Judging Conflict:

The European Court of Human Rights and The Kurdish Issue in Turkey

Dara Yıldız

DPI | Democratic Progress Institute

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The legal, political, & human dimensions of conflict in Turkey

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Foreword

In the persistent shadows of conflict, the Kurdish issue in Turkey has etched a narrative that spans decades, challenging the very foundations of justice and human rights. The protracted existence and relevance of these issues underscore its intricate nature and the challenges that persist in its resolution, as the Kurdish minority continues to battle discrimination in their engagement with the State.

This book attempts to navigate the intricate terrain of the European Convention on Human Rights (ECHR) as a lens through which the trajectory of the ongoing conflict is scrutinized. This analysis is not meant as a mere academic exercise, but it also serves as an independent assessment shedding light on the human rights violations. The research question guiding this book is multifaceted, aiming to unravel the effectiveness of the ECHR in addressing human rights violations within the context of the conflict. Yet, it transcends this particular case, seeking insight into the broader capacity of the European Court of Human Rights (ECtHR) to influence and provide redress in conflict-affected settings. Therefore, the critical question at the heart of this analysis extends beyond the specific case of the Kurdistan Workers Party (PKK, which has been designated a terrorist organisation by the European Union) and Turkey and delves into the broader impact and systematic shortcomings that a regional human rights system like the ECHR can wield on prolonged conflicts. Such scrutiny is not limited to legal nuances but encompasses the intricacies of Turkey's political structure as well as the outcomes and implementation of ECHR judgements.

Starting off by running through the timeline of the ongoing conflict, this book briefly explores the history of Kurds and the genesis of the conflict with Turkey. Building upon this foundation, it delves into the background of the ECHR and its relevance in conflict-afflicted scenarios. Then, it proceeds with discussing transitional justice and outlining the procedural intricacies of submitting an application to the ECtHR and anticipating potential pitfalls in the context of protracted conflicts.

The focus will then shift onto a meticulous dissection of the ECtHR case law stemming from the region. Here, the objective is quite clear, that is to examine the perspective of the victim, analyse the outcome of the judgment, and assess the overall impact each case has had in terms of providing redress. In the absence of domestic proceedings in Turkey, the cases outlined here will serve as a narrative of the adjudication of the conflict.

Furthermore, an evaluation of the overarching effectiveness of the ECHR in addressing the issue is conducted, based on comparisons with other conflict areas, such as the strife in Northern Ireland. Hence, this book not only provides a summation of findings, but strikes to present final thoughts on how to fortify the ECHR mechanism and equipe it better to address conflicts concerning its Contracting Parties.

The journey you are about to undertake encompasses the legal, political, and human dimensions of a conflict that transcends borders and reverberates in the halls of justice. As we unravel the intricacies of the conflict through the lens of the ECHR, may this book also serve as a call to action. The quest for justice and human rights in conflict-affected settings demands not just analysis, but a real commitment to transformative change.

Rajesh Rai
Deputy Head of Chambers
1MCB
Chambers of John Benson, KC

List of Abbreviations

AKP	*Justice and Development Party*
CoE	*Council of Europe*
CoM	*Committee of Ministers*
DTP	*Democratic Society Party*
DEP	*Democracy Party*
ECHR	*European Convention on Human Rights*
ECtHR	*European Court of Human Rights*
EEC	*European Economic Community*
HDP	*Peoples Democracy Party*
IRA	*Irish Republican Army*
KADEK	*Kurdistan Freedom and Democracy Congress*
NSC	*National Security Council*
PKK	*Kurdistan Workers Party*
POW	*Prisoners of War*

Introduction

The Kurdish Issue in Turkey has been underpinned by conflict since the mid-1980s that is still relevant in 2022 and in large part appears no closer to resolution. Oppression and discrimination still remain prominent features of State engagement with the Kurdish minority. By analysing the European Convention on Human Rights (ECHR) system's adjudication of cases emerging from the conflict, we have an independent assessment of the trajectory of the conflict and the human rights violations committed during efforts to contain the conflict. This will then allow us to draw conclusions on the impact, if any, that a supranational human rights system such as the ECHR can have on protracted ongoing conflicts. The research question addressed in this book is whether the ECHR provides an effective framework for addressing the human rights violations occurring in the context of conflict between the PKK and Turkey but the aim is to provide insight into whether the European Court of Human Rights (ECtHR) has the ability to impact and provide redress in conflict-affected settings more broadly, by both addressing issues underpinning conflict, as well as violations of the Convention by States as they seek to contain conflict.

The book will also consider the systematic shortcomings of the ECHR framework as applied to situations of protracted conflict by addressing the question of whether the Convention system is adequately equipped to deal with situations of systematic human rights abuses – like that of Turkey's efforts to contain the PKK, particularly during the 1990s, for example. In order to ascertain a specific answer to the research question, evaluating the effectiveness of various elements that affect the long-running conflict in Turkey is a critical component of this book. This will include areas such as Turkey's political structure, and outcomes and implementation of cases brought to the ECHR, as well as the evolution in both these areas in recent years. Chapter 1 serves to provide a brief background of the Kurdish Issue in Turkey, including the history of the Kurdish people, as well as the origins of the conflict between the Kurds and Turkey. Chapter 2 proceeds with discussing the background of the ECHR and its applicability to conflict-afflicted settings and relevant areas such as the right to truth and transitional justice in Turkey. Chapter 2 also outlines the process of taking an application to the ECtHR and the potential pitfalls that may arise in regard to protracted armed conflicts. Chapter 3 is devoted to analysing the myriad of ECtHR case law emanating from Turkey's Kurdish region. The objectinve in this chapter is to critically analyse cases, examining the perspective of the victim, the outcomes, and the overall impact each case has had in terms of providing redress. Also, in the absence of domestic proceedings in Turkey, the cases outlined in this chapter serves as a historical record of how the Kurdish conflict has been adjudicated. Chapter 4 outlines the ECHR's overarching effectiveness regarding the Kurdish Issue, comparing the conflict in Turkey to other areas of conflict, such as the conflict in Northern Ireland. Chapter 4 also gives a conclusion to this book and aims to provide some final thoughts and arguments as to what ECHR mechanisms can be improved in order to be better equipped to address conflicts concerning the High Contracting Parties.

Chapter 1

Background of the Kurdish Issue in Turkey

In the Kurdish regions, there has been a long history of struggle and persecution, with continual external powers' repression being met by Kurdish resistance. While a comprehensive account of this history is beyond the scope of this book, a summary of important events, focusing on the period from the onset of the conflict in the mid-1980s to the present will be outlined. Modern Turkey was formed in 1923, following the collapse of the Ottoman Empire in the aftermath of World War I, and was led by Mustafa Kemal Atatürk, the country's first nationalist leader. In Turkey, the post-independence 'Turkification'[1] of the southeast began with the appointment of ethnic Turks to prominent administrative positions in the Kurdish region, and all references to Kurdistan were removed from official documents. Atatürk constructed a government out of members of his Ankara-Based revolutionary group, and in 1924, he was elected President of Turkey. Atatürk banned the use of the Kurdish language in official domains, including schools, and traditional Kurdish clothing and music were also forbidden. He served as president until his death in 1939. Atatürk and his supporters wanted to establish a singular Turkish identity by enacting dramatic reforms that aimed to marginalize Islam in society and place the military at the core of the state. Atatürk effectively ruled as a dictator, and the Kurds, as Turkey's biggest and most visible non-Turkish population, stood to lose a lot from Atatürk's ideology.[2] The eradication of different identities through assimilation was a neces-

1 *Carolin Liebisch-Gümüş, 'Embedded Turkification: Nation Building and Violence within the Framework of the League of Nations 1919–1937', (International Journal of Middle East Studies 2020) 230*

2 *Yildiz, Kerim; Breau, Susan, The Kurdish Conflict: International Humanitarian Law and Post-Conflict Mechanisms' (Routledge 2010) 1.2 History of the Republic of Turkey, 6*

sary tenet of the vision of attaining an all-Turkish national identity. This was demonstrated in the failure to recognise the Kurds as a minority in need of protection or to officially acknowledge their language.

In 1934, a new Turkish law divided the country into three zones, and the state was given the authority to force those from the third 'zone' to assimilate. The law was enacted in order to disperse the Kurdish population and therefore erase Kurdish identity.[3] The incumbent government was voted out of power with the emergence of multi- party democracy in 1945, and a more liberal government, led by the Democratic Party, was elected in 1950. This new democratic age came to an end in 1960 with a military coup, which ignited a wave of social unrest. The military responded with a 'coup by memorandum' in 1971, proclaiming martial law and commencing a wide-ranging crackdown on 'leftist' and 'separatist' groups.[4] Another military coup took place in 1980, with Parliament disbanded and the country controlled by the National Security Council (NSG). In 1982, a new Constitution was developed and enacted, ending a decade of one-party government under Turgut Özal's Motherland Party. The military reasserted its influence in Turkish politics in 1997, forcing Prime Minister Necmettin Erbakan's Islamist theocratic coalition government to resign. In what has been termed Turkey's "post-modern coup", the army turned the government over to more secular politicians.[5] However, the Justice and Development Party (AKP), which is seen as Erbakan's successor, won legislative elections in 2002, and AKP candidate Abdullah Gül was elected President of the Republic in 2007. Gül was president until 2014, where another AKP party member, Recep

3 *Ibid.*

4 *Ibid.*

5 *Ibid.*

Tayyip Erdoğan, was elected and is Turkey's current president. In 2016, Turkey saw yet another attempted military coup, which resulted in more than 240 deaths and more than 2000 injured. It was speculated that those behind the coup were the senior military officers at the forefront of the fight against the Kurdistan Workers' Party (PKK).[6]

1.1 PKK Violence and Morality

The PKK was founded in 1978 and launched its first armed attack against the Turkish state in 1984. Following this attack, the government responded to the PKK with militaristic measures and, in 1987, declared a state of emergency in eight Kurdish populated provinces, using all possible means, including cooperation with deep state elements, to violently suppress the demands of the Kurds. According to common estimates, between 1984 and 1999 more than 35,000 people were killed, most of whom were civilians.[7] After several ceasefires failed, the latest one, initiated in 2012 and subsequently broken in July 2015, led to one of the bloodiest conflicts between Turkish security forces and PKK militants. Since 2011, the International Crisis Group (ICG) has compiled a database of deaths caused by the conflict, based on open-source reporting from the Turkish language media, the Turkish military, local Kurdish rights organizations, and the PKK itself.[8] Since July 2015 and last updated on 10th May 2022, there have been an estimated 5,972 people killed in clashes or terror attacks. This figure includes 595 civilians, confirmed by Crisis Group as non-com-

6 *Francesco F Milan, 'Turkey: What Hides Behind a Failed Coup Attempt', The RUSI Journal (2016) 15 July 2016: A Coup Against What?, 29*

7 *HRW, Displaced and Disregarded: Turkey's Failing Village Return Program, 30 October 2002*

8 *International Crisis Group, 'Turkey's PKK Conflict: A Visual Explainer', https://www.crisisgroup.org/content/turkeys-pkk-conflict-visual-explainer.*

batants, 1,335 state security force members, 3,816 PKK militants, and 226 individuals of unknown affiliation, which include individuals aged 16-35 killed primarily in urban curfew zones who cannot be confirmed as either civilians or combatants.[9] Given that the conflict is almost four decades long, it is surprising to see so little progress being made with regard to conflict resolution between Turkish security forces and the PKK. Aside from pro-Kurdish political parties, which, in reality are toothless in the realm of corruption and authoritarianism within Turkey, the PKK may be the only form of hope for many Kurds. Of course, there should be no justification for acts of violence and terrorism, but it is clear that without the PKK, the Kurds would likely be subject to Turkification and the essential eradication of their ethnicity.

Despite the tactics employed by state forces against the Kurdish people, the PKK's relative 'success' as an armed group has arguably involved morally dubious tactics as well. There has been an equal degree of intolerance towards those whom the PKK or Turkish state considered as enemies. Like the security forces, the message was clearly spread that the PKK would punish those who participated with Turkish forces or acted against its interests. The Turkish state for its part, has always labelled the conflict not as a conflict but as a counter-terrorist effort. The unquestioning acceptance by large parts of the international community of this characterisation of the conflict may seem unjust but to view the PKK as 'Freedom Fighters' or a 'Freedom Movement', as its supporters claim, is also highly subjective. It is evident more than ever

9 *Ibid.*

today that for the Turkish state to subscribe to such a view would be to share the historical burden of Turkey's atrocities against the Kurdish people by indirectly approving of the repression campaign and ignoring the essence of the ongoing conflict.[10] As an armed conflict group, the PKK not only represents a significant section of Turkish Kurds, but it also employs tens of thousands of guerrillas, activists, politicians, and self-declared diplomats on a full-time basis. The conflict cannot be resolved without any type of engagement with the PKK, for these and other practical reasons, as earlier peace processes have demonstrated, and any eventual solution has numerous technical as well as political dimensions.

10 *Ismet G. Ismet, 'The PKK: Terrorists or Freedom Fighters?', The International Journal of Kurdish Studies Vol.10 (1996) 98*

Chapter 2

The Council of Europe and the European Union: Navigating Turkey's Kurdish Conflict

2.1 The Background of the Convention and its Evolutive Nature

For more than half a century, the European Court has played an important role in European democratic consolidation and integration, defining meaningful standards and providing legal remedies to the oppressed, politically vulnerable, and socially excluded. Following their independence from Soviet control in the 1990s, the rising democracies of Central and Eastern Europe moved toward the Convention system, with many considering membership in the European Union. They carried with them some requirements, ambitions, and experiences with which the European Court was unfamiliar, necessitating a review of some of its substantive rulings in light of these changes and the institutional pressures that resulted.[11] Perhaps one of the most fundamental components of the European Union is its demand for upholding democratic values. Article 3 of the Statute of the Council of Europe declares:

> '*Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter 1.*'[12]

11 *James A. Sweeney, 'The European Court of Human Rights in the Post-Cold War Era Universality in Transition' (Routledge Research in Human Rights Law 2017) Introduction, 2*

12 *Statute of the Council of Europe, Chapter II- Membership: Article 3, https://assembly.coe.int/nw/xml/rop/statut_ce_2015-en.pdf*

Article 4 holds that any European state has successfully fulfilled the criteria of Article 3 may be invited '*…to become a member of the Council of Europe by the Committee of Ministers.*'[13] Sweeney suggests that the reason the Council of Europe has such a strong stance on democracy lies in the ideological conflict between Eastern and Western Europe, which was becoming more pronounced at the time the statute was drafted, and thus the need to demonstrate opposition to communism and dictatorship was evident.[14] Another reason was that many of the individuals involved in drafting the statute had been involved in the hardships of World War II at the hands of oppressive regimes; they understood that the first steps to successful dictatorship involve restricting the fundamental rights that democracy aims to uphold.[15]

An analysis of the Council of Europe's approach to the states of Central and Eastern Europe reveals that, while the Council has advocated for certain transitional measures, it has not itself sought to capitalise on the constructive or constitutive role that the identification of transitional justice implies law can play. This will be discussed further in assessing conflict specific case law in the following chapter. The European Court of Human Rights considers the Convention to be a "living instrument" with a "mandate" to realign European human rights legislation to reflect the concept of transition. However, in the past, evolving interpretations of the Convention have tended to result in higher standards rather than approval of context-specific rights limits. Thus, there is no apparent foundation in the Court's previous jurisprudence on the Convention as a living instrument to impose a different, lower standard of review for

13 *Ibid. Article 4*

14 *James A. Sweeney, 'The European Court of Human Rights in the Post-Cold War Era Universality in Transition' (Routledge Research in Human Rights Law 2017) 1.1.1 The Council of Europe, human rights, and democracy, 10*

15 *Ibid.*

states emerging from periods of democratic transition.[16] This is particularly worrisome when a high volume of human rights violations are being brought to the ECtHR, stemming from authoritarian countries such as Turkey that will see no resolution whatsoever at the domestic level.

As to international law, the International Court of Justice follows a reasonably similar evolutive interpretation, and the approach may also be justified as an inquiry into the parties' common intention, and hence the ECHR's object and purpose. In accordance with international law, the domestic interpretation of the ECHR cannot influence the rulings of ECtHR judgements. As seen in *Hirst v United Kingdom*,[17] however well-reasoned the issue is, the UK Parliament cannot legally overturn a Strasbourg ruling, and the Human Rights Act 1998 cannot be considered to have established a catalogue of rights independent of the ECtHR's interpretation. At the international level, States tend to be less confrontational: they do not appear to have serious reservations or worries about the ECHR's development under the Court's aegis. The debates and threats of withdrawal from the Convention might be explained by political opportunism rather than actual legal concerns.[18] This is particularly evident from Turkey's recent withdrawal from the Istanbul Convention in March 2021, the Council of Europe's Treaty on preventing violence against women and domestic violence.[19] Turkish far-right populists argue that withdrawing from the Istanbul Convention is in furtherance of protecting local traditions, despite recent polls showing high levels of

16 *James A. Sweeney, 'The European Court of Human Rights in the Post-Cold War Era Universality in Transition' (Routledge Research in Human Rights Law 2017) 1.2.4 Transitional justice and human rights: the odd couple, 28*

17 *Hirst v United Kingdom (No.2) (2005) ECHR 681*

18 *S Theil, Is the 'living instrument' approach of the European Court of Human Rights compatible with the ECHR and International Law?', European Public Law Vol 23 (Issue 3) (2017) 32*

19 *Özlam Atlan-Olcay & Bertil Emrah Oder, 'Why Turkey's withdrawal from the Istanbul Convention is a global problem', (2021) opendemocracy.net*

public support for the Convention with widespread protests and declarations against the withdrawal.[20] This provides further evidence for the lack of democratic values in Turkey, as well its unconcerned stagnancy towards proving itself capable of becoming a European Union member state.

Since first applying for associate membership of the then European Economic Community (EEC) in 1959, Turkey has overcome numerous barriers to achieving membership and in 2004, it appeared that Turkish accession would finally become a reality when the European Council agreed to open accession negotiations. However, in 2006, EU foreign ministers voted to suspend eight of the 35 chapters comprising Turkey's negotiations to join the EU.[21] Other countries such as Bulgaria and Romania acquired EU membership in 2007, despite their own systemic shortcomings. Turkey has argued that it has made more progress than that of other countries which have acquired membership. However, it is primarily Turkey's lack of fundamental human rights protections that precludes them from acceding to the EU. This raises the question of whether Turkey's accession to the EU remains a political priority because the process itself would undoubtedly entail a series of further domestic reforms, including in the area of human rights protections, something that has proved exceptionally difficult against the backdrop of the ongoing Kurdish issue. Without tangible progress being made towards membership, 'reform fatigue' has likely set in.[22] This was made clear, when in 2009, only four years after Turkish accession negotiations began, Turkey's Constitutional Court voted to ban the main Kurdish

20 Ibid.

21 Edel Hughes, 'Turkey's Accession to the European Union The politics of exclusion?', (Routledge 2011) Introduction, 2

22 Ibid.

political party, the pro-Kurdish Democratic Society Party (DTP), dispelling any aspirations of a democratic solution in the near future.[23] The Kurdish conflict lies central to understanding the human rights issues raised in Turkey. The European Commission has indicated that resolving the issue in a civil, non-military manner is key to accession. However, one might question the EU's proficiency in judging the climate of the conflict. In 2004 they signalled satisfaction with Turkey's treatment of the Kurds by opening membership negotiations. It could be argued that this was done without any significant progress towards solving the Kurdish issue. It has been suggested that the EU is in fact 'politically and morally obliged to facilitate a just and peaceful resolution of the Kurdish issue.'[24] And it has been mentioned that there has been a 'tendency to tone down references to the Kurds' in a review of recent EU literature.[25] Conflict resolution is a central objective of the EU's foreign policy, and it is therefore axiomatic that the EU would seek a peaceful end to a conflict on its borders. While it is undeniably true that the EU has a major role to play in pressuring Turkey to resolve the conflict in the south-east, it is also true that the European Union is not as robust in its approach as it once may have been during Turkey's initial bid to realise EU accession. As time goes on and 'reform fatigue' grows stronger, a lasting resolution to the conflict remains elusive.

23 Edel Hughes, 'Turkey's Accession to the European Union The politics of exclusion?', (Routledge 2011) 4.3.2 Formation of the Partiya Karkerên Kurdistan, 41

24 Edel Hughes, 'Turkey's Accession to the European Union The politics of exclusion?', (Routledge 2011) 5 Summary, 44

25 Ibid.

2.2 The Right to Truth and Transitional Justice in Turkey

Perhaps one of the main features of the armed conflict between the Turkish security forces and the PKK has been the lack of transparency, particularly on behalf on the Turkish state at the domestic level. As noted above, the EU has arguably not viewed the resolution of the Kurdish conflict as a prerequisite for Turkey's membership of the EU, despite highlighting the myriad of human rights abuses that flow from the conflict in its annual reports on Turkey's progress towards membership.[26] When it comes to the Council of Europe, it is important to assess whether the ECHR even has the required mechanisms for dealing with protracted armed conflicts within its borders. One of the ways in which the Council of Europe's mechanisms might usefully be engaged would be to uphold the right to truth. The right to truth is particularly important in regard to the Kurdish conflict, as the case law commonly exhibits the lack of access to state documents in conjunction with the lack of effective investigation leading to the concealment of the truth in many cases. Although the truths of injustices come to light upon ECtHR rulings, there are shortcomings when it comes to establishing the widespread truth of state violations. Attempts to obtain access to previously hidden secrets and to build a more authentic past are common throughout transitional periods.

As a result, truth commissions have been established in various states, notably the Truth and Reconciliation Commission in South Africa following the dismantling of the apartheid system.[27] In post-Cold War Europe, such moves were uncommon. In international law, there is some

26 *See, for example, the most recent report of the European Commission on Turkey's Progress Towards Membership, 'Turkey 2021 Report', outlining the continued 'deterioration of human and fundamental rights.' Available at https://ec.europa.eu/neighbourhood-enlargement/system/files/2021-10/Turkey%202021%20report.PDF*

27 *Desmond Tutu, 'Truth and Reconciliation Commission, South Africa', Britannica.com*

legal recognition of a 'right to truth' or a 'right to know' independent of official truth commissions. The right of relatives of people who go missing during international armed conflict to know their fate is recognized in Articles 32 and 33 of the Additional Protocol I to the Geneva Conventions,[28] and the International Committee of the Red Cross has now claimed that the right to know is a customary norm applicable in both international and non-international armed conflict.[29] The right to truth has taken a long time to develop in the Council of Europe, despite some acknowledgement of its importance in the context of disappearances. The Council of Ministers has made numerous key suggestions regarding general access to state-held information. More specifically on the issue of the right to truth in transitional or post conflict situations, in a 1987 recommendation to the Committee of Ministers about the Cyprus conflict, the Parliamentary Assembly urged the Committee to "support every effort made to cast light on the fate of missing persons."[30]

Article 10 of the ECHR details the right to freedom of expression. Article 10(1) states:

> *'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'*[31]

Regarding the vast number of Kurdish cases brought to the ECtHR, Article 10 is particularly important for protecting the rights of the victim to have their story of human rights violations taken seriously. As mentioned, Turkey's lack of transparency often hides the truth and may put

28 *Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts, Section III- Missing and Dead Persons, Article 32 & 33*

29 *Monique Crettol and Anne-Marie La Rosa, 'The missing and transitional justice: the right to know and the fight against impunity', International Review of the Red Cross, (2006) international-review.icrc.org*

30 *James A. Sweeney, 'The European Court of Human Rights in the Post-Cold War Era Universality in Transition', (Routledge Research in Human Rights Law 2017) 3.2 The right to truth, 72*

31 *Guide to Article 10 of the Convention- Freedom of Expression, Article 10(1)*

the Court in the position of fact 'finder' rather than arbiter when assessing these cases. This application of Article 10 is highly relevant for providing justice in armed conflict cases. Another way Article 10 has been paramount for the Kurds is in its protection of the Kurdish language. In the case of *Şükran Aydin and others v Turkey*,[32] which concerned the applicants' complaint about a law, amended in 2010, which made it illegal to speak any language other than Turkish during election campaigns. They were found guilty and sentenced to prison terms and fines for having spoken Kurdish during the election campaigning, in breach of section 58 of Law no. 298. Kurdish had been the mother tongue of both the applicants, and the population that was present at the rallies. Some of the applicants had stressed that many people in the crowd, notably the elderly and women, had not understood Turkish. They stated that free elections were inconceivable without the free exchange of political opinions and information and noted that Turkey had been the only nation - based on the material available in respect of 22 Contracting States[33] - to make the use of minority languages by candidates speaking at election meetings subject to criminal penalties. The Court welcomed, in this respect, the amendment of section 58 of Law no. 298 in 2010, and therefore concluded that there had been a violation of Article 10(2), as the interference with the applicants' freedom of expression had not been "necessary in a democratic society".[34] In *Erdoğdu v Turkey*,[35] a previous case from 2000, the applicant was editor of a periodical entitled *The Worker's Voice* and published an article written by a reader called *"The Kurdish Problem is a Turkish Problem."* The public prosecutor instituted criminal proceedings against the publisher and the applicant. The prosecutor noted that

32 *Şükran Aydin and others v Turkey (2013) (Applications nos. 4917/06, 23196/07, 50242/08, 60912/08 and 14871/09)*

33 *Ibid.*

34 *Guide to Article 10 of the Convention- Freedom of Expression, Article 10(2)*

35 *Erdoğdu v Turkey (2000) (Application No 25723/94)*

in the article in question, "acts of separatist terrorism perpetrated in the south- east of the country were described as Kurdish National Resistance; part of the country, [thus] of the State of the Republic of Turkey, was called Kurdistan [and] an appeal was made for support for acts described as being of National Resistance."[36] The defendants were charged and found guilty of disseminating propaganda, through the medium of a periodical, against the territorial integrity of the State and the indivisible unity of the Turkish nation. The Court determined that the article in question was a type of political speech, and that there was limited room for restriction under Article 10(2) in this context. It was determined that the applicant's deference to the punishment was insufficient to warrant moderate punishment since the deference was conditional on the applicant's behaviour. It was decided that the article did not promote violence but rather addressed a topic of public concern.[37]

These two cases show the continued 'taboo' nature of the Kurdish issue in Turkey, with continued restrictions on the use of the Kurdish language in the political area, and the punishing of civilians for something as trivial as delineating and discussing the Kurdish issue as one of concern for the whole country. Transitional justice can be defined as the process that responds to large-scale human rights violations by instilling political reform and judicial redress in order to prevent such injustices from recurring. Transitional justice in Turkey would seek to transition the Turkish state from a country that persistently violates human rights into a state that provides recognition for its wrongdoings, respects human rights and upholds the rule of law. A main component for the progression of transitional justice is the permission of NGOs, scholars and journalists to bring to light the various contested events that have occurred in Turkey as a result of the Kurdish conflict.

36 *The Future of Free Speech, 'ERDOGDU v TURKEY', 2020, https://futurefreespeech.com/erdogdu-v-turkey/*

37 *Ibid.*

Turkey's political framework, in actuality, is incompatible with transitional justice. This is due to the fact that traditional transitional justice is predicated on a political transition from dictatorship to democracy.[38] In Turkey, there has been a demand for transitional justice in the absence of a regime change that allows for the implementation of transitional justice mechanisms. Any remedy based on the transitional justice method derived from the experiences of other countries may be easily disregarded on this basis as well. Because there is no "one-size-fits-all" solution for all countries, the Kurdish issue, like other conflicts, has a variety of distinguishing characteristics. It is unrealistic to expect to find a strong example to use as a model. The ECtHR's intervention has assisted transitional justice efforts by revealing the truths about the conflict. Individual human rights cases brought before the Court aided public understanding of the conflict and undermined the Turkish government's one- dimensional narrative. In striking contrast to the Turkish government's narratives, the judgments have showcased the human dimensions of mass atrocities and resemble the work of a truth commission. However, the question of whether justice has truly been served for the Kurds as a result of the ECtHR cases is debatable. Calls for identifying, punishing, or expunging from the Council of Europe (or indeed the European Union) those state officials who have committed major human rights offenses, have been notably absent. The Kurdish rights reform agenda seems to be more forward-looking and does not include responsibility for past atrocities. Although some victims were compensated financially, the crimes were initially ignored, then covered up, and finally normalised.[39]

38 *Yeliz Budak, 'Dealing with the Past: Transitional Justice, Ongoing Conflict and the Kurdish Issue in Turkey', International Journal of Transitional Justice, Volume 9 (Issue 2) (2015) 229*

39 *Ibid. 230*

2.3 Bringing Cases to the ECtHR and the Implementation of Judgements

TThe ECHR has certainly made progress in the way of accessibility for applicants. In the past, it took at least four or five years for ECHR cases to make their way through the system. Protocol 11 of the Convention,[40] which came into effect in 1998, removed the two-tier structure of Commission and Court and replaced it with a single permanent full-time court with the primary goal being to expedite the process. Despite the implementation of Protocol 11, the backlog of Convention cases continued to rise. In 1999, there were 8,396 candidates registered. The number of new applications increased dramatically from 18,200 in 1998 to 44,100 in 2004, with the exponential increase raising concerns about the Court's ability to cope with the inflow of applications.[41] Thus, calls for further reform were made which materialised with the drafting and adoption of Protocol 14, which was ratified in 2006 and came into force on June 1 2010.[42] The most significant changes brought about by Protocol 14 were: (i) the addition of a new admissibility requirement in Article 35 ECHR, (ii) the establishment of a single judge formation who will have the authority to make final decisions without further examination, (iii) the extension of the competence of the committee of three judges to cover repetitive cases, and (iv) the establishment of a new procedure which permit the Committee of Ministers to bring proceedings before the Court where a state refused to comply with a judgement.[43] While

40 *Protocol No.11 to the Convention for the Protection of Human Rights and Fundamental Freedoms Restructuring the Control Machinery Thereby, ETS 155, 11.V.1994*

41 *Kerim Yildiz and Lucy Claridge, 'Taking Cases to the European Court of Human Rights Manual', (KHRP/BHRC 2006) 1.1.1 Protocol 11, 18*

42 *Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention, CETS No. 194*

43 *Kerim Yildiz and Lucy Claridge, 'Taking Cases to the European Court of Human Rights Manual', (KHRP/BHRC 2006) 1.1.2 Protocol 14, 19*

an exact timeline of all the proceedings an applicant would go through when taking a case to the ECHR is beyond the scope of this section, the notable ones for armed conflict resolutions are discussed below.

According to Article 34 of the ECHR,[44] an applicant must claim that one or more Convention rights have been violated. The Court's test is that the petitioner must establish that the alleged complaint has affected him or her personally or directly. Applicants must detail the procedures they took to exhaust domestic remedies in their application. The burden of proof then shifts to the respondent government to establish non-exhaustion by pointing to a domestic remedy that should have been sought in the circumstances of the case but was not. The government must convince the court that the remedy was an effective one both in principle and in practice at the time in question. If the government asserts that an accessible remedy should have been used, the applicant must either demonstrate that the remedy was exhausted or that the purported remedy is insufficient.[45] It is important to note that Article 35(1) states that the Court shall only deal with a matter that has been submitted within four months of the final outcome given in the domestic proceedings.[46] It is probable that demonstrating an exhaustion of domestic remedies as an applicant with limited resources may also surpass the four-month petition period. But there have been developments in the ECHR case law that deals with this scenario. If an applicant is successful, the principal remedy offered by the European Court is an acknowledgment that there has been a violation of the Convention, and an award, which, as per Article 41, must '…afford just satisfaction to the injured party.'[47] Just

44 *European Convention on Human Rights, Article 34 Individual Applications*

45 *Kerim Yildiz and Lucy Claridge, 'Taking Cases to the European Court of Human Rights Manual', (KHRP/BHRC 2006) Burden of Proof 3.4.1, 48*

46 *European Convention on Human Rights, Article 35 Admissibility Criteria*

47 *European Convention on Human Rights, Article 41*

satisfaction includes compensation for both monetary and non-monetary loss, as well as legal costs. To be successful in seeking compensatory damages, the petitioner must show a causal relationship between the violation and the alleged losses. Loss of income (past and future), pension plan benefits, penalties and taxes levied, fees spent, loss of inheritance, and property value loss are all possible awards. Pain and suffering, agony and distress, trauma, anxiety, frustration, feelings of isolation, helplessness, and injustices, as well as loss of opportunity, reputation, or relationships, may all be included in non-pecuniary damage awards.[48]

As stated in Article 46,[49] the Committee of Ministers (CoM) is the body tasked with overseeing the execution of rulings and settlement agreements. The Directorate General of Human Rights assists the Committee in its duties. The Committee receives the final decision and requests that the Respondent State informs it of the steps taken to pay any just satisfaction awarded, as well as any individual or general measures that may be required to comply with the State's legal responsibility to implement the Court's orders. Although most Respondent States are ready to provide reasonable satisfaction and strive to fulfil their obligations under Article 46(1),[50] there may be instances when a Respondent State rejects or delays the execution of a final judgment. There might be political, financial, or other reasons for the failure to carry out the reforms, such as the magnitude of the adjustments necessary to provide just satisfaction. The Committee may adopt a range of measures to support execution, including diplomatic measures and the issuance of interim resolutions. If the problems persist, the Committee may issue stronger resolutions urg-

48 *Kerim Yildiz and Lucy Claridge, 'Taking Cases to the European Court of Human Rights Manual', (KHRP/BHRC 2006) 4.2.1 Pecuniary and Non-pecuniary Compensation, 66*

49 *European Convention on Human Rights, Article 46*

50 *Ibid.*

ing the Respondent State to comply with the judgment, ultimately reiterating the unconditional nature of the obligation to comply with the Court's judgments and emphasizing that compliance is a requirement of membership in the Council of Europe.[51] When a state fails to carry out a final judgment even with the additional help of the Committee, the ECHR does not provide for sanctions. Instead, as a last option, the Committee may decide to suspend a Council of Europe member's rights of representation or expel it based on its continuous failure to follow the Court's judgments. As mentioned above, a primary concern with the ECHRs ability to deal with armed conflict is that aside from monetary compensation and a recognition of a violation, not much else can be done to provide redress for victims of human rights violations. Authoritarian states would much rather pay a fine over implementing concrete democratic change that would lead to better human rights practices.

2.4 ECHR and Armed Conflict Compatibility

The question of whether the ECHR is equipped to deal with the nature and magnitude of human rights violations that occur in situations of armed conflict is not a new one. Kamminga noted in his 1994 article that the past record of the supervisory system of the ECHR in dealing with 'gross and systemic violations' has been 'unimpressive.'[52] He states: 'The more serious and widespread the violations, the less adequate has been the response.'[53] Although his article was written almost thirty years ago before reforms like Protocol 14 were brought about, he makes some valid points in terms of improving the way the ECHR deals with cases of

51 *Kerim Yildiz and Lucy Claridge, 'Taking Cases to the European Court of Human Rights Manual', (KHRP/BHRC 2006) 4.3 Enforcement, 69*

52 *Menno T. Kamminga, 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?' (2 NQHR) (1994) 163*

53 *Ibid.*

gross and systemic violations. Kamminga argues that reforms are needed to help ensure that these violations of human rights can be effectively considered by the Court even if it has not received relevant applications. By considering situations of extreme violations *proprio motu*, it would enable the European Court to act on the information submitted by non-governmental organisations.[54] This would be useful in cases where the victims of such violations are unable to take an application to the ECHR themselves or surpass the four-month time period as discussed above. However, more recently, it has it been claimed that this argument has lost persuasiveness, as the Court has relaxed the admissibility criteria for victims of military operations.[55] In this respect, the case of *Akdivar*[56] is instructive. It dealt with the destruction of the applicants' homes amid "severe disturbances" in Turkey's south-east between security forces and members of the PKK. In this case, the Court decided that there is no requirement to exhaust insufficient or unrealistic remedies, or where an administrative practice renders domestic proceedings pointless or ineffectual. However, the Court specifically stated that this decision was limited to the specific events of the case.

Regarding interstate cases, any state party to the Convention may submit to the Court any alleged violation of the Convention's and Protocols' provisions by another state party, according to Article 33 of the Convention.[57] This article protects the right to pursue interstate litigation and is an essential mechanism for seeking remedies for human rights violations committed during armed conflict. Interstate cases primarily involve circumstances in which a state supports individual claims in the context of

54 *Ibid. 164*

55 *Giorgi Nakashidze, 'The European Court Of Human Rights In A New Reality: Does It Have Sufficient Procedural Infrastructure To Deal With Armed Conflicts?', (2020) 1.2, 51*

56 *Akdivar and Others v. Turkey, Application No. 21893/93, 16 September 1996*

57 *European Convention on Human Rights, Article 33*

broad Convention breaches. The 'victim' criterion does not apply to interstate petitions as a matter of standing before the Court, confirming the interstate application's *erga omnes* nature.[58] Interstate applications have been submitted by Georgia and Ukraine against Russia as they offer more flexibility than individual applications. For the Kurds, similar interstate applications would only be possible should sufficient pressure be brought to bear on a High Contracting Party to the Convention by pro-Kurdish advocates. In the case of *Cyprus v Turkey*,[59] the court saw an application of the 'just satisfaction' provision of Article 41 in the case of an interstate application. The case concerned the situation in Northern Cyprus since Turkey carried out military operations there in July and August 1974, and the continuing division of the territory of Cyprus since that time. The application of Article 41 in interstate cases does not occur very often, with the others being the previous case of *Ireland v The United Kingdom*,[60] and the more recent case of *Georgia v Russia (I & II)*.[61] In *Cyrpus* and Georgia, the respondent states argued that Article 41 could only be applied to individual applications. However, the Court found this defence to be insufficient and held that Turkey had to pay a total of ninety million euros. In *Cyrpus*, the Court held:

> *'The overall logic of Article 41 of the Convention was not substantially different from the logic of reparations in public international law. Accordingly, the Court considered that Article 41 did, as such, apply to inter- State cases. However, according to the very nature of the Convention, it was the individual and not the State who was directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights. If just satisfaction was afforded in an inter-State case, it always had to be done for the benefit of individual victims.'*[62]

Despite the success of interstate applications for recognition of human rights violations at the ECtHR, it has led to the chaos and confusion in the Court's already troubled jurisprudence on the 'extra-territorial scope' of the Convention, often referred to as 'the jurisdiction question.'[63] *Georgia v Russia (II)*[64] was problematic for the Court due to the 'effective control' test, which is where an armed group's conduct is only attributable to a state if that state had 'effective control over the military or paramilitary operations in the course of which the alleged violations were committed,' as per the ICJ case of *Nicaragua v the United States*.[65] As a result, serious allegations of unlawful killings of civilians in Russia II were found to be inadmissible, raising concerns for the coherence of the European Court's jurisprudence and for the ability of the Convention to provide protection and oversight in situations where they are most needed. As mentioned in section 2.1, the Convention is regarded as a 'living instrument' that is evolutive in nature, which may lead to insecurity for victims of systemic violations due to judgements of excessive uncertainty.

Another mechanism of the European Courts in dealing with cases of large-scale systemic violations is Pilot Judgements, codified in 2011 under Rule 61 of the ECHR.[66] Pilot judgements were developed as a means of dealing with large groups of identical cases that derive from the same underlying problem. Repetitive cases represent a significant proportion of the Court's workload and therefore contribute to the congestion in

58 Giorgi Nakashidze, 'The European Court Of Human Rights In A New Reality: Does It Have Sufficient Procedural Infrastructure To Deal With Armed Conflicts?', (2020) 2.3, 54

59 Cyprus v Turkey, Application No. 25781/94, 10 May 2001

60 Ireland v The United Kingdom, Application No. 5310/71, 18 January 1978

61 Georgia v Russia, Application No. 13255/07, 3 July 2014

62 HUDOC, 'Grand Chamber judgment on the question of just satisfaction in the Cyprus v. Turkey case', (2014), Just satisfaction award, 3

63 Helen Duffy, 'Georgia v Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights', (2021), Justsecurity.org

64 Georgia v Russia (II), Application No. 38263/08, 21 January 2021

65 Nicaragua v. The United States of America, 1986 I.C.J. 14

66 European Court of Human Rights, Rule 61 of the Rules of the Court, Pilot-judgement procedure, echr.coe.int

the Court's processes.[67] A positive effect of pilot judgements was that the Court's formalised pilot judgment approach vested it with the authority to not only identify the systemic problem, but also to issue guidance for mandatory national remedies that had to be implemented within a certain time frame. In this way, the Court's remedies and timetable became legally enforceable. Thus, it is no longer a matter of political debate in CoM, but rather a clear legal order from the Court.[68] The first pilot judgement was delivered in *Broniowski v* Poland in 2005.[69] *Broniowski* concerned the alleged failure to meet the applicant's right to property compensation. According to the Polish government, approximately 80,000 people were expected to be in a similar position. The Court ruled that the applicant's right to property had been violated, and that the breach was caused by a systemic problem related to the failure of Polish legislation and practice. In 2008, the Court closed these similar cases after it was assessed that Poland had demonstrated an effective compensation scheme which was capable of proving the situation had been solved. In the context of armed conflict cases, the pilot judgment approach appears to contradict the reality of armed conflicts, where the main cause of repeated applications is related to the extent of military operations rather than defective law or administrative practice. Although the pilot judgment procedure may be used to handle certain aspects of armed conflict, such as a post-war compensation scheme, it would inevitably fail to answer the myriad of petitions alleging specific breaches arising from active military operations.

As discussed, the ECHR can serve to provide collective reparation for victims of armed conflict by shining light onto the human right abuses, thereby emulating a large-scale truth commission. Pecuniary relief is also the primary form of compensation, which is certainly beneficial for those who have lost property, employment, or come from poverty. However, as mentioned, the Convention does not lead to any individual prosecution of those responsible for the atrocities, such as state officials or military command in charge of ordering attacks. In comparison to the International Criminal Court (ICC) - a Court that has the power to impose sanctions and prosecute those responsible for war crimes, such as military leaders - the ECHR is ill-equipped. Even the ICC's effectiveness is debatable, with critics arguing that because the ICC does not have its own police or military force, it must rely on the cooperation of states and international institutions to detain accused suspects. Relying on third-party assistance to apprehend wanted criminals undermines deterrence since these actors may lack the willingness or capability to cooperate with ICC demands. As a result, wanted people frequently elude arrest, escaping punishment for their crimes and undermining the Court's deterrent power.[70] While the sceptics are correct that the ICC has restricted means for enforcing indictments, they also overlook the full spectrum of costs that the ICC may impose on individuals in addition to imprisonment. Although the threat of prosecution is likely to have the greatest impact on individuals, the ICC has the power to impose various kinds of punishment that reduce the expected payoffs for human rights violations.[71] The ECtHR is not a criminal court and to be comparable to the ICC, it would be useful for the Council of Europe to strengthen some of its features. For example, giving greater powers for the COM's role in overseeing the execution of judgements could be beneficial.

67 *Information note issued by the registrar, 'The Pilot-Judgement Procedure', European Court of Human Rights, echr.coe.int*

68 *Ivanna Ilchenko, 'Pilot Judgement Procedure of the European Court of Human Rights: Panacea or dead-end for Poland, Russia and Ukraine', (2013), 4.3, 78*

69 *Broniowski v Poland, Application No. 31443/96, 28 September 2005*

70 *Benjamin J. Appel, 'In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?' Journal of Conflict Resolution 62(1) (2018) 4*

71 *Ibid.*

Chapter 3

Kurdish Case Law at the European Court of Human Rights

This chapter provides an overview of the key case law emanating from Turkey's Kurdish conflict that has made its way to the European Court of Human Rights in Strasbourg. Analysis reveals a number of shortcomings in the way in which the conflict as a whole has been addressed by the Court. However, this must be assessed against the background of wider systemic issues within the ECHR system, such as caseload and political pressure. The Court's engagement with the conflict arguably calls into question the ability of regional human rights mechanisms to respond to the systemic human rights abuses that often go hand in hand with protracted conflict. However, as detailed in the previous chapter, there have been significant achievements, particularly in terms of establishing the truth and providing pecuniary relief for victims of the conflict.

3.1 The ECHR's Failure to Address the Issue of Discrimination in Cases Involving State Crimes Against Kurds

Article 14 serves to ensure the Convention's prohibition of discrimination,[72] but despite its significance to potentially challenge the systemic discrimination in High Contracting Parties, the implementation of Article 14 remains feeble when compared to other articles of the Convention. Since the 1990s, hundreds of applications related to crimes committed by the state security forces were submitted to the Court and in the majority of these applications, the applicants claimed that they were subjected to

72 European Convention on Human Rights, Article 14 Prohibition on discrimination

these crimes because of their Kurdish origin. The Court found serious violations in many cases but rejected the claims lodged under Article 14. For example, in the case of *Kişmir v Turkey*,[73] the applicant alleged that her son Aydin Kismir had been taken into police custody in Diyarbakir where he was tortured and killed due to his alleged involvement with the PKK. The Court found a violation of Articles 2, 3 and 13 of the Convention but did not find it necessary to invoke a violation of Article 14 in conjunction with the others. Judge Mularoni, disagreeing with the majority view on this issue, stated:

> *'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.'*

In *Koku v Turkey*,[74] the applicant, Hüseyin Koku, was an active member of the pro-Kurdish Democracy party (DEP) who was detained and tortured by police forces who accused him of membership of, and helping and abetting, the PKK. He was allegedly killed after police detention and his body was found in the southeast of Turkey. The Court found violations of Articles 2 and 13 and held by six votes to one that it was unnecessary to examine a violation of Article 14. Judge Mularoni again stated his dissatisfaction with the majority's failure to examine the applicant's argument under Article 14, which he repeats in *Toğcu v Turkey*[76]

73 *Kişmir v Turkey, Application no. 27306/95, 31 May 2005*
74 *Ibid. Partly dissenting opinion of Judge Mularoni*
75 *Koku v Turkey, Application no. 27305/95, 31 May 2005*
76 *Toğcu v Turkey, Application no.27601/95, 31 May 2005*

and *Dizman v Turkey*.[77] In *Dizman*, Judge Mularoni goes as far to say that 'After such a judgment I feel even more uncomfortable. I am really unable to understand why the Court decided to examine such a complaint in the *Nachova and Others* case and continues to consider that it is unnecessary to do that in cases like the present one.' There is clearly a pattern of failure by the Court to engage in an analysis of Article 14 in Kurdish cases. More recently, the Court has continued this reluctance. *In Önkol v. Turkey*,[78] a case concerning the death of 12-year-old Ceylan Önkol from an explosion while she was herding sheep in a village near Diyarbakir, the applicant alleged the lack of effective investigation into her death violated the procedural limb of Article 2 and a violation of Article 14 due to discriminatory practice during the investigations by authorities because of their Kurdish origins. The Court rejected a violation of Article 2 and 14, finding the allegations of discrimination too broad and not in support of the case.[79] In *Makbule Kaymaz v Turkey*,[80] the applicant's home was raided in 2004 by the police forces, which led to the death of her husband and 13-year-old son. The raid took place due to an anonymous allegation that the home was visited by armed individuals, and it was suspected that they were involved in terrorist activity. The police officers involved in the shooting were acquitted by the Assize court. While the ECtHR found a violation of Article 2 on both its substantive and procedural limb, it did not find a violation of Article 14.

77 *Dizman v Turkey, Application no. 27309/95, 20 September 2005*
78 *Önkol v. Turkey, Application no. 24359/10, 17 January 2017*
79 *Ibid. paragraph 109*
80 *Makbule Kaymaz v Turkey, Application no 651/10, 25 February 2014*

3.2 Reluctance of the ECtHR to Classify Crimes Against Kurds as Crimes Against Humanity or Consider Them as Administrative Practice

Since the commencement of the conflict between the PKK and the Turkish State in the mid-1980s, Turkey has been the stage for thousands of violations of rights that could be described as crimes against humanity. It has been reported that between 1984 and 1998, more than 35,000 people have been killed, most of whom were civilians.[81] During this period, thousands of individuals, including civil rights activists and politicians, suspected of having ties with the PKK, were kidnapped, tortured and murdered whilst in detention. The efforts by the Turkish State in combating the PKK has led to an estimated 3500 towns and villages being destroyed, and between 1 and 3 million people forcibly displaced from their homes by the security forces during this period.[82] However, despite the severity of the conduct of Turkish security forces, the Court has been reluctant to define these violations as "crimes against humanity" or classify them as administrative or systematic practices against the Kurds. The Court's evaluations remain limited to individual applications. This is certainly problematic considering the conflict has been ongoing for almost four decades. The ECtHR, which in effect has been documenting the conflict since the late 1990s, should be using its position to name and shame the systemic nature of Turkey's administrative problems.

In the recent 2019 judgement of *Elçi v Turkey*,[83] the case involves a direct application to the ECtHR in relation to violations of Convention rights during the military curfew in Cizre in 2016. The applicant argued that

81 *Human Rights Watch, 'Displaced and Disregarded: Turkey's Failing Village Return Program', Vol. 14 (No. 7) (2002)*

82 *Mark Muller, Linzey Sharon, 'The Internally Displaced Kurds of Turkey: Ongoing Issues of Responsibility, Redress and Resettlement' (Democratic Progress Institute 2007)*

83 *Elçi v Turkey, Application no. 63129/15, 29 January 2019*

applications to the Turkish Administrative and Constitutional Court regarding a different curfew in 2015 had been rejected. The case was held to be inadmissible due to the failure to exhaust domestic remedies despite his claims that they were ineffective. The court here failed to recognise the regular imposition of curfews and the tolerance of crimes committed during the curfews as an administrative malpractice This amounts to a *prima facie* violation of numerous Convention articles, as the permitting of administrative malpractice may be the underlying cause of the majority of violations complained of. In the similar cases of *Ahmet Tunc and Others v Turkey and Tunc and Yerebasan v Turkey*,[84] a failure to exhaust domestic remedies was cited as the reason for inadmissibility. These applications concerned the military curfews imposed in Cizre in 2015. The applicants' relative, Orhan Tunc, was injured and trapped in a basement in Cizre during the curfew. The court granted a request for interim measures under Rule 39 of the Rules of the Court[85] on January 16th, 2016, indicating to the government that they must do all to preserve his physical integrity and right to life. In February, the court was informed that the applicant was still in the basement and had not been picked up by authorities.

31 applicants, including Tunc, lodged an application with the Turkish Constitutional Court and shortly after, a second application with the ECtHR for interim measures indicating that they were all injured and trapped. Orhan Tunc's body was later found. Because the issue was ongoing before the constitutional court, the court denied the applicants' claim that Article 2 had been violated in the subsequent application to

84 *Ahmet Tunc and Others v Turkey, Application no. 4133/16 & Tunc and Yerebasan v Turkey, Application no. 31542/16, 29 January 2019*

85 *Rules of Court, Rule 39 interim measures, 17 March 2022, https://www.echr.coe.int/documents/rules_court_eng.pdf*

Strasbourg. The court rejected the idea that the curfews were subject to an administrative and judicial practise of impunity. In this regard, it believed that the applicants had not provided enough evidence to back up their complaint that the excessive influence of the executive prevented the Turkish judiciary and the Constitutional Court from being willing or able to consider their complaints in an independent and impartial manner. The Court was unable to establish if Turkey had a general problem of independence and impartiality which had an impact on how the judiciary functioned as a whole, and to draw conclusions from such analysis for the purposes of the applicants' case. In the earlier case of *Öcalan v Turkey*,[86] the Court did apply emergency interim measures under Rule 39 ECtHR. The case concerned the death penalty sentence against PKK leader at the time Abdullah Öcalan. The Court applied Rule 39 to ensure that the death penalty was not carried out so as to give the Court time to effectively examine the admissibility of the application under the Convention. Administrative malpractice has arguably become embedded in the way the Turkish State has dealt with Kurdish people over the years. As highlighted below, the case law demonstrates a clear trend of State dishonesty and brutality against anyone who is unfortunate enough to be suspected of PKK involvement.

3.3 Violations of the Right to Life (Article 2 ECHR)

In the Grand Chamber case of *Tahsin Acar v Turkey*,[87] the applicant claimed that his brother Mehmet Salim Acar had disappeared on August 20, 1994, after being kidnapped by two unknown people who were allegedly plain clothes police officers. The applicant, who primarily relied

86 Öcalan v Turkey, Application no. 46221/99, 12 May 2005

87 Acar v. Turkey, GC, Application no. 26307/ 95, 8 April 2004

on Articles 2 and 38, complained about the unlawfulness and length of his brother's detention, the alleged mistreatment and acts of torture his brother had allegedly experienced while in detention, and the lack of adequate medical care for his brother whilst in detention. Despite finding a 'procedural' violation of Article 2, as the State had failed to conduct an adequate investigation into the disappearance, the Court did not acknowledge a substantive violation of Article 2, as Acar has failed to prove the State's responsibility in other aspects 'beyond [a] reasonable doubt.' Judge Bonello found it 'unacceptable that the applicant is told by a court of justice that he cannot win against the State, as he failed to provide evidence which the State had wrongly failed to produce,'[88] and described the judgement as 'profoundly disturbing.'[89]

In *Akkoç v Turkey*,[90] the applicant, relying on Article 2, claimed that the state had failed to protect the life of her husband Zübeyir Akkoç, who had been killed by an unknown perpetrator. The Court noted that the applicant's husband, who was a teacher of Kurdish origin, had been involved with the applicant in the trade union Eğit-Sen, which was regarded as unlawful by the authorities. The applicant made a statement to a Diyarbakır newspaper stating that the teachers were verbally abused, harassed and in some cases assaulted by the police during a meeting involving the trade union. During her ten days in custody, the applicant was subjected to various forms of ill-treatment, including sexual abuse and psychological pressure. She was interrogated by police officers, who accused her of being involved with the PKK and was coerced into signing a statement drawn up by the police detailing she was a member of the PKK. She was also taken to a hospital where a doctor, influenced by

88 Concurring opinion of Judge Bonello in Acar v Turkey, Paragraph 9

89 Ibid. paragraph 10

90 Akkoç v. Turkey, Application no. 22947/93 and 22948/93, 10 October 2000

the police, submitted a report that she displayed no evidence of physical abuse, although she in fact did. The inability of the Turkish authorities to effectively investigate the circumstances surrounding the death of the applicant's husband was unanimously cited as the reason for the violation of Article 2 by the Court, who also found a unanimous violation of Article 3.[91]

In *Avşar v Turkey*,[92] the applicant's brother Mehmet Şerif Avşar, was abducted from his shop by village guards and found killed outside Diyarbakır. The Court held that the authorities' failure to carry out an effective investigation into the abduction and death of Mehmet Şerif Avsar constituted a violation of Article 2." In the case of *Akkum and others v Turkey*,[93] the Court was unable to establish the circumstances behind a number of claims made by the applicants, which related to the deaths of the applicants' relatives during a military operation. The Court held as follows after noting that this failure was caused by the respondent Government's reluctance to provide the Court with relevant documents:

> *'The Government have failed to adduce any argument from which it could be deduced that the documents withheld by them contained no information bearing on the applicant's claims. Therefore, the Court will examine whether the Government have discharged their burden of explaining the killings of the applicants' two relatives and the mutilation of the body of Mehmet Akkum.*[94] Thus, the Court found a violation of Article 2.

In the similar case *of Celikbilek v Turkey*,[95] the applicant was unable to present substantial proof that his brother had been taken into custody by state forces. The Commission and the Court had also requested the

91 European Convention on Human Rights, Article 3 Prohibition of Torture

92 Avşar v. Turkey, Application no. 25657/94, 10 July 2001

93 Akkum and Others v Turkey, Application no. 21894/93, 24 March 2005

94 Ibid. Paragraph 212

95 Çelikbilek v Turkey, Application no. 27693/95, 31 May 2005

Turkish Government to provide custody documents from the police station where, according to the applicant, his brother had been arrested and killed. The Turkish Government did not despite several requests to do so, and so relying on *Celikbilek,* the Court found a violation of Article 2 because of the state's lack of explanation for the death. In the case of *Kurt v Turkey*,[96] Mrs. Koçeri Kurt submitted an application on her own behalf and on behalf of her son, Uzeyir Kurt, who she claims was last seen in the custody of security forces during an operation in her village and then disappeared. The applicant argued that the respondent State's authorities were accountable for her son's disappearance. She said that he looked like he had been beaten before he was taken away. The Government claims that Uzeyir was never detained and proclaimed that there were grounds to believe that he either fled the village during the operation to join the PKK or was abducted by the PKK. When she went to the authorities to find out where he was, she was told that he was never taken into custody. The Bismil Public Prosecutor issued a decision of non-jurisdiction in the matter of Uzeyir's abduction on the ground that the crime had been committed by the PKK. The Court found no violation of Article 2 and held that the applicant's arguments that her son died at the hands of the authorities were insufficient, due to the lack of hard evidence. It is a common theme in Kurdish cases involving violations of Article 2 that the Turkish State does very little to investigate Kurdish deaths, and if cases are brought against the state, they will do their best to conceal evidence and misrepresent the facts. There seems to be an inconsistency with Article 2 rulings, as the Court is seen finding with either the applicant or the state in cases with strikingly similar facts.

96 Kurt v. Turkey, Application no. 15/1997/799/1002, 25 May 1998

3.4 Violation of the Right not to be Subjected to Torture or to Inhuman and Degrading Treatment (Article 3 ECHR)

In *Aksoy v Turkey*,[97] a seminal Article 3 case, the applicant, according to the government, was detained in November 1992 together with thirteen other people, on suspicion of aiding terrorists belonging to the Kiziltepe branch of the PKK. The applicant was subjected to electrical shocks and the "Palestinian hanging" torture method, in which his arms were tied behind his back and used to hang him. As a result of the four-day torture, he lost the ability to move his arms and hands. When a doctor examined him, he asked about his injuries, to which the police officer responded by saying it was an "Accident." After that, the doctor made a mocking comment, saying, "Everyone who came there seems to have an accident."[98] Mr Aksoy was shot dead in 1994, after various threats in order to make him withdraw his application to the Commission. The government alleged the killing was done by a member of the PKK and a suspect was charged with murder. The court in accepting the Commission's findings of the facts, held that there was a violation of Article 3: '…where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention."[99]

The dissenting opinion of Judge Gölcüklü concerns the issue of the lack of exhaustion of domestic remedies rule and as such, the burden of proof falling back on the applicant after the respondent government have demonstrated the existence of domestic remedies.[100] However, it is fair to argue that Turkey's authoritarian nature provides ample reason for such omission. In

97 *Aksoy v Turkey, Application no. 21987/93, 18 December 1996*

98 *Ibid. paragraph 16*

99 *Ibid. paragraph 61*

100 *Ibid. Dissenting opinion of Judge Gölcüklü, paragraph 10*

Berktay v Turkey,[101] an application was made by Turkish nationals of Kurdish origin, Hüseyin and Devrim Berktay (father and son). Police detained the second applicant and took him to his house so that it could be searched. He suffered a fall from the balcony during the search and was seriously injured. He was taken into intensive care and remained in a coma for approximately two weeks and subsequently claimed that the police officers were to blame for his fall. The first applicant was forced to go to the police station and sign a report which claimed his son was a militant. As to Article 3, the second applicant referred to the police actions in throwing him from the balcony and the first applicant alleged that he was forced by the police to sign a report incriminating his son and was told that until he did so he would be unable to bring his son to receive emergency medical treatment. A unanimous violation of Article 3 was found for the son but there was no violation of Article 3 found for the father.

The case of *Veznedaroğlu Sevtap v Turkey*[102] involved a Turkish national, Sevtap Veznedaroglu. She was detained in 1994, and claims she was subjected to horrific torture while being interrogated and was coerced into signing a statement admitting her connections to the PKK. On her upper left arm and right tibia, two significant bruises were discovered after she underwent a medical examination. She came before the public prosecutor and was accused of holding PKK membership, but the case was ultimately dismissed for a lack of evidence domestically. The Court found it challenging to determine whether the applicant's injuries were caused by the police, and if she had been subjected to the level of torture claimed based on her evidence. It did, however, point out that the authorities' unwillingness to look into her allegations was what made it difficult to determine whether her allegations had any substance. Due to this failure to investigate, the Court held unanimously that there had been a violation of Article 3.

101 *Berktay v Turkey, Application no. 22493/93, 1 March 2001*

102 *Veznedaroğlu Sevtap, Application no. 32357/96, 11 April 2000*

3.5 Violation of the Right to Respect for the Applicant's Home (Article 8 ECHR) and/or of the Right to Property (Article 1 of Protocol No.1)

In *Ayder and others v Turkey*,[103] the applicants were Turkish citizens of Kurdish origin, who, at the time of the events giving rise to their application, were living in the town of Lice in Diyarbakir. The application concerned the applicants' allegation that the security forces deliberately destroyed the town of Lice, including their house and other possessions, as an act of retaliation for the inhabitants' alleged sympathy for the PKK. Both within and outside of Lice, there had previously been considerable PKK activity. Attacks took place at night against State structures in Lice. According to reports, state soldiers were seen firing and causing destruction in Lice without any opposition. For three or four hours, a large group of people were forced to wait in the square for the provincial governor to show up. Speaking to the people in Turkish, the governor said that the PKK was to blame for the damage.

Following the Governor's speech, a curfew was imposed. Upon returning to their houses the applicants found nothing but a pile of ashes. After the curfew was lifted, they left Lice. The applicants complained to the public prosecutor who did not formally record their complaints, but he did make arrangements for damage assessment reports to be drawn up. The applicants received no compensation. No investigation was launched into the actions of the security forces until the notification to the Government of the application to the ECHR by the Commission. The government alleged that the PKK launched an attack on Lice which continued until the evening, and that the security forces had to respond. Their claim was that in the course of the PKK attack and the defence by the security forces certain houses and shops were damaged. The applicants invoked Article 3 and were successful. The Court held: 'The Court considers that the destruction of the applicants' homes and possessions, as well as the anguish and distress suffered by members of their family, must have caused them suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3.'[104]

The Court went as far as to say that even if the motive behind the actions of the security forces was to punish those involved with, or in support of the PKK, it would not '…provide a just satisfaction for such ill-treatment.' The Court also found a breach of Article 8 and Article 1 of Protocol No.1 because of the deliberate destruction of their homes and property. The Court held that the state forces had led to 'unjustified interferences with the applicants' rights to respect for their private and family life and home, and to the peaceful enjoyment of their possessions.'[105]

In *Menteş v Turkey*,[106] the applicants complained that their houses were burned in the course of an operation by the security forces in June 1993. The applicants lived in the village of Sağgöz, which was among an area of known PKK activity. The applicants alleged that their homes were burned because it was consistent with a practice as part of a policy by the security forces to combat the PKK. The government argued that there were no security forces present on the day the applicants' homes were burned, and that the applicants were not even the true 'owners' of the homes. However, the court in recognising a violation of Article 8, held that there was no justification for the burning of such houses, and that the applicants did not need to be the owners of the home to be guaranteed protection under Article 8. In the partly dissenting judgment of Judge Jambrek, he stated that there should have been no violation of Ar-

103 Ayder and others v Turkey, Application no. 23656/94, 8 January 2004

104 Ibid. paragraph 110

105 Ibid. paragraph 119

106 Menteş v Turkey, Application no. 23186/94, 28 November 1994

ticle 8 found due to the difficulty in ascertaining '…the full truth about what really happened…' and disagreed with the majority opinion of the facts being proved 'beyond a reasonable doubt.'[107] In *Selçuk and Asher v Turkey*,[108] the applicants complained that security forces deliberately burned their homes. They claim that their houses were burned because the security forces believed they were being used by the PKK, and were warned months prior to leave the village of Islamkoy, and failure to do so would result in their homes being destroyed. The court found a violation of Article 8 and Article 1 of Protocol I in that the state forces clearly deliberately burned down homes in the village. These cases are significant for providing justice to at least some of the inhabitants of the approximately 3500 Kurdish villages that were burned down by Turkish security forces in the 1990s.

3.6 The Weak and Ineffective Monitoring Mechanism of ECtHR Judgements

The Committee of Ministers (CoM) has adopted several resolutions concerning some of these judgements against Turkey in relation to crimes committed against Kurds. The CoM has called upon Turkey to take further steps to ensure compliance with ECtHR judgements regarding extrajudicial killings, torture, disappearances, and destruction of property committed by the Turkish security forces several times.[109] However, Turkey has failed to respond to these calls, and the gross violations of human rights have continued. The unresponsive nature of the Turkish

107 Ibid. Partly Dissenting Opinion of Judge Jambrek, paragraph 7

108 Selçuk and Asher v Turkey, Application no. 23184/94, 24 April 1998

109 See CoM, Interim Resolutions adopted in Aksoy Group cases: CM/DH(99)434, CM/DH(2002)98, CM/ResDH(2005)43 and CM/ResDH(2008)69. https://wcd.coe.int/ViewDoc.jsp?id=1344121

government to these allegations suggests that the existing ECtHR system has been ineffective in addressing the issue of impunity in Turkey because of its toothless monitoring system. The European Implementation Network noted that:

> *'While Turkey has been complying with repetitive ECtHR judgements which can be closed with individual measures and has paid compensation to applicants in the majority of cases, it is much less willing to take steps towards resolving more systemic and structural problems…Most of these judgements were delivered in the early 2000s and still await full implementation. The lack of implementation for leading cases draws us into a spiral of further violations and a growing number of repetitive cases added to the list each year.'*[110]

For example, in 2016, a submission from the Truth Justice Memory Centre (Hafiza Merkezi) and the European Centre for Constitutional and Human Rights highlighted that most investigations in relation to enforced disappearance cases under the Aksoy group were either dismissed due to the statute of limitations or were under such a risk. As Dilek Kurban has noted, Turkey approved a mechanism that provides partial compensation to only a select group of victims of state crimes and does not contain any promises for truth and justice. Thus, it is evident that the Court not only abandoned its own case law but also endorsed Turkey's impunity regime.[111] In *Selahattin Demirtas v Turkey*,[112] a case concerning the arrest and pre-trial detention of Mr. Selahattin Demirtas, who was at the time co-chair of the People's Democratic Party (HDP).

110 Ibid.

111 Dilek Kurban, 'Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict' (Cambridge: Cambridge University Press 2020), 95.

112 Selahattin Demirtas v Turkey, Application no. 14305/17, 22 December 2020

Following his active political speeches against the government on the Kurdish issue, he was arrested on suspicion of membership of an armed terrorist organisation (presumably the PKK) and inciting others to commit an offence. The Court found violations of his freedom of expression under Articles 10 and 3 of Protocol No I, which entails the right to free elections, the right to liberty and security under Articles 5(1) and 5(3), and Article 18 of the Convention. As the Court found Demirtas' ongoing detention violates Convention rights, Turkey is therefore in violation of Article 46, which states: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.'[113] In 2021, the CM ruled that the judgement applies to the ongoing detention. However, Turkey alleges that new evidence came to light after the ECtHR judgement. The CM should now refer the question of whether Turkey is continuing violation of its obligation to execute judgements under Article 46(4),[114] which is dangerous insofar that a positive finding and a referral back to the CoM may lead to Turkey's expulsion from the Council of Europe (CoE).

Although it may be unlikely this would happen given the evident lenience of the CoE, a failure to take action contributes to the culture of impunity that permeates Turkey's treatment of its Kurdish population. Even where violations of the Convention have been found, this has not translated into any action taken against the perpetrators domestically. Tahir Elci was a Kurdish lawyer who was on trial for publicly saying the PKK was not a terrorist organisation in the eyes of many Kurds was gunned down by police in 2015. When Selahattin Demirtas cast doubt on whether those responsible would ever be caught: 'Our scepticism is

113 *European Convention on Human Rights, Article 46(1), Binding force and execution of judgements*

114 *Ibid. Article 46(4)*

fair as so many similar sufferings have taken place on our land in this past,' he said at the funeral. 'We were never able to say goodbye to them with our minds at ease thinking those responsible will be caught', this was undoubtedly reflective of how many Kurds feel about getting justice in the Turkish State.[115] In some individual cases the ECtHR may have provided applicants with some recompense, but the overall conclusion has to be that the system should (and could) do more. As Kurban succinctly puts it:

> *'Even during the heyday of Kurdish legal mobilization, the ECtHR did not make full use of its adjudicatory powers and tools. While issuing hundreds of similar judgements in nearly identical cases of torture, enforced disappearances, extrajudicial executions and forced displacement, it did not, even once, find that Turkey's treatment of its Kurdish citizens constituted discrimination. It never said that the Emperor has no clothes- namely, that Turkey was engaged in organized violence against a part of its own population, carried out and covered up by the entire state apparatus, including a complicit judiciary.'*[116]

115 *The Guardian, 'Thousands mourn Kurdish lawyer Tahir Elci after gun death in Turkey', 29 Nov 2015, theguardian.com*

116 *Dilek Kurban, 'Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict' (Cambridge: Cambridge University Press 2020) 299.*

Chapter 4

Overarching Effectiveness of the ECHR

4.1 The ECHR and the Conflict in Northern Ireland

The purpose of this section is to provide an analysis of how the ECtHR has dealt with the other protracted conflict on which it has adjudicated- in Northern Ireland- and assess whether parallels can be drawn with its treatment of the Kurdish conflict in Turkey. Systematic violence erupted in Northern Ireland in 1968 and the subsequent conflict dubbed 'the Troubles,' a euphemistic phrase concocted to describe the politically motivated violence of competing nationalisms in Northern Ireland, continued until the signing of the Belfast Agreement in 1998. The origin of the unrest in Northern Ireland can be traced back to the fact that a substantial proportion of the population in the North would rather have been living under an Irish flag, as opposed to a British one. With an approximate population of 1.7 million, 40 to 45% of whom are in favour of becoming a United Ireland,[117] the Troubles, analogous to the Kurdish conflict, is thus primarily a conflict about identity, national allegiance, and the status of territory. The English oppression originated from their invasion of Ireland in the twelfth century and more recently over differences in religion, with the Irish being predominantly Catholic and the English Protestant. The Troubles lasted for three decades and consisted of armed conflict between the Irish Republican Army (IRA), an Irish republican paramilitary organisation and the British Army and Loyalist paramilitaries. The IRA has been compared to the PKK, identifying itself as an organisation that pursues political objectives using military and violent means. Both conflicts involved harsh oppression by the occupying state which has led to violations

117 *Brice Dickson, 'The European Convention on Human Rights and the Conflict in Northern Ireland', (Oxford University Press, 2010) 2 The Background to the Conflict and the Rights Discourse', 6*

of numerous Convention rights. While a full account of the case law emanating from Northern Ireland is beyond the scope of this section, it is important to assess the ways in which the ECtHR has made a contribution to providing adequate redress for the innocent victims of the Troubles. Dickson contends that the Convention was 'largely irrelevant both to the way the conflict was managed while it was raging and to the way it was largely resolved[118] In parallel with the Kurdish conflict, the Convention was used as a tool for victims of perceived injustices who were frustrated at the lack of remedies in the domestic law of Northern Ireland for basic human rights abuses. A critical error by the ECHR was however made in one of the earliest cases dealing with the conflict, involving a consideration of the British policy of internment and the treatment of detainees. In *Ireland v the United Kingdom*[119] the case concerned Convention violations over the mistreatment of suspected IRA members who were subjected to ill-treatment and torturous interrogation techniques. Although there was strong evidence that the detainees had been tortured, the Court failed to support the findings of the European Commission and held that there is a universal standard for the measurement of human pain when dealing with torture, and disregarded the issue of the intent of the security professional who had conducted the interrogation[120] The ECtHR missed a significant opportunity to establish the criteria for acceptable prisoner treatment at a time when the Troubles were at their most violent. There were successes in Strasbourg for the victims of the Troubles, but it could be argued that they came too late, with most of the Court's impositions occurring when the conflict had settled. To its credit, the Court has refined the doctrine of substantive positive obligations arising out of Articles 2 and 3 of the

118 *Brice Dickson, 'The European Convention on Human Rights and the Conflict in Northern Ireland', (Oxford University Press, 2010) 13 The Contribution of the Convention in Northern Ireland, 362*

119 *Ireland v the United Kingdom, Application no. 5310/71, 18 January 1978*

120 *Ibid. Paragraph 162*

ECHR. However, the Court has largely ignored Articles 13 and 14 of the Convention, guaranteeing the right to an effective remedy and to not be subject to discrimination. This is unfortunate as it represents a missed opportunity to constructively contribute to the resolution of conflicts centred on contentious ethno-political, racial, linguistic, and/or religious differences. The Council of Europe's Commissioner for Human Rights may be able to play a more significant role in this area through reports and interventions, assisting the Court in better addressing the variety of claims of systemic and egregious violations that are frequently[121] It is reasonable to claim that the Northern Irish conflict has had a far steadier progression when it comes to conflict resolution in the North, compared with the Kurdish issue in Turkey. Following the 1998 Good Friday Agreement, the IRA ended its operations, and the violence has remained relatively dormant ever since.

There has been controversy regarding the British government's accountability for their actions during the conflict. There is currently a Bill going through Parliament which seeks to give immunity to all involved.[122] Families and victims are worried that the Commission will not carry out effective investigations or deliver meaningfully for their loved ones. The magnitude of state oppression has arguably proven far greater for the Kurds, and this is partly because the Turkish government has never taken any formal responsibility for their atrocities. There is a discernible divergence between the conflict resolution efforts of democratic states and those of authoritarian governments. Turkey's lack of authentic democracy plays a large role in human rights violations, which may be a reason for the failure to find a solution to the Kurdish issue.

121 *Onder Bakircioglu and Brice Dickson, 'The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey', Volume 66 (Issue 2) (2017) 293*

122 *Department of Foreign Affairs, 'Ireland welcomes decision by Council of Europe on Northern Ireland legacy issues', (June 2022), https://www.gov.ie/en/press-release/fb0b5-ireland-welcomes-decision-by-council-of-europe-on-northern-ireland-legacy-issues/*

4.2 Acknowledgement of Government Responsibility and the ECtHR as a Pathway to Impunity

A substantial component of the ECHR's failure to provide long lasting solutions to situations of protracted armed conflict is their omission of acknowledging government responsibility. Cohen offers insight into the psychology of denial that exists in Turkey: *'Implicatory denial concedes the facts of the matter and even their conventional interpretations. But their expected implications- emotional or moral- are not recognized…there is deliberate deception, blatant lies offered cynically and in bad faith: such as the denials made by the Turkish government or by the tobacco industry executives.'*[123]

With there being obvious and deliberate deception in Turkey, the alternative of implicatory denial may be significant, which can entail an 'it doesn't concern me…why should I care' perspective.[124] The Kurdish issue is certainly a concern for the ECtHR, but after the point of judicial ruling and pecuniary relief for individual applicants, the underlying problems of the state are not dealt with stringently enough. There should be no doubt when it comes to the Turkish state's blatant disregard for Kurdish victims seeking remedies under the Convention. As mentioned in the previous chapter, the decision process of the Court often seemed like a coin toss, favouring either the applicant or the state in cases with strikingly similar facts. And many cases had similar problems to those seen in *Ipek v Turkey*,[125] where the generals involved in the case failed to give evidence to the fact-finding tribunal, thereby preventing the Commission from establishing the facts. The Turkish state would also continuously argue that their domestic courts had sufficient procedures in place for dealing with

123 Stanley Cohen, 'States of Denial: Knowing about Atrocities and Suffering', (John Wiley & Sons, 2013) Chapter 2, Everyday denial

124 Ibid.

125 Ipek v Turkey, Application no. 25760/94, 17 February 2004

human rights violations. One of the fundamental reasons for the failure of long-lasting acknowledgment is because the ECtHR was seen by the Turkish government as siding with the PKK in its fight, and applicants were frequently portrayed as state adversaries. The process of officially acknowledging governmental atrocities was severely hindered by the PKK's affiliation with the human rights litigation agenda.[126] The applicants' allegations and the ECtHR rulings, which held that the Turkish state had all too frequently acted unlawfully and infringed on its citizens' human rights in its security operations and the administration of justice, stood in contrast to this narrative. Turkey has compensated victims financially, but it hasn't publicly admitted that its agents are accountable for their conduct. Furthermore, the logic of legal and political reform procedures, pushed principally by Turkey's EU candidacy has not been a threat to the government's grand narrative of security and counterterrorism.[127] Notably, no senior government official or member of the security forces has ever been held accountable for crimes against the state in Southeast Turkey. This demonstrates that high-ranking officials in the security forces had *de facto* immunity for the decisions they made in the face of the PKK's violent and criminal operations in Turkey. As underlined in Chapter 2, the ECHR has been particularly useful in that it emulates that of a truth commission portraying the realities of Convention violations in Turkey. Even though the cases point to the lack of adequate domestic political conditions in Turkey to engage in the process of acknowledgement, the Convention also failed to act as a catalyst for truth and official acknowledgment and did nothing to prompt domestic prosecutions in cases where agents of the State were found to have violated Convention rights. Grover outlines many ways in

126 Başak Çali, '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 & Social Inquiry, Vol. 35 (No.2) (2010) 333

127 Ibid.

which the ECtHR acts as a pathway to impunity for international crimes. She states that this is done through immunity for such crimes, as shown above and argues:

> *'(a) in cases of international crimes as defined under the Rome Statute and under certain other international law such as the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, neither the State nor the individual perpetrators of international crimes are legitimately shielded by State immunity in civil actions, and (b) the State, while not criminally prosecutable as a State, should, if international law is correctly applied, be vulnerable to other mechanisms of accountability by the international community for the fostering, or failure to prevent international crimes committed by its public officials or other agents of the State while those agents were acting in their capacity as representatives of the State.'*[128]

To establish such a reality is easier said than done but Grover's position certainly solves one of the most significant failures of the Convention. She also notes that the ECHR, '…in affirming the forum State's grant of immunity to the offending State that is directly or indirectly responsible for torture within that non forum State's borders, thus inadvertently aids and abets the respondent State in upholding the *fallacious* contention that acts of torture are… sovereign acts.'[129] The absence of responsibility has led to the repetition of violations by state authorities, serving to further undermine democracy in Turkey and embed such malpractices into everyday life for Kurdish people.

128 Sonja C. Grover, 'The European Court of Human Rights as a Pathway to Impunity for International Crimes' (1st edition, Springer Berlin, Heidelberg, 2010) Part I: Selected Factors Facilitating Impunity for International Crimes Through the European Court of Human Rights, 2

129 Ibid. 3

Conclusion

The Kurdish issue is one of Turkey's most controversial topics that has tested the limits of the European Convention on many levels. The aim of this book was not to detract from the fact that the ECtHR has provided some recompense for victims of violations of the Convention. In fact, without its existence, the Kurdish conflict would have likely attracted far less recognition for victims of state violence. There are, however, several ways in which the Convention has failed to provide redress to the Kurdish people, beyond ruling in favour of individual applicants. The CoM is perhaps the only formal way the ECtHR can follow up on its rulings, and when it does, it has proven ineffective in deterring Turkey from committing Convention violations. Much more needs to be done as Grover suggests, to hold states accountable on an international level for their misconduct. Turkey's authoritarianism plays a large role in its ability to sustain the narrative of the protagonist, keeping the Kurds as the enemy, framing them as terrorists and a threat to state sovereignty. As Kurban suggested, the ECtHR has not made full use of its adjudicatory powers and tools, which has led to insufficient restitution for the Kurdish people.[130] Perhaps in the coming years the Convention will recognise their shortcomings and provide ample reparations, not only to the victims, but also for ethnic identities.

130 Dilek Kurban, 'Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict' (Cambridge: Cambridge University Press 2020) 299.

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DPI Aims and Objectives

Aims and Objectives of DPI Include:

- To contribute to broadening bases and providing new platforms for discussion on establishing a structured public dialogue on peace and democracy building.
- To provide opportunities, in which different parties are able to draw on comparative studies, analyse and compare various mechanisms used to achieve positive results in similar cases.
- To create an atmosphere whereby different parties share knowledge, ideas, concerns, suggestions and challenges facing the development of a democratic solution in Turkey and the wider region.
- To support, and to strengthen collaboration between academics, civil society and policy-makers.
- To identify common priorities and develop innovative approaches to participate in and influence democracy-building.
- Promote and protect human rights regardless of race, colour, sex, language, religion, political persuasion or other belief or opinion.

DPI aims to foster an environment in which different parties share information, ideas, knowledge and concerns connected to the development of democratic solutions and outcomes. Our work supports the development of a pluralistic political arena capable of generating consensus and ownership over work on key issues surrounding democratic solutions at political and local levels.

We focus on providing expertise and practical frameworks to encourage stronger public debates and involvements in promoting peace and democracy building internationally. Within this context DPI aims to contribute to the establishment of a structured public dialogue on peace and democratic advancement, as well as to widen and create new existing platforms for discussions on peace and democracy building. In order to achieve this we seek to encourage an environment of inclusive, frank, structured discussions whereby different parties are in the position to openly share knowledge, concerns and suggestions for democracy building and strengthening across multiple levels.

DPI's objective throughout this process is to identify common priorities and develop innovative approaches to participate in and influence the process of finding democratic solutions. DPI also aims to support and strengthen collaboration between academics, civil society and policy-makers through its projects and output. Comparative studies of relevant situations are seen as an effective tool for ensuring that the mistakes of others are not repeated or perpetuated. Therefore we see comparative analysis of models of peace and democracy building to be central to the achievement of our aims and objectives.

This book attempts to navigate the intricate terrain of the ECHR as a lens through which the trajectory of the ongoing conflict in Turkey is scrutinised. The study is multifaced, aiming to unravel the effectiveness of the ECHR at addressing Human Rights violations within the context of conflict resolution

It is also aimed at seeking insight into the broader capacity of the ECHR to provide redress in conflict affected settings.

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