International, *Turkey: No Security without Human Rights*, AI Index: EUR/44/84/96 (1996), at p. 37-38.

<sup>1526</sup> UN Commission on Human Rights, Question of the Violation of Human Rights and Fundamental Freedoms, in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories: Extrajudicial, Summary or Arbitrary Executions, *Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1996/74, E/CN.4/1997/ 60/Add.1*, 23 December 1996, at p. 119.

Working Group on Enforced or Involuntary Disappearances (UNWG)<sup>1527</sup> and the Special Rapporteur against Torture<sup>1528</sup> to conduct on-site visits were left unanswered for several years, whereas the Representative of the UN Secretary-General on Internally Displaced Persons<sup>1529</sup> was overturned on the ground that “Turkey did not have a displacement issue”.<sup>1530</sup>

In contrast to these UN monitoring mechanisms which rely on state consent to conduct fact-finding missions, the CoE’s European Convention for the Prevention of Torture imposes on state parties an unqualified obligation to permit the European Committee for the Prevention of Torture (CPT) to visit “any place within its jurisdiction where persons are deprived of their liberty by a public authority.”<sup>1531</sup> The CPT has a broad mandate to organise periodic and *ad hoc* country visits without official invitation, visit “at any time any place” where individuals are deprived of their liberties and interview such individuals in private.<sup>1532</sup> With respect to Turkey, the CPT made full use of its monitoring powers by holding periodic and *ad hoc* fact-finding visits on nearly a yearly basis and carried out 16 such visits during 1990-2002. While the Turkish authorities lacked the power to prevent these visits, they systematically impeded the CPT’s work by providing false information,<sup>1533</sup> concealing detainees<sup>1534</sup> or removing them from

---

<sup>1527</sup> UN Commission on Human Rights, Civil and Political Rights, Including Questions of Disappearances and Summary Executions: Addendum, *Report on the Visit to Turkey by two Members of the Working Group on Enforced or Involuntary Disappearances (20-26 September 1998)*, E/CN.4/1999/62/Add.2, 28 December 1998, at p. 3 (hereafter “UNWG 1998 Report”).

<sup>1528</sup> UN Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37*, E/CN.4/1996/35, 9 January 1996, at para. 178.

<sup>1529</sup> The name of this office was subsequently changed to the “Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons.”

<sup>1530</sup> Francis Deng, former Representative of the UN Secretary General for Internally Displaced Persons, keynote at conference titled “Internal Displacement in Turkey and Abroad: International Principles, Experiences and Policy Proposals”, Turkish Economic and Social Studies Foundation (TESEV), Istanbul, 4-5 December 2006.

<sup>1531</sup> European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, at Article 2.

<sup>1532</sup> *Ibid.*, at Articles 7-8.

<sup>1533</sup> Council of Europe, *Report to the Turkish Government on the Visit to Turkey by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 21 September 1990*, CPT/Inf(2007)1, 11 January 2007, at para. 27 (hereafter “CPT 1990 Report”); Council of Europe, *Report to the Turkish Government on the Visit to Turkey by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 17 October 1997*, CPT/Inf(99)2, 23 February 1999, at para. 7.

<sup>1534</sup> See e.g. Council of Europe, *CPT 1990 Report*, at paras 50-55.

detention facilities,<sup>1535</sup> refusing delegates access to designated detention areas<sup>1536</sup> and subjecting them to long delays,<sup>1537</sup> and warning detainees not to complain to the delegation about their treatment.<sup>1538</sup> Where the delegations were given access, in an effort to save face, the Turkish authorities made superficial improvements in detention facilities prior to their inspection.<sup>1539</sup> Turkey made full use of the European Convention for the Prevention of Torture's rules of confidentiality by not authorizing the CPT to publish its fact-finding reports. As a result, the CPT's reports regarding its 1990, 1991, 1992, 1994 and 1996 visits were published as late as 2007.<sup>1540</sup> As I discussed in Chapter 5, the government's failure to cooperate and improve the situation in light of its recommendations prompted the CPT to unconventionally issue a public statement in 1992<sup>1541</sup> and in 1996<sup>1542</sup> that there was a practice of torture in Turkey. Thus, Turkey became the first country against which the CPT issued a public statement.<sup>1543</sup>

Throughout the 1990s, Turkey responded to the international community's efforts to monitor its human rights policies by attacking the integrity of diplomatic delegates and threatening the liberty and security of human rights activists. In 1995, Amnesty International reported that Turkey's State Minister Ayvaz Gökdemir publicly referred to three female members of the European Parliament as "those whores coming from Europe".<sup>1544</sup> He was not only not asked to resign, but was reappointed to the new government in 1996.<sup>1545</sup> An Amnesty International

---

<sup>1535</sup> Council of Europe, *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 29 September to 7 October 1991*, CPT/Inf(2007)3, 11 January 2007, at para. 14 (hereafter "CPT 1991 Report"); Council of Europe, *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 22 November to 3 December 1992*, CPT/Inf(2007)5, 11 January 2007, at para. 7; Council of Europe, *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 28 October 1994*, CPT/Inf(2007)7, 11 January 2007, at para. 9 (hereafter "CPT 1994 Report"); Council of Europe, *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 18 to 20 September 1996*, CPT/Inf(2007)9, 11 January 2007, at para. 4; Council of Europe, *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 27 February to 3 March 1999*, CPT/Inf(2000)17, 7 December 2000, at para. 7.

<sup>1536</sup> Council of Europe, *CPT 1994 Report*, at para 7.

<sup>1537</sup> *Ibid.*, at paras. 7-8.

<sup>1538</sup> *Ibid.*, at para. 9.

<sup>1539</sup> Council of Europe, *CPT 1991 Report*, at para. 15 (mentioning the "extraordinary situation" where detention and interrogation areas at the Anti-Terror Department of the Ankara Police were "full of bowls of flowers and potted plants" and there were "bathroom slippers and shower curtains, together with two types of scented soap" in a shower room for detainees, which was "window-dressing" amounting to "parody").

<sup>1540</sup> The exception was the CPT's first visit in 1996, which took place upon the invitation of the Turkish government. See the CPT's website on Turkey: <http://www.coe.int/en/web/cpt/turkey>.

<sup>1541</sup> Council of Europe, CPT, *Public Statement on Turkey (Adopted on 15 December 1992)*, CPT/Inf(93)1 (hereafter "CPT 1992 Public Statement").

<sup>1542</sup> Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Public Statement on Turkey (issued on 6 December 1996)*, CPT/Inf(96)34 (hereafter "CPT 1996 Public Statement").

<sup>1543</sup> The CPT has since issued public statements against the Russian Federation (2001, 2003 and 2007), Greece (2011), Bulgaria (2015) and Belgium (2017). See the CPT's website: <http://www.coe.int/tr/web/cpt/public-statements>.

<sup>1544</sup> Amnesty International, *Turkey: Unfulfilled Promise of Reform*, AI Index: 44/87/95 (1995), at p. 4.

<sup>1545</sup> Amnesty International, *Turkey: No Security without Human Rights*, at p. 41.

researcher who was finally granted permission to enter Turkey in late May 1995 was arrested, interrogated in incommunicado detention and deported on 7 June.<sup>1546</sup>

In this political climate, the ECtHR emerged as the only external actor capable of bringing real pressure on the Turkish government. By recognizing the right of individual petition and the Court's compulsory jurisdiction in 1987 and 1990, respectively, Turkey had subjected its laws and policies to the ECtHR's oversight on the eve of initiating a policy of state violence in the emergency region. As Mahoney commented at the time, Kurdish lawyers' ability to make immediate use of the individual petition mechanism effectively turned the ECtHR into "a court of first instance" for Kurdish victims, turning the Convention's subsidiary nature "on its head".<sup>1547</sup>

### 6.2.1 The ECtHR on Issues of the Convention Mechanism and Procedure

Turkey challenged the admissibility of the Kurdish cases on the ground that the applicants failed to fulfil the criteria laid out in Articles 34 and 35 of the Convention. Article 34 – former Article 25 – requires the applicant to be a victim of a violation of the Convention, whereas Article 35 (1) – former Article 26 – puts forth eight admissibility criteria, including the exhaustion of domestic remedies. These challenges, the applicants' responses and the ECtHR's conclusions in 87 Kurdish Human Right Project (KHRP)-assisted cases in the early phase of Kurdish litigation in Strasbourg during 1992-1999 were analysed in detail in a report published in 2000.<sup>1548</sup> The discussion below concerning admissibility issues is limited to the exhaustion of domestic remedies, which presented the main obstacle for the applicants and led to a major breakthrough in the Court's jurisprudence.

Once admitted, the Kurdish cases raised complex procedural issues because the facts put forth by the applicants were fiercely disputed or, in most cases, denied by the government. Contrary to usual practice in supra-national litigation, the facts had not been settled by domestic courts before the cases reached Strasbourg, owing to the judicial authorities' failure to carry out meaningful investigations. The Convention institutions had to establish the facts themselves amidst structural obstacles such as their inability to directly communicate with witnesses, lack of cultural familiarity, and lack of powers to compel witnesses to attend to their hearings and sanction those who did not give truthful testimony.<sup>1549</sup> Most importantly, the Court faced an obstructionist government, which not only categorically denied the allegations but also often refused to cooperate with the Court. To overcome these barriers, the EComHR and the ECtHR invoked Article 38,<sup>1550</sup> which they resorted to in "exceptional situations",<sup>1551</sup> to establish the facts themselves. The Convention institutions held fact-finding hearings in 60 Kurdish cases,

---

<sup>1546</sup> Amnesty International, *Turkey: Unfulfilled Promise of Reform*, at p. 3.

<sup>1547</sup> Paul Mahoney, "Speculating on the Future of the Reformed European Court of Human Rights", *Human Rights Law Journal*, vol. 20, no. 1-3 (1999), pp. 1-4, at p. 4. For a review of the Court's jurisprudence on extra-judicial executions, property destructions, enforced disappearances, ill treatment/torture, and freedom of expression or association until late 1999, see Buckley, *Turkey and the European Convention on Human Rights*.

<sup>1548</sup> Buckley, *Turkey and the European Convention on Human Rights*.

<sup>1549</sup> Reidy, Hampson and Boyle, "Gross Violations of Human Rights", at p. 170.

<sup>1550</sup> Article 38 – former Article 28 – empowers the Court to "if need be, undertake an investigation."

<sup>1551</sup> Philip Leach, Costas Paraskeva and Gordana Uzelac, *International Human Rights and Fact-Finding: An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights* (London Metropolitan University, 2009), at p. 5.

constituting two-thirds of the 92 fact-finding missions they conducted in 16 member states during 1957-2007.<sup>1552</sup>

### 6.2.1.1 Admissibility: The Exhaustion of Domestic Remedies

Article 35(1) of the ECHR requires the exhaustion of all domestic remedies for the Court to entertain a case, adding the qualification that this rule is subject to “the generally recognised rule of international law.” The Court had interpreted this rule to entail three main exceptions. First, the applicants have no obligation to have recourse to remedies which are ineffective or inadequate in redressing their grievances.<sup>1553</sup> Remedies must be effective not just in theory, but in practice by providing applicants redress and offering reasonable prospects of success.<sup>1554</sup> Compensation by itself is inadequate where the state had not taken reasonable steps to comply with its obligations under the Convention or pursued a policy or an administrative practice authorizing or tolerating human rights violations.<sup>1555</sup> Second, even where domestic remedies are adequate and effective, there might be special circumstances absolving applicants to exhaust them.<sup>1556</sup> Third, the rule does not apply if there is an administrative practice which renders domestic proceedings futile or ineffective.<sup>1557</sup> Such a practice consists of repetition of acts incompatible with the ECHR and their tolerance by the state authorities.<sup>1558</sup> Repetition means “an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system”<sup>1559</sup> and official tolerance is present where “the superiors of those immediately responsible, though cognisant of [plainly illegal] acts, take no action to punish them or to prevent their repetition; or that higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity – or that in judicial proceedings a fair hearing of such complaints is denied”.<sup>1560</sup>

Turkey repeatedly challenged the admissibility of the Kurdish cases on the grounds that the applicants had not exhausted the administrative, civil and criminal domestic remedies,<sup>1561</sup> such

---

<sup>1552</sup> Ibid, at p. 24 (fact-finding missions refer to both fact-finding hearings and on-the-spot investigations).

<sup>1553</sup> EComHR, *Austria v. Italy*, Application no. 788/60, Decision, 11 January 1961.

<sup>1554</sup> EComHR, *Donnelly and Others v. United Kingdom*, Application no. 5577/72 and 5583/72, First Decision, 5 April 1973.

<sup>1555</sup> EComHR, *Donnelly and Six Others v. United Kingdom*, Application no. 5577-5583/72, Second Decision, 15 December 1975.

<sup>1556</sup> EComHR, *Donnelly and Others*, First Decision.

<sup>1557</sup> EComHR, *Denmark, Norway, Sweden and the Netherlands v. Greece (The Greek Case I)*, Application nos. 3321/67, 3322/67, 3323/67, 3344/67, Report, 5 November 1969; ECtHR, *Ireland v. United Kingdom*, Application no. 5310/71, Judgment, 18 January 1978; EComHR, *Donnelly and Others*.

<sup>1558</sup> ECtHR, *Ireland v. United Kingdom*, at para. 159.

<sup>1559</sup> Ibid.

<sup>1560</sup> EComHR, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, Applications no. 9940-9944/82 (joined), Decision, 6 December 1983, at para 19.

<sup>1561</sup> For a discussion of these government submissions in KHRP-supported cases, see Buckley, *Turkey and the European Convention on Human Rights*, at pp. 52-57.

as filing criminal complaints in ordinary<sup>1562</sup> and military<sup>1563</sup> courts and claiming compensation under civil<sup>1564</sup> and administrative law.<sup>1565</sup> The government submitted examples of administrative court rulings awarding applicants compensation in cases of death, injury or property damage on the basis of the social risk doctrine, which does not require the proof of guilt on the part of authorities. With regard to the latter, Turkey made conflicting arguments. While in some cases the government argued that administrative courts were entitled to award damages even where criminal courts acquitted implicated security officers<sup>1566</sup> and presented examples of rulings compensating applicants whose houses had been burned by soldiers,<sup>1567</sup> in *Menteş and Others* it admitted that the prevalent judicial practice was to award compensation for damages caused by the Kurdistan Workers' Party (*Partiya Karkerên Kurdistan-PKK*) but not by the security forces. The government effectively stated that the applicants would have received compensation had they lied:

it would have been possible for the applicants to seek compensation in the administrative courts by invoking the objective responsibility of the State for damage caused by terrorist violence... It was clear in view of the circumstances that a claim that the security forces had been responsible would have been rejected. However, there were a number of administrative court decisions to show that the applicants would have stood a very great chance of success had they claimed that the houses had been burned by members of the PKK or during clashes between them and the security forces.<sup>1568</sup>

The applicants' principal argument in requesting to be discharged of the domestic remedies rule was that there was a state practice of village destructions and forced displacement,<sup>1569</sup> enforced

---

<sup>1562</sup> Under Turkish Criminal Code, the acts alleged in cases concerning torture, forced displacement, enforced disappearance and extrajudicial killings were criminal offences. The government pointed out that the public prosecutor had the duty to investigate allegations concerning such crimes and that, where the prosecutor decided not to initiate criminal proceedings, the complainants had the right to appeal.

<sup>1563</sup> If the suspect was a member of the armed forces, the applicable law depended on the nature of the offences. "Military offences" codified under Military Criminal Law (no. 1632) required the initiation of criminal proceedings in military courts. Where the offence was of ordinary nature, the suspect was tried in ordinary criminal courts.

<sup>1564</sup> The Turkish Law of Obligations provided for a right of damages against civil servants who had committed illegal acts, be it a tort or a crime. Such claims were raised before ordinary civil courts.

<sup>1565</sup> Article 125 of the Turkish Constitution rendered the administration liable to indemnify people who have suffered damages due to its own acts and measures. The provision was also applicable in a state of emergency. Article 1 of the State of Emergency Law entailed a similar provision.

<sup>1566</sup> ECtHR, *Akdivar and Others v. Turkey*, GC, Application no. 21893/93, Judgment, 16 September 1996, at para. 57.

<sup>1567</sup> ECtHR, *Selçuk and Asker v. Turkey*, Application no. 12/1997/796/998-999, Judgment, 24 April 1998, at para. 62. The summary of the court ruling provided by the government appeared to concern the burning of the applicant's house by the security forces after the house had been abandoned and the village evacuated, making it unclear whether the security forces had engaged in an intentional or a negligent act. *Ibid.*, at para. 67.

<sup>1568</sup> ECtHR, *Menteş and Others v. Turkey*, Application no. 58/1996/677/867, Judgment, 28 November 1997, at para. 55.

<sup>1569</sup> ECtHR, *Akdivar and Others*, at para 60; *Matyar v. Turkey*, Application no. 23423/94, Judgment, 21 February 2002, at para. 143; *Menteş and Others*, at para. 97.

disappearances,<sup>1570</sup> extrajudicial killings<sup>1571</sup> and torture.<sup>1572</sup> To prove the repetition element, they put forth estimate statistics<sup>1573</sup> and cited reports and public statements of UN and CoE expert bodies,<sup>1574</sup> investigation reports of the Turkish Parliament and the Prime Ministry,<sup>1575</sup> reports of international<sup>1576</sup> and domestic human rights NGOs<sup>1577</sup> and fact-finding and trial observation reports of international delegations.<sup>1578</sup> As for official tolerance, they argued that the Turkish authorities systematically denied the existence of human rights abuses as well as remedies to victims.<sup>1579</sup> They argued that this administrative practice was “tolerated, condoned and possibly ordered by the highest authorities in the State”, rendering domestic remedies “illusory, inadequate and ineffective”.<sup>1580</sup> To assist the Court in an unfamiliar legal terrain (the establishment of state responsibility in the absence of official acknowledgment), the KHRP legal team presented comparative international law analysis on the Inter-American system’s jurisprudence on enforced disappearances.<sup>1581</sup>

In the alternative, the applicants argued that domestic remedies were ineffective. They noted that gross abuses clearly fell outside the duties of public officials and therefore the competence

---

<sup>1570</sup> ECtHR, *Akdeniz v Turkey*, Application no. 25165/94, Judgment, 31 May 2005, at para. 122; *Kurt v. Turkey*, Application no. 15/1997/799/1002, Judgment, 25 May 1998, at paras. 102-112; *Ertak v. Turkey*, Judgment, Application no. 20764/92, Judgment, 9 May 2000, at para. 105; *Timurtaş v. Turkey*, Application no. 23531/94, Judgment, 13 June 2000, at para. 114.

<sup>1571</sup> EComHR, *Mahmut Kaya v. Turkey*, Application No. 22535/93, Report, 23 October 1998, at para. 338; ECtHR, *Tanrıkulu v. Turkey*, Application no. 23763/94, Judgment, 8 July 1999, at para. 120.

<sup>1572</sup> ECtHR, *Aksoy v Turkey*, Application no. 21987/93, Judgment, 18 December 1996, at para. 46; *Aydın v. Turkey*, GC, Application no. 57/1996/676/866, Judgment, 25 September 1997, at paras. 121-122; *Akkoç v. Turkey*, Application no. 22947/93 and 22948/93, Judgment, 10 October 2000, at para. 128.

<sup>1573</sup> ECtHR, *Akdivar and Others*, at para 60 (claiming that over two million people had been displaced from almost 3,000 settlements).

<sup>1574</sup> ECtHR, *Akkoç*, at paras. 52-58 (citing the CPT’s public statements of 15 December 1992 and 6 December 1996, and 1997 report); EComHR, *Koçeri Kurt v. Turkey*, Application no. 24276/94, Report, 5 December 1996, at paras. 57 and 199 (referring to the UNWG’s 1994 report); ECtHR, *Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, Judgment, 6 April 2004, at paras. 71-81 (citing the various public statements, reports and preliminary observations issued by the CPT between 1992 and 2002); *Orhan v. Turkey*, Application no. 25656/94, Judgment, 18 June 2002, at para. 34 (citing the CPT’s public statements of 15 December 1992 and 6 December 1996, UN Committee against Torture’s 1993 Summary Account on Turkey, the Committee against Torture’s (CAT) decision of 8 May 1996 in *Ismail Aslan v. Turkey*, UNWG’s 1996 report on Turkey).

<sup>1575</sup> ECtHR, *Mahmut Kaya v. Turkey*, Application no. 22535/93, Judgment, 28 March 2000; *Avşar v. Turkey*, Application no. 25657/94, Judgment, 10 July 2001; *Tanrıkulu* (all citing the Turkish Prime Ministry’s Susurluk report).

<sup>1576</sup> EComHR, *Sukran Aydın v. Turkey*, Application no. 23178/94, 7 March 1996 at para. 59 (citing Amnesty International report *Turkey: Health Professionals in the Emergency Zone, Southeast Turkey*); ECtHR, *Orhan*, at para. 34 (citing Human Rights Watch’s 1994 world report, Amnesty International’s 1995 report *Turkey: Mothers of Disappeared Take Action*, the KHRP’s 1996 report *A Report on Disappearances in Turkey*).

<sup>1577</sup> ECtHR, *Orhan*, at para. 34 (citing the İHD’s 1994 report).

<sup>1578</sup> *Ibid* (citing the Bar Human Rights Committee of England and Wales’ and the KHRP’s 1995 joint trial observation report entitled *Advocacy and the Rule of Law in Turkey: Advocates under Attack*).

<sup>1579</sup> ECtHR, *Kılıç v. Turkey*, Application no. 22492/93, Judgment, 28 March 2000, at para. 94 (extrajudicial killing); *Taş v. Turkey*, Application no. 24396/94, Judgment, 14 November 2000, at para. 97 (enforced disappearance); *Mahmut Kaya*, at para. 127 (extrajudicial killings and torture); *Timurtaş*, at para. 114 (disappearance); *Akdivar and Others*, at para. 85 (village burning, property destruction and forced displacement); *Aksoy*, at paras. 107-108; ECtHR, *Aydın*, at paras. 121-122 (torture); *Akkoç*, at para. 128 (torture).

<sup>1580</sup> ECtHR, *Akdivar and Others*, at para. 60; *Aksoy*, at para. 46.

<sup>1581</sup> Among these materials were written comments from the Center for Justice and International Law (CEJIL), an NGO representing victims of human rights abuses before the Inter-American system. For the full text of these comments, see KHRP, *Timurtaş v. Turkey & Ertak v. Turkey: State Responsibility in ‘Disappearances’* (2001).

of Turkish administrative courts.<sup>1582</sup> While civil and criminal courts had the competence to entertain such claims, emergency legislation precluded judicial action against members of security forces acting under the orders of the Regional Governor of the State of Emergency.<sup>1583</sup> Moreover, in the absence of a criminal court finding that a crime had been committed, there was no prospect for the applicants to be awarded damages by civil courts. Citing the policy of denial and the prosecutors' failure to investigate human rights abuses, the applicants argued that obtaining a criminal conviction against security forces in Turkish courts was virtually impossible.<sup>1584</sup> They also pointed out the extreme difficulty of pursuing domestic remedies due to the intimidation of applicants, as well as their lawyers and doctors.<sup>1585</sup> That remedies existed only on paper was evident in the government's inability to produce court rulings where victims had been awarded compensation or responsible security officers had been punished or at least put on trial.

The ECtHR was faced with the issue in its first judgment in *Akdivar*.<sup>1586</sup> In addressing the applicants' request for exemption from the domestic remedies rule, the Grand Chamber had two options. It could conclude that Turkey engaged in a policy of forced displacements and village burnings and exempt the *Akdivar* applicants and all future ones in similar cases. Alternatively, adopting a case-by-case approach, it could inquire whether there were special circumstances justifying an exemption for the *Akdivar* applicants. The Grand Chamber adopted the latter approach. It attached significance to the fact that the government had not been able to produce a single example of a domestic ruling awarding compensation to applicants whose property had been purposefully destroyed by government agents or prosecuting the implicated security forces. The Grand Chamber found the prospect for successful claims against security forces before civil courts "to be negligible in the absence of any official inquiry into [the] allegations," noting that it took the authorities two years to take the applicants' statements.<sup>1587</sup> It took note of the legal and political context in which the offenses occurred (a region governed by emergency rule and characterized by severe civil strife) and the applicants' special circumstances (insecurity and vulnerability owing to the destruction of their properties and the risk of reprisals against them or their lawyers if they had filed legal proceedings against the security forces). It concluded that there were "special circumstances" which dispensed the applicants from the domestic remedies rule,<sup>1588</sup> with the following caveat:

---

<sup>1582</sup> ECtHR, *Akdivar and Others*, at para 60; *Menteş and Others*, at para. 84.

<sup>1583</sup> Referring to *Olağanüstü Hal Kanunu* [State of Emergency Law], no. 2935, 25 October 1983, Official Gazette, no. 18204, 27 October 1983; *Olağanüstü Hal Bölge Valiliği İhdası Hakkında Kanun Hükmünde Kararname* [Decree with the Force of Law Establishing the Regional Governorship of the State of Emergency], no. 285, 10 July 1987, Official Gazette, no. 19517, 14 July 1987 (hereafter "Decree no. 285"); and *Olağanüstü Hal Bölge Valiliği ve Olağanüstü Halin Devamı Sürecince Alınacak İlave Tedbirler Hakkında Kanun Hükmünde Kararname* [Decree with the Force of Law Regarding Additional Measures to be adopted during the Continuation of the Regional Governorship of the State of Emergency and the State of Emergency], no. 430, 15 December 1990, Official Gazette, no. 20727, 16 December 1990 (hereafter "Decree no. 430"). For a discussion of the emergency law and decrees, see Chapter 3.

<sup>1584</sup> ECtHR, *Aksoy*, at paras. 47-48; *Aydın*, at para. 122-123; *Menteş and Others*, at para. 84.

<sup>1585</sup> *Ibid.*

<sup>1586</sup> For a discussion of the ECtHR's application of the domestic remedies rule in KHRP-supported cases, see Buckley, *Turkey and the European Convention on Human Rights*, at pp. 58-69.

<sup>1587</sup> *Ibid.*, at para 73.

<sup>1588</sup> *Ibid.*, at para. 75.

The Court would emphasise that its ruling is confined to the particular circumstances of the present case. It is not to be interpreted as a general statement that remedies are ineffective in this area of Turkey or that applicants are absolved from the obligation under Article 26 ... to have normal recourse to the system of remedies which are available and functioning. It can only be in exceptional circumstances such as those which have been shown to exist in the present case that it could accept that applicants address themselves to the Strasbourg institutions for a remedy in respect of their grievances without having made any attempt to seek redress before the local courts.<sup>1589</sup>

Nonetheless, *Akdivar* led the ECtHR to be inundated with thousands of applications asking for direct review. While some of these cases only concerned forced displacement and property destructions,<sup>1590</sup> others also involved enforced disappearances<sup>1591</sup> and extrajudicial executions,<sup>1592</sup> and yet others were solely about enforced disappearances,<sup>1593</sup> extrajudicial executions<sup>1594</sup> and torture.<sup>1595</sup> In all cases where the Court exempted the applicants from Article 35, it based its reasoning on their special circumstances and not on the existence of an administrative practice. At the same time, as Reidy, Hampson and Boyle argued, in repeatedly pointing out the absence of domestic court cases compensating the victims, the Court extended “an implicit recognition...of the systematic denial, or at least systematic absence, of effective remedies for deliberate destruction of villages by the security forces”.<sup>1596</sup>

### 6.2.1.2 Establishing the Facts amidst Government Denial and non-Cooperation

As Mahoney has noted, government denial was a “special feature” of the Kurdish cases.<sup>1597</sup> In case after case, Turkey disputed the facts stated by the applicants, denied any wrongdoing by its security forces or lack of effective domestic remedies in its judicial system, and resorted to what Çalı has named “counternarratives of denial.”<sup>1598</sup> Where applicants alleged their relatives had been disappeared following detention or tortured in custody, the government presented false custody logs to show that the alleged victim had never been taken in. Where the applicants alleged forced evictions and house destructions by the security forces, the government blamed them on the PKK – a common feature of its defence strategy before the ECtHR.<sup>1599</sup> In *Aksoy*, for example, the government denied torture in custody, despite medical proof to the contrary, and claimed that the applicant was murdered by the PKK due to “a settlement of scores between quarrelling PKK factions.”<sup>1600</sup> The Court accepted the existence of this policy in a 2013 judgment by stating the following: “As was generally the case in the south-east of Turkey at

---

<sup>1589</sup> Ibid, at para. 77.

<sup>1590</sup> ECtHR, *Menteş and Others; Selçuk and Asker*.

<sup>1591</sup> ECtHR, *İpek v. Turkey*, Application no. 25760/94, Judgment, 17 February 2004; *Kurt; Orhan*.

<sup>1592</sup> ECtHR, *Meryem Çelik and Others v. Turkey*, Application no. 3598/03, Judgment, 16 April 2013.

<sup>1593</sup> ECtHR, *Akdeniz and Others*, Application no. 23954/94, Judgment, 31 May 2001; *Akdeniz; Er and Others v. Turkey*, Application no. 23016/04, Judgment, 31 July 2012; *Timurtaş*.

<sup>1594</sup> ECtHR, *Yaşa v. Turkey*, Application no. 63/1997/847/1054, Judgment, 2 September 1998; *Tanrıkuş; Akkoç v Turkey*, Application no. 22947/93 and 22948/93, Judgment, 10 October 2000.

<sup>1595</sup> ECtHR, *Aydın; Aksoy*.

<sup>1596</sup> Reidy, Hampson and Boyle, “Gross Violations of Human Rights”, at p. 166.

<sup>1597</sup> Mahoney, “Speculating on the Future”, at p. 3.

<sup>1598</sup> Çalı, “The Logics of Supranational Human Rights Litigation”, at p. 319.

<sup>1599</sup> Ibid.

<sup>1600</sup> EComHR, *Zeki Aksoy v. Turkey*, Application no. 21987/93, Report, 23 October 1995, at para. 51.

the time of the events, [the authorities] hastily blamed the killings on the PKK without any basis.”<sup>1601</sup>

The disputes ran so deep that the Court was left with no choice but establish the facts itself, acting, in the words of Leach and colleagues, “as a *de facto* court of first instance”.<sup>1602</sup> During the hearings, Turkey displayed what Keller and Heri characterized as a “wall of silence”.<sup>1603</sup> Despite repeated requests and reminders, it did not produce the complete investigation files<sup>1604</sup> and/or evidence crucial for the establishment of facts<sup>1605</sup> and did not secure the attendance of key witnesses the Commission had summoned.<sup>1606</sup> In several cases, the Court concluded that the government violated its obligations under Article 38, which confers on member states the duty to furnish “all necessary facilities”<sup>1607</sup> to the Court in its task of establishing the facts.<sup>1608</sup>

Turkey’s non-cooperative stance was an essential element of state violence. Individuals who had direct (perpetrators committed the violations) or indirect (judicial authorities and doctors

---

<sup>1601</sup> ECtHR, *Benzer and Others v. Turkey*, Application no. 23502/06, Judgment, 12 November 2013, at para. 191.

<sup>1602</sup> Leach, Paraskeva and Uzelac, *International Human Rights and Fact-Finding*, at p. 26. On fact-finding hearings in KHRP-supported cases, see Buckley, *Turkey and the European Convention on Human Rights*, at pp. 91-97.

<sup>1603</sup> Keller and Heri, “Enforced Disappearance and the European Court of Human Rights”, at p. 745. See also Leach, Paraskeva and Uzelac, *International Human Rights and Fact-Finding*, at pp. 13-14; Buckley, *Turkey and the European Convention on Human Rights*, at pp. 98-102.

<sup>1604</sup> ECtHR, *Menteş and Others*, at para. 31; *Tanrıkulu*, at para. 31; *Taş*, at para. 38; *Akkum and Others v. Turkey*, Application no. 21894/93, Judgment, 24 March 2005; *Çelikkilek v. Turkey*, Application no. 27693/95, Judgment, 31 May 2005, at paras. 57-62.

<sup>1605</sup> ECtHR, *Çakıcı v. Turkey*, Application no. 23657/94, Judgment, 8 July 1999, at para. 43 (failing to produce original custody records where the applicant claimed his brother was disappeared in custody); *Timurtaş*, at para. 39 (failing to produce copies of detention entries of the prison where the applicant claimed his son had been detained prior to his disappearance); *Taş*, at para. 38 (submitting the names of special operations officers who were possibly involved in the disappearance of the victim only after the Commission had closed taking evidence); *Orhan*, at para. 268-272 (failing to submit the full military operations record and the identity of the security officer in charge of the detention facility the applicant’s disappeared brothers and son had been held); *Akkum and Others*, at para. 187 (failing to submit the detailed military operation report during which the applicants claimed their son was unlawfully killed by the security forces); *Çelikkilek* (failing to submit the custody records of all detention facilities in the province where the applicant claimed his brother had been tortured to death in custody).

<sup>1606</sup> ECtHR, *Menteş and Others*, at para. 31 (failing to identify and serve with the Commission’s summons the gendarme commander of the villages); *Çakıcı*, at para. 43 (failing to secure the attendance of a public prosecutor and a gendarme commander summoned by the Commission on the ground that it was unable to require the attendance of such senior figures); *Tanrıkulu*, at para. 39 (failing to secure the attendance of six summoned witnesses including two prosecutors investigating the incident and a doctor who conducted the autopsy of the applicant’s husband); *Timurtaş*, at para. 39 (claiming that the five summoned witnesses, including two who claimed to have seen in prison the disappeared person whose detention the government denied, did not appear before the Commission because they were kidnapped by the PKK, had no money to attend the hearing, had nothing to say or were in prison); *Orhan*, at para. 270 (failing to secure the attendance of the commander of the Bolu Regiment who was in charge of the military operation during which the applicant’s family members were disappeared on the ground that he had already given evidence in another ECtHR case and had no further information to give); *İpek*, at paras. 122-124 (failing to secure the attendance of the same witness as in *Orhan* on the basis of the same argument). On non-attendance of public officials in fact-finding hearings, see also Leach, Paraskeva and Uzelac, *International Human Rights and Fact-Finding*, at pp. 58-63; Buckley, *Turkey and the European Convention on Human Rights*, at pp. 98-101.

<sup>1607</sup> In its case law, the Court has interpreted this duty to include the submission of documentary evidence; the identification, location and ensuring the attendance of witnesses; the provision of response to documents submitted to the Court; and reply to questions transmitted by the Court. Leach, Paraskeva and Uzelac, *International Human Rights and Fact-Finding*, at p. 13.

<sup>1608</sup> ECtHR, *Çakıcı; Tanrıkulu; Timurtaş; Taş; Orhan; İpek; Çelikkilek; Tanış and Others v. Turkey*, Application no. 65899/01, Judgment, 2 August 2005.

who covered them up) culpability were often the very witnesses the Court had summoned. Take the example of a judge, a public prosecutor and two police officers who did not attend the hearings held in September 1999 in Ankara concerning the extra-judicial execution of Necati Aydın, the President of the Health Workers' Trade Union. On 18 March 1999, Aydın, his wife (then six months pregnant) and several relatives were arrested in Diyarbakır. Following a 17-day long incommunicado detention, Aydın and his cousin were brought before a judge.<sup>1609</sup> A lawyer who happened to be in the court building saw Aydın being brought to the court by two police officers. Although the judge ordered their release, Aydın and his cousin never emerged from the front door where their families and friends were waiting. A relative testified to the Commission that a few days after the two men had been disappeared, she was called in to a prosecutor's office, where they were joined by two more prosecutors and two judges. While discussing what might have happened, one judge said "I wonder if it was those with the walkie-talkies?"<sup>1610</sup> The Commission summoned the judge who ordered Aydın's release and the prosecutor who called in his relative, and asked the government to identify and secure the attendance of the two policemen. None of the summoned witnesses appeared before the Commission and the authorities never disclosed the names of the two police officers.<sup>1611</sup>

Over time, the Court started to draw adverse inferences from the government's non-disclosure of documents which were in its possession and essential for the establishment of the facts.<sup>1612</sup> In *Timurtaş*, where the applicant claimed his son was disappeared following apprehension by the gendarmes, the Court made a direct link between the applicants' right to petition under Article 34 and the states' obligation under Article 38:

It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent State has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information as is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 ..., but may also give rise to the drawing of inferences as to the well-foundedness of the allegations.<sup>1613</sup>

---

<sup>1609</sup> His wife and most of their relatives were released from police custody four days after their detention.

<sup>1610</sup> *Süheyla Aydın v. Turkey*, Application no. 25660/94, Judgment, 24 May 2005, at para. 85. "Those with the walkie-talkies" was a clear reference to Gendarmerie Intelligence and Counter-Terrorism Organization (*Jandarma İstihbarat ve Terörle Mücadele Teşkilatı-JİTEM*) members who were known to abduct, torture and execute individuals in the Kurdish region. On JİTEM's *modus operandi*, see Chapter 5.

<sup>1611</sup> See also ECtHR, *Taniş and Others* (failing to secure the attendance of the commanding gendarmerie officer and the unidentified officer who summoned a Kurdish politician, who, with his colleague, were disappeared after they entered the gendarmerie station). For more on this case, see Chapter 5.

<sup>1612</sup> But see the earlier 1999 ECtHR ruling of *Tanrıkulu* (while citing the principle of adverse inference, the Court did not find that the case disclosed any special circumstances to justify drawing a negative inference from the government's failure to produce the requested materials and to conclude beyond a reasonable doubt that the applicant's husband was killed by or with the connivance of security forces).

<sup>1613</sup> ECtHR, *Timurtaş*, at para. 66. For similar language in subsequent cases, see ECtHR, *Taş* (drawing "very strong inferences" from the government's failure to produce any evidence as to where the applicant's disappeared son had been detained and "provide a satisfactory and plausible explanation as to what happened to him" to conclude that he must be presumed dead, for which the liability was attributable to the government); *Orhan*, at para. 266; *İpek*, at para. 112 (drawing inferences in favour of the applicant also "applies to the failure

However, this did not mean that the Court shifted the burden of proof. The applicants were still expected to prove their allegations beyond reasonable doubt. In its early case law, the Court had ruled that “such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.”<sup>1614</sup> In *Timurtaş*, the applicant was able to discharge this burden thanks to a fortuitously discovered photocopy of a signed gendarmerie operation report describing the apprehension of his son. It was on the basis of this document that the Court concluded that his son had been detained and “must be presumed dead following an unacknowledged detention by the security forces.”<sup>1615</sup>

Not every applicant was so fortunate to discover – and smuggle out – a legal document proving his/her claims. In *Tekdağ*,<sup>1616</sup> the only evidence the applicant could submit was circumstantial; she alleged that her husband was disappeared and possibly killed after he was abducted by the security forces from a street. She said she witnessed the incident and named a man who said he saw her husband in custody at the Rapid Intervention Force (*Çevik Kuvvet*) in Diyarbakır and was willing to testify. She submitted the copy of a newspaper article based on an anonymous source that her husband had been murdered in the custody of the Armoured Brigade in Silvan. The ECtHR concluded that prosecutors did not follow up on the possible leads provided by the applicant, first and foremost by interviewing the applicant’s witness who they knew to be in a prison in Diyarbakır, and did not take any steps to identify possible other witnesses. The Court held that Turkey breached Article 38 by not submitting the full investigation file and securing the attendance of “the most crucial witness in favour of the applicant’s allegations”.<sup>1617</sup> Nonetheless, it did not reverse the burden of proof. Instead, the Court concluded that the applicant failed to corroborate her account in a decisive manner, relied on hearsay and failed to prove that her husband had been abducted and killed by the security forces. This ruling was issued in 2004, eight years after *Akdivar*, during which time the Court had observed first-hand Turkey’s denial strategy and found case after case that domestic courts did not conduct meaningful investigations into the allegations.

The Court’s persistence in its high evidentiary standard was protested by Judge Bonello. In his concurring opinion in the Grand Chamber’s *Tahsin Acar* ruling, Bonello found the majority’s reasoning “profoundly disturbing” for rewarding the State which was found to have procedurally violated the right to life under Article 2 and Article 38 at the expense of the applicant who failed to establish beyond reasonable doubt the government’s responsibility in the disappearance of his brother. Pointing out the “moral deficit” in this outcome, Bonello warned that failure to shift the burden of proof in disappearance cases “will only embolden rogue States in their efforts to rig sham investigations, and encourage the suppression of

---

of the State to ensure the attendance of witnesses at a fact-finding hearing case”); *Taniş and Others*, at para. 160 (these principles also apply to cases where, although an individual’s detention by the authorities has not been proven, “it is possible to establish that he or she was officially summoned by the military or the police, entered a place under their control and has not been seen since”); *Süheyla Aydın*, at para. 137 (these principles also apply “to delays by the State in submitting information which prejudices the establishment of the facts in a case”). For a discussion of the Court’s case law on adverse inferences, see Leach, Paraskeva and Uzelac, *International Human Rights and Fact-Finding*, at pp. 19-20 and pp. 62-63.

<sup>1614</sup> ECtHR, *Ireland v. United Kingdom*, at para. 161.

<sup>1615</sup> ECtHR, *Timurtaş*, at para. 86.

<sup>1616</sup> ECtHR, *Tekdağ v. Turkey*, Application no. 27699/95, Judgment, 15 January 2004.

<sup>1617</sup> *Ibid*, at para. 65.

incriminating evidence.”<sup>1618</sup> In fact, as Uğur Erdal, a lawyer working at the ECtHR’s Registry, wrote in 2001 criticizing the application of the beyond reasonable doubt standard, this was not the first time an internal objection was raised. In a 2000 Grand Chamber ruling, eight of the 17 judges, including Judge Bonello, had issued a strong dissent against the requirement of a standard of proof used in criminal cases in some legal systems.<sup>1619</sup>

It was only in March 2005, in *Akkum and Others*, that the Court modified its approach and shifted the burden of proof in cases where the applicants were unable to prove their claims due to the government’s failure to discharge their “procedural obligations”.<sup>1620</sup> The government admitted the existence of the military operation during which the applicants claimed their sons/brothers had been killed, but denied the killings. Yet, it withheld the documents indispensable for the establishment of the facts, prompting the Court to find it “inappropriate” to conclude that the applicants failed to support their allegations given that the evidence they needed was in the hands of the government.<sup>1621</sup>

In situations where “the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities”, concluded the Court, it is for the Government to discharge its burden of proof by either “argu[ing] conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or...provid[ing] a satisfactory or convincing explanation of how the events in question occurred”<sup>1622</sup> to fulfil their procedural obligations.<sup>1623</sup> In *Toğcu*, the Court added the final element of this test; the burden will shift to the government only when the applicant makes out a *prima facie* case of state control over the missing person prior to his/her disappearance.<sup>1624</sup> *Akkum* and *Toğcu* marked the beginning of a new approach, whereby the Court shifted the burden of proof to governments who failed to fulfil their procedural obligations under Articles 2 and 3. The Court has since applied this test

---

<sup>1618</sup> Concurring opinion of Judge Bonello in ECtHR, *Tahsin Acar v. Turkey*, GC, Application no. 26307/95, 8 April 2004, at paras. 10 and 12.

<sup>1619</sup> Uğur Erdal, “Burden and Standard of Proof in Proceedings under the European Convention”, *European Law Review Human Rights Survey*, vol. 26 (2001), pp. 68-85, at p. 77 (citing ECtHR, *Labita v. Italy*, GC, Application no. 26772/95, Judgment, 6 April 2000). For a discussion of the beyond reasonable doubt standard, see also Uğur Erdal and Hasan Bakırcı, *Article 3 of the European Convention on Human Rights: A Practitioner’s Handbook*. (OMCT Handbook Series, vol.1, 2006), at pp. 256-259.

<sup>1620</sup> Two ECtHR judges wrote that the introduction of the concept of “procedural obligations” resulted from the Court’s inability to continue to engage in fact-finding. Helen Keller and Olga Chernishova, “Disappearance Cases before the European Court of Human Rights and the U.N. Human Rights Committee: Convergences and Divergences”, *Human Rights Law Journal*, vol. 32, no. 7-12 (2012), pp. 237-249, at p. 243; Egbert Myjer, “Human Rights without Peace? The European Court of Human Rights and Conflicts between High Contracting Parties”, in Antoine Buyse (ed.), *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict* (Intersentia, 2011), pp. 1-33, at pp. 22-23.

<sup>1621</sup> ECtHR, *Akkum and Others*, at para. 209.

<sup>1622</sup> *Ibid*, at para. 211. See also ECtHR, *Çelikbilek*, at paras. 66-72 (reversing the burden of proof in response to the government’s non-disclosure of the custody records necessary to establish the facts and concluding that the applicant’s brother was killed in the hands of the security forces in substantive violation of Article 2).

<sup>1623</sup> ECtHR, *Akkum and Others*, at para. 289.

<sup>1624</sup> ECtHR, *Toğcu v. Turkey*, Application no. 27601/95, Judgment, 31 May 2005, at para. 95 (finding in this case that the applicant failed to present such a case).

in enforced disappearance cases in Cyprus<sup>1625</sup> and the Russian Northern Caucasus (particularly Chechnya).<sup>1626</sup>

A recurrent government strategy during the fact-finding hearings was attempting to undermine the credibility of the applicants. In some cases, the authorities depicted the applicants as PKK terrorists<sup>1627</sup> or as sympathizers who fabricated allegations under PKK pressure<sup>1628</sup> to use “the ECtHR as a forum for the dissemination of lies against Turkey”,<sup>1629</sup> an argument shared by the ECtHR judge from Turkey, Feyyaz Gölcüklü.<sup>1630</sup> For instance, the authorities portrayed the 17 year-old Şükran Aydın, who was raped and tortured in state custody, as a PKK militant manipulating the ECtHR for propaganda purposes.<sup>1631</sup> Based on a confessor, they claimed that Şükran had been engaged in “intimate relations” with two PKK members<sup>1632</sup> and that her “decision to marry and her ability to be sexually active so soon after her claimed traumatic experience were scarcely consistent with the behaviour of a rape victim.”<sup>1633</sup> When she appeared before the Commission in Strasbourg, let alone being able to frame what has been done to her in legal terms (“torture”), Şükran’s limited life experience did not enable her to say, even in Kurdish, that she had been raped.<sup>1634</sup> When pressed to tell what had been done to her in detention, the best approximation she could come up with was “dirty things.”<sup>1635</sup> Since the government contested her credibility partly due to her alleged inaccurate description of uniforms worn by gendarmes in summer, Şükran was asked to describe the texture of clothes rubbing against her skin while she was raped. It was “rough” fabric, she said.<sup>1636</sup> The Commission was unequivocal in its conclusion on the credibility issue:

The Commission has not been persuaded of the existence of any motivation which would induce the applicant to lie and her family to support a fabricated story of this kind. On the contrary, both the applicant and her father were credible and convincing in their answers to questions and impressed as people who had suffered distressing events.<sup>1637</sup>

---

<sup>1625</sup> ECtHR, *Varnava and Others v. Turkey*, GC, Application nos. 16064-16073/90, Judgment, 18 September 2009.

<sup>1626</sup> ECtHR, *Goygova v. Russia*, Application no. 74240/01, Judgment, 4 October 2007; *Aziyevy v. Russia*, Application no. 77626/01, Judgment, 20 March 2008; *Magomed Musayev and Others v. Russia*, Application no. 8979/02, Judgment, 23 October 2008.

<sup>1627</sup> ECtHR, *Çakıcı; Yöyler v. Turkey*, Application no. 26973/95, Judgment, 24 July 2003.

<sup>1628</sup> *Menteş and Others*, at para. 31.

<sup>1629</sup> Çalı, “The Logics of Supranational Human Rights Litigation”, at p. 322.

<sup>1630</sup> Dissenting opinions of Judge Gölcüklü, in ECtHR, *Akdivar and Others*, at p. 28 (that the applicants filed the case “with the aim of spreading anti-Turkish propaganda”); *Menteş and Others*, at p. 33 (together with Judge Franz Matscher, that the applicants and their witnesses “belonged to families of which certain members were PKK activists and in some cases terrorists”); *Tanrikulu*, at p. 37 (accusing the applicant of engaging in “bad faith or a political ploy aimed at discrediting the respondent State”).

<sup>1631</sup> The facts of the case are accounted in detail in Chapter 5.

<sup>1632</sup> EComHR, *Sukran Aydın*, at para. 48.

<sup>1633</sup> ECtHR, *Aydın*, at para. 68. Şükran was married to her cousin, to whom she was already promised in marriage, immediately after the rape incident and gave birth to a baby soon after. The baby was established by a gynaecologist to be her husband’s child. By the date of the Grand Chamber ruling, they had two more babies.

<sup>1634</sup> For a touching story of Şükran’s testimony to the EComHR, see Michael D. Goldhaber, *A People’s History of the European Court of Human Rights* (Rutgers University Press, 2009), at pp. 139-140.

<sup>1635</sup> EComHR, *Sukran Aydın*, at para. 104.

<sup>1636</sup> *Ibid.*

<sup>1637</sup> *Ibid.*, at para. 180.

The government also questioned the applicants' credibility by pointing out the inconsistencies between their statements to their lawyers on the one hand and to Turkish prosecutors and the EComHR on the other.<sup>1638</sup> In *Akdivar*, the Commission dismissed that these differences were proof of fabricated allegations. Instead, noting the "almost identical manner" in which the statements of multiple villagers were recorded, it reached the impression that the statements had been "drafted in a uniform manner by the gendarmes", making it "highly doubtful whether [they] can be said to reflect the information that the villagers intended to convey in regard to the events at issue."<sup>1639</sup> The Commission demonstrated its awareness of the broader political context:

it must have been difficult for [the applicants] in their vulnerable position to make direct accusations against the security forces when being heard by State officials. The manner in which some of the State officials who were heard by the Commission's delegates reacted to the very idea of the security forces being responsible for destruction in villages makes it easy to understand that such suggestions are not well received and could entail harmful consequences for those who make them.<sup>1640</sup>

The Commission's conclusion was not shared by the ECtHR's Turkish Judge Gölcüklü, who frequently questioned the credibility of British and Kurdish lawyers affiliated with the KHRP and the Diyarbakır branch of the Human Rights Association (*İnsan Hakları Derneği-İHD*).<sup>1641</sup>

## 6.2.2 The ECtHR on Substantive Issues

The Kurdish cases posed novel substantive issues for the ECtHR, whose jurisprudence on human rights abuses in the context of an armed conflict was limited to Northern Ireland.<sup>1642</sup> In the latter case, not only were human rights abuses less egregious and systematic, but also, as Kevin Boyle had noted, the governments of the United Kingdom and the Republic of Ireland "have demonstrated at least some commitment to legality" by not engaging in a "wholesale abuse of emergency powers" and enabling the judicial, municipal and media oversight of human rights abuses.<sup>1643</sup>

The applicants in the Kurdish cases raised claims the ECtHR had no experience dealing with. They alleged that their family members had been disappeared by the state at a time when enforced disappearance had not yet been defined or codified under international human rights

---

<sup>1638</sup> For a review of the issue of credibility in KHRP-supported cases, see Buckley, *Turkey and the European Convention on Human Rights*, at pp. 92-97.

<sup>1639</sup> EComHR, *Akdivar and Others v. Turkey*, Application no. 21893/93, Report, 26 October 1995, at para. 197.

<sup>1640</sup> *Ibid*, at para. 201.

<sup>1641</sup> ECtHR, *Akdivar and Others; Menteş and Others* (joint dissenting partly opinion with Judge Matscher).

<sup>1642</sup> While gross human rights abuses had also been committed in Cyprus in the 1970s, the Court's jurisprudence on this armed conflict did not develop until the 2000s for political and jurisdictional reasons. On the inter-state cases, see Chapter 2. On the reasons for the delay in the Court's first judgment in individual complaints (the 2009 ruling in *Varnava v. Turkey*), see Myjer, "Human Rights without Peace".

<sup>1643</sup> Kevin Boyle, "Human Rights and Political Resolution in Northern Ireland", *Yale Journal of International Law*, vol. 9, no. 1 (1982), pp. 156-177, at p. 158 (noting, though, that the Northern Ireland conflict proved the inadequacy of common law courts in protecting human rights during times of emergency). The substantive violations raised in these cases concerned the use of internment or detention without trial, the ill-treatment of detainees, the use of lethal force in counter-terrorism operations and the violations of the right to fair trial.

law,<sup>1644</sup> except for the Inter-American human rights system.<sup>1645</sup> They asked the Court to hold the Turkish state responsible for the disappearance of their loved ones despite the lack of any traces of the victim or the crime. They claimed that their family members had been killed by or with the connivance/knowledge of the authorities while the government vehemently denied to have had any dealings with the victims. Kurdish applicants claimed that they had been tortured in custody in the absence of any official record of their detention. While they had stories to tell and family and friends to back them up, the Court's standards of proof required them to establish their claims 'beyond a reasonable doubt' – an impossible burden to dispose in the face of government denial. In addition, the applicants claimed to be victims of a policy of gross human rights abuses targeting the entire Kurdish population or select Kurdish individuals because of their ethnicity and/or political opinion and of denying the victims any legal remedies, including the official acknowledgment of the truth.

It was, in other words, 'he said, she said.' Faced with hundreds of applicants making identical claims and a government vehemently contesting their narrative and denying responsibility, the ECtHR incrementally, but not necessarily consistently, built its substantive doctrine on state violence.

#### 6.2.2.1 Turkey's Emergency and Derogation Regimes

The ECHR's derogations regime is based on Article 15(1): "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."<sup>1646</sup> Decades before the war between the Turkish military and the PKK started, the Court had addressed the validity of states' derogations from their human rights obligations and resort to extrajudicial executive powers under terrorism-justified emergency regimes in its jurisprudence on the Northern Ireland conflict.<sup>1647</sup> Displaying a

---

<sup>1644</sup> While the prohibition of enforced disappearance is argued to date back to the judgments of International Military Tribunal in Nuremberg, it was defined for the first time under the 1998 Rome Statute of the International Criminal Court and codified in an international treaty under the 2006 UN International Convention for the Protection of All Persons from Enforced Disappearance. Keller and Chernishova, "Disappearance Cases before the European Court of Human Rights and the U.N. Human Rights Committee", at p. 237.

<sup>1645</sup> In what are collectively known as the "Honduran Disappearance Cases", the Inter-American Court of Human Rights (IACtHR) defined and established state responsibility for the crime of enforced disappearance. IACtHR, *Velásquez Rodríguez v. Honduras*, Series C, no. 4, 29 July 1988; *Godínez Cruz v. Honduras*, Series C, no. 5, 20 January 1989; *Fairén Garbi and Solls Corrales v. Honduras*, Series C, no. 6, 15 March 1989; *Caballero Delgado and Santana v. Colombia*, 8 December 1995.

<sup>1646</sup> Article 15(2) prohibits derogation from the right to life and freedom from torture, slavery and from *ex-post facto* laws under any circumstances, with the exception of deaths resulting from lawful acts of war. On the drafting history of Article 15, see Ronald St. John Macdonald, "Derogations under Article 15 of the European Convention on Human Rights", *Columbia Journal of Transnational Law*, vol. 36 (1997), pp. 225-267. On the evolution of the Convention institutions' early jurisprudence on Article 15, see Rosalyn Higgins, "Derogations under Human Rights Treaties," *British Yearbook of International Law*, vol. 48, no. 1 (1977), pp. 281-319.

<sup>1647</sup> ECtHR, *Lawless v. Ireland*, Application no. 332/57, Judgment, 1 July 1961 (in its first ever judgment in an individual complaint, finding the applicant's internment for five months without judicial review to be "strictly required by the exigencies of the situation" in light of the existence of a public emergency threatening the life of the nation); *Ireland v. United Kingdom* (finding the United Kingdom authorities' prolonged extrajudicial powers of arrest, detention and internment in Northern Ireland not to violate the right to liberty and security); *Brannigan and McBride v. United Kingdom*, Application nos. 14553/89 and 14554/89, Judgment, 25 May 1993 (finding the

“sweeping”<sup>1648</sup> deference to the governments of Ireland and the United Kingdom, the ECtHR exercised restraint in assessing derogations justified by emergencies. While in *Lawless v. Ireland* the Court had declared its competence to “determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled”,<sup>1649</sup> it gradually expanded states’ margin of appreciation<sup>1650</sup> and, as Gross and Ní Aoláin noted, “increasingly [ate] away its ability to exercise meaningful and effective supervision” over emergency measures.<sup>1651</sup> In *Ireland v. United Kingdom*, the Court granted states a “wide” margin in deciding “both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it” because the national authorities were better placed than an international court in making such assessments due to “their direct and continuous contact with the pressing need of the moment.”<sup>1652</sup> On the basis of this “better position” doctrine, the Court limited its competence to examining whether specific government measures were “strictly required by the exigencies of the situation”,<sup>1653</sup> leaving decisions on the presence of an emergency to the member states. Thus, in restricting its role to proportionality analysis, the Court effectively retracted to the boundaries of European supervision the Commission had drawn in the *First Cyprus Case*.<sup>1654</sup> The first and so far only time where the Convention institutions rejected an emergency justification was in the *Greek Case* concerning the invocation of Article 15 by the military junta which had overthrown the democratically elected government.<sup>1655</sup> After this ruling, the Court’s Article 15 jurisprudence was interpreted to draw a distinction between anti-democratic regimes and “ostensibly democratic states”,<sup>1656</sup> whereby

---

detention of two IRA suspects for over six and four days respectively without having brought before a judge not to violate Article 5(3) on the basis of the United Kingdom’s emergency derogation under Article 15).

<sup>1648</sup> Oren Gross and Fionnuala Ní Aoláin, “From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights”, *Human Rights Quarterly*, vol. 23 (2001), pp. 625-649, at p. 633.

<sup>1649</sup> ECtHR, *Lawless v. Ireland*, at para. 22.

<sup>1650</sup> The roots of the margin of appreciation doctrine go back to an inter-state case contesting the United Kingdom’s colonial policies in Cyprus. The Commission introduced the notion that states had a “certain measure of discretion” in adopting emergency measures and declared its competence in assessing whether such measures were “strictly required by the exigencies of the situation”. EComHR, *Greece v. United Kingdom (First Cyprus Case)*, Application no. 176/56, Report, 26 September 1958. The Commission reworded this discretion as “a certain margin of appreciation” and expanded its scope to determining the existence of “a public emergency threatening the life of the nation”. EComHR, *Lawless v. Ireland*, Application no. 332/57, Report, 19 December 1959, at para. 90. When the *Lawless* case came before it, the Court did not confirm the Commission’s language, emphasizing instead its competence to conduct a substantive review of states’ invocation of Article 15. ECtHR, *Lawless v. Ireland*, at para. 22.

<sup>1651</sup> Gross and Ní Aoláin, “From Discretion to Scrutiny”, at p. 632.

<sup>1652</sup> ECtHR, *Ireland v. United Kingdom*, at para. 207.

<sup>1653</sup> ECtHR, *Ireland v. United Kingdom*, at para. 207; *Brannigan and McBride*, at para. 43.

<sup>1654</sup> The “trend on the retreat from scrutiny” which started with *Ireland v. United Kingdom* continued with the Court’s judgments in Article 5 cases against the United Kingdom for its policies in Northern Ireland. Ní Aoláin, “The Emergence of Diversity”, at pp. 117-118 (citing ECtHR, *Brogan and Others v. United Kingdom*, Application nos. 11209/84, 11234/84, 11266/84 and 11386/85, Judgment, 19 November 1988; *Brannigan and McBride*).

<sup>1655</sup> The Commission did not grant any margin to the junta government. Based on its own assessment of the facts, the Commission refuted the government’s claim that there was an imminent threat of communist takeover and concluded that there did not exist a public emergency within the meaning of Article 15. The case did not reach the Court due to the junta’s withdrawal from the CoE and denunciation of the ECHR at the anticipation of a judgment along the lines of the Commission report. EComHR, *Denmark, Norway, Sweden and The Netherlands v. Greece (The Greek Case I)*, Application nos. 3321/67, 3322/67, 3323/67, 3344/67, Report, 5 November 1969.

<sup>1656</sup> Ní Aoláin, “The Emergence of Diversity”, at p. 114.

the latter have been given full discretion in their assessments of the necessity of emergency-based derogations.

Emergency regimes, and by extension derogation measures, are essentially provisional.<sup>1657</sup> In 1997, Judge Macdonald, a former ECtHR member, noted that the Court had not yet required states to prove the effectiveness of their counter-terrorism measures and stated that “should an emergency situation continue to the point at which it appears to have become quasi-permanent, such judicial reticence becomes questionable.”<sup>1658</sup> However, by then, it was already evident that “entrenched emergency” had been the norm and not the exception<sup>1659</sup> in Turkey, and in the United Kingdom, whose governments had been “repeat players” in the derogation regime.<sup>1660</sup> Nonetheless, the Convention institutions did not question the necessity of prolonged emergency regimes in these countries.

At the same time, unlike the United Kingdom, Turkey’s derogations regime did not commence with the Kurdish conflict, nor was it limited to responding to an armed conflict or terrorism. Hegarty and Leonard reported that between 1970 and 1987, Turkey invoked Article 15 “for more than 77 percent of the time, including a continuous stretch of almost seven years from September 1980 to May 1987.”<sup>1661</sup> One episode of this practice, derogations announced by the junta after the 1980 *coup*, was contested before the EComHR in an inter-state case.<sup>1662</sup> Turkey routinely resorted to derogations each and every time it declared a state of emergency or martial law, which itself was a routine deflection from the rule of law. Whereas, as Gross put it, a crisis “must be a truly extraordinary exigency to qualify as a derogation-justifying emergency”,<sup>1663</sup> it was Turkey’s adherence to its obligations under the ECHR which has been the exception, not its emergency and derogation regimes.

In the context of the Kurdish conflict, Turkey declared a state of emergency on 19 July 1987 and filed a formal notice of derogation with the Secretary General of the CoE on 6 August 1990, seven months after it recognized the ECtHR’s compulsory jurisdiction.

---

<sup>1657</sup> Macdonald, “Derogations under Article 15, at p. 241.

<sup>1658</sup> *Ibid.*, at p. 238.

<sup>1659</sup> Gross and Ní Aoláin, “From Discretion to Scrutiny”, at p. 645 (defining an entrenched emergency as “a de facto, permanent, complex or institutionalized state of emergency” which blurs the demarcation lines between normalcy and emergency). See also Oren Gross, “‘Once More unto the Breach’: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Democracies”, *The Yale Journal of International Law*, vol. 23 (1998), pp. 437-501, at pp. 442-443 (noting the danger of overreliance on the assumption of the exceptionality of emergency in the Convention institutions’ jurisprudence on the entrenched emergency in Northern Ireland and Turkey’s systematic violations against the Kurds).

<sup>1660</sup> Fionnuala Ní Aoláin, “Transitional Emergency Jurisprudence: Derogation and Transition”, in Antoine Buyse and Michael Hamilton (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge University Press, 2011), pp. 24-51, at p. 34. Northern Ireland was governed by emergency rule “for a combined period of some thirty years.” Gross and Ní Aoláin, “From Discretion to Scrutiny”, at p. 646.

<sup>1661</sup> Angela Hegarty and Siobhan Leonard (eds.), *A Human Rights: An Agenda for the 21<sup>st</sup> Century* (Cavendish Publishing, 1999), at p. 108 (listing the durations of such derogations as follows: from 16 June 1970 to 5 August 1975, from 26 December 1978 to February 1980, and from 12 September 1980 to 25 May 1987).

<sup>1662</sup> In separate complaints joined by the EComHR, five European countries contested, among others, the junta’s derogation under Article 15, arguing that the situation in Turkey had significantly improved since the *coup* and that the government measures went beyond what was strictly required by the exigencies of the situation. EComHR, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*. For more, see Chapter 2.

<sup>1663</sup> Gross, “‘Once More unto the Breach’”, at p. 452.

The Republic of Turkey is exposed to threats to its national security in South East Anatolia which have steadily grown in scope and intensity over the last months so as to amount to a threat to the life of the nation in the meaning of Article 15 of the Convention.

During 1989, 136 civilians and 153 members of the security forces have been killed by acts of terrorists, acting partly out of foreign bases. Since the beginning of 1990 only, the numbers are 125 civilians and 96 members of the security forces.

...

Because of the intensity and variety of terrorist actions and in order to cope with such actions, the Government has not only to use its security forces but also take steps appropriate to cope with a campaign of harmful disinformation of the public, partly emerging from other parts of the Republic of Turkey or even from abroad and with abuses of trade-union rights.<sup>1664</sup>

In effect, Turkey was informing the CoE of its intention to censor the press and restrict the freedom of association to prevent the flow of information between the Kurdish region and the rest of the world. As for its emergency measures, the government referred to Decrees nos. 424 and 425 of 10 May 1990 as the basis of its derogations from Articles 5, 6, 8, 10, 11 and 13 of the ECHR.<sup>1665</sup> On 5 May 1992, Turkey further informed the Secretary General that it limited the scope of its derogation to Article 5 and that derogations with respect to the remaining articles were no longer in effect.<sup>1666</sup>

The first case where Strasbourg addressed the validity of Turkey's derogations was *Aksoy*. The Commission and the Court were reluctant to question Turkey's derogation grounds, citing the member states' "wide margin of appreciation in assessing the existence and scale of an emergency and the measures needed to deal with it."<sup>1667</sup> The Commission concluded, without engaging in any discussion:

There is no serious dispute between the parties as to the existence of a public emergency in South-East Turkey threatening the life of the nation. In view of the grave threat posed by terrorism in this region, the Commission can only conclude that there is indeed a state of emergency in South-East Turkey which threatens the life of the nation.<sup>1668</sup>

The Court agreed, finding that the "particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, 'a public emergency threatening the life of the nation'."<sup>1669</sup>

This unquestioning deference to the government's emergency arguments reflects the Court's consistent failure to adopt a contextualized and historically grounded approach to Turkey's

---

<sup>1664</sup> ECtHR, *Aksoy*, at para. 31.

<sup>1665</sup> On the extra-ordinary powers these decrees granted to the executive in the emergency region, see Chapter 3.

<sup>1666</sup> ECtHR, *Aksoy*, at para. 31.

<sup>1667</sup> EComHR, *Zeki Aksoy*, at para. 173 (citing ECtHR, *Ireland v. United Kingdom* and ECtHR, *Brannigan and McBride*).

<sup>1668</sup> *Ibid*, at para. 179.

<sup>1669</sup> ECtHR, *Aksoy*, at para. 70.

legal regime. Unlike in the *Greek Case*, the Commission did not conduct its own factual assessment as to whether the situation in Turkey amounted to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”<sup>1670</sup> In their deference to the government, the Convention institutions treated Turkey as a democratic regime although its emergency legislation was designed by the military *junta* which had violently overthrown the elected government, like in Greece.<sup>1671</sup> Going against its own case law stressing that emergency regimes must be provisional and exceptional,<sup>1672</sup> they did not address the fact that emergency rule had become effectively permanent in the Kurdish region.<sup>1673</sup> Neither did they take into account Turkey’s abuse of the ECtHR’s derogations regime under the pretext of counter-terrorism. For example, on 19 June 1970, Turkey cited “demonstrations organised by several groups” in two cities which “have caused damage to public property” and “have in certain places been of an insurrection character” as the grounds for a state of siege.<sup>1674</sup>

Finally, the Commission and the Court did not scrutinize whether normal restrictions under the Convention were plainly inadequate to secure law and order in the Kurdish region. They limited their review to assessing whether the emergency measures were within the territorial scope of the derogations<sup>1675</sup> or were, in the case of prolonged pre-trial detentions, strictly required by the exigencies of the situation in the Kurdish region.<sup>1676</sup> In doing so, the Court did not review the proportionality of Turkey’s overall emergency measures, such as the exile from the region of civil servants solely because they exercised their democratic rights.<sup>1677</sup> The applicant in *Süheyla Aydın* raised this issue, claiming that her and her late husband’s repeated postings to outside the

---

<sup>1670</sup> ECtHR, *Lawless v. Ireland*, at para. 28 (finding a state of emergency in Ireland in July 1957 owing to the existence in its territory of a secret army engaged in unconstitutional activities and violence, which was also operating outside Ireland and jeopardising its relations with the United Kingdom, and the steady and alarming increase in terrorist activities). In the *Greek case*, the Commission elaborated on this definition by stating that “a public emergency threatening the life of the nation” had to: 1) be actual or imminent; 2) have effects involving the whole nation; 3) threaten the continuance of the organised life of the community; and 4) pose an exceptional crisis or danger, where the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate. EComHR, the *Greek Case*, at para. 153.

<sup>1671</sup> See Chapter 2.

<sup>1672</sup> At the same time, Court and the Commission did not truly apply these criteria in their prior case law on the Northern Ireland conflict. Gross, “Once More unto the Breach”, at p. 464.

<sup>1673</sup> Gross and Ní Aoláin, “From Discretion to Scrutiny”, at p. 645-646.

<sup>1674</sup> CoE, “Derogations (Article 15 of the Convention): Turkey”, in *Yearbook of the European Convention on Human Rights: 1970* (Martinus Nijhoff, 1972), at p. 18.

<sup>1675</sup> ECtHR, *Abdulsamet Yaman v. Turkey*, Application no. 32446/96, Judgment, 2 November 2004 (holding that Turkey’s derogation was limited to the state of emergency region, which did not include the province of Adana where the applicant had been arrested and detained, and therefore inapplicable *ratione loci* to the facts of the case); *Sakik and Others v. Turkey*, Application nos. 87/1996/706/898-903, Judgment, 26 November 1997 (finding Turkey’s derogation to be inapplicable *ratione loci* to the arrest and detention of the applicants in Ankara, which was outside the state of the emergency region).

<sup>1676</sup> ECtHR, *Aksoy* (finding the incommunicado detention of the applicant for at least 14 days without judicial oversight, medical examination and contact with family and friends to be in violation of Article 5(3)); *Demir and Others v. Turkey*, Application no. 71/1997/855/1062-1064, Judgment, 23 September 1998 (finding the incommunicado detention of the applicants for at least 23 and at least 16 days respectively without access to any procedural safeguards to be in violation of Article 5(3)).

<sup>1677</sup> The Regional Governor of the State of Emergency was vested with the powers to exile from the region public officials and employees (Decree no. 285) and any other person (Decree no. 430) he deemed to be harmful to public security. For more on the extraordinary powers of the executive in the emergency region, see Chapter 3.

emergency region<sup>1678</sup> and her husband's enforced disappearance and murder were due to their trade union activities.<sup>1679</sup> In his testimony to the EComHR, the Chief Public Prosecutor of Diyarbakır DGM confessed that individuals deemed to be PKK sympathizers were exiled from the region when efforts to convict them failed.<sup>1680</sup> Although the prosecutor did not make a direct link between the prosecution of the applicant and her husband and their union activities, the applicant told the EComHR that it was only after she and her husband joined the union that they started to be harassed with detentions and interrogations.<sup>1681</sup> When they challenged their exile before Turkish courts, they were told that they had been sent away from Diyarbakır because their existence in the city "constituted a threat to peace and security."<sup>1682</sup> The ECtHR did not find it necessary to examine the applicant's complaint under Article 11, although the particular emergency measure was still in effect after Turkey had removed its derogation under that article.

### 6.2.2.2 Violence as a State Policy: The ECtHR on Administrative Practice Claims

The Kurdish applicants also claimed the existence of an administrative practice in support of their substantive claims of enforced disappearance, torture, extrajudicial execution and forced displacement in the emergency region. This went into the heart of these cases, since an ECtHR ruling finding such a practice would substantially alleviate the applicants from the burden of proving the elements of crimes they attributed to the state. It would also lead, the applicants hoped, to findings of aggravated violations of the Convention.<sup>1683</sup>

The Court was evasive in addressing the administrative practice claims, even where the applicants substantiated their claims with the findings of UN and CoE expert bodies. In *Aksoy*, for example, the applicant presented the CPT's 1992 public statement, the UN Committee against Torture's (CAT) 1993 fact-findings and the UN Special Rapporteur's 1995 report to show that torture in Turkey was systematic and widespread.<sup>1684</sup> In *Şükran Aydın*, the applicant cited the CPT's 1992 and 1996 public statements and the UN Special Rapporteur on Torture's 1995 report to support her claim regarding official tolerance of torture.<sup>1685</sup> In 1992, the CoE's own CPT publicly stated that "the practice of torture and other forms of severe ill-treatment of persons in police custody remains widespread in Turkey."<sup>1686</sup> The CAT reported in 1993 that "the existence of systematic torture in Turkey cannot be denied."<sup>1687</sup> In 1994, the CPT repeated

---

<sup>1678</sup> The applicant and her husband had eventually resigned from their civil servant jobs and stayed in Diyarbakır. ECtHR, *Süheyla Aydın*, at para. 75. Arguably, it was the failure of repeated harassments by the authorities that led to the extrajudicial execution of the applicant's husband.

<sup>1679</sup> *Ibid*, at para. 200.

<sup>1680</sup> *Ibid*, at para. 107. The Court summarized the prosecutor's statement as follows: "His office would sometimes receive intelligence indicating that certain civil servants had been in contact with members of the PKK. In such circumstances, and when he was unable to obtain any evidence to indict such civil servants, he would ensure their transfer to other cities."

<sup>1681</sup> *Ibid*, at para 74.

<sup>1682</sup> *Ibid*, at para. 75.

<sup>1683</sup> ECtHR, *Aksoy*, at para. 107; *Ertak*, at para. 142; *Akkoç*, at para. 128.

<sup>1684</sup> ECtHR, *Aksoy*, at para. 46.

<sup>1685</sup> ECtHR, *Aydın*, at para. 121.

<sup>1686</sup> Council of Europe, *CPT 1992 Public Statement*, at para. 21.

<sup>1687</sup> UN General Assembly, *Report of the Committee against Torture: Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey*, 15 November 1993, A/48/44/Add.1, at para. 38 (hereafter "CAT 1993 Report").

its earlier finding and warned that “it would be quite misleading to present the problem of torture and ill-treatment as simply being an unfortunate consequence of the scale of terrorist activity in Turkey.”<sup>1688</sup> In 1995, the Special Rapporteur on Torture found that “torture of detainees ... continues to be systematic”.<sup>1689</sup> In another public statement in 1996, the CPT had “once again found clear evidence of the practice of torture and other forms of severe ill-treatment by the Turkish police”<sup>1690</sup> and warned:

resort to torture and other forms of severe ill-treatment remains a common occurrence in police establishments in Turkey. To attempt to characterise this problem as one of isolated acts of the kind which can occur in any country – as some are wont to do – is to fly in the face of the facts.<sup>1691</sup>

When the Grand Chamber deliberated *Aydın* in April and August 1997, it had at its disposal all of these findings. Yet, reiterating the Chamber ruling in *Aksoy*,<sup>1692</sup> it found the evidence produced by expert UN and CoE bodies based on their visits to detention facilities, medical examination of detainees, and interviews with torture survivors, doctors and lawyers, to be “insufficient” to reach a conclusion on the existence of an administrative practice.<sup>1693</sup> Thus, the Court treated torture in Turkey as an isolated phenomenon.

The Court responded similarly to state practice claims in enforced disappearance cases. In *Kurt*, the applicant cited the UNWG’s report that the highest number of alleged disappearance cases globally reported in 1994 occurred in Turkey.<sup>1694</sup> The ECtHR’s response was that the applicant rested her case “entirely on presumptions”<sup>1695</sup> and failed to adduce “any evidence to substantiate her claim”.<sup>1696</sup> However, a different approach was possible. The ECtHR could have, as Amnesty International and the applicant’s lawyers requested, followed the example of the Inter-American Court of Human Rights (IACtHR) starting with its 1988 judgment of *Velásquez Rodríguez*.<sup>1697</sup> Agreeing with the conclusion of the Inter-American Commission of Human Rights (IAComHR) “that the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances” and that the disappearance of an individual “would be impossible to prove” without “circumstantial or indirect evidence or by logical inference”,<sup>1698</sup> the IACtHR had laid-out a test for proving the disappearance of an individual amidst government denial. The applicant should: 1) show “that there was an official practice of disappearances ... carried out by the Government or at least

---

<sup>1688</sup> CPT 1994 Report, at para. 36.

<sup>1689</sup> UN Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32, E/CN.4/1995/34*, 12 January 1995, at p. 157.

<sup>1690</sup> Council of Europe, *CPT 1996 Public Statement*, at para.2.

<sup>1691</sup> *Ibid*, at para. 10.

<sup>1692</sup> ECtHR, *Aksoy*, at para. 109.

<sup>1693</sup> ECtHR, *Aydın*, at para. 124.

<sup>1694</sup> EComHR, *Kurt*, at paras. 57 and 199; ECtHR, *Kurt*, at para. 166.

<sup>1695</sup> ECtHR, *Kurt*, at para. 108.

<sup>1696</sup> *Ibid*, at para. 116.

<sup>1697</sup> Irum Taqi, “Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights’ Approach”, *Fordham International Law Journal*, vol. 24, no. 3 (2000), pp. 940-987.

<sup>1698</sup> IACtHR, *Velásquez Rodríguez*, at para. 124.

tolerated by it”; and 2) link the disappearance of their family member to that practice.<sup>1699</sup> As for the applicable standard of proof, the IACtHR allowed the submission of circumstantial evidence in light of the seriousness of the charge, the applicants’ inability to present direct evidence and the crucial difference between a criminal case and a human rights case.

Circumstantial evidence, indicia, and or presumptions may be considered, as long as they lead to conclusions consistent with the facts. Circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim. ...

In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State’s cooperation.<sup>1700</sup>

Based on witness testimonies, press clippings of public statements by high-ranking Honduran military, executive and judicial authorities, and the *amicus curiae* of international human rights organizations, the IACtHR concluded that there was a practice of enforced disappearances targeting individuals deemed to be dangerous to state security and carried out or tolerated by Honduran officials during 1981-1984, and that the disappearance of *Velásquez Rodríguez* fell within the framework of that practice.<sup>1701</sup>

Despite the ECtHR’s reluctance to follow the IACtHR’s lead, Kurdish applicants continued to make administrative practice claims.<sup>1702</sup> In *Kılıç*, the applicant’s brother, a journalist working for the daily *Özgür Gündem* and a member of the İHD in Şanlıurfa, was killed one month after he had issued a press release criticising the governor for not protecting the offices, employees and distributors of his newspaper against death threats. The applicants alleged that their brothers had been killed by undercover security agents or by members of Hizbullah acting under their express or implied instructions and receiving support from the state.<sup>1703</sup> They presented the Turkish Parliament’s reports on Susurluk and unresolved political killings, the latter of which had identified 908 extrajudicial killings, including nine journalists during 1975-1994.<sup>1704</sup>

The Court was adamant in refusing to address administrative practice claims even in cases where it effectively accepted the existence of a victim profile:

It is undisputed that there were a significant number of killings – the “unknown perpetrator killing” phenomenon” – which included prominent Kurdish figures such as Musa Anter and other journalists... The Court is satisfied that Hasan Kaya, as a doctor suspected of aiding and abetting the PKK, was at that time at particular risk of falling

---

<sup>1699</sup> Ibid, at para. 126.

<sup>1700</sup> Ibid, at paras. 130-135.

<sup>1701</sup> Ibid, at para. 148.

<sup>1702</sup> ECtHR, *Mahmut Kaya; Ertak; Timurtaş; Akdeniz and Others*.

<sup>1703</sup> *Kılıç*, at para. 47.

<sup>1704</sup> On these reports, see Chapter 5.

victim to an unlawful attack. Moreover, this risk could in the circumstances be regarded as real and immediate.<sup>1705</sup>

In another case, the Court repeated the first sentence, replacing “other journalists” with “other persons suspected of opposing the authorities’ policies in the south-east” and continued:

The Court is satisfied that Zübeyir Akkoç, a Kurdish teacher involved in [trade union] activities *perceived by the authorities as being unlawful and in opposition to their policies in the south-east*, was at that time at particular risk of falling victim to an unlawful attack. Moreover, this risk could in the circumstances be regarded as real and immediate.<sup>1706</sup>

In *Avşar*, the Court implicitly identified the *modus operandi* of extrajudicial executions with respect to the victim’s abduction and execution by village guards, a confessor and a gendarme officer:

While it is not established that any gendarme was aware of any intent to kill Mehmet Şerif Avşar, the circumstances in which he was removed from his shop and not submitted to formal procedure of recorded detention showed that he was at real and immediate risk of arbitrary and unlawful treatment, including, in the circumstances of south-east Turkey at the time, the risk of being killed.<sup>1707</sup>

In *Mahmut Kaya*, the Court even admitted the plausibility of the involvement of security forces when it, in reference to the Parliament’s report on unresolved political killings, said:

The Court does not rely on the report as establishing that any State official was implicated in any particular killing. The report does, however, provide further strong substantiation for allegations, current at the time and since, that “contra-guerilla” groups involving confessors or terrorist groups were targeting individuals perceived to be acting against State interests, with the acquiescence, and possible assistance, of members of the security forces.<sup>1708</sup>

In *Osmanoğlu*, the Court made a similar observation about the disappearance of the applicant’s son following his abduction by two armed plainclothes men carrying walkie-talkies who introduced themselves as police officers:

To this end, the Court observes that the manner of his abduction shows many similarities with the disappearances of persons prior to their being killed in south-east Turkey at the relevant time which have been examined by the Court.<sup>1709</sup>

Thus, the Court implicitly identified a pattern of disappearances and extrajudicial executions during a certain period in a certain region of Turkey, but always shied away from concluding

---

<sup>1705</sup> ECtHR, *Mahmut Kaya*, at para. 89.

<sup>1706</sup> ECtHR, *Akkoç*, at para. 81 (citing its earlier ruling in *Yaşa*, emphasis added).

<sup>1707</sup> ECtHR, *Avşar*, at p. 411 (citing earlier rulings of *Kılıç* and *Mahmut Kaya*).

<sup>1708</sup> ECtHR, *Mahmut Kaya*, at para. 91; *Akkoç*, at para. 84.

<sup>1709</sup> ECtHR, *Osmanoğlu v. Turkey*, Application no. 48804/99, Judgment, 24 January 2008, at para. 58 (citing its prior rulings in *Avşar*, *Nuray Şen v. Turkey (no. 2)*, Application no. 25354/94, Judgment, 30 March 2004, and *Çelikbilek*).

that a state practice existed. The closest the Court has come to the Inter-American approach was in its 2012 ruling in *Er and Others* where it noted “the pattern of disappearances of large numbers of persons in south-east Turkey between 1992 and 1996.”<sup>1710</sup> But again, it did not explicitly say that Turkey had an administrative practice or put forth a legal test to reach such a determination.

In terms of the agents of state violence, while the Court was somewhat open to the applicants’ claims, this was gradual and by no means consistent. In *Ahmet Özkan and Others*, the Court did not question the credibility of a PKK militant-turned-confessor whose testimony was the sole ground for the detention of ten villagers.<sup>1711</sup> It did not ask whether the confessor’s allegation that the villagers had links with the PKK was reasonable ground for lawful detention, although it had in multiple cases been submitted the Turkish Parliament’s conclusions that confessors fabricated allegations against innocent individuals for obtaining amnesty, making financial gain and getting even with individuals against whom they had a personal grudge.

The Turkish Parliament had also concluded that village guards abused their authority to engage in criminal activities and retaliate against villagers who did not join the force. The ECtHR raised its reservations about this system for the first time in its 2001 ruling in *Avşar*:

This case additionally highlights the risks attaching to the use of civilian volunteers in a quasi-police function. Notwithstanding the official denials that guards were used outside their own villages, it has been established in this case that guards were used regularly on a variety of official operations, including the apprehension of suspects. According to the regulations provided by the Government, village guards were hierarchically subordinate to the district gendarme commander. However, it is not apparent what supervision was, or could be exerted over guards who were engaged in duties outside the jurisdiction of the district gendarme commander. Nor, as the village guards were outside the normal structure of discipline and training applicable to gendarmes and police officers, is it apparent what safeguards there were against wilful or unintentional abuses of position carried out by the village guards either on their own initiative or under the instructions of security officers who themselves were acting outside the law.<sup>1712</sup>

In its 2006 ruling in *Ihsan Bilgin*, noting that the government did not provide any information on the equipment given to village guards or the written and oral instructions they receive on the use of deadly force, the Court raised questions about the adequacy of the training and control given to security forces who are armed and authorized to use deadly force.<sup>1713</sup> In 2009, in *Seyfettin Acar*, where it found Turkey responsible for the killing of a group of peasants by the village guards, the ECtHR made its strongest statements to this date about the system:

In this connection, the Court reiterates, in particular, its misgivings as regards the use of civilian volunteers such as village guards in a quasi-police function... the village

---

<sup>1710</sup> ECtHR, *Er and Others*, at para 77.

<sup>1711</sup> For details of the case, see Chapter 5.

<sup>1712</sup> ECtHR, *Avşar*, at para. 414.

<sup>1713</sup> ECtHR, *Ihsan Bilgin v. Turkey*, Application no. 40073/98, Judgment, 27 July 2006.

guards operated outside the normal structure of discipline and training applicable to gendarmes and police officers, it was thus not apparent what safeguards there were against wilful or unintentional abuses of position carried out by the village guards either on their own initiative or under the instructions of security officers... The Court's misgivings in this respect are further compounded by the Ministry of the Interior's information, which was submitted to the Court by the applicants [that a total of 4,938 village guards committed offences in the past eighteen years, 1,215 of which were against the person] , the accuracy of which is not disputed by the Government.<sup>1714</sup>

Exceptionally, the Court found a substantive violation of Article 2 although, in this case, the village guards had been prosecuted in Turkey and sentenced to life imprisonment –the highest possible sentence. Yet, for the Court, it was the very existence of a system where the state armed civilians with heavy weapons and used them in counter-terrorism which constituted a violation. This ruling is also significant because the ECtHR expressed its awareness of the possibility, or even fact, that security forces used village guards to engage in crimes and that they themselves committed unlawful acts, departing from its hitherto tendency to treat human rights abuses by village guards as isolated incidents. However, the Court fell short of calling for the abolishment of the system.

Finally, in *İpek*, the Court reached the following conclusion regarding large scale military operations in villages carried out by the Bolu Brigade:

This operation was not an isolated one. During that period other hamlets and villages suffered the same fate, with soldiers, again possibly from the Bolu brigade, backed up military helicopters and vehicles, combing the area.<sup>1715</sup>

Despite these findings which effectively drew a pattern of the acts, actors and *modus operandi* of state violence, the ECtHR has never concluded that there was an administrative practice of gross human rights abuses in the Kurdish region.

### **6.2.2.3 Impunity as a State Policy: Denial of Effective Remedies to Victims**

Under Article 13 of the Convention, “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” The applicants based their claims regarding the third type of administrative practice on this provision. Claiming that they were denied effective remedies in Turkish courts, the applicants summed up the workings of the impunity regime in Turkey:

the legal order and practice in south-east Turkey, which was subject to the state of emergency, had been changed in order deliberately to make the exercise of remedies against the State more difficult. The special legislation in force in that region had established a system which ensured impunity for the security forces, based on the

---

<sup>1714</sup> ECtHR, *Seyfettin Acar v Turkey*, Application no. 30742/03, Judgment, 6 October 2009, at para 34.

<sup>1715</sup> ECtHR, *İpek*, at para. 155.

authorities' strategy of denying the facts and any liability, in order to prevent effective access to domestic remedies.<sup>1716</sup>

The applicants' claims under Article 13 were essentially the same as their requests for an exemption from the domestic remedies rule. In *Kurt*, the applicant

maintained further that not only did the inadequacy of the official investigation into her complaint result in her being denied access to an effective remedy in respect of her son's disappearance but that this failure on the part of the authorities was indicative of the lack of an effective system of remedies in the respondent State to address the occurrence of serious violations of Convention rights.<sup>1717</sup>

In *Aksoy*, the Court elaborated on the notion of effective remedy:

The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention... Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law in the sense that it must not be unjustifiably hindered by the acts or omissions of the authorities."<sup>1718</sup>

As far as claims of gross human rights abuses were concerned:

where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.<sup>1719</sup>

The Court developed this test with respect to a torture claim and applied it with respect to enforced disappearances, extrajudicial killings and village destructions, finding the authorities to have violated Article 13 by not carrying out any meaningful investigation,<sup>1720</sup> or where an investigation had been commenced, not conducting it effectively or thoroughly.<sup>1721</sup> At the same time, its reluctance to find an administrative practice led the Court to refrain from concluding the existence of an impunity policy. Yet, in between the lines, it unearthed the pattern with all its elements.

One characteristic of impunity was the prosecutors' tendency to attribute responsibility to the PKK without any evidence, as in *Ahmet Özkan and Others*, where the applicants claimed that the security forces had left behind the explosive which led to the death of a small child.

---

<sup>1716</sup> ECtHR, *Yaşa*, at para. 110.

<sup>1717</sup> ECtHR, *Kurt*, at para. 136.

<sup>1718</sup> ECtHR, *Aksoy*, at para. 95.

<sup>1719</sup> *Ibid*, at para. 98.

<sup>1720</sup> ECtHR, *Kurt* (disappearance); *Gasyak and Others v. Turkey*, Application no. 27872/03, Judgment, 13 October 2009 (extrajudicial execution); *Süheyla Aydın*, at para. 185 (extrajudicial execution); *İpek*, at para. 145 (village burning and disappearance).

<sup>1721</sup> ECtHR, *Aydın* (torture); *Mahmut Kaya* (extrajudicial execution); *Anter and Others v. Turkey*, Application no. 55983/00, Judgment, 19 December 2006 (extrajudicial execution).

the Court is struck by the sudden and – in so far as can be established – unsubstantiated conclusion of Şenol Önal in his decision of lack of jurisdiction that an unknown number of PKK terrorists had caused the death of Abide Ekin by having left explosive material behind after the incident.<sup>1722</sup>

Turkish judicial authorities' ideological approach was vividly laid out before the Commission itself. In *Süheyla Aydın*, Bekir Selçuk, the Chief Prosecutor of the Diyarbakır DGM expressed his belief that the victim was a PKK member and was probably killed by the PKK because he had left the organization.<sup>1723</sup> When reminded by the Commission that the victim had been released by the DGM judge for lack of any evidence of his involvement with the PKK, Selçuk said that the acquittal was “the personal opinion of the trial court judge” and did not mean that the victim was not involved in terrorism.<sup>1724</sup> The ECtHR found “these disturbing comments from a senior public prosecutor reflect an abject disregard of the rule of law.”<sup>1725</sup> In fact, the Commission was familiar with Selçuk; in 1995, it had negatively reflected<sup>1726</sup> on Selçuk's oral evidence in *Akdivar* that the allegations that the security forces evicted villagers from their homes and burn their houses were “incredible, illogical and impossible”.<sup>1727</sup> At the same time, Selçuk was not an exception. Two more prosecutors who testified in *Süheyla Aydın* dismissed any suggestion that the security forces might have engaged in wrongdoing. One prosecutor explained his decision not to carry out a full autopsy with his opinion that the method of killing (single gunshot to the head, hands tied and body dumped at a roadside) established that the perpetrator was the PKK.<sup>1728</sup> The other's testimony summed up the approach of the judicial authorities at the time: “[I]n an investigation into a killing which had taken place in that area at that time, the starting point would be that the perpetrators were members of the PKK”.<sup>1729</sup> This statement, in and of itself, was the admission of the impunity policy.

Another aspect of impunity was the prosecutors' reliance on information given by the security forces and failure to conduct their own investigation. In *Özkan and Others*, the Court found the prosecutor's failure to investigate the death of a detainee from the pneumonia he contracted for having made to walk barefoot in the snow and due to the conditions of his detention to be “directly influenced by the information allegedly given to him by the police” that Ekin was a PKK terrorist who had contracted frostbite during his stay in the caves.<sup>1730</sup> In *Taniş*, the Court was “struck” by the prosecutors' failure to check the initial investigation conducted by the gendarmerie.<sup>1731</sup> In *Kaya*, it was “struck in particular” by the prosecutor's “readiness to accept

---

<sup>1722</sup> ECtHR, *Ahmet Özkan and Others*, at para. 318.

<sup>1723</sup> ECtHR, *Süheyla Aydın*, at para. 104. The prosecutor later argued that the PKK killed the applicant's husband so that a complaint could be lodged against Turkey to the EComHR. *Ibid*, at para. 108.

<sup>1724</sup> *Ibid*, at para. 105.

<sup>1725</sup> *Ibid*, at para. 165.

<sup>1726</sup> EComHR, *Akdivar and Others*, at para. 212 (finding the testimony given by officials, including Selçuk, to be “generally evasive”).

<sup>1727</sup> *Ibid*.

<sup>1728</sup> ECtHR, *Süheyla Aydın*, at para. 110.

<sup>1729</sup> *Ibid*, at para. 113.

<sup>1730</sup> ECtHR, *Ahmet Özkan and Others*, at para. 327. For a description of the facts of this case, see Chapter 5.

<sup>1731</sup> ECtHR, *Taniş and Others*, at para. 187.

at face value the information given by the military” and “assum[ption] without question that the deceased was a terrorist who had died in a clash with the security forces.”<sup>1732</sup>

The ECtHR also detected, implicitly, the judicial practice of appearing to investigate until the statute of limitations ran out. In *Osmanoğlu*, it concluded that the prosecutor’s decision of non-jurisdiction was not taken at the end of an investigation but “was a decision merely confirming that the statute of limitations had been reached.”<sup>1733</sup> In *Süheyla Aydın*, the Court also reflected on the standard practice of “three-monthly, pro-forma reports drawn up by the gendarmes”, which could not “be taken as proof of any investigation”.<sup>1734</sup>

And yet, despite all these findings and conclusions, the ECtHR evaded the impunity issue, not finding it necessary to determine whether violations of Articles 2, 3 and 13 it found were part of a state practice.<sup>1735</sup>

#### 6.2.2.4 Defining the Scope of Substantive Rights

Enforced disappearance and extrajudicial execution cases primarily raised violations of Article 2(1) of the Convention, which provides as follows: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” Under Article 2(2), there are exceptions for deprivation of life resulting from “the use of force which is no more than absolutely necessary” for the purposes of defending any person from unlawful violence, a lawful arrest or preventing the escape of someone lawfully arrested and lawful actions aimed at quelling a riot or insurrection. In torture cases, the applicants primarily relied on Article 3 which entails an absolute prohibition without any exceptions: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Cases concerning forced displacements and village destructions primarily raised violations of Article 8 which protects the right to respect for private and family life, home and correspondence, subject to certain restrictions,<sup>1736</sup> and Article 1 of Protocol 1 which entitles everyone to the peaceful enjoyment of his/her possessions, subject to the protection of public interest. Finally, in most Kurdish cases, the applicants raised the Convention’s ancillary anti-discrimination provision, Article 14, which states the following: “The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

---

<sup>1732</sup> ECtHR, *Kaya v. Turkey*, Application no. 158/1996/777/978, Judgment, 19 February 1998, at para. 89.

<sup>1733</sup> ECtHR, *Osmanoğlu*, at para. 33.

<sup>1734</sup> ECtHR, *Süheyla Aydın*, at para. 184.

<sup>1735</sup> See e.g. ECtHR, *Mahmut Kaya*, at para. 30.

<sup>1736</sup> These restrictions are laid out in Article 8(2): “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

#### 6.2.2.4.1 Enforced Disappearances

In enforced disappearance cases, the applicants were faced with a fundamental challenge; the Court had never before dealt with a case where an individual vanished after he was last seen in the custody of the security forces. In *Kurt*, the Court's first ever ruling on disappearances, unable to produce direct evidence to establish the death of her son, the applicant cited the IACtHR and asked the establishment of state responsibility on the basis of circumstantial evidence.<sup>1737</sup> She noted that when a person had been missing for a long period and there was a state practice of disappearances, the IACtHR found reasonable presumption to conclude that he had been killed. Alternatively, she asked the ECtHR to conclude that her son had been killed due to the "life-threatening context" in which he had disappeared.<sup>1738</sup> She also asked the Court to apply its approach in *Tomasi v. France* to enforced disappearance cases. In *Tomasi*, the Court had held that where an individual who had been taken into custody in good health was found to be injured at the time of his release, the burden of proof shifts on the state to prove a plausible explanation of the causes of the injury.<sup>1739</sup> The applicant in *Kurt* asked the Court to similarly hold that the state's failure to provide a plausible explanation for the death of an individual proven taken into custody gives rise to state responsibility under Article 2.<sup>1740</sup> The Court refuted all of the arguments because it lacked "concrete evidence" to conclude beyond a reasonable doubt that the applicant's son was killed by the security forces.<sup>1741</sup> Instead, it reviewed the case under Article 5, concluding that "the unacknowledged detention of an individual is a complete negation" of the right to liberty.<sup>1742</sup> On another note, the Court broke new ground in *Kurt* by concluding that the close relatives of the disappeared may themselves be subject to inhuman and degrading treatment under Article 3 because of the distress and anguish they suffer.<sup>1743</sup>

In the next two years, the ECtHR issued two new rulings. In *Çakıcı*, the applicant's brother went missing after being detained by the security forces during an operation. The government denied detention and claimed that the missing person was a PKK militant who had been killed during a clash with the security forces. However, multiple eyewitnesses saw him being taken away by the security forces and ill-treated in detention. In *Ertak*, the applicant's son went missing after he was detained at a police checkpoint. While the government denied the detention, there were six eye witnesses, including a lawyer, who saw the missing person in custody, some of whom witnessed him being tortured. The primary factual difference of *Kurt* was that no one saw the missing person being taken away by the security forces or witnessed his treatment in detention. That he was last seen by his mother in the custody of the security forces in the village was not sufficient for the Court to conclude that he had been detained and died in detention. In *Çakıcı*, on the other hand, the Court found "sufficient circumstantial evidence, based on concrete elements, on which it may be concluded beyond reasonable doubt"

---

<sup>1737</sup> On the evolution of the Convention institutions' early jurisprudence on enforced disappearance, see Buckley, "The European Convention on Human Rights", at pp. 55-64; Buckley, *Turkey and the European Convention on Human Rights*, at pp. 117-124.

<sup>1738</sup> ECtHR, *Kurt*, at para. 101.

<sup>1739</sup> ECtHR, *Tomasi v. France*, Application no. 12850/87, Judgment, 27 August 1992.

<sup>1740</sup> Buckley, "The European Convention on Human Rights", at p. 57.

<sup>1741</sup> ECtHR, *Kurt*, at para. 107.

<sup>1742</sup> *Ibid*, at para. 124.

<sup>1743</sup> *Ibid*, at para. 134.

that the applicant's son had been a victim of unacknowledged detention and died in custody.<sup>1744</sup> It ruled similarly in *Ertak*.<sup>1745</sup>

Then came *Timurtaş*, whose factual resemblance to *Kurt* rendered the distinction the Court made between them less convincing.<sup>1746</sup> The applicant claimed that his son went missing after he was apprehended by the security forces during an operation in their village. He was unable to provide eye-witness evidence of his son's detention, though he claimed to have been told by two confessors that they saw his son alive in custody. The Commission established beyond a reasonable doubt that the applicant's son had been detained. When the case came before the Court, the issue was whether the authorities' failure to provide a plausible explanation as to a detainee's fate, in the absence of a body, might raise issues under Article 2. Still reluctant to find an administrative practice, the Court introduced the "life-threatening" test that the applicant in *Kurt* had advocated and stated that the answer depended on the existence of sufficient circumstantial evidence, such as the lapse of time since the missing person was detained, the establishment that he was taken into custody and the existence of motive on the part of the authorities.<sup>1747</sup> Pointing out that the disappeared had been missing for six and a half years, was taken to a place of detention and was wanted by the authorities for his alleged PKK links, the Court concluded:

In the general context of the situation in south-east Turkey in 1993, it can by no means be excluded that an unacknowledged detention of such a person would be life-threatening.<sup>1748</sup>

The Court did not elaborate why the lapse of time in *Kurt* (four and a half years) was not sufficient to conclude that the missing person had died. Searching for a counter-terrorism motive in detentions, the Court missed the fact that the authorities suspected anyone and everyone in the Kurdish region to support the PKK and arbitrarily detained and disappeared individuals for no other reason than being Kurdish and/or living in villages close to the PKK camps. Its reluctance to find state practice led the ECtHR to draw an incomplete victim profile and rather unconvincingly distinguish *Kurt* rather than overturn it.<sup>1749</sup>

In *Akdeniz and Others*, the enforced disappearance case discussed in Chapter 5, the Court applied the test it had incrementally developed in *Çakıcı*, *Ertak* and *Timurtaş*. Drawing very strong inferences from the length of the elapsed time (over seven years) and the government's inability to provide a satisfactory and plausible explanation as to what might have happened to

---

<sup>1744</sup> ECtHR, *Çakıcı*, at para. 85. Among such evidence was the government's claim that the missing person's identity card was found on the body of a dead terrorist.

<sup>1745</sup> ECtHR, *Ertak*, at para. 131 (drawing very strong inferences from eyewitness testimonies to find "sufficient evidence beyond reasonable doubt" that the disappeared person had been taken into custody, where he died due to severe ill treatment).

<sup>1746</sup> For a detailed account of the facts, the applicants' complaints, the proceedings, the EComHR's decisions and the ECtHR's judgments in *Timurtaş* and *Ertak*, see KHRP, *Timurtaş v. Turkey & Ertak v. Turkey*.

<sup>1747</sup> ECtHR, *Timurtaş*, at para. 82.

<sup>1748</sup> *Ibid*, at para. 85.

<sup>1749</sup> In the future, the Court continued to base its findings of Article 2 violations on factual differences. See e.g. ECtHR, *Orhan*, at para. 330 (that the missing person in *Kurt* was last seen surrounded by soldiers in his own village whereas the Orhans were last seen being taken away by the authorities to an unidentified place of detention and that there was direct evidence that the Orhans were wanted by the authorities).

the missing villagers and noting that in the context of the situation in south-east Turkey in 1993 an unacknowledged detention would be life-threatening, the Court held that the missing eleven must be presumed dead following their detention by the security forces. On that ground, the Court found a substantive violation of Article 2.

In its 2005 ruling in *Koku*,<sup>1750</sup> the Court applied to enforced disappearances the principle of positive obligations, which it had developed in *Osman v. United Kingdom*<sup>1751</sup> and had already introduced to extrajudicial executions cases (see below). Hüseyin Koku was the chairman of the People's Democracy Party's (*Halkın Demokrasi Partisi*-HADEP) provincial branch in Elbistan. He had been detained and tortured on charges of PKK membership, threatened by the governor with death for his membership in a "terrorist" political party, regularly followed by plainclothes police officers and threatened by the mayor to leave town or else face the consequences. Two days after this last incident, Koku was abducted from the street by plainclothes men who carried walkie-talkies, drove a white Renault and introduced themselves as police officers. His wife and a colleague witnessed the abduction. The ECtHR took particular notice of the chronology of attacks against pro-Kurdish parties, including the killing of over 60 politicians between the HEP's entry into the Parliament in 1990 and Koku's abduction in 1994. It noted that Koku "belonged to a category of persons who ran a particular risk of falling victim to a disappearance and murder"<sup>1752</sup> and following his disappearance his life was "at more real and immediate risk than other persons at the time."<sup>1753</sup>

It follows, therefore, that the action which was expected from the domestic authorities was not to prevent the disappearance of the applicant's brother – which had already taken place – but to take preventive operational measures to protect his life which was at risk from the criminal acts of other individuals.<sup>1754</sup>

Despite the breakthrough, disappearance cases continued to raise substantial evidentiary issues, particularly after the Court ceased to hold fact-finding hearings. In *Osmanoğlu*, the applicant alleged to have seen his son being taken away by armed plainclothes men carrying walkie-talkies who introduced themselves as police officers. He claimed that a shop owner witnessed the abduction and submitted a newspaper article where Abdülkadir Aygan, a former state agent, said that the applicant's son had been kidnapped and killed by Gendarmerie Intelligence and Counter-Terrorism Organization (*Jandarma İstihbarat ve Terörle Mücadele Teşkilatı*-JİTEM), named the alleged killer and gave the coordinates of the place where the body had been buried.<sup>1755</sup> In the absence of any domestic investigation, the applicant asked the Court to hold a fact-finding hearing to, in particular, verify the accuracy of Aygan's allegations. The Court declined on the grounds that "such an investigation is a matter for the domestic authorities" and it was "not persuaded that a fact-finding inquiry... would clarify the circumstances of the case"

---

<sup>1750</sup> ECtHR, *Koku v. Turkey*, Application no. 27305/95, Judgment, 31 May 2005.

<sup>1751</sup> ECtHR, *Osman v. United Kingdom*, Application no. 87/1997/871/1083, 28 October 1998. On the ECtHR's positive obligations jurisprudence, see Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004).

<sup>1752</sup> ECtHR, *Koku*, at para. 131. On the history of the Kurdish political parties, see Chapter 3.

<sup>1753</sup> *Ibid*, at para. 132.

<sup>1754</sup> *Ibid*.

<sup>1755</sup> On Aygan's public revelations about JİTEM, see Chapter 5.

in light of the applicant's inability to locate the eyewitness or Aygan.<sup>1756</sup> This justification was in contrast to past practice where the Convention institutions conducted fact-finding hearings in similar circumstances and required the government to identify, locate and ensure the attendance of key witnesses. Although disagreeing with the government's assertion that Aygan's allegations were vague, the Court concluded that it could not attach decisive importance to them "since they were untested and at the most circumstantial evidence".<sup>1757</sup> In not attempting to question a potentially crucial witness such as Aygan, the Court missed a unique opportunity to unearth state violence in the Kurdish region. In contrast, the insider information provided by officers of the Honduran military had been crucial for the IACtHR's finding of state practice.<sup>1758</sup>

In *Osmanoğlu*, the Court established that the applicant's son had been abducted by two men, but not that those men were security forces.<sup>1759</sup> Nonetheless, it held that

a finding of State involvement in the disappearance of a person is not a condition *sine qua non* for the purpose of establishing whether that person can be presumed dead; in certain circumstances the disappearance of a person may in itself be considered as life-threatening.<sup>1760</sup>

Effectively, the Court was departing from *Timurtaş* which required state involvement for a presumption of death. Moreover, in *Osmanoğlu* the Court established state responsibility despite the lack of any suggestion that the victim might have been involved with the PKK, which was one of the differences it had pointed out in distinguishing *Timurtaş* from *Kurt*.<sup>1761</sup> In fact, in *Osmanoğlu*, the Court introduced a new standard altogether:

To this end, the Court observes that the manner of his abduction shows many similarities with the disappearances of persons prior to their being killed in south-east Turkey at around the relevant time which have been examined by the Court.<sup>1762</sup>

Ten years after *Kurt*, the ECtHR effectively endorsed the IACtHR's approach by linking a policy put in place in the Kurdish region at the time and the disappearance of the applicant's son in finding an Article 2 violation. *Osmanoğlu* was undoubtedly a milestone in the Court's jurisprudence on enforced disappearances. At the same time, remarkably, the Court was still reluctant to conclude the existence of an administrative practice.

#### 6.2.2.4.2 Extrajudicial Executions

These cases also concerned Article 2 violations, but raised slightly different issues compared to enforced disappearances. In the presence of a body, the Court did not need to settle whether the

---

<sup>1756</sup> ECtHR, *Osmanoğlu*, at para. 51.

<sup>1757</sup> Ibid, at para. 50 (citing its prior ruling in *Nesibe Haran v. Turkey*, Application no. 28299/95, Judgment, 6 October 2005, where the applicant had submitted similar allegations by Aygan concerning the killing of her husband).

<sup>1758</sup> IACtHR, *Velásquez Rodríguez v. Honduras*.

<sup>1759</sup> ECtHR, *Osmanoğlu*, at para. 56.

<sup>1760</sup> Ibid, at para. 57.

<sup>1761</sup> Ibid, at para. 58. This, too, was pointed out by the dissenting judges.

<sup>1762</sup> Ibid.

disappeared should be presumed dead. The question was whether, and if so how, the state should be held responsible.<sup>1763</sup> Unable to prove beyond a reasonable doubt that their family members were apprehended, detained and/or killed by the security forces, the applicants tried to establish a pattern of extrajudicial executions based on the victims' profile. They relied on circumstantial evidence, such as the Susurluk reports, the fact-findings of intergovernmental treaty bodies, the reports of international and domestic NGOs and newspaper reports.

The Court's first judgment was in *Yaşa*, where the applicant, whose uncle was killed and who himself was shot by unidentified individuals, claimed that the attacks were part of an orchestrated campaign against *Özgür Gündem* and other pro-Kurdish newspapers carried out with the connivance or direct participation of state agents. He referred to the prosecutions, and confiscation and closure orders against *Özgür Gündem*, the killing, injury and ill treatment of its journalists, the prosecution and detention of its owners, editors and journalists and the threats and physical attacks against its distributors.<sup>1764</sup> He submitted the Prime Ministry's Susurluk report which implicated security forces in the attacks against the financiers, staff and distributors of pro-Kurdish newspapers.<sup>1765</sup> For the ECtHR, while giving rise to "serious concerns" and having "particularly alarming" sections on *Özgür Gündem*, the report did not contain material to enable the identification of perpetrators of the attacks against the applicant and his uncle "with sufficient precision".<sup>1766</sup>

One month later, the Commission issued its fact-finding report in *Mahmut Kaya* concerning the killing of doctor Hasan Kaya and lawyer Metin Can.<sup>1767</sup> The applicant, Hasan's brother, claimed that the murders were planned and executed by state agents, in particular undercover security forces, implementing "a policy of identifying and eliminating those persons who are considered to be a threat to the State."<sup>1768</sup> He cited previous threats made by the authorities against Kaya and Can; JITEM officer Cem Ersever's revelations to journalist Soner Yalçın naming four confessors as the executors;<sup>1769</sup> and the Susurluk report's finding that confessors, contra-guerrillas and undercover agents acting under the order or with the knowledge of the security agencies, the security forces themselves and the village guards executed prominent Kurdish dissidents, listing Can as a victim. The Commission found Yalçın's oral testimony, "although strictly speaking hearsay", to be "strongly probative concerning the formation of confessor groups by the security forces and the involvement of such groups in unlawful killings, including those of Metin Can and Hasan Kaya."<sup>1770</sup> It found the Susurluk report's explicit mention of Can's name to be

persuasive evidence that the drafter of the report was of the opinion that Metin Can, and presumably Hasan Kaya, was deliberately targeted as a PKK sympathiser by one of

---

<sup>1763</sup> On the Convention institutions' early jurisprudence on extrajudicial executions, see Buckley, "The European Convention on Human Rights", at pp. 36-44; Buckley, *Turkey and the European Convention on Human Rights*, at pp. 103-117.

<sup>1764</sup> ECtHR, *Yaşa*, at paras. 22-28.

<sup>1765</sup> *Ibid*, at para. 46. On the Susurluk Report's findings on the targeting of the pro-Kurdish media, see Chapter 5.

<sup>1766</sup> *Ibid*, at paras. 95-96.

<sup>1767</sup> For a detailed discussion of the facts of this case, see Chapter 5.

<sup>1768</sup> EComHR, *Mahmut Kaya*, at para. 49.

<sup>1769</sup> On Major Ersever's revelations to journalist Soner Yalçın, see Chapter 5.

<sup>1770</sup> EComHR, *Mahmut Kaya*, at para. 328.

these groups acting outside the law and that the authorities were aware of it. However..., the report is not a judicial or factfinding exercise. The report is an indication that strong suspicions exist as to contra-guerilla and State involvement in the deaths of Metin Can and Hasan Kaya but no more.<sup>1771</sup>

The Commission concluded that despite “a significant body of evidence which supports a strong suspicion of connivance or knowledge by some elements of State security or intelligence agencies” in the killings, it was not established beyond reasonable doubt that this was the case.<sup>1772</sup> In imposing on applicants an unattainable standard of proof, the Commission seems to have not given sufficient weight to the fact that an investigatory committee of the Turkish Parliament had reached conclusions similar to the Prime Ministry’s Susurluk report or that the Turkish judiciary had never investigated these killings. Furthermore, the applicant had provided quite detailed circumstantial evidence, including the names of alleged perpetrators.

In *Tanrikulu*, the applicant claimed that her husband, a doctor suspected by the authorities to support the PKK, was killed by or with their connivance of the security forces. She relied on the Susurluk report to claim the existence of an official policy seeking “the deliberate elimination of locally prominent Kurds... suspected of harbouring PKK sympathies”.<sup>1773</sup> She argued that her husband belonged to the same category of individuals at risk the Commission identified in *Mahmut Kaya*. She submitted that her husband had been questioned by the police on the allegation that he was sheltering a PKK militant, was known for issuing accurate medical reports for torture victims, and was rumoured to be on a hit list. Yet, the Court concluded that the applicant failed to prove her claim beyond reasonable doubt.

The breakthrough came in the Court’s 2000 ruling in *Mahmut Kaya*. The Court used the positive obligation principle in establishing state responsibility for a killing where a state agent’s involvement had not been established beyond reasonable doubt. The Court recalled that Article 2(1) enjoins states not only to refrain from intentional and unlawful killings, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.<sup>1774</sup> This involved a primary duty to put in place effective criminal law provisions to deter the commission of offences, backed up by law-enforcement machinery to prevent, suppress and punish breaches of such provisions. Such duty “also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual”.<sup>1775</sup> Appropriate circumstances did not mean “every claimed risk to life”, but situations where it was established that

the authorities knew or ought to have known at the time of the existence of *a real and immediate risk* to the life of an identified individual or individuals from the criminal

---

<sup>1771</sup> Ibid, at para. 334.

<sup>1772</sup> Ibid, at para. 336.

<sup>1773</sup> ECtHR, *Tanrikulu*, at para. 90.

<sup>1774</sup> ECtHR, *Mahmut Kaya*, at para. 85 (citing *L.C.B. v. United Kingdom*).

<sup>1775</sup> Ibid.

acts of a third party and failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.<sup>1776</sup>

The Court drew strong inferences from the fact that he and Can were transported by the kidnappers over 130 kilometres through a series of official checkpoints, a suspected terrorist who claimed to have been involved in their killing was seen by two witnesses to be assisted by the gendarmes, the testimonies of Can's wife and colleague were strikingly consistent with Ersever's account to Yalçın that the contra guerilla had targeted a lawyer and doctor in Elazığ, and the Susurluk report had concluded that the execution of Can, and by implication Kaya, was carried out with the knowledge of the authorities. The Court also considered that both Can and Kaya had received death threats and believed that they were under police surveillance. Can, as a lawyer representing PKK suspects and heading the İHD in Elazığ, and Kaya, as a doctor suspected of treating PKK militants, were perceived by the authorities as PKK sympathizers. Also taking into account the broader context in the region where prominent Kurdish figures and journalists were killed by unidentified perpetrators, the Court was satisfied that Kaya had faced a real and immediate risk to his life.

The next question was whether the authorities knew or ought to have known of the existence of such a risk. Drawing strong inferences from the oral evidence given to the EComHR by Bira Zordağ that prior to their disappearance the police had questioned him in detention about Can and Kaya and threatened to punish them, the Turkish Parliament's conclusion that the security officers might be providing aid and training to Hizbullah and be implicated in the 908 extrajudicial killings in the south-east, and the Prime Minister's pledge to take appropriate measures in light of the findings of the Susurluk report, the Court was "satisfied that the authorities must be regarded as being aware of this risk."<sup>1777</sup> The final question was whether the authorities did all that could reasonably be expected of them.<sup>1778</sup>

A wide range of preventive measures would have been available to the authorities regarding the activities of their own security forces and those groups allegedly acting under their auspices or with their knowledge. The Government have not provided any information concerning steps taken by them prior to the Susurluk report to investigate the existence of contra-guerilla groups and the extent to which State officials were implicated in unlawful killings carried out during this period, with a view to taking appropriate measures of prevention.<sup>1779</sup>

In *Akkoç*, the Court expanded the victim profile to include "persons suspected of opposing the authorities' policies in the south-east".<sup>1780</sup> A Kurdish teacher, who was involved in union activities which the authorities deemed to be unlawful, had been detained a number of times by the police and had petitioned the prosecutor about the death threats he had received, was deemed

---

<sup>1776</sup> Ibid, at para. 86 (emphasis added).

<sup>1777</sup> Ibid, at para. 90.

<sup>1778</sup> The Court dismissed the government's argument about the existence of effective criminal law provisions to protect the right to life. Citing its earlier rulings in *Güleç* and *Oğur* with respect to administrative councils and *Incal* with respect to the DGMS, the Court reiterated the "particular characteristics" of the implementation of such laws with respect to allegations of unlawful acts carried out by the security forces.

<sup>1779</sup> Ibid, at para. 100.

<sup>1780</sup> ECtHR, *Akkoç*, at para. 81.

by the Court to be under a real and immediate risk. With respect to preventive measures, the Court drew attention to the failure of the prosecutor to take any steps after the applicant and her deceased husband had petitioned him about the death threats they received.<sup>1781</sup>

While the applicant in *Suheyla Aydin* was another wife similarly claiming that her husband fell into a category of persons targeted by the state,<sup>1782</sup> the facts of this case differed from prior ones in that several days before his body was found, the victim had been disappeared from the court house immediately after he had been released by the judge presiding the criminal case where he was put on trial. In the absence of a release record, a lawyer accompanying the victim at the hearing and anyone who saw him being released from the courtroom, the ECtHR established that he remained in official custody and concluded that the government failed to explain how the victim was killed while still in the hands of the state agents. It was based on this reasoning that the Court found a substantive violation of Article 2 without addressing the applicant's claim regarding her husband's victim profile.

Notwithstanding this significant progress in its jurisprudence, the Court remained cautious in framing the killings. In *Musa Anter*, concerning one of the most high-profile political killings in Kurdish history, the Court noted that

there was no evidence to support the applicants' allegation that their father had been the victim of an extrajudicial killing. However, there were grounds for seriously considering that the perpetrators of the murder were known to the authorities.<sup>1783</sup>

At the same time, the Court drew inferences from the Susurluk report's finding that Anter's murder "was one of a serious [*sic*] of *extrajudicial killings* committed with the authorities' knowledge"<sup>1784</sup> to hold that

Anter, a political figure and well-known pro-Kurdish writer, long known for his involvement in public life, was particularly likely to be attacked. In addition, having regard to the circumstances, that risk could have been considered genuine and imminent, so that the authorities could not have been unaware of it.<sup>1785</sup>

Thus, the Court applied the life-threatening test for the purpose of its substantive review under Article 2 only to the killing of Kurdish politicians, human rights lawyers and activists who, with the exception of Anter, lived in the Kurdish region and faced a real and immediate risk to their lives due to death threats and/or police harassment or, as in the case of Anter, were such high

---

<sup>1781</sup> The Court did not extend the victim profile to Kurdish businessmen extrajudicially executed in Istanbul and Ankara in the absence of an indication that they had been threatened or had reasons to believe that their lives were at risk prior to their death, even though one of the victims was explicitly mentioned in the Susurluk reports. ECtHR, *Ülkü Ekinci v. Turkey*, Application no. 27602/95, Judgment, 16 July 2002; *Buldan v. Turkey*, Application no. 28298/95, Judgment, 20 April 2004; *Selim Yıldırım and Others v. Turkey*, Application no. 56154/99, Judgment, 19 October 2006.

<sup>1782</sup> She pointed out that her husband was a trade union activist who was related to Vedat Aydın, a leading Kurdish politician and the first high-profile victim of extrajudicial killings, and had been repeatedly posted to jobs in different cities by the authorities who, as established by domestic courts, deemed his presence in Diyarbakir a threat to peace and security.

<sup>1783</sup> ECtHR, "Chamber Judgment Anter and Others v. Turkey", Press Release, 19 December 2006.

<sup>1784</sup> *Ibid*, at p. 3 (emphasis added).

<sup>1785</sup> *Ibid*.

profile figures that the state should have known that they needed protection. At the same time, the Court did not adopt this approach from the outset (e.g. *Tanrıkulu*, where it did not consider a doctor repeatedly harassed by the police for issuing accurate medical reports to torture survivors to be under a life-threatening risk) and refrained from using it where it had another option (e.g. *Suheyla Aydin*).

#### 6.2.2.4.3 Torture and Degrading and Inhuman Treatment

The ECtHR issued its first ruling in a torture case in the Kurdish region in the case of *Aksoy*. Applying the test it had developed in *Tomasi v. France*, the Court concluded that the applicant's ill treatment under detention which led to the partial paralysis of his both arms constituted deliberate infliction of inhuman treatment causing very serious and cruel suffering amounting to torture.<sup>1786</sup>

The Court's next ruling in *Şükran Aydın* broke new ground in the ECHR system. This time, responding to calls to follow the IACoMHR's precedent,<sup>1787</sup> the ECtHR ruled, for the first time in its jurisprudence on Article 3, that the rape of a female detainee by a state agent can constitute torture. In addition to the "especially cruel act of rape", the Court found the victim to have also suffered torture due to the deep and long lasting psychological suffering and the acute physical pain inflicted on her. The Court found the "particularly terrifying and humiliating experiences" such as being kept blindfolded for over three days, beaten, paraded naked, spinned around in a tyre and pummelled with high pressure water to constitute torture, in regard of the sex and youth of the victim.<sup>1788</sup>

While *Şükran Aydın* rightfully took its place in every textbook on the ECHR system, Kurdish cases where the Court did not live up to its standards have not received due attention. In *Sevtap Veznedaroğlu*, the applicant was a leading human rights scholar in Diyarbakır who, together with her husband, pioneered the ECtHR litigation in Turkey, as discussed in Chapter 4. This time filing her own case at the ECtHR, Sevtap Yokuş (Veznedaroğlu) claimed that she was held in police custody for eleven days on suspicion of PKK membership, during which time she was tortured and ill treated. She claimed that she was kept naked, hung by her arms, given electric shocks to her mouth and sexual organs, threatened with death and rape, and told not to work on human rights. She alleged that she was forced, under threat of torture and rape, to sign a confession statement which also stated that her injuries were due to a fall. She was medically examined both at the beginning and the end of her detention. Two forensic doctors who examined her after her release (in the company of police officers) noted bruising in her arm and leg. When she was brought before a prosecutor, she did not acknowledge her confession and maintained that she signed it under torture. She repeated the same statements to a judge, who released her the same day. Neither the prosecutor nor the judge took any action to investigate

---

<sup>1786</sup> ECtHR, *Aksoy*, at paras. 61-64. For another Kurdish case where the Court found the severity of the ill treatment inflicted on the applicant and the surrounding circumstances of her detention to constitute "very serious and cruel suffering" amounting to torture, see ECtHR, *Akkoç*, at p. 117.

<sup>1787</sup> Amnesty International's written submissions, ECtHR, *Aydın*, at para. 51 (referring to the IACoMHR's decision in *Fernando and Raquel Mejia v. Peru*, report no 5/96, Case 10,970, 1 March 1996, which found the rape of a female detainee by a state agent for purposes such as extracting information or confession or humiliating, punishing or intimidating the victim to constitute torture).

<sup>1788</sup> *Ibid*, at paras. 83-86.

her torture complaint. Before the Court, Yokuş lacked any medical evidence to substantiate her torture claims other than the doctor reports showing injury during detention, which the government did not deny but claimed to have resulted from a fall. The Court put the burden of proof squarely on the applicant to prove both that her injuries were caused by the police and that she was tortured. When she was not able to establish her claims beyond a reasonable doubt, the Court was not satisfied, on the “evidence”, that she had suffered torture or even inhuman treatment.<sup>1789</sup> Noting that the Court made no mention of its established case law that it is incumbent on the government to provide a plausible explanation for injuries suffered during police custody, Erdal wrote in 2001 that the judgment “seem[ed] to sit ill with” the earlier judgments.<sup>1790</sup> Yet, the Court’s astounding departure from its case law has escaped the attention of conventional scholarship, as evident in Mowbray’s praise of the Court for upholding the states’ positive obligations to investigate allegations of torture and ill treatment.<sup>1791</sup>

Judge Bonello’s powerful dissent leaves nothing to add in response to the majority opinion and merits a lengthy reference. Noting that “basic and vital elements of the rules of evidence that should inspire any court”<sup>1792</sup> required the onus of proof to be on the government where an individual is injured in detention, Bonello argued that the Court should have shifted the onus of proof to the authorities who have “done nothing” to provide a plausible explanation for the applicant’s injuries. Not only did the Court rest the burden of proof on the applicant, it also expected her to prove her allegations beyond reasonable doubt, a “legally untenable and, in practice unachievable” standard imposed on an individual claiming to be tortured.<sup>1793</sup> Bonello noted that expecting from torture victims “any ‘hard’ evidence, beyond the eloquence of their injuries, is to reward and invigorate the ‘inequality of arms’ inherent in most torture scenarios.”<sup>1794</sup> Pointing out the key question of credibility where the solitary victim’s account is negated by security forces who corroborate each other, Judge Bonello appealed to the Court’s institutional memory on state violence in Turkey:

I ask if, relying on its memory in handling so many cases of torture, the Court has compelling reasons to award more faith and credit to security forces which have an unenviable track-record to live down, rather than to those who claim to be their victims. No allegation has been made against the personal integrity and uprightness of the applicant, other than the damning circumstance that she was the wife of a human rights activist. The test, in the event, should have been: on a balance of credibility, who is likelier to have provided the court with a more reliable version of the incidents? The security forces?<sup>1795</sup>

---

<sup>1789</sup> ECtHR, *Sevtap Veznedaroğlu v. Turkey*, Application no. 32357/96, 11 April 2000, at para. 30. It did, however, find the authorities’ failure to investigate her complaints to be a procedural violation of Article 3.

<sup>1790</sup> Erdal, “Burden and Standard of Proof”, at p. 84.

<sup>1791</sup> Mowbray, *The Development of Positive Obligations*, at p. 61.

<sup>1792</sup> Partly dissenting opinion of Judge Bonello in ECtHR, *Sevtap Veznedaroğlu*, at para. 8.

<sup>1793</sup> *Ibid*, at para 11.

<sup>1794</sup> *Ibid*, at para. 15.

<sup>1795</sup> *Ibid*, at paras. 8 and 16.

#### 6.2.2.4.4 Forced Displacement/Property Destruction

The Court's first ever ruling in a Kurdish case was *Akdıvar*, concerning a military operation in the village of Kelekçi, during which the security forces burned several houses and evicted all residents without prior notice. The Court was brief in its assessment of Article 8 and Article 1 of Protocol 1, finding that "there can be no doubt that the deliberate burning of the applicants' homes and their contents constitutes at the same time a serious interference with the right to respect for their family lives and home and with the peaceful enjoyment of their possessions."<sup>1796</sup> In *Menteş*, the EComHR had found the circumstances in which the applicants had their houses burned, were prevented from saving their belongings and were left without shelter to constitute inhuman and degrading treatment due to the anguish and suffering it has caused them. Yet, the Court did not examine the applicants' Article 3 claims on the ground that it already found a violation under Article 8.<sup>1797</sup>

In *Selçuk and Asker*, the Court for the first time addressed Article 3 claims in the context of displacement. Recalling that ill treatment must attain a minimum level of severity, the Court said that such a finding depended on all of the circumstances, including the duration of the ill treatment, its physical and/or mental effects and, in some cases, the sex, age and health of the victim. Noting that the applicants were elderly people who lived in their village all their lives and the destruction of their property deprived them of their livelihoods, the Court found the security forces' burning of houses in a premeditated and contemptuous manner and failure to provide the applicants any assistance afterwards to constitute inhuman and degrading treatment.<sup>1798</sup> Even if the security forces did not intend to punish the applicants but to prevent their homes from being used by the PKK or to discourage others, this would not justify the ill treatment.<sup>1799</sup> In *Ayder and Others*, concerning the destruction of houses in the town of Lice, the Court went further and found even an intent to punish the applicants for their alleged involvement in the PKK not to justify the inhuman treatment.<sup>1800</sup> The conditional language here is noteworthy; though cognizant of the possibility of property destructions as a form of punishment, the Court shied away from addressing the government's intent behind this policy.<sup>1801</sup>

In several property destruction cases, the applicants argued that the military operations aimed at terrorising and humiliating the local population. In *Ahmet Özkan and Others*, the village destruction case discussed in Chapter 5, the applicants claimed that the rounding up of the entire village on a cold February morning was collective punishment. The Court disagreed, finding the security forces' decision, based on intelligence about the presence of PKK militants in the vicinity and in reaction to the initial shots fired at them from the village, to conduct a systematic search of the village and gather its inhabitants in the square to constitute a proportionate degree of force. On the other hand, the Court found that the treatment of villagers "intended to

---

<sup>1796</sup> ECtHR, *Akdıvar and Others*, at para. 88.

<sup>1797</sup> ECtHR, *Menteş and Others*, at para. 76-77.

<sup>1798</sup> ECtHR, *Selçuk and Asker*, at paras. 76-78. For similar findings, see ECtHR, *Ayder and Others*; *Yöyler*; *Hasan İlhan v. Turkey*, Application no. 22494/93, Judgment, 9 November 2004.

<sup>1799</sup> ECtHR, *Selçuk and Asker*, at para. 79.

<sup>1800</sup> ECtHR, *Ayder and Others*, at para. 110.

<sup>1801</sup> Bakircioglu and Brice Dickson, "The European Convention in Conflicted Societies", at p. 285.

intimidate, humiliate and debase the villagers, surpassed the usual degree of intimidation and humiliation that is inherent in every arrest or detention.”<sup>1802</sup> The Court found the security forces’ forcing adolescent and adult men to lie blindfolded and face down on the ground, in full view of their wives, mothers and children, and beating, kicking and walking over them to be unjustifiable in the absence of any resistance. While the Court found the ways in which the apprehended villagers were taken to town (blindfolded, tied together, made to walk in the snow for hours without proper clothing and shoes, during which they fell several times and were beaten by the security forces) and the conditions in which they were subsequently detained to constitute inhuman and degrading treatment, it accepted the government’s argument that “there was not necessarily a deliberate intention of ill-treating, humiliating or debasing these villagers” because the security forces acted with the concern of taking the villagers to the town as soon as possible, for reasons of security.<sup>1803</sup>

The 2004 ruling in *Doğan and Others* marked a turning point in the ECtHR’s case law on forced displacement, as discussed in Chapter 4. By the time the ECtHR ruled in *Doğan and Others*, it had the report of Francis Deng, the Representative of the UN Secretary-General on Internally Displaced Persons, at its disposal.<sup>1804</sup> In this case, in addition to contesting their forced eviction and the destruction of their houses, the applicants raised broader issues concerning the government’s post-displacement policies. They claimed that they were forced to live in extreme poverty with inadequate heating, sanitation and infrastructure, lacked access to employment and basic public services and were not given any humanitarian assistance or compensation by the government. They also raised the issue of return, stating that until 2003 the authorities did not allow them to go back to their village or access their properties. As in prior cases, the Court found violations of Article 8 and Article 1 of Protocol 1. But this time, it based its findings not only on the instance of forced displacement and village burning in 1994, but also on the poverty the applicants had suffered since. Also, the Court went beyond the case and made general assessments on Turkey’s policies. Its language, too, was different. Citing Deng, the ECtHR referred to “the situation of the internally displaced persons”,<sup>1805</sup> effectively noting the collective nature of the violation though still not identifying an administrative practice. The implication of this judgment for the ECtHR’s future engagement in the Kurdish cases is discussed in the next section.

#### 6.2.2.4.5 Discrimination

In most Kurdish cases, the applicants also made a discrimination claim. They argued that the destruction of their property, their forced displacement, the torture inflicted on them, the enforced disappearance and extrajudicial execution of their relatives, and the authorities’ failure to investigate into these abuses were part of a policy directed against them because of their

---

<sup>1802</sup> ECtHR, *Ahmet Özkan and Others*, at para. 343.

<sup>1803</sup> *Ibid*, at para. 353.

<sup>1804</sup> For background on Deng’s mission on report, see Chapter 4. Following Turkey’s declaration as a candidate for EU membership, the CoE was also able to conduct a fact-finding on forced displacement. The applicants submitted to the ECtHR the report of this mission as well. Council of Europe, Committee on Migration, Refugees and Democracy, *Humanitarian Situation of the Displaced Kurdish Population in Turkey*, adopted by Recommendation 1563 (2002) of the Parliamentary Assembly of the Council of Europe, 29 May 2002.

<sup>1805</sup> ECtHR, *Doğan and Others v Turkey*, Applications no. 8803-8811/02, 8813/02 and 8815-8819/02, Judgment (Merits), 29 June 2004, at para 154.

ethnic origin and, in some cases, political opinion. The Kurdish applicants appealed to the ECtHR's presumed learning curve:

...sufficient evidence, including a significant amount of published material on the position of the Kurds in south-east Turkey, is before the Court in the present and in previous cases to conclude that the motives, or at least the impact of the impugned actions, is clearly discriminatory.<sup>1806</sup>

Yet, the ECtHR held that the applicants failed to submit sufficient evidence to substantiate their claims or simply deemed it not necessary to examine the complaints separately under Article 14. The Court has never explained why these gross abuses did not raise to the level of discrimination – direct or indirect.

Certainly, the Court's reluctance to conduct Article 14 review was not limited to Kurdish cases, but was a characteristic of its approach to discrimination claims raised by members of minorities across Europe.<sup>1807</sup> This was illustrated by Judge Bonello's strongly worded dissent in a case concerning the death of a Roma due to ill treatment in police custody in Bulgaria:

The Europe projected by the Court's case law [on Article 14] is that of an exemplary haven of ethnic fraternity...Frequently and regularly the Court acknowledges that members of vulnerable minorities are deprived of life or subjected to appalling treatment in violation of Article 3; but not once has the Court found that this happens to be linked to their ethnicity. Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it.<sup>1808</sup>

Over time, perhaps partially as a result of Judge Bonello's strong objection, dissenting voices emerged also in the Kurdish cases. In *Hasan İlhan*, Judge Loucaides started off by pointing out the inconsistencies in the majority's reasoning. He reminded that the Court found it established that 19 days after the PKK's alleged armed attack against a gendarme station, the gendarmes went to the applicant's hamlet, burned down his home and its contents as well as fruits orchards and oak trees. The Court did not accept the government's argument that the applicant's family left the village due to fear of reprisals from the PKK after the gendarmes allegedly found weapons in a hideout belonging to a member of the applicant's family, which had allegedly been used in a number of killings. In any case, the argument "could not by any imagination explain why the applicant's property was destroyed by the security forces, as the Court

---

<sup>1806</sup> ECtHR, *Orhan*, at para. 397.

<sup>1807</sup> On the ECtHR's narrow and inconsistent approach to Article 14 and discussions of recent developments in case law, see Marie-Benedicte Dembour, "Still Silencing the Racism Suffered by Migrants... The Limits of Current Developments under Article 14 ECHR", *European Journal of Migration and Law*, vol. 11 (2009), pp. 221-234; Janneke Gerards, "The Discrimination Grounds of Article 14 of the European Convention on Human Rights", *Human Rights Law Review*, vol. 13, no. 1 (2013), pp. 99-124; Ruth Rubio-Marin and Mathias Möschel, "Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism", *European Journal of International Law*, vol. 26, no. 4 (2016), pp. 881-899.

<sup>1808</sup> Partly dissenting opinion of Judge Bonello in ECtHR, *Anguelova v. Bulgaria*, Application no. 38361/97, Judgment, 13 June 2002, at paras. 1-2. See also Sardaro, "*Jus Non Dicere* for Allegations of Serious Violations of Human Rights", at p. 618 (criticizing the Court for using "the 'dogma' of the proof 'beyond reasonable doubt' for avoiding pronouncing on politically sensitive issues").

had...established.”<sup>1809</sup> Invoking the Court’s institutional memory, Judge Loucaides stressed the need to draw a pattern based on past judgments in similar cases:

In the circumstances, it is only reasonable to conclude that the reason for the destruction in question was that the applicant was a Kurd and that the destruction of his home was part of the general objective of the military operation in the village... I consider it highly relevant that this is not the first case against Turkey in which the Court has found similar violations against persons of Kurdish origin as a result of military operations by members of the security forces using the same *modus operandi* with objectives, reasons, methods and results that are strikingly similar to those in the present case.<sup>1810</sup>

Judge Mularoni also dissented from the majority opinion on Article 14, explicitly referring to Bonello’s dissent in *Anguelova v. Bulgaria*.<sup>1811</sup> In three separate rulings issued the next year, she elaborated on her objection.

After examining tens and tens of similar applications, all lodged, without exception, by Turkish citizens of Kurdish origin, and very often concluding that there was a violation of Articles 2 and 3 of the Convention, the Court should, to my mind, at least consider that there could be a serious problem under Article 14 of the Convention as well... I cannot agree with the majority approach, which to me is tantamount to considering that the prohibition of discrimination in this type of cases is not an important issue.<sup>1812</sup>

Notwithstanding, the ECtHR stood its feet, holding on to its remarkable position that the Kurds of Turkey did not have a discrimination problem. It was not only that the Court did not examine the discrimination claims because it found a violation of another article, but in some cases, the Court explicitly concluded that the government did not violate Article 14.<sup>1813</sup>

### 6.3 A New Phase: Collaboration between the ECtHR and Turkey

After years of non-cooperation and failure to adopt meaningful reforms to execute the ECtHR judgments, it was the prospect of joining the EU, not pressure from the Committee of Ministers (CoM), which led Turkey to initiate a reform process.<sup>1814</sup> As in Turkey’s ratification of the UN and the CoE human rights conventions to join the Western club after World War II and recognition of the ECtHR’s individual petition mechanism to enhance its chances for EU membership, what lay beneath the reform process during the late 1990s and the mid-2000s was

---

<sup>1809</sup> Partly dissenting opinion of Judge Loucaides in ECtHR, *Hasan İlhan*, at p. 31.

<sup>1810</sup> *Ibid.*

<sup>1811</sup> Partly dissenting opinion of Judge Mularoni in ECtHR, *Hasan İlhan*, at p. 35.

<sup>1812</sup> Partly dissenting opinion of Judge Mularoni in ECtHR, *Koku*, at p. 37; *Kişmir v. Turkey*, Application no. 27306/95, Judgment, 31 May 2005, at p. 32; *Toğcu v. Turkey*, Application no. 27601/95, Judgment, 31 May 2005, at p. 31.

<sup>1813</sup> ECtHR, *Kurt; Akdivar and Others; Tanrikulu*.

<sup>1814</sup> On the EU process being the principal instigator of the legal reforms in Turkey, including those adopted to execute the ECtHR rulings, see Yasemin Özdek and Emine Karacaoğlu, “Turkey”, in Robert Blackburn and Jörg Polakiewicz (eds.), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), pp. 879-913; Kurban, Erözden and Gülalp, *Supranational Rights Litigation*; Çalı, “The Logics of Supranational Human Rights Litigation”; Kurban and Gülalp, “A Complicated Affair”.

the government's foreign policy considerations. For reasons discussed in Chapter 2, the EU started to monitor Turkey's progress in fulfilling the accession criteria in 1998, one year before it was declared a candidate for membership. The EU's treatment of the ECtHR judgments as benchmarks in assessing the performance of candidate countries made it too costly for Turkey to continue its policy of 'violating the Convention and paying the price'. The prospects of EU accession opened a new chapter in Turkey's dealings with the Court, leading to its adoption of hundreds of legislative and constitutional changes within a matter of few years, and cooperation with the international community, first and foremost the UN treaty bodies, special representatives and rapporteurs. However, this would not be a linear process; it would have highs and lows, fluctuating in tune with the ups and downs of Turkey's EU accession process. Even at the peak of the reforms, however, Turkey would refuse to make strides in the most important outstanding issue in the execution of the ECtHR judgments: impunity. When the Turkish government, cognizant of the Court's unmanageable docket, offered cooperation in the execution of judgments, it found an ECtHR which was ready and willing for "partnership". Seemingly blinded by a self-interest to ease its caseload, the Court would not hesitate to send over 1,000 Kurdish cases back to Turkey's legal system, glossing over its own jurisprudence which had time and again stressed that accountability was the *sine qua non* of the effective remedy of gross human rights abuses.

### 6.3.1 The Era of Reforms: Complying with the ECtHR with an Eye to the EU

Turkey's reforms to address gross human rights abuses started with legislative and regulatory measures to combat torture and ill treatment in detention. While it had prohibited the use of torture and ill treatment as a method of interrogation in 1992, the Court's *Aksoy* and *Aydın* rulings showed that this was window dressing. From the mid-1990s onwards, the government conducted human rights training for military personnel in the emergency region<sup>1815</sup> and revised the rules governing the actions of the security forces. A law adopted in 1997 reduced the maximum periods of pre-trial detention<sup>1816</sup> and granted persons held in custody in connection with offences falling under the jurisdiction of the DGMs the rights to see a lawyer after four days and to file *habeas corpus* petitions to challenge the legality of their detention.<sup>1817</sup> However, these reduced detention periods were circumvented by the police through tactics such as post-dating arrests and charging detainees on multiple counts.<sup>1818</sup> The Regulation on Apprehension, Police Custody and Interrogation, updated on 1 October 1998, improved detention conditions

---

<sup>1815</sup> CoM, *Information Provided by the Government of Turkey the Committee of Ministers' Examination of the Execution Questions Raised by the Activities of the Security Forces in Turkey*, Appendix to Interim Resolution ResDH(99)(434), 9 June 1999.

<sup>1816</sup> In offences falling under the jurisdiction of the DGMs and committed by several persons, maximum pretrial detention period was reduced from 15 to seven days under normal circumstances and from 30 to ten days in a state of emergency. In offences committed by individuals, the maximum period was reduced from four to two days. *Ceza Muhakemeleri Usulü Kanunu, Devlet Güvenlik Mahkemelerinin Kuruluş ve Yargılama Usulleri Hakkında Kanun ve Bu Kanunlarda Değişiklik Yapan 18.11.1992 Tarih ve 3842 Sayılı Kanunda Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of Certain Provisions of the Law of Criminal Procedure, the Law on the Establishment and Trial Procedures of State Security Courts and Law no. 3842 dated 18.11.1992 which Amended These Laws], no. 4229, 6 March 1997, Official Gazette, no. 22931, 12 March 1997, at Article 3.

<sup>1817</sup> The MoI and the Prime Minister issued circulars instructing the security forces to observe these new rules in their treatment of detainees. CoM, Appendix to Interim Resolution ResDH(99)(434).

<sup>1818</sup> Joseph R. Crowley Program, "Justice on Trial", at p. 2164.

through, *inter alia*, granting detainees the rights to see a lawyer from the outset of their detention, to inform their next of kin, to see a doctor at various stages of detention and to be medically examined without the presence of security forces.<sup>1819</sup>

In its first interim resolution on Turkey's performance, the CoM did not find "any significant improvement" with respect to offences falling under the jurisdiction of DGMs and/or committed in the emergency region.<sup>1820</sup> It reminded the ECtHR's emphasis that effective remedy, within the meaning of Article 13, entailed not only compensating victims of gross abuses where appropriate, but also carrying out effective investigations capable of identifying and punishing the perpetrators. The CoM called on Turkey to, *inter alia*, abolish the special powers of administrative councils in criminal proceedings, enable the prosecutors to identify and punish security forces engaged in violations and rapidly compensate the victims.<sup>1821</sup>

Thus, until Turkey gained a prospect for EU membership, it did not adopt meaningful reforms to execute the ECtHR judgments. In its first progress report, the European Commission referred to the EComHR's conclusion that the presence of a military judge undermined the independence of the DGMs.<sup>1822</sup> On 18 June 1999, less than one year after this assessment and on the eve of the EU Council's December summit where Turkey was expected to be declared a candidate for membership, the Turkish Parliament adopted a constitutional amendment removing military judges and prosecutors from the DGMs.<sup>1823</sup> The same year, the government extended the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions the invitation her office had been requesting since 1992.<sup>1824</sup> Weeks before the EU summit, the Law on the Prosecution of Civil Servants and other Public Employees replaced the 1914 law which had given local administrative councils the exclusive power to decide, without time limit, whether to prosecute security forces for any offence other than intentional killing.<sup>1825</sup> While the new law introduced a time limit and enabled prosecutors to contest a non-authorization decision, it did not, in the words of a UN Special Rapporteur, address the institutional impunity

---

<sup>1819</sup> Ibid. There were also a few cosmetic reforms adopted in response to pressure from the UN treaty bodies. The Special Bureau to Investigate Allegations Concerning Missing Persons established prior to the UNWG's 1998 visit reported that in most of the cases it had investigated, it found that the missing person had never been detained or had actually joined a terrorist organization or was abroad. UN Commission on Human Rights, *UNWG 1998 Report*, at p. 10.

<sup>1820</sup> CoM, *Action of the Security Forces in Turkey: Measures of a General Character (Cases of Akdivar and Others against Turkey and 12 Other Cases)*, Interim Resolution ResDH(99)434, 9 June 1999.

<sup>1821</sup> Ibid.

<sup>1822</sup> European Commission, *1998 Regular Report on Turkey's Progress towards Accession*, 13 October 1999, at p. 13 (citing EComHR, *Incal v. Turkey*, Application no. 22678/93, Report, 25 February 1997).

<sup>1823</sup> *Türkiye Cumhuriyeti Anayasasının 143 üncü Maddesinin Değiştirilmesine Dair Kanun* [Law on the Amendment of Article 143 of the Constitution of the Republic of Turkey], no. 4388, 18 June 1999, Official Gazette, no. 23729, 18 June 1999, at Article 1.

<sup>1824</sup> UN Commission on Human Rights, Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights Resolution 2001/45, Addendum: Mission to Turkey*, E/CN.4/2002/74/Add.1, 18 December 2001 (hereafter "Jahangir 2001 Report"). In March 2001, a standing invitation was extended to all thematic special procedures mandate holders of the Office of the UN High Commissioner for Human Rights. UN Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, Addendum, Mission to Turkey*, A/HRC/23/47/Add.2, 18 March 2013, at p. 3 (hereafter "Heyns 2013 Report").

<sup>1825</sup> *Memurlar ve Diğer Kamu Görevlilerinin Yargılanması Hakkında Kanun* [Law on the Prosecution of Civil Servants and other Public Employees], no. 4483, 2 December 1999, Official Gazette, no. 23896, 4 December 1999.

extended to security forces or public employees in cases of crimes committed in connection to their duties.”<sup>1826</sup> In fact, the new law was a step backward; instead of administrative councils, prosecutors were now required to get authorization from the immediate superior of the public official implicated in the complaints.

Legal and policy reforms continued with an accelerating momentum until the EU’s next critical decision on whether and if so when to open accession negotiations with Turkey. The most significant reform were the 2001 constitutional amendments, including the limitation of the custody period before suspects are brought before a judge to a maximum of four days for persons accused of collective offences.<sup>1827</sup> In 2002, the death penalty was abolished in peacetime, the derogation from Article 5 of the Convention was lifted and the emergency rule, the geographic scope of which had gradually been diminished since 1999, was completely abolished.

When the CoM issued its second interim resolution in 2002, the number of ECtHR judgments and decisions relating to torture, homicide, property destruction and lack of effective remedies had reached 42.<sup>1828</sup> While welcoming recent reforms, the CoM noted two outstanding issues: fresh complaints of torture and serious forms of ill treatment, and impunity. It called upon the government to undertake a global reorganization of the training of its security forces, abolish “all restrictions on the prosecutors’ competence to conduct criminal investigations against State officials” and establish sufficiently deterring minimum prison sentences for grave abuses such as torture.

The reforms gained further momentum with the Justice and Development Party’s (*Adalet ve Kalkınma Partisi*-AKP) election on a pro-EU platform. In 2003, the new government announced “zero-tolerance towards torture” and abolished the need for administrative authorization for the prosecution of security officials, though only for charges of torture and ill treatment and not for, for example, allegations of unlawful killings. The biggest breakthrough came in 2004, on the eve of the EU Council’s summit in Copenhagen which was expected to decide on whether to open the accession process. Turkey ratified Protocol no. 13 to the Convention on the abolition of the death penalty in all circumstances, amended its constitution to give the ECHR and the ECtHR case law supremacy over national law,<sup>1829</sup> abolished the

---

<sup>1826</sup> UN Commission on Human Rights, *Jahangir 2001 Report*, at p. 25. See also Amnesty International, *Turkey: New Law on the prosecution of Civil Servants: Not a Major Step towards Ending Impunity for Torturers* AI Index: EUR/44/38/00 (2000).

<sup>1827</sup> *Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Değiştirilmesi Hakkında Kanun* [Law on the Amendment of Certain Provisions of the Constitution of the Republic of Turkey], no. 4709, 3 October 2001, Official Gazette, no. 24556, 17 October 2001.

<sup>1828</sup> CoM, *Progress Achieved and Outstanding Problems – General Measures to Ensure Compliance with the Judgments of the European Court of Human Rights in the Cases against Turkey listed in Appendix II (Follow up to Interim Resolution DH(99)434)*, Interim Resolution ResDH(2002)98, 10 July 2002.

<sup>1829</sup> *Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Değiştirilmesi Hakkında Kanun* [Law on the Amendment of Various Provisions of the Constitution of the Turkish Republic], no. 5170, 7 May 2004, Official Gazette no. 25469, 22 May 2004. The following clause was added to Article 90: “In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”

DGMs<sup>1830</sup> and adopted a compensation law for displaced Kurds.<sup>1831</sup> For the EU, the reforms were “a breakthrough, a revolution in the overall mentality in Turkey”.<sup>1832</sup>

This period witnessed a tremendous legislative and bureaucratic activity aimed at aligning the domestic legal framework with the ECtHR rulings. Pursuant to amendments in Regulations on Apprehension, Police Custody and Interrogation and a new Law on Criminal Procedure,<sup>1833</sup> all suspects were given the rights to see a judge within 24 hours of their detention in regular cases and three days in exceptional cases, to access a lawyer of their own choosing at the outset of custody, to correspond with a lawyer in confidentiality without time restrictions, to have a lawyer free of charge where they cannot afford one, to access their files, to the automatic appointment of a lawyer when charged with crimes requiring a minimum five years of imprisonment and to a medical examination before and after detention and without the presence of the security forces. Minimum prison sentences for crimes of torture and ill treatment were introduced, which could not be converted to fines or suspended. On the implementation front, selected ECtHR judgments were translated into Turkish and disseminated to courts, while judges and prosecutors were trained on the ECHR standards.<sup>1834</sup>

In its third interim resolution, relating to the execution of 74 rulings on gross human rights abuses, the CoM called on the government to “remove any ambiguity regarding the fact that administrative authorization is no longer required to prosecute *any serious crimes* allegedly committed by members of security forces”.<sup>1835</sup> The words in italics alluded to the fact that such authorization was still required for serious human rights offences other than torture. The CoM expressed regret that the government did not provide statistics on the number and outcome of complaints lodged against the security forces to enable it to assess the efficiency of the reforms. Indeed, implementation remained a problem. In 2006, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism published the official data on investigations into torture and ill treatment allegations against the security forces. The 2004 statistics showed that only a margin of these investigations actually resulted in convictions or even trials; of the 1,831 cases concluded, 1,631 resulted in acquittals, 85 in fines and a mere 99 in imprisonment.<sup>1836</sup>

---

<sup>1830</sup> Yet, Turkey’s dual criminal justice system was sustained by Heavy Penal Courts equipped with special powers which replaced the DGMs. Amnesty International, *Turkey: Justice Delayed and Denied: The Persistence of Protracted and Unfair Trials for those Charged under Anti-Terrorism Legislation*, AI Index: EUR/44/013/2006 (2006). In 2012, special Heavy Penal Courts were replaced by regional courts authorized under the Anti-terror Law, which amounted to “little more than a change of name”. Human Rights Watch, *Time for Justice: Ending Impunity for Killings and Disappearances in 1990s Turkey* (2012), at p. 7.

<sup>1831</sup> *Terör ve Terörle Mücadeleden Doğan Zararların Karşılanması Hakkında Kanun* [Law on the Compensation of Losses Resulting from Terrorism and the Fight against Terrorism], no. 5233, 17 July 2004, Official Gazette, no. 25535, 27 July 2004 (hereafter “Law no. 5233” or “Compensation Law”). For more on the law, see below.

<sup>1832</sup> Interview with an EU official, Brussels, 11 November 2013.

<sup>1833</sup> *Ceza Muhakemesi Kanunu* [Law on Criminal Procedure], no. 5271, 4 December 2004, Official Gazette, no. 25673, 17 December 2004.

<sup>1834</sup> Within the framework of “Council of Europe/European Commission Joint Initiative,” human rights-training was given to prosecutors, judges and lawyers on the ECHR system. CoM, *Progress Achieved and Outstanding Problems: General Measures to Ensure Compliance with the Judgments of the European Court of Human Rights in the Cases against Turkey concerning Actions of the Security Forces*, Interim Resolution ResDH(2005)43, 7 June 2005.

<sup>1835</sup> CoM, Interim Resolution ResDH(2005)43 (emphasis added).

<sup>1836</sup> Special Rapporteur on Human Rights 2006 Report, at para. 50.

Nonetheless, Turkey's reform initiative and cooperative attitude towards the international community bore their diplomatic fruits. After its December 2005 visit, the CPT reported that the legislative and regulatory framework governing detention was "capable of combatting effectively torture and other forms of ill treatment by law enforcement officials".<sup>1837</sup> In 2008, partially based on this assessment, the CoM closed its examination of four of the five issues concerning the actions of security forces.<sup>1838</sup> In reality, as discussed in Chapter 2, Turkey had already rolled back some of the reforms it had adopted with the stated purpose of executing the ECtHR judgments. Human rights observers found the CoM's closure of the item on procedural safeguards in custody to be "extremely problematic",<sup>1839</sup> particularly in light of the 2006 changes in the Anti-Terror Law which allowed the denial to suspects of access to a lawyer for a period of 24 hours.<sup>1840</sup> While there was a downward trend in the number of cases of torture and ill treatment in detention,<sup>1841</sup> the security forces had started to circumvent the remaining procedural safeguards by depriving individuals of their liberty through means other than formal custody and inflicting on them ill treatment or torture outside the detention centers. In 2006, the European Commission noted with "concern" that such cases were "still being reported".<sup>1842</sup> According to the 2007 report of the Human Rights Foundation of Turkey (*Türkiye İnsan Hakları Vakfı-TİHV*), 34.9 percent of cases of ill treatment and torture took place in cars and outdoor areas in contrast to 30.6 percent in police headquarters, 19 percent in police stations and 5.3 percent in gendarmerie premises.<sup>1843</sup>

The only issue whose examination the CoM left open was the impunity of the security forces. Indeed, impunity was a major issue. Not only have Turkish governments, including the AKP, not removed the impediments to the criminal accountability of security forces but adopted legal changes to further strengthen the impunity regime in Turkey. In 2000, the Parliament adopted a law suspending criminal proceedings opened against law enforcement officials for crimes they committed before 23 April 1999.<sup>1844</sup> Accordingly, the execution of sentences of defendants

---

<sup>1837</sup> Council of Europe, *Report to the Turkish Government on the Visit to Turkey by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* from 7 to 14 December 2005, CPT/Inf(2006)30, 6 September 2006, at para. 12.

<sup>1838</sup> The CoM closed its examination of the following issues: improvement of procedural safeguards in custody, improvement of the professional training of security forces, prompt and efficient implementation of the compensation law, giving direct effect to the ECHR requirements and training of judges and prosecutors. CoM, *Interim Resolution CM/ResDH(2008)69 on the Execution of the Judgments of the European Court of Human Rights of Cases Concerning the Actions of the Security Forces in Turkey – Progress Achieved and Outstanding Issues (General Measures to Ensure Compliance with the Judgments of the European Court of Human Rights in the Cases against Turkey listed in Appendix II) (Follow up to Interim Resolution DH(99)434, DH(2002)98 and ResDH(2005)43)*, 18 September 2008.

<sup>1839</sup> KHRP, "Response to the Committee of Ministers Resolution of 18 September 2008, on the Execution of ECtHR Judgments in Relation to Turkish Security Forces", Public Statement, 2 October 2008.

<sup>1840</sup> The CPT expressed its "serious misgivings" about the amendment. Council of Europe, *Report to the Turkish Government on the Visit to Turkey by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* from 4 to 17 June 2009, CPT/Inf(2011)13, 31 March 2011, at para. 22 (hereafter "CPT 2009 Report").

<sup>1841</sup> Council of Europe, *CPT 2009 Report*, at para. 14.

<sup>1842</sup> European Commission, *2006 Regular Report on Turkey's Progress towards Accession*, SEC(2006) 1390, 8 November 2006, at p. 13.

<sup>1843</sup> S. Erdem Türközü, Evren Özer and Marko Perels, *Türkiye İnsan Hakları Raporu 2007* [Turkey Human Rights Report 2007] (TİHV, 2008), at p. 61.

<sup>1844</sup> *23 Nisan 1999 Tarihine Kadar İşlenen Suçlardan Dolayı Şartla Salıverilmeye, Dava ve Cezaların Ertelenmesine Dair Kanun* [Law on the Suspension of Conditional Releases, Prosecutions and Sentences in

who had been convicted before the new law's entry into force was suspended. In 2008, Article 231 of the Law on Criminal Procedure was amended to allow criminal courts to suspend pronouncement of the judgment where the accused is sentenced to a prison sentence of less than two years. The offender is then kept under supervision for five years and if s/he does not commit another wilful offence during that period and abides by the supervision order, the conviction is permanently erased from his/her criminal history. Finally, there is the issue of statute of limitations. Murders committed before the revised Penal Law entered into force in June 2005 are subject to a 20-year statute of limitations, which runs out where prosecutors have not taken any steps towards prosecution, such as indicting or arresting a suspect. The statute of limitations for torture is only ten years whereas enforced disappearance is not even an autonomous crime under the Penal Law and is regarded as an offence of deprivation of liberty for which the statute of limitations is seven and a half years. While due to a recent amendment the statute of limitations no longer applies to the crime of torture, it is not applied retrospectively.<sup>1845</sup> The current legal framework means that an extrajudicial execution committed in January 1992 will time out in 2022.

### 6.3.2 Back to Domestic Remedies: The ECtHR's "Partnering" with Turkey<sup>1846</sup>

By the mid-2000s, the relations between Turkey and the ECtHR had fundamentally changed in comparison to the 1990s. Though Turkey was far from being a true democracy, it had made undeniable progress in human rights, at least on paper. The Court, too, had changed. The CoE's eastbound expansion after the end of the Cold War resulted in an exponential increase in the workload of the ECtHR,<sup>1847</sup> which was already unable to cope with the thousands of repetitive cases filed against Italy and Turkey.<sup>1848</sup> The ECtHR's docket crisis led to a reform process,<sup>1849</sup> culminating in three new protocols<sup>1850</sup> and high level conferences.<sup>1851</sup>

---

Relation to Crimes Committed until 23 April 1999], No. 4616, 21 December 2000, Official Gazette no. 24268, 22 December 2000.

<sup>1845</sup> UN Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, Addendum: Follow-up to Country Recommendations: Turkey, A/HRC/29/37/Add.4*, 6 May 2015, at para. 57.

<sup>1846</sup> Section 3.6.2 partly draws on Dilek Kurban, "Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations", *Human Rights Law Review*, vol. 16, no. 4 (2016), pp. 731-769.

<sup>1847</sup> Wildhaber, "Consequences for the European Court of Human Rights".

<sup>1848</sup> Antoine Buyse, "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (The Greek Law Journal)* [Online], vol. 57 (2009), pp. 78-90, at p. 86, available at: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1514441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1514441).

<sup>1849</sup> The new process was a continuation of the reforms which had started with Protocol 11 in 1998.

<sup>1850</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 13 May 2004 (introducing significant institutional and procedural changes); Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24 June 2013 (codifying the principles of subsidiarity and margin of appreciation and reducing from six to four months the period within which an application must be filed following a final domestic decision); Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, 2 October 2013 (authorizing national high courts to request advisory opinions on the interpretation or application of the Convention or its protocols).

<sup>1851</sup> High level conferences were convened in Interlaken in 2010, Izmir in 2011 and Brighton in 2012. The declarations are available at: <http://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=>.

One of the reforms was the pilot judgment mechanism,<sup>1852</sup> which was discussed in Chapter 4. On 29 June 2004, one week after its first ever pilot judgment in *Broniowski v. Poland*,<sup>1853</sup> the Court issued its second one in a Kurdish case. In *Doğan and Others v. Turkey*, the Court for the first time referred to internal displacement as the structural problem giving rise to mass claims against Turkey.<sup>1854</sup> Finding the government's efforts to remedy the situation of the displaced, in particular its projects on village returns, to be "inadequate and ineffective", the Court called on the government to provide the conditions and means for the applicants to return to their villages or voluntarily resettle elsewhere.<sup>1855</sup> While the Court did not explicitly call for general measures, its identification of a structural problem and assessment of Turkey's return policies were a call in that direction.<sup>1856</sup> At the same time, the Court's emphasis was on the socio-economic situation of the displaced, though repeating that "effective remedy" under Article 13 required both compensating the victim and identifying and punishing the perpetrator.<sup>1857</sup>

As far as the applicants in *Doğan* were concerned, the Court was fairly accurate in the individual remedy it asked for. The problem was that this judgment implicated a broader group of cases where applicants raised a whole range of gross violations and claimed a wide array of remedies ranging from the accountability of perpetrators to the identification of the whereabouts of the disappeared. In adopting UN-parlance, the Court reframed as "return to village cases"<sup>1858</sup> what it once termed as cases arising from the "actions of the security forces", restricting continuing violations to the applicants' inability to return. Even within this restricted framework, the Court's review was cursory. As pointed out by the Parliamentary Assembly of the Council of Europe, the ECtHR "did not address the problem of whether the applicant(s), or persons in the same situation, can, in fact, return to their villages".<sup>1859</sup> Indeed, landmines, the armed conflict, village guards, lack of basic public services and poverty still posed substantial obstacles to returns.<sup>1860</sup>

---

<sup>1852</sup> For origins, see Philip Leach, Helen Hardman, Svetlana Stephenson and Brad K. Blitz, *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level* (Intersentia, 2010). On the development of the pilot judgment procedure, see Kurban, "Forsaking Individual Justice".

<sup>1853</sup> ECtHR, *Broniowski v Poland*, GC, Application no. 31443/96, Judgment, 22 June 2004. For a brief discussion, see Chapter 4.

<sup>1854</sup> ECtHR, *Doğan and Others*, at para 154. Quite unusually, the ECtHR retroactively labelled *Doğan* as a pilot judgment in an inadmissibility decision it issued two years later. Arguably cognizant of its failure to adopt the language of the CoM resolution, the ECtHR stated, rather inaccurately, that in *Doğan* it had "identified the presence of a structural problem with regard to internally displaced persons and indicated possible measures to be taken in order to put an end to the systemic situation in Turkey". ECtHR, *İçyer v. Turkey*, Application no. 18888/02, Decision (Admissibility), 12 January 2006, at para. 85. For an argument that *İçyer* "appears to be a kind of regret by the Court for not using *Doğan* and others as a clear-cut pilot judgment", see Sitaropoulos, "Implementation of the European Court of Human Rights' Judgments", at p. 12.

<sup>1855</sup> ECtHR, *Doğan and Others*, at para 154 (in reference to Deng, the Court called on Turkey to design its return, reintegration and resettlement policies in accordance with the UN Guiding Principles on Internal Displacement).

<sup>1856</sup> For an argument on why, contrary to the dominant view in the ECtHR literature, *Doğan and Others* is a pilot judgment and why it matters, see Kurban, "Forsaking Individual Justice".

<sup>1857</sup> ECtHR, *Doğan and Others*, at para. 106.

<sup>1858</sup> ECtHR, *İçyer*, at para 73 (Retrospectively in reference to *Doğan and Others*).

<sup>1859</sup> PACE, *Implementation of judgments of the European Court of Human Rights*, Report of the Committee on Legal Affairs and Human Rights, doc. 11020, 18 September 2006, at para 70.

<sup>1860</sup> Dilek Kurban, Deniz Yüksek, Ayşe Betül Çelik, Turgay Ünal and A. Tamer Aker, *Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey* (TESEV Publications, 2007).

18 days after *Doğan*, the Turkish Parliament adopted the compensation law<sup>1861</sup> for victims of “terrorism” or the “fight against terrorism”.<sup>1862</sup> Although the law was portrayed as a general compensation scheme, it was evident that the intended beneficiaries of the law were the displaced.<sup>1863</sup> However, the law’s wide material scope allowing the compensation of victims of terrorism and counter-terrorism meant that the government went far beyond the measure the ECtHR called for – enabling village returns – and aimed at the inadmissibility of a wider group of Kurdish cases, including those concerning extrajudicial killings and property destructions. Once the compensation law was adopted, it was clear that the Court’s next ruling on forced displacement would assess whether this new remedy merited an inadmissibility decision. The ECtHR’s expected ruling came in *İçyer v. Turkey*, 19 months after *Doğan*.<sup>1864</sup> The two cases were strikingly similar. In both, the incidents occurred in Tunceli in October 1994, the applicants were evicted from their villages by the security forces and their properties were destroyed. The applicants in both cases requested the Court to issue a judgment on the merits on the grounds that the domestic remedies were inadequate and ineffective. While the Court had issued a substantive finding in *Doğan*, it rejected *İçyer*.

What changed the ECtHR’s mind was the new compensation law. The government impressed the Court with statistics showing 170,000 applications nationwide and a “substantial number of sample decisions” awarding up to 31,000 Euros per applicant, leading the Court to conclude that the remedy was accessible and provided “reasonable prospects of success”.<sup>1865</sup> What the Court did not note was that the government did not present statistics on rejected applications or the ratio of the sample decisions to that of all applications.<sup>1866</sup> According to the MoI, as of May 2006 – 22 months after the adoption of the law – a mere 27,011 of the 195,463 applications nationwide (nearly 14 percent) were concluded during the nearly two years since the law had entered into force. Of these, 15,112 (more than 50 per cent) were rejected.<sup>1867</sup> Yet, concluding that the government “can be deemed to have fulfilled their duty to review the systemic situation at issue and to introduce an effective remedy,” the Court rejected 800-1,500<sup>1868</sup> pending cases, referring them back to the domestic system.

---

<sup>1861</sup> Law no. 5233.

<sup>1862</sup> *Ibid*, at Article 1.

<sup>1863</sup> The statements made at the parliament by members of the governing party and the opposition show that the intent was to prepare a compensatory scheme for the displaced to win an inadmissibility decision in Strasbourg. Dilek Kurban and Mesut Yeğen, *Adaletin Kıyısında: ‘Zorunlu’ Göç Sonrasında Devlet ve Kürtler – 5233 Sayılı Tazminat Yasası’nın bir Değerlendirmesi – Van örneği* [On the Verge of Justice: The State and the Kurds after Forced Migration – An Assessment of the Compensation Law no. 5233 – the case of Van] (TESEV Yayınları, 2012), at pp. 56-58. An executive decision also stated that with the adoption of the Compensation Law, “a major step is taken towards the elimination of the difficulties faced by our citizens who were obliged to leave their villages”. Turkey, Bakanlar Komitesi [Council of Ministers], “Yerinden Olmuş Kişiler Sorunu ile Köye Dönüş ve Rehabilitasyon Projesine Yönelik Tedbirler” [Measures on the Issue of IDPs and the Return to Villages and Rehabilitation Project], Decision of Principle, 17 August 2005.

<sup>1864</sup> ECtHR, *İçyer*.

<sup>1865</sup> *Ibid*, at para 83.

<sup>1866</sup> Kurban *et al.*, *Coming to Terms with Forced Migration*.

<sup>1867</sup> *Ibid*, at pp. 94-95.

<sup>1868</sup> Just how many petitions were rejected in *İçyer* is a matter of confusion. While the Court gave the number as “almost 1,500” in its Article 41 judgment on *Doğan* (ECtHR, *Doğan and Others*, Just Satisfaction, 13 July 2006, at para 6.), in 2011 it claimed the number to be 800. ECtHR Registrar, “Cases concerning the effectiveness of the compensation procedure for victims of terrorism in Turkey: inadmissible”, Press release, ECHR 102 (2011), 8 July 2011 (hereafter “ECtHR, 2011 Press Release”).

Something even more fundamental was missing in the Court’s analysis. While concluding that administrative action under Turkish laws does not entail “the identification and punishment” of perpetrators and is therefore ineffective, the ECtHR evaded addressing whether the new law filled this accountability gap. Instead, it noted with approval that the applicant could claim compensation for the damages he sustained, concluding that the government “can be deemed to have fulfilled their duty to review the systemic situation at issue and to introduce an effective remedy.”<sup>1869</sup> In reality, the compensation law carried all the faulty characteristics the Court had identified in Turkey’s legal system since *Akdıvar*. Based on the “no-fault responsibility” of the state, the law precludes any official admission of wrongdoing.<sup>1870</sup> The applicants can only claim compensation for bodily harm, property damage and financial losses arising from inability to access their properties left in villages. Compensation for emotional distress, including the psychological sufferings of Kurdish women who were subject to sexual assault in custody, are not covered. The law is executed by administrative commissions which lack independence from the executive.<sup>1871</sup> The fixed compensation amounts paid for death and bodily harm are very low compared to those awarded by the Turkish courts,<sup>1872</sup> whereas property related damages are determined by the commissions on the basis of restrictive evidentiary rules, which led thousands of applications to be rejected on grounds of “lack of sufficient documentation”.<sup>1873</sup> Due to fear of being accused of compensating terrorists and/or their own political prejudice, commissions too often rejected well-founded applications by misconstruing an inadmissibility ground in the law, which renders individuals who inflicted damages onto themselves ineligible.<sup>1874</sup> Considering convictions under the Anti-Terror Law as automatic grounds for inadmissibility, the commissions rejected the applications of individuals with such criminal records without assessing whether there was a causal relationship between their conviction and the damages they claimed.<sup>1875</sup>

There is no doubt that an administrative reparations program designed to compensate more than one million individuals has unique challenges and may never be able to fully meet the expectations of victims. Yet, it can still be favourable compared to judicial review if it offers

---

<sup>1869</sup> ECtHR, *İçyer*, at para 83.

<sup>1870</sup> The law refers to the constitutional doctrine of “social risk based on the objective responsibility of the state.”

<sup>1871</sup> Set up at the provincial level, the damage assessment commissions have seven members, six of whom are civil servants, and are led by a deputy governor representing the central government. For an ethnographic insight on these commissions, see Zerrin Özlem Biner’s following works: “The Logic of Reconciliation: Between the Right to Compensation and the Right to Justice in Turkey”, *Humanity*, vol. 4, no. 1 (2013), pp. 73-91; “Documenting ‘Truth’ in the Margins of the Turkish State”, in Julia Eckert, Brian Donahoe, Christian Strümpell and Zerrin Özlem Biner (eds.), *Law against the State: Ethnographic Forays into Law’s Transformations* (Cambridge University Press, 2012), pp. 228-244.

<sup>1872</sup> In cases of general civil law, in determining the amounts of compensation for death, Turkish courts take into account the victim’s age, socio-economic status, level of education, profession, level of income and number of inheritors as well as the age of any dependent children left behind. The Compensation Law awards the same amount for the death of a 30-year-old male with regular income and a dependent family and a 85-year-old retiree living alone. For more on the law, see Kurban *et al.*, *Coming to Terms with Forced Migration*.

<sup>1873</sup> The real and perceived threat of being sanctioned by the government has led the commissions, particularly early in the process, to require the applicants to prove that the security forces had caused their damages, an impossible burden in light of the denial of state responsibility. On the mechanisms of political pressure on the commissions and the commissions’ rigid application of evidentiary rules, see Kurban, “Forsaking Individual Justice”; Kurban and Yeğen, *Adaletin Kıyısında*.

<sup>1874</sup> Law no. 5233, at Article 2(f).

<sup>1875</sup> For examples of such inadmissibility decisions, see Kurban, “Forsaking Individual Justice”.

advantages such as “faster results, lower costs, relaxed standards of evidence, non-adversarial procedures, and virtual certainty” which courts cannot.<sup>1876</sup> Turkey’s compensation law offers none of these mitigating conditions, except for a free of charge application process.<sup>1877</sup> The evaluation of the petitions takes nearly as long as the judicial process; compensation awards are paid with substantial delay,<sup>1878</sup> the evidentiary bar is too high; commissions are perceived by the applicants as adversarial and there is no guarantee that everyone who has incurred damages will receive compensation.<sup>1879</sup>

It is argued that “strong and efficient supervision by the Committee of Ministers becomes crucial in the case of a pilot judgment procedure”.<sup>1880</sup> In the context of the Kurdish cases, this was all the more necessary in light of the ECtHR’s premature assessment of a law which had hardly started to be implemented. And yet, the CoM’s supervision was far from effective. In June 2008, it found the law to be an effective measure “preventing similar violations”<sup>1881</sup> without showing the empirical basis for such a swift conclusion. It noted that the “substantial number of sample decisions furnished by the Turkish government” showed that individuals successfully claimed compensation for their damages.<sup>1882</sup> In closing its examination of *Doğan*, the CoM relied on Turkey’s assurances that there were a wide range of available domestic remedies, including the administrative courts.<sup>1883</sup>

In theory, *İçyer* did not preclude victims from applying to the ECtHR. That was the understanding until 28 June 2011, when the Court rejected 200 petitions filed by individuals who had applied to the compensation law before coming to Strasbourg.<sup>1884</sup> The cases raised a number of issues ranging from the rejection of applications to the incomplete assessment of damages, from the non-awarding of non-pecuniary damages to the delayed payment of compensations.<sup>1885</sup> In its assessment, the Court first addressed the overall implementation, finding the compensation amounts to be reasonable and the practice of the commissions

---

<sup>1876</sup> Pablo de Greiff, “Justice and Reparations”, in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006), pp. 451-477, at p. 459.

<sup>1877</sup> In many cases this advantage has never materialized in practice due to the commissions’ requirement of already impoverished applicants to produce documents such as proofs of inheritance and criminal records, which were prohibitively costly to obtain and were at any rate in the possession of the government.

<sup>1878</sup> Although the law requires the compensation awards to be paid within three months, most of the applicants received their payments with substantial delay of up to four years. Kurban and Yeğen, *Adaletin Kıyısında*, at pp. 127-128.

<sup>1879</sup> Not surprisingly, the practice of the Immovable Property Commissions (IPC) established by Turkey to process the property claims of Greek-Cypriots resembles that of the compensation assessment commissions, including low compensation amounts, unjustifiably delayed processing of applications and the imposition of prohibitively high evidentiary burden on the applicants. Katselli Proukaki, “The Right of Displaced Persons to Property and to Return Home after *Demopoulos*”, *Human Rights Law Review*, vol. 14 (2014), pp. 701-732.

<sup>1880</sup> Buyse, “The Pilot Judgment Procedure at the European Court of Human Rights”, at p. 14.

<sup>1881</sup> CoM, *Execution of the judgment of the European Court of Human Rights Doğan and others against Turkey*, Resolution CM/ResDH(2008)60, 25 June 2008.

<sup>1882</sup> CoM, Interim Resolution CM/ResDH(2008)69.

<sup>1883</sup> *Ibid.*

<sup>1884</sup> The ECtHR similarly found inadmissible the applications of three Greek-Cypriots who had applied to the new domestic remedy created by the Turkish government in Cyprus, but whose claims had been rejected by the IPCs. ECtHR, *Meleagrou and Others v. Turkey*, Application no. 14434/09, Decision (Admissibility), 2 April 2013.

<sup>1885</sup> ECtHR, *Akbayır and Others v. Turkey*, Application no. 30415/08; *Fidanten and Others v. Turkey*, Application no. 27501/06; *Bingölbali and 54 Others v. Turkey*, Application no. 18443/08; *Boğuş and 91 Others v. Turkey*, Application no. 54788/091, Decision (Admissibility), all decided on 28 June 2011.

effective. It noted that the commissions had concluded 230,000 of the 360,000 applications nationwide and awarded a total of one billion euros in compensation to more than 133,000 applicants.<sup>1886</sup> The ECtHR did not address the fact that nearly half of the applications were rejected or that the figures it cited amounted to an average of 7,500 euros per person, a negligible sum in relation to the harm. By way of comparison, the ECtHR awarded the applicants in *Doğan* an average of 18,500 euros in pecuniary damages.<sup>1887</sup>

As of 2013, of the 331,000 applications to the Compensation Law nationwide, 156,000 were rejected. This is nearly one out of every two applications. A tiny fraction of these were brought to Strasbourg only to be rejected on the ground that the applicants could seek review in Turkish courts. In one case, the ECtHR rejected three applicants who had been denied compensation due to their convictions under the Anti-Terror Law.<sup>1888</sup> However, the incidents which led to the convictions occurred in 1993, one year before the applicants' displacement, and the damage assessment commission established that the applicants were evicted on security grounds. On 20 September 2011, a single-judge ECtHR formation concluded this case to be inadmissible without offering any explanation, seemingly adopting the same approach as the commissions in Turkey in equating criminal conviction with automatic ineligibility for the protection of property rights.

In *İçyer*, the ECtHR was confronted with the applicants' claim for compensation for pain and suffering, which the compensation law does not provide despite established ECtHR precedent. The Court erroneously deferred to the government's argument that while the commissions could not award non-pecuniary damages, the applicants could seek it in Turkish courts. Lawyers had from the beginning contested this argument, pointing out that the administrative courts would be bound by the text of the compensation law, which rules out non-pecuniary damages.<sup>1889</sup> Indeed, on 25 June 2009, the Turkish Constitutional Court rejected a lower court's opinion that victims should be compensated for their emotional pain and suffering.<sup>1890</sup> The Constitutional Court based its judgment on the fact that the compensation law is based on the non-fault liability of the administration and that the separation of powers requires deference to the legislative for the compensation of losses "which do not result from the acts and procedures of the executive".<sup>1891</sup> This reasoning shows that the Turkish judiciary, at its highest level, continues to uphold the impunity of security forces.

Thus, Turkey's law, in substance and implementation, does not compensate the material losses of all eligible victims and, contrary to the Court's erroneous conclusion in *İçyer*, does not allow compensation for their emotional distress. Even if one were to assume that the ECtHR was misled in believing that compensation for non-pecuniary damages could be claimed in domestic courts, there is no legitimate explanation as to why the Court rejected the petitions of individuals

---

<sup>1886</sup> ECtHR, "2011 Press Release", at pp. 2-3.

<sup>1887</sup> ECtHR, *Doğan and Others*, Just Satisfaction.

<sup>1888</sup> ECtHR, *Hüseyinoğlu and Kalabay v Turkey*, Application no. 41176/10, Decision (Admissibility), 20 September 2011.

<sup>1889</sup> Interviews conducted by the authors and colleagues in 2005 with lawyers in Diyarbakır, Batman and Hakkari. Kurban *et al.*, *Coming to Terms with Forced Migration*.

<sup>1890</sup> The lower court had concluded that the compensation of emotional pain and suffering was required by the Constitution and the ECtHR case law, citing *Menteş and Others*.

<sup>1891</sup> AYM, E. 2006/79, K. 2009/97, 25 June 2009.

whose claims were denied by both the commissions and the courts in Turkey. Noteworthy that the applicants in *Akbayır* were from the same village as the applicants in *Doğan* and were evicted at the same time and in the same fashion.<sup>1892</sup>

Arguably, the ECtHR rectified *İçyer* with its 2009 ruling in *Gasyak*, concerning the extra-judicial execution of four individuals by gendarmes and confessors in 1994. Three of the families had been awarded partial compensation by a damage assessment commission based on its uncorroborated conclusion that the victims had been killed by the PKK. Citing this decision, the government requested the ECtHR to reject the case on the ground that the applicants had lost their victim status. Reverting back to its pre-*İçyer* jurisprudence, the Court held that a non-fault administrative remedy incapable of identifying and punishing the perpetrators “cannot be regarded as an effective remedy for the purposes of Article 2.”<sup>1893</sup> However, this was a partial rectification; the Court reactivated the *Akdivar* exception only as far as “cases concerning the deprivations of life” are concerned,<sup>1894</sup> leaving victims of torture, forced evictions, village burnings and possibly disappearances at the mercy of the commissions.

Having conducted dozens of fact-finding hearings and issued hundreds of judgments on the Kurdish conflict, the ECtHR was the best situated international authority to make an informed assessment about the effectiveness of the new remedy. But, due to political expediency and/or fatigue, it chose not to; an unwillingness of which the repercussions would go beyond the pending cases. In 1994, Kamminga had criticized the EComHR for approving a friendly settlement in the inter-state case against Turkey after the 1980 *coup*.<sup>1895</sup> He had argued that the decision, which must have been perceived by Turkey as “a great diplomatic victory” and a “stamp of approval” from Strasbourg, removed from Ankara the pressure for reform, as evident in the continuation of “widespread and systematic torture” into the 1990s.<sup>1896</sup> Two decades later, *İçyer* was perceived in the same fashion by the government and had similar consequences for the protection of human rights in Turkey. The MoI saw the compensation law adopted in consultations with the ECtHR as “a kind of diplomatic success”.<sup>1897</sup> The Minister interpreted *İçyer* as “a serious diplomatic and legal gain in the international arena”, noting that the UN referred to Turkey’s law as a best practice in its dealings with countries experiencing internal displacement.<sup>1898</sup> Most importantly, as discussed in the next section, the ECtHR’s decision to lessen its oversight has arguably made it easier for Turkey to continue committing gross human rights violations with impunity.

---

<sup>1892</sup> The petitions of Elif Akbayır, Düzgün Akbayır and Şehriban Yer, filed with the ECtHR on 17 June 2008.

<sup>1893</sup> ECtHR, *Gasyak and Others*, at para 71.

<sup>1894</sup> *Ibid*, at paras 68-71.

<sup>1895</sup> EComHR, *France v. Turkey*, Application no. 9940/82, *Norway v. Turkey*, Application no. 9941/82, *Denmark v. Turkey*, Application no. 9942/82, *Sweden v. Turkey*, Application no. 9943/82, *Netherlands v. Turkey*, Application no. 9944/82, Report, 7 December 1985.

<sup>1896</sup> Kamminga, “Is the European Convention on Human Rights Sufficiently Equipped”, at 158-159.

<sup>1897</sup> Ministry of Interior report on the Compensation Law, cited in Kurban and Yeğen, *Adaletin Kıyısında*, at p. 64.

<sup>1898</sup> Minister of Interior, Response to the written query by a member of the parliament, *Tutanak Dergisi*, vol. 23, no. 5, legislative year 2, 22<sup>nd</sup> session, 20 November 2007.

### 6.3.3 A Lost Opportunity? The Search for Truth and Justice in Turkey

At a time when the ECtHR was effectively withdrawing from overseeing the Kurdish cases and Turkey was rolling back its human rights reforms, unexpected domestic developments gave rise to a “momentum for accountability”.<sup>1899</sup> In 2008, the AKP government retaliated against the military’s successive attempts to undermine its power<sup>1900</sup> by launching a criminal investigation into alleged *coup* attempts by an ultranationalist clandestine network named *Ergenekon*.<sup>1901</sup> Among the defendants were some of the leading actors of state violence in the Kurdish region, including the commander of the Bolu Brigade Yavuz Ertürk, implicated in several ECtHR rulings,<sup>1902</sup> and Veli Küçük, a retired general named as a JİTEM leader in the Susurluk reports. The indictment revealed several suspects’ links to the Susurluk scandal and the crimes of JİTEM and the ‘Yüksekova Gang’,<sup>1903</sup> a criminal network of high-ranking military personnel, confessors, village guards and local politicians in the province of Hakkari, which was implicated in the extrajudicial execution of 16 Kurdish civilians.<sup>1904</sup> However, despite high public expectations, the court limited the charges against defendants with crimes against the state (attempted overthrow of the government) and did not extend them to crimes against individuals (gross human rights abuses in the Kurdish region in the 1990s).

In late 2008, another investigation was launched by a court in Mardin, this time exclusively focusing on state violence in the Kurdish region. It seemed to the families of the victims and their lawyers that the tide had turned. The case concerned the criminal activities of a network involving military and civilian leaders in the town of Cizre during 1993-1995, who were accused of forming an execution squad.<sup>1905</sup> Defendants included Cemal Temizöz, the major commanding the local gendarmerie, Kamil Atağ, the former mayor and a village guard leader, and several confessors. Defendants were charged with executing or disappearing 20 victims aged between 12 and 48.<sup>1906</sup> The detention of Temizöz, who had in the meantime become a colonel commanding the regional gendarmerie forces in central Turkey, and the charging of the defendants with organized crime raised expectations that the prosecutors were finally ready to unearth the crimes committed against civilians in the Kurdish region.

---

<sup>1899</sup> Human Rights Watch, *Time for Justice*, at p. 3.

<sup>1900</sup> The highlight of this opposition was the Turkish Chief of Staff’s attempt to prevent the election of AKP’s presidential candidate Abdullah Gül in 2007 and the dissolution case initiated by the Chief Prosecutor of the High Court of Appeals against the AKP in 2008. For more, see Chapter 2.

<sup>1901</sup> Starting with one case against 86 defendants, the investigation expanded to 22 cases against 275 defendants, which were merged into a single case. The court’s verdict against most of the defendants was eventually overturned by the High Court of Appeals in April 2016 on the ground that the prosecutor failed to prove the existence of *Ergenekon*. For more on the case, see Human Rights Watch, *Time for Justice*; Gülçin Avşar, Koray Özdil and Nur Kırmızıdağ, *The Other Side of the Ergenekon: The Extrajudicial Killings and Forced Disappearances – Abridged Version* (TESEV Publications, 2013).

<sup>1902</sup> ECtHR, *Akdeniz and Others*; *Orhan*.

<sup>1903</sup> Avşar, Özdil and Kırmızıdağ, *The Other Side of the Ergenekon*, at p. 7.

<sup>1904</sup> For more on the ‘Yüksekova Gang’, see Chapter 5.

<sup>1905</sup> The case was triggered by a letter sent to a prosecutor by an individual who was once an insider of the alleged execution squad.

<sup>1906</sup> Two of the defendants in *Temizöz and Others* were confessors who were named in an extrajudicial execution which resulted in an ECtHR judgment against Turkey. ECtHR, *Gasyak and Others*. For more details on the victims, acts and perpetrators, see Human Rights Watch, *Time for Justice*.

All of a sudden, the political climate had changed and the prospect of home-grown justice seemed possible. With the support of human rights lawyers and bar associations, families of the disappeared and executed victims filed new criminal complaints. Seemingly encouraged by the new favourable atmosphere, prosecutors started to launch new investigations and made tangible progress in those which had been opened in the past but remained on paper.<sup>1907</sup> Many of these cases concerned incidents or individuals implicated in cases where the ECtHR had found violations. The most significant is the *Musa Anter and the Main JITEM Case*, made up of two merged cases involving 18 defendants charged with establishing a criminal organization for the purpose of torturing and murdering 13 individuals including the Kurdish writer and journalist Musa Anter.<sup>1908</sup> Originally launched in 1999, the JITEM case was shuffled between five different courts for ten years, awaiting the statute of limitations to run out. Then came Abdülkadir Aygan's confessions in 2004, which produced new evidence of JITEM's existence (an official payroll produced by Aygan) and its crimes (the remains of a disappeared man unearthed on the basis of Aygan's descriptions). In response, prosecutors in Diyarbakır expedited their investigation and expanded the list of suspects to include Mahmut Yıldırım, a.k.a. 'Yeşil' or 'Sakallı', and Aygan himself.<sup>1909</sup> Meanwhile, Aygan's confessions triggered a separate investigation into Anter's murder in 2009, leading to the arrest in 2012 of a suspect Aygan had identified as the killer. In 2014, the *JITEM* and *Anter* cases were merged.

In 2012, a court in Mardin launched an investigation into the extrajudicial killing and enforced disappearance of 13 individuals in the town of Derik during 1992-1994. The defendant Musa Çitil, the head of the local gendarme forces at the material time, was charged with multiple murders.<sup>1910</sup> In 2013, a court in Diyarbakır launched an investigation into the enforced disappearance of eleven Kurdish peasants in Kulp. The sole defendant in this case was retired Brigadier Yavuz Ertürk, who was charged with establishing a criminal organization for the purpose of mass murder and inciting riot and murder.<sup>1911</sup> In addition to the main case, separate investigations were opened into JITEM crimes. In the *Ankara JITEM Case*, launched in 2014, 19 defendants, including the former Minister of Interior implicated in the Susurluk scandal, were charged with the extrajudicial and arbitrary execution of 19 individuals in Ankara and its vicinity during 1993-1996.<sup>1912</sup> Also launched in 2014, the *Kızıltepe JITEM Case* charged nine retired and active duty gendarme commanders and village guards with the extrajudicial execution or enforced disappearance of 22 individuals in Mardin during 1992-1996. The

---

<sup>1907</sup> For up-to-date detailed information of the progress of the 12 cases concerning crimes committed in the Kurdish region, see *Faili Belli*, a website launched in 2012 by TESEV Democratization Program. Since 2015, it is being updated by Hakikat Adalet Hafıza Merkezi (Hafıza Merkezi) [Center for Truth Justice Memory], *Faili Belli: Yüzleşme Davaları İzleme Sitesi* [Perpetrator not-Unknown: Monitoring Site for the Cases Dealing with the Past], available in English at: <http://failibelli.org/en/>.

<sup>1908</sup> For the relevant ECtHR ruling, see ECtHR, *Anter and Others*. On Anter's significance for the Kurdish national movement, see Chapter 3. On his execution, see Chapter 5.

<sup>1909</sup> On Aygan's confessions and Mahmut Yıldırım, see Chapter 5.

<sup>1910</sup> Musa Çitil was implicated in two separate ECtHR rulings concerning other incidents, where the Court found that detainees held under his command had been subject to torture (including rape) and ill treatment. See, respectively, ECtHR, *Aydın*; *Tekin v. Turkey*, Application no. 52/1997/836/1042, Judgment, 9 June 1998. For a detailed description of the facts of the first case, see Chapter 5.

<sup>1911</sup> For a detailed description of the enforced disappearance of eleven peasants in Kulp and the crimes committed by the Bolu 2<sup>nd</sup> Commando unit, see Chapter 5. For the relevant ECtHR ruling, see *Akdeniz and Others*.

<sup>1912</sup> For the relevant ECtHR rulings, see *Ülkü Ekinci*, *Buldan*, and *Selim Yıldırım and Others*.

*Dargeçit JİTEM case*, launched in 2015, concerned the enforced disappearance of eight individuals, including three children, in Mardin during 1995-1996. The 18 defendants included senior gendarme commanders and village guards.<sup>1913</sup>

For a brief period, it seemed to victims, their lawyers and the human rights community that Turkey's long awaited moment of transitional justice had arrived. The cases led to a renewed legal mobilization by Kurdish lawyers, in the leadership of the bar associations in the region and supported by national NGOs, who joined their resources for strategic litigation, this time before the domestic courts.<sup>1914</sup> The victims' families, particularly the İHD-supported "Saturday Mothers", monitored the entire process by attending the hearings, holding press conferences and organizing protests. Several defendants and witnesses provided new revelations on state violence in the Kurdish region. So, how did this happen? Kurdish lawyers share the widely held view among the human rights community in Turkey that the actors of this process were the prosecutors and judges affiliated with the Fethullah Gülen community, a.k.a. 'cemaat', a transnational religious movement which has gained increasing influence in the judiciary since the early 1980s and particularly after the AKP came to power in 2002.<sup>1915</sup> According to attorney Cihan Aydın:

At the time, prosecutors who are now labelled by the government as 'cemaat' made an effort. We cannot tell whether it was a political motive or their conscience or sense of professional duty which motivated them. They might also have wanted to alleviate the harm they had brought on us through collective trials, the KCK case, detentions etc. We cannot know. But, they did make this contribution.

Barış Yavuz, another lawyer in Diyarbakır representing the victims' families in these cases, has pointed out that the determinative factor in the launch of this process was politics, not law:

The government demonstrated a political will to come to terms with the past. That's how *Ergenekon* was launched. Then, the investigations which had earlier been opened into JİTEM after Aygan's revelations but remained moot gained momentum. And new cases were opened... What is determinative is the political will. As long as the government stands behind them, prosecutors do not fear. They arrest and prosecute whomever they like.

And then, the process stopped, as unexpectedly and abruptly as it had started. With the exception of a handful of cases resulting in the conviction of low level gendarmes,<sup>1916</sup> the overwhelming majority of military and civilian officials have not been held accountable for their crimes and remain unidentified. Courts declined requests for the detention of the

---

<sup>1913</sup> For the relevant ECtHR ruling, see *Seyhan v. Turkey*.

<sup>1914</sup> A number of national NGOs mobilized in developing collective projects to provide legal and financial support to victims' families and their lawyers. Among them were the İHD, Diyarbakır Bar Association, Progressive Lawyers Association (*Çağdaş Hukukçular Derneği-ÇHD*), TİHV, TESEV Democratization Program, and Hafıza Merkezi.

<sup>1915</sup> For more on the Gülen movement and its public fallout with the AKP since 2011, see Chapter 2.

<sup>1916</sup> In an exceptional judgment, a Turkish court sentenced a specialist sergeant to 30-years-imprisonment for his involvement in the unlawful killing of an individual in 1994. The 3<sup>rd</sup> Heavy Penal Court in Diyarbakır, E. 2007/439, K. 2008/79, 20 March 2008. The defendant was among the suspects the ECtHR had identified in finding a substantive violation of Article 2. ECtHR, *Avşar*.

defendants in existing cases and released the handful who had been detained early on, including Colonel Temizöz. Prosecutors declined requests for the expansion of the investigations and the charging of new defendants. After its official visit to Turkey in March 2016, the first since 1998, the UNWG reported that it “has perceived a palpable lack of interest to seriously investigating, prosecuting and adjudicating these cases, as if going forward with them would harm the interest of the State, which should instead be preserved.”<sup>1917</sup> The final blow was the transfer of virtually every case from courts in the Kurdish region to those in central or western Turkey.<sup>1918</sup> According to Cihan Aydın:

Courts started to rapidly decide to transfer the cases. This has become fashionable lately. They formally launch these cases with very weak indictments and immediately transfer the cases. This has become an administrative practice... The government does not want these cases to lead anywhere. This is very clear. They also made a deal with the military. The government wants to protect the military personnel, especially those on active duty, with impunity. Particularly since its fight with *cemaat* started.<sup>1919</sup>

For Barış Yavuz, a close observer of the entire process, the case transfers are new wine in an old bottle – a new judicial tool for impunity.

Once the government started settling accounts with its rivals, it stopped paying attention to these cases. Turkey’s coming to terms with its past all of a sudden turned into the AKP’s coming to terms with its own political rivals... With these transfers, it will not be possible for us, the lawyers who followed these cases from the beginning, to remain involved. These cases will continue for another five-ten years in their new courts and then time out... In the future, this period will be referred as ‘the period of case transfers’.

The transfer decisions were made on grounds of “public safety”<sup>1920</sup> and against the protests of victims’ families and lawyers. In an op-ed he wrote 18 months before he was murdered in suspect circumstances,<sup>1921</sup> Tahir Elçi, the President of Diyarbakır Bar Association and a leading lawyer acting on behalf of the families of victims, characterized the transfers as “abuse”:

The transfer of the cases sets aside the principal prosecutorial goals such as unearthing the truth, establishing justice and protecting the victims and virtually moves the hearings to the location of the defendants in consideration of their convenience ... Even before

---

<sup>1917</sup> UN Office of the High Commissioner for Human Rights, “Preliminary Observations of the Working Group on Enforced or Involuntary Disappearances at the Conclusion of its Visit to Turkey (14-18 March 2016)” (hereafter “UNWG, Preliminary Observations”), available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18476&LangID=E>.

<sup>1918</sup> For example: *Musa Çitil* (from Mardin to Çorum in 2012); the *Kulp* case (from Diyarbakır to Ankara in 2014); *Kızıltepe JİTEM* (from Mardin to Ankara in 2014); the *Lice* case (from Diyarbakır to İzmir in 2014); *Temizöz and Others* (from Cizre to Eskişehir in 2015); *Main JİTEM Case and Musa Anter* (from Diyarbakır to Ankara in 2015).

<sup>1919</sup> Interview with Cihan Aydın, Diyarbakır, 31 March 2015.

<sup>1920</sup> Article 19(2) of the Law on Criminal Procedure: “If conducting the prosecution in the district of the court that has subject matter jurisdiction and venue would be endangering the public safety, the Minister of Justice shall request the High Court of Appeals to issue an order on the transfer of the case.”

<sup>1921</sup> Tahir Elçi was shot dead on 28 November 2015 on a street of Diyarbakır immediately after he delivered a press statement calling for the cessation of the armed conflict between the PKK and the Turkish military. He was caught in the middle of a shootout between police officers and PKK militants, and was killed by an unidentified source. His murder remains unresolved. For more, see Chapter 7.

the trials start or a sign of danger to public safety or defendants emerges, upon the request of the defendants, the Ministry of Justice requests the High Court of Appeals to order a transfer and the transfer is realized arbitrarily and without any investigation or assessment by the Ministry or the Court... The transfer of a case leads the new court to have a favourable prejudice towards defendants. The “exiled case” becomes divorced from the material and social climate of the place where the crime was committed, the judge is devoid of the opportunity to see the crime scene, the plaintiffs and witnesses cannot face the court and prosecution turns into an attempt to expeditiously absolve the defendants.<sup>1922</sup>

Elçi concluded his piece by warning that the transfer of politically charged cases may result in the acquittal of defendants.<sup>1923</sup> Indeed, in cases involving high-profile senior military officers, the courts did not wait for the statute of limitations to run out and issued acquittal rulings. First Musa Çitil and then Colonel Cemal Temizöz, along with all the other defendants tried with him, were acquitted in June and November 2015, respectively.

The prevalent view among the observers of this process is that the real motive behind the launching of these cases was not a search for truth and justice but the settling of scores between the AKP and its rivals. According to a journalist renown for his court reporting, it was the end of a turbulent political process, which had caused schisms within the judicial branch during the AKP’s fight against the military with the support of ‘Gülenist’ judges and prosecutors, and the re-institution of the status quo which resulted in the transfer of these cases and the acquittal of defendants.<sup>1924</sup> While it is not possible to test the accuracy of these widely-held convictions, that the government did not adopt requisite legal reforms for a meaningful transitional justice process is a fact. The investigation of gross human rights abuses continues to be subject to the statute of limitations discussed earlier. The discovery of a handful of mass graves in the mid-late 2000s had been possible with the efforts of victims’ families and the İHD based on information provided by confessors,<sup>1925</sup> or due to chance encounter, as in the case of the missing eleven of Kulp.<sup>1926</sup> In the latter case, despite official pleas by the İHD, the prosecutor declined to conduct an on-site investigation, making the villagers collect the human remains themselves, and he went to the site only after he had been publicly exposed by the İHD.<sup>1927</sup> The UN treaty

---

<sup>1922</sup> Tahir Elçi, “Adaletin Ebediyete İntikali” [The Transmission of Justice to Eternity], *Radikal*, 4 May 2014.

<sup>1923</sup> The UNWG also expressed concern over the transfer of cases relating to enforced disappearances, noting the adverse consequences such as delays, judicial ineffectiveness and the prevention of the families to follow the trials. UNWG, Preliminary Observations.

<sup>1924</sup> Gökçer Tahincioğlu, “JİTEM, Nakil Hukuk ve Tahir Elçi” [JİTEM, the Transferred Law and Tahir Elçi], *Milliyet*, 5 December 2012.

<sup>1925</sup> Based on the information confessor Abdülkadir Aygan provided about the kidnapping, torture and execution of Murat Aslan who had been disappeared in 1994, Aslan’s family sought help from İHD Diyarbakır, which petitioned the prosecutor to order an excavation in the burial site whose coordinates Aygan had given. The official excavation resulted in the discovery of bones which were concluded by forensic experts to belong to Aslan. Burhan Ekinci, “İşte İtiraf, İşte Ceset! Sorumlular Nerede?” [Here is the Confession, Here is the Body! Where are those Responsible?], *Bianet*, 2 February 2005.

<sup>1926</sup> The remains of nine of the eleven missing of Kulp were exhumed upon the discovery by chance of a burial site by villagers who had returned to their homes in 2003, ten years after the incidents. See Chapter 5.

<sup>1927</sup> For the Turkish Parliament’s undated report on the missing eleven of Kulp discussed in Chapter 5, TBMM, *Diyarbakır’ın Kulp İlçesi Alaca Köyü Kepir Bölgesinde Bulunan Toplu Mezar Hakkında Rapor* [Report on the Mass Grave Discovered in the Kepir Region of the Alaca Village of the Kulp District of Diyarbakır] (undated), available at: [https://www.tbmm.gov.tr/komisyon/insanhaklari/belge/kr\\_22DiyarbakirKulp.pdf](https://www.tbmm.gov.tr/komisyon/insanhaklari/belge/kr_22DiyarbakirKulp.pdf), at p. 10 (citing

bodies expressed particular concern about the way in which mass graves were uncovered, in particular the contamination, loss or destruction of human remains and other potential evidence,<sup>1928</sup> and the fact that the collection and recording of forensic evidence was often carried out by the same police or gendarmerie units implicated in the crimes.<sup>1929</sup>

Despite repeated calls from the victims' families, human rights NGOs and the international community, the Turkish government did not sign the International Convention on the Protection of All Persons from Enforced Disappearance, nor did it develop a policy to search for the missing individuals. The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the UNWG called on the government to acknowledge the existence of graves, adequately preserve the burial sites and exhume them in a comprehensive and systematic way, guarantee the families' and the judicial authorities' access to official archives including those of the security agencies, and ensure proper, independent and transparent investigation to identify and prosecute the perpetrators in conformity with the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the Minnesota Protocol).<sup>1930</sup> Due to lack of an official investigation, the number and location of mass graves are unknown. In 2014, the İHD Diyarbakır branch announced the findings of its fieldwork in 25 provinces, claiming the existence of a total of 348 mass graves containing the remains of 4,201 individuals.<sup>1931</sup>

Finally, the village guard system remains in force despite the misgivings expressed by the ECtHR in *Seyfettin Acar* and repeated calls for the abolishment of this force by the UN Special Representative for Internally Displaced Persons,<sup>1932</sup> the European Commission,<sup>1933</sup> the UN Special Representative on Extrajudicial, Summary or Arbitrary Executions<sup>1934</sup> and the CoE's High Commissioner for Human Rights.<sup>1935</sup> In fact, the government has stepped up recruiting

---

Selahattin Demirtaş, the then President of İHD Diyarbakır). In a separate case, the ECtHR found a procedural violation of Article 2 in the prosecutors' failure to conduct an effective investigation into evidence discovered in connection with a disappearance case. The evidence, several bones and parts of a Russian motorbike, were dug up in 2009 near the area where the missing man was last seen in 1994 after he had been stopped by soldiers while travelling on his Russian motorbike. ECtHR, *Saygı v. Turkey*, Application no. 37715/11, Judgment, 27 January 2015.

<sup>1928</sup> UN Human Rights Council, *Heyns 2013 Report*, at paras. 56-57.

<sup>1929</sup> UN Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, Addendum: Follow-up to Country Recommendations: Turkey*, A/HRC/29/37/Add.4, 6 May 2015, at para. 55. For similar concerns, see UNWG, Preliminary Observations; European Commission, *Turkey 2012 Progress Report*, SWD(2012) 336, 10 October 2012, at p. 20; European Commission, *Turkey 2013 Progress Report*, SWD(2013) 417, 16 October 2013, at p. 50; European Commission, *Turkey 2014 Progress Report*, SWD(2014) 0307, 8 October 2014, at p. 50; European Commission, *Turkey 2015 Progress Report*, SWD(2015) 216, 10 November 2015, at p. 62.

<sup>1930</sup> UN Human Rights Council, *Heyns 2013 Report*, at para. 57.

<sup>1931</sup> For the interactive map indicating the locations of mass graves, see <http://map.ihddiyarbakir.org/map.aspx>.

<sup>1932</sup> UN Commission on Human Rights, *Deng Report*.

<sup>1933</sup> Since its 2001 Progress Report, the European Commission has been consistently pointing out to the problems caused by the village guard system for the displaced Kurds.

<sup>1934</sup> UN Commission on Human Rights, *Jahangir 2001 Report*, at p. 29; UN Human Rights Council, *Heyns 2013 Report*, at p. 7.

<sup>1935</sup> Council of Europe, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey from 10 to 14 October 2011*, CommDH(2012)2, 10 January 2012; Council of Europe, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey from 28 June to 3 July 2009*, CommDH(2009)30, 1 October 2009.

new ones in response to the re-escalation of the armed conflict with the PKK.<sup>1936</sup> In September 2015, the government announced that it would recruit around 5,000 more village guards.<sup>1937</sup>

## **6.4 The ECtHR's Reluctant Comeback**

The CoM's conclusion of its monitoring of the majority of issues concerning the actions of the security forces and the ECtHR's application of the pilot judgment procedure to Kurdish cases rested on the assumption that Turkey's reforms would ensure the non-repetition of gross human rights abuses. It soon became clear that this was by no means a foregone conclusion. A new era of gross human rights abuses started at a time when the victims' search for justice for the crimes of the 1990s still continued. The new wave of violations disproved the assumption of the European institutions, including the ECtHR, that the unlawful killings of Kurdish civilians by the security forces belonged to the 'old' Turkey and that the 'new' Turkey presented a success story of post-conflict democratic transition. The cases also demonstrated that impunity prevailed, not only with respect to crimes committed in the 1990s, but also with respect to new violations.

Meanwhile, pilot judgments were not the only change introduced in the ECtHR's adjudication of cases. As part of the ongoing reforms of the Convention system, the Court started to prioritize pending cases raising violations of Articles 2 and 3 and to guide State Parties in their execution of existing case law through issuing Article 46 judgments. These pointed out specific legal measures that need to be adopted to prevent the emergence of similar violations in the future. The intersection of these developments led to the ECtHR's forceful come back in adjudicating the Kurdish cases – old and new.

### **6.4.1 Old Wine in not-so-New Bottles: The Resumption of State Violence in the Kurdish Region**

Despite the legal reforms, the normalization of politics and the spirit of democratization, it became clear very soon that state violence had paused, not ceased in the Kurdish region. Perhaps the first sign of this phenomenon was the summary execution of a 13-year-old boy, Uğur Kaymaz, and his father by the special police squad teams in front of their home in the province of Mardin on 21 November 2004, less than one month before the EU Council's conclusion that Turkey "sufficiently" fulfilled its accession criteria. Uğur was hit by 13 bullets and his father by eight. They were in their slippers, unarmed. When they were killed, Uğur was helping his lorry-driver father load his truck. The official reaction was all too familiar. The provincial government claimed that "two terrorists have been captured dead following a clash",<sup>1938</sup> before withdrawing this statement upon public outcry. The authorities did not carry out an on-site investigation to collect evidence. The government claimed that the house had been placed under surveillance following an anonymous tip that it contained armed individuals planning a terrorist

---

<sup>1936</sup> See e.g., European Commission, *Turkey 2009 Progress Report*, SEC(2009)1334, 14 October 2009, at p. 31.

<sup>1937</sup> *IMC TV*, "İçişleri Bakanı: 5 Bin Korucu Alınacak" [The Minister of the Interior: "5,000 Guards will be Recruited"], 19 September 2015.

<sup>1938</sup> Turkish media reports after the events.

attack and that the victims were killed in a shoot-out with the law enforcement officers.<sup>1939</sup> While the four officers were charged with homicide, all of them were acquitted and none received any disciplinary sanctions.

In its 2014 judgment in this case, the ECtHR pointed out that the police had not noted any suspicious incidents during their surveillance, had not explored any leads other than the anonymous denunciation and had had no evidence to believe that terrorists were hiding in the house or a terrorist attack was being planned. It noted that the Turkish court's conclusion that the police had responded in self-defence in response to shots fired by the deceased, one of whom was 13 years old, was based mainly on the statements of the officers obtained ten days after the killings without an assessment of their credibility. The Court was struck by the fact that the authorities did not take fingerprints from the weapons they claimed to have found near the bodies of the deceased.<sup>1940</sup>

The mid-2000s also witnessed the emergence of a new form of right to life violations in Turkey; the security forces' excessive use of lethal force in peaceful demonstrations. On 28–31 March 2006, riots broke out in Diyarbakır following the funerals of 14 PKK militants, which spread to several other Kurdish cities.<sup>1941</sup> The security forces' excessive and arbitrary use of lethal force resulted in the death of eleven civilians, including seven minors.<sup>1942</sup> Some of the victims were killed by indiscriminately fired tear-gas grenades. Although forensic reports established that the cartridges killing the victims came from a type of tear-gas grenade used by the security forces, the authorities were 'not able to identify' members of the security forces responsible for the deaths on the ground that the police officers were wearing balaclavas. Other victims were killed by bullets, indiscriminately fired on the crowds. No criminal investigations were opened into any of these deaths, except for one where three police officers were put on trial due to the diligence of lawyers who identified the weapon which shot the cartridge removed from the victim's skull in autopsy.<sup>1943</sup>

From then on, the law enforcement's excessive use of lethal force in public protests became the new norm in the Kurdish region. Impunity prevailed, with old and new judicial tactics. In some cases, courts refused to hold members of the security forces accountable even where lawyers were able to trace the bullets to the weapons of individual police officers who killed the victims. In one case, a university student was killed as a result of indiscriminate firing by the police at a peaceful demonstration organized in Diyarbakır on 6 December 2009 to protest against the dissolution of the Democratic Society Party (*Demokratik Toplum Partisi-DTP*) by the Constitutional Court (*Anayasa Mahkemesi-AYM*). The protest was also attended by DTP mayors and members of the parliament. None of the protesters was armed. The police officers gathered all the spent bullet cases from the crime scene and threw them into the toilet of their station. Due to the diligence of the victim's lawyers, several spent bullet cases were recovered from the toilet and sent to forensic examination, which established that they had been discharged from the pistols of three police officers. These officers admitted to the prosecutor

---

<sup>1939</sup> ECtHR, *Makbule Kaymaz and Others*, Application no. 651/10, Judgment, 24 February 2014.

<sup>1940</sup> *Ibid.*

<sup>1941</sup> See Chapter 3.

<sup>1942</sup> Interview with Reyhan Yalçındağ, Diyarbakır, 1 April 2015.

<sup>1943</sup> Interview with Barış Yavuz, Diyarbakır, 31 March 2015.

that they used firearms during the demonstration and threw the spent bullet cases into the toilet. Despite all this evidence, the prosecutor decided not to open a criminal investigation on the ground that the victim was “killed as a result of a shot fired by an unidentified individual”; that it was not possible to identify whether the bullet was fired from a weapon belonging to a police officer on the scene; that the empty bullet hatches on the scene resulted from the police officers’ firing in the air to protect themselves; and that the officers collected these hatches and “threw into the toilet of the police house to prevent them from ending up in the hands of people with ulterior motives.”<sup>1944</sup> The victim’s family petitioned the ECtHR in 2011. Communicated to the government in 2015, the case is currently pending in Strasbourg.<sup>1945</sup>

The most striking evidence that it was business as usual in Turkey’s Kurdish region came with the indiscriminate killing of 34 Kurdish civilians, including 17 minors, by military jets on 28 December 2011. The victims were residents of Ortasu (*Roboski*) and Gülyazı (*Bujeh*) hamlets located on the Iraqi border. On the night of the incident, the group containing 37 civilians had crossed the border back from Iraqi Kurdistan. They were “smuggling diesel fuel, tea, and sugar, carried on mules, a centuries-old practice in a region with few employment opportunities”,<sup>1946</sup> with the knowledge and implicit consent of the military and administrative authorities in the region.<sup>1947</sup> In a statement on 29 December, the Chief of Staff of the Turkish Armed Forces claimed that it judged an airstrike to be necessary because it had received intelligence that the PKK was preparing to carry out assaults from across the border, it was known from past assaults that the PKK used mules to transport weapons into Turkey, and the drone-generated intelligence showed that a group was moving towards Turkey from Iraq.<sup>1948</sup> The government denied having authorized the strikes. There has been “no direct apology, from either the military or civilian authorities”, concluded the European Commission.<sup>1949</sup> The case ended in military courts after the civilian prosecutor “washed its hands of the case”.<sup>1950</sup> The investigation showed that the bombardment was carried out by the Turkish military and approved by the Chief of Staff, presumably with the consent of the government, allegedly on the basis that the victims were mistaken as PKK militants. The investigation ended in December 2013, when the military prosecutor dismissed the case on the grounds that the killings were an unavoidable mistake, “prov[ing] once again that in Turkey the state can kill civilians and get away with it”.<sup>1951</sup>

Impunity was a state policy endorsed by the concerted and coordinated efforts of all branches of the government. In September 2015, only three months after his acquittal by the judiciary, Musa Çitil was rewarded by the AKP government with one of the highest military offices in

---

<sup>1944</sup> Diyarbakır Chief Prosecutor’s Office, Decision Regarding the Absence of Need for Additional Prosecution, Investigation no. 2010/328, Decision no. 2010/183, 20 September 2010, at p.3 (signed by public prosecutor Ahmet Karaca, no. 38116).

<sup>1945</sup> Also for the ECtHR’s statement of the facts, see ECtHR, *Melese Erdem and Mahmut Erdem v. Turkey*, Application no. 64727/11, communicated to the Turkish government on 26 January 2015.

<sup>1946</sup> Human Rights Watch, *Turkey: No Justice for Airstrike Victims*, 27 December 2012, available at: [hrw.org/news/2012/12/27/turkey-no-justice-airstrike-victims](http://hrw.org/news/2012/12/27/turkey-no-justice-airstrike-victims).

<sup>1947</sup> *Cumhuriyet*, “Jetler Sivilleri Vurdu” [The Jets Struck the Civilians], 30 December 2011.

<sup>1948</sup> *Sabah*, “Genelkurmay’dan Uludere Açıklaması” [The Chief of Staff’s Statement on Uludere], 29 December 2011.

<sup>1949</sup> European Commission, *Turkey 2012 Progress Report*, at p. 34.

<sup>1950</sup> Emma Sinclair-Webb, *Dispatches: Impunity and Cover-up in Turkey*, *Human Rights Watch*, 7 January 2014, available at: [hrw.org/news/2014/01/07/dispatches-impunity-and-cover-turkey](http://hrw.org/news/2014/01/07/dispatches-impunity-and-cover-turkey).

<sup>1951</sup> *Ibid.*

the Kurdish region. One of the principal perpetrators of state violence of the 1990s implicated in two separate ECtHR judgments, including *Aydın* where the Court found that detainees held in the gendarmerie station under his command had been subject to rape and other forms of torture, Çitil was promoted to the rank of major general to head the regional command of the military police in Diyarbakır. Not only was Musa Çitil not held criminally responsible for his past crimes against Kurdish civilians, he was given the license to commit new ones.

#### 6.4.2 When “Partnering” goes Wrong

The post-2004 reform process in the ECHR system brought several novelties in the Court’s adjudication. Taking on a proactive role to assist the CoM in the execution of judgments, the ECtHR started to issue “Article 46 rulings” in select cases.<sup>1952</sup> Standing somewhere between regular and pilot judgments, these rulings are employed in cases raising novel legal issues, irrespective of whether there are repetitive pending cases, to give member states direction in the general measures they need to adopt to prevent similar breaches of the Convention. In its 2008 ruling in *Aleksanyan v. Russia*, where it found the applicant’s continuous detention unacceptable in view of the gravity of his illness and ordered the government to find an “other, reasonable and less stringent, measure of restraint”,<sup>1953</sup> the Court explained the difference between pilot and Article 46 judgments as follows:

However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a systemic situation it has found to exist (see *Broniowski v. Poland...*). In other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure.<sup>1954</sup>

Another novelty was the Court’s decision to prioritize pending cases which raise Articles 2 and 3 violations rather than continuing to adjudicate the admitted cases in the chronological order in which they were filed. In the case of Turkey, the combination of this decision and the new Article 46 procedure led to landmark judgments where the ECtHR called for specific reform measures to prevent future violations of Articles 2 and 3, and the simultaneous release of judgments in cases which are residues of the 1990s and those concerning ongoing gross human rights abuses. These developments narrowed the time lag between the violation and the judgment, leading the ECtHR to speak forcefully about the present as well as the past.

Since 2012, the Court issued several Article 46 rulings where it found substantive violations of Article 2 in the Kurdish region – in the 1990s and since the mid-2000s.<sup>1955</sup> The most exceptional

---

<sup>1952</sup> Article 46 (1) requires the High Contracting Parties to “abide by the final judgment of the Court”. The second clause tasks the CoM with the supervision of the final judgments of the Court.

<sup>1953</sup> ECtHR, *Aleksanyan v. Russia*, Application no. 46468/06, Judgment, 22 December 2008, at para. 240.

<sup>1954</sup> *Ibid*, at para. 239.

<sup>1955</sup> ECtHR, *Nihayet Arıcı v. Turkey*, Application nos. 24604/04 and 16855/05, Judgment, 23 October 2012 (establishing state responsibility for the killing of the applicants’ relatives during a military operation and ordering the government to conduct effective investigations under the CoM’s supervision with a view to identifying the circumstances of the deaths); ECtHR, *Tekçi and Others v. Turkey*, Application no. 13660/05, Judgment, 10 December 2013 (establishing state responsibility for the disappearance and killing of the

judgment, for reasons not limited to the Article 46 procedure, was *Benzer and Others*.<sup>1956</sup> The case concerns the indiscriminate aerial bombardment of two Kurdish villages by Turkish military jets on 26 March 1994.<sup>1957</sup> The applicants reported that military planes and a helicopter opened machine gun fire and dropped bombs “as big as a table”, killing 38 civilians, mostly children, elderly and women. The authorities did not visit the villages for an on-site investigation, did not carry out post-mortem examination on any of the deceased with the exception of a child nor did they offer humanitarian or medical help to the survivors. The prosecutor, without conducting an investigation, taking testimonies or collecting evidence, concluded that the PKK had carried out the bombing and referred the case to the military court. Based on a statement by the 2<sup>nd</sup> Air Force Command in Diyarbakır that none of their planes or helicopters conducted flights on the relevant place and date, the military prosecutor issued non-jurisdiction on grounds of lack of evidence showing the involvement of the military. From the civilian prosecutor’s conclusion in 1996 that the bombings were carried out by the PKK to the military prosecutor’s implication in 2006 that they might have been done by another state, official narrative based on denial and counter-blame remained intact.

When the case was back in the hands of civilian courts, the EU accession negotiations had commenced and the government had supposedly initiated legal reforms to eradicate impunity. These developments did not alter the progress of the case. The gendarmes, and not the prosecutor, took testimonies from individuals who did not witness the attacks instead of the survivors whose whereabouts were known. The ‘witnesses’ were village guards who claimed that the PKK had killed the victims. The gendarmes carried out a fact-finding in November 2008, 14 years after the events, and reported that there was no evidence left on the sites. Meanwhile, on 26 May 2006, the survivors petitioned the ECtHR through their lawyer Tahir Elçi. In June 2012, Elçi sent the Court a flight log belonging to the Turkish Air Force and a letter from the Civil Aviation Directorate of the Ministry of Transportation, showing that before noon on 26 March 1994 two F-4 and two F-16 fighter jets armed with two MK83 bombs and four MK82 bombs carried out a “successful mission” in the region where the villages were located.

What is striking about this case, in addition to the gravity of the violations, is the attitude of the AKP government, which had claimed and received international recognition for its reform agenda. Resorting to the all too well-known tactics of denial, misrepresentation, counter-blame and secrecy, the government claimed that the applicants’ lawyer had advised his clients to invent the entire story to obtain compensation, implied that the applicants lied, claimed that the deceased were killed by the PKK, and did not submit, despite an express request by the Court, a copy of the entire investigation file. The Court’s response was unequivocal. It found “disingenuous” the efforts to discredit the applicants’ lawyer “in a case of such exceptional seriousness”,<sup>1958</sup> expressed amazement at the attribution of guilt to the PKK when “there was not a single document in the investigation files containing even a suggestion that the PKK were

---

applicants’ relative by the security forces and ordering the government to expeditiously prosecute the two identified suspects under the CoM’s supervision);

<sup>1956</sup> The analysis of this case here draws on Kurban, “Forsaking Individual Justice”.

<sup>1957</sup> ECtHR, *Benzer and Others*.

<sup>1958</sup> *Ibid*, at para. 169-170.

involved in the attacks”,<sup>1959</sup> ridiculed the expectation from villagers “with no specialist knowledge of military aviation” to identify the planes, found “clearly lack[ing] any logic” the claim that a foreign aircraft could have bombed the villages without having been detected<sup>1960</sup> and attributed particular weight to the fact that the government withheld the flight log.<sup>1961</sup> Concluding that the villages were bombed by the Turkish military, the Court held that “the inadequacy of the investigation was the result of the national investigating authorities’ unwillingness officially to establish the truth and punish those responsible”.<sup>1962</sup>

The result was an exceptional judgment. The Court found a procedural and a substantive violation of Article 2. It concluded that witnessing the deaths of their family members, having personally to collect “what was left of the bodies” and put them in plastic bags for burial in mass graves without religious services, and not having received “even the minimum humanitarian assistance” from the authorities after the bombing must have caused the applicants suffering “attaining the threshold of inhuman and degrading treatment” in violation of Article 3.<sup>1963</sup> In addition, for the first time in its case law on the Kurdish conflict, and only the second in its overall jurisprudence,<sup>1964</sup> the Court cited the principles of international humanitarian law regulating the use of force in internal armed conflicts. For the ECtHR, which had hitherto refrained from naming the Kurdish issue an armed conflict, this was undoubtedly a turning point. Finally, the Court rewarded the applicants a total of 2,310,700 Euros in compensation and exceptionally ordered, under Article 46, the government to carry out an effective criminal investigation under the supervision of the CoM to identify and punish those responsible for the bombing of the villages “in order to prevent impunity”.<sup>1965</sup>

At the same time, the ECtHR’s judgment in *Benzer* has aspects which are squarely at odds with its decision in *İçyer*. The Court considered the independence and impartiality of a village guard whose testimony was relied on by the government to be “questionable” because he “was employed by the State”.<sup>1966</sup> In *İçyer*, however, it had not reached a similar conclusion about the compensation commissions which are dominated by civil servants employed by the state and operating under the risk of disciplinary sanctions. In *Benzer*, the Court endorsed *restitutio in integrum* in noting that Article 41 imposed on the contracting parties an obligation to restore the victim, as far as possible, to his/her situation before the breach. This was one of those “exceptional cases, where the very nature of the violation found was such as to leave no real choice between measures capable of remedying it”,<sup>1967</sup> requiring the Court to indicate the measures Turkey had to take. The Court did not elaborate on what rendered *Benzer* so exceptional compared to earlier cases involving mass unlawful killings, enforced

---

<sup>1959</sup> Ibid, at para. 172.

<sup>1960</sup> Ibid, at para. 174.

<sup>1961</sup> Ibid, at para. 156.

<sup>1962</sup> Ibid, at para. 197.

<sup>1963</sup> Ibid, at para. 209-211.

<sup>1964</sup> ECtHR, *Isayeva v Russia*, Application no. 57950/00, Judgment, 24 February 2005. For a more recent judgment discussing the relationship between international human rights law and humanitarian law in the context of the invasion of Iraq by the United Kingdom and the United States, see ECtHR, *Hassan v. the United Kingdom*, GC, Application no. 29750/09, Judgment, 16 September 2014.

<sup>1965</sup> ECtHR, *Benzer and Others*, at para. 219.

<sup>1966</sup> Ibid, at para. 170.

<sup>1967</sup> Ibid, at para. 217.

disappearances and village burnings. While the Court condemned Turkey's "unwillingness officially to establish the truth and punish those responsible",<sup>1968</sup> it did not address its own responsibility in condoning this state behaviour in *İçyer* by upholding a law which does not entail any mechanism to hold the perpetrators accountable and rests on the denial of state responsibility for the atrocities giving rise to the damages it compensates.

In 2014, the Court issued an Article 46 judgment on the use of lethal force by the security forces against peaceful protesters. *Ataykaya* concerned an unlawful killing which occurred during the 28-31 March 2006 demonstrations in Diyarbakır. In reference to its recent rulings that Turkish law lacked any specific provisions governing the use of tear-gas grenades during protests,<sup>1969</sup> the Court reiterated its calls upon the Turkish government to adopt a clear set of rules in that regard to minimise the risk of death and injury. In terms of the execution of its judgment in *Ataykaya*, where it found substantive and procedural violations of Article 2, the Court called on the government to take measures to prevent impunity by an effective criminal investigation aimed at the identification and, if appropriate, punishment of those responsible for the victim and at the establishment of the responsibility of senior police officers.<sup>1970</sup>

In addition to these Article 46 rulings, the Court issued new judgments in cases concerning enforced disappearances and extrajudicial executions in the 1990s<sup>1971</sup> and unlawful killings occurring since the mid-2000s, including the earlier-discussed summary execution of 13-year-old Uğur Kaymaz and his father in 2004.<sup>1972</sup> In 2015 and 2016, the ECtHR found substantive and/or procedural violations of Article 2 in three more cases concerning the use of excessive force by the police against 2006 protests in Diyarbakır.<sup>1973</sup>

Finally, the ECtHR revisited the impunity issue. In unlawful killing cases where domestic courts did prosecute and convict the responsible security officers, but lowered and postponed their sentences or suspended the pronouncement of the judgment, the ECtHR started to automatically find Article 2 violations on the grounds that the unlawful killing had already been established at the domestic level. In a case concerning an unlawful killing by a police officer in western Turkey, the ECtHR found that the "extremely lenient" sentence of one year, one month and ten days, which was then suspended altogether, effectively rendered the conviction ineffective and constituted a violation of Article 2 in its procedural aspect.<sup>1974</sup> In a case

---

<sup>1968</sup> Ibid at para. 197.

<sup>1969</sup> In cases where the Turkish law enforcement's systemic use of force in peaceful protests had caused injury to the applicants, the ECtHR called on the government to prevent similar Article 3 violations by adopting clearer set of rules in the implementation of the regulation on the use of tear gas and tear-gas grenades. ECtHR, *Abdullah Yaşa and Others v. Turkey*, Application no. 44827/08, Judgment, 16 July 2013; *İzci v. Turkey*, Application no. 42606/05, Judgment, 23 July 2013.

<sup>1970</sup> ECtHR, *Ataykaya v. Turkey*, Application no. 50275/08, Judgment, 22 July 2014.

<sup>1971</sup> ECtHR, *Bozkır and Others v. Turkey*, Application no. 24589/04, Judgment, 26 February 2013; ECtHR, *Meryem Çelik and Others v. Turkey*, Application no. 3598/03, Judgment, 16 April 2013.

<sup>1972</sup> ECtHR, *Makbule Kaymaz* (finding both substantive and procedural violation of Article 2).

<sup>1973</sup> ECtHR, *Behçet Söğüt and Others v. Turkey*, Application no. 22931/09, Judgment, 20 October 2015 (finding procedural violation of Article 2 in the death of a 78-year-old man due to injuries caused by stone throwing); ECtHR, *Hakim İpek v. Turkey*, Application no. 47532/09, Judgment, 10 November 2015 (finding procedural violation of Article 2 in the injury of an individual by gunfire he alleged to have been fired by police officers); *Mızrak and Atay v. Turkey*, Application no. 65146/12, Judgment, 18 October 2016 (finding substantive and procedural violation of Article 2 in the death of a protestor due to tear-gas grenade thrown by police officers);

<sup>1974</sup> ECtHR, *Külah and Koyuncu*, Application no. 24827/95, Judgment, 23 April 2013, at para. 42-44.

concerning an unlawful killing by a police officer in western Turkey, the ECtHR noted that the suspension of the pronouncement of the judgment “results in the impunity of the perpetrators.”<sup>1975</sup> After several more such judgments, in a 2015 ruling, the Court identified three principal practices by Turkish judicial authorities which have enabled the perpetrators of torture, ill treatment and unlawful killings to escape punishment. According to the Court, the suspension of criminal proceedings or the execution of sentences is “comparable to a partial amnesty [because]... the convicted officers enjoy virtual impunity despite their conviction”.<sup>1976</sup> The reduction of sentences followed by the suspension of their pronouncement “suggests that the national judges exercise their discretion to minimise the consequences of extremely serious unlawful acts rather than show that such acts can in no way be tolerated”.<sup>1977</sup> Finally, in failing to act diligently and expediting the investigation and prosecution of serious crimes, the judicial authorities allowed criminal proceedings to be time-barred on account of the expiration of statute of limitations.

## 6.5 Conclusion: The Legacy of Strasbourg in Turkey’s Kurdish Conflict

So, what has been the impact of the Convention institutions in the Kurdish conflict? In light of Turkey’s refusal to hold accountable the perpetrators of the 1990s *and* continuing engagement in gross violations in the Kurdish region, what conclusion can and should be drawn regarding the effectiveness of the ECHR system? Is it solely a matter of recalcitrance on the part of the Turkish government? Or does it also speak to the ECtHR itself? Has the Court exhausted the jurisprudential doctrines available to it in its oversight of state violence in the Kurdish region?

During the first phase of their engagement in the Kurdish conflict, the Convention institutions wrote history. They put on written record what had hitherto remained oral, creating a juridical history of state violence under emergency rule in Turkey. As seasoned Kurdish human rights lawyer Sezgin Tanrikulu has noted, through their fact-finding hearings, reports and judgments, the EComHR and the ECtHR effectively served as a “quasi-truth commission”.<sup>1978</sup> In allowing the applicants to directly petition Strasbourg (but on a case-by-case basis), the Court exposed the Turkish judiciary’s complicity in state violence. In incrementally relaxing the procedural rules in favour of the victims (but with nine years of delay) in response to Turkey’s failure to fulfil its Article 38 obligations, it established state responsibility in enforced disappearances. A declaratory judgment often coupled with compensation, albeit after a long delay, provided the Kurdish victims with the justice they had been denied at home. In concluding that the security forces tortured, raped, disappeared, murdered, displaced innocent civilians and were never held accountable, the Court’s rulings revealed Turkey as what it was; a rogue state disregarding basic notions of the rule of law under the disguise of counter-terrorism. They also empowered Kurdish victims in disclosing the falsehood the state had created through the concerted efforts

---

<sup>1975</sup> ECtHR, *Kasap and Others v. Turkey*, Application no. 8656/10, Judgment, 14 January 2014, at para. 60.

<sup>1976</sup> ECtHR, *Uğur v. Turkey*, Application no. 37308/05, Judgment, 13 January 2015, at para. 99.

<sup>1977</sup> *Ibid*, at para. 100.

<sup>1978</sup> Sezgin Tanrikulu, “Bir Hakikat Komisyonu Olarak İnsan Hakları Avrupa Mahkemesi” [The European Court of Human Rights as a Truth Commission], in Kerem Altıparmak (ed.), *Fifty Years of the European Court of Human Rights: Failure or Success* (Ankara Barosu Yayınları, 2009), pp. 222-232.

of all of its institutions and restored their dignity in the eyes of domestic and international community.

At the same time, while *individual* Kurds have been vindicated, the Kurds *as a people* have not. Invoking the law, the ECtHR disregarded history and politics. Hiding behind legal procedures, it lost sight of the principles shaping them. As Judge Bonello and several others constantly reminded, it *was* possible for the Court to deliver justice without transgressing the boundaries of judicial review. While it took the IACtHR one case, and its first case, to name the Honduran policy for what it was, despite hundreds of judgments in nearly identical cases, the Court has never dared to pass judgment on the core issue giving rise to these abuses: organized and discriminatory state violence against a minority carried out, covered up and legitimized by an entire government apparatus. Its unwillingness to condemn this policy was embedded in the Court's treatment of Turkey as a democratic regime based on the rule of law. The implication of this was, for example, to attribute evidentiary value to the authorities' denial of the crimes and to expect victims to produce hard evidence to prove their allegations beyond a reasonable doubt.

The futility of the case-by-case approach to individual justice is evident. Take the Court's acclaimed application of its positive obligations test to the Kurdish cases. This was seemingly a practical solution to establish state responsibility in Article 2 violations without easing the "beyond a reasonable doubt" standard of proof. Where the authorities knew or should have known that an individual faces a life-threatening situation, held the Court, they were under an obligation to take operational measures to save his/her life. The paradox cannot be overstated. In the context of the Kurdish conflict, which state authorities were supposed to protect the disappeared Kurdish dissidents? Prosecutors of the likes of Bekir Selçuk? Security officers documented to have been directly or indirectly involved in enforced disappearance and extrajudicial executions at the first place? While it makes perfect sense to impose on the United Kingdom positive obligations to protect the lives of those serving time in its prisons, it is at best naive to expect the Turkish authorities to protect the Kurdish political dissidents they deemed to be PKK supporters and that they themselves harassed, detained and threatened.

One of the striking aspects of the ECtHR's jurisprudence is how inconsistent and incoherent it has been despite its claims of judicial meticulousness. In establishing state responsibility for Article 2 violations, the Court accepted circumstantial evidence in enforced disappearance cases but not in extrajudicial executions. Reluctant to find administrative practice, the Court shied away from identifying the pattern of state violence despite the conclusions of numerous UN and CoE non-judicial bodies and even of the Turkish Parliament. While condemning the village guard system, though with delay and without calling for its abolishment, the Court has never questioned the use of confessions in military operations and intelligence-gathering. When it was asked to summon a former confessor whose revelations had led to the discovery of the remains of a disappeared man and documented the involvement of the Turkish security forces in crimes, the ECtHR declined to do so. While it has, but with significant delay, effectively identified the *modus operandi* of state violence and established state responsibility by linking individual cases to the pattern of enforced disappearances, the Court has never taken the extra small step of saying that the Emperor was naked.

Then came the second phase when, motivated by self-interest and/or political expediency, the ECtHR went against its own case law by approving Turkey's Compensation Law as an effective domestic remedy and thereby closed the door it had opened to Kurdish victims of state violence two decades earlier. If there is one ECtHR ruling which is beyond comprehension, even by strictly legal standards, it is *İçyer*. In upholding a law which provides partial compensation to only a group of eligible victims of gross human rights abuses and does not entail even a promise of truth and justice, the Court abandoned its own case law and effectively endorsed Turkey's impunity regime. After *İçyer*, any analysis which portrays the ECHR as an effective system and Turkey's continuing human rights abuses as solely a compliance problem is not credible.

By 2004, the prevalent view among the European governments and institutions had become that there was a 'new' Turkey under the leadership of a reform-minded government determined to overhaul the country's authoritarian legal regime and to come to terms with the past. This new outlook led the EU to prematurely open accession talks with Turkey and the ECHR system to endorse the cosmetic reforms adopted by the government to execute the ECtHR rulings. Two years later, the prematurity of these decisions became apparent when the government, enabled by the halting of the EU accession process, started to roll back the reforms and granted security forces extraordinary new powers enabling them to engage in old (extra-judicial executions) and new (the use of lethal force in demonstrations) forms of violence against Kurdish civilians. By the late 2000s, it became evident that the 'old' Turkey was well and alive.

Thus, the ECtHR's engagement in the Kurdish conflict entered into its third phase. Cognizant of the fact that Turkey's impunity regime was still in full force, shielding the perpetrators of old and new crimes against criminal accountability, the Court started to issue strong judgments breaking new ground. This time, the Court's transfer of knowledge and experience between the Kurdish and Chechen cases had started to work in the reverse direction. The reference to international humanitarian law in *Benzer* was the first in a case against Turkey, following the precedent set in *Isayeva v Russia*. The Court's issuing of Article 46 judgments in the Kurdish cases was also inspired by its case law on the Chechen conflict. Yet, as ground-breaking as they were, these moves were too little, too late. Too little because the Court's judgments on gross human rights abuses in the Kurdish region suffer from the same decontextualized and ahistorical approach it had adopted in its earlier engagement. And too late because Turkey's EU accession process is now effectively over. In the absence of this truly effective external force of pressure, Turkey's motivations for compliance are no longer much different from Russia's minimalist approach; to keep up its international reputation as much as its authoritarianism allows.

Finally, a note on the ECHR scholarship. Research conducted by Hafiza Merkezi, a domestic NGO working on transitional justice in Turkey, identified 253 enforced disappearance cases in the Kurdish region in the 1990s. In 69 percent of these, the Turkish judicial authorities did not conduct any investigation after the passage of an average of 19 years and nine months.<sup>1979</sup> While criminal charges were brought in the rest, as of 2014, 17 percent were still pending, 13 percent resulted in the acquittal of defendants, the suspension of proceedings or the expiration of the

---

<sup>1979</sup> Gülşah Kurt, *Cezasızlık Sorunu: Soruşturma Süreci* [The Impunity Problem: Investigation Process] (Hakikat Adalet Hafıza Merkezi, 2014), at p. 9.

statute of limitations and only one percent resulted in a conviction. In contrast, of the 116 cases (out of the same 253) which were taken to Strasbourg, the ECtHR found a violation of Articles 2, 3 and 13 in 78 percent, while nine percent resulted in a friendly settlement. Thus, state responsibility was established in 87 percent of the disappearance cases which found their way to Strasbourg.<sup>1980</sup> These findings reveal not only the systematic denial of justice to victims of state violence in Turkey but also the ECtHR's indispensable role in partially filling that gap. They also show how misplaced are the calls for a decentralized ECHR system based on the central role of domestic judicial systems in delivering individual justice, as far as countries such as Turkey are concerned. The Turkish judges and prosecutors who struck the ECtHR with their complicity in the 1990s are still in power (some in person, others in ideology) and are hardly the desirable and suitable "partner" the ECtHR can rely on for the domestic resolution of gross violations.<sup>1981</sup>

---

<sup>1980</sup> Ibid.

<sup>1981</sup> Sadurski, "Partnering with Strasbourg".



---

## Conclusions and Implications

### 7.1 Main Research Findings

In authoritarian regimes where the state is engaged in violence against a minority group in the context of an ethno-political conflict and claiming legitimacy from counter-terrorism, what are the possibilities and limitations for consequential engagement by a transnational human rights court? This study has aimed to answer this question by taking the ECtHR's engagement in Turkey's Kurdish conflict as a case study. In doing so, I asked the following primary question: how has the Court approached the gross abuses committed or condoned by the Turkish security forces in the context of the emergency rule governing the Kurdish region? Has it exhausted the jurisprudential doctrines available to it in its oversight of state violence? To what extent does the ECHR regime empower legal mobilization by minority groups in an authoritarian context?

To properly address the ways in which an authoritarian regime has handled the group rights claims arising from an ethno-political conflict, I also looked into the Turkish state's restrictions of Kurdish linguistic and political rights and asked the following secondary research question: In light of the ECHR's individualistic approach to human rights protection, how has the ECtHR dealt with the Kurds' linguistic rights claims as well as political rights claims which have collective elements? As a transnational human rights court reputable for its strong defence of political freedoms, how has the ECtHR addressed the continuing restrictions of the political activities of Kurdish politicians, parties and activists in Turkey?

#### 7.1.1 Transnational Judicial Oversight of State Violence

The ECtHR's oversight of gross abuses committed by the Turkish security forces in the Kurdish region consisted of cycles. The Court has been at its most innovative, boldest and most receptive during the first phase of its engagement, which lasted from the early 1990s until the early 2000s. The novelty of the legal issues raised in the Kurdish cases obliged and enabled the Court to incrementally develop its procedural jurisprudence by, for instance, establishing state responsibility for enforced disappearances based on circumstantial evidence. In the face of Turkey's categorical denial of the allegations in all cases and the absence of any meaningful domestic investigation, the ECtHR displayed flexibility in its evidentiary rules concerning the

burden of proof and admissibility rules regarding the exhaustion of domestic remedies. Through fact-finding hearings, the Convention institutions created a juridical history of state violence in Turkey's Kurdish region. The Court's conclusions that the security forces tortured, raped, disappeared, murdered and displaced innocent civilians and were never held accountable for their crimes revealed Turkey for what it was; a rogue state disregarding the basic notions of the rule of law. Moreover, by enabling the victims of these atrocities to tell their stories before a court, the Convention institutions restored their dignity in the eyes of domestic and international public opinion. In sum, during this first phase, by flexibly applying its procedural rules and incrementally developing its substantive jurisprudence, the Court showed that it was possible for a transnational human rights court to have a consequential engagement in state violence. Here, "consequential" does not imply bringing change in state policies. In the context of the 1990s when Turkey was vehemently denying the existence of human rights abuses, the ECtHR's consequential impact has been to document state violence, give voice to its victims and discredit Turkey's official narrative.

At the same time, while the Court was receptive to some of the claims in the right to life and torture cases, it was persistently unreceptive to others. Even during this Golden Age when Kurdish legal mobilization had its highest impact on the Court's case law, the ECtHR never exhausted the jurisprudential doctrines available to it. Its procedural flexibility was always subject to self-limitations, which are not inherent in the function of a regional human rights court. The Court insisted on imposing on the applicants a prohibitively high standard of proof which, as Judge Bonello stressed, was impossible to meet in light of the Turkish government's denial of the crimes and refusal to disclose the material evidence in its exclusive possession. Unlike the Inter-American Court of Human Rights (IACtHR) which understood that a state-sanctioned policy of enforced disappearances is "impossible to prove... [without] circumstantial or indirect evidence or by logical inference"<sup>1982</sup> and considered various forms of evidence including newspaper articles, the ECtHR refused to consider as evidence of state violence even the investigation reports of the Turkish Parliament and Prime Ministry. While it is reasonable for a transnational court to require the establishment of facts by domestic "judicial or factfinding exercise"<sup>1983</sup> in democratic regimes, it is against the principle of justice to do so with respect to an authoritarian regime where a minority group has been systematically subject to egregious human rights abuses with the concerted efforts of the entire state apparatus, including a complicit judiciary. The ECtHR failed to appreciate that the Turkish Parliament, despite all its limitations, was the only government body which had spoken up against state violence and impunity in the Kurdish region. It was also striking that the Court did not defer to the UN and CoE non-judicial mechanisms which had concluded, based on their fact-finding missions, on the existence of a state practice of gross violations in the emergency region.

Another way in which the Court failed to exhaust the available jurisprudential tools concerns its persistent refusal to conclude the existence of an administrative practice in the Kurdish region. While exempting the applicants from the domestic remedies rule, the ECtHR rigidly stuck to its case-by-case approach. While it incrementally, though belatedly, identified the

---

<sup>1982</sup> IACtHR, *Velásquez Rodríguez v. Honduras*, Series C, no. 4, 29 July 1988, at para. 124.

<sup>1983</sup> EComHR, *Mahmut Kaya v. Turkey*, Application No. 22535/93, Report, 23 October 1998, at para. 334.

*modus operandi* of enforced disappearances and established state responsibility in individual cases which fit to this pattern, the Court never condemned Turkey for engaging in a policy of violence targeting Kurdish civilians because of their ethnicity and/or (perceived) political opinions. Again, this was not inevitable; the Inter-American system had already demonstrated that it was legally possible and politically acceptable for a regional court to identify administrative practice based on a single case and circumstantial evidence. The ECtHR's failure to identify a policy of extrajudicial executions, enforced disappearances, torture and forced displacements in Turkey's emergency region was not an inherent limitation of transnational judicial review, but a political choice. For the ECtHR, Turkey was engaged in counter-terrorism against the Kurdistan Workers' Party (*Partiya Karkerên Kurdistan*-PKK), not in a deeply rooted ethno-political conflict with its Kurdish minority. It was due to this framing that the Court has never questioned the necessity of protracted emergency rule in the Kurdish region. Even in its proportionality analysis of emergency measures, the Court was unduly self-restrained. While finding prolonged incommunicado detention periods not to be necessary in a democratic society, for example, the Court has never questioned the practice of exiling political dissidents engaged in human rights activities under the pretext of maintaining public security.

The second phase in the ECtHR's engagement in the Kurdish cases lasted through the 2000s and was shaped by game-changing political developments in Turkey, in Europe and in bilateral relations. The enlargement of the CoE and the improvement of Turkey-EU relations reinforced each other, leading to the convergence of the interests of Ankara and Strasbourg and the diminishing of the Court's receptiveness to Kurdish legal mobilization. The EU's treatment of the execution of ECtHR judgments as an accession criterion, the AKP's eagerness to improve Turkey's tarnished international reputation and the Court's interest in easing its docket led to an unprecedented cooperation between the parties. The Turkish government's resort to counter-tactics to lessen the ECtHR's involvement in the Kurdish conflict, first through unilateral declarations which offered compensation to victims in individual cases and later by adopting a compensation law as a wholesale solution to get rid of the Kurdish cases pending in Strasbourg, resonated with the ECtHR. The Court's willingness to get rid of as many pending cases as possible was so strong that it went against its established jurisprudence and endorsed Turkey's strategy of compensating the material losses of victims without offering them apology, truth or justice. For a brief period which ended with the Grand Chamber's intervention, the ECtHR penalized the applicants who rejected the government's settlement offers by striking out their petitions. Then, in *İçyer*, it approved the compensation law as an effective domestic remedy and effectively endorsed Turkey's impunity regime it had been condemning since its first ruling in *Akdivar*. Thus, during a brief period when the ECtHR had the opportunity to have a truly consequential engagement in the Kurdish conflict in the sense of bringing actual change in government policies, it held its interests in easing its docket above the principle of individual justice.

With the deterioration of Turkey-EU relations in the mid-2000s, the ECtHR's engagement in the Kurdish conflict entered into its third phase. As soon as the EU negotiations halted soon after they had commenced, the AKP government turned its attention to domestic politics and, in the name of attracting the nationalist votes to preserve its single-party government, started to roll back the human rights reforms it had adopted to gain accession status. The heightened

powers given to security forces led to the resumption of state violence in the Kurdish region and, consequently, the arrival in Strasbourg of new cases concerning gross human rights abuses, disproving the prevalent assumption in Europe that the unlawful killings of Kurdish civilians belonged to 'old' Turkey. They also demonstrated that impunity prevailed, not only with respect to violations of the 1990s, but also new ones. Meanwhile, as part of the reforms in the ECHR system, the Court had started to prioritize Article 2 and 3 cases on the one hand and issue Article 46 judgments pointing out the specific measures governments need to adopt to prevent similar violations, on the other. As a result, in the early 2010s, the ECtHR issued strongly-worded judgments against Turkey finding substantive Article 2 violations, ordering the Turkish government to conduct effective criminal investigations to identify and punish perpetrators and even, in one case, citing the principles of international humanitarian law.

Yet, as ground-breaking as they were, these moves were too little, too late. Too little because the Court's new judgments on gross human rights abuses in the Kurdish region suffer from the same decontextualized and ahistorical approach as its earlier engagement. For example, while finally raising serious reservations about Turkey's village guard system, the Court has not called for its abolishment. Furthermore, while condemning Turkey's persistent impunity regime, the ECtHR has not addressed its own responsibility in this outcome through its *İçyer* decision. And too late because Turkey's EU accession process is effectively over. In the absence of this truly effective external force of pressure, Turkey's motivations for compliance are no longer much different from Russia's; to keep up its international reputation as much as its authoritarianism allows.

Earlier, I drew on the IACtHR's jurisprudence on state violence in Honduras to point out the possibilities available to a regional human rights court in its oversight of gross violations. While a comparative analysis of the two systems is beyond the scope of this study, the Inter-American model brings to surface a principal limitation of its European counterpart as far as authoritarian regimes are concerned. The Inter-American system is made up of countries which share, among others, a common history (of colonialism, military dictatorships, internal wars), language (with the exception of Brazil) and complete or ongoing political transitions (from dictatorship to democracy and/or war to peace).<sup>1984</sup> Judicial officials tasked with enforcing the Inter-American Convention share similar experiences, legal education, professional formation and, arguably, a perspective on the interplay of law and politics. This shared legacy, at societal and individual levels, arguably bestows on the Inter-American judges a deep understanding of complex and structural human rights problems in the region. Presumably, an IACtHR judge from Argentina does not need much legal argumentation or concrete material evidence to detect and name state violence in Guatemala.

In the ECHR system, Turkey was one of its kind for decades. Until Russia's accession, there was no other contracting party which engaged in systematic violence against an ethnic minority within its borders. The Northern Ireland conflict was a world apart from the Kurdish one. Gross violations in Northern Ireland (qualitatively and quantitatively) dwarfed in comparison to those in the Kurdish region and the governments of the United Kingdom and the Republic of Ireland

---

<sup>1984</sup> While the US and Canada are exceptions, they do not really matter since the former signed but did not ratify and the latter did not even sign the Inter-American Convention on Human Rights.

generally remained within the confines of legality by enabling judicial and municipal oversight of human rights abuses. In Turkey, by contrast, there was utter lawlessness; the systematic and egregious abuses conducted against Kurdish civilians were enabled, tolerated and encouraged by the government and covered up by the medical and judicial professions. The indiscriminate and arbitrary nature of the abuses and the conduct of the entire state apparatus closely resembled those in South and Central America, particularly the latter where it was the unique combination of authoritarianism and violent armed conflicts which enabled unchecked state violence against minorities.<sup>1985</sup>

It is my contention that lacking the life experience of their Latin American counterparts, the early ECtHR and EComHR judges did not have the ability and perhaps the will to think beyond the legal procedures and rules they had been trained to rigidly apply. Unfamiliar, in theory and practice, with state violence by a contracting party to an international human rights convention, they were not able to ‘see’ the atrocities committed by an ECHR signatory under their watch for what they were. Unlike the Inter-American judges who could differentiate between indiscriminate state violence against dissidents and minorities on the one hand and legitimate counter-terrorism measures on the other, the ECtHR judges and lawyers working at the Court’s Registry unquestioningly deferred to the Turkish government. Admittedly, my contention is based solely on a close reading of the ECtHR jurisprudence on Turkey and not supported by empirical research focusing on the decision makers at the Court. Moreover, if is true, it only partially explains the ECtHR’s persistent reluctance to follow the inter-American model. After all, one would expect the Court to have had a steep learning curve based on its own institutional memory in the Kurdish cases. Understanding why the Court failed to exhaust the jurisprudential tools and doctrines available to it in its oversight of state violence in Turkey requires further research based on interviews with generations of ECtHR judges and lawyers at the Registry who worked on the Kurdish cases.<sup>1986</sup>

### **7.1.2 The ECtHR’s Oversight of Kurdish Cultural and Political Rights Claims**

Turkey’s exceptional treatment of its Kurdish citizens has never been limited to a protracted emergency rule in the Kurdish region, but has penetrated its entire legal system. While the 10 percent electoral threshold succeeded to exclude Kurdish parties from the Parliament (until 2015), various bodies of law were used, with the concerted efforts of all government branches, to ban successive Kurdish parties, convict Kurdish politicians for their non-violent advocacy of

---

<sup>1985</sup> In the Southern Cone, the targets of disappearances, extrajudicial killings and torture were political dissidents, whereas in the context of civil war in Central America, governments also indiscriminately attacked impoverished indigenous communities on grounds of harbouring or supporting the guerrillas. Jeffrey Davis, *Seeking Justice in Latin America: Truth, Extra-Territorial Courts, and the Process of Justice* (Cambridge University Press, 2014), at pp. 1-2; Jeffrey Davis and Edward H. Warner, “Reaching Beyond the State: Judicial Independence, the Inter-American Court of Human Rights and Accountability in Guatemala”, *Journal of Human Rights*, vol. 6, no. 2 (2007), pp. 233-255.

<sup>1986</sup> We know from Anthony Lester, a barrister reputable, among others, for his litigation experience at the ECtHR, that the key responsibility for the management of the ECtHR’s docket lies with the Registry staff, not the judges. Lester has called the Court “a factory system, dominated by the Registry, attempting to achieve high productivity in delivering mass production of mainly negative decisions.” Anthony Lester, “The European Court of Human Rights after 50 Years”, in Jonas Christoffersen and Mikael Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011), pp. 98-115, at p. 109.

political and cultural rights and strip Kurdish deputies and mayors of their seats and offices. Through these policies, Turkey has deprived an entire Kurdish constituency of the right to be represented by the politicians and parties of its choice and use its language in political activities and official documents.

Kurdish human rights lawyers contested some of these laws and policies in Strasbourg, pushing the boundaries of the Convention's individual rights framework. While the ECtHR's precedent-setting judgments upholding Kurdish political parties' right to exist and to advocate democratic solutions to the Kurdish conflict have been widely acclaimed in scholarship, the ways in which the Court has avoided to address the Kurds' group rights claims has largely escaped attention. Once again, this approach was not inevitable. Notwithstanding its individualistic approach, the ECHR does allow the Court some room for manoeuvre in the protection of individual rights of minorities. In one instance, the ECtHR was receptive; it upheld the Kurds' right to have their names spelled in official documents in accordance with their own language. This, however, was an exception. In other cases, the Court denied review, did not find a violation or, in several cases where it found Turkey to have violated the Convention, incorrectly framed the legal issue at stake or avoided addressing the central one. In cases concerning linguistic rights, it upheld the ban on the official use of three Kurdish letters which do not exist in the Turkish alphabet and incorrectly framed the prosecution of Kurdish politicians for having spoken Kurdish in election campaigns as the sanctioning of communication between private individuals in violation of freedom of expression rather than between an electorate and its political representatives in violation of the right to free elections. In addressing the Kurds' political rights claims, the ECtHR treated the effective exclusion of Kurdish parties from the Parliament on the basis of Europe's highest electoral threshold as a democratic nation's decision over its electoral system and depicted the dismissal of a Kurdish mayor and members of a municipal council as an intra-administration dispute rather than an infringement of the right to free elections and an anti-democratic intervention into local governance.

While the laws and practices at issue in these cases might be legitimate in liberal democracies, they must be read against an authoritarian state's decades-old centralization and assimilation policies targeting an ethnic minority. Instead of adopting a contextualized and historically grounded approach to Turkey's legal regime, the ECtHR treated these cases in isolation – from history, from each other and from earlier case law. The Court failed to see that the ban on three Kurdish letters had nothing to do with maintaining public order, but is the residue of a historical policy which, at its peak, banned the Kurdish language in its entirety and in every walk of life, including on the street. While the Court noted in one case that Kurdish politicians are justified to speak their mother tongue in election campaigns because many elderly and female Kurdish voters do not speak Turkish, it did not take this fact into account in declining to review the dismissal of an elected mayor and municipal officials because of their decision to provide public services in Kurdish. While municipalities are indeed constituent components of state structure and public authority in democracies, in the case of Turkey, this has never been the case as far as municipalities run by Kurdish parties are concerned. The Kurdish mayor who was dismissed

from office belonged to the same political tradition as dozens of Kurdish parliamentarians who had been stripped of their seats and provisionally banned from politics following the dissolution of their parties, which the Court had time and again found to be in violation of freedom of association and the right to free elections. And then there is the Grand Chamber's astounding judgment concerning Europe's highest electoral threshold. Not only is 10 percent very high even for a liberal democracy, in the context of Turkey's authoritarian regime, it has for decades aimed at and achieved the exclusion from the Parliament of political parties representing a particular region predominantly populated by a particular ethnic minority. Although the Grand Chamber considered "in general" a 10 percent threshold to be "excessive", it nonetheless did not find a violation of the right to free elections, disregarding the essential and unique role of political parties for democracies which it had emphasized since its judgment in *United Communist Party*. Considering that the ECtHR would one year later not hesitate from rejecting the terms of an international peace agreement which ended the violent conflict in Former Yugoslavia due to the exclusion of members of minority groups from the electoral process,<sup>1987</sup> its failure to show any sensitivity to the political participation rights of Turkey's largest minority group was all the more striking.

Ultimately, the underlying problem of the ECtHR's oversight of Kurdish political and cultural rights claims in Turkey has been the assumption that it was dealing with a democratic regime. This attribution is, in turn, based on a procedural understanding of democracy on the basis of regular, free and fair elections, representative institutions and a constitutional commitment to separation of powers and human rights. It is only where this process is suspended by a military intervention abolishing the parliament, suspending the constitution and cancelling the elections that democracy is understood to be lacking. In reality, democracy is a form of government based on the substantive protection of the rights and liberties of all citizens, the effective constitutional protection of minority rights, an independent and ideologically impartial judiciary, a free and independent media which speaks truth to power, and a civil society which is not inhibited in its participation to and oversight of the political system. At the end of the day, the real indicator of substantive democracy is a country's politico-legal regime, not the regularity, fairness and free nature of its elections.

Turkey has never been a democracy. Brief periods of relative liberalization – in the early 1960s, mid-1980s and early 2000s – did not alter the authoritarianism embedded in its politico-judicial regime. This is not only because rule by elected governments has frequently been interrupted by direct and indirect military interventions, but because the basic elements of substantive democracy have always lacked in Turkey. Exceptional legal regimes, special criminal tribunals and anti-terror laws conferring special powers on the executive have been constant features – during military and civilian rule alike. Throughout Turkey's history, non-violent political dissent has been criminalized as terrorist or separatist propaganda, particularly when expressed by the Kurds and leftists, and minorities were either granted legal recognition at the cost of

---

<sup>1987</sup> ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, GC, Application nos. 27996/06 and 34836/06, Judgment, 22 December 2009.

systematic discrimination or forced into cultural assimilation in return for invitation to effective citizenship. Furthermore, Turkey's current legal regime is not democratic even by procedural standards. The Constitution itself and laws governing the criminal justice system, elections, municipal governance, civil society, political parties, broadcasting, emergency rule, education, judiciary etc. were designed and put in place by the junta which ruled Turkey for three years after the 1980 *coup d'état*. This legal regime has been implemented and expanded by all elected governments governing Turkey since the transition back to civilian rule and to this date remains in place, notwithstanding hundreds of EU-induced reforms.

The ECtHR has never questioned the democratic deficit in the substance or even in the *process* of adoption of Turkey's legal regime. The 10 percent threshold; the restrictions on the official use of the Kurdish language; and the bans on political parties from using Kurdish, advocating minority rights and proposing democratic solutions to the Kurdish question were all legacies of the junta. So oblivious was the Court to this essential fact that the Grand Chamber was misled by the Turkish government in claiming that the electoral threshold was introduced *after* the military regime.<sup>1988</sup> In reality, the law introducing the threshold was, as the Grand Chamber itself noted, adopted in June 1983, whereas the military regime lasted until December that year.<sup>1989</sup> The systematic torture in detention centres which gave rise to the only inter-state complaint against Turkey after the 1980 *coup* has long been a feature of 'interrogation' in gendarmerie and police stations. Furthermore, it has been committed during not only military but also civilian regimes, and not only in the context of the armed conflict with the PKK but also in times of peace. The ECtHR judges did not see (or if they saw, did not declare) that torture was inflicted against not only political dissidents including the Kurds, but, as the CPT documented in its reports, also ordinary suspects accused of petit crimes, defying Turkey's counter-terrorism defence. They never acknowledged the simple fact that enforced disappearances, extrajudicial executions and village destructions were committed by, and only by, civilian governments. In fact, none of the violations contested in the Kurdish cases were committed during military rule. Instead, they were the works of nominally democratic governments who justified their policies with the exigencies caused by the PKK terrorism, which the Court has never questioned.

### 7.1.3 Geopolitics as a Limitation on Effective Transnational Oversight

Of course, there are limitations inherent to transnational justice even where it is exercised by a court willing to push its jurisprudential limits. The most obvious concerns transnational courts' inability to enforce their judgments and their dependence on the will of governments for the execution of their rulings. In the ECHR system, what further complicates the picture is that it is the CoM, the CoE's executive body made up of governments of member states, not the ECtHR which is tasked with overseeing the execution of rulings. Much has been written on the

---

<sup>1988</sup> "Following the military regime between 1980 and 1983, Law no. 2839 on the election of members of the National Assembly, enacted on 13 June 1983, re-established proportional representation, with two electoral thresholds" including the national one. ECtHR, *Yumak and Sadak v. Turkey*, GC, Application no. 10226/03, Judgment, 8 July 2008, at para. 45 (emphasis added).

<sup>1989</sup> This material mistake then led a scholar to erroneously depict the law as a *transitional* measure "enacted in 1983 after a three-year period of military rule". Michael Hamilton, "Transition, Political Royalties and the Order of the State", in Antoine Buyse and Michael Hamilton (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge University Press, 2011), pp. 151-184, at p. 172.

desirability of such an enforcement mechanism and the purpose of this section is not to engage in this debate. Rather, it is to show how geopolitics has been an impeding factor with regard to the ECtHR's oversight of Turkey's Kurdish conflict.

In their seminal study on the "boomerang effect" of transnational human rights networks, Keck and Sikkink noted the inability of these networks to penetrate into states which "superpowers consider important to their national security interests", citing Turkey as an example.<sup>1990</sup> Indeed, as a NATO member neighbouring the Soviet Union, Turkey's geostrategic significance for the Alliance has been *the* factor insulating its domestic policies from external pressure throughout the Cold War. This was the primary reason why successive *coups* followed by military rule and systematic gross human rights abuses by military and civilian governments alike were tolerated by European institutions and governments. It explains why the inter-state complaint mechanism was invoked against Turkey solely in response to the third military intervention in 1980 and was settled in a very contestable manner. Arguably, it was geopolitics which led the EComHR to use its discretionary powers to approve (rather than reject) the terms of the settlement reached between the applicants and the new Turkish government, despite the fact that the constitutional regime set up by the junta remained intact after the transition and was certain to give rise to new gross abuses including torture.

Scholarship on democratic transitions in South America has pointed out the emergence of a global human rights regime and the decline of Latin America's geostrategic significance at the end of the Cold War as the enabling factors for transnational advocacy networks' influence on US foreign policy.<sup>1991</sup> By contrast, the end of the Cold War has only enhanced Turkey's geostrategic importance for the West due to the rise of political Islam in Iran, Afghanistan and beyond. Proved to be a blessing for the state over and over again, Turkey's geographic location has been the main political obstacle for Kurdish lawyers and the broader human rights movement in their efforts to mobilize the European governments and institutions to exert effective pressure on the Turkish state. Geopolitics was in play once again in the refugee deal reached between the EU and the AKP government in March 2016. Formally, the terms of the agreement were Turkey's containment of the Syrian and other refugees within its borders in exchange for the EU's financial support, waiver of visa requirement for Turkish citizens and re-opening of the accession talks. In reality, there was an additional unspoken condition: the EU's silence vis-à-vis the atrocities in Turkey's Kurdish region and the AKP government's ongoing crackdown on political dissent, first and foremost the Kurdish opposition. And indeed, the EU remained silent as the AKP government engaged in atrocities amounting to allegations

---

<sup>1990</sup> Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998), at p. 117.

<sup>1991</sup> Alison Brysk, "From Above and Below: Social Movements, the International System, and Human Rights in Argentina", *Comparative Political Studies*, vol. 26, no. 3 (1993), pp. 259-285, at pp. 269-271 (giving the example of the Argentinian military regime which faced military and economic sanctions by the US government, was repeatedly condemned by the UN and the Organization of American States for its human rights violations and gained a "pariah" status in the eyes of international community).

of war crimes in the Kurdish region and the elected representatives of the Kurds were stripped of their immunities and put in jail without any conviction.

Certainly, the EU and the CoE are separate institutions and the ECtHR is moreover a judicial body independent from the political organs of the CoE. At the same, as I have aimed to show throughout this study, the Convention institutions' case law on Turkey has been affected by the progress of political relations between Turkey and EU institutions and governments. From the EComHR's approval of the settlement reached in the inter-state case to the ECtHR's lenience towards Turkey's EU-induced legal reforms, not to mention the CoM's superficial monitoring of Turkey's execution of the ECtHR's judgments, it is my contention that the Court has let itself be unduly affected by politics.

## 7.2 Recent Developments

As explained in the Introduction Chapter, while the time frame of this study was meant to end in 2012, when the constitutional complaint mechanism entered into force, extraordinary developments which took place in Turkey since 2015 required adaptation. I already discussed in respective chapters recent developments concerning democracy, rule of law and the Kurdish conflict. The purpose of this section is to look into the Constitutional Court's (*Anayasa Mahkemesi*-AYM) evolving jurisprudence to see whether the development of the constitutional complaint mechanism as an intermediary step between the lower courts and the ECtHR has improved human rights protection and the rule of law in Turkey. While the focus of this section is the cases arising from the Kurdish conflict, in view of the dramatic erosion of the rule of law since the failed *coup* in July 2016, the discussion will start with the AYM's response to complaints filed by individuals purged from civil service and imprisoned on terrorism allegations.

### 7.2.1 After the Storm: Lawlessness

Zeynep Mercan was a judge in the northern province of Giresun. On 17 July 2016, two days after the failed *coup* against the AKP government, she was dismissed from her job. She is one of the 140,000 civil servants, including 4,500 judges and prosecutors, who lost their jobs after being declared as members or sympathizers of the Gülenist network which the government holds responsible for the *coup*.<sup>1992</sup> Overnight, they turned from public employees to unemployed paupers and lost their life savings, pensions, housing, health insurance and passports. Just like that – without a legal process, without any evidence. Mercan did not just lose her job; she is one of the 2,500 prosecutors and judges held in pre-trial detention on terrorism charges.

---

<sup>1992</sup> These are approximate numbers based on a website publishing the updated toll of the civil servants dismissed from their jobs, individuals detained and arrested and institutions shut down. See <https://turkeypurge.com/>.

Mercan's appeal against her detention was rejected by the lower court. Instead of applying to the upper courts, she went directly to Strasbourg and asked the Court to dispense her from the obligation to exhaust domestic remedies, citing special circumstances. What she was referring to was an astounding development between her detention and the lower court's decision. On 4 August, the AYM dismissed two of its own members for their alleged links to the Gülenist network. Mercan argued that in such a context, the AYM could not make impartial decisions about the executive measures justified under the state of emergency declared on 21 July. There was another indicator of the changing times in Turkey. In October 2016, the AYM rejected the appeal by the main opposition Republican People's Party (*Cumhuriyet Halk Partisi*-CHP) for the annulment of several decrees which it argued exceeded the purpose of the state of emergency by introducing permanent measures which will stay in place after the expiration of the emergency rule. In a striking departure from its case law on emergency decrees discussed in Chapter 3, the AYM unanimously declined to review whether the decrees were indeed issued within the substantive scope of the emergency regime.<sup>1993</sup> It had become clear that the AYM was not willing or able to review the constitutionality of emergency measures adopted by the AKP government.

In the eyes of the ECtHR, there was no ground for Mercan to be concerned about her right to fair trial. The dismissal of two AYM judges did not "cast doubt" on the effectiveness of the constitutional complaint mechanism and Mercan's "fears" of the AYM's impartiality did not relieve her of the obligation to exhaust that remedy.<sup>1994</sup> After all, reminded the Court, the AYM had proven the effectiveness of this mechanism in its "recent judgments" where, for example, it found unconstitutional the pre-trial detention of two journalists without tangible facts to substantiate the offences with which they were charged.<sup>1995</sup>

Now, here was a transnational human rights court telling a lower court judge who was dismissed from her job without a cause to seek justice at her country's constitutional court which had recently dismissed two of its own members through the same process, on the basis of the same executive decree and on grounds of the same allegations. The ECtHR was assuring the applicant of the effectiveness of the constitutional complaint mechanism on the basis of an AYM judgment which was issued *before* the collapse of the rule of law in Turkey; it predates the *coup*, the introduction of emergency rule and the government purges.<sup>1996</sup> As for the post-*coup* phase, the AYM made it very clear that in reviewing the constitutionalism of the purges, it would not look for evidence linking the dismissed individuals to the Gülenist network. In its judgment on the dismissal of its own members, the AYM explicitly said that it did not look for "[e]stablishing a link between members of the Constitutional Court and the terrorist organization." The "conviction" of the majority of remaining judges was sufficient.<sup>1997</sup>

---

<sup>1993</sup> AYM, E. 2016/166, K. 2016/159, 12 October 2016.

<sup>1994</sup> ECtHR, Registrar, "An Application concerning the Lawfulness of a Judge's pre-Trial Detention following the *coup d'état* of 15 July 2016 has been rejected for failure to exhaust domestic remedies", Press Release, ECHR 372 (2016), 17 November 2016 (referring to *Mercan v. Turkey*, Application no. 56511/16).

<sup>1995</sup> The ECtHR has since rejected several petitions on grounds of non-exhaustion of domestic remedies. See e.g. ECtHR, *Zihni v. Turkey*, Application no. 59061/16, Decision (Admissibility), 29 November 2016; *Köksal v. Turkey*, Application no. 70478/16, Decision (Admissibility), 6 June 2017 (in both case, rejecting the applications of dismissed teachers).

<sup>1996</sup> AYM, *Erdem Gül and Can Dündar*, Application no. 2015/18567, 25 February 2016.

<sup>1997</sup> AYM, E. 2016/6, K. 2016/12, 4 July 2016, at para. 84 (English translation taken from the Venice Commission's below-cited opinion).

Undoubtedly, this conviction is solely an assessment on whether the person concerned is suitable to remain in the profession irrespective of whether there is criminal liability. Article 3 of the Decree Law [no. 667 dismissing the two judges] prescribes no requirement to rely on a certain kind of evidence in order to reach this conviction.

For the Venice Commission, which published an opinion one month after the ECtHR rejected Mercan's petition, this meant that it sufficed for the majority of the AYM "to be *subjectively persuaded* that a link between a member of the Constitutional Court and the Gülenist network exists."<sup>1998</sup> Noting that the AYM thus confirmed the validity of Decree no. 667, which was used to dismiss thousands of other judges, the Venice Commission concluded that "challenging the legitimacy of the process of mass dismissals of judges and prosecutors before those courts will have little chance of success."<sup>1999</sup> So, what to make of these two divergent views on the effectiveness of domestic legal remedies in Turkey? The non-binding nature of the Venice Commission's opinion aside, which of the two represents the moral voice of the CoE?

At the end of the day, however, the CoE institutions were united in desiring the resolution of the post-*coup* cases in the Turkish legal system irrespective of the fact that the violations were enabled by an authoritarian legal framework and a complicit judiciary. In the same opinion, the Venice Commission recommended the establishment of a domestic mechanism to review the executive measures adopted by emergency decrees. Aware of the implications of creating such a remedy for the pending cases before the ECtHR, in January 2017, the AKP-dominated Parliament passed a law for the adoption of an administrative commission<sup>2000</sup> and established it in May 2017, after diplomatic pressure from Strasbourg.<sup>2001</sup> In June 2017, the ECtHR gave its much-awaited decision on the new mechanism. The case was filed by Gökhan Köksal, a primary school teacher dismissed from his job ten days after the *coup*.<sup>2002</sup> Unlike Ms. Mercan, he had filed a constitutional complaint on 28 September 2016, but then asked the ECtHR to review his case without waiting for the AYM's decision. Köksal's case and thousands of similar others had revealed the AYM's reluctance to review dismissals and left the ECtHR in a conundrum. With the establishment of the commission, the Court was now able to direct the applicants to first apply to this new mechanism (and then the AYM). The commission finally started its work in July 2017 after repeated warnings by the CoE's General Secretary that the ECtHR would otherwise start reviewing the pending dismissal cases.<sup>2003</sup> On July 14<sup>th</sup>, the Ministry of Justice announced the 'good news'; in recognition of the commission's start of its work, the ECtHR dismissed 12,600 petitions concerning dismissals from civil service, dissolution of legal personalities (such as associations, businesses and media organizations) and

---

<sup>1998</sup> Venice Commission, *Turkey: Emergency Decree Laws no. 667-676 adopted Following the Failed Coup of 15 July 2016*, CDL-AD(2016)037, 12 December 2016, at para. 136.

<sup>1999</sup> *Ibid.*, at para. 186.

<sup>2000</sup> *Olağanüstü Hal İşlemleri İnceleme Komisyonu Kurulması Hakkında Kanun Hükmünde Kararname* [Decree with the Force of Law Regarding the Establishment of the Commission for the Review of State of Emergency Measures], no. 685, Official Gazette, no. 29957, 23 January 2017.

<sup>2001</sup> Stockholm Center for Freedom, "CoE Secretary General Jagland Warns Turkey on Rights Violations", 1 March 2017, available at: <http://stockholmcf.org/coe-secretary-general-jagland-warns-turkey-on-rights-violations/>.

<sup>2002</sup> ECtHR, *Köksal v. Turkey*, Application no. 70478/16, Decision, 6 June 2017.

<sup>2003</sup> CoE Newsroom, "Secretary General Jagland calls for Release of Turkish Hunger Strikers", 26 June 2017, available at: <https://www.coe.int/en/web/portal/-/council-of-europe-secretary-general-jagland-calls-for-release-of-turkish-hunger-strikers> (that "the Commission has to start its work now").

dismissals of students in higher education, bringing the number of cases pending in Strasbourg to 12,000.<sup>2004</sup>

### 7.2.2 When the Kurdish Cases Strike: The AYM's Paradox

For some observers, what happened in Turkey in July 2016 was such a grave threat to democracy that it justifies an emergency rule and warrants exceptional measures for effective counter-terrorism. The AYM's deference to the government should be read in this broader political context and not reflect negatively on the effectiveness of the constitutional complaint mechanism. In that case, let's look at the AYM's performance *before* the *coup* attempt.

The AYM made a promising start to the individual complaint mechanism. In December 2013, it issued a precedent-setting judgment in *Mustafa Ali Balbay* where it held that the pre-trial detention of a member of the parliament (from the CHP) was a violation of the right to be elected because it infringed on his political activities and his right to representation.<sup>2005</sup> In April and May 2014, the AYM found the government bans on access to Twitter<sup>2006</sup> and Youtube<sup>2007</sup> to violate free speech and received domestic and international praise for speaking up against anti-democratic measures. But, when presented with the litmus test, the AYM showed that it was 'business as usual' as far as the Kurdish conflict was concerned. Just as any discussion of democracy and the rule of law in Turkey has to start from the state's tackling of the Kurdish demands, any meaningful assessment of the effectiveness of the constitutional complaint mechanism has to look into the AYM's resolution of cases arising from the Kurdish conflict.

I started this study with Taybet İnan and dozens of other victims of state violence in the Kurdish region whose constitutional complaints were rejected by the AYM in late 2015 and early 2016. Let's continue with the *Roboski* villagers; the 34 Kurdish civilians bombed to death by Turkish military jets. In Chapter 6, we left their story in December 2013, with the military prosecutor's dismissal of their case on the grounds that the aerial bombardment of civilians was an "unavoidable mistake" during counter-terrorism. By then, two important developments had happened. In September 2012, the constitutional complaint mechanism entered into force, prompting *Roboski* families to petition the AYM, and in November 2013, the ECtHR issued its unprecedented judgment in *Benzer v. Turkey*, where it found the indiscriminate bombardment of two Kurdish villages by Turkish military jets in 1994 to constitute a substantive violation of Article 2 and, exceptionally, ordered the government to carry out an effective investigation to identify and punish those responsible for the bombings to prevent impunity.<sup>2008</sup>

From the moment it was filed, *Roboski* was a 'hot potato' for the AYM. The first serious human rights case brought before the AYM, it showed that the impunity of security forces continued

---

<sup>2004</sup> Turkey, Ministry of Justice, "OHAL Komisyonu Kurulmasıyla AİHM Binlerce Dosyayı Düşürdü" [AIHM Dismissed Thousands of Cases with the Establishment of the State of Emergency Commission], 14 July 2017, available at [http://www.inhak.adalet.gov.tr/duyurular/faaliyet\\_duyurular/2017/Temmuz/basin-ilani.pdf](http://www.inhak.adalet.gov.tr/duyurular/faaliyet_duyurular/2017/Temmuz/basin-ilani.pdf).

<sup>2005</sup> AYM, *Mustafa Ali Balbay*, Application no. 2012/1272, Judgment, 4 December 2013.

<sup>2006</sup> AYM, *Yaman Akdeniz and Others*, Application no. 2014/3986, Judgment, 2 April 2014.

<sup>2007</sup> AYM, *Youtube LLC Corporation Company and Others*, Application no. 2014/4705, Judgment, 29 May 2014.

<sup>2008</sup> ECtHR, *Benzer and Others v Turkey*, Application no. 23502/06, Judgment, 12 November 2013. For more on the judgment, see Chapter 6.

unabated in Turkey, leading the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to conclude after a 2012 visit that “the most important and urgent challenge is the lack of accountability in cases of killings, both those perpetrated recently and those from the 1990s”.<sup>2009</sup> The problem was that *Roboski* was not a residue of the 1990s for which the current government bears no responsibility. Quite the contrary, it was the AKP government which had authorized military jets to undertake the bombardment and covered up the parliamentary and judicial investigations. Furthermore, *Benzer* left no room for doubt for the kind of ruling the AYM should give to fulfil its promise and obligation to follow the ECtHR case law.

Luckily for the AYM, the applicants’ lawyers were two days late in submitting the additional documents they had been requested. Based on this, the AYM rejected the case in February 2016.<sup>2010</sup> The missing information the AYM identified in the application were copies of decisions of the military prosecutor and the military court, the date when lawyers were informed of these decisions, notarized power of attorney with respect to some of the applicants and a few minor errors made in the application form. While the lead lawyer presented a medical report to excuse his delay, the AYM found the illness indicated in the report not to be grave enough and pointed out that there were many other lawyers who had power of attorney.

Dissenting from the opinion, one AYM judge criticized the majority for being “extremely formalistic.”<sup>2011</sup> Referring to the AYM’s and the ECtHR’s case law, which regard very short time periods, unreasonable bureaucratic hurdles or formalistic procedural requirements to constitute disproportionate restrictions on access to justice, Judge Paksüt said that the AYM could have easily obtained the documents from the Chief of Staff taking into account that the already short 15-days-period coincided with the month of August when military courts are exceptionally busy. Moreover, the applicants’ lawyers had correctly identified the number and date of the decisions of the military authorities in their application, which the AYM could easily verify in case of doubt. With regard to the missing powers of attorney, the majority should have taken into account the remoteness of the villages where the applicants lived and the security situation in the region which might have reasonably delayed the completion of the process. Furthermore, most of the applicants had given valid powers of attorney and only a few were missing. Finally, reminded Judge Paksüt, the rules of procedure governing constitutional complaints do not lay out specific illnesses that constitute valid excuses for delays.

So, this was the AYM’s take on gross human rights abuses in the Kurdish region. What about Kurdish political rights claims? Just as state violence in the Kurdish region continued in the 2010s, so did infringements on the Kurds’ political representation and participation rights. In Chapter 3, we had left the Kurdish national movement represented in the Turkish Parliament with 59 HDP deputies, 55 of whom were stripped of their immunities and 13 were placed in pre-trial detention. Unlike the DEP deputies in 1994, the HDP deputies now had the right to petition the AYM, which they exercised – twice. First, they challenged the constitutionality of

---

<sup>2009</sup> UN Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, Addendum, Mission to Turkey*, A/HRC/23/47/Add.2, 18 March 2013, at p. 1.

<sup>2010</sup> AYM, *Mehmet Encü and Others*, Application no. 2014/11864, Decision (Admissibility), 24 February 2016.

<sup>2011</sup> Dissenting opinion of Judge Osman Alifeyyaz Paksüt.

the parliamentary decision lifting their immunities. As discussed in Chapter 3, in a unanimous decision, the AYM declined review and several HDP deputies including the co-chairs Selahattin Demirtaş and Figen Yüksekdağ were arrested. Then came the second constitutional complaint. The imprisoned HDP deputies went back to the AYM, this time to challenge their pre-trial detention based on the *Mustafa Ali Balbay* ruling. Thus another ‘hot potato’ fell into the AYM’s docket. In light of the clear standard it had established in a very similar case, the AYM was caught between *stare decisis* and its reputation on the one hand and the backlash it would face from President Erdoğan if it would adhere to the rule of law on the other. The broader political context needs to be emphasized; the HDP deputies filed their petition on 17 November 2016, a few months after the AYM had dismissed two of its own judges after the failed *coup* attempt in July. This time, the applicants’ lawyers did not make mistakes, depriving the AYM of an easy way out. In this case, the AYM opted for the next best option and kept the application pending. As of July 2017, the AYM’s word is not yet out.

### 7.2.3 The ECtHR between Self-Interest and Individual Justice

So, already before the *coup* attempt, the AYM had proven itself to be unwilling to uphold the Constitution in the Kurdish cases by rejecting the petitions of civilians caught in the curfew areas, the *Roboski* families and the HDP deputies. It had become clear that as far as gross human rights abuses in the Kurdish region and the Kurds’ political rights were concerned, the constitutional complaint mechanism had not magically turned the AYM from the guardian of official ideology to the protector of individual rights. The AYM’s post-*coup* performance has only accentuated this obvious reality by extending the reach of its inaccessibility for victims of human rights violations beyond the Kurdish ones. Not only has the AYM refrained from challenging the pre-trial detention of the HDP deputies, but provided legal legitimacy to the dismissal and arrest of tens of thousands of individuals without any due process.

Many of those who could not find justice in Ankara ended up in Strasbourg. The new wave of petitions was the last thing the ECtHR needed. Just when it had gotten rid of thousands of pending and potential cases thanks to the new domestic remedies the AKP government had established since the mid-2000s, as discussed in Chapters 2, 4 and 6, the ECtHR was swamped with 8,300 new applications in 2016 alone; nearly four times as many as in 2015.<sup>2012</sup> These petitions posed a particular challenge for the ECtHR; they were filed by individuals who had either unsuccessfully petitioned the AYM or directly applied to Strasbourg claiming the futility of exhausting this new remedy. So now, the Court was asked to pass verdict on the effectiveness of Turkey’s constitutional complaint mechanism. In a sense, this is a much more difficult choice compared to the 1990s. Back then, it was only the Kurds living in the Kurdish region who claimed that effective domestic remedies did not exist under emergency rule. This time, people from all walks of life across the country make the same claim with regards to the entire legal system in Turkey, including the country’s constitutional court.

Kurdish cases were also among the new petitions which reached Strasbourg. First the curfew cases, then the *Roboski* case and finally the HDP deputies’ petitions were filed with the Court

---

<sup>2012</sup> ECtHR, *Analysis of Statistics 2016* (January 2017), available at: [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2016\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf), at p. 11.

after they had been rejected or ignored by the AYM. At the time of writing, these cases are at different stages. As discussed in Chapter 1, in all but five of the 34 curfew cases, the Court declined the applicants' interim measures requests. In December 2016, it issued partial inadmissibility decisions, rejecting the applicants' Article 5 complaints and adjourning its examination of the remaining substantive complaints pending the government's submissions by beginning of June 2017.<sup>2013</sup> The government submitted 9,058 pages of documents in 17 cases alone, to which the lawyers are required to respond by 31 August 2017.<sup>2014</sup> The *Roboski* case was filed with the ECtHR in August 2016 and has not yet been communicated to the Turkish government. Finally, giving up on the AYM, the HDP deputies petitioned the ECtHR on 20 February 2017.<sup>2015</sup>

While the ECtHR has not yet issued final rulings in any of these petitions, its performance in the curfew cases is disheartening on many levels. When presented with conflicting opinions by the AYM and the CoE's non-judicial bodies, the ECtHR has incomprehensibly deferred to the former. Take the question of interim measures. The AYM had rejected all such requests, relying on the government's contested argument that the civilians trapped in the curfew zones had full and unhindered access to public services. In rejecting interim measures, the ECtHR deferred to the AYM and, indirectly, to the Turkish government.<sup>2016</sup> Then there are the Article 5 complaints. The applicants argued that the authorities violated their rights to liberty and security by executing the curfews so strictly that they did not allow ambulances to dispatch the injured or the families to do so with their own means, prevented individuals from retrieving the bodies of their relatives and put the residents of entire neighbourhoods or towns under indefinite house arrest. In dismissing these complaints as "manifestly ill-founded", the ECtHR did not even address the claim that the curfews lacked legal basis. Just like the AYM, the ECtHR glossed over the legality issue, although by then the CoE's two reputable organs, the Commissioner for Human Rights<sup>2017</sup> and the Venice Commission,<sup>2018</sup> had concluded that the curfews were not lawful.

---

<sup>2013</sup> ECtHR, *Cemil Altun v. Turkey*, Application no. 4353/16; *Mehmet Latif Karaman*, Application no. 5237/16; *İrfan Uysal and Others v. Turkey*, Application no. 4817/16; *Mehmet Balcal and Others and Ahmet Karaduman and Selahattin Çiçek v. Turkey*, Application nos. 8699/16 and 6758/16; *Ömer Elçi and Eight Other Applications v. Turkey*, Application no. 63129/15; *Kemal Koç and Others v. Turkey*, Application no. 8536/16; *Mazlum Dolan and Four Other Applications v. Turkey*, Application no. 9414/16; *Mehmet Oran and Three Other Applications v. Turkey*, Application no. 1905/16; *Halil Yavuzel and Two Other Applications v. Turkey*, Application no. 5317/16, Decisions (partial admissibility). All of these decisions were issued on 6 December 2016 and communicated to the Turkish government on 15 December.

<sup>2014</sup> Information received via-email from the applicants' co-counsel Benan Molu, 14 August 2017.

<sup>2015</sup> Peoples' Democratic Party (*Halkların Demokratik Partisi*-HDP), "Appeal to the ECtHR for our Co-Chairs", 20 February 2017.

<sup>2016</sup> ECtHR Registrar, "Curfew Measures in South-Eastern Turkey: Court Decides to Give Priority Treatment to a Number of Complaints", Press Release, ECHR 054 (2016), 5 February 2016.

<sup>2017</sup> Commissioner for Human Rights of the Council of Europe, *Memorandum on the Human Rights Implications of anti-Terrorism Operations in South-Eastern Turkey*, CommDH(2016)39, 2 December 2016 (hereafter "Memorandum").

<sup>2018</sup> Venice Commission, *Turkey: Opinion on the Legal Framework Governing Curfews*, CDL-AD(2016)010, 13 June 2016, at para. 86 (that although Turkish law allows curfews during states of emergency, the government chose not declare emergency rule and instead based the curfews on a general law which assigns provincial governors and sub-governors very broad, unlimited and unchecked powers).

Finally, there is the proportionality issue. When the ECtHR dismissed the Article 5 claims because the materials in its possession gave “no appearance of a violation”,<sup>2019</sup> it had at its disposal the Memorandum of the Commissioner for Human Rights of the CoE published four days earlier. Based on his fact-finding visit to Turkey, the Commissioner had concluded that the curfews and the anti-terrorist operations accompanying them were disproportionate to the aims they pursued. He drew attention to the “big contrast” between the number of affected (1,6 million) and displaced (355,000) civilians on the one hand and the official number of terrorists killed, injured or captured by the security forces on the other (873, 196 and 718); as well as to the “tremendous” destruction of neighbourhoods and the use of lethal force and heavy weaponry in residential areas.<sup>2020</sup> The Court could have deferred to the Commissioner or at the very least invoke its own institutional memory on state violence in the Kurdish region to cast doubt on the government’s arguments. After all, that was what the Commissioner had done:

Turkey has a very long record of extremely grave human rights violations recognised as such by the European Court of Human Rights, with the most severe forms of violation having occurred in South-Eastern Turkey in the 1990s (...) As regards numerous allegations of human rights violations committed by security forces, the Commissioner finds them to be extremely serious and consistent. He considers many of these allegations to be credible, given their sources and considering past patterns of human rights violations committed by Turkish security forces during anti-terrorism operations in the South-East, as well as the Turkish authorities’ efforts to reinforce the immunity of security forces from prosecution during this period.<sup>2021</sup>

The real challenge in the curfew cases concerns the applicants’ right to life claims. Those who lost family members claimed that the government failed to send or allow ambulances to take the injured to hospitals, fulfil its positive obligations to protect the lives of those it knew to have been seriously injured and investigate the deaths caused by the security forces. They also claimed their relatives had been killed by the security forces in substantive violation of Article 2.<sup>2022</sup> The past performance of the Turkish authorities, including the AYM, indicates that the government will flatly deny the allegations in its submissions to the ECtHR. In the meantime, in April 2017, the Commissioner made a third-party intervention in the 34 curfew cases – for the first time in a case against Turkey. In his written observations, the Commissioner did not spare his words. He once again underlined the disproportionality of the curfews. With their open-ended and round-the-clock nature imposed in 32 districts and nine provinces without prior warning or information about their lengths for up to 134 days, the curfews amounted to “a restriction of liberty equivalent to house arrest for all intents and purposes” and it was “difficult

---

<sup>2019</sup> See e.g. ECtHR, *Zehide Paksoy and Others v. Turkey*, Application no. 3758/16, Decision (Admissibility), 6 December 2016, at para. 30.

<sup>2020</sup> Commissioner for Human Rights of the Council of Europe, *Memorandum*, at paras. 28-29.

<sup>2021</sup> *Ibid*, at paras. 119-122.

<sup>2022</sup> The applicants also claimed that their inability to find, retrieve and bury the bodies of their relatives for a long time and/or having to witness the death of their relatives amounted to inhuman treatment under Article 3. In some cases, they raised Article 3 on behalf of family members who died after having waited for a long time for help. Some applicants complained that the bodies of their relatives were not handed over to them and that the family members were not given the opportunity to organise and be present during a funeral, in violation of their right to respect for their private lives under Article 8 and freedom of religion under Article 9.

to imagine a harsher application of a curfew.”<sup>2023</sup> He brought back the legality issue. In rejecting the interim requests of individuals in need of urgent medical assistance, he noted, the AYM did not examine the legality of the curfews or take into account the particular vulnerabilities of the applicants suffering life endangering injuries. Finally, he spoke out on the serious and credible allegations of serious human rights abuses by the security forces. Reminding that the curfew areas were completely isolated from the outside world, independent observers were not allowed in for fact-finding, the authorities (including the AYM) did not investigate the allegations and allegedly destroyed some of the evidence, the Commissioner said that the applicants will not be able to make even a *prima facie* case of their right to life complaints in the absence of government cooperation. In between the lines, he was calling on the ECtHR to relax its burden of proof and evidentiary standards.

### 7.2.4 Persecution of Kurdish Human Rights Lawyers

On 28 November 2015, three weeks before and only several blocks away from Taybet İnan’s murder, Tahir Elçi was assassinated in Sur, the ancient city center of Diyarbakır. His name and work have appeared throughout this study. Elçi started to petition the ECtHR as a solo practitioner in the small Kurdish town of Cizre in the early 1990s, practically fled to Diyarbakır in November 1993 due to interrogations, death threats and torture he had been subject to in relation to his ECtHR litigation,<sup>2024</sup> was one of the 25 Kurdish lawyers who were held in incommunicado detention and subjected to torture for several weeks in 1993 in retaliation for their criminal defense of terrorism suspects<sup>2025</sup> and ECtHR litigation on behalf of victims of state violence, won precedent-setting judgments in Strasbourg<sup>2026</sup> as well as litigated novel legal issues such as the 10 percent electoral threshold. He was the leading lawyer who sought justice for *Roboski* families (discussed earlier) as well as the disappeared and extra-judicially executed Kurds in the late 2000s when several cases were opened in Turkish courts against the perpetrators of state violence committed in the 1990s, as discussed in Chapter 6.<sup>2027</sup> He represented Kurdish political dissidents prosecuted for their statements and non-violent acts, including defendants in the *KCK* case discussed in Chapter 3. Moments before he was shot dead, Elçi delivered a press conference in his capacity as the President of Diyarbakır Bar Association and called for the cessation of fighting in the urban centers of the Kurdish region including Sur. Right after Elçi delivered his statement, the regular, special squad and anti-terror police officers who were at the scene to record the event for intelligence purposes started to shoot at two PKK militants who were fleeing from the police in an unrelated incident and happened to run by the crowd gathered for the press conference. Caught in the middle of the

---

<sup>2023</sup> Commissioner for Human Rights of the Council of Europe, *Third Party Intervention under Article 36, paragraph 3, of the European Convention on Human Rights*, CommDH(2017)13, 25 April 2017, at paras. 8-9.

<sup>2024</sup> See UN Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32, E/CN.4/1995/34*, 12 January 1995, paras. 757-779. For more, see Chapter 5.

<sup>2025</sup> ECtHR, *Elci and Others v. Turkey*, Applications no. 23145/93 and 25091/94, Judgment, 13 November 2003.

<sup>2026</sup> See e.g. ECtHR, *Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, Judgment, 6 April 2004 (the forced displacement case discussed at length in Chapter 5); *Benzer and Others* (discussed earlier); *Gasyak and Others v. Turkey*, Application no. 27872/03, Judgment, 13 October 2009 (extrajudicial execution case briefly discussed in Chapter 6).

<sup>2027</sup> Among others, Elçi represented the victims’ families in *Temizöz and Others*, *Musa Çitil*, the *Lice case* and *Main JITEM Case and Musa Anter*.

shooting, Elçi was killed by a bullet shot from close range by an unidentified source. Despite the presence of countless police officers and cameras, neither has the source of the bullet been identified nor a suspect identified. The widely shared conviction among the human rights community in Turkey is that the bullet was fired by a police officer. As the Commissioner for Human Rights of the CoE Nils Muižnieks has noted, the investigation “had been riddled with question marks”, suggesting that “entrenched patterns reinforcing impunity, widely attested in the ECtHR’s case law, are still in operation.”<sup>2028</sup> Tragically, once again, a Kurdish lawyer who has dedicated his professional life to fighting against impunity in Turkey has become its victim.

On 6 April 2016, Ramazan Demir, one of the new generation Kurdish lawyers who filed many of the interim measure requests to the AYM and the ECtHR, including on behalf of Taybet İnan, was arrested and detained on terrorism charges. Just as Elçi and his colleagues had been arrested and tortured for representing the Kurdish victims of state violence in the 1990s, Demir was targeted for his advocacy work on behalf of the Kurdish victims of state violence in 2015. As Muižnieks noted in his written observations in the curfew cases pending before the ECtHR, the prosecutor who interrogated Demir accused him of “propaganda and agitation activities on behalf of the terrorist organisation, aiming at weakening our country through discourse such as rights violations, torture, etc., both nationally and in the international fora [including]... conduct[ing] interviews/meetings with a person named ‘Delegation’ (*sic*), a foreign national.”<sup>2029</sup> Muižnieks stressed with deep concern that he had contacted Demir for a meeting to obtain from him information regarding the interim measure requests, implying that he was the “foreign national” in question. After five months in pre-trial detention, Demir was conditionally released in September.

Noteworthy is that all of these incidents predated the failed *coup* attempt. Yet, with the exception of the CoE’s and the UN’s human rights monitoring mechanisms, the targeting of Kurdish lawyers for their human rights work did not attract the international attention it deserved. The international community was finally alerted to the situation of human rights defenders in Turkey with the detention on 5 July 2017 of ten activists, whilst attending a routine workshop on digital security. Accused of aiding an unidentified terrorist group for plotting to overthrow the government, the detainees were held in custody for 12 days and six of them were placed in pre-trial detention. Among the six are İdil Eser, Amnesty International’s Turkey Director, and Peter Steudtner, a human rights trainer holding German citizenship. Earlier, in June 2107, Amnesty’s Turkey chair Taner Kılıç had been arrested on charges of membership of a terrorist organization. According to Amnesty’s Turkey researcher Andrew Gardner, this is the first time in Amnesty’s history that its country director and chair are imprisoned.<sup>2030</sup> More significantly, the Turkish government had now arrested a German citizen who, unlike earlier imprisoned journalists who are Turkish-German dual nationals, is the holder of only a German passport. It was Steudtner’s arrest which has led the German government to finally consider a

---

<sup>2028</sup> Commissioner for Human Rights of the Council of Europe, *Memorandum*, at paras. 101-102.

<sup>2029</sup> Commissioner for Human Rights of the Council of Europe, *Third Party Intervention under Article 36*, at para. 41.

<sup>2030</sup> İrfan Aktan, “Andrew Gardner: Türkiye Böyle Devam Ederse Geri Dönüş çok Zor Olacak” [If Turkey Continues in this Fashion, Return will be very Difficult], *Gazeteduvar*, 21 July 2017; Hülya Karabağlı, “KHK’lar Kürtçe Dil Öğreten Okulları ve Dernekleri Vurdu” [The Decrees with the Force of Law Hit Schools and Associations Providing Education in Kurdish], *T24*, 4 December 2016.

change in its policies towards the AKP government by issuing travel warnings for its citizens and raising the possibility of ceasing to guarantee German corporate investment in Turkey.

### **7.2.5 Crackdown on the Kurds' Political Participation and Linguistic Rights**

As in the 1990s, the crackdown on Kurdish human rights defenders was accompanied by one against the Kurds' elected representatives. Taking advantage of the failed putsch attempt of July 2016, Erdoğan's regime continued with full force its crackdown on the HDP deputies in the Parliament whose immunities had been lifted in May 2016, as I discussed in Chapter 3. Portraying, without any evidence, the HDP cadres as collaborators of Gülenists in the latter's alleged *coup* attempt, the government arrested 13 HDP deputies on multiple terrorism charges in November 2016. Held in pre-trial detention, these parliamentarians include party co-chairs Selahattin Demirtaş and Figen Yüksekdağ. They are facing hundreds of years of jail time. Yüksekdağ was subsequently stripped of her parliamentary seat upon her conviction in one of the many cases brought against her. So, history repeated itself yet again and the Kurds' elected representatives were taken from the Parliament and put into prison with the concerted efforts of all three branches of the state. Notably this time, the deputies belong to the third largest political party represented in the Turkish Parliament, which received over five million votes in the November 2015 general elections.

The AKP government made use of the emergency powers it bestowed upon itself after the *coup* attempt to also crackdown on local democracy. An emergency decree (no. 674) issued on 1 September 2016 permits the central government to dismiss, arrest or ban from public office mayors and other elected municipal officials accused of terrorism and to replace them with appointed bureaucrats ("trustees").<sup>2031</sup> While mayors and municipal officials accused of being linked to the Gülen movement were also affected, the main target were the Kurdish political movement. As of August 2017, the AKP government suspended the elected mayors of 89 of the 104 HDP-run municipalities in the Kurdish region, replacing them with "trustee mayors", and incarcerated over 80 mayors pending their trial on terrorism charges in addition to the nearly 20 who had been imprisoned earlier.<sup>2032</sup>

As soon as they took over the HDP-run municipalities, the AKP-appointed trustees brought an end to the HDP's multilingual policies by removing Kurdish name plates placed in front of municipal buildings, Kurdish signboards at the entrance of provinces and towns, and Kurdish names given to public buildings, parks, cultural centres. They also closed down kindergartens and elementary schools providing education in Kurdish. Finally, pursuant to emergency decrees adopted after the failed *coup*, the AKP government ended its own reforms in the area of linguistic rights by closing down hundreds of Kurdish-language media outlets and cultural

---

<sup>2031</sup> *Olağanüstü Hal Kapsamında Bazı Düzenlemeler Yapılması Hakkında Kanun Hükmünde Kararname* [Decree with the Force of Law Concerning Certain Regulations in the Context of State of Emergency], no. 674, Official Gazette, no. 29818, 1 September 2016, at Articles 38 and 39.

<sup>2032</sup> Information received via e-mail from Hişyar Özsoy, Deputy Co-chair of HDP Responsible for Foreign Affairs and Member of Parliament, 23 August 2017.

associations promoting the Kurdish language.<sup>2033</sup> The last remnants of the AKP's 'Kurdish opening' discussed in Chapter 3 thus vanished.

### 7.2.6 Conclusion

This update of recent developments in Turkey confirms the very same dynamics I have discussed throughout this study. They show, once again, that Turkey is an authoritarian state where the basic ingredients of liberal democracy such as the separation of powers, accountability, the rule of law and human rights protection do not exist. Turkey's extremely politicized judiciary upholds the state's interest over individual rights, no matter how egregious the violations or how repressive the government. Just as state violence continues in the Kurdish region, so does the repression of Kurdish human rights lawyers who seek justice for the victims of gross abuses at the ECtHR. Recently, too, the ECtHR has been reluctant to question the necessity of emergency rule in Turkey or even to assess the proportionality of measures adopted in response to a *coup* attempt. When it comes to the Kurdish conflict, the ECtHR finds the counter-terrorism argument so legitimate that it does not even require a formal emergency regime for the Turkish government to subject 1,6 million civilians to house arrests or forced displacement. In judiciously applying its procedural rules and upholding its subsidiarity principle by sending cases back to the Turkish legal system, the ECtHR does not show any consideration of the political context which gives rise to these violations in the first place. Where these matters are concerned, there is a remarkable disconnect between the ECtHR and the CoE's non-judicial mechanisms in their assessments of democracy and the rule of law in Turkey.

The current situation in Turkey also confirms the principal argument I have made throughout this study. Namely, the way in which the ECHR system has responded to Turkey's human rights problem generally and the cases arising from the Kurdish conflict particularly have rested on the misplaced assumption that Turkey is a democratic regime whose legal system is capable of providing effective remedies for victims of gross human rights abuses and that the restrictions on Kurdish political and cultural rights are necessary in a democratic society. This presumption of normalcy has led the ECHR system to be blind to the fact that indiscriminate violence against civilians has been an established government practice in the Kurdish region – before, during and after the 1990s. In treating Turkey as a democratic regime, the ECtHR has approached gross human rights abuses in the Kurdish region as aberrations rather than as a systematic state policy and did not make exceptions to its procedural rules, evidentiary standards and substantive norms. In treating Turkey as a country based on the rule of law, the Court did not hesitate in deferring in the name of subsidiarity to the AYM and the newly established administrative commission to deliver individual justice at a time when the state of emergency is in effect, the AYM's two members are in prison and Erdoğan's regime is growing more authoritarian by the day.

---

<sup>2033</sup> On the AKP's crackdown on the HDP and reversal of multilingual municipal policies, see e.g. Human Rights Watch, "Turkey: Crackdown on Kurdish Opposition: MPs Jailed, Elected Mayors Removed Ahead of Referendum", 20 March 2017; Mahmut Bozarlan, "Turkey's Emergency Rule Hits Thousands of Destitute Kurds", *Al Monitor*, 6 December 2016; US Department of State, *Turkey 2016 Human Rights Report* (2016).

### 7.3 Implications for Further Research

In 2000, Conor Gearty had argued that any assessment of the ECtHR's effectiveness must take into account the distinction between "countries on the edge of democracy, committed in the abstract to representative government and human dignity, but hostile on the ground to the infiltration of such ideas" and those with a "reasonably effective set of democratic institutions" and constitutional structures able to produce political solutions to disagreements within their societies. Explicitly referring to Turkey within the first category, Gearty had projected that:

the results on the ground of the Strasbourg Court's engagement with Turkey may in time provide the definitive case-study on the effectiveness of a charter of human rights imposing itself through litigation in relatively hostile territory.<sup>2034</sup>

Gearty's call for a differentiated approach seems to have not been headed by scholars, certainly where Turkey is concerned. While theoretical scholarship on the effectiveness of the ECHR system has completely overlooked the Turkish case, compliance studies have explained the ongoing human rights problems in Turkey solely with government failure in the execution of ECtHR judgments without paying any attention to the Court's role in this outcome. Scholars' generous assessment of the Court's effectiveness in human rights protection, in Turkey and beyond, has also penetrated into ongoing debates on the future of the Court. The increasing calls for the ECtHR's evolution from reviewing every admissible case to performing a quasi-constitutional role implies a greater role for domestic courts, particularly constitutional courts, in the protection of fundamental rights. The advocacy of constitutionalist justice rests on the idea that domestic constitutional courts are, as Sadurski has put it, reliable "partners" the ECtHR can count on in the effective protection of human rights.<sup>2035</sup>

This argument is based on an implicit assumption of homogeneity of all CoE member states in terms of the independence and willingness of their judicial systems in upholding individual rights against government encroachment. It is moreover based on the specific experience of the Central and Eastern European Countries (CEECs), which were, at least until recently, perceived as models of successful democratic transition. These countries, much like earlier waves of democratic and constitutional transition in southern Europe and Latin America, experienced an identifiable rupture with the ancient regime and an overhaul of their legal systems following the fall of communism. They had new constitutions, which were procedurally and substantively democratic, and new constitutional courts tasked with transitional mandates. Furthermore, the regime change in the CEECs was often coupled with transitional justice mechanisms ranging from the restitution of confiscated properties to the prosecution of perpetrators of war crimes and serious human rights abuses.

---

<sup>2034</sup> Conor Gearty, "Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal", *Northern Ireland Legal Quarterly*, vol. 51, no. 3 (2000), pp. 381-396, at p. 385.

<sup>2035</sup> Wojciech Sadurski, "Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments", *Human Rights Law Review*, vol. 9, no. 3 (2009), pp. 397-453.

In light of the above, grouping Turkey in the same category with the CEECs for the purpose of re-emphasizing the principle of subsidiarity as a solution to the ECtHR's docket crisis is based on a significant theoretical misconception. More importantly, it has practical consequences for the protection of human rights at the national level. Take the right of constitutional complaint. Prescribed by the international community as a *sine qua non* of constitutionalism, granting their citizens the right to petition constitutional courts was among the conditions the EU accession countries were required to fulfil. The introduction of a new layer of domestic remedy was also in the interests of the ECtHR, not least to alleviate its unmanageable docket crisis. Turkey, as both an EU accession candidate and the country producing the highest number of applications until Russia's accession, was prescribed the same reform, without any consideration of whether its constitutional regime was capable of upholding the rights and freedoms protected under the ECHR. The AYM's performance so far clearly refutes the assumption that all domestic courts are reliable partners for Strasbourg.

This study has shown the necessity of differentiated analyses regarding the effectiveness of transnational human rights courts in authoritarian versus democratic regimes. A differentiated approach is necessary not only in the scholarship but also, and more urgently, in the practice of transnational courts. As Gearty had noted, as far as the ECHR system is concerned, Turkey is the "definitive case study". But it is no longer the only one. Recent developments in Hungary and Poland, the poster-children of post-communist democratic and constitutional transition, have not only shown that the ECtHR has not been effective in overseeing authoritarian regimes, but also that the principle of subsidiarity cannot be applied across the board without due attention to differences between the judicial systems and political cultures of contracting parties. The Turkish case also questions the conventional understandings of representative democracy and the role of transnational human rights courts. While the ECtHR's invocation of its margin of appreciation doctrine to defer to governments in their treatment of minority claims may be desirable from the perspective of democracy as far as liberal democratic regimes are concerned, to do so in authoritarian settings where the minorities are, as Benvenisti put it, "in a very real sense political captives of the majority",<sup>2036</sup> serves to provide legitimacy to the disempowerment, repression and disenfranchisement of minority groups.

The Turkish case also gives rise to important conclusions regarding transnational legal mobilization in contexts where the combination of an authoritarian regime and an armed conflict arising from a protracted politico-ethnic conflict produce state violence, as in Turkey and Russia in the ECHR context. In trying to mobilize the ECtHR, Kurdish human rights lawyers have faced particular challenges their counterparts in democratic settings have not. In addition to the usual hurdles of fund-raising, organizing, case selecting etc., Kurdish lawyers mobilizing against state violence have not only faced government repression against their clients and themselves, but also have had to convince the ECtHR that what is giving rise to gross human rights abuses are systematic government policies targeting specific minority groups and not, as the Turkish government has claimed, isolated and unfortunate consequences of counter-terrorism. The inability of Kurdish human rights lawyers to win an ECtHR ruling naming and condemning an administrative practice in the Kurdish region attests to the

---

<sup>2036</sup> Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards", *International Law and Politics*, vol. 31 (1999), pp. 843-854, at p. 848.

limitations of transnational legal mobilization in authoritarian settings and point out the need for further empirical scholarship in this area.<sup>2037</sup>

Finally, while I did not systematically engage with the literature on the politics of courts, my findings and conclusions are also significant for the emerging scholarship on judicial politics in authoritarian settings.<sup>2038</sup> The literature on judicial politics in Turkey has been largely limited in its scope (focusing on the politics of high courts, particularly the AYM) and theoretical approach (understanding the judicialization of politics to refer to the efforts of high courts to counteract the elected institutions, namely the legislature and the executive).<sup>2039</sup> The Turkish courts have played a multi-faceted role in the survival of authoritarianism, which went beyond the high courts' policing of elected governments. The entire court system, from criminal to civil courts, from low courts to the High Court of Appeals, has played an indispensable role in covering up the state violence in Turkey's Kurdish region. The AYM, which was formally insulated from this complicity until the introduction of the constitutional complaint mechanism, has since proven its reliability in performing what Shapiro has named the "judicial duty to serve the ... executive".<sup>2040</sup> Future scholarship on the politics of courts in Turkey must account for the entire judicial structure's complicity in state violence which has been carried out by the elected governments they have been designed to control. For when it comes to the Kurdish conflict, there has never been anything resembling a true separation of powers in Turkey.

---

<sup>2037</sup> Lynette J. Chua's work on the "pragmatic resistance" of Singapore's gay movement is a rare example of emerging scholarship on legal mobilization in authoritarian settings. It does not, however, speak to the challenges of legal mobilization against state violence in the context of an armed conflict. *Mobilizing Gay Singapore: Rights and Resistance in an Authoritarian State* (Temple University Press, 2014).

<sup>2038</sup> For prominent examples, see Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008); Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge University Press, 2007); Tamir Moustafa, "Law versus the State: The Judicialization of Politics in Egypt", *Law and Social Inquiry*, vol. 28 no. 4 (2003), pp. 883-930.

<sup>2039</sup> Hootan Shambayati, "The Turkish Constitutional Court and the Justice and Development Party (2002-2009)", *Middle Eastern Studies*, vol. 48, no. 1 (2012), pp. 107-123; Hootan Shambayati, "Courts in Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (And Iranian) Politics", in Ginsburg and Moustafa (eds.), *Rule by Law*, pp. 283-303.

<sup>2040</sup> Martin Shapiro, "Courts in Authoritarian Regimes", in Ginsburg and Moustafa (eds.), *Rule by Law*, pp. 326-335.





## List of Abbreviations

- AKP- Justice and Development Party (*Adalet ve Kalkınma Partisi*)  
ANAP- Motherland Party (*Anavatan Partisi*)  
AP- Justice Party (*Adalet Partisi*)  
AYM- Constitutional Court (*Anayasa Mahkemesi*)  
BDP- Peace and Democracy Party (*Barış ve Demokrasi Partisi*)  
CAT- UN Committee against Torture  
CEECs- Central and Eastern European Countries  
CEJIL- Center for Justice and International Law  
CFM- Council of Forensic Medicine  
CHP- Republican People's Party (*Cumhuriyet Halk Partisi*)  
CoE- Council of Europe  
CoM- Committee of Ministers  
CPT- European Committee for the Prevention of Torture and Unhuman or Degrading Treatment of Punishment  
CSCE- Conference on Security and Co-operation in Europe  
CUP- Committee of Union and Progress  
ÇHD- Progressive Lawyers Association (*Çağdaş Hukukçular Derneği*)  
DDKD- Revolutionary Eastern Cultural Association (*Devrimci Doğu Kültür Derneği*)  
DDKO- Revolutionary Eastern Cultural Hearths (*Devrimci Doğu Kültür Ocakları*)  
DEHAP- Democratic People's Party (*Demokratik Halk Partisi*)  
DEP- Democracy Party (*Demokrasi Partisi*)  
DGM- State Security Courts (*Devlet Güvenlik Mahkemesi*)  
DP- Democrat Party (*Demokrat Parti*)  
DTP- Democratic Society Party (*Demokratik Toplum Partisi*)  
ECHR/Convention- European Convention on Human Rights  
ECJ- European Court of Justice  
EComHR- European Commission for Human Rights  
ECtHR/Court- European Court of Human Rights  
EEC- European Economic Community  
EHRAC- European Human Rights Advocacy Centre  
EU- European Union  
HADEP- People's Democracy Party (*Halkın Demokrasi Partisi*)  
HDP- Peoples' Democratic Party (*Halkların Demokratik Partisi*)  
HEP- People's Labour Party (*Halkın Emek Partisi*)  
HSYK- Supreme Council of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu*)  
IAComHR- Inter-American Commission of Human Rights  
IACtHR- Inter-American Court of Human Rights  
ICCPR- International Covenant on Civil and Political Rights  
ICESCR- International Covenant on Economic, Social and Cultural Rights  
ICJ- International Commission of Jurists  
İHD- Human Rights Association (*İnsan Hakları Derneği*)  
İHOP- Human Rights Joint Platform (*İnsan Hakları Ortak Platformu*).  
JGK- General Command of Gendarmerie (*Jandarma Genel Komutanlığı*)  
JİTEM- Gendarmerie Intelligence and Counter-Terrorism Organization (*Jandarma İstihbarat ve Terörle Mücadele Teşkilatı*)

KCK- Union of Communities in Kurdistan (*Koma Ciwakên Kurdistan*)  
KHRP- Kurdish Human Rights Project  
Konsey- Council of National Security (*Milli Güvenlik Konseyi*)  
KTCC- Kurdish Society of Mutual Aid and Progress (*Kürdistan Teaviün ve Terakki Cemiyeti*)  
LPP- Law on Political Parties  
MAZLUMDER- Organisation for Human Rights and Solidarity for Oppressed People (*İnsan Hakları ve Mazlumlar için Dayanışma Derneği*)  
MBK- Committee of National Unity (*Milli Birlik Komitesi*)  
MDP- Nationalist Democracy Party (*Milliyetçi Demokrasi Partisi*)  
MFA- Ministry of Foreign Affairs  
MGK- National Security Council (*Milli Güvenlik Kurulu*)  
MHP- Nationalist Movement Party (*Milliyetçi Hareket Partisi*)  
MİT- National Intelligence Organization (*Milli İstihbarat Teşkilatı*)  
MP- Member of Parliament  
NATO- North Atlantic Treaty Organization  
NGO- Non-Governmental Organization  
OECD- Organisation for Economic Co-Operation and Development  
OEEC- Organisation for European Economic Cooperation  
OHCHR- Office of the United Nations High Commissioner for Human Rights  
OSCE- Organization for Security and Co-operation in Europe  
ÖZDEP- Freedom and Democracy Party (*Özgürlük ve Demokrasi Partisi*)  
PACE- Parliamentary Assembly of the Council of Europe  
PKK- Kurdistan Workers' Party (*Partiya Karkerên Kurdistan*)  
SHP- Social Democratic People's Party (*Sosyal Demokrat Halkçı Parti*)  
TBMM- Grand National Assembly of Turkey (*Türkiye Büyük Millet Meclisi*)  
TESEV- Turkish Economic and Social Studies Foundation  
TİHV- Human Rights Foundation of Turkey (*Türkiye İnsan Hakları Vakfı*)  
TİP-Workers Party of Turkey (*Türkiye İşçi Partisi*)  
TİT- Turkish Vengeance Brigade (*Türk İntikam Tugayı*)  
TOHAV- Foundation for Society and Legal Studies (*Toplumsal Hukuk Araştırmaları Vakfı*)  
TSK- Turkish Armed Forces (*Türk Silahlı Kuvvetleri*)  
UN- United Nations  
UNWG- UN Working Group on Enforced or Involuntary Disappearances  
US- United States  
VGM- Directorate General of Foundations (*Vakıflar Genel Müdürlüğü*)  
YÖK- Board on Higher Education (*Yüksek Öğrenim Kurumu*)

# List of Interviews

## A. Human Rights Lawyers and Legal Scholars in Turkey

### a. Individual Interviews

**Akın Birdal**, former President of İHD, former Member of Parliament from DTP  
Istanbul, 3 December 2015

**Barış Yavuz**, lawyer, TİHV representative  
Diyarbakır, 31 March 2015

**Benan Molu**, lawyer  
Berlin, 27 April 2017

**Cihan Aydın**, lawyer, former İHD representative  
Diyarbakır, 31 March 2015

**Emin Aktar**, lawyer, former President of Diyarbakır Bar Association  
Diyarbakır, 1 April 2015

**Eren Keskin**, lawyer, former President of Istanbul İHD  
Istanbul, 4 December 2015

**Fevzi Veznedaroğlu**, lawyer, former President of Diyarbakır İHD  
Istanbul, 20 January 2016

**Hüsnü Öndül**, lawyer, former President of İHD  
Ankara, 2 December 2015; Istanbul, 14 January 2016

**Mahmut Şakar**, lawyer, former President of Diyarbakır İHD  
Cologne, 13 November 2015

**Meral Danış Beştaş**, lawyer, currently Member of Parliament from HDP  
Diyarbakır, 1 October 2013

**Mesut Beştaş**, lawyer  
Diyarbakır, 1 April 2015

**Orhan Kemal Cengiz**, lawyer  
Ankara, 2 December 2015

**Semih Gemalmaz**, Professor of Public Law at Istanbul University Law Faculty  
Istanbul, 21 January 2016

**Reyhan Yalçındağ**, lawyer, former İHD representative in Diyarbakır  
Diyarbakır, 1 April 2015

**Sedat Aslantaş**, lawyer, former President of Diyarbakır İHD  
Ankara, 1 December 2015

**Sevtap Yokuş**, Professor of Public Law at Kemerburgaz University Law Faculty  
via skype, 21 October 2016

**Tahir Elçi** († 2015), lawyer, President of Diyarbakır Bar Association  
Diyarbakır, 9 May 2006

### b. Group Interviews

**Ruşen Doğan & Yaşar Aydın**, lawyers, TOHAV representatives  
Istanbul, 17 October 2007

(for the JURISTRAS project)

**Mesut Beştaş, Reyhan Yalçındağ & Tahir Elçi**, lawyers

Diyarbakır, 16 February 2008  
(by Haldun Gülap and Ozan Erözden for the JURISTRAS project)

## **B. Human Rights Lawyers and Advocates in the UK**

**Bill Bowring**, Professor of Law at Birkbeck School of Law  
London, 27 March 2015; New Orleans, 4 June 2016

**Françoise Hampson**, Emeritus Professor at Essex University Law School  
Ankara, 9 March 2008

(with Haldun Gülap and Ozan Erözden for the JURISTRAS project)

**Kerim Yıldız**, founder and former Director of KHRP  
London, 23 June 2016

## **C. Kurdish Politicians**

**Abdullah Demirbaş**, former mayor of the Sur district of Diyarbakır from DTP  
Diyarbakır, 1 October 2013

**Fırat Anlı**, lawyer, former mayor of the Yenişehir district of Diyarbakır from DTP, currently  
co-mayor of the Metropolitan Municipality of Diyarbakır from HDP Diyarbakır, 2 October  
2013

**Osman Baydemir**, lawyer, former President of Diyarbakır İHD, former mayor of the  
Metropolitan Municipality of Diyarbakır from HDP, currently Member of Parliament from  
HDP Istanbul, 7 October 2013

## **D. Kurdish Human Rights Victims**

**Anonymous internally displaced Kurdish civilian**  
Diyarbakır city centre, Turkey, 8 May 2006

**Anonymous internally displaced Kurdish civilian**  
A village of Batman, Turkey, 25 June 2005

(with Ayşe Betül Çelik, for TESEV Working Group on Internal Displacement project which  
also included Deniz Yüksek, Turgay Ünal and A. Tamer Aker)

## **E. Turkish Government Officials**

**Anonymous deputy governor**  
Kurdish region, Turkey, 10 May 2006

**Hacı Ali Açıkgül**, President; **Selahattin Doğan**, Deputy President; **Ahmet Metin Gökler**,  
Judge, Human Rights Department of the Ministry of Justice  
Ankara, 1 December 2015

## **F. European Union Representatives**

**Anonymous EU representative**  
Brussels, 11 November 2013

**Anonymous EU representative**

Brussels, 12 November 2013

**Anonymous EU representative**

Ankara, 3 October 2013

**Hélène Flautre**, former Member of the European Parliament

Brussels, 28 June 2013

**Joost Lagendijk**, former Member of the European Parliament

Istanbul, 5 October 2013

## **G. ECtHR and Other Council of Europe Representatives**

**Anonymous officials**, Office of the Commissioner for Human Rights

Strasbourg, 7 October 2015

**Işıl Karakaş**, currently ECtHR judge from Turkey

Strasbourg, 8 October 2015

**Özgür Derman**, Head of Division, Department for the Execution of ECtHR Judgments

Strasbourg, 8 October 2015

**Rıza Türmen**, former ECtHR judge from Turkey

Istanbul, 3 December 2015

**Uğur Erdal**, lawyer, ECtHR Registry

Strasbourg, 6 October 2015



# Bibliography

## Literature

Agreement Establishing an Association between the European Economic Community and Turkey, Ankara, 12 September 1963, *Official Journal of the European Communities*, no. L 361/1, 31 December 1977.

Ağaşe, Çetin. *Cem Ersever ve JİTEM Gerçeği* [Cem Ersever and the JİTEM Reality]. Pencere Yayınları, 1998.

Akbulut, Olgun. “Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties”, *Fordham International Law Journal*, vol. 34, no. 1 (2010): 46-77.

Akçam, Taner. *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*. Metropolitan Books, 2006.

Akkaya, Ahmet Hamdi, and Joost Jongerden. “The PKK in the 2000s: Continuity through Breaks?” in Marlies Casier and Joost Jongerden, eds., *Nationalisms and Politics in Turkey: Political Islam, Kemalism and the Kurdish Issue*. Routledge, 2011: 143–161.

———. “Reassembling the Political: The PKK and the Project of Radical Democracy”, *European Journal of Turkish Studies* [Online], vol. 14 (2012), available at: <https://ejts.revues.org/4615>.

Aksoy, Murat. “The Gendarmerie”, in Ahmet İnsel and Ali Bayramoğlu, eds., *Almanac Turkey 2006-2008: Security Sector and Democratic Oversight*. TESEV Publications, 2010: 172-187.

Aktar, Ayhan. *Varlık Vergisi ve ‘Türkleştirme’ Politikaları* [The Wealth Tax and ‘Turkification’ Policies]. İletişim Yayınları, 2000.

Alkin, Sinan. “Underrepresentative Democracy: Why Turkey should Abandon Europe’s Highest Electoral Threshold”, *Washington University Global Studies Law Review*, vol. 10, no. 2 (2011): 347-369.

Alpkaya, Gökçen. “‘Kayıp’lar Sorunu ve Türkiye” [The Problem of the Missing and Turkey] [online] (1995), available at: [http://www.politics.ankara.edu.tr/dergi/pdf/50/3/8\\_gokcen\\_alpkaya.pdf](http://www.politics.ankara.edu.tr/dergi/pdf/50/3/8_gokcen_alpkaya.pdf).

Altıparmak, Kerem. “Türkiye’de İnsan Haklarında Kurumsallaş(ama)ma”[(The Lack of) Institutionalization in Human Rights in Turkey], in Türkiye Barolar Birliği, ed., *Bürokrasi ve İnsan Hakları* [Bureaucracy and Human Rights]. TBB Yayınları, 2007: 54-111.

———. “Turkish Cases Relating to Terrorism before the European Court of Human Rights: Procedural Issues”, *Journal of Civil Liberties*, vol. 5 (2000): 30-48.

Amnesty International. *Turkey: Extrajudicial Executions*, AI Index: EUR 44/45/90 (1990).

———. *Annual Report 1992 (covering the period January-December 1991)*, AI Index: POL 10/0001/1992 (1992).

———. *Turkey: Walls of Glass*, AI Index: EUR 44/75/92 (1992).

———. *Turkey: Unfulfilled Promise of Reform*, AI Index: 44/87/95 (1995).

———. *Turkey: No Security without Human Rights*, AI Index: EUR/44/84/96 (1996).

———. *Turkey: New Law on the prosecution of Civil Servants: Not a Major Step towards Ending Impunity for Torturers*, AI Index: EUR/44/38/00 (2000).

———. *Justice Delayed and Denied: The Persistence of Protracted and Unfair Trials for Those Charged under Anti-Terrorism Legislation*, AI Index: EUR/44/013/2006 (2006).

Anagnostou, Dia, ed. *The European Court of Human Rights: Implementing Strasbourg’s Judgments on Domestic Policy*. Edinburgh University Press, 2013.

———. “Introduction: Untangling the Domestic Implementation of the European Court of Human Rights’ Judgments”, in Anagnostou, ed., *The European Court of Human Rights: Implementing Strasbourg’s Judgments on Domestic Policy*: 1-24.

———, ed. *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System*. Hart Publishing, 2014.

———. “Law and Rights’ Claiming on behalf of Minorities in the Multi-level European System”, in Anagnostou, ed., *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System*: 1-24.

———. “From Belfast to Diyarbakir and Grozny via Strasbourg: Transnational Legal Mobilisation against State Violations in Contexts of Armed Conflict”, in Anagnostou, ed., *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System*: 157-218.

Anagnostou, Dia, and Evangelia Psychogiopoulou. “Under what Conditions do National Authorities Implement the European Court of Human Rights’ Rulings? Religious and Ethnic Minorities in Greece”, in Anagnostou, ed., *The European Court of Human Rights: Implementing Strasbourg’s Judgments on Domestic Policy*: 143-165.

Anagnostou, Dia, and Yonko Grozev. “Human Rights Litigation and Restrictive State Implementation of Strasbourg Court Judgments: The Case of Ethnic Minorities from Southeast Europe”, *European Public Law*, vol. 16, no. 3 (2010): 401-418.

Andersen, Ellen Ann. *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. The University of Michigan Press, 2005.

Anter, Musa. *Hatıralarım* [My Memoirs]. Aram Yayınları, 2013.

Arato, Andrew. “The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition”, *Constellations*, vol. 17, no. 2 (2010): 345-350.

———. “Ten Theses on Constitutional Change in Turkey”, *Public Seminar*, 4 October 2013, available at: <http://www.publicseminar.org/2013/10/10-theses-on-constitutional-change-in-turkey/#.WMKdGPnyuM8>.

Arık, Kemal Fikret. *Avrupa İnsan Hakları Sözleşmesi Üzerine bir İnceleme: Esaslar-Teşkilat-İçtihat* [An Analysis of the European Convention on Human Rights: Rudiments-Organization-Jurisprudence]. Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları, 1965.

Arslan, Zühtü. “Avrupa İnsan Hakları Sözleşmesi ve Türk Anayasa Yargısı: Uyum Sorunu ve Öneriler” [European Convention in Human Rights and Turkish Constitutional Jurisprudence: Harmonization Problem and Proposals], *Anayasa Yargısı*, vol. 17 (2000): 274-93.

———. “Conflicting Paradigms: Political Rights in the Turkish Constitutional Court”, *Critique: Critical Middle Eastern Studies*, vol.11, no.1 (2002): 9-25.

Aslan, Senem. “Incoherent State: The Controversy over Kurdish Naming in Turkey”, *European Journal of Turkish Studies* [Online], vol. 10 (2009), available at: <https://ejts.revues.org/4142>.

———. “Everyday Forms of State Power and the Kurds in the Early Turkish Republic,” *International Journal of Middle East Studies*, vol. 43, no. 1 (2011): 75-93.

Avşar, Gülçin, Koray Özdil, and Nur Kırmızıdağ. *The Other Side of the Ergenekon: The Extrajudicial Killings and Forced Disappearances – Abridged Version*. TESEV Publications, 2013.

Ayata, Bilgin. “Turkish Transnational Politics and Turkey’s Changing Kurdish Policy: The Journey of Kurdish Broadcasting from Europe to Turkey”, *Journal of Contemporary European Studies*, vol. 19, no. 4 (2011): 523-533.

———. “The Politics of Displacement: A Transnational Analysis of the Forced Migration of Kurds in Turkey and Europe”, unpublished PhD thesis, Johns Hopkins University, Department of Political Science (2011).

Ayata, Bilgin, and Deniz Yüksek. “A Belated Awakening: National and International Responses to the Internal Displacement of Kurds in Turkey”, *New Perspectives on Turkey*, vol. 32 (2005): 5-42.

Aydın-Düzgüt, Senem, and E. Fuat Keyman. *EU-Turkey Relations and the Stagnation of Turkish Democracy*, working paper no. 2. Istituto Affari Internazionali, 2012.

Azınlık Hakları Çalışma Grubu [Working Group on Minority Rights], *Cemaat Vakıfları: Bugünkü Sorunları ve Çözüm Önerileri* [Community Foundations: Current Problems and Proposals for Solutions]. İstanbul Barosu İnsan Hakları Merkezi, 2002.

Babuş, Fikret. *Osmanlı'dan Günümüze Etnik ve Sosyal Politikalar Çerçevesinde Göç ve İskan Siyaseti ve Uygulamaları* [Migration and Settlement Policies and Practices within the Framework of Ethnic and Social Policies from the Ottoman Era to Today]. Ozan Yayıncılık, 2006.

Bakircioglu, Onder, and Brice Dickson. "The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey", *International and Comparative Law Quarterly*, vol. 22 (2017): 263-294.

Bâli, Aslı. "Unpacking Turkey's 'Court-Packing' Referendum", *MERIP*, 5 November 2010, <http://www.merip.org/mero/mero110510>.

———. "Courts and Constitutional Transition: Lessons from the Turkish Case", *International Journal of Constitutional Law*, vol. 11, no. 3 (2013): 666-701.

Bali, Rifat, N. *Devlet'in Yahudileri ve "Öteki" Yahudi* [The Jews of the State and the "Other" Jew]. İletişim Yayınları, 2004.

Balzacq, Thierry, and Yılmaz Ensaroğlu. *Human Rights and Security: Turkey, England and France*. TESEV Publications, 2008.

Barkey, Henri J., and Graham E Fuller. *Turkey's Kurdish Question*. Rowman & Littlefield, 1998.

Başlangıç, Celal. *Korku Tapınağı: Güçlükonak-Silopi-Lice-Tunceli* [The Temple of Fear: Güçlükonak-Silopi-Lice-Tunceli]. İletişim, 2001.

Bates, Ed. *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights*. Oxford University Press, 2010.

———. "The Birth of the European Convention on Human Rights – and the European Court of Human Rights", in Jonas Christoffersen and Mikael Rask Madsen, eds., *The European Court of Human Rights between Law and Politics*. Oxford University Press, 2011: 17-42.

Bayır, Derya. "Representation of the Kurds by the Turkish Judiciary", *Human Rights Quarterly*, vol. 35, no. 1 (2013): 116-142.

———. *Minorities and Nationalism in Turkish Law*. Ashgate, 2013.

Bayrak, Mehmet. *Kürtler ve Ulusal-Demokratik Mücadeleleri: Gizli Belgeler-Araştırmalar-Notlar* [The Kurds and their National-Democratic Struggle: Secret Documents-Studies-Notes]. Özge, 1993.

Bayramoğlu, Ali, ed. *The High Council of Judges and Prosecutors in Turkey: Roundtable Discussion on its New Structure and Operations*. TESEV Publications, 2012.

Belge, Ceren. "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey", *Law and Society Review*, vol. 40, no. 3 (2006): 653-692.

Benvenisti, Eyal. "Margin of Appreciation, Consensus, and Universal Standards", *International Law and Politics*, vol. 31 (1999): 843-854.

Beşe, Ertan. “Intelligence Activities of the Gendarmerie Corps (JİTEM & JİT)”, in Ümit Cizre, ed., *Almanac Turkey 2005: Security Sector and Democratic Oversight*. TESEV Publications, 2006: 172-189.

———. “Office of Special Operations”, in Cizre, ed., *Almanac Turkey 2005: Security Sector and Democratic Oversight*: 118-127.

———. “Temporary Village Guards”, in Cizre, ed., *Almanac Turkey 2005: Security Sector and Democratic Oversight*: 138-147.

Beşikçi, İsmail. *Kürtlerin Mecburi İskânı* [The Forced Settlement of the Kurds]. İsmail Beşikçi Vakfı Yayınları, 2013.

———. *Tunceli Kanunu (1935) ve Dersim Jenosidi* [Tunceli Law (1935) and the Dersim Genocide]. İsmail Beşikçi Vakfı Yayınları, 2013.

Biner, Zerrin Özlem. “Documenting ‘Truth’ in the Margins of the Turkish State”, in Julia Eckert, Brian Donahoe, Christian Strümpell, and Zerrin Özlem Biner, eds., *Law against the State: Ethnographic Forays into Law’s Transformations*. Cambridge University Press, 2012: 228-244.

———. “The Logic of Reconciliation: Between the Right to Compensation and the Right to Justice in Turkey”, *Humanity*, vol. 4, no. 1 (2013): 73-91.

Blackburn, Robert, and Jörg Polakiewicz, eds. *Fundamental Rights in Europe: The European Convention in Human Rights and its Member States, 1950-2000*. Oxford University Press, 2001.

Bloxham, Donald. *The Great Game of Genocide: Imperialism, Nationalism, and the Destruction of the Ottoman Armenians*. Oxford University Press, 2005.

Bogdan, Dragoş, and Alina Mungiu-Pippidi. “The Reluctant Embrace: The Impact of the European Court of Human Rights in post-Communist Romania”, in Anagnostou, ed., *The European Court of Human Rights: Implementing Strasbourg’s Judgments on Domestic Policy*: 71-93.

Boyle, Kevin. “Human Rights and Political Resolution in Northern Ireland”, *The Yale Journal of World Public Order*, vol. 9 (1982): 156-177.

Boyle, Kevin, and Hurst Hannum. “Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice: The Donnelly Case”, *The American Journal of International Law*, vol. 68, no. 3 (1974): 440-453.

Boyle, Kevin, Tom Hadden, and Paddy Hillyard. *Law and State: The Case of Northern Ireland*. Martin Robertson, 1975.

Bozarslan, Hamit. “Kurds and the Turkish State”, in Reşat Kasaba, *The Cambridge History of Turkey, Volume 4*. Cambridge University Press, 2008: 333-356.

Börzel, Tanja. "Participation through Law Enforcement: The Case of the European Union", *Comparative Political Studies*, vol. 39, no. 1 (2006): 128-152.

Branch, Taylor. *Parting the Waters: America in the King Years 1954-63*. Simon & Schuster Paperbacks, 1988.

Brems, Eva. "Transitional Justice in the Case Law of the European Court of Human Rights", *The International Journal of Transitional Justice*, vol. 5 (2011): 282-303.

Brysk, Alison. "From Above and Below: Social Movements, the International System, and Human Rights in Argentina", *Comparative Political Studies*, vol. 26, no. 3 (1993): 259-285.

Buckley, Carla. *Turkey and the European Convention on Human Rights: A Report on the Litigation Programme of the Kurdish Human Rights Project*. KHRP, 2000.

———. "The European Convention on Human Rights and the Right to Life in Turkey", *Human Rights Law Review*, vol. 1, no. 1 (2001): 35-65.

Burstein, Paul. "Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity", *American Journal of Sociology*, vol. 96, no. 5 (1991): 1201-1225.

Buyse, Antoine. "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (The Greek Law Journal)* [Online], vol. 57 (2009): 78-90, available at: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1514441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1514441).

Buyse, Antoine, and Michael Hamilton. "Conclusions", in Antoine Buyse and Michael Hamilton, eds. *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*. Cambridge University Press, 2011: 286-300.

Cafilisch, Lucius. "The Reform of the European Court of Human Rights: Protocol No 14 and Beyond", *Human Rights Law Review*, vol. 6, no. 2 (2006): 403-415.

Cain, Patricia A. "Litigating for Lesbian and Gay Rights: A Legal History", *Virginia Law Review*, vol. 79, no. 7 (1993): 1551-1641.

Cameron, Iain. "Turkey and Article 25 of the European Convention on Human Rights", *International and Comparative Law Quarterly*, vol. 37 (1988): 887-925.

Casier, Marlies. "The Politics of Solidarity: The Kurdish Question in the European Parliament", in Casier and Jongerden, eds., *Nationalisms and Politics in Turkey: Political Islam, Kemalism and the Kurdish Issue*: 197-217.

Cavallaro, James L., and Stephanie Erin Brewer. "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court", *The American Journal of International Law*, vol. 102, no. 4 (2008): 768-827.

Celep, Ödül. "The Political Causes of Party Closures in Turkey", *Parliamentary Affairs*, vol. 67, no. 2 (2014): 371-390.

Cemal, Hasan. *Türkiye'nin Asker Sorunu: Ey Asker Siyasete Karışma!* [Turkey's Military Problem: Hey Soldier, Stay away from Politics!]. Doğan Kitap, 2010.

Christoffersen, Jonas, and Mikael Rask Madsen. "Introduction: The European Court of Human Rights between Law and Politics", in Christoffersen and Madsen, eds., *The European Court of Human Rights between Law and Politics*: 1-13.

Chua, Lynette J. *Mobilizing Gay Singapore: Rights and Resistance in an Authoritarian State*. Temple University Press, 2014.

Cichowski, Rachel A. "Women's Rights, the European Court, and Supranational Constitutionalism", *Law and Society Review*, vol. 38, no. 3 (2004): 489-512.

———. "Courts, Rights, and Democratic Participation", *Comparative Political Studies*, vol. 39, no. 1 (2006): 50-75.

———. *The European Court and Civil Society: Litigation, Mobilization, and Governance*. Cambridge University Press, 2007.

———. "Civil Society and the European Court of Human Rights", in Christoffersen and Madsen, eds. *The European Court of Human Rights between Law and Politics*: 77-97.

Cizre, Ümit. "The Truth and Fiction about (Turkey's) Human Rights Politics", *Human Rights Review*, vol. 3, no. 1 (2001): 55-77.

———. "Disentangling the Threads of Civil-Military Relations in Turkey: Promises and Perils", *Mediterranean Quarterly*, vol. 22, no. 2 (2011): 57-75.

———. "Introduction: The Politics of Redressing Grievances – The AK Party and its Leader", in Ümit Cizre, ed., *The Turkish AK Party and its Leader: Criticism, Opposition and Dissent*. Routledge, 2016: 1-19.

Cleary, Edward L. *The Struggle for Human Rights in Latin America*. Praeger Publishers, 1997.

Committee to Protect Journalists. *Journalists Killed: Turkey – Halit Gungen: 2000'e Dogru*, available at: <https://cpj.org/killed/1992/halit-gungen.php>.

———. *Journalists Killed: Turkey – Hafiz Akdemir*, available at: <https://www.cpj.org/killed/1992/hafiz-akdemir.php>.

———. *Journalists Killed: Turkey – Namik Taranci: Gercek*, available at: <https://cpj.org/killed/1992/namik-taranci.php>.

Conant, Lisa. *Justice Contained: Law and Politics in the European Union*. Cornell University Press, 2002.

———. "Individuals, Courts, and the Development of European Social Rights", *Comparative Political Studies*, vol. 39, no. 1 (2006): 76-100.

Council of Europe. "Derogations (Article 15 of the Convention): Turkey", in *Yearbook of the European Convention on Human Rights: 1970*. Martinus Nijhoff, 1972.

———. “Turkey’s Declaration under Article 25 of the Convention”, in *Yearbook of the European Convention on Human Rights: 1991*, vol. 34. Martinus Nijhoff, 1995.

Croissant, Aurel, and Wolfgang Merkel. “Introduction: Democratization in the Early Twenty-First Century”, *Democratization*, vol. 11, no. 5 (2004): 1-9.

Çakır, Ruşen. “The Reemergence of Hizballah in Turkey”, *Policy Focus*, no. 74 (2007).

Çalı, Başak. “Human Rights Discourse and Domestic Human Rights NGOs”, in Zehra F. Kabasakal Arat, ed., *Human Rights in Turkey*. University of Pennsylvania Press, 2007: 217-232.

———. “The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996-2006”, *Law and Social Inquiry*, vol. 35, no. 2 (2010): 311-338.

Çandar, Cengiz. *‘Leaving the Mountain’: How may the PKK Lay down Arms? Freeing the Kurdish Question from Violence*. TESEV Publications, 2012.

Çelik, Ayşe Betül. “Evaluation of Fieldwork Conducted in the Province of Batman: The Socio-Economic Consequences of Internal Displacement and Obstacles to Return”, in Dilek Kurban, Deniz Yüksek, Ayşe Betül Çelik, Turgay Ünal, and A. Tamer Aker, *Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey*. TESEV Publications, 2007: 205-227.

Dağ, Bekir Sıtkı. “Mevcut Gelişmeler. Türkiye ve Yerinden Olmuş Kişiler” [Current Developments. Turkey and Internally Displaced Persons], presented at conference titled *Yerinden Olmuş Kişiler* [Internally Displaced Persons], UNDP, Ankara, 23 February 2006.

Dağı, İhsan. “Democratic Transition in Turkey, 1980–1983: The Impact of European Diplomacy”, *Middle Eastern Studies*, vol. 32, no. 2 (1996): 124–141.

Davis, Jeffrey. *Seeking Justice in Latin America: Truth, Extra-Territorial Courts, and the Process of Justice*. Cambridge University Press, 2014.

Davis, Jeffrey, and Edward H. Warner. “Reaching Beyond the State: Judicial Independence, the Inter-American Court of Human Rights and Accountability in Guatemala”, *Journal of Human Rights*, vol. 6, no. 2 (2007): 233-255.

de Beco, Gauthier and Emma Lantschner. “The Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC)”, in Gauthier de Beco, ed., *Human Rights Monitoring Mechanisms of the Council of Europe*. Routledge, 2011: 100-126.

de Fazio, Gianluca. “Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States”, *International Journal of Comparative Sociology*, vol. 53, no. 1 (2012): 3-22.

de Greiff, Pablo. “Justice and Reparations”, in Pablo de Greiff, ed., *The Handbook of Reparations*. Oxford University Press, 2006: 451-477.

de Varennes, Fernand, and Elżbieta Kuzborska. “Human Rights and a Person’s Name: Legal Trends and Challenges”, *Human Rights Quarterly*, vol. 37 (2015): 977-1023.

de Witte, Bruno. “Politics versus Law in the EU’s Approach to Ethnic Minorities”, in Jan Zielonka, ed., *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union*. Routledge, 2002: 137-160.

———. “Linguistic Minorities in Western Europe: Expansion of Rights Without (Much) Litigation?” in Anagnostou, ed., *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System*: 27-52.

Dembour, Marie-Benedicte. “Still Silencing the Racism Suffered by Migrants... The Limits of Current Developments under Article 14 ECHR”, *European Journal of Migration and Law*, vol. 11 (2009): 221-234.

Deng, Francis. Keynote speech at international conference titled “Internal Displacement in Turkey and Abroad: International Principles, Experiences and Policy Proposals”, TESEV, Istanbul, 4-5 December 2006.

Derince, Mehmet Şerif. “A Break or Continuity? Turkey’s Politics of Kurdish Language in the New Millennium”, *Dialect Anthropol*, vol. 37 (2013): 145-162.

Diyarbakır Barosu. “5233 Sayılı Yasanın ve Zarar Tespit Komisyonlarının Değerlendirilmesi Toplantısı Sonuçları” [Conclusions of the Meeting to Evaluate Law No. 5233 and the Damage Assessment Commissions], 2 February 2006.

Diyarbakır Barosu, Ağrı Barosu, TOHAV, Göç-Der and İHD. “5233 Sayılı Yasa Adil Değildir” [Law no. 5233 Is Unjust], Press Statement, 25 February 2006.

Doğan, Arif. “*JİTEM’i Ben Kurdum*” [“I Founded JİTEM”]. Timaş, 2011.

Dorransoro, Gilles. “The Autonomy of the Political Field: The Resources of the Deputies of Diyarbakır (Turkey): 1920-2002”, *European Journal of Turkish Studies* [Online], vol. 3 (2005), available at: <https://ejts.revues.org/477>.

Dorransoro, Gilles, and Nicole F Watts. “Toward Kurdish Distinctiveness in Electoral Politics: The 1977 Local Elections in Diyarbakır”, *International Journal of Middle Eastern Studies*, vol. 41 (2009): 457-478.

Doruk, Yılmaz. “Türkiye’de Yerinden Edilmişlik Olgusu” [The Phenomenon of Internal Displacement in Turkey], in *Türkiye’de Zorunlu Göç: Hükümet Politikaları* [Internal Displacement in Turkey: Government Policies]. TESEV Yayınları, 2010.

Dunbar, Robert. “The Committee of Experts of the European Charter for Regional or Minority Languages (The CECL)”, in de Beco, ed., *Human Rights Monitoring Mechanisms of the Council of Europe*: 150-170.

ECtHR Research Division. *Cultural Rights in the Case-Law of the European Court of Human Rights*. Council of Europe/European Court of Human Rights, 2011.

Elçi, Tahir. “Türkiye’de Gözaltında Kayıplar” [Disappearances in Detention in Turkey], *Diyalog* (September-October 2009): 91-97.

Elmas, Esra, and Dilek Kurban. *Communicating Democracy–Democratizing Communication: Media in Turkey: Legislation, Policies, Actors*. TESEV Publications, 2011.

Erdal, Uğur. “Burden and Standard of Proof in Proceedings under the European Convention”, *European Law Review Human Rights Survey*, vol. 26 (2001): 68-85.

Erdal, Uğur, and Hasan Bakırcı. *Article 3 of the European Convention on Human Rights: A Practitioner’s Handbook*. OMCT Handbook Series, vol.1, 2006.

Ergil, Doğu. “The Kurdish Question in Turkey”, *Journal of Democracy*, vol. 11, no. 3 (2000): 122-135.

Epp, Charles R. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. University of Chicago Press, 1998.

Flaherty, Martin. “Human Rights Violations against Defense Lawyers: The Case of Northern Ireland”, *Harvard Human Rights Journal*, vol. 7 (1994): 87-123.

Fokas, Effie. “Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence”, *Oxford Journal of Law and Religion*, vol. 4 (2015): 54-74.

Galanter, Marc. “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change”, *Law and Society Review*, vol. 9 (1974): 95-160.

Gearty, Conor. “Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal”, *Northern Ireland Legal Quarterly*, vol. 51, no. 3 (2000): 381-396.

Gemalmaz, Mehmet Semih. *The Institutionalization Process of the “Turkish Type of Democracy”*: A Politico-Juridical Analysis of Human Rights. Amaç Yayıncılık, 1989.

———. “State of Emergency Rule in the Turkish Legal System: Perspectives and Texts”, *Turkish Yearbook of Human Rights*, vol. 11-12 (1989-1990): 115-156.

———. “1991 Türkiye’inde İnsan Hakları” [Human Rights in 1991’s Turkey], in *Örneklerle Türkiye İnsan Hakları Raporu 1991* [Turkey Human Rights Report with Examples 1991]. TİHV, 1991.

———. “Historical Roots of Martial Law within the Turkish Legal System: Perspectives and Texts”, *Turkish Yearbook of Human Rights*, vol. 13 (1991): 73-145.

———. “1920-1950 Martial Law in Turkey: Is it Additional Measure or a Main Instrument for Repression? Perspectives and Texts”, *Turkish Yearbook of Human Rights*, vol. 14 (1992): 85-115.

———. *Temel Belgelerde İnsan Hakları – Usul Hukuku I* [Human Rights in Fundamental Texts– Procedural Law I]. İHD, 1994.

———. *Avrupa İnsan Hakları Mahkemesi Kararları (1)* [The Judgments of the European Court of Human Rights (1)]. İHD, 1995.

———. *Temel Belgelerde İnsan Hakları – Usul Hukuku II* [Human Rights in Fundamental Texts – Procedural Law II]. İHD, 1995.

———. *Avrupa İnsan Hakları Mahkemesi Kararları (2)* [The Judgments of the European Court of Human Rights (2)]. İHD, 1996.

———. *Avrupa İnsan Hakları Mahkemesi Kararları (3)* [The Judgments of the European Court of Human Rights (3)] (İHD, 1996).

Gerards, Janneke. “The Discrimination Grounds of Article 14 of the European Convention on Human Rights”, *Human Rights Law Review*, vol. 13, no. 1 (2013): 99-124.

Gilbert, Geoff. “The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights”, *Human Rights Quarterly*, vol. 24 (2002): 736-780.

Ginsburg, Tom, and Tamir Moustafa, eds. *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge University Press, 2008.

Giritli, İsmet. “2001 Anayasa Değişikliklerinin Temel Hak ve Özgürlüklere Yansıması” [The Reflection of the 2001 Constitutional Amendments to Fundamental Rights and Freedoms], *Anayasa Yargısı*, vol. 19 (2002): 88-103.

Glennon, Robert Jerome. “The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957”, *Law and History Review*, vol. 9, no. 1 (1991): 59-112.

Goldhaber, Michael D. *A People’s History of the European Court of Human Rights*. Rutgers University Press, 2009.

Goldston, James A. “Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges”, *Human Rights Quarterly*, vol. 28 (2006): 492-527.

———. “The Struggle for Roma Rights: Arguments that have Worked”, *Human Rights Quarterly*, vol. 32, no. 2 (2010): 311-325.

Göral, Özgür Sevgi, Ayhan Işık, and Özlem Kaya. *Konuşulmayan Gerçek: Zorla Kaybetmeler* [The Unspoken Reality: Enforced Disappearances]. Hakikat Adalet Hafıza Merkezi, 2013.

Gözler, Kemal. “Bireysel Başvuru ve Kıbrıs Sorunu” [Individual Complaint and the Cyprus Problem], *İnsan Hakları Yıllığı*, vol. 15 (1993): 165-174.

Green, Penny J., and Tony Ward. “State Crime, Human Rights, and the Limits of Criminology”, *Social Justice*, vol. 27, no. 1 (2000): 101-115.

Greer, Steven. *The European Convention on Human Rights: Achievements, Problems and Prospects*. Cambridge University Press, 2006.

Gross, Oren. “‘Once More unto the Breach’: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Democracies”, *The Yale Journal of International Law*, vol. 23 (1998): 437-501.

Gross, Oren, and Fionnuala Ní Aoláin. “From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights”, *Human Rights Quarterly*, vol. 23 (2001): 625-649.

Grozev, Yonko. “Political Opposition and Judicial Resistance to Strasbourg Case Law Regarding Minorities in Bulgaria”, in Anagnostou, ed., *The European Court of Human Rights: Implementing Strasbourg’s Judgments on Domestic Policy*: 122-142.

Güneş, Cengiz. *The Kurdish National Movement in Turkey: From Protest to Resistance*. Routledge, 2012.

Gürbey, Gülistan. “The Kurdish Conflict in Turkey – (not) a Subject for the OSCE?” *Helsinki Monitor*, vol. 12, no. 1 (2001): 7–20.

Gürbüz, Mustafa. *Rival Kurdish Movements in Turkey: Transforming Ethnic Conflict*. Amsterdam University Press, 2016.

Güven, Dilek. *Cumhuriyet Dönemi Azınlık Politikaları ve Stratejileri Bağlamında 6-7 Eylül Olayları* [The 6-7 September Incidents in the Context of the Minority Policies and Strategies of the Republican Era]. İletişim Yayınları, 2006.

Hacettepe Üniversitesi Nüfus Etütleri Enstitüsü [Hacettepe University Institution of Population Studies]. *Türkiye’de Göç ve Yerinden Olmuş Nüfus Araştırması* [Turkey Migration and Internally Displaced Population Survey]. Hacettepe Üniversitesi, 2006.

Hakikat Adalet Hafıza Merkezi [Truth Justice Memory Center]. *Faili Belli: Yüzleşme Davaları İzleme Sitesi* [Perpetrator not-Unknown: Monitoring Site for the Cases Dealing with the Past], available in English at: <http://failibelli.org/en/>.

———. *Zorla Kaybedilenler Veritabanı* [Database on Enforced Disappearances], available at: <http://www.zorlakaybetmeler.org/>.

———. *Zorla Kaybedilenler Veritabanı: Ömer Savun’un Zorla Kaybedilmesi* [Database on Enforced Disappearances: The Enforced Disappearance of Ömer Savun], available at: <http://www.zorlakaybetmeler.org/victim.php?id=HAH/person/606>.

Hakyemez, Yusuf Şevki, and Birol Akgün. “Limitations on the Freedom of Political Parties in Turkey and the Jurisdiction of the European Court of Human Rights”, *Mediterranean Politics*, vol.7, no. 2 (2002): 54-78.

Hamilton, Michael. “Transition, Political Royalties and the Order of the State”, in Buyse and Hamilton, eds. *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*: 151-184.

Hanioglu, M. Şükrü. *A Brief History of the Late Ottoman Empire*. Princeton, 2008.

Hannum, Hurst, and Kevin Boyle. "The Donnelly Case, Administrative Practice and Domestic Remedies under the European Convention: One Step Forward and Two Steps Back", *The American Journal of International Law*, vol. 71, no. 2 (1977): 316-321.

Happold, Matthew. "Letting States get away with murder", *New Law Journal*, vol. 151 (2001): 1323.

Hegarty, Angela, and Siobhan Leonard, eds. *A Human Rights: An Agenda for the 21<sup>st</sup> Century*. Cavendish Publishing, 1999.

Helfer, Laurence R. "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", *The European Journal of International Law*, vol. 19, no. 1 (2008): 125-159.

Helfer, Laurence R., and Anne-Marie Slaughter. "Toward a Theory of Effective Supranational Adjudication", *The Yale Law Journal*, vol. 107, no. 2 (1997): 273-391.

Helvacı, Nevzat. *Karanlıkta Yol Aramak* [Searching for the Light in the Dark]. İmge Kitabevi, 2013.

Hicks, Neil. "Legislative Reform in Turkey and the European Human Rights Mechanisms", *Human Rights Review*, vol. 3 (2001): 78-85.

Higgins, Rosalyn. "Derogations under Human Rights Treaties," *British Yearbook of International Law*, vol. 48, no. 1 (1977): 281-319.

Hilson, Chris. "New Social Movements: The Role of Legal Opportunity", *Journal of European Public Policy*, vol. 9, no. 2 (2002): 238-255.

Hodson, Loveday. *NGOs and Litigation before the European Court of Human Rights*. Hart Publishing, 2011.

Hovannisian, Richard G., ed. *The Armenian Genocide: History, Politics, Ethics*. St. Martin's Press, 1992.

Hughes, James, and Gwendolyn Sasse. "Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEEC's", *Journal of Ethnopolitics and Minority Issues in Europe*, no. 1 (2003): 1-36.

Human Rights Joint Platform (*İnsan Hakları Ortak Platformu-İHOP*). *Yargı Gözlem Raporu: Diyarbakır KCK Davası* [Judicial Monitoring Report: Diyarbakır KCK Case] (2011).

———. "Gözaltında Kaybedilme: Kulp-Alacaköy Kayıpları" [Disappearance under Detention: The Missing of Kulp-Alacaköy], 3 April 2015, available at: <http://www.ihop.org.tr/2015/04/03/gozaltinda-kaybedilme-kulp-alacakoy-kayiplari/>.

Human Rights Watch. *Destroying Ethnic Identity: The Kurds of Turkey – An Update* (1990).

———. *Weapons Transfers and Violations of the Laws of War in Turkey* (1995).

———. *What is Turkey's Hizbullah? A Human Rights Watch Backgrounder* (2000).

- . “Turkey: Human Rights Developments”, in *World Report 2000* (2000).
- . *Turkey: Human Rights and the European Union Accession Partnership* (2000).
- . *Displaced and Disregarded: Turkey’s Failing Village Return Program* (2002).
- . *Unjust, Restrictive, and Inconsistent: The Impact of Turkey’s Compensation Law with Respect to Internally Displaced People* (2006).
- . *Time for Justice: Ending Impunity for Killings and Disappearances in 1990s Turkey* (2012).
- . *Turkey: No Justice for Airstrike Victims*, 27 December 2012, available at: [hrw.org/news/2012/12/27/turkey-no-justice-airstrike-victims](http://hrw.org/news/2012/12/27/turkey-no-justice-airstrike-victims).
- . “Turkey: Crackdown on Kurdish Opposition: MPs Jailed, Elected Mayors Removed Ahead of Referendum”, 20 March 2017.

International Commission of Jurists. *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction: A Practitioners Guide* (2015).

———. *Turkey: Judicial System in Peril – A Briefing Paper* (2016).

International Crisis Group. *Turkey: Ending the PKK Insurgency* (2011).

———. *Crying “Wolf”: Why Turkish Fears Need Not Block Kurdish Reform* (2013).

Işıkse, Türküler. “Between Text and Context: Turkey’s Tradition of Authoritarian Constitutionalism”, *I CON*, vol. 11, no. 3 (2013): 702-726.

İHD. *1. Olağan Genel Kurulu Çalışma Raporu* [Working Report of the 1st Regular General Meeting] (1987).

———. *Kuruluşundan Bugüne İHD* [İHD from its Foundation to Today] (2001).

———. *17-30 Mayıs: Kayıplar Haftası – Kayıpları Unutmadık* [17-30 May: The Week of the Missing – We did not Forget the Missing] (2003).

———. *Ocak 1990-Mart 2009 Döneminde Köy Korucuları Tarafından Gerçekleştirilen İnsan Hakları İhlallerine İlişkin Özel Rapor* [Special Report concerning Human Rights Violations by Village Guards in the Period January 1990 – March 2009] (2009).

———. “İHD’ye Yönelik Algı Operasyonlarına Son Verin” [Put an End to the Psychological Operations against the İHD], press statement, 16 March 2016.

İlkiz, Fikret. “KCK Cases and the Judiciary Mechanism”, *Perspectives-Political Analysis and Commentary from Turkey*, no. 2 (2012): 41–45.

Jenkins, Gareth. *Political Islam in Turkey: Running West, Heading East?* Palgrave Macmillan, 2008.

Jongerden, Joost. *The Settlement Issue in Turkey and the Kurds: An Analysis of Spatial Policies, Modernity and War*. Brill, 2007.

Jongerden, Joost, and Ahmet Hamdi Akkaya. "The Kurdistan Workers Party and a New Left in Turkey: Analysis of the Revolutionary Movement in Turkey through the PKK's Memorial Text on Haki Karer", *European Journal of Turkish Studies* [Online], vol. 14 (2012), available at: <https://ejts.revues.org/4613>.

Jorem, Henrik. "Protecting Human Rights in Cases of Urgency: Interim Measures and the Right of Individual Application under Article 34 ECHR", *Nordic Journal of Human Rights*, vol. 30, no. 4 (2012): 404-428.

Joseph R. Crowley Program. "Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey", *Fordham International Law Journal*, vol. 22, no. 5 (1998): 2129-2269.

Kaboğlu, İbrahim Özden, and Stylianos Ioannis G. Koutnatzis. "The Reception Process in Greece and Turkey", in Helen Keller and Alec Stone Sweet, eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems*. Oxford University Press, 2008: 451-529.

Kamminga, Menno T. "Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?" *Netherlands Quarterly for Human Rights*, vol. 2 (1994): 153-164.

Kaplan, Hasip. *Bir Onur Kavgası: Cizre'den Strasbourg'a Yeşilyurt Dışkı Yedirme Davası* [A Struggle for Dignity: The Yeşilyurt Excrement Case from Cizre to Strasbourg]. Belge Yayınları, 1996.

Karpat, Kemal. "The Military and Politics in Turkey, 1960-1964: A Socio-Cultural Analysis of a Revolution", *The American Historical Review*, vol. 75, no. 6 (1970): 1654-1683.

Kasaba, Reşat. "Do States Always Favor Stasis? The Changing Status of Tribes in the Ottoman Empire", in Joel S. Migdal, ed., *Boundaries and Belonging: States and Societies in the Struggle to Shape Identities and Local Practices*. Cambridge University Press, 2004: 27-48.

Kaufman, Edy, and Patricia Weiss Fagen. "Extrajudicial Executions: An Insight into the Global Dimensions of a Human Rights Violation", *Human Rights Quarterly*, vol. 3, no. 4 (1981): 81-100.

Keck, Margaret E., and Kathryn Sikkink. *Activists beyond Borders: Advocacy Networks in International Politics*. Cornell University Press, 1998.

Keller, Helen, and Alec Stone Sweet, eds. *A Europe of Rights: The Impact of the ECHR on National Legal Systems*. Oxford University Press, 2008.

Keller, Helen, and Alec Stone Sweet. "Assessing the Impact of the ECHR on National Legal Systems", in Keller and Stone Sweet, eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems*: 677-712.

Keller, Helen, and Corina Heri. “Enforced Disappearance and the European Court of Human Rights: A ‘Wall of Silence’, Fact-Finding Difficulties and States as ‘Subversive Objectors’”, *Journal of International Criminal Justice*, vol. 12 (2014): 735-750.

Keller, Helen, and Olga Chernishova. “Disappearance Cases before the European Court of Human Rights and the U.N. Human Rights Committee: Convergences and Divergences”, *Human Rights Law Journal*, vol. 32, no. 7-12 (2012): 237-249.

Keohane, Robert O., Stephen Macedo, and Andrew Moravcsik. “Democracy-Enhancing Multilateralism”, *International Organization*, vol. 63 (2009): 1-31.

Keskin, Eren. *Adli Tıp Raporlarının Dava Dosyalarına Etkisi* [The Impact of the Council of Forensic Medicine on Court Cases]. Gözaltında Cinsel Taciz ve Tecavüze Karşı Hukuki Yardım Bürosu, undated.

Keskin, Eren, and Leman Yurtsever. *Hepsi Gerçek: Devlet Kaynaklı Cinsel Şiddet* [It’s All True: Sexual Violence Stemming from the State]. Punto, 2006.

KHRP. *Timurtaş v. Turkey & Ertak v. Turkey: State Responsibility in ‘Disappearances’* (2001).

———. “Response to the Committee of Ministers Resolution of 18 September 2008, on the Execution of ECtHR Judgments in Relation to Turkish Security Forces”, Public Statement, 2 October 2008.

Kılıç, Ecevit. “JİTEM’in Öyküsü” [The Story of JİTEM], in Ali Bayramoğlu and Ahmet İnsel, eds., *Almanak Türkiye: 2006-2008: Güvenlik Sektörü ve Demokratik Gözetim* [Almanac Turkey 2006-2008: Security Sector and Democratic Oversight]. TESEV Yayınları, 2009: 220-229.

Kirişçi, Kemal, and Gareth M. Winrow. *The Kurdish Question and Turkey: An Example of a Trans-State Ethnic Conflict*. Frank Cass, 1997.

Klein, Janet. “Kurdish Nationalists and non-Nationalist Kurdistans: Rethinking Minority Nationalism and the Dissolution of the Ottoman Empire, 1908-1909”, *Nations and Nationalism*, vol. 13, no.1 (2007): 135-153.

Koğacıoğlu, Dicle. “Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain”, *International Sociology*, vol. 18, no. 1 (2003): 258-276.

———. “Progress, Unity, and Democracy: Dissolving Political Parties in Turkey”, *Law and Society Review*, vol. 38, no. 3 (2004): 433-462.

Koopmans, Ruud. *Democracy from Below: New Social Movements and the Political System in West Germany*. Westview Press, 1995.

Kumm, Matthias. *Democracy is not Enough: Rights, Proportionality and the Point of Judicial Review*, Public Law and Legal Theory Research Paper Series, Working Paper no. 09-10. New York University Law School, 2009.

Kurban, Dilek. "Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey's Path to the European Union," *Columbia Human Rights Law Review*, vol. 35, no.101 (2003): 151-214.

———. "Unraveling a Trade-off: Reconciling Minority Rights and Full Citizenship in Turkey," *European Yearbook of Minority Issues*, vol. 4, no. 2004/5 (2006): 341-372.

———. "Internal Displacement and Reparative Justice: Implementation of the Compensation Law in the Province of Hakkari", in Kurban et al., eds., *Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey*: 291-311.

———. *A Quest for Equality: Minorities in Turkey*. Minority Rights Group International, 2007.

———. "The Village Guard System as a 'Security' Policy", in Insel and Bayramoğlu, eds., *Almanac Turkey 2006-2008: Security Sector and Democratic Oversight*: 203-210.

———. *To Europe and Back: The Three Decades of Kurdish Struggle in Turkey*, Global Turkey in Europe Policy Briefs. Stiftung Mercator, Istanbul Policy Center and Istituto Affari Internazionali, 2013.

———. *Not a Roadmap for Peace: Erdoğan's Democratisation Package Defies Kurdish Expectations*, SWP Comments 35/2013. SWP, 2013.

———. "Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations", *Human Rights Law Review*, vol. 16, no. 4 (2016): 731-769.

Kurban, Dilek, Ayşe Betül Çelik, and Deniz Yüksek. *'Overcoming a Legacy of Mistrust: Towards Reconciliation between the State and the Displaced' – Update on the Implementation of the Recommendations Made by the UN Secretary-General's Representative on Internally Displaced Persons Following his Visit to Turkey*. TESEV and NRC/IDMC Publications, 2006.

Kurban, Dilek, and Ceren Sözeri. *Caught in the Wheels of Power: The Political, Legal and Economic Constraints on Independent Media and Freedom of the Press in Turkey*. TESEV Publications, 2012.

Kurban, Dilek, and Deniz Yüksek. *A Permanent Solution to Internal Displacement? An Assessment of the Van Action Plan for IDPs*. TESEV Publications, 2009.

Kurban, Dilek, Deniz Yüksek, Ayşe Betül Çelik, Turgay Ünal, and A. Tamer Aker. *Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey*. TESEV Publications, 2007.

Kurban, Dilek, and Esra Elmas. "Turkish Media Policy in National Context," in Evangelia Psychogiopoulou, ed., *Understanding Media Policies: A European Perspective*. Palgrave Macmillan, 2012: 214-229.

Kurban, Dilek, and Haldun Gülalp. “A Complicated Affair: Turkey’s Kurds and the European Court of Human Rights”, in Anagnostou, ed., *The European Court of Human Rights: Implementing Strasbourg’s Judgments on Domestic Policy*: 166-187.

Kurban, Dilek, and Mesut Yeğen. *Adaletin Kıyısında: ‘Zorunlu’ Göç Sonrasında Devlet ve Kürtler – 5233 Sayılı Tazminat Yasası’nın bir Değerlendirmesi – Van örneği* [On the Verge of Justice: The State and the Kurds after Forced Migration – An Assessment of the Compensation Law no. 5233 – the case of Van]. TESEV Yayınları, 2012.

Kurban, Dilek, Ozan Erözden, and Haldun Gülalp. *Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: A Case Study of Turkey*, prepared for project titled ‘JURISTRAS: The Strasbourg Court, Democracy and the Human Rights of Individuals and Communities: Patterns of Litigation, Implementation and Domestic Reform’ and funded by the European Commission, October 2008.

Kurt, Gülşah. *Cezasızlık Sorunu: Soruşturma Süreci* [The Impunity Problem: Investigation Process]. Hakikat Adalet Hafıza Merkezi, 2014.

Kurt, Mehmet. *Din, Şiddet ve Aidiyet: Türkiye’de Hizbullah* [Religion, Violence and Belonging: Hizbullah in Turkey]. İletişim, 2015.

Kuyucu, Ali Tuna. “Ethno-religious ‘Unmixing’ of ‘Turkey’: 6-7 September Riots as a Case in Turkish Nationalism”, *Nations and Nationalism*, vol. 11, no. 3 (2005): 361-380.

Lapitskaya, Julia. “ECHR, Russia, and Chechnya: Two is not Company and Three is Definitely a Crowd”, *International Law and Politics*, vol. 43 (2011): 479-547.

Leach, Philip, Costas Paraskeva, and Gordana Uzelac. *International Human Rights and Fact-Finding: An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*. London Metropolitan University, 2009.

Leach, Philip, Helen Hardman, Svetlana Stephenson, and Brad K Blitz. *Responding to Systemic Human Rights Violations: An Analysis of ‘Pilot Judgments’ of the European Court of Human Rights and their Impact at National Level*. Intersentia, 2010.

Lester, Anthony. “The European Court of Human Rights after 50 Years”, in Christoffersen and Madsen, eds., *The European Court of Human Rights between Law and Politics*: 98-115.

Macdonald, Ronald St. John. “Derogations under Article 15 of the European Convention on Human Rights”, *Columbia Journal of Transnational Law*, vol. 36 (1997): 225-267.

Madra, Ömer. *Avrupa İnsan Hakları Sözleşmesi ve Bireysel Başvuru Hakkı* [The European Convention on Human Rights and the Right to Individual Petition] . Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları, 1981.

Madsen, Mikael Rask. “Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence”, in Christoffersen and Madsen, eds., *The European Court of Human Rights between Law and Politics*: 43-60.

Mahoney, Paul. “Speculating on the Future of the Reformed European Court of Human Rights”, *Human Rights Law Journal*, vol. 20, no. 1-3 (1999): 1-4.

———. “New Challenges for the European Court of Human Rights Resulting from the Expanding Caseload and Membership”, *Penn State International Law Review*, vol. 21 (2002): 101-114.

Marcus, Aliza. *Blood and Belief: The PKK and the Kurdish Fight for Independence*. New York University Press, 2007.

Matthees, Kevin, and Günter Seufert. *Erdoğan and Öcalan Begin Talks: A Paradigm Shift in Turkey’s Kurdish Policy and a New Strategy of the PKK*, SWP Comments 13/2013, SWP, 2013.

McAdam, Doug, Sidney Tarrow, and Charles Tilly. *Dynamics of Contention*. Cambridge University Press, 2001.

McCann, Michael. “Reform Litigation on Trial”, *Law and Social Inquiry*, vol. 17, no. 4 (1992): 715-74.

———. *Rights at Work: Pay Equality Reform and the Politics of Legal Mobilization*. University of Chicago Press, 1994.

———. “Law and Social Movements: Contemporary Perspectives”, *Annual Review of Law and Social Science*, vol. 2 (2006): 17-38.

———. “Litigation and Legal Mobilization”, in Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira, eds., *The Oxford Handbook of Law and Politics*. Oxford University Press, 2008: 522-540.

———. Discussant in panel titled “Formal Institutions as Instruments of Social Movements”, Law and Society Association annual conference titled “At the Delta: Belonging, Place and Visions of Law and Social Change”, 1-5 June 2016, New Orleans.

McDowall, David. *A Modern History of the Kurds*. I.B. Tauris, 2004.

Medda-Windischer, Roberta. “The European Court of Human Rights and Minority Rights”, *Journal of European Integration*, vol. 25, no. 3 (2003): 249-271.

Méndez, Juan E., and José Miguel Vivanco. “Disappearances and the Inter-American Court: Reflections on a Litigation Experience”, *Hamline Law Review*, vol. 13, no. 3 (1990): 507-578.

Merry, Sally Engle. “Rights Talk and the Experience of Law: Implementing Women’s Human Rights to Protection from Violence”, *Human Rights Quarterly*, vol. 25, no. 2 (2003): 343-381.

Morgenthau, Henry. *Ambassador Morgenthau’s Story*. Doubleday, Page & co., 1918.

Moustafa, Tamir. “Law versus the State: The Judicialization of Politics in Egypt”, *Law and Social Inquiry*, vol. 28 no. 4 (2003): 883-930.

———. *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*. Cambridge University Press, 2007.

Mowbray, Alastair. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*. Hart Publishing, 2004.

Müftüler-Bac, Meltem. “The Never-Ending Story: Turkey and the European Union”, *Middle Eastern Studies*, vol. 34, no. 4 (1998): 240-258.

Myjer, Egbert. “Human Rights without Peace? The European Court of Human Rights and Conflicts between High Contracting Parties”, in Antoine Buyse, ed., *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict*. Intersentia, 2011: 1-33.

Ní Aoláin, Fionnuala. “The Emergence of Diversity: Differences in Human Rights Jurisprudence”, *Fordham International Law Journal*, vol. 19, no. 1 (1995): 101-142.

———. “Transitional Emergency Jurisprudence: Derogation and Transition”, in Buyse and Hamilton, eds., *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*: 24-51.

Ní Aoláin, Fionnuala, and Colm Campbell. “The Paradox of Transition in Conflicted Democracies”, *Human Rights Quarterly*, vol. 27, no. 1 (2005): 172-213.

O’Donnell, Guillermo A. “On the State, Democratization and Some Conceptual Problems: A Latin American View with Glances at Some Post-Communist Countries”, *World Development*, vol. 21, no. 8 (1993): 1355-1369.

———. “Illusions about Consolidation”, *Journal of Democracy*, vol. 7, no.2 (1996): 34-51.

———. “Democracy, Law and Comparative Politics”, *Studies in Comparative International Development*, vol. 36, no. 1 (2001): 7-36.

Olson, Robert. *The Emergence of Kurdish Nationalism and the Sheikh Said Rebellion, 1880-1925*. University of Texas Press, 1989.

Oran, Baskın. *Türkiye’de Azınlıklar: Kavramlar, Teori, Lozan, İç Mevzuat, İçtihat, Uygulama* [Minorities in Turkey: Concepts, Theory, Lozan, Domestic Laws, Precedent, Implementation]. İletişim Yayınları, 2004.

Öden, Merih. “Anayasa Mahkemesi ve Olağanüstü Hal ve Sıkıyönetim Kanun Hükmünde Kararnamelerinin Anayasaya Uygunluğunun Yargısal Denetimi” [The Constitutional Court and the Judicial Review of the Constitutionality of Decrees Having the Force of Law Issued during a State of Emergency and Martial Law], *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, vol. 58, no. 3 (2009): 659-691.

Öktem, Kerem. “The Nation’s Imprint: Demographic Engineering and the Change of Toponymes in Republican Turkey”, *European Journal of Turkish Studies* [Online], vol. 7 (2008), available at <http://ejts.revues.org/2243>.

Ölmez, Osman. *Türkiye Siyasetinde DEP Depremi: “Legal Kürt Mücadelesi”* [DEP Earthquake in Politics in Turkey: “Legal Kurdish Struggle”]. Doruk, 1995.

Özbudun, Ergun. “Turkey’s Search for a New Constitution”, *Insight Turkey*, vol. 14, no. 1 (2012): 39-50.

Özdek, Yasemin, and Emine Karacaoğlu. “Turkey”, in Blackburn and Polakiewicz, eds., *Fundamental Rights in Europe: The European Convention in Human Rights and its Member States, 1950-2000*: 879-913.

Parla, Taha. *Türkiye'nin Siyasal Rejimi: 1980-1989* [Turkey's Political Regime: 1980-1989]. İletişim Yayınları, 1993.

Parla, Taha, and Andrew Davison. *Corporatist Ideology in Kemalist Turkey: Progress or Order?* Syracuse University Press, 2004.

Pentassuglia, Gaetano. “The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?” *International Journal on Minority and Group Rights*, vol. 19 (2012): 1-23.

Peoples' Democratic Party. “Appeal to the ECtHR for our Co-Chairs”, 20 February 2017.

———. *The Lifting of Legislative Immunities at the Parliament of Turkey: An Assessment Report*, 13 June 2016.

Pevehouse, Jon C. *Democracy from Above: Regional Organisations and Democratization*. Cambridge University Press, 2005.

Piening, Christopher. “The European Parliament: Influencing the EU's External Relations”, paper presented at the 5th biennial ECSA Conference, Seattle, 30 May 1997.

Proukaki, Katselli. “The Right of Displaced Persons to Property and to Return Home after *Demopoulos*”, *Human Rights Law Review*, vol. 14 (2014): 701-732.

Reidy, Aisling, Françoise Hampson, and Kevin Boyle. “Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey”, *Netherlands Quarterly of Human Rights*, vol. 15, no. 2 (1997): 161-173.

Reiter, Dan. “Why NATO Enlargement Does Not Spread Democracy”, *International Security*, vol. 25, no. 4 (2001): 41-67.

Republic of Turkey, Ministry of Foreign Affairs. Deputy Directorate General for the Council of Europe and Human Rights, written communication numbered AKGY-6 40 and titled ‘*Doğan and others* Judgment and return to village applications’, 7 January 2005 (unpublished document; on file with the author).

Republic of Turkey, Ministry of Justice. *State of Play Regarding the Legislative Work on Judiciary and Fundamental Rights (Chapter 23) in Turkey* (undated) (unpublished document; on file with the author).

Robertson, Arthur Henry, and J.G. Merrills. *Human Rights in Europe*. Juris Publishing, 1993.

Robins, Philip. “The Overlord State: Turkish Policy and the Kurdish Issue”, *International Affairs*, vol. 69, no. 4 (1993): 657-676.

Rodley, Nigel S. "Torture, Extra-Legal Execution and 'Disappearance' as Crimes under International Law", in Petro R. David, ed., *Crime and Criminal Policy: Papers in Honour of Manuel López-Rey y Arrojo*, Publication No. 25. United Nations Social Defence Research Institute, 1985.

Romano, David. *The Kurdish Nationalist Movement: Opportunity, Mobilization, and Identity*. Cambridge University Press, 2006.

Rubio-Marin, Ruth, and Mathias Möschel. "Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism", *European Journal of International Law*, vol. 26, no. 4 (2016): 881-899.

Sadurski, Wojciech. "Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments", *Human Rights Law Review*, vol. 9, no. 3 (2009): 397-453.

Sağlam, Fazıl. "Avrupa İnsan Hakları Mahkemesi'nin Türkiye'de Kapatılan Partilere İlişkin Kararlarının Partiler Hukukuna Etkisi" [The Impact of the European Court of Human Rights' Rulings on Dissolved Parties in Turkey to the Party Laws], *Anayasa Yargısı*, vol. 16 (1999):189-216.

Sancar, Mithat, and Eylem Ümit Atılğan. "*Adalet biraz Es Geçiliyor*": *Demokratikleşme Sürecinde Hakimler ve Savcılar* ["Justice can be Bypassed Sometimes": Judges and Prosecutors in the Democratization Process]. TESEV Yayınları, 2009.

Sardaro, Pietro. "*Jus Non Dicere* for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court", *European Human Rights Law Review*, vol. 6 (2003): 601-630.

Sarıbrahimoğlu, Lale. "Gendarmerie", in Cizre, ed., *Almanac Turkey 2005: Security Sector and Democratic Oversight*: 100-111.

Scheingold, Stuart A. *The Politics of Rights: Lawyers, Public Policy, and Political Change*. Yale University Press, 1974.

Schmitter, Philippe C. "Dangers and Dilemmas of Democracy", *Journal of Democracy*, vol. 5, no. 2 (1994): 57-74.

Seufert, Günter. *Is the Fethullah Gülen Movement Overstretching Itself? A Turkish Religious Community as a National and International Player*, SWP Research Paper. SWP, 2014.

Shambayati, Hootan. "Courts in Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (And Iranian) Politics", in Ginsburg and Tamir, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes*: 283-303.

———. "The Turkish Constitutional Court and the Justice and Development Party (2002-2009)", *Middle Eastern Studies*, vol. 48, no. 1 (2012): 107-123.

Shambayati, Hootan, and Güliz Sütçü. "The Turkish Constitutional Court and the Justice and Development Party (2002-09)", *Middle Eastern Studies*, vol. 48, no. 1 (2012): 107-123.

Shapiro, Martin. "Courts in Authoritarian Regimes", in Ginsburg and Tamir, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes*: 326-335.

Sinclair-Webb, Emma. *Dispatches: Impunity and Cover-up in Turkey*, Human Rights Watch, 7 January 2014, available at: [hrw.org/news/2014/01/07/dispatches-impunity-and-cover-turkey](http://hrw.org/news/2014/01/07/dispatches-impunity-and-cover-turkey).

Sitaropoulos, Nicholas. "Implementation of the European Court of Human Rights' Judgments Concerning National Minorities or Why Declaratory Adjudication does not Help", European Society of International Law, Conference Paper Series no. 4/2011, Tallinn Research Forum, 26-28 May 2011.

Solvang, Ole. "Chechnya and the European Court of Human Rights: The Merits of Strategic Litigation", *Security and Human Rights*, no. 3 (2008): 208-219.

Söyler, Mehtap. "Informal Institutions, Forms of State and Democracy: The Turkish Deep State", *Democratization* [Online], DOI:10.1080/13510347.2011.650915 (2012).

Stockholm Center for Freedom, "CoE Secretary General Jagland Warns Turkey on Rights Violations", 1 March 2017, available at: <http://stockholmcf.org/coe-secretary-general-jagland-warns-turkey-on-rights-violations/>.

Stone Sweet, Alec. "Constitutional Courts and Parliamentary Democracy", *West European Politics*, vol. 25, no. 1 (2002): 77-100.

———. "Constitutionalism, Legal Pluralism, and International Regimes", *Indiana Journal of Global Legal Studies*, vol. 16, no. 2 (2009): 621-645.

———. "A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe", *Journal of Global Constitutionalism*, vol. 1, no. 1 (2012): 53-90.

Stone Sweet, Alec, and Helen Keller. "Introduction: The Reception of the ECHR in National Legal Orders", in Keller and Stone Sweet, eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems*: 3-28.

Sunar, İlkay, and Sabri Sayarı. "Democracy in Turkey: Problems and Prospects", in Guillermo O'Donnell, Philippe C. Schmitter and Laurence Whitehead, eds., *Transitions from Authoritarian Rule: Southern Europe*. Johns Hopkins University Press, 1986: 165-186.

Sweeney, James A. *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition*. Routledge, 2013.

Şahan, Timur, and Uğur Balık. *İtirafçı: Bir JİTEM'ci Anlattı* [The Confessor: A JİTEM Member has Spoken Out]. *Aram Yayıncılık*, 2004.

Tahmazoğlu, Sultan, Ozan Erözden, Sibel İnceoğlu, Fazıl Sağlam, Oktay Uygun, Mesut Gülmez, Fikret İlkiz, Ayşe Kollu, Ece Öztan, and Nihan Yancı. *National Report: Turkey*. Union of Turkish Bar Associations, 2004.

Tanör, Bülent. “States of Exception in Turkey”, in International Commission of Jurists (ICJ), *States of Emergency: Their Impact on Human Rights* (1983): 309-33.

———. “Who’s in Charge in Turkey?” *The Review*, no. 34 (International Commission of Jurists, 1985): 61-68.

———. *Türkiye’nin İnsan Hakları Sorunu* [Turkey’s Human Rights Problem]. BDS Yayınları, 1994.

———. *İki Anayasa: 1961-1982* [Two Constitutions: 1961-1982]. XII Levha, 2013.

———. *Osmanlı-Türk Anayasal Gelişmeleri: 1789-1980* [Ottoman-Turkish Constitutional Developments: 1789-1980]. Yapı Kredi Yayınları, 2015.

Tanör, Bülent, and Necmi Yüzbaşıoğlu. *1982 Anayasasına Göre Türk Anayasa Hukuku* [Turkish Constitutional Law under the 1982 Constitution]. Yapı Kredi Yayınları, 2001.

Tanrıkulu, Sezgin. “Bir Hakikat Komisyonu Olarak İnsan Hakları Avrupa Mahkemesi” [The European Court of Human Rights as a Truth Commission], in Kerem Altıparmak, ed., *Fifty Years of the European Court of Human Rights: Failure or Success*. Ankara Barosu Yayınları, 2009: 222-232.

Taqi, Irum. “Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights’ Approach”, *Fordham International Law Journal*, vol. 24, no. 3 (2000): 940-987.

Tekeli, İlhan. “Osmanlı İmparatorluğu’ndan Günümüze Nüfusun Zorunlu Yer Değiştirmesi” [The Forced Relocation of Populations from the Ottoman Empire to Present Day], *Toplum ve Bilim*, no. 50 (1990): 49-71.

ten Napel, Hans-Martien. “The European Court of Human Rights and Political Rights: The Need for more Guidance”, *European Constitutional Law Review*, vol. 5 (2009): 464-480.

Tezcür, Güneş Murat. “Judicial Activism in Perilous Times: The Turkish Case”, *Law and Society Review*, vol. 43, no. 2 (2009): 305-336.

———. “When Democratization Radicalizes: The Kurdish Nationalist Movement in Turkey”, *Journal of Peace Research*, vol. 47, no. 6 (2010): 775-789.

TİHV, *Örneklerle Türkiye İnsan Hakları Raporu 1991* [Turkey’s Human Rights Report with Examples-1991] (1992).

Tocci, Nathalie. *The Baffling Short-Sightedness in the EU-Turkey-Cyprus Triangle*, document IAI 1021. Istituto Affari Internazionali, October 2010.

Tocci, Nathalie, and Alper Kaliber. “Human Rights, Civil Society and Conflict in Turkey's Kurdish Question”, in Raffaele Marchetti and Nathalie Tocci, eds., *Civil Society, Conflicts and the Politicisation of Human Rights*. United Nations University Press, 2011: 139-160,

Toggenburg, Gabriel N. “Minority Protection in a Supranational Context: Limits and Opportunities”, in Gabriel N. Toggenburg, ed., *Minority Protection and the Enlarged European Union: The Way Forward*. Open Society Institute, 2004: 3-36.

Treaty of Peace with Turkey, 24 July 1923, 28 *L.N.T.S.* 11 (1924).

Tuğcu, Tülay. “Speech Given on the Occasion of the Opening of the Judicial Year”, 20 January 2006, in ECtHR, *Annual Report 2005*. Registry of the ECtHR, 2006: 28-34.

Tunçay, Mete. *Türkiye Cumhuriyeti'nde Tek Parti Yönetiminin Kurulması (1923-1931)* [The Establishment of Single Party Rule in the Republic of Turkey (1923-1931)]. Yurt Yayınları, 1981.

Turam, Berna. *Between Islam and the State: The Politics of Engagement*. Stanford University Press, 2007.

Turhan, Ebru. *The European Council Decisions Related to Turkey's Accession to the EU: Interests v. Norms*. Nomos, 2012.

Türkiye Büyük Millet Meclisi [The Grand National Assembly of Turkey]. *Ülkemizin Çeşitli Yörelerinde İşlenmiş Faili Meçhul Siyasi Cinayetler Konusunda Meclis Araştırma Komisyonu Raporu* [Report of the Parliamentary Investigation Commission on Unresolved Political Killings in Various Regions of Our Country], 12 October 1995.

———. *Yasadışı Örgütlerin Devletle Olan Bağlantıları ile Susurluk'ta Meydana Gelen Kaza Olayının ve Arkasındaki İlişkilerin Aydınlığa Kavuşturulması Amacıyla Kurulan Meclis Araştırma Komisyonu Raporu* [Report of the Parliamentary Investigation Commission Established for the Purpose of Bringing to Light the Links of Illegal Organizations to the State and the Accident in Susurluk and the Relations Behind it], 3 April 1997.

———. *Doğu ve Güneydoğu Anadolu'da Boşaltılan Yerleşim Birimleri Nedeniyle Göç Eden Yurttaşlarımızın Sorunlarının Araştırılarak Alınması Gereken Tedbirlerin Tespit Edilmesi Amacıyla Kurulan Meclis Araştırma Komisyonu* [Report of the Parliamentary Investigation Commission Established with the Aim of Investigating the Problems of our Citizens who Migrated due to the Eviction of Settlements in East and Southeast Anatolia and to Assess the Measures that Need to be Taken], 14 January 1998.

———. *İstiklâl Mahkemeleri: Kanun, Gerekçe ve Genel Kurul Tutanakları* [Courts of Independence: Law, Justification and General Assembly Minutes], vol. 1. TBMM Basın, Yayın ve Halkla İlişkiler Başkanlığı Basımevi, 2015.

———. *Diyarbakır'ın Kulp İlçesi Alaca Köyü Kepir Bölgesinde Bulunan Toplu Mezar Hakkında Rapor* [Report on the Mass Grave Discovered in the Kepir Region of the Alaca Village of the Kulp District of Diyarbakır] (undated), available at: [https://www.tbmm.gov.tr/komisyon/insanhaklari/belge/kr\\_22DiyarbakirKulp.pdf](https://www.tbmm.gov.tr/komisyon/insanhaklari/belge/kr_22DiyarbakirKulp.pdf).

Türkiye Cumhuriyeti Adalet Bakanlığı [Republic of Turkey Ministry of Justice]. “OHAL Komisyonu Kurulmasıyla AIHM Binlerce Dosyayı Düşürdü” [AIHM Dismissed Thousands of Cases with the Establishment of the State of Emergency Commission], 14 July 2017, available at [http://www.inhak.adalet.gov.tr/duyurular/faaliyet\\_duyurular/2017/Temmuz/basin-ilani.pdf](http://www.inhak.adalet.gov.tr/duyurular/faaliyet_duyurular/2017/Temmuz/basin-ilani.pdf).

Türkiye Cumhuriyeti Bakanlar Komitesi [Republic of Turkey Council of Ministers]. Decision no. 9632, 27 June 1985.

———. “Yerinden Olmuş Kişiler Sorunu ile Köye Dönüş ve Rehabilitasyon Projesine Yönelik Tedbirler” [Measures on the Issue of IDPs and the Return to Villages and Rehabilitation Project], Decision of Principle, 17 August 2005.

Türkiye Cumhuriyeti İçişleri Bakanlığı [Republic of Turkey Ministry of Interior]. Toplumla İlişkiler Daire Başkanlığı [Social Relations Department], Yazılı Soru Önermesine Yanıt [Response to a Written Motion], no. B050Tİb00000001/538, 24 December 2003, available at: <http://www2.tbmm.gov.tr/d22/7/7-1471c.pdf>.

Türkmen, Füsün. “Turkey’s Participation in Global and Regional Human Rights Regimes”, in Arat, ed., *Human Rights in Turkey*: 249–261.

Türközü, S. Erdem, Evren Özer, and Marko Perels. *Türkiye İnsan Hakları Raporu 2007* [Turkey Human Rights Report 2007]. TİHV, 2008.

Türmen, Rıza. “Avrupa İnsan Hakları Sözleşmesi’nin İç Hukukumuzda Etkileri” [The Impact of the European Convention on Human Rights to our Domestic Law], *Anayasa Yargısı*, no. 17 (2000): 32-40.

Uçarlar, Nesrin. “Establishment, Construction and Preservation of the Village Guard System in the Meeting Minutes of the Turkish National Assembly and in the Turkish Press”, in Şemsa Özar, Nesrin Uçarlar, and Osman Aytar, eds., *From Past to Present a Paramilitary Organization in Turkey: Village Guard System*. Diyarbakır Institute for Political and Social Research, 2013.

UN Office at Vienna, Centre for Social Development and Humanitarian Affairs. *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*. UN, 1991.

UN Office of the High Commissioner for Human Rights, “Preliminary Observations of the Working Group on Enforced or Involuntary Disappearances at the Conclusion of its Visit to Turkey (14-18 March 2016)”, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18476&LangID=E>.

UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989, available at: <http://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf>.

US Committee for Refugees. *The Wall of Denial: Internal Displacement in Turkey* (1999).

US Department of State. *Turkey Human Rights Practices, 1993* (1994).

———. *Turkey Country Report on Human Rights Practices for 1997* (1998).

———. *Turkey 2016 Human Rights Report* (2016).

Ünalán, Turgay. “Internally Displaced Persons Concepts and Situation in the World”, presentation made for the launch of the Hacettepe Study, 4 March 2005, available at: <http://www.hips.hacettepe.edu.tr/eng/InternallyDisplacedPersonsConceptsandSituationintheWorld.pdf>.

Ünalán, Turgay, Ayşe Betül Çelik, and Dilek Kurban. “Internal Displacement in Turkey: The Issue, Policies, and Implementation”, in Kurban et al., eds., *Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey*: 79-105.

Üngör, Uğur Ümit. “Geographies of Nationalism and Violence: Rethinking Young Turk ‘Social Engineering’”, *European Journal of Turkish Studies* [Online], vol. 7 (2008), available at: <http://ejts.revues.org/2583>.

van Bruinessen, Martin. “Between Guerrilla War and Political Murder: The Workers’ Party of Kurdistan”, *MERIP Middle East Report*, no. 153 (1988): 40–46.

———. *Agha, Shaikh and State*. Zed Books, 1991.

———. “Kurds, Turks and the Alevi Revival in Turkey”, *Middle East Report*, no. 200 (1996): 7-10.

———. “Constructions of Ethnic Identity in the Late Ottoman Empire and Republican Turkey: The Kurds and their Others”, paper presented at the workshop “Social Identities in the Late Ottoman Empire”, Department of Middle Eastern Studies, New York University, 8 March 1997.

van der Vet, Freek. “Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights”, *Human Rights Review*, vol. 13 (2012): 303-325.

———. “Holding on to Legalism: The Politics of Russian Litigation on Torture and Discrimination Before the European Court of Human Rights”, *Social and Legal Studies*, vol. 23, no. 3 (2014): 361-381.

Vanhala, Lisa. “Anti-Discrimination Policy Actors and their Use of Litigation Strategies: The Influence of Identity Politics”, *Journal of European Public Policy*, vol. 16, no. 5 (2009): 738-754.

———. “Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK”, *Law and Society Review*, vol. 46, no. 3 (2012): 523-556.

Verstichel, Annelies, André Alen, Bruno de Witte, and Paul Lemmens, eds. *Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* Intersentia, 2010.

Waldron, Jeremy. *Law and Disagreement*. Oxford University Press, 1999.

Watts, Nicole. “Relocating Dersim: Turkish State-Building and Kurdish Resistance, 1931-1938”, *New Perspectives on Turkey*, vol. 23 (2000): 5-30.

Watts, Nicole F. *Activists in Office: Kurdish Politics and Protest in Turkey*. University of Washington Press, 2010.

———. “Institutionalizing Virtual Kurdistan West: Transnational Networks and Ethnic Contention in International Affairs”, in Migdal, ed., *Boundaries and Belonging: States and Societies in the Struggle to Shape Identities and Local Practices*: 121-147.

Werz, Michael, and Max Hoffman. *The United States, Turkey, and the Kurdish Regions: The Peace Process in Context*. Center for American Progress, 2014.

White, Robin C.A., and Clare Ovey. *Jacobs, White and Ovey: The European Convention on Human Rights*. Oxford University Press, 2010.

Wildhaber, Luzius. “Consequences for the European Court of Human Rights of Protocol No. 14 and the Resolution on Judgments Revealing an Underlying Systemic Problem – Practical steps of implementation and challenges”, *Applying and Supervising the ECHR: Reform of the European Human Rights System*, Proceedings of the high-level seminar, Oslo, 18 October 2004.

———. “The Role of the European Court of Human Rights: An Evaluation”, *Mediterranean Journal of Human Rights*, vol. 8, no. 1 (2004): 9-32.

Yalçın, Soner. *Binbaşı Ersever’in İtirafı* [The Confessions of Major Cem Ersever]. Doğan Kitap, 2003.

Yazıcı, Serap, ed. *A Judicial Conundrum: Opinions and Recommendations on Constitutional Reform on Turkey*. TESEV Publications, 2010.

Yeğen, Mesut. *Devlet Söyleminde Kürt Sorunu* [The Kurdish Question in State Rhetoric]. İletişim Yayınları, 1999.

———. “Citizenship and Ethnicity in Turkey”, *Middle Eastern Studies*, vol. 40, no. 6 (2004): 51-66.

———. *Müstakbel Türk'ten Sözde Vatandaşa: Cumhuriyet ve Kürtler* [From Prospective Turk to So-Called Citizen: The Republic and the Kurds]. İletişim Yayınları, 2006.

———. “‘Jewish Kurds’ or the new frontiers of Turkishness,” *Patterns of Prejudice*, vol. 41, no. 1 (2007): 1-20.

———. “‘Prospective Turks’ or ‘Pseudo-Citizens:’ Kurds in Turkey,” *Middle East Journal*, vol. 63, no. 4 (2009): 597-615.

Yokuş, Sevtap. *Avrupa İnsan Hakları Sözleşmesi'nin Türkiye'de Olağanüstü Hal Rejimine Etkisi* [The Impact of the European Convention on Human Rights on Turkey's Emergency Rule Regime]. Beta Basım Yayım, 1996.

Zanon, Flavia. “The European Parliament: An Autonomous Foreign Policy Identity?” in Esth er Barbe and Anna Herranz, eds., *The Role of Parliaments in European Foreign Policy: Debating on Accountability and Legitimacy*. Fonet, 2005.

Zemans, Frances Kahn. “Legal Mobilization: The Neglected Role of the Law in the Political System”, *The American Political Science Review*, vol. 77, no. 3 (1983): 690-703.

Zimová, Adriána. *Strategic Litigation Impacts: Roma School Desegregation*. Open Society Foundations, 2016.

Zwaak, Leo. “A Friendly Settlement in the European Inter-State Complaints against Turkey”, *SIM Newsletter*, no. 13 (1986): 44-48.

## Newspaper Articles

*Ajans Haber*. “Cumhurbaşkanı Erdoğan’dan HDPliler için ‘Dokunulmazlık’ Çağrısı” [President Erdoğan Makes an ‘Immunity Call’ Regarding the HDP Deputies], 2 January 2016.

Akın, Doğan. “20 Soruda Tansu Çiller Türkiye’sinin Karanlığında İşlenen o Cinayetler” [In Twenty Questions, those Murders Committed in the Darkness of Tansu Çiller’s Turkey], *T24*, 11 July 2014.

Aktan, İrfan. “Andrew Gardner: Türkiye Böyle Devam Ederse Geri Dönüş çok Zor Olacak” [If Turkey Continues in this Fashion, Return will be very Difficult], *Gazeteduvar*, 21 July 2017.

Aktar, Mehmet Emin. “Vedat Aydın: Yokluğu ile Hepimizi Eksik Bırakan Kahraman” [Vedat Aydın: The Hero whose Absence has Lessened us all], *Hür Bakış*, 10 July 2015.

Aydemir, Şenay. “İki Yılda 27 Çalışanı Öldürüldü” [27 Employees Murdered in Two Years], *Radikal*, 18 March 2011.

*Bianet*. “Kürtçe için Okuldan Atılanlar Geri Dönecek” [Those Dismissed from School for Demanding Kurdish will Return], 23 August 2002.

———. “1990’den Bugüne, HEP’ten DTP’ye Kürtlerin Zorlu Siyaset Mücadelesi” [From 1990 to Today, from HEP to DTP, the Kurds’ Formidable Political Struggle], 12 December 2009.

Bozarıslan, Mahmut. “Turkey’s Emergency Rule Hits Thousands of Destitute Kurds”, *Al Monitor*, 6 December 2016.

*Cumhuriyet*. “Jetler Sivilleri Vurdu” [The Jets Struck the Civilians], 30 December 2011.

*Diken*. “Erdoğan’a göre HDP’liler Zaten Yargılanacak: Bu İşten Kaçış Yok” [According to Erdoğan, the HDP Deputies will be Prosecuted Anyhow: There is no Escape], 20 May 2016.

Düzel, Neşe. “JİTEM İtirafçısı Abdülkadir Aygan Anlatıyor” [JİTEM Confessor Abdülkadir Aygan is Telling it All], *Taraf*, 26-29 January 2009.

Ekinci, Burhan. “İşte İtiraf, İşte Ceset! Sorumlular Nerede?” [Here is the Confession, Here is the Body! Where are those Responsible?], *Bianet*, 2 February 2005.

Elçi, Tahir. “Adaletin Ebediyete İntikali” [The Transmission of Justice to Eternity], *Radikal*, 4 May 2014.

Fisk, Robert. “The 70,000 post-coup Arrests are now at the Heart of the Turkish Government's Propaganda War”, *Independent*, 8 October 2016.

Gülalp, Haldun. “The Battle for Turkey’s Constitution”, *Guardian*, 4 September 2010.

Güneç, Sedat. “Terör Tazminatında öncelik Tunceli ve Diyarbakır’da” [Priority in the Compensation of Terrorism lies with Tunceli and Diyarbakır], *Zaman*, 6 October 2005.

*Haber7com*. “Yüksekova Çetesi Mağdurları Umutlandı” [The Victims of the Yüksekova Gang have Gained Hope], 13 August 2010.

Hansen, Suzy. “Inside Turkey’s Purge: As the Ruling Party Expands the Ranks of its Enemies, Life in a Fragile Democracy becomes Stranger and Stranger”, *The New York Times Magazine*, 13 April 2017.

*Hürriyet*. “Cüretin Böylesi” [What a Dare], 4 August 1998.

*Hürriyet Daily News*. “DGM Wants RP Deputy’s Political Immunity Lifted”, 25 December 1996.

———. “Turkey’s Erdoğan Demands Lifting of HDP Deputies’ Immunity”, 28 July 2015.

*IMC TV*. “İçişleri Bakanı: 5 Bin Korucu Alınacak” [The Minister of the Interior: “5,000 Guards will be Recruited”], 19 September 2015.

Kalafat, Haluk. “Aziz Nesin, Kenan Evren, Değişmeyen Türkiye” [Aziz Nesin, Kenan Evren, the Turkey that never Changes], *Bianet*, 9 February 2013.

Karabağlı, Hülya. “KHK’lar Kürtçe Dil Öğreten Okulları ve Dernekleri Vurdu” [The Decrees with the Force of Law Hit Schools and Associations Providing Education in Kurdish], *T24*, 4 December 2016.

———. “CHP’den ‘OHAL Bilançosu’ Raporu: Şüpheli Sayısı 100 Bini Aştı; En Az 25 Kişi Canına Kıydı” [CHP’s Report on ‘State of Emergency Balance’: The Number of Suspects Exceeded 100,000; at least 25 People Committed Suicide], *T24*, 2 March 2017.

Kayar, Sertaç. “Cenazesi 7 Gün Yerde Kalan Taybet Ana’nın Evinde ‘Kara’ Bayram” [‘Dark’ Eid at the House of Mother Taybet, whose Body Lay out on the Street for Seven Days], *T24*, 5 July 2016.

Keskin, Adnan. “HADEP Kapatıldı” [HADEP is Dissolved], *Radikal*, 14 March 2003.

*NTV*. “DTP Kapatıldı” [DTP is Dissolved], 11 December 2009.

———. “MİT: Türk İntikam Tugayı Adında bir Örgüt Yok” [MİT: There is no such Organization named Turkish Vengeance Brigade], 15 January 2010.

*Radikal*. “DEHAP’a da Dava Açıldı” [DEHAP, too, Faces Dissolution], 14 March 2003.

———. “Ve Devlet JİTEM’i Resmen Kabul Etti” [And the State Finally Acknowledged JİTEM], 3 July 2011.

Rodley, Nigel. “Kevin Boyle Obituary: Internationally Respected Human rights Lawyer and Academic”, *The Guardian*, 2 January 2011.

*Sabah*. “Genelkurmay’dan Uludere Açıklaması” [The Chief of Staff’s Statement on Uludere], 29 December 2011.

———. “Türkiye’de kaç tane Köy Korucusu var? Köy Korucularının Görevleri Nelerdir?” [How many Village Guards are there in Turkey? What are the Duties of Village Guards?], 17 May 2016.

Tahincioğlu, Gökçer. “JİTEM, Nakil Hukuk ve Tahir Elçi” [JİTEM, the Transferred Law and Tahir Elçi], *Milliyet*, 5 December 2012.

*The Guardian*. “Defiant Erdogan vows to Press for New Turkey Constitution”, 14 August 2015.

*Timeturk*. “Hüda-Par’ın Bağımsızları ne Kadar Oy Aldı?” [How many Votes did the Independent Candidates of Hüda-Par Receive?], 8 June 2015.

*T24*. “Tam Liste: 15 Temmuz’dan Sonra Kaç KHK Çıkarıldı, Kaç Kurum Kapatıldı, Hangi Kurumdan Toplam Kaç Kişi İhraç Edildi?” [The Full List: How many Decrees have been Adopted since 15 July, how many Institutions have been Closed Down, how many Individuals have been Dismissed and from which Institutions?], 2 December 2016.

Yıldız, Şenay. “Cemaat Endüstriyel bir İktidara Dönüştü” [The Community has Turned into an Industrial Power], *Akşam*, 20 January 2014.

*Yüksekova Haber*. “Muharrem Erbey: Mücadeleye Kaldığımız Yerden Devam Edeceğiz” [Muharrem Erbey: We will Continue the Struggle from Where we Left], 19 April 2014.

*Zaman*. “İşte JİTEM’in Belgesi” [Here is the JİTEM Document], 12 March 2009.

## **Documents of International Organizations**

Commission of the European Communities. *Commission Opinion on Turkey’s Request for Accession to the Community*, SEC(89) 2290 final/2, 20 December 1989.

Commissioner for Human Rights of the Council of Europe. “Turkey Should Ensure Immediate Access to Cizre by Independent Observers”, Statement, 11 September 2015.

———. “Turkey Should Ensure the Protection of Human Rights in the Fight against Terrorism”, Statement, 18 November 2015.

———. *Memorandum on the Human Rights Implications of anti-Terrorism Operations in South-Eastern Turkey*, CommDH(2016)39, 2 December 2016.

———. *Third Party Intervention under Article 36, paragraph 3, of the European Convention on Human Rights*, CommDH(2017)13, 25 April 2017.

Committee of Ministers (CoM). *Cyprus against Turkey, Applications nos. 6780/74 and 6950/75*, Resolution DH(79), 20 January 1979.

———. *Action of the Security Forces in Turkey: Measures of a General Character (Cases of Akdivar and Others against Turkey and 12 Other Cases)*, Interim Resolution ResDH(99)434, 9 June 1999.

———. *Information Provided by the Government of Turkey the Committee of Ministers' Examination of the Execution Questions Raised by the Activities of the Security Forces in Turkey*, Appendix to Interim Resolution ResDH(99)(434), 9 June 1999.

———. *Progress Achieved and Outstanding Problems – General Measures to Ensure Compliance with the Judgments of the European Court of Human Rights in the Cases against Turkey listed in Appendix II (Follow up to Interim Resolution DH(99)434)*, Interim Resolution ResDH(2002)98, 10 July 2002.

———. *Resolution Res(2004)3 on Judgments Revealing an Underlying Systemic Problem*, 12 May 2004.

———. *Recommendation Rec(2004)6 to Member States on the Improvement of Domestic Remedies*, 12 May 2004.

———. *Progress Achieved and Outstanding Problems: General Measures to Ensure Compliance with the Judgments of the European Court of Human Rights in the Cases against Turkey concerning Actions of the Security Forces*, Interim Resolution ResDH(2005)43, 7 June 2005.

———. *Execution of the Judgment of the European Court of Human Rights Doğan and Others against Turkey*, Resolution CM/ResDH(2008)60, 25 June 2008.

———. *Interim Resolution CM/ResDH(2008)69 on the Execution of the Judgments of the European Court of Human Rights of Cases Concerning the Actions of the Security Forces in Turkey – Progress Achieved and Outstanding Issues (General Measures to Ensure Compliance with the Judgments of the European Court of Human Rights in the Cases against Turkey listed in Appendix II) (Follow up to Interim Resolution DH(99)434, DH(2002)98 and ResDH(2005)43)*, 18 September 2008.

———. *Communication from Turkey Concerning the Ormanci and Other Group of Cases against Turkey (Application no. 24240/07)*, DH-DD (2014)1468, 2 December 2014.

Conference on Security and Co-operation in Europe. *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 29 June 1990.

Council of Europe. *Report to the Turkish Government on the Visit to Turkey by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 17 October 1997*, CPT/Inf(99)2, 23 February 1999.

———. *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 27 February to 3 March 1999*, CPT/Inf(2000)17, 7 December 2000.

———. *Report to the Turkish Government on the Visit to Turkey by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 14 December 2005*, CPT/Inf(2006)30, 6 September 2006.

———. *Report to the Turkish Government on the Visit to Turkey by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 21 September 1990*, CPT/Inf(2007)1, 11 January 2007.

———. *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 29 September to 7 October 1991*, CPT/Inf(2007)3, 11 January 2007.

———. *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 22 November to 3 December 1992*, CPT/Inf(2007)5, 11 January 2007.

———. *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 28 October 1994*, CPT/Inf(2007)7, 11 January 2007, Appendix I.

———. *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 18 to 20 September 1996*, CPT/Inf(2007)9, 11 January 2007.

———. *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey from 28 June to 3 July 2009*, CommDH(2009)30, 1 October 2009.

———. *Report to the Turkish Government on the Visit to Turkey by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 17 June 2009*, CPT/Inf(2011)13, 31 March 2011.

———. *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey from 10 to 14 October 2011*, CommDH(2012)2, 10 January 2012.

Council of Europe, Committee on Migration, Refugees and Democracy. *Humanitarian Situation of the Displaced Kurdish Population in Turkey*, adopted by Recommendation 1563 (2002) of the Parliamentary Assembly of the Council of Europe, 29 May 2002.

Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). *Public Statement on Turkey (Adopted on 15 December 1992)*, CPT/Inf(93)1.

———. *Public Statement on Turkey (issued on 6 December 1996)*, CPT/Inf(96)34.

Council of Europe, Newsroom. “Secretary General Jagland calls for Release of Turkish Hunger Strikers”, 26 June 2017, available at: <https://www.coe.int/en/web/portal/-/council-of-europe-secretary-general-jagland-calls-for-release-of-turkish-hunger-strikers>.

ECtHR. *Analysis of Statistics 2016* (January 2017), available at: [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2016\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf).

ECtHR Registrar. “The Members of a Dissolved Municipal Council did not have Standing before the Court”, Press Release, no. 921, 1 December 2010.

———. “Cases concerning the effectiveness of the compensation procedure for victims of terrorism in Turkey: inadmissible”, Press release, ECHR 102 (2011), 8 July 2011.

———. “Dissolution of the Political Party DTP was in Breach of the Convention”, Press Release, ECHR 009 (2016), 12 January 2016.

———. “Requests for Lifting of Curfew Measures in South-Eastern Turkey: The Court Refuses to Indicate Interim Measures for Lack of Elements, but is Pursuing its Examination of Applications”, Press Release, ECHR 016 (2016), 13 January 2016.

———. “Curfew Measures in South-Eastern Turkey: Court Decides to Give Priority Treatment to a Number of Complaints”, Press Release, ECHR 054 (2016), 5 February 2016.

———. “An Application concerning the Lawfulness of a Judge’s pre-Trial Detention following the *coup d’état* of 15 July 2016 has been rejected for failure to exhaust domestic remedies”, Press Release, ECHR 372 (2016), 17 November 2016.

European Commission. *1998 Regular Report on Turkey’s Progress towards Accession*, 13 October 1999.

———. *2003 Regular Report on Turkey’s Progress towards Accession* (2003).

———. *2004 Regular Report on Turkey’s Progress towards Accession*, SEC(2004)1201, 6 October 2004.

———. *2006 Regular Report on Turkey’s Progress towards Accession*, SEC(2006) 1390, 8 November 2006.

———. *Turkey 2009 Progress Report*, SEC(2009)1334, 14 October 2009.

———. *Turkey 2012 Progress Report*, SWD(2012) 336, 10 October 2012.

———. *Turkey 2013 Progress Report*, SWD(2013) 417, 16 October 2013.

———. *Turkey 2014 Progress Report*, SWD(2014) 0307, 8 October 2014.

———. *Turkey 2015 Progress Report*, SWD(2015) 216, 10 November 2015.

European Commission for Democracy through Law (Venice Commission). *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, CDL-AD(2009)006, 13-14 March 2009.

———. *Interim Opinion on the Draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey*, CDL-AD(2010)042, 20 December 2010.

———. *Opinion on the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey*, CDL-AD(2011) 040, 18 October 2011.

———. *Turkey: Opinion on the Legal Framework Governing Curfews*, CDL-AD(2016)010, 13 June 2016.

———. *Turkey: Opinion on the Suspension of the Second Paragraph of Article 83 of the Constitution (Parliamentary Inviolability)*, CDL-AD(2016)027, 14 October 2016.

———. *Turkey: Emergency Decree Laws no. 667-676 adopted Following the Failed Coup of 15 July 2016*, CDL-AD(2016)037, 12 December 2016.

———. *Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017*, CDL-AD(2017)005, 13 March 2017.

European Council. *Conclusions of the Presidency – Copenhagen: 21-22 June 1993*, SN 180/1/93 REV 1, 1993.

———. *Presidency Conclusions – Copenhagen: 12-13 December 2002*, 15917/02, 29 January 2003.

———. *Presidency Conclusions – Copenhagen: 16-17 December 2004*, 16238/04 REV 1, 1 February 2005.

———. *Enlargement: Accession Negotiations with Turkey: General EU Position, Annex II: Negotiating Framework*, 12 October 2005.

European Parliament. *Resolution on the Events in Turkey*, 18 September 1980.

———. *Resolution on Death Sentence Imposed on 52 Turkish Trade Union Leaders*, 22 June 1982.

———. *Resolution on Political Situation in Turkey*, 8 July 1982.

———. *Resolution on the Human Rights Situation in Turkey*, 23 October 1985.

———. *Resolution on the Human Rights Situation in Turkey: 23 October 1985*, *Official Journal of the European Communities*, no. C 343/61, 31 December 1985.

Human Rights Committee. General Comment 23, Article 27 (50<sup>th</sup> session 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1/1994.

Parliamentary Assembly of the Council of Europe (PACE). *Situation in Turkey*, Recommendation 904 (1980), 1 October 1980.

———. *Term of Office of the Turkish Parliamentary Delegation*, Order 398 (1981), 14 May 1981.

———. *Situation in Turkey*, Resolution 765 (1982), 28 January 1982.

———. *Situation in Turkey*, Resolution 786 (1982), 6 October 1982.

———. *Situation in Turkey*, Resolution 794 (1983), 27 January 1983.

———. *Situation in Turkey*, Resolution 803 (1983), 30 September 1983.

———. *Situation in Turkey*, Resolution 822 (1984), 10 May 1984.

———. *Situation in Turkey*, Resolution 840 (1985), 23 April 1985.

———. *Situation in Turkey*, Resolution 860 (1986), 24 April 1986.

———. *Restrictions on Political Parties in the Council of Europe Member States*, Doc. 9526, Explanatory Memorandum by the Rapporteur, 17 July 2002.

———. *Implementation of judgments of the European Court of Human Rights*, Report of the Committee on Legal Affairs and Human Rights, doc. 11020, 18 September 2006.

———. *The Functioning of Democratic Institutions in Turkey*, Resolution 2121(2016), 22 June 2016.

Steering Committee for Human Rights (CDDH). *Guaranteeing the long-term effectiveness of the European Court of Human Rights*, Interim Report to be submitted to the Committee of Ministers, CDDH(22 2002)016 Addendum, 14 October 2002.

UN Commission on Human Rights. Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment: Question of Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1995/36, 30 December 1994.

———. Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32*, E/CN.4/1995/34, 12 January 1995.

———. Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37*, E/CN.4/1996/35, 9 January 1996.

———. Question of the Violation of Human Rights and Fundamental Freedoms, in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories: Extrajudicial, Summary or Arbitrary Executions, *Report by the Special*

*Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1996/74, E/CN.4/1997/60/Add.1, 23 December 1996.*

———. Civil and Political Rights, Including Questions of Disappearances and Summary Executions: Addendum, *Report on the Visit to Turkey by two Members of the Working Group on Enforced or Involuntary Disappearances (20-26 September 1998)*, E/CN.4/1999/62/Add.2, 28 December 1998.

———. Civil and Political Rights, Including the Questions of: Torture and Detention, *Report of the Special Rapporteur: Sir Nigel Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37*, E/CN.4/1999/61/Add.1, 27 January 1999.

———. Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights Resolution 2001/45, Addendum: Mission to Turkey*, E/CN.4/2002/74/Add.1, 18 December 2001.

———. Specific Groups and Individuals Mass Exoduses and Displaced Persons, *Report of the Representative of the Secretary-General on internally displaced persons, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 2002/56*, E/CN.4/2003/86/Add.2, 27 November 2002.

UN Committee on the Elimination of Racial Discrimination (CERD). *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Combined Fourth to Sixth Periodic Reports of States Parties due in 2013: Turkey*, CERD/C/TUR/4-6, 17 April 2014.

UN General Assembly. *Report of the Committee against Torture: Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey*, 15 November 1993, A/48/44/Add.1.

UN Human Rights Council. *Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Addendum, Mission to Turkey*, A/HRC/4/26/Add.2, 16 November 2006.

———. Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”, *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/4/41, 25 January 2007.

———. *Report of the Special Rapporteur Extrajudicial, Summary or Arbitrary Executions, Philip Alston*, A/HRC/14/24, 20 May 2010.

———. Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, Addendum, Mission to Turkey*, A/HRC/23/47/Add.2, 18 March 2013.

———. Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *Report of the Special Rapporteur*

*on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, Addendum: Follow-up to Country Recommendations: Turkey, A/HRC/29/37/Add.4, 6 May 2015.*

UN Human Rights Office of the High Commissioner (OHCHR). *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, February 2017.

UNICEF. *Field Visit Report on Children Deemed to be Terrorist Offenders for Participating in Demonstrations* (2010).

## **ECtHR & EComHR Case Law**

### ***ECtHR Judgments and Decisions***

*Abdullah Demirbaş and Others v. Turkey*, Application no. 1093/08, 301/08, 303/08 et al., Decision (Admissibility), 9 November 2010.

*Abdullah Yaşa and Others v. Turkey*, Application no. 44827/08, Judgment, 16 July 2013.

*Abdulsamet Yaman v. Turkey*, Application no. 32446/96, Judgment, 2 November 2004.

*Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, Judgment, 6 April 2004.

*Ahmet Tunç and Zeynep Tunç v. Turkey and Ahmet Tunç and Güler Yerbasan v. Turkey*, Application nos. 4133/16 and 31542/16, Decision (Interim Remedy), 19 January 2016.

*Akbayır and Others v. Turkey*, Application no. 30415/08, Decision (Admissibility), 28 June 2011.

*Akdeniz v. Turkey*, Application no. 25165/94, Judgment, 31 May 2005.

*Akdeniz and Others v. Turkey*, Application no. 23954/94, Judgment, 31 May 2001.

*Akdivar and Others v. Turkey*, GC, Application no. 21893/93, Judgment, 16 September 1996.

*Akkoç v. Turkey*, Application no. 22947/93 and 22948/93, Judgment, 10 October 2000.

*Akkum and Others v. Turkey*, Application no. 21894/93, Judgment, 24 March 2005.

*Akman v. Turkey*, Application no. 37453/97, Judgment (Striking Out), 26 June 2001.

*Aksoy v. Turkey*, Application no. 21987/93, Judgment, 18 December 1996.

*Aleksanyan v. Russia*, Application no. 46468/06, Judgment, 22 December 2008.

*Angelova v. Bulgaria*, Application no. 38361/97, Judgment, 13 June 2002.

*Anter and Others v. Turkey*, Application no. 55983/00, Judgment, 19 December 2006.

*Ataykaya v. Turkey*, Application no. 50275/08, Judgment, 22 July 2014.

*Avşar v. Turkey*, Application no. 25657/94, Judgment, 10 July 2001.

*Aydın v. Turkey*, GC, Application no. 57/1996/676/866, Judgment, 25 September 1997.

*Ayder and Others v. Turkey*, Application no. 23656/94, Judgment, 8 January 2004.

*Aziyevy v. Russia*, Application no. 77626/01, Judgment, 20 March 2008.

*Behçet Söğüt and Others v. Turkey*, Application no. 22931/09, Judgment, 20 October 2015

*Benzer and Others v. Turkey*, Application no. 23502/06, Judgment, 12 November 2013.

*Bingölbali and 54 Others v. Turkey*, Application no. 18443/08, Decision (Admissibility), 28 June 2011.

*Birdal v. Turkey*, Application no. 53047/99, Judgment, 2 October 2007.

*Boğuş and 91 Others v. Turkey*, Application no. 54788/091, Decision (Admissibility), 28 June 2011.

*Bozkır and Others v. Turkey*, Application no. 24589/04, Judgment, 26 February 2013.

*Brannigan and McBride v. UK*, Application nos. 14553/89 and 14554/89, Judgment, 25 May 1993.

*Brogan and Others v. UK*, Application nos. 11209/84, 11234/84, 11266/84 and 11386/85, Judgment, 19 November 1988.

*Broniowski v. Poland*, GC, Application no. 31443/96, Judgment, 22 June 2004.

*Buldan v. Turkey*, Application no. 28298/95, Judgment, 20 April 2004.

*Burghartz v. Switzerland*, Application no. 16213/90, Judgment, 22 February 1994.

*Canan v. Turkey*, Application no. 39436/98, Judgment, 26 June 2007.

*Cemil Altun v. Turkey*, Application no. 4353/16, Decision (Interim Remedy), 19 January 2016.

*Cemil Altun v. Turkey*, Application no. 4353/16, Decision (Admissibility), 6 December 2016.

*Chiragov and Others v. Armenia*, Application no. 13216/05, Judgment, 16 June 2015.

*Cyprus v. Turkey*, GC, Application no. 25781/94, Judgment (Merits), 10 May 2001.

*Cyprus v. Turkey*, GC, Application no. 25781/94, Judgment (Just Satisfaction), 12 May 2014

*Çakıcı v. Turkey*, Application no. 23657/94, Judgment, 8 July 1999.

*Çelikkilek v. Turkey*, Application no. 27693/95, Judgment, 31 May 2005.

*Çiçek v. Turkey*, Application no. 25704/94, Judgment, 27 February 2001.

*Demir and Others v. Turkey*, Application no.71/1997/855/1062-1064, Judgment, 23 September 1998.

*Democracy and Change Party v. Turkey*, Application no. 39210/98, 39974/98, Judgment, 21 April 2005.

*Dicle for the Democracy Party (DEP) of Turkey v. Turkey*, Application no. 25141/94, Judgment, 10 December 2002.

*Doğan and Others v. Turkey*, Applications no. 8803-8811/02, 8813/02 and 8815-8819/02, Judgment (Just Satisfaction), 13 July 2006.

*Doğan and Others v. Turkey*, Applications no. 8803-8811/02, 8813/02 and 8815-8819/02, Judgment (Merits), 29 June 2004.

*Elci and Others v. Turkey*, Applications no. 23145/93 and 25091/94, Judgment, 13 November 2003.

*Emek Party and Şenol v. Turkey*, Application no. 39434/98, Judgment, 31 May 2005.

*Er and Others v. Turkey*, Application no. 23016/04, Judgment, 31 July 2012.

*Ertak v. Turkey*, Application no. 20764/92, Judgment, 9 May 2000.

*Fidanten and Others v. Turkey*, Application no. 27501/06, Decision (Admissibility), 28 June 2011.

*Freedom and Democracy Party (ÖZDEP) v. Turkey*, Application no. 23885/94, Judgment, 12 August 1999.

*Gasyak and Others v. Turkey*, Application no. 27872/03, Judgment, 13 October 2009.

*Goygova v. Russia*, Application no. 74240/01, Judgment, 4 October 2007.

*Guillot v. France*, Application no. 22500/93, Judgment, 24 October 1993.

*Güzel Erdagöz v. Turkey*, Application no. 37483/02, Judgment, 21 October 2008.

*HADEP and Demir v. Turkey*, Application no. 28003/03, Judgment, 14 December 2010.

*Hakim İpek v. Turkey*, Application no. 47532/09, Judgment, 10 November 2015.

*Halil Yavuzel and Two Other Applications v. Turkey*, Application no. 5317/16, Decision (Admissibility), 6 December 2016.

*Haran v. Turkey*, Application no. 25754/94, Judgment (Striking Out), 26 March 2002.

*Hassan v. the UK*, GC, Application no. 29750/09, Judgment, 16 September 2014.

*Hasan İlhan v. Turkey*, Application no. 22494/93, Judgment, 9 November 2004.

*Hüseyinoğlu and Kalabay v. Turkey*, Application no. 41176/10, Decision (Admissibility), 20 September 2011.

*Ihsan Bilgin v. Turkey*, Application no. 40073/98, Judgment, 27 July 2006.

*Incal v. Turkey*, Application no. 41/1997/825/1031, Judgment, 9 June 1998.

*Ireland v. UK*, Application no. 5310/71, Judgment, 18 January 1978.

*Isayeva v. Russia*, Application no. 57950/00, Judgment, 24 February 2005.

*İçyer v. Turkey*, Application no. 1888/02, Decision (Admissibility), 12 January 2006.

*İpek v. Turkey*, Application no. 25760/94, Judgment, 17 February 2004.

*İrfan Temel and Others v. Turkey*, Application no. 36458/02, Judgment, 3 March 2009.

*İrfan Uysal and Others v. Turkey*, Application no. 4817/16, Decision (Admissibility), 6 December 2016.

*İzci v. Turkey*, Application no. 42606/05, Judgment, 23 July 2013.

*Kasap and Others v. Turkey*, Application no. 8656/10, Judgment, 14 January 2014.

*Kaya v. Turkey*, Application no. 158/1996/777/978, Judgment, 19 February 1998.

*Kaya and Others v. Turkey*, Application no. 4451/02, Judgment, 24 October 2006.

*Kemal Koç and Others v. Turkey*, Application no. 8536/16, Decision (Admissibility), 6 December 2016.

*Kemal Taşkın and Others v. Turkey*, Application no. 30206/04, 37038/04, 43681/04, 45376/04, 12881/05, 28697/05, 32797/05 and 45609/05, Judgment, 2 February 2010.

*Kılıç v. Turkey*, Application no. 22492/93, Judgment, 28 March 2000.

*Kişmir v. Turkey*, Application no. 27306/95, Judgment, 31 May 2005.

*Koku v. Turkey*, Application no. 27305/95, Judgment, 31 May 2005.

*Köksal v. Turkey*, Application no. 70478/16, Decision (Admissibility), 6 June 2017.

*Kurt v. Turkey*, Application no. 15/1997/799/1002, Judgment, 25 May 1998.

*Külah and Koyuncu*, Application no. 24827/95, Judgment, 23 April 2013.

*Lawless v. Ireland*, Application no. 332/57, Judgment, 1 July 1961.

*Loizidou v. Turkey*, GC, Application no. 15318/89, Judgment (Merits), 18 December 1996.

*Loizidou v. Turkey*, GC, Application no. 15318/89, Judgment (Preliminary Objections), 23 March 1995.

*Magomed Musayev and Others v. Russia*, Application no. 8979/02, Judgment, 23 October 2008.

*Mahmut Kaya v. Turkey*, Application no. 22535/93, Judgment, 28 March 2000.

*Makbule Kaymaz and Others*, Application no. 651/10, Judgment, 24 February 2014.

*Matyar v. Turkey*, Application no. 23423/94, Judgment, 21 February 2002.

*Mazlum Dolan and Four Other Applications v. Turkey*, Application no. 9414/16, Decision (Admissibility), 6 December 2016.

*Mehmet Balcal and Others and Ahmet Karaduman and Selahattin Çiçek v. Turkey*, Application nos. 8699/16 and 6758/16, Decision (Admissibility), 6 December 2016.

*Mehmet Latif Karaman v. Turkey*, Application no. 5237/16, Decision (Interim Remedy), 22 January 2016.

*Mehmet Latif Karaman*, Application no. 5237/16, Decision (Admissibility), 6 December 2016.

*Mehmet Nuri Özen and Others v. Turkey*, Application nos. 15672/08, 24462/08, 27559/08, 28302/08, 28312/08, 34823/08, 40738/08, 41124/08, 43197/08, 51938/08 and 58170/08, Judgment, 11 January 2011.

*Mehmet Oran and Three Other Applications v. Turkey*, Application no. 1905/16, Decision (Admissibility), 6 December 2016.

*Meleagrou and Others v. Turkey*, Application no. 14434/09, Decision (Admissibility), 2 April 2013.

*Melese Erdem and Mahmut Erdem v. Turkey*, Application no. 64727/11, communicated to the Turkish government on 26 January 2015.

*Menteş and Others v. Turkey*, Application no. 58/1996/677/867, Judgment, 28 November 1997.

*Mentzen v. Latvia*, Application no. 71074/01, Decision, 7 December 2004.

*Meryem Çelik and Others v. Turkey*, Application no. 3598/03, Judgment, 16 April 2013.

*Mızrak and Atay v. Turkey*, Application no. 65146/12, Judgment, 18 October 2016.

*Müdür Turgut and Others*, Application no. 4860/09, Decision (Admissibility), 11 April 2013.

*Nesibe Haran v. Turkey*, Application no. 28299/95, Judgment, 6 October 2005.

*Nihayet Arıcı v. Turkey*, Application nos. 24604/04 and 16855/05, Judgment, 23 October 2012.

*Nuray Şen v. Turkey (no. 2)*, Application no. 25354/94, Judgment, 30 March 2004.

*Orhan v. Turkey*, Application no. 25656/94, Judgment, 18 June 2002.

*Osman v. UK*, Application no. 87/1997/871/1083, Judgment, 28 October 1998.

*Osmanoğlu v. Turkey*, Application no. 48804/99, Judgment, 24 January 2008.

*Opuz v. Turkey*, Application no. 33401/02, Judgment, 9 June 2009.

*Ömer Elçi and Eight Other Applications v. Turkey*, Application no. 63129/15, Decision (Admissibility), 6 December 2016.

*Öncü v. Turkey*, Application no. 4817/16, Decision (Interim Remedy), 21 January 2016.

*Özgen and Others v. Turkey*, Application no. 38607/97, Judgment, 20 September 2005.

*Party for a Democratic Society (DTP) and Others v. Turkey*, Application nos. 3870/10, 3870/10, 3878/10, 15616/10, 21919/10, 39118/10 and 37272/10, Judgment, 12 January 2016.

*Refah Partisi (Welfare Party) and Others v. Turkey*, Application nos. 41340-44/98, Judgment, 31 July 2001.

*Sadak and Others v. Turkey (no. 1)*, Application nos. 29900/96, 29901/96, 29902/96 and 29903/96, Judgment, 17 July 2001.

*Sakık and Others v. Turkey*, Application nos. 87/1996/706/898-903, Judgment, 26 November 1997.

*Sargsyan v Azerbaijan*, Application no. 40167/06, Judgment, 16 June 2015.

*Saygı v. Turkey*, Application no. 37715/11, Judgment, 27 January 2015.

*Sejdić and Finci v. Bosnia and Herzegovina*, GC, Application nos. 27996/06 and 34836/06, Judgment, 22 December 2009.

*Selçuk and Asker v. Turkey*, Application no. 12/1997/796/998-999, Judgment, 24 April 1998.

*Selim Yıldırım and Others v. Turkey*, Application no. 56154/99, Judgment, 19 October 2006.

*Sevtap Veznedaroğlu v. Turkey*, Application no. 32357/96, Judgment, 11 April 2000.

*Seyfettin Acar v Turkey*, Application no. 30742/03, Judgment, 6 October 2009.

*Socialist Party and Others v. Turkey*, Application no. 20/1997/804/1007, Judgment, 25 May 1998.

*Süheyla Aydın v. Turkey*, Application no. 25660/94, Judgment, 24 May 2005.

*Şükran Aydın and Others v. Turkey*, Applications nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, Judgment, 22 January 2013.

*T.A. v. Turkey*, Application no. 26307/95, Judgment (Striking Out), 9 April 2002.

*Tahsin Acar v. Turkey*, GC Application no. 26307/95, Judgment (Merits), 8 April 2004.

*Tahsin Acar v. Turkey*, GC, Application no. 26307/95, Judgment (Preliminary Issue), 6 May 2003.

*Tanış and Others v. Turkey*, Application no. 65899/01, Judgment, 2 August 2005.

*Tanrıkulu v. Turkey*, Application no. 23763/94, Judgment, 8 July 1999.

*Taş v. Turkey*, Application no. 24396/94, Judgment 14 November 2000.

*Tekçi and Others v. Turkey*, Application no. 13660/05, Judgment, 10 December 2013.

*Tekdağ v. Turkey*, Application no. 27699/95, Judgment, 15 January 2004.

*Tekin v. Turkey*, Application no. 52/1997/836/1042, Judgment, 9 June 1998.

*Tepe v. Turkey*, Application no. 27244 /95, Judgment, 9 May 2003.

*Timurtaş v. Turkey*, Application no. 23531/94, Judgment, 13 June 2000.

*Toğcu v. Turkey*, Application no. 27601/95, Judgment (Merits and Just Satisfaction), 31 May 2005.

*Toğcu v. Turkey*, Application no. 27601/95, Judgment (Striking Out), 9 April 2002.

*Tomasi v. France*, Application no. 12850/87, Judgment, 27 August 1992.

*Uğur v. Turkey*, Application no. 37308/05, Judgment, 13 January 2015.

*United Communist Party of Turkey and Others v. Turkey*, Application no. 133/1996/752/951, Judgment, 30 January 1998.

*Uzun v. Turkey*, Application no. 10755/13, Decision (Admissibility), 30 April 2013.  
*Ülkü Ekinci v. Turkey*, Application no. 27602/95, Judgment, 16 July 2002.  
*Ümmühan Kaplan v. Turkey*, Application no. 43647/98, Judgment, 20 March 2012.  
*Varnava and Others v. Turkey*, GC, Application nos. 16064-16073/90, Judgment, 18 September 2009.  
*Yaşa v Turkey*, Application no. 63/1997/847/1054, Judgment, 2 September 1998.  
*Yazar and Others v. Turkey*, Application no. 22723/93, 22724/93 and 22725/93, Judgment, April 2002.  
*Yöyler v. Turkey*, Application no. 26973/95, Judgment, 24 July 2003.  
*Yumak and Sadak v. Turkey*, GC, Application no. 10226/03, Judgment, 8 July 2008.  
*Yurtseven and Others v. Turkey*, Application no. 31730/96, Judgment (Friendly Settlement), 18 December 2003.  
*Zana v. Turkey*, GC, Application no. 18954/91, Judgment, 25 November 1997.  
*Zehide Paksoy and Others v. Turkey*, Application no. 3758/16, Decision (Interim Remedy), 18 January 2016.  
*Zehide Paksoy and Others v. Turkey*, Application no. 3758/16, Decision (Admissibility), 6 December 2016.  
*Zihni v. Turkey*, Application no. 59061/16, Decision (Admissibility), 29 November 2016.

### ***EComHR Reports and Decisions***

*Akdivar and Others v. Turkey*, Application no. 21893/93, Report, 26 October 1995.  
*Aslantas v. Turkey*, Application no. 25658/94, Report, 1 March 1999.  
*Association "Andecha Astur" v. Spain*, Application no. 34184/96, Decision, 7 July 1997.  
*Austria v. Italy*, Application no. 788/60, Decision, 11 January 1961.  
*Cemil Kılıç v. Turkey*, Application No. 22492/93, Report, 23 October 1998.  
*Cyprus v. Turkey*, Application no. 8007/77, Report, 4 October 1983.  
*Cyprus v. Turkey*, Applications nos. 6780/74 and 6950/75, Report, 10 July 1976.  
*Denmark, Norway, Sweden and The Netherlands v. Greece (The Greek Case II)*, Application no. 4448/70, Reports, 5 October 1970 and 4 October 1976.  
*Denmark, Norway, Sweden and The Netherlands v. Greece (The Greek Case I)*, Application nos. 3321/67, 3322/67, 3323/67, 3344/67, Report, 5 November 1969.  
*Donnelly and Six Others v. UK*, Application no. 5577-5583/72, Second Decision, 15 December 1975.  
*Donnelly and Others v. UK*, Application no. 5577/72 and 5583/72, First Decision, 5 April 1973.  
*France v. Turkey*, Application no. 9940/82, *Norway v. Turkey*, Application no. 9941/82, *Denmark v. Turkey*, Application no. 9942/82, *Sweden v. Turkey*, Application no. 9943/82, *Netherlands v. Turkey*, Application no. 9944/82, Report, 7 December 1985.  
*France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, Applications no. 9940-9944/82 (joined), Decision (Admissibility), 6 December 1983.  
*Fryske Nasjonale Partij and Others v. The Netherlands*, Application no. 11100/84, Decision, 12 December 1985.  
*Greece v. UK (First Cyprus Case)*, Application no. 176/56, Report, 26 September 1958.  
*Gürdoğan, Müştak, Müştak and Müştak v. Turkey*, Application nos. 15202/89, 15203/89, 15204/89, 15205/89, Decision (Friendly Settlement), 12 January 1993.  
*Incal v. Turkey*, Application no. 22678/93, Report, 25 February 1997.  
*Koçeri Kurt v. Turkey*, Application no. 14276/94, Report, 5 December 1996.  
*Lawless v. Ireland*, Application no. 332/57, Report, 19 December 1959.  
*Mahmut Kaya v. Turkey*, Application No. 22535/93, Report, 23 October 1998.

*Mehmet Emin Akdeniz and Others v. Turkey*, Application no. 23954/94, Report, 10 September 1999.

*Mentes v. Turkey*, Application no. 23186/93, Report, 7 March 1996.

*Metropolitan Chrysostomos, Bishop of Kitium v. Turkey*, Application no. 15299/89,  
*Archimandrite Georgios Papachrysostomou v. Turkey*, Application no. 15300/89, *Titina Loizidou v. Turkey*, Application no. 15318/89, Decision (Admissibility), 4 March 1991.

*Sukran Aydin v. Turkey*, Application no. 23178/94, Report, 7 March 1996.

*Zeki Aksoy v. Turkey*, Application no. 21987/93, Report, 23 October 1995.

## **IACtHR & IAComHR Case Law**

### ***IACtHR***

*Caballero Delgado and Santana v. Colombia*, 8 December 1995.

*Fairén Garbi and Solls Corrales v. Honduras*, Series C, no. 6, 15 March 1989;

*Godínez Cruz v. Honduras*, Series C, no. 5, 20 January 1989.

*Velásquez Rodríguez v. Honduras*, Series C, no. 4, 29 July 1988.

### ***IAComHR***

*Fernando and Raquel Mejia v. Peru*, report no 5/96, Case 10,970, 1 March 1996.

## **Turkish Legislation**

### ***Constitutional and Legislative Texts***

*Anayasa Düzeni Hakkında Kanun* [Law on the Constitutional Order], no. 2324, 27 October 1980, Official Gazette, no. 17145, 28 October 1980.

*Anayasa Mahkemesinin Kuruluşu ve Yargılama Usulleri Hakkında Kanun* [Law on the Establishment and Adjudication Procedures of the Constitutional Court], no. 6126, 30 March 2011, Official Gazette, no. 27894, 3 April 2011.

*Anayasanın Halk Oylamasına Sunulması Hakkında Kanun* [Law on the Submission of the Constitution to Popular Vote], no. 2707, 24 September 1982, Official Gazette, no. 17823, 25 September 1982.

*Avrupa İnsan Hakları Mahkemesine Yapılmış Bazı Başvuruların Tazminat Ödenmek Suretiyle Çözümüne Dair Kanun* [Law on the Settlement of Some Applications Lodged with the European Court of Human Rights by Means of Paying Compensation], no. 6384, 9 January 2013, Official Gazette, no. 28533, 19 January 2013.

*Bazı Suç Failleri Hakkında Uygulanacak Hükümlere Dair Kanun* [Law on the Provisions to be Applied to the Perpetrators of Certain Crimes], no. 3419, 25 March 1988, Official Gazette, no. 19770, 30 March 1988.

*Belediye Kanunu* [Law on Municipalities], no. 5393, 3 July 2005, Official Gazette, no. 25874, 13 July 2005.

*Ceza Muhakemesi Kanunu* [Law on Criminal Procedure], no. 5271, 4 December 2004, Official Gazette, no. 25673, 17 December 2004.

*Ceza Muhakemesi Kanunu ile Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanunda Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of Law on Criminal Procedure and the Execution of Sentences and Security Measures], no. 6411, 24 January 2013, Official Gazette, no. 28545, 31 January 2013.

*Ceza Muhakemeleri Usulü Kanunu, Devlet Güvenlik Mahkemelerinin Kuruluş ve Yargılama Usulleri Hakkında Kanun ve Bu Kanunlarda Değişiklik Yapan 18.11.1992 Tarih ve 3842 Sayılı Kanunda Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of Certain Provisions of the Law of Criminal Procedure, the Law on the Establishment and Trial Procedures of State Security Courts and Law no. 3842 dated 18.11.1992 which Amended These Laws], no. 4229, 6 March 1997, Official Gazette, no. 22931, 12 March 1997.

*Ceza Muhakemeleri Usulü Kanunu ile Devlet Güvenlik Mahkemelerinin Kuruluş ve Yargılama Usulleri Hakkında Kanunun Bazı Maddelerinde Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of Certain Provisions of the Law of Criminal Procedure and the Law on the Establishment and Trial Procedures of the State Security Courts], no. 3842, 18 November 1992, Official Gazette, no. 21422, 1 December 1992.

*Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4963, 30 July 2003, Official Gazette, no. 25192, 7 August 2003.

*Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4928, 15 July 2003, Official Gazette, no. 25173, 19 July 2003.

*Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4793, 23 January 2003, Official Gazette, no. 25014, 4 February 2003.

*Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4778, 2 January 2003, Official Gazette, no. 24990, 11 January 2003.

*Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4771, 3 August 2002, Official Gazette, no. 24841, 9 August 2002.

*Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* [Law on the Amendment of Various Laws], no. 4748, 26 March 2002, Official Gazette, no. 24721, 9 April 2002.

*Devlet Güvenlik Mahkemelerinin Kuruluş ve Yargılama Usulleri Hakkında Kanun* [Law on the Establishment of State Security Courts and their Adjudication Procedures], no. 2845, 16 June 1983, Official Gazette, no. 18081, 18 June 1983.

*İnsan Haklarını ve Ana Hürriyetleri Koruma Sözleşmesi ve Buna Ek Protokolün Tasdiki Hakkında Kanun* [Law on the Ratification of the Convention on Human Rights and Fundamental Liberties and its Additional Protocol], no. 6366, 10 March 1954, Official Gazette, no. 8662, 19 March 1954.

*İskân Kanunu* [Settlement Law], no. 885, 31 May 1926, Official Gazette, no. 409, 1 July 1926.

*İskân Kanunu* [Settlement Law], no. 2510, 14 June 1934, Official Gazette, no. 2733, 21 June 1934.

*Köy Kanunu* [Village Law], no. 442, 18 March 1924, Official Gazette, no. 68, 7 April 1924.

*Köy Kanunu'nun 74üncü Maddesine İki Fıkra Eklenmesine Dair Kanun* [Law on the Addition of two Paragraphs to Article 74 of the Village Law], no. 3175, 26 June 1985, Official Gazette, no. 18715, 4 April 1985.

*Kurucu Meclis Hakkında Kanun* [Law on the Constituent Assembly], no. 2485, 29 June 1981, Official Gazette, no. 17386, 30 June 1981.

*Kurucu Meclis Teşkilî Hakkında Kanun* [Law on the Establishment of the Constituent Assembly], no. 157, 13 December 1960, Official Gazette, no. 10682, 16 December 1960.

*Memurlar ve Diğer Kamu Görevlilerinin Yargılanması Hakkında Kanun* [Law on the Prosecution of Civil Servants and other Public Employees], no. 4483, 2 December 1999, Official Gazette, no. 23896, 4 December 1999.

*Milletvekili Seçim Kanunu* [Law on the Election of Members of the Parliament], no. 2839, 10 June 1983, Official Gazette, no. 18076, 13 June 1983.

*Olağanüstü Hal Kanunu* [State of Emergency Law], no. 2935, 25 October 1983, Official Gazette, no. 18204, 27 October 1983.

*Seçimlerin Temel Hükümleri ve Seçmen Kütükleri Hakkında Kanun ile Milletvekili Seçimi Kanununda Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of the Law on the Fundamental Provisions Governing Elections and Voter Registration and the Law on Members of the Parliament], no. 5980, 8 April 2010, Official Gazette, no. 27548, 10 April 2010.

*Seçimlerin Temel Hükümleri ve Seçmen Kütükleri Hakkında Kanun* [Law on the Amendment of the Law on the Fundamental Provisions Governing Elections and Voter Registration and the Law on Members of the Parliament], no. 298, 26 April 1961, Official Gazette, no. 10796, 2 May 1961.

*Siyasi Partiler Kanunu* [Law on Political Parties], no. 2820, 22 April 1983, Official Gazette, no. 18027, 24 April 1983.

*Takriri Sükun Kanunu* [Law on the Restoration of Order], no. 578, 4 March 1925, Official Gazette, no. 87, 4 March 1925.

*Temel Hak ve Hürriyetlerin Geliştirilmesi Amacıyla Çeşitli Kanunlarda Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of Certain Laws for the Purpose of Advancing Fundamental Rights and Liberties], no. 6529, 2 March 2014, Official Gazette, no. 28940, 13 March 2014.

*Terörle Mücadele Kanunu* [Law on Combatting Terrorism], no. 3713, 12 April 1991, Official Gazette, no. 20843, 12 April 1991.

*Terörle Mücadele Kanununda Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of the Anti-Terror Law], no. 5532, 29 June 2006, Official Gazette, no. 26232, 18 July 2006.

*Terör ve Terörle Mücadeleden Doğan Zararların Karşılanması Hakkında Kanun* [Law on the Compensation of Losses Resulting from Terrorism and the Fight against Terrorism], no. 5233, 17 July 2004, Official Gazette, no. 25535, 27 July 2004.

*Topluma Kazandırma Kanunu* [Law for Gaining Citizens to Society], no. 4959, 29 July 2003, Official Gazette, no. 25191, 6 August 2003.

*Tunceli Vilayetinin İdaresi Hakkında Kanun* [Law on the Administration of the Province of Tunceli], no. 2884, 25 December 1935, Official Gazette, no. 3195, 2 January 1936.

*Türk Ceza Kanunu* [Turkish Penal Code], no. 5237, 26 September 2004, Official Gazette, no. 25611, 12 October 2004.

*Türkçeden Başka Dillerde Yapılacak Yayınlar Hakkında Kanun* [Law on Broadcasting in Languages Other than Turkish], no. 2932, 19 October 1983, Official Gazette, no. 18199, 22 October 1983.

*Türkiye Cumhuriyeti Anayasası* [The Constitution of the Turkish Republic], no. 2709, 7 November 1982, Official Gazette, no. 17863, 9 November 1982.

*Türkiye Cumhuriyeti Anayasasında Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of the Constitution of the Republic of Turkey], no. 6771, 21 January 2017, Official Gazette, no. 29976, 11 February 2017.

*Türkiye Cumhuriyeti Anayasasında Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of the Constitution of the Republic of Turkey], no. 6718, 20 May 2016, Official Gazette, no. 29736, 8 June 2016.

*Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun* [Law on the Amendment of Certain Provisions of the Constitution of the Republic of Turkey], no. 5982, 7 May 2010, Official Gazette, no. 27580, 13 May 2010.

*Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Değiştirilmesi Hakkında Kanun* [Law on the Amendment of Various Provisions of the Constitution of the Turkish Republic], no. 5170, 7 May 2004, Official Gazette, no. 25469, 22 May 2004.

*Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Değiştirilmesi Hakkında Kanun* [Law on the Amendment of Certain Provisions of the Constitution of the Republic of Turkey], no. 4709, 3 October 2001, Official Gazette, no. 24556, 17 October 2001.

*Türkiye Cumhuriyeti Anayasasının bazı Maddelerinin Değiştirilmesi ve Geçici Maddeler Eklenmesi Hakkında Kanun* [Law on the Amendment of Certain Provisions of and the Addition of Provisional Articles to the Constitution of the Turkish Republic], no. 1488, 20 September 1971, Official Gazette, no. 13964, 22 September 1971.

*Türkiye Cumhuriyeti Anayasasının 143 üncü Maddesinin Değiştirilmesine Dair Kanun* [Law on the Amendment of Article 143 of the Constitution of the Republic of Turkey], no. 4388, 18 June 1999, Official Gazette, no. 23729, 18 June 1999.

*Varlık Vergisi Kanunu* [The Wealth Levy Law], no. 4305, 11 November 1942, Official Gazette, no. 5255, 12 November 1942.

*Yabancı Dil Eğitimi ve Öğretimi ile Türk Vatandaşlarının Farklı Dil ve Lehçelerinin Öğrenilmesi Hakkında Kanun* [Law on the Teaching of and Education in Foreign Languages and the Learning of Different Languages and Dialects by Turkish Citizens], no. 2923, 14 October 1983, Official Gazette, no. 18196, 19 October 1983.

*23 Nisan 1999 Tarihine Kadar İşlenen Suçlardan Dolayı Şartla Salıverilmeye, Dava ve Cezaların Ertelenmesine Dair Kanun* [Law on the Suspension of Conditional Releases, Prosecutions and Sentences in Relation to Crimes Committed until 23 April 1999], No. 4616, 21 December 2000, Official Gazette no. 24268, 22 December 2000.

*1961 Anayasası* [1961 Constitution], 27 May 1961, Official Gazette, no. 10859, 20 July 1961.

*2510 Sayılı İskân Kanununa Ek Kanun* [Supplementary Law to the Law on Settlement no. 2510], no. 105, 19 October 1960, Official Gazette, no. 10638, 25 October 1960.

### **Regulations, Decrees and By-Laws**

*Adli Tıp Kurumu Kanunu Uygulama Yönetmeliğinde Değişiklik Yapılmasına Dair Yönetmelik* [Regulation on the Application of the Law on Forensic Medicine], Official Gazette, no. 29586, 7 January 2016.

*Anayasa Mahkemesi İçtüzüğü* [By-Laws of the Constitutional Court], Official Gazette, no. 28351, 12 July 2012.

*Köy Korucuları Yönetmeliği* [Regulation on Village Guards], Official Gazette, no. 24096, 1 July 2000.

*Olağanüstü Hal Bölge Valiliği ve Olağanüstü Halin Devamı Sürecince Alınacak İlave Tedbirler Hakkında Kanun Hükmünde Kararname* [Decree with the Force of Law Regarding the Regional Governorship of the State of Emergency and the Additional Measures to be adopted during the Continuation of the State of Emergency],no. 430, 15 December 1990, Official Gazette, no. 20727, 16 December 1990.

*Olağanüstü Hal Bölge Valiliği İhdası Hakkında Kanun Hükmünde Kararname* [Decree with the Force of Law Establishing the Regional Governorship of the State of Emergency], no. 285, 10 July 1987, Official Gazette, no. 19517, 14 July 1987.

*Olağanüstü Hal İşlemleri İnceleme Komisyonu Kurulması Hakkında Kanun Hükmünde Kararname* [Decree with the Force of Law Regarding the Establishment of the Commission for the Review of State of Emergency Measures], no. 685, Official Gazette, no. 29957, 23 January 2017.

*Olağanüstü Hal Kapsamında Bazı Düzenlemeler Yapılması Hakkında Kanun Hükmünde Kararname* [Decree with the Force of Law Concerning Certain Regulations in the Context of State of Emergency], no. 674, Official Gazette, no. 29818, 1 September 2016.

*Şiddet Olaylarının Yaygınlaşması ve Kamu Düzeninin Ciddi Şekilde Bozulması Sebebine Dayalı Olağanüstü Halin Devamı Sürecince Alınacak İlave Tedbirlere İlişkin Kanun Hükmünde Kararname* [Decree with the Force of Law Regarding Additional Measures to be Adopted during the Continuation of the State of Emergency due to the Spreading of Violent Incidents and the Serious Disruption of the Public Order], no. 424, 9 May 1990, Official Gazette, no. 20514, 10 May 1990.

*Türkiye Cumhuriyeti Milli Güvenlik Konseyi Yasama Görevleri İçtüzüğü* [By-Laws on the Legislative Duties of the Council of National Security of the Turkish Republic], 25 September 1980, Official Gazette, no. 17119, 28 September 1980.

## **Jurisprudence of Turkish Courts**

### ***Constitutional Court (AYM): Constitutional Complaints***

*Ayhan Sevikte ve Mehmet Oran*, Application no. 2016/43, Decision (Interim Remedy), 8 January 2016.

*Ekrem Şen ve Diğerleri*, Application no. 2015/20376, Decision (Interim Remedy), 20 January 2016.

*Erdem Gül and Can Dündar*, Application no. 2015/18567, Judgment, 25 February 2016.

*Ferhat Balcal ve Diğerleri*, Application no. 2016/2602, Decision (Interim Remedy), 12 February 2016.

*İrfan Uysal ve Diğerleri*, Application no. 2015/19907, Decision (Interim Remedy), 26 December 2015.

*Mehmet Denan Dağlı ve Diğerleri*, Application no. 2016/1905, Decision (Interim Remedy), 3 February 2016.

*Mehmet Encü and Others*, Application no. 2014/11864, Decision (Admissibility), 24 February 2016.

*Mehmet Girasun ve Ömer Elçi*, Application no. 2015/15266, Decision (Interim Remedy), 11 September 2015.

*Mehmet Yavuzel ve Diğerleri*, Application no. 2016/1652, Decision (Interim Remedy), 29 January 2016.

*Meral Danış Beştaş*, Application no. 2015/19545, Decision (Interim Remedy), 22 December 2015.

*Mustafa Ali Balbay*, Application no. 2012/1272, Judgment, 4 December 2013.

*Nuriye Acar*, Application no. 2015/20218, Decision (Interim Remedy), 31 December 2015.

*Yaman Akdeniz and Others*, Application no. 2014/3986, Judgment, 2 April 2014.

*Youtube LLC Corporation Company and Others*, Application no. 2014/4705, Judgment, 29 May 2014.

### ***AYM: Proceedings for Annulment and Constitutional Objections***

E. 1970/44, K. 1970/42, 17 November 1970.

E. 1974/35, K. 1975/126, 6 May 1975.

E. 1990/32, K. 1990/25, 16 October 1990.

E. 1990/25, K. 1991/1, 10 January 1991.

E. 1991/6, K. 1991/20, 3 July 1991.

E. 1991/18, K. 1992/20, 31 March 1992.

E. 2008/16, K. 2008/116, 5 June 2008.  
E. 2008/1, K. 2008/2, 30 July 2008.  
E. 2006/79, K. 2009/97, 25 June 2009.  
E. 2016/54, K. 2016/117, 3 June 2016.  
E. 2016/6, K. 2016/12, 4 July 2016  
E. 2016/166, K. 2016/159, 12 October 2016.

***AYM: Political Party Dissolutions***

E. 1992/1, K. 1993/1, 14 July 1993 (HEP).  
E. 1993/1, K. 1993/2, 23 November 1993 (ÖZDEP).  
E. 1993/3, K. 1994/2, 16 June 1994 (DEP).  
E. 1999/1, K. 2003/1, 13 March 2003 (HADEP).  
E. 2007/1, K. 2009/4, 11 December 2009 (DTP).

***Council of State [Danıştay]***

5th Chamber, E. 1986/1723, K. 1991/933, 22 May 1991.  
E. 2008/6679, K. 2009/1227, 20 February 2009.

***Lower Court Documents***

The 3<sup>rd</sup> Heavy Penal Court in Diyarbakır, E. 2007/439, K. 2008/79, 20 March 2008.



## Summary

In authoritarian regimes where the state is engaged in violence against a minority group in the context of an ethno-political conflict and is claiming legitimacy from counter-terrorism, what are the potentials and limitations for consequential engagement by a supra-national human rights court? The study seeks to answer this question by focusing on the European Court of Human Rights' (ECtHR) involvement in Turkey's Kurdish conflict as a case study.

Turkey not only ratified the European Convention on Human Rights (ECHR/the Convention) as early as in 1954, but is among its drafters. It has been subject to the oversight of what has been considered to be the most effective human rights regime in the world since its recognition of the compulsory jurisdiction of the ECtHR/Court in 1990. Since 2005, it is an EU accession country – a status reserved for countries which uphold the rule of law, guarantee human rights and protect their minorities. Yet, state violence in the Kurdish region continues, showing striking parallels to that in the 1990s, regarding which the ECtHR had issued hundreds of judgments finding multiple human rights violations. Turkey is still governed by an authoritarian politico-legal regime, its security forces engage in gross violations and still enjoy impunity for those they committed in the past, while Kurdish politicians are imprisoned on terrorism charges and stripped of their elected offices solely on account of their democratic activities.

To tackle this puzzle, the study addresses two related research questions on the basis of an interdisciplinary and process-oriented approach. The first is how the ECtHR has approached the gross abuses committed by the Turkish security forces against Kurdish civilians within an emergency setting. I address this question from two perspectives. I draw on the law and society scholarship's *bottom-up* approach to the use of courts for social change. Drawing on qualitative interviews with key players, as well as archival material, I show how Kurdish lawyers have used the individual petition mechanism to resist state violence since Turkey's recognition of the ECtHR's individual petition mechanism in 1987. By analysing the Court's response over time, I show whether, and if so how, the Convention regime empowers the legal mobilization of minorities in an authoritarian context. In addition, drawing on the judicial impact literature's *top-down* approach, I turn to legal scholarship and its doctrinal method to inquire whether the Court has exhausted the adjudicatory means available to it in overseeing state violence in Turkey's Kurdish region. Based on a longitudinal analysis of the ECtHR's judgments *and* decisions concerning state violence in Turkey's Kurdish region since the early 1990s, I aim to understand whether the continuity of gross abuses against Kurdish civilians is only a compliance problem, as depicted in conventional scholarship, or whether it also speaks to more fundamental limitations of the ECtHR.

Second, I also address the more general question of the potential and limitations of supranational courts in addressing the inherent deficiencies of democracy in authoritarian regimes where the majority abuses its numerical superiority to deny minorities their fundamental rights. Given that the ECHR is not a minority protection regime and yet has been

used by minorities across Europe in their struggle for social justice, I inquire into the jurisdictional, doctrinal and political opportunities and constraints which enable *and* constrain the ECtHR in ensuring that those who are marginalized on account of their race, ethnicity etc. can exercise their rights under the ECHR. I analyze how the ECtHR has responded to the Kurds' political participation/representation and cultural recognition claims. In light of the Court's individualist approach to rights protection and the limitations of its margin of appreciation and consensus doctrines, I discuss whether, and if so how, the Court has used the jurisprudential tools available to it in overseeing Turkey's embedded cultural assimilation and political disenfranchisement policies against the Kurds.

The study consists of two parts. To explain why Turkey remains an authoritarian regime after over 60-years of engagement with the ECHR, Part I situates Turkey's domestic policies and the European engagement with them in a historical context. Chapter 2 lays out the evolution and progress of Turkey's transition to polyarchy and its tumultuous experience with democracy, constitutionalism, human rights and minority protection against the backdrop of its post-World War II engagement with inter-governmental institutions, including the ECHR regime and the EU. With regard to the former, this chapter is limited to the Convention institutions' engagement until Turkey's recognition of the right of individual petition in 1987. Chapter 3 then provides a historical background on Turkey's Kurdish policies and on the Kurdish political mobilization in response to them, tracing both of them to late 19<sup>th</sup> century Ottoman era. To address the second research question of this study, the chapter analyses the Court's oversight of Turkey's cultural assimilation and political disenfranchisement policies on the basis of its case law on the Kurds' cultural and political rights. The chapter also looks into the substance and implementation of the EU-induced reforms adopted by successive Turkish governments to address the Kurds' cultural recognition and political participation/representation claims.

Part II is the empirical core of this study; it addresses the first research question on the basis of qualitative fieldwork and archival research. Chapter 4 accounts how a small group of lawyers in Turkey's Kurdish region have used the ECtHR's individual petition mechanism to resist state violence within the emergency context. Drawing on the legal mobilization literature, it traces the varying ways in which Turkey's recognition of the right of individual petition, its efforts to accede to the EU and the post-enlargement reforms of the ECtHR have affected and been affected by Kurdish legal mobilization since the early 1990s. The aim of Chapter 5 is to draw a picture of state violence in the context of the emergency rule in Turkey's Kurdish region by mapping out its actors, acts and victims. It lays out the main perpetrators of state violence; describes the *modus operandi* of four types of gross violations committed by these actors (enforced disappearances, torture, extrajudicial executions and forced displacement); shows how the perpetrators were insulated by an impunity regime upheld by the Turkish judiciary; and, in an effort to put names and stories to statistics, presents detailed accounts of four cases which resulted in an ECtHR ruling. Chapter 6 focuses on the ECtHR's response to Kurdish legal mobilization against state violence by tracing the evolution of the ECtHR's jurisprudence on the four types of gross human rights abuses discussed in Chapter 5. Discussing the evolution of the Court's case law as well as Turkey's execution of these rulings against the backdrop of broader political developments in Europe (the Court's post-enlargement docket crisis and the

reforms adopted to address it) and in Turkey (the EU accession process, and the rise and fall of the democratization process), it shows how the ECtHR's engagement in the Kurdish conflict has been affected by these internal and external factors.

The Conclusion chapter revisits the study's research questions in light of its findings, and recent legal and political developments in Turkey. After a brief account of the Turkish Constitutional Court's evolving jurisprudence on the individual complaint mechanism in light of the resumption of state violence in the Kurdish region in 2015 and the collapse of democracy and the rule of law in Turkey since the failed *coup* attempt in July 2016, the chapter discusses the implications of the study's findings for the judicial impact, legal mobilization and judicial politics scholarships, and puts forth suggestions for further research.

The study concludes that the ECtHR's oversight of state violence in Turkey's Kurdish region has consisted of cycles. The Court has been at its most innovative, boldest and most receptive during the first phase of its engagement until the early 2000s, during which it showed the possibility for a supranational court to have a consequential engagement in state violence. At the same time, even during this Golden Age when Kurdish legal mobilization had its highest impact on the Court's case law, the ECtHR never exhausted the jurisprudential tools and doctrines available to it in its oversight of state violence. As for its oversight of the Kurds' political and cultural rights claims, instead of adopting a contextualized and historically-grounded approach, the ECtHR has treated these cases in isolation and failed to read them against an authoritarian state's decades-old centralization and assimilation policies targeting an ethnic minority.

Based on the in-depth study of the Turkish case, the study argues that in assessing the ECtHR's effectiveness, scholars and practitioners need to engage in differentiated analyses of authoritarian versus democratic regimes. The subsidiarity principle cannot be applied across the board without due attention to differences between the judicial systems and political cultures of contracting parties – a conclusion further supported by recent developments in several post-communist signatory states such as Poland and Hungary. The Turkish case also questions the conventional understandings of representative democracy and the role of regional human rights courts. While the ECtHR's invocation of its margin of appreciation doctrine to defer to governments in their treatment of minority claims may be desirable from the perspective of democracy as far as liberal democratic regimes are concerned, to do so in authoritarian settings serves to provide legitimacy to the disempowerment, repression and disenfranchisement of minority groups.



## **Author's Biography**

Dilek Kurban was born in Istanbul in 1975. She received her Bachelor's of Arts in Political Science and International Relations from Boğaziçi University, Istanbul in 1996. She pursued her graduate studies in the United States. In 1999, she obtained her Master in International Affairs (MIA) from Columbia University's School of International and Public Affairs. In 2004, she received her Juris Doctor (JD) from Columbia Law School.

Before transitioning back to the academia, Kurban built a professional career in research-oriented policy work. During 2005-2013, she worked at Turkey's prominent think-tank, the Turkish Economic and Social Studies Foundation (TESEV), as a Program Officer and subsequently as the Director of the Democratization Program. Earlier in her career, during 1999-2001, she worked as an Associate Political Affairs Officer at the Security Council Affairs Division of the United Nations Department of Political Affairs in New York. Since 2012, she is the Turkey expert of the European Commission's Network of Independent Experts in the Non-Discrimination Field.

Kurban has held several research fellowships. During 2014-2017, she was a Marie Curie fellow at the Hertie School of Governance, where she was also employed as a lecturer during spring 2016. During April 2013-September 2014, she was the Mercator-IPC Research Fellow at the Stiftung Wissenschaft und Politik (SWP) in Berlin. After obtaining her JD, Kurban was awarded the Columbia Human Rights Fellowship which she used for research stays at TESEV and the European Minority Issues Centre in Flensburg.

In 2007 and 2008, Kurban taught Sociology of Law at the Political Science and International Affairs Department of Boğaziçi University. In 2015 and 2016, she taught European Human Rights Law (with Mark Dawson) and International Law at the Hertie School of Governance.

Kurban's research interests are European human rights law, transnational legal mobilization, forced displacement, minority rights, gross human rights abuses during ethnic conflicts and authoritarian rule of law. She is specialized on Turkey. She has published several articles in peer-reviewed journals, book chapters, policy-oriented research reports and legal opinions.