

STATE VIOLENCE AND HUMAN RIGHTS: THE EUROPEAN HUMAN RIGHTS
COURT CASES SUBMITTED AGAINST TURKEY ON DETENTION

by

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ABSTRACT

STATE VIOLENCE AND HUMAN RIGHTS: THE EUROPEAN HUMAN RIGHTS COURT CASES SUBMITTED AGAINST TURKEY ON DETENTION AND RIGHT TO LIFE

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Turkey gave its citizens the right to individual petition to the European Court of Human Rights (ECtHR) in 1987. In the same year, via legislative decree, State of Emergency Rule which excluded the acts of the administration or responsibility of public servants in the field of emergency issues from judicial review was declared in seven provinces located in the Kurdish region. At the juncture of these two critical shifts that envisaged significant changes in the legal status of millions of people, the human rights violations committed predominantly against Kurds during the state of emergency period were carried to the ECtHR in the absence of an effective and accessible domestic judicial mechanism. In the years that followed, the ECtHR was bombarded with thousands of individual applications from southeast Turkey, whereby the narratives of violence taking place in the 1990s were for the first time heard in a public forum. Yet, despite the thousands of the judgments of the Court finding Turkey guilty of breaching the Convention requirements, the effect of these judgments remained limited at the domestic level as a result of the development of the official narrative of security and counter-terrorism alongside the human rights narratives and reforms. What I propose to do in this thesis is to delve into the dynamics of this dual development of seemingly contradictory narratives – whereby rights given by one hand were taken away by the other – by looking at the cases on alleged incidents of state killings or deaths in detention, submitted to the ECtHR against Turkey prior to May 2009. By looking at the ways of attribution of responsibility to the state and the transformation of the scopes of the cases by the Court in these proceedings, I try to understand the limitations of human rights law in denouncing state violence through locating the silences, exceptions and exclusions in the Court's reasoning.

Keywords: European Court of Human Rights (ECtHR), Kurdish Movement, Human Rights, Right to Life, Detention, Violence, State of Emergency

ÖZET

İNSAN HAKLARI VE DEVLET ŞİDDETİ: TÜRKİYE ALEYHİNE AVRUPA İNSAN HAKLARI MAHKEMESİ'NE GÖTÜRÜLMÜŞ GÖZALTI VE YAŞAM HAKKI İLE İLGİLİ DAVALAR

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Türkiye Avrupa İnsan Hakları Mahkemesi'ne bireysel başvuruda bulunabilme hakkını 1987'de vermiştir. Aynı yıl bir kanun hükmünde kararname ile Kürt bölgelerinde yer alan yedi şehirde olağanüstü hal ilan edilmiş ve böylece kolluk kuvvetlerinin bu alandaki uygulamaları yargısal denetimden muaf tutulmuştur. Milyonlarca insanın hukuki statüsünde değişikli öngören bu iki önemli gelişmenin kesişiminde, daha çok Kürtlere karşı işlenen insan hakları ihlalleri erişilebilir ve etkili bir iç hukuk mekanizmasının yokluğunda AİHM'e taşınmıştır. Takip eden yıllarda AİHM Türkiye'nin güneydoğusundan yapılan binlerce bireysel başvuru almış ve böylece 1990'larda yaşanmış olan şiddete dair hikâyeler ilk defa kamusal bir forumda duyulmuştur. Mahkeme'nin Türkiye aleyhine vermiş olduğu binlerce karara rağmen, insan hakları söylemi ile birlikte güvenlik ve anti-terör söylemlerinin de gelişmesiyle, bu kararların etkisi ulusal seviyede kısıtlı kalmıştır. Bu tezde yapmayı amaçladığım Mayıs 2009'dan önce Türkiye aleyhine verilmiş gözaltında ölüm ile ilgili mahkeme kararlarını inceleyerek birbirine zıt olarak görünen bu iki söylemin iç dinamiklerini anlamaya çalışmaktır. Mahkemenin, devleti ve devletin sorumluluklarını nasıl kurguladığına ve mahkeme kararlarının mevcut ihtilafların kapsamlarını nasıl dönüştürdüğüne bakarak, insan hakları hukunun devlet şiddetine müdahale etmekte ne ölçüde kısıtlı kaldığını mahkemenin kararlarındaki istisna durumlarına ve suskunlukları üzerinden incelemeyi hedeflemekteyim.

Anahtar Sözcükler: Avrupa İnsan Hakları Mahkemesi (AİHM), Kürt Hareketi, İnsan Hakları, Yaşam Hakkı, Gözaltı, Olağanüstü Hal

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CHAPTER I

INTRODUCTION¹

Recently, while walking down Istiklal Street, a central Istanbul thoroughfare, I came across a group of women surrounded by curious onlookers. I soon realized that these were the ‘Saturday Mothers’², women who gather every Saturday to demand an account of their missing and dead relatives. I was familiar with the names under the photos held by the women as well as the details of their legal actions, but this was the first time I had actually seen the faces of, ‘the deceased’, whose cases I had analyzed throughout the chapters of this thesis. It was the Saturday Mothers, along with various local, national and international human rights networks who initially brought the issue state killings to the attention of the European Court of Human Rights (ECtHR) as well as to the Turkish and European public. This thesis will focus on the cases brought to the ECtHR by these mothers and many others mourning for their loss, and analyze the decisions and reasoning of the ECtHR.

In 1987, two significant events occurred in Turkish law: Turkey gave its citizens the right to petition the ECtHR, and a State of Emergency Rule was decreed which excluded

¹ This thesis is a collective work. Without the help and support of Ayşe Öncü, I would not be able to write this thesis. Virginia Brown Keyder read patiently my earlier drafts and helped to develop my ideas through her invaluable comments and feedbacks. Leyla Neyzi kindly accepted to be in my thesis committee and supported me through the entire thesis-writing process. I would also like to thank to Dicle Koğacioğlu who motivated me to pick up my topic and become interested in sociology of law.

² A group formed initially of Mothers who have lost their sons and daughters in police custody in 1995. Until recent years Saturday Mothers, *Cumartesi Anneleri*, were subjected to severe police violence as they gathered every week in front of Galatasaray High School, Istiklal Street.

acts of public servants from judicial review by Turkish courts was declared in several provinces of the Kurdish region. Subsequently, human rights violations committed by public servants predominantly against Kurds during the state of emergency period were brought before the ECtHR. In the years that followed, the ECtHR came to function as an archive of previously unheard stories of state violence. This archive offered a glimmer of hope to those living in the Kurdish region of Turkey.

Although the right to petition has been available since 1987, Kurds did not start to file cases in Strasbourg until after a 1992 visit to Diyarbakır by Kevin Boyle, a British human rights professor from Essex University (Kurban et al). The meeting was initiated by Kurdish Human Rights Project (KHRP), an organization based in London. KHRP was founded by a Kurdish refugee in 1992 and worked with human rights professors in Essex University. The organization established connections with the Diyarbakır branch of the Human Rights Association (HRA) and initiated transnational links between the Kurdish lawyers in Turkey and the international community (Kurban et al). Kevin Boyle and François Hampson, another British law professor from Essex, advised Kurdish lawyers on the individual petition mechanism. The Kurdish lawyers, equipped with the training they received from British and Turkish professors pioneered the litigation in Strasbourg. Frequently the Turkish judge in the ECtHR Feyyaz Golcuklu referred to the cooperation between KHRP and HRA as the ‘triangle between Diyarbakir-London-Strasbourg’ in his dissenting opinions where he argued that the cases submitted to the Court were part of a conspiracy arranged by these organizations.

The ECtHR decisions were significant not only for government officials, who considered them harmful to Turkey’s reputation in the European context, but also for various NGOs and opposition groups who view the Court as an alternative to the domestic legal mechanisms. Turkey tried to use Article 15, which grants the right to states to derogate from its obligations under the Convention in cases of war or other public emergency threatening the life of the nation. While Turkey was denied a margin of appreciation³ under Article 15, the United Kingdom was given a margin of appreciation

³ According to the margin of appreciation doctrine the judges are obliged to take into account the cultural, historic and philosophical differences between Strasbourg and the nation in question. The doctrine allows the court to take into effect the fact that the Convention will be interpreted differently in different signatory states.

based on the existence of a public emergency in Northern Ireland.⁴ Factors, including either awareness of differences in power between states or misplaced faith in the credentials of ‘long-lived’ democracies, may have led the Court, perhaps unconsciously, to be more lenient towards the United Kingdom than towards Turkey (Dembour, 2006).

Although there have been numerous ECtHR judgments finding Turkey in breach of the European Human Rights Convention (ECHR), the effect of these decisions has remained limited at the domestic level. The major reason for this has been the growth of an official narrative of security and counter-terrorism that trump the development of a human rights narrative and reforms (Çalı, forthcoming). This thesis aims to explore the development of seemingly contradictory narratives by examining allegations of state killings or deaths in detention presented to the ECtHR against Turkey prior to May 2009. Through an analysis of specific cases I propose to shed light on the relationship between human rights discourse and state violence by examining in particular how the ECtHR conceptualizes violence, attributes responsibility to state actors and applies exceptions to human rights norms in certain cases. In short, this thesis is an attempt to understand the relation of law and violence in the context of State of Emergency Rule and the ECtHR by examining how the ECtHR views some allegations of violence as contravening human rights norms while others do not. For analytical purposes, I have limited my selection of cases⁵ to those involving detention and the right to life as set forth in Article 2 of ECHR as follows:

ARTICLE 2

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

⁴ See, Selly Marks, *The Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights*.

⁵ Throughout the chapters, I use the names of the people as they appear on the legal proceedings in the ECtHR database, assuming that it is their own preference to use their real names and since there is public access to the database.

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defense of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

There are various interpretations in the cases as to what is meant by right to life in the Convention. By examining these interpretations, it is possible to see how the boundaries of the state are constructed by the Court as it attempts to assess whether death constitutes a violation of the Convention or a result of proportional use of force or in what cases the state is actively responsible for the death and in what cases it has merely omitted to exercise a preventative function. Therefore, this thesis is also an attempt to explore when and in what conditions an act of killing amounts to a breach of the right to life within human rights discourse.

Recent studies have focused on law as an agent of social construction (Pottage, 2004) or as an active participant in the process through which history is written and memory constructed (Sarat&Kearns, 1999; Minow, 1987). In these studies ‘the legal’ is viewed not as mirroring the social, cultural and political, but instead as embedded in relatively autonomous structures that transcend and shape the content of social issues (Gordon, 1984; Kennedy, 1980). The ECtHR decisions, apart from being a set of legal operations and practices, have also influenced the extent and the content of the disputes as well as their social meanings by creating public knowledge regarding human rights issues. However, in this thesis, I mainly focus on the internal structure of legal discourse rather than its impact upon the social.

My analysis has showed that although according to the case law of the Court, detention centers are generally considered as places where the state has full jurisdiction and knowledge regarding the course of events, torture as a performance is vital in the construction of a particular spatiality as a detention centre and the identification of the deceased as vulnerable. The Court will find a violation of the right to life only when the cause of death can be considered within the meaning of Article 3 (on torture). Torture as a practice that refers to an utterly unproportional use of force is significant in the Court’s

decisions, since the Court finds a violation of Article 2 only in circumstances in which the deceased can be constructed as a vulnerable being prior to his/her death. The practice of torture helps the Court to fabricate such a construction. Even in disappearance cases where the body of the deceased is never found, the finding of a violation in Article 2 by the Court is followed by Article 3 with respect to the applicant rather than the deceased for the suffering caused by the disappearance. That being said in connection with the detention cases, in cases where the applicant accuses state functionaries of abduction and killing, the Court rarely finds a substantive violation of Article 2. In abduction cases, confronted with serious allegations of state violence which fall outside this narrow interpretation, the Court minimizes real human rights violations and thereby conceals the fundamental relationship between the state and violence. By only finding a violation by the government of failing to conduct effective investigation following deprivation of life in these cases, the Court frames real human rights violations as lack of expertise in criminal investigation.

As of 1 January 2009, the Court had issued 1,939 judgments concerning Turkey, in 1,676 of which the Court found at least one violation. Two hundred ninety four of the cases were struck after the applicants and the government reached what is known as a 'friendly settlement'⁶. In 66 cases the Court found that Turkey violated right to life, and in 120, it failed to conduct an effective investigation after the deprivation of life.⁷ In 53 of these cases, which constitute the main subject of this thesis, death/killing occurs either in detention or in some other place considered by the Court to be comparable to detention centers. In 26 of the detention cases, the Court found that Turkey violated the right to life and in all 53 of the detention cases the Court concluded that Turkey failed to conduct an effective investigation following deprivation of life. These cases are contained in the online

⁶ Mutual accord between the government and the applicant in which the government acknowledges the violation and offers compensation for it.

⁷ The European Court of Human Rights, Some Facts and Figures 2009

database of the ECtHR.⁸ I have relied on Turkish translations for those cases which are only in French.⁹

To understand the cases analyzed here, it is important to understand the procedures under which the Court operates and evaluates the cases. Equally important is the context within which the ECtHR emerged as an alternative to domestic law. Chapter Two provides some insight into the evolution of human rights, the operation of the Court and the general context in which cases were filed. In Chapter Three I discuss the right to life Article and the detention cases. By giving examples from cases, I try to demonstrate that detention is not a stable category and is a matter of dispute between the applicant and the government.

In Chapter Four, by showing that the Court finds a violation of right to life only if death is a result of torture, I suggest that torture is significant not only for naming an incident as ‘detention’, but also in the construction of the identity of the deceased. Accordingly, the Court in the majority of the cases found a violation of the right to life only in those cases where the deceased can be imagined to be a victim of disproportional force because only then is the identity of the deceased constructed as a *vulnerable* detainee and the government is accused of failing to protect his/her right to life. Limiting actionable violence in detention centers to torture, however, results in the exclusion of victims of other types of violence from judicial protection and restricts the protection of law to those envisaged as vulnerable by the Court.

In Chapter Five, by looking at cases in which government officials are accused of abduction and killing, I explore how the legal framing of ‘abduction’ rather than ‘detention’ affects the Court’s approach. Due to its restricted interpretation of state action to certain spatial settings, the Court fails to respond effectively to accusations of breach that should, in the writer’s opinion, be actionable.

⁸ <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>

⁹ The English or Turkish translations of the French cases can be found in, <http://aihm.anadolu.edu.tr/> and <http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp>. The database of the ECtHR can be reached through <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

CHAPTER II

HUMAN RIGHTS AND THE ECtHR

Human Rights

The origins of human rights, the degree to which human rights can be considered as the ideals of liberal market or Western imperialism and the relation between religions and a secular view of human rights are debated between scholars. The origins of human rights date back to religious texts and early legal documents such as Hammurabi's code or Greek city states. However in the abstract sense we use today, human rights are considered to be the product of the 17th and 18th century European thought, particularly the Enlightenment ideals which emphasized the notion of 'natural law.' Natural law theory, based on the existence of a law whose content is set by nature and therefore is valid everywhere, also gave rise to the idea of natural rights, which provided the philosophical basis for the emergence of the Bill of Rights in Europe and United States. In that sense, the Bill of Rights of England (1689), the Bill of Rights of the United States (1791) and the 1789 Declaration of the Rights of Man and Citizen in France are landmarks in the history of human rights discussions.

Human rights emerged as a subject of international relations with the Universal Declaration of Human Rights in 1948.¹⁰ The Declaration arose directly from the experience of the Second World War and represents the first global expression of rights to which all human beings are entitled. Today, the International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. The Universal Declaration aims to set moral standards to the practices of the states and although it is not legally binding, the Declaration has influenced various national constitutions since 1948.

In Europe, the devastation and human suffering caused by the Second World War paved the way for the idea of European Integration through the creation of common institutions. The Council of Europe was established by ten states¹¹ in 1949 as an organization to work on the issues of legal standards, human rights, democratic development and cultural cooperation. European Convention on Human Rights was adopted in 1950 and European Court of Human Rights which supervises compliance with the Convention was established in 1959 by the Council of Europe. Any person who feels his/her rights set forth in the Convention are violated by a state party can take a case to the Court. The establishment of a Court to protect individuals from human rights violations is an innovative feature for an international convention on human rights, since it gives the individual an active role on the international arena. The European Convention is still the only international human rights agreement providing such a high degree of individual protection. The European Convention on Human Rights is generally regarded as the most effective and advanced international system for the protection of human rights in existence today. The Court's workload has increased dramatically, as the number of the member

¹⁰ There are various debates in relation to human rights among scholars. The two of the most important concepts in terms of understanding the application of human rights to policies and practices are considered to be universalism and cultural relativism. While the universalist approach suggests that certain rights are natural or inherent to humanity and therefore they are so fundamental that there should be no exception to their application, cultural relativism is based on the idea that there are no objective standards by which others can be judged. Another debate questions the coinciding of the post-colonial era with the institutionalization of the human rights discourse and view human rights as another tool to control the non-West in the post-colonial era.

Or whether human rights, being institutionalized in the post- colonial era, has been created by the West to

¹¹ These ten states are Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

states in the Council of Europe has increased dramatically after the end of the Cold War, when Central and Eastern European countries became members in the early 1990s.

During the Cold War era, because of the ideological and geopolitical struggle between Soviet Union and United States, the progress in the human rights area was terminated. Therefore human rights had barely any active life before 1989, when all violations were sanctioned in the fight against communism. Since the end of the Cold War, the US government has been central to the development of the idea of the "human" implicit in rights discourse (Asad, 2003). Al Qaeda attacks of September 11 in 2001, the subsequent declaration of a "global war on terror," and the rapid development of more stringent counter-terrorism efforts have undermined the issue of human rights. Indeed, following 9/11 a number of countries that routinely violate the human rights of political prisoners or dissidents found tacit American sanction to expand their repressive practices. Therefore, human rights started to be seen as subordinate to security objectives or even antithetical to security.

The context

Turkey gave its citizens the right to individual petition to the ECtHR in 1987 as part of a strategy to facilitate its accession to the EU. In the same year, via legislative decree, State of Emergency Rule was declared. This legislative decree required the establishment of a new administrative unit called the Governorship of State of Emergency region, *Olağanüstü Hal Bölge Valiliği*, which has jurisdiction over ten provinces¹² located in the Southeastern Turkey. This legislative decree required for the first time the formation of a new administrative unit to govern the selected seven provinces (Üskül, 2003). The decree contradicted Constitutional provisions in two ways. First it required the formation of a new administrative body unrecognized in the Constitution (Duran, 1988). Secondly, by creating a space of emergency in a large part of the Kurdish region of Turkey, it vested extraordinary powers in regional governors and excluded the acts of administration or responsibility of public servants in the field of emergency issues from judicial review, in

¹² These ten provinces are Diyarbakır, Hakkari, Siirt, Mardin, Tunceli, Van, Elazığ, Bingöl, Şırnak, Batman. The State of Emergency Rule was lifted in 2002.

violation of the Constitution (Muller 1996). In many of the cases before the ECtHR, the legislative decree was itself referred as evidence that the legal framework operating in southeastern Turkey inadequately protected the right to life. In its various judgments the Court acknowledges the deficiencies in the legal framework in terms of fostering a lack of accountability for members of the security forces for their actions.

Thousands of petitions from the state of emergency region were filed under various articles of the ECHR, a great majority of which related to right to life¹³. More precisely, ninety out of the one hundred fifty three right to life cases originated from the ten provinces under state of emergency. This flood of individual applications from southeast Turkey enabled the narratives of violence taking place in 1990s to be heard for the first time in a public forum (Çalı, forthcoming).

The Structure of the ECtHR

Applications to the ECtHR first arrive in the Registry, whose task is defined as providing legal and administrative support to the Court in the exercise of its judicial functions.¹⁴ The Registry is composed of administrative and technical staff, translators and lawyers who assure that the applications are in correct form and prepare them for adjudication with the help of other staff. From the Registry, the applications are sent to either a three-member committee¹⁵ or a chamber¹⁶ where admissibility is decided

¹³ The first applications lodged to the Court for the human rights violations against Kurds were brought by Kurdish Human Rights Project (KHRP) in partnership with Essex University Human Rights Professors. KHRP is an NGO founded in London in 1992. Because the lawyers operating in the State of Emergency Region did not have the particular expertise in making submissions to a highly bureaucratic mechanism at that time, in the beginning of 1990s the great majority of the cases were brought to the court with the assistance of KHRP.

¹⁴ <http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/The+Registry/> (retrieved in 10 May 2009).

¹⁵ Committees are founded to eliminate the applications that are clearly unfounded at an early stage to decrease the work load of the court. They consist of three judges.

¹⁶ Chambers evaluate the merits of the cases and present their judgments. The cases in certain circumstances can be referred to the Grand chamber.

unanimously or by majority vote respectively. The decisions of the three-member committees or chambers constitute a secondary selection process. It is important to note that two out of three applications do not pass the registration stage (Dembour, 2006:124). Applications allocated to a committee or a chamber are accompanied by copies of relevant documents.¹⁷ A high percentage of applications are found inadmissible by the three-member committee or the chamber.

In the absence of a thorough domestic judicial examination of the events in question, the Court was confronted with a large number of cases in which the primary facts were in dispute. Therefore the Commission¹⁸ acted as a first-instance tribunal of fact.¹⁹ It dealt with conflicting factual accounts of events and established the facts on which the case would be presented to the Court for adjudication. Under this system, the Court reserved the power to dispute the Commission's finding of fact. In the right to life cases I show that the Commission was aware of its limitations as a first-instance tribunal of fact, due to language problems, lack of detailed and direct familiarity with the conditions of the region and its lack of power to compel witnesses to appear and testify²⁰. In the majority of the right to life

¹⁷ The ECtHR, Some Facts and Figures, <http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresEN.pdf>

¹⁸ With the ratification of protocol 11 in 1998, the structure of the court was changed with the aim of responding to the increasing applications efficiently. The Court and the Commission were merged into a single body. In the former system the major tasks of the Commission was to decide the admissibility of the applications and arrange friendly settlements between the applicant and the state. Also the commission was conducting investigations when such needs arise. In that system, a case was brought to the attention of the Court only when it was referred by the Commission and after the failure of attempts for friendly settlement between the parties within the set time period.

¹⁹In almost none of the cases all the witnesses who are summoned by the Commission and the applicant are heard. Although, under the convention the state is responsible for facilitating and cooperating the fact-finding exercise of the Commission, this hardly happens. The hearings mostly take place in Ankara or Strasbourg. Some assigned witnesses of the applicant turn down the Commission delegates due to lack of financial resources for their travel. Responsible from gathering the assigned witnesses, in some cases the state declares its incapability in reaching the witnesses due to their being kidnapped by the PKK or the witness' inability to attend the hearings for they are in prison. Sometimes the witnesses who approve the request and inform the Commission of their attendance do not show up at the end. In these cases the Commission asks for a written document from the government with the signature of the assigned witness to make sure that he or she did not go back, intimidated by the government.(Timurtas v Turkey)

²⁰ *Ergi v Turkey*, App. No. 23818/94 paragraph [29].

applications filed in the ECtHR during the 1990s, since primary facts were in dispute, the Commission was required to conduct an investigation despite its limitations.

Despite the fact that the majority of the applications do not reach the stage of judgment, the court's work load has dramatically increased since the 1980s. There were no cases in the 1950s, ten in the 1960s, twenty six in the 1970s, and one hundred sixty nine in the 1980s (Janis *et al* 2008:113). More than 90% of the Court's judgments since its creation in 1959 were delivered between 1998 and 2008.²¹ On 1 January 2009 in total approximately 97,300 applications were pending before the Registry, the Committee and Chambers, and the Court. More than half of these applications have been lodged against one of three countries: Russia, Turkey and Romania.²²

In almost all cases brought against Turkey, the preliminary objection of the government was based on the non-exhaustion of the domestic remedies, a prerequisite for lodging an application. The *Akdivar* case²³, therefore, set a precedent as it was declared admissible under circumstances in which the issue of the exhaustion of domestic remedies was in dispute (Kurban *et al.* Juristras Report). In the *Akdivar* case the Court acknowledged that Article 26 of the ECHR requiring the exhaustion of domestic remedies is relevant only when the domestic remedies exist not only in theory but in practice.²⁴ The exception made in the *Akdivar* case was, however, accompanied by the Court's emphasis that its ruling is confined to the particular circumstances of the present case and it is not to be interpreted as a general statement that remedies are ineffective in this area of Turkey or that applicants are absolved from their obligation of exhausting domestic remedies. The Court's decision of admissibility in *Akdivar* case provided encouragement to other potential applicants from the region, but also created uncertainty, as the Court refrained from making a general statement regarding the inaccessibility of domestic remedies.

²¹ The ECtHR, Some Facts and Figures, <http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresEN.pdf> (retrieved in 10 May 2009).

²² http://www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85/0/ENG_Infodoc.pdf (retrieved in 10 May 2009).

²³ *Akdivar v Turkey* (21893/93), judgment of 30 August 1996. In this case the applicant maintains that the destruction of their houses was part of a State-inspired policy which had affected two million people. The Court eventually finds a violation of Article 8 (right to privacy), and Article 1 of Protocol no 1, (right to peaceful enjoyment of possessions).

²⁴ *Akdivar v Turkey*, (21893/93), paragraph [73-77]

Similarly in *Aksoy v Turkey*²⁵ the Court absolved the applicant from his obligation to exhaust domestic remedies, yet found it unnecessary to examine his allegation regarding the non-existence of domestic remedies as part of an "administrative practice".²⁶ If the Court had referred to an 'administrative practice' preventing applicants from making use of domestic judicial mechanisms, subsequent applicants would have been able to go directly to Strasbourg without having to produce evidence to demonstrate why national remedies were illusory in their particular circumstances (Dembour, 2006: 52). In the years that followed, thousands of applications were rejected due to non-exhaustion of domestic remedies. The flexible interpretation of the requirement of exhaustion of domestic remedies, did however pave the way for other applications to be declared admissible.

²⁵ *Aksoy v Turkey*, (21987/93), judgment of 18/12/1996. In this case the applicant alleges that when he was in custody, he was subjected to torture by the police and because of that now he cannot use his arms and hands. The Court finds a violation of article 3 (Prohibition of Torture), article 5 (Right to Liberty) and Article 13 (Right to Effective Remedy).

²⁶ *Aksoy v Turkey*, (21987/93), judgment of 18/12/1996, paragraph [46].

CHAPTER III

THE RIGHT TO LIFE ARTICLE AND DETENTION CASES

‘Right to Life’ Article

Article 2 on the right to life ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. For the Court, together with Article 3 prohibiting torture, Article 2 enshrines the basic values of the democratic societies making up the Council of Europe. As will be seen in subsequent chapters, however, interpretation of this article can become complicated. The text of the Article is reproduced here for easy reference:

1. Everyone's Right to Life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

This article places both negative and positive obligations on signatory states. The negative obligation of the state is 'not to kill.' More precisely, the state must refrain from killing or planning to kill in all circumstances not prescribed by law. The article also imposes the positive obligation to protect the right to life. The Court, however, is careful in interpreting this obligation as it could result in designating a state liable for almost every death/killing incident. Thus, the Court limits the obligation of states to protect the right to life to cases in which the risk to life is real and immediate, and can be known or ought to have been known by state officials. The case law states that the reason for a narrow interpretation of this positive obligation is the 'unpredictability of human conduct.' In other words, according to the Court, because human conduct is 'unpredictable', the government cannot be held responsible for 'not knowing' about or 'not preventing' every risk to life. Therefore, the obligation to protect the right to life is not absolute but subject to the Court's interpretation in the context of a particular case. States also have a positive obligation to conduct an effective investigation following death and killing incidents and must conduct some form of effective official investigation when individuals are killed as a result of the use of force.²⁷ Under the ECtHR system, the first two obligations, i.e. 'not to kill' and 'to protect the Right to Life', form the 'substantive' part of the Article, while the obligation to carry out an effective investigation is considered 'procedural.'

Another important feature of the right to life article concerns who may bring the application when the victim of the breach of right to life is no longer alive. According to the Convention, the 'right to individual petition'²⁸, belongs to the victim.²⁹ In the ECtHR system the 'victim' is someone whose rights as set forth in the Convention are violated. In right to life cases, applicants are expected to demonstrate why the particular death resulted

²⁷ In the ECtHR system the obligation of investigation concerns not the result of the investigation, but the means, such as the proper preparation of the forensic reports or collecting evidence. Therefore the Court is not concerned whether the perpetrators of the killing are found and detained or not.

²⁸ See Article 48 of the Convention which elaborates who can bring a case before the Court.

²⁹ To clarify the 'victim status' through an example, if I see someone dead lying on the ground and after the exhaustion of domestic remedies regarding the fate of that person decide to take his case to the ECtHR, for the Court to find my case admissible, I need to submit why the death of that particular person puts me in victim status. Therefore, the right to life cases are mainly brought to the Court through the relatives of the deceased.

in their victimization. Therefore in majority of the cases the applicants are the relatives of the deceased. The change in the position of the victim in right to life cases transforms the substance of the subject matter and content of the right granted by the Convention in such a way that the obligation of the state under the article turns out to “protect the right to life, rather than life itself” (Fawcett, 1987).

Detention Cases and the ‘Right to Life’

In detention cases, as opposed to other right to life cases, the *burden of proof*³⁰ is on the state rather than the applicant. This means that the state must prove that there was nothing officials could have done to prevent death in question. The main reasons for this reversal in burden of proof are, first, that the government is considered to have full *jurisdiction* over and the *knowledge* of the course of events leading to death in detention and secondly that detainees are considered to be in a *vulnerable* position. In these cases therefore the government must account for any injuries to the detainees that occur during entry to and exit from a detention center.³¹

My analysis of the cases has shown that ‘detention’ is not necessarily synonymous with ‘in detention centers’. Instead, the category of detention may apply to any space where the state has full control. Because the extent of state control over a particular space is open to dispute and both parties have a stake in whether a particular case will be ‘named’ as detention or not by the Court, it is usually a point of contention between the parties. In this sense, the detention cases can also be considered as a struggle revolving around the notion of space with the aim of inciting the Court to refer, or deflecting it from referring a

³⁰ Proof’s being seen as a burden is a product of the modern theory of law, as in ancient law proof was regarded as the right of one or the other of the contending parties. See, Weber 1967, *On Law in Economy and Society*, pp. 227.

³¹ “Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.”

particular spatial setting as detention. The way detention is ‘named’ is crucial in determining who is liable for the death and the claims of the parties.

For instance in *Çakıcı v Turkey*³², the main point of contention between the applicant and state was the spatial setting in which Ahmet Çakıcı's death occurred. His relatives argued for his disappearing/dying whilst in police custody, while the government's argument was based on the alleged absence of his name in any of the custody records:

Ahmet Çakıcı was a militant member of the PKK organisation. Following an armed clash between the PKK and the security forces on 17 to 19 February 1995, he had been found dead with fifty-five other militants at Kılıboğan Hill. Ahmet Çakıcı had been implicated in the killing on 23 October 1993 of five teachers from Dadaş whom he had reportedly described as “servile dogs of the State”. He most probably disappeared after this incident with the intention of escaping justice and continuing his activities for the PKK.³³

For the government, Ahmet Çakıcı was not in detention, but on Kılıboğan Hill, clashing with state forces at the time of his death. In so doing the state wished to place him within the exception set out in paragraph 2 of Article 2 and deny him standing as a ‘citizen’ with rights by showing he was engaged in a certain illegal action and in the possession of firearms. Partially admitting to the alleged act, the government contended that the issue was not who killed Çakıcı, but rather where he was killed, with the intent to exclude him from the obligation of protection of the Article 2 right to life. In the case that the Court ‘names’ and ‘frames’ the incident as a ‘security operation’ rather than ‘detention’, the Court creates the grounds for the government to evade responsibility and deny knowledge of the incident, unlike in cases of detention, the exclusive knowledge of where is attributed to the state. In the Çakıcı case, the Court found a substantive violation of the Article 2 and declared the state liable for the death.³⁴ A witness, who testified that he was in the same cell with Çakıcı while in detention, led the Court to reject the government’s allegation and decide that Çakıcı was indeed in detention at the time of death.

In these cases, what is at stake for the applicant is ‘spacing’ the deceased under the jurisdiction and within the knowledge of government agents. The government, on the other

³² A very similar case to Çakıcı case is *Ikincisoy v Turkey*, in which the government alleges that Mehmet Ikincisoy was killed in a clash, while the applicant asserts that he is killed by torture in detention. The Court in this case also decides that there is a violation of article 2 from both substantive and procedural aspects.

³³ *Çakıcı v. Turkey* (23657/94), judgment of 08/07/99, paragraph 20.

³⁴ *Ibid*, paragraph 85.

hand, in order not to be found in substantive violation of Article 2, denies *jurisdiction* and *knowledge* by arguing for the existence of another armed individual/group apart from state forces. The attribution or denial of jurisdiction and knowledge is also essential for the attribution of an identity to the deceased party. While proving that the deceased was indeed killed under detention would construct the identity of the killed as a ‘vulnerable’ detainee according to the case law of the Court, being armed places him outside the protected category of ‘citizens.’ How the deceased is identified then, determines which paragraph of the Article 2 will apply, and consequently will be crucial to how the Court decides the case.

The dispute over ‘space’ between the applicant and government also complicates the meaning of detention as a category. For instance in cases of *Özalp*³⁵, *Demiray*³⁶ and *Yasin Ates*³⁷ the government, acknowledging that the deceased were all in detention, contends that they were outside the detention center, being taken by soldiers to reveal the hide-outs of PKK members, and died on the way when explosive material, placed on the road by the PKK, blew up. They contend that although the deceased were under official control and jurisdiction, they were killed by the explosives placed by the PKK in order not to be found in substantive violation of right to life attempted to avoid jurisdiction and knowledge.

*Dundar v Turkey*³⁸ is another good example to demonstrate the significance of spatiality upon the way law functions. Mesut Dundar on many occasions walked in front of the crowd in Kurdish national holidays, carrying the Kurdish colours; yellow, red and green. His activities attracted the attention of the police, and he was taken into custody three times, every time being beaten and tortured by the officers. In July 1992, police officers from Cizre Police Headquarters came to the applicant’s house to take Mesut Dündar to Elazığ Psychiatric Hospital for treatment. Being taken to the Police Headquarters, Mesut Dündar feared he would be killed in the hospital and escaped through a window. The police officers then threatened to kill his father if he did not find his son and bring him back. After promising to bring in his son, the applicant was released. A few

³⁵ *Ozalp v Turkey* (32457/96), Judgment Of 08/07/2004

³⁶ *Demiray v Turkey* (27308/95), Judgment Of 04/04/2001

³⁷ *Yasin Ates v Turkey* (30949/96), Judgment Of 31/08/2005

³⁸ *Dündar v Turkey* (26972/95), judgment of 20/12/2005

months later, Mesut Dündar's strangled body was found near a watermill in Sulak Village. According to an interview made with women from the village who witnessed the incident by *Özgür Gündem*, the pro-Kurdish newspaper, four armed persons, one of whom was thought to be a police officer, had strangled Mesut Dündar while his arms were tied behind his back. Soldiers, who came to the place where Mesut Dündar had been strangled following the killing, dragged his body behind an armoured personnel carrier, claiming that they were doing so because they thought there might be a booby-trap under the body. When the applicant's relatives saw the body of Mesut Dündar at the hospital, they noticed that his body was covered with bruises and spots. In response to these allegations, the government asserted that a PKK flag was found in one of the pockets of Mesut Dündar's corpse indicating that he was murdered by the PKK. Not receiving any concrete results from the domestic investigations as to the fate of Mesut Dündar, the applicant brought the case before the ECtHR, alleging that Mesut Dündar was taken into custody prior to his murder, and that no credible explanation for his death was given by the government. The state contended that its officials cannot be held responsible, since the events that took place following the escape of Mesut Dündar from the police were entirely unknown and the applicant's allegation that his son was killed while in custody had therefore no basis. The government also contended that Mesut Dündar joined the PKK and was killed by members who feared that he would divulge information about their activities. The Court stated that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them found that:

Mesut Dündar was killed in September 1992 that is some two months after he had escaped from the police station, during which time he was at large. It follows, therefore, that it is not for the respondent Government to account for the death of the applicant's son. In the circumstances of the present case, the burden of proving the allegation that his son was killed by agents of the State remains on the applicant.³⁹

The Court decided that there was insufficient evidence to conclude that the applicant's son was killed by, or with the connivance of, state agents. The burden of proof which is

³⁹ Dündar v Turkey (26972/95), judgment of 20/12/2005, paragraph 65

usually on the state in cases concerning death incidents taking place in custody, was reversed in *Dündar v Turkey* on the grounds that Mesut Dündar had escaped from the police station. In addition, the case law regarding the vulnerability of the detainees is not applied in Mesut Dündar's case because he was outside the detention center. If so, does Mesut Dündar, an escapee and therefore a person 'wanted' by the authorities, cease to be a target of state officials when he is outside the police station? Why does the Court, in this case, find that Dündar, having escaped from the police station is no longer in a vulnerable position, and therefore refuse to find a substantive violation of Article 2? What is the relation between the judicial enforcement of the right to life and vulnerability within human rights discourse? How is 'vulnerability' discursively, materially and spatially constructed in relation to human rights norms and transformed into legal language? Is Mesut Dündar, as an escapee, considered to be no longer under the jurisdiction of the State when he is outside of the detention center? Thus, how is the limit of the state's jurisdiction and knowledge constructed and maintained in human rights law? In the following chapters I will try to answer these questions using examples from diverse cases.

CHAPTER IV

*For millennia, man remained what he was for Aristotle:
an animal with the additional capacity for a political
existence: modern man is an animal whose politics
place his existence as a living being in question.
(Foucault, History of Sexuality)*

SUFFERING AND THE RIGHT TO LIFE

Introduction

The way torture is defined in law and its image in the public psyche in different periods needs to be examined in order to trace the evolution in the relationship between pain, truth and the body. State torture has not always been strictly prohibited in national legislation or religious law. On the contrary, in the intersection of religion and law, the pain and suffering experienced in the practice of torture used to be seen as providing the socially redeeming benefits of moral and spiritual cleansing, therefore indispensable for the discovery of truth (Nagan&Atkins, 2001). The employment of torture in past times was therefore an important example of the way in which the legal institutions reflect broader cultural logic in the sense that torture testified both to the ‘meaningfulness of human suffering’ and the corresponding ‘valuelessness of human volition’ (Silverman, 2001: 8). The ECtHR system and international law in general, which rest on the ‘meaninglessness of suffering’ and the ‘freedom of individual choice’, conceive Article 3 in ECHR on torture as

allowing no derogation, regardless of the circumstances. The main reason for my considering the death incidents under detention in relation to Article 3 on torture in ECHR is the narrow conceptualization of violence in the Court's reasoning and judgments, as a result of which the possibilities of exerting violence in detention is restricted to the practice of torture, thereby excluding various other practices with lethal consequences such as causing one to fall off or commit suicide. As the prototype of the free individual projected by a liberal creed lies at the centre of the Convention and the Court's reasoning, the cases I will analyze in this chapter, I believe, will demonstrate how the Court, by constantly treating some detained individuals as vulnerable, non-agentive victims subjected to suffering, and others as being in possession of free will and agency, frequently strays from its established case law on injuries occurring in detention.

In this chapter, I will analyze the cases in which death occurred in detention centres by looking at the Court's understanding of the concept of detention. Although according to the case law of the Court, detention centres are generally considered as places where the state has full jurisdiction and knowledge regarding the course of events, I argue that torture as a performance is vital in the construction of a particular spatiality as a detention centre and the identification of the deceased as vulnerable. I suggest that the vulnerability of the detained, referred to in the case law of the Court, is not all-encompassing, but an exclusive category depending on the *performativity* of the deceased at the time of being killed. Vulnerability, therefore, is not an identity imputed on any detainee, yet the identity of the detainee is 'performatively constituted' (Butler, 1990: 25), by the Court through a selective evaluation of the *position* of the detainee vis-à-vis the state whereby the questions of jurisdiction and knowledge that the government is considered to be in possession of, is assessed and judgment is made. If rights are relations between right-subjects (persons) and right-objects (persons, physical objects, abstract legal entities) (Raz, 2003: 176), I suggest that the attribution of the cause of death as torture is decisive in the Court's reasoning due to the uneven relation that the practice of torture constitutes between the tortured subject and the torturer, in which the tortured, vulnerable and non-agentive, is reduced to a suffering being. As this is the case, it is even possible to trace references to torture in

disappearance cases where neither the place where the deceased is taken is known nor is the body of the disappeared ever found.

Human Rights and Torture

In *Gomi v Turkey*⁴⁰, four prisoners died and seventy were wounded as a result of force used by prison guards in Ümraniye Prison. The case came before the ECtHR. The state acknowledged the involvement of prison officials in the incident and alleged that use of force was inevitable as the prisoners, holding desks, radiator pipes and parts of beds as weapons, managed to come out of their cells to the prison corridor by breaking the main door of the ward. According to the applicant, the rebellion was a consequence of violence used against the prisoners during their transfer to the prison. The prisoners were then denied medical treatment and were allowed no visitors. The Court found no substantive violation of right to life as the case was framed as a security operation in which the state forces were found to have used proportional force.⁴¹ Thus the fact that the applicants were detainees does not suffice for the Court to find a violation of the right to life. In *Gomi v Turkey*, two points are worth emphasizing in order to understand the shift in the Court's attitudes towards detainees and the type of violence prohibited by the Convention. First, the Court distinguished previous case law which attributes vulnerability to the detainees. As the detainees at the time of death were involved in a confrontation with the prison guards, their specific *performance* with makeshift arms strips them of the vulnerability that the Court imputes to detainees in its case law. Secondly, the violence used by the prison guards against the detainees is not framed as torture by the Court, as not every kind of violence to detained persons is viewed as torture. The Court frames the confrontation between the detainees and prison guards as an encounter in which the concept of proportionality in terms of the use of force by the prison guards is in dispute, rather than as torture which implicates an uneven relationship between the two sides.

⁴⁰ *Gomi v Turkey* (35962/97), judgment of 21/03/2007

⁴¹ Similar cases are *Ceyhan Demir and Others v. Turkey* (34491/97) and *Satık v. Turkey* (no. 36961/97)

The disproportionality of torture as a way of exerting force and the uneven relation that the practice of torture inscribes between the tortured and the torturer are depicted by Elaine Scarry (1987) as she discusses torture and phenomenology of pain with respect to the bible where being God is conceived to speak as a being that has only voice. Humans, on the other hand, have bodies on which God's voice is inscribed. In a similar vein, for Scarry, through the process of torture, the torturer turns into a voice asking questions and making further demands, while the tortured is converted into a body under severe corporal pain. The transformation of the torturer into a God-like being, without body but voice, and the tortured into a body without proper voice; groaning and clamoring is what marks torture as an acutely disproportional act that constructs an uneven relationship between the tortured and torturer, like the relationship between human and God. In *Gomi v Turkey*, the Court does not find a substantive violation, but only a procedural one, since the detainees taking part in a rebellion did not fit in the Court's projection of 'vulnerable detainee' referred in its case law and therefore are not constructed in an uneven relationship to whom the force used can be considered to be disproportional.

Torture as a form of punishment or a way of obtaining information is frequently used in particular circumstances by state officials regardless of the dichotomies of first world-third world or democratic-totalitarian (Avelar, 2004). Torture is defined by the UN Committee Against Torture (CAT) as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him information or a confession, punishing him for an act he has committed or is suspected of having committed, or intimidating or coercing him, [...] when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'⁴² Thus, in international law, torture is defined as a particular form of inflicting pain by state functionaries for specific purposes, rather than a 'lawless rage' (Foucault, 1978). The act of cruelty named as torture when used by the state, if committed by an individual without an official status, would not constitute torture in the context of international law, but an assault (Scott, 1995: 3). Torture is a technique that has its own rationale driven by a particular purpose, 'a

⁴² Article 1 of Convention Against Torture and Other Inhuman, Degrading or Cruel Treatment or Punishment (CAT).

calculated production of an effect” (Avelar, 2004: 45) which inscribes a particular power relation and sets the terms of space. Thus, following DeCerteau’s conceptualization of space as a concept that ‘‘occurs as the effect produced by the operations that orient and situate it’’ (1984: 117), the *effect* of torture as assigning utterly uneven positions to the tortured and his torturer is the major constitutive of the category of detention. What the Court traces in the facts presented by the parties is such a relation which connotes that death was a result of disproportional force used by state officials in order to find a violation of right to life from both substantive and procedural aspects. The significance of torture will be better understood as I evaluate other cases in which the cause of death is always torture for the applicant, yet changes for the state depending on the particularities of the case -such as suicide, natural sickness, accidental fall...etc.

A) Suicide

AA and others v Turkey is an example of the struggle between the applicant and state in terms of the attribution of torture and suicide respectively as the cause of death. CA was arrested in Diyarbakir in August 1994, for alleged links with the PKK. Two days after his arrest, he was found hanged in his cell. The forensic report states that CA had hanged himself when he was alive and it cannot be inferred that he was killed before being hanged. In March 1995, the District Attorney of Diyarbakir heard the testimony of three officers responsible for questioning CA. Denying the allegations, the officers refuse that marks found on the body of the deceased were caused by them. By a ruling of April 1996, the Criminal Court of Diyarbakir acquitted the three officers due to lack of sufficient evidence, finding that CA had committed suicide due to his abnormal psychological state. The Court of Cassation upheld the ruling of First Instance Court in November 1998, and the applicant, having exhausted the domestic remedies, takes the case to the ECtHR where the applicant alleged that CA died from torture inflicted in detention. The state, presenting the autopsy report before the Court, argues that CA committed suicide. The difference in the allegations of the parties also point to a difference in the identification of the deceased; for the applicant, CA, a vulnerable detainee, was subjected to torture and died as a result of

disproportional use of force by the officials, while for the government, CA, a free individual, died as a consequence of his own choice to take his life.

The first question that the Court must respond to is whether CA was killed by the state officials or by his own hand. As neither the autopsy report nor the witness statements indicate that CA died as a result of torture, the Court dismisses the first question on the grounds that the allegation is not proved to the necessary standard of proof adopted by the Court which is proof 'beyond reasonable doubt.' The second question the Court has to tackle under the right to life article is whether the state could have foreseen CA's suicidal tendencies and taken preventive measures to protect his right to life. The change of the state's status from perpetrator to protector, thus of the degree of responsibility attributed to the state for CA's death alters the scope of the case, which in turn affects the identities of the participants (Felstiner *et al*, 1980). The Court must then go on to assess whether the authorities knew or ought to have known of CA's suicidal tendencies by taking into consideration the 'difficulties of policing modern societies', the 'unpredictability of human conduct,' the 'availability of resources' and priorities.⁴³ Moreover, the positive obligation of the state to protect right to life involves not every risk to life, but only the situations in which the state remained inactive in the face of real and immediate risks. In CA's case and other similar cases⁴⁴, the questions of whether there indeed was a real and immediate risk and whether prison officials should have known about it are measured through the mental health reports on CA before his death. The applicant, however, did not provide the Court with any report indicating that CA had psychological problems which would have required

⁴³The exact phrase the Court uses in its case law to decide whether the state has failed its positive obligation or not is, "Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise in the context of where the risk to a person derives from self-harm, such as a suicide in custody, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual and, if so, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

⁴⁴ The phrase appears in all cases in which the Court considers whether the government has failed to fulfil its positive obligation under the article, which is to protect right to life : *Uçar v Turkey* App. No. 52392/99 paragraph [84] , *Akdoğan v Turkey* App. No. 46747/99 paragraph [45], *Tanrıbilir v Turkey* App. No. 21422/93 paragraph [70], *A.K and V.K v Turkey* App. No. 38418/97 paragraph [42], *Kılavuz v Turkey* App. No.8327/03 paragraph [68], *A.A and Others v Turkey* App. No. 30015/96 paragraph [45].

the authorities to take special care because of potential self-destructive behaviour. Basing its decision on the absence of such a report, the Court concluded that it would put a disproportionate burden on the authorities to hold them responsible for failing to protect the right to life of CA and therefore found only a procedural violation. For the Court, as there was no medical report, he was found to be mentally *normal* and state officials could not be expected to anticipate suicidal tendencies in a *normal* man due to the ‘unpredictability of human conduct.’⁴⁵

There are a total of seven cases in which the state denies responsibility on the basis of suicide. I chose *AA and others v Turkey* is because in CA’s case, the Court dismisses the applicant’s allegation and does not find a substantive violation of right to life despite the existence of an autopsy report showing that CA was subjected to torture.⁴⁶ Constructing CA as a free agent, who chose to commit suicide by his own will while in detention, the Court does not find a substantive violation of the article, in contradiction with its case law which puts the liability of death incidents occurring in detention on governments. The fact that evidence of torture was seen on CA’s body is a matter that will be dealt with under Article 3, prohibition of torture, not the right to life by the Court; unless it can be proved that it is specifically torture which is the cause of death.

B) Accidental Fall

The question of what constitutes a breach of Article 2 should be considered in relation to the Court’s tendency to measure the suffering that an individual had to experience while dying in its evaluation of whether there is a violation of the right to life or not. In that sense not only cases in which death is seen as a result of suicide but also the ones in which death is a result of a fall are excluded from constituting a substantive violation of Article 2 by the

⁴⁵ In *Kilavuz v Turkey* case, similarly, the applicant again alleges that Kilavuz did not commit suicide as alleged by the authorities, but was killed during detention. The Court, in this case, is led to give a substantive violation of article 2 to the state asserting that the state failed to protect the right to life of Mr Klavuz; since a medical report drawn during his detention stating that he was suffering from psychological problems exists. The court concludes that because his state of mind was not normal and this fact was known by the authorities, some extra measures should have taken by the state to prevent his suicide.

⁴⁶ See also *Akdogdu v Turkey*(46747/99) which is also very similar to *AA and others v Turkey* in that the Court decides that death came as a result of suicide despite the autopsy report which suggests that the deceased was subjected to torture.

Court. In *H.Y. and Hu.Y. v Turkey*⁴⁷, the applicants are the parents of Mahmut Y. Mahmut Y. was arrested at the age of 15 in 1997 on the basis of information from a PKK member. Upon his arrest he went through the usual medical checks and was found healthy. Three days later he died. The state and the witnesses (inmates sharing the same cell with Mahmut Y.), claim that Mahmut fell off one of the two wooden benches placed in the cell, hitting his head on the ground. The forensic report confirms the state's claims, finding the cause of death to be 'acute dural hematoma' which could be caused by acute trauma such as a fall. During the domestic proceedings, the prosecutor demanded a second forensic examination of the body to determine whether there were traces of torture on the body. In its final report, the forensic committee concludes that "death could have been caused both by a direct traumatic shock as a result of an accidental fall or a fall caused by a third party, without it being possible to favour one of the assumptions."⁴⁸ However, Mahmut's uncle who was heard during the domestic proceedings claims that he saw some bruises and scars that were bloody on the shoulders of Mahmut's corpse. The evidence of torture noticed by the relatives was explained by forensic experts to be due to 'post-mortem changes'. The domestic proceedings resulted in the acquittal of the accused officer due to the absence of forensic evidence that could support the allegations of Mahmut's relatives. Despite the Court's case law which requires the government to provide a satisfactory and convincing explanation as to the allegations of death and injury occurring in detention, in this case, ascertaining that death came in consequence of a fall, the Court rejected the applicant's allegation, since it did not meet the required burden of proof (beyond reasonable doubt) and found no substantive violation of Article 2.

In *Erikan Bulut v Turkey*, the applicant, Erikan Bulut, who was arrested in Istanbul by officers from the Anti-Terrorism Branch of the Pendik Security Directorate on suspicion of aiding and abetting the PKK, alleges he was made to drink drugged tea as a result of which he lost consciousness and found himself in the hospital, having fallen out of a fifth-floor window of the office of the Security Directorate Building. The state denied the applicant's allegations and attested that when Erikan Bulut was taken to the office to sign his release report, he ran and jumped out of the window. As the office in which the incident took place

⁴⁷ *H.Y. and Hu.Y v Turkey* (40262/98), paragraph 33.

⁴⁸ *Ibid*, paragraph 53

was solely used by police officers, the state contends there was no real and immediate risk on the basis of which the police officers should have taken extra care or placed window guards to prevent Erikan's suicide. The absence of risk, alleged with a view to support the state's denial of any positive obligation to protect the right to life, was accepted by the Court and Turkey was found to have breached only the procedural aspect of the Article.

Erikan Bulut's case was heard by the Court after the police officers involved were acquitted in domestic proceedings. According to the Court:

Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of facts for that of the domestic Courts and as a general rule it is for those Courts to assess the evidence before them. Though the Court is not bound by the findings of domestic authorities, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those authorities.⁴⁹

Fact-finding exercises were actively carried out by the Commission in the early 1990s for the cases lodged from the State of Emergency region due to the explicit absence of such proceedings and structural inaccessibility of legal mechanisms under the State of Emergency Rule.⁵⁰ The Court, however, in cases for which domestic proceedings exist, but are alleged to be 'unjust' by the applicants, will not reexamine the finding of facts, unless there are cogent elements to lead it to depart from the findings of the domestic authorities. In Erikan Bulut case the Court decides to evaluate the case based on the facts established by the domestic Courts, which means that the evidence such as forensic reports and witness statements as set forth in the case file during the domestic proceedings. However, in Erikan

⁴⁹ Erikan Bulut v Turkey, (51480/99), paragraph 28.

⁵⁰ The first legislative decree no. 285 (10 July 1987), established a regional governorship of the State of Emergency in ten of the eleven provinces of south-east Turkey. Under Article 4 (b) and (d) of the decree, all private and public security forces and the Gendarmerie Public Peace Command are at the disposal of the regional governor. The second decree no. 430 (16 December 1990), reinforced the powers of the regional governor, for example to order transfers out of the region of public officials and employees, including judges and prosecutors, and provided in Article 8: "No criminal, financial or legal responsibility may be claimed against the state of emergency regional governor or a provincial governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this Decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of individuals to claim indemnity from the State for damage suffered by them without justification."

Bulut's case, this resulted in an inconsistency between the statements of Erikan Bulut's current lawyer and Erikan Bulut's own statement before the domestic court. Because the Court accepted the testimony of Erikan Bulut given during the domestic proceedings where he denied having been subjected to torture, it was concluded by the Court that there is an inconsistency between the applicant and his representative.⁵¹ Accepting that there are divergent versions as to the circumstances which led to the Erikan Bulut's fall from the window, the Court decided that there is an insufficient evidentiary basis to conclude that the applicant was thrown out the window by the police officers. Thus the Court takes the position that it will recognize the vulnerability of the applicant when it has been established that he has been tortured, but does not recognize such vulnerability when the validity of his own statement is disputed on the basis that he was tortured. In all such cases⁵², the Court finds only a violation of Article 2 based on the state's failure to conduct an effective investigation after death incidents. The officials are discharged of their substantive obligations under Article 2 through the case law which considers human as unpredictable and the state as responsible only for preventing acts it could be expected to predict.

The Court recalls that after spending one night in custody, the applicant was seen by a doctor on the day of the incident before being brought to the Pendik Security Directorate Building to be released. There is no mention of a psychological distress in the medical report and it is undisputed that the applicant was aware of the fact that he was about to be released. As a result, the Court concludes that there is no evidence about the applicant's actions or behavior that ought to have put the authorities on notice that he posed a danger to his life.⁵³

Thus, other kinds of violence, for instance the possibility of Erikan's being thrown out the window by police officers or in the case that CA indeed committed suicide but not tortured to death, the possibility that he committed suicide due to his psychological state as a person subjected to torture - unless conceived within the meaning of torture do not amount to a substantive violation of the right to life article within the Court's case law. The restriction of the type of violence to torture in detention, however results in the exclusion of other violent acts that cannot be named as torture from constituting a violation of the

⁵¹ Erikan v Turkey (51480/99), paragraph 16

⁵² Kilavuz v Turkey (8327/03).

⁵³ Erikan Bulut v Turkey (51480/99), paragraph 36.

Convention. Hence in detention cases, death amounts to a substantive violation of the article in terms of state's liability for the death, only when death is the consequence of torture or ill-treatment. In the majority of detention cases a substantive violation of Article 2 is followed by the Court's finding a violation of the Article 3. This is even the case in disappearance cases where the body of the deceased is never found. However, this time the Court finds a violation of the Article 3, together with the Article 2, for the relatives of the deceased in the absence of the ones who are the direct victims of right to life.

C) Disappearances

There are fourteen cases⁵⁴ in which the names of the alleged detained people do not show up in custody records. All of these cases are lodged to the Court from the provinces under State of Emergency Rule. What distinguishes these cases from the others is that while in the cases outlined above, the state acknowledges that the persons in question were detained or at least had a confrontation with the state forces, and accounts for the cause of death; in these cases detention is unacknowledged. In disappearance cases where the detainees are kept is not known; but what is known is that they are seen "being taken away to an unidentified place of detention."⁵⁵ The pattern in majority of these kinds of cases is that the applicants complain about the unacknowledged detention or disappearance of their relatives who were taken into custody following an operation in the village. The state defends itself by the non-existence of such a security operation as alleged by the applicant and the absence of the names of those who have been alleged to have disappeared in the custody records. The main dispute between the applicant and the state is over the space in which death occurred. For the former, what is at stake is to prove to the Court that the person in question, allegedly dead, was indeed taken and detained by the state forces so that the burden of proof can be put upon the state. When confronted with such an allegation whose possible veracity would potentially result in Court's finding a substantive violation

⁵⁴ For disappearance cases, see; *Cicek v Turkey* (25704/94), *Ipek v Turkey* (25760/94), *Orhan v Turkey* (25656/94), *Osmanoglu v Turkey* (48804/99), *Kurt v Turkey* (24276/94), *Diril v Turkey* (68188/01), *Tas v Turkey* (24396/94), *Timurtas v Turkey* (23531/94), *Akdeniz v Turkey* (25165/94), *Akdeniz and others v Turkey* (23954/94), *Ertak v Turkey* (20764/92), *Suheyla Aydin v Turkey* (25660/94), *Tanis v Turkey* (65899/01).

⁵⁵ *Orhan v Turkey* (25656/94).

of right to life, the state wholly denies the alleged presence of the disappeared people in any of its detention centers. In disappearance cases the applicant relies on witnesses, while the state rests its claim upon its records on which the name of the disappeared person never appears. The Court, in these cases, does not bound itself with the custody records kept by state officials; on the contrary, acknowledges the unreliability of these records in its case law and notes that the absence of the names of the allegedly disappeared people cannot be seen to be conclusive proof that they were not detained.

In these cases what is referred as death is actually the disappearing of the person. For the Court, the more time goes by without any news of the detained person, the greater the likelihood that the person has died.

In the general context of the situation in south-east Turkey in 1994, it can by no means be excluded that an unacknowledged detention of such persons would be life-threatening [...] It is to be recalled that the Court has held in earlier judgments that defects undermining the effectiveness of criminal law protection in the south-east during the period relevant also to this case, permitted or fostered a lack of accountability of members of the security forces for their actions.⁵⁶

As the body of the disappeared is never found, therefore not subjected to post-mortem analysis for the identification of the facts regarding the case, the absence of body imputes more importance on the witness statements. Since most of the incidents of disappearances occurred in a village setting, often following an operation in or around the village. In a large number of cases villagers' testimony that the deceased was last seen in the hands of the state forces suffices for the Court to give both substantive and procedural violations of the Article. In cases where the government denies detention, but concedes the operation, the government's witnesses are mainly village guards and soldiers who participated in the particular military operation, in consequence of which the persons in question are allegedly detained. The commanders of the operations mostly do not show up despite the request of the Commission during its fact-finding exercise and remain unheard by the Commission delegates. In the majority of the disappearance cases, the Court finds a violation of right to life from both substantive and procedural aspects.

⁵⁶ The phrase appears in all disappearance cases.

Touching on sensitive political issues and confronted with allegations of grave human rights violations, the court has been careful to maintain the appearance of impartiality:

It is to be further observed that the applicant and his witnesses were simple, unsophisticated persons who were testifying in regard to matters of great personal concern and pain, with attendant risks that their interpretation of events might be coloured by emotion.⁵⁷

The emotion attributed to the testimony of the applicant does not only come from the pain of having lost a relative, but also the presumed political motivation of the applicants as inhabitants of a place which has become the scene of a perpetual conflict between the state forces and the PKK:

The Court cannot overlook either that the area in which the applicant and his witnesses lived at the time was part of a wider region which was the scene of fierce fighting between the PKK and the security forces. It cannot be excluded that many inhabitants of that region, including in the applicant's own locality, might have sympathised with the PKK cause and seized on opportunities to discredit the government forces by making unfounded allegations against them⁵⁸.

The case law also shows that the Court is also aware of the vulnerability of the political situation in the south-east in terms of human rights violations:

Between 1992 and 1994 a large number of disappearances and unexplained killings occurred in south-eastern Turkey in the context of counter-insurgency measures against the PKK.⁵⁹

The facts presented by applicants are similar in most of the disappearance cases. Yet, *Kurt v Turkey*⁶⁰ differs from other unacknowledged detention cases, not necessarily in terms of the facts presented by the applicant, but the way the Court reasoned and rendered its judgment. The incident referred to in the *Kurt* case took place in Bismil, in the village of

⁵⁷ Ipek v Turkey (25760/94), paragraph 115.

⁵⁸ Ibid, paragraph 117.

⁵⁹ Cicek, Orhan, Timurtas

⁶⁰ Kurt v Turkey (24276/94).

Ağilli in November, 1993. The applicant alleged that following intelligence reports that the 'terrorists' would visit the village, the security forces took up positions in the village. They stayed for three days at the end of which ten houses were burnt down and the villagers were told to evacuate the village. On the second day of the operation, the soldiers gathered the villagers in the school yard. One of the suspected persons they were looking for was Uzeyir Kurt who was not at the schoolyard at the time of the gathering. Upon receiving the information that Uzeyir Kurt was in his aunt's house, the soldiers went to the house and arrested him. He spent two nights with soldiers in the house of another villager, Hasan Kılıç. On the following morning, Uzeyir Kurt's mother received a message from a child that Uzeyir Kurt wanted some cigarettes. She took the cigarettes to Hasan Kılıç's house. Outside the house, she saw him surrounded by ten soldiers and six village guards, with bruises and swellings on his face. Being told to leave by the soldiers, she left and this was the last time she saw Uzeyir Kurt and there is no evidence that he was seen elsewhere after this time.

The government asserts in response to the allegations that Ağilli is a small village from which about fifteen men and women had joined the PKK, one of whom was Türkan, the granddaughter of the applicant. An operation did take place in Ağilli, yet Uzeyir Kurt was not taken into custody by the security forces. There was no reason for him being taken as he did not have any previous history of detention or problems with the authorities. For the government, Uzeyir Kurt either joined the PKK or was kidnapped by the PKK. It was confirmed by the other villagers that the shelter, found outside the village by the security forces after the operation, was used by Uzeyir Kurt in his contacts with the PKK.

The Commission held a hearing in Ankara and listened to the testimony of the witnesses and the applicant. The Commission rejected the government's contention that Uzeyir Kurt was either kidnapped by the PKK or left the village to join the organization, since the government's allegation is without any basis and cannot rebut the applicant's eyewitness account of her son's detention. In the end, the facts of the case established by the Commission and presented to the Court were that the applicant saw Uzeyir Kurt surrounded by soldiers and village guards outside Hasan Kılıç's house and this was the last time he was seen by any member of his family or anyone from the village. The Commission however decided that Uzeyir Kurt's case does not fall within the scope of

Article 2 due to the absence of any evidence as to the fate of Uzeyir Kurt subsequent to his detention in the village. The Commission found that facts of the case support a claim under Article 5⁶¹ (Right to Liberty) rather than Article 2. In her submission to the Court, the applicant asserted that torture, unexplained deaths in custody and disappearances are common practices in the southeast Turkey, and the routine nature of these practices should lead the Court to find that Uzeyir Kurt was also a victim of such practices. The Court as a mechanism dealing with individual complaints refused to find that Uzeyir Kurt died in custody simply because there is a well established practice of disappearances on the part of the Government. The Court stated:

Almost four and a half years have passed without information as to his subsequent whereabouts or fate. In such circumstances the applicant's fears that her son may have died in unacknowledged custody at the hands of his captors cannot be said to be without foundation. She has contended that there are compelling grounds for drawing the conclusion that he has in fact been killed.... However, like the Commission, the Court must carefully scrutinize whether there does in fact exist concrete evidence which would lead it to conclude that her son was, beyond reasonable doubt, killed by the authorities either while in detention in the village or at some subsequent stage.⁶²

The Court did find a violation of the right to liberty in Uzeyir Kurt's case based on witnesses' description of Uzeyir Kurt standing in the middle of soldiers and village guards, and therefore in detention. Yet what is not known and cannot be known by the Court is whether or not he died while surrounded by state forces. Therefore the Court analyzed the case through Article 5 (right to liberty) rather than the right to life on the basis of the assumption that Uzeyir Kurt is still alive in the absence of contrary evidence in support of his death.

Orhan v Turkey is one of the cases that took place in Cağlayan village, Kulp. In this case the applicant alleged that the first time soldiers arrived in the village, the *imam* announced that everyone was asked to assemble in front of the mosque by the commander who in turn informed the villagers that their houses would be burnt so they could leave and

⁶¹ Article 5 of the ECHR is "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."

⁶² Kurt v Turkey (24276/94).

pick up their possessions. The soldiers set fire to the houses in the village. Given the permission by the Kulp District Gendarme Commander to leave after harvesting their crops, the villagers waited to harvest their crops before leaving the village. Eighteen days later, the soldiers came back, this time in larger numbers. The soldiers told the applicant's two brothers and his son that the Commander wanted to see them and that they could come back after they saw the commander. They were then taken by the soldiers to the Gümüşsuyu Village where a number of villagers also saw that the Orhans were with the soldiers there, asking for help.

The government acknowledged that there had been numerous counter-insurgency military operations in the province of Diyarbakır at that time, but denied having held an operation and taken the Orhans into detention. Finally, the Court, having already disputed the accuracy of custody records in the area for the time, accepts that the Orhans were initially detained by the soldiers in Lice Boarding School which had a separate military complex at that time.⁶³ The Court views the Orhan case as a right to life case, distinguishing it from the Kurt case, because;

Üzeyir Kurt was last seen surrounded by soldiers in his own village, whereas the Orhans were last seen being taken away to an unidentified place of detention by authorities for whom the State is responsible.⁶⁴

Another reason for the Court's distinguishing the Orhan case from the Kurt case is related to the time that had passed since the Orhans were last seen:

In this respect the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died. The passage of time may therefore to some extent affect the weight to be attached to

⁶³ The name of Lice Boarding School appears in a large number of disappearance cases. As a result of the constant appearance of the name of the school in relation to torture and disappearance incident, the Court asked the authorities in several cases (*Orhan v Turkey*, *Cicek v Turkey*) the name of the officer in charge of the military complex in Lice Boarding School, who appears frequently in the testimonies given in unacknowledged detention cases. However, the name of the officer has never been submitted to the Court and the officer was not listened as a witness by the Commission delegates. The Court asks the government plan of the place and the officers on duty there. However only a plan of the school in which the military complex was excluded was handed in to the delegates. (*Cicek v Turkey*).

⁶⁴ *Orhan v Turkey* (25656/94) paragraph 330 and *Akdeniz v Turkey*

other elements of circumstantial evidence before it can be concluded that the person concerned is to be presumed dead. In this respect the Court considers that this situation gives rise to issues which go beyond a mere irregular detention in violation of Article 5. Such an interpretation is in keeping with the effective protection of the right to life as afforded by Article 2, which ranks as one of the most fundamental provisions in the Convention (...).⁶⁵

The Court also sees *Timurtas v Turkey*⁶⁶, another unacknowledged detention case from Cizre, as a right to life case, distinguishing it from the Kurt case again by the length of time that passed since the disappearance:

Six and a half years have now elapsed since Abdulvahap Timurtaş was apprehended and detained – a period markedly longer than the four and a half years between the taking into detention of the applicant's son and the Court's judgment in the Kurt case. Furthermore, whereas Üzeyir Kurt was last seen surrounded by soldiers in his village, it has been established in the present case that Abdulvahap Timurtaş was taken to a place of detention – first at Silopi, then at Şırnak – by authorities for whom the State is responsible.⁶⁷

How the Court distinguishes these cases is important because it is on this basis that it decides on the compensation that the government must pay. Ronan Shamir (1996: 233) uses the term 'conceptualism' to understand law's mode of operation:

Conceptualism is a mode of cognition based on the belief that the most accurate and reliable way for knowing reality (hence "truth") depends on the ability to single out the clearest and most distinct elements that constitute a given phenomenon. Conceptualism is a praxis of extracting and isolating elements from the indeterminate and chaotic flow of events and bounding them as fixed categories. Each concept must relate to only one aspect of things, and the pure concept is simple and well demarcated, in contrast to vague and flexible images and sensory data. Conceptualism, in short, works through isolation, division, separation, and fixity, conceiving reality as a series of moments and not as an ongoing process.

It is possible to consider the Court's distinguishing the Kurt case from other disappearance cases and analyzing it under Article 5 rather than Article 2 through the law's

⁶⁵ *Timurtas v Turkey, Cicek v Turkey, Orhan v Turkey...* etc.

⁶⁶ *Timurtas v Turkey* (23531/94).

⁶⁷ *Timurtas v Turkey*, paragraph 85.

“conceptualist” mode of operation. In the Kurt case, despite its acceptance that Üzeyir Kurt was last seen surrounded by soldiers and referring to the circumstances as detention, the Court freezes that moment and decides to evaluate the case through Article 5 as opposed to other similar cases where the disappeared individuals were last seen being taken by officials. Due to the conceptualist mode of operation, the subsequent fate of Uzeyir Kurt becomes unknown to the judges who are therefore led to view the case as an issue of liberty rather than life. The Court simplifies chaotic flow of events by associating certain moments or scenes with specific articles, whereby similar stories are seen to fall under different articles.

In disappearance cases the Court finds a violation of Article 3 (Prohibition of Torture) together with a violation of Article 2 despite the absence of the body of the disappeared. Yet, the breach of Article 3 is found not with respect to the disappeared person but to the applicant as the body of the former is never found. For example, in *Cicek v Turkey*, the applicant stated:

...the disappearance of her two sons at the hands of the security forces constitutes inhuman and degrading treatment contrary to Article 3 of the Convention in respect of herself. She accordingly requests the Court to find that the suffering, which she has endured, engages the responsibility of the respondent State under Article 3 of the Convention.

The government, in response, stated that “there is no causal link between the alleged violation of her sons’ rights under the Convention and her distress and anguish.”⁶⁸ The Court decided that there is a violation of Article 3 for the applicant with respect to the uncertain situation in which the applicant inquired for the whereabouts of his son or requested to be given his body:

The Court observes that the applicant has had no news of her sons for almost six years. She has been living with the fear that her sons are dead and has made attempts before the public prosecutor and requested the authorities to be at least given their bodies. The uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time has undoubtedly caused her severe mental distress and anguish...Having regard to the circumstances described above as well as

⁶⁸ *Cicek v Turkey* (25704/94) paragraph 171.

to the fact that the complainant is the mother of victims of grave human rights violations and herself the victim of the authorities' complacency in the face of her anguish and distress, the Court finds that the respondent State is in breach of Article 3 in respect of the applicant.⁶⁹

In the case law, the type of incidents covered by Article 3 is differentiated on the basis of the degree of suffering. Not every act that inflicts pain is called torture. Article 3 also covers acts which do not amount to torture, but are referred as "inhuman and degrading treatment." For instance in *Cicek v Turkey* and similar disappearance cases, when the Court finds a violation of Article 3 with respect to the relatives of the disappeared person, the suffering caused by the disappearance and the indifferent attitude of the state officials are referred as not torture but inhuman and degrading treatment.

Alan Hunt argues that the elements of ideology cannot be reduced to a mere reflection of economic or social relations, yet the ideology itself has an internal discourse, an internal dimension that the semiotics seeks to grasp through the concept of 'sign' (Hunt, 1993). I suggest that in the type of detention cases analyzed in this Chapter, Article 3 is that sign through which the Court evaluates whether there is a violation of the right to life. However, in cases where the Court equates disappearance with death, as the disappearance of individuals makes it impossible for their bodies to be analyzed post-mortem, the finding of violation of Article 2 is followed by a violation of Article 3 with respect to their relatives. I suggest that the reason for this is related to the case law which portrays detainees as vulnerable and therefore in need of state's protection. Through finding a violation of Article 3, thus stating that a detainee is subjected to torture, the identity of the detainee is constructed as vulnerable in compliance with the case law on detention. Therefore the detainee's death is considered to amount to a violation of right to life, since the vulnerability of the detainee makes it impossible for the state to justify its use of force by arguing that it was 'absolutely necessary.' It is through torture that the Court constructs the identity of the detainee as a suffering being therefore vulnerable or vice versa, because torture, as an utterly disproportional act, inscribing an uneven relation between the detainee and the officials, helps the Court to evaluate the circumstances in which death took place. In other words, the circumstances in which one can be reduced to a body without voice, as

⁶⁹ Ibid, paragraph 173-174.

Scarry argues, or to someone whose voice becomes inaudible in her demands for inquiry from state officials while searching for a body, either dead or alive constitute the conditions for the Court to evaluate the identities of the deceased as a villager or a militant, a vulnerable detainee or a rebel. The reason for this is that the circumstances through which torture can be used as a technique by the officials requires an already uneven relationship between the two sides. The disproportionality that the practice of torture entails and the negation of the state's claim of its use of force as absolutely necessary through the construction of the detainee as vulnerable are significant in the Court's evaluation of whether an act constitutes a violation or not.⁷⁰ Once an individual can be constructed as vulnerable within the circumstances of his/her death, the Court can even associate open spaces such as villages or streets with detention centres and treat them as places where the state has full jurisdiction and knowledge.

Villagers as Detainees

The impact of torture in the Court's decision is perhaps most salient in *Akkum v Turkey* where the Court draws a parallel between the detainees and the villagers who were allegedly killed by state forces. In *Akkum v Turkey*, according to the applicant, Mehmet Akkum took the village animals to graze on the plains around the Kursunlu village together with Mehmet Akan to undertake his duty as a shepherd according to the village rota in Dicle district of Diyarbakir in November 1992.⁷¹ When they were on the mountainside, they came across the soldiers and the soldiers surrounded the two Mehments. They were last seen alive in the mountains by two other villagers, Hacire and Hediye. The two women were told by the soldiers to go back to the village. On the way back home they saw Dervis and told him to go back as there were soldiers everywhere and the two Mehments had been taken by them. At that time the soldiers appeared and hit Derviş on his shoulder with their rifle butts. Then firing began from all around the plain and Derviş was shot. Since the

⁷⁰ Although it is beyond the scope of this thesis, it should be noted that in a large number of cases submitted to the ECtHR in relation to article 2, no substantive violation is found by the Court despite the state's claiming responsibility for the death. The reason is that the cases fall under the 2nd paragraph of article 2 under which acts of killing conducted by proportional use of force are justified.

⁷¹ *Akkum v Turkey* (21894/93).

bullets caused the dust to rise, the women could not approach Derviş's body, but ran back to village to take shelter. The next day, the villagers went to the plain to find the bodies, but found only animal corpses. They went to Dicle to make inquiries about the incident and inform the authorities of the disappearance of the Mehmetts and the death of Derviş. Not receiving any word about the fate of the men, they came back to village, and later in the day they were informed that the bodies of Derviş and one of the Mehmetts were found in the plains. The body of the other Mehmet was later found in Elazığ, mutilated and his ears cut off.

The allegations of the applicant are denied by the government. According to the government, a large PKK base had been previously been dismantled in the area and an operation had been carried out to prevent the PKK from re-establishing itself. Yet, the inhabitants of the nearby villages were already informed beforehand so that they would not enter the operation area. In the course of the clash the soldiers returned fire at the individuals they believed to be terrorists, who were hiding behind a herd of animals, owned by villagers from Kurşunlu village and were firing at the soldiers. No soldier was injured during the operation. When the firing stopped, the soldiers started a search and found a body which was deemed by the soldiers to be that of a person assisting and harbouring terrorists. During the search, the soldiers also found a number of spent cartridges.

Members of the gendarme were subsequently tried in the Diyarbakir Military Court, and acquitted due to lack of evidence and eyewitnesses. Testimony of Hacire and Hediye passed into the records of the domestic proceedings to the effect that the two women were not aware that an operation was taking place and did not see anything. The forensic report was also prepared without details by an ordinary doctor, as there were no forensic experts in the Dicle district of Diyarbakir at that time. The reports used throughout the domestic proceedings, however, only demonstrated the bullet entry and exit point in the body, but not the type of arms used and the distance of shooting. According to the applicants, all the men were shot at close range, which indicates that they were not involved in an armed clash, but were ordinary villagers who went up to the mountains to graze their animals and were killed by the soldiers for no reason.

The Commission held a fact-finding hearing in Ankara and heard the testimony of the witnesses. It also requested on more than one occasion that the government submit the operation report and other documents concerning the domestic proceedings, but they were never received and no reason was given by the government for the failure. As neither the applicant nor the Court had access to these documents without the Government's cooperation, the Court was led to decide in the absence of important, possibly decisive, documents. The Court inferred from the government's failure to comply that the applicants' allegations were well founded and found both substantive and procedural breaches of Article 2 (right to life).

The Court considers it legitimate to draw a parallel between the situation of detainees, for whose well-being the State is held responsible, and the situation of persons found injured or dead in an area within the exclusive control of the authorities of the State. Such a parallel is based on the salient fact that in both situations the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities.⁷²

The Court accepted the facts as presented by the applicant and decided that the deceased were *villagers* who were on the plain to graze their animals rather than people aiding and abetting PKK members as alleged by the state. Concluding that the deceased were unarmed and subjected to arbitrary treatment by the soldiers on duty, the Court equated the villagers with detainees. *Akkum v Turkey* is the only case in which the Court found a substantive violation of the Article 2 by establishing a connection between detention centres and the plains upon which the villagers' death occurred. The decision of the Court in the Akkum case should again be considered in relation to the Court's finding a violation of the Article 3 with respect to the father of Mehmet Akkum whose body was mutilated by the soldiers. The applicant states that the mutilation of the ears of his son by the soldiers is contrary to the Article 3 in relation to him, since as a Muslim he had to bury an incomplete and mutilated body. The Court states:

...the Court has no doubts that the anguish caused to Mr Akkum as a result of the mutilation of the body of his son amounts to degrading treatment contrary to Article 3 of the Convention. It

⁷² Ibid., paragraph 209.

follows that there has been a violation of Article 3 of the Convention in relation to the first applicant, Zülfi Akkum.⁷³

The reason for finding a violation of the Article 3 for the first applicant is explained by the Court:

In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account, but the absence of any such purpose cannot conclusively rule out a violation of Article 3.⁷⁴

The Akkum case is not the only one in which Turkish soldiers were accused of mutilating bodies of the deceased.⁷⁵ However, it is only in the Akkum case that the Court finds a violation of Article 3 in relation to the applicant, since in the other cases the deceased whose bodies were mutilated were considered by the Court to be armed at the time of death and therefore a substantive violation of Article 2 was not found on the grounds that the state’s use of force was absolutely necessary. In contrast to these cases, in the Akkum case the construction of the villagers as vulnerable by the Court resulted in the Court’s finding violations of both Articles 2 and 3.

Conclusion

In this chapter, I tried to show how the Article on torture in the Convention is significant in the Court’s evaluation of whether or not there is a violation of the right to life, by giving examples from different cases. In the majority of the detention cases the Court finds a violation of the right to life only when a violation of the Article 3 can also be found. The significance of Article 3 in the Court’s decisions is related to the tendency of the Court

⁷³ Ibid paragraph 259.

⁷⁴ Ibid paragraph 257.

⁷⁵ The other two cases are *Kanlibas v Turkey* (32444/96), judgment of 08/03/2006 and *Akpınar and Altun v Turkey* (56760/00), judgment of 27/05/2007.

to find a violation of the right to life only when a detainee can be constructed as a suffering being due to his vulnerable condition. Therefore in cases where the state alleges that death is not a result of torture but suicide or accidental, the Court does not find a substantive violation of the right to life. The main reason is that because in the incidents of suicide and accident, which are considered as matters of individual choice or personal negligence, the detainees cannot be constructed as vulnerable beings. Therefore the Court's case law which projects all detainees as vulnerable is not applied in these cases and a substantive violation of the Article 2 is not found.

In disappearance cases, where the Court usually finds violations of Articles 2 and 3, although the body of the deceased is never found and therefore never examined to determine whether he was subjected to torture, the Court finds a violation of the Article 3 for the suffering of the applicants rather than the deceased. Even where killing occurred outside a detention centre, when the Court is convinced that the deceased was unarmed at the time of death, the Court finds a violation of both the Article 2 and 3 in relation to the suffering of the applicant by establishing a connection between detainees and villagers. However, the Court's finding violations of Article 2 and 3 together has certain implications for the application of the human rights norms. First, this results in the exclusion of other possible killing or death incidents from judicial protection and restricts the type of violence of the state functionaries to torture. Second, by trying to measure the suffering caused by a particular action to decide whether there is a violation of the Article 2, the Court restricts what constitutes a human rights violation to acts which are assumed to have caused suffering.

CHAPTER IV

RENAULT TOROS AS A DETENTION PLACE?

Introduction

In recent years, particularly with the acceleration of the obligations of the states under international law, states have sought judicial oversight where they engage in torture to protect them from unfavorable international or domestic attention. By ‘judicial oversight,’ I refer to the failure to take notice of acts in contravention with human rights principles within the legal mechanisms. Perhaps the most common of such practices is the ‘torture flights’ used particularly in the US ‘war against terror’ whereby the victims are carried to territories outside of the US in which torture is frequently used allegedly as a technique of obtaining information. The cases analyzed in this Chapter provide some insight into the attitude of international human rights law and its constraints about numerous incidents of killings occurring in these ‘judicial oversights.’

In these cases the main claims are for abduction and killing by state officials. The cases usually involve journalists, human rights activists and lawyers. There were sixteen abduction cases brought before the ECtHR during the 1990s. These cases are different from those analyzed in the previous Chapter, in that the government is accused of abduction instead of irregular or unacknowledged detention. The legal framing of the cases as ‘abduction’ is significant, because this fundamentally challenges the human rights system

which envisions the state as a legal and rational body responsible for the provision of human rights norms in its jurisdiction. This system acknowledges the prospect of killing by state officials, but the cause of death is explained away as technical failure in the planning and conduct of state agents (like the neglect of the officials to record the names of the detainees properly) or bad legislation (such as State of Emergency Rule), implying that improvement will be observed once better laws and expertise are introduced. The accusation of 'abduction' addressed to the government, however, puts into question the intrinsic relation between nation state and violence, and designates the state as a body having a specific intention to eliminate certain individuals for their political participation, ethnicity, religion...etc. The Court's attitude in these cases is crucial to understanding which types of violence and the traumas arising therefrom can be captured and 'resolved' within or is excluded from the human rights discourse which has become the only accepted language of resistance (Rajagopal, 2003).

In these cases the applicant must prove the link between the government and the act of killing, as abduction, according to the testimony of the witnesses, is carried out by people in civil attire rather in uniform. Therefore, while in the previous Chapter the main concern of the Court was the identity of the deceased, here the focus is that of the perpetrators -whether they are in one way or another linked to the government or whether their actions could have been predicted or known by officials. The Court, in a significant number of abduction cases, finds only a procedural violation on the grounds that the government failed to conduct an effective investigation. Although in some cases substantive violation is found, it is done in such a way that the state is located as the body which could have taken protective measures to prevent the killing, rather than the body which kills. The Court's selectivity in finding a substantive violation results in the framing of the incidents of death/killing as if stemming from lack of expertise of the government in conducting an effective investigation. Expertise emerges as the salient concept which is claimed to have the capability of overcoming obstacles to social, political and legal development.

In this chapter, I will analyze three types of abduction cases in which the Court's decisions vary depending on the degree of official involvement in the abduction and

subsequent killing. While, in the first case *Kaya and others v Turkey*⁷⁶, the Court finds only a procedural violation of the right to life, stating that the authorities can be held responsible neither for the killing nor failing to know the risks or protecting the right to life, in the second case *Mahmut Kaya v Turkey*, the Court finds a substantive violation of Article 2 on the grounds that the government failed to protect the right to life despite knowing about the risks to the life of the deceased. In the third case, *Avşar v Turkey*, which is the only abduction case of its kind, the Court draws a parallel between detention and abduction and finds the government ‘guilty’ of abduction and killing. The differences in the Court’s approach to these cases, I suggest, is based on the way the Court conceptualizes the spatial setting through which the car used for the abduction traversed. The elements of the spatial setting, for the Court, are also vital in the construction of the identities of the perpetrators and the degree of official involvement in the act.

Toros Car as a Judicial Oversight?

In November 1996, when Hakki Kaya was walking with his two friends in Diyarbakir city centre, a white Toros car with the registration number 06 EKN 22 approached them. Three men dressed in civilian clothes and carrying walkie-talkies introduced themselves as police officers to Hakki Kaya and his friends and carried out an identity check. At some point while looking at the identities, the men with walkie-talkies forced Hakki Kaya into the Toros, persuading him to get in by saying that he had to go to the police station to make a statement. He entered the car and was never seen again. The applicant, Hakki Kaya’s wife, informed various bodies of her husband's disappearance. In March 1997 the Human Rights Investigation Committee of the Turkish Grand National Assembly stated that Hakki Kaya was not in detention and the car with the registration number 06 EKN 22 was a Fiat Şahin, and not a white Toros estate car as alleged, and that it belonged to someone who resided in Ankara.

It is possible to expand and narrow the scope of disputes through the legal phrasing of the facts (Mather&Yngvesson, 1980/81). I believe abduction cases are good examples of

⁷⁶ *Kaya and others v Turkey* (36206/97), judgment of 22/02/2006

the expansion of the disputes. It is through this kind of a legal framing, phrasing or re-phrasing of disputes outside the tacitly accepted legal categories that disputes can be expanded. Expansion of a dispute involves the organization of reality by stretching and changing accepted frameworks and linking subjects or issues that are typically separated (Ibid), as was done in the abduction cases by juxtaposing intentional killing, the state and civil men working as murderers in the name of the state. Although in abduction cases, in Hakki Kaya's case as well, the Court mainly found that the government had failed to conduct an effective investigation, the fact that these cases are found admissible by the Court is meaningful, as the ECtHR is instituted as a mechanism to evaluate and judge incidents to which individuals claiming to be the victims of violations by state officials⁷⁷ can apply, not the ones whose victim status is caused by private individuals. Applications directed against not states but individuals or a group of individuals are supposed to be declared inadmissible. Therefore, the mere admissibility of these cases has also certain implications, even though at the level of decision making in majority of these cases a substantive violation of the right to life is not found by the Court.

Hakki Kaya's case was eventually brought to the ECtHR by his wife and two children as they received no news regarding his whereabouts from the domestic authorities. Before the Court, they alleged that Hakki Kaya had been detained and killed by the state security forces, relying on the testimony of the witnesses to the incident, who were accompanying Hakki Kaya in Diyarbakir city centre and the interview made with Abdulkadir Aygan⁷⁸, in

⁷⁷ Article 25 of the ECHR, 1st paragraph.

⁷⁸ Abdulkadir Aygan, a former PKK member, is known to have worked in JITEM. In a series of interviews he mentions Hakki Kaya's name as one of the victims of the organization. One of these interviews was made by Nese Duzel on 28 January 2009, Taraf: "You said 'People were reporting, investigations were being made and JITEM was questioning.' Were there many canaries among people? Many of them were coming. Unfortunately a lot. There were the ones harmed by the PKK, the ones against the PKK. There were also the ones who were reporting out of jealousy to eliminate their competitors at work. There are people who died as a result of these kinds of accusations. For instance... the reason for Hakki Kaya's death is a confessor called Muhsin Gul. He exaggerated by saying that the daughter of him was in the mountain and reported the man. There are cases like that. The confessor Muhsin Gul perhaps wanted to take advantage of him. When the man did not respond positively, he eliminated the man through JITEM.'" (Halk ihbar ediyordu, istihbarat yapıyordu ve JITEM sorguluyordu" dediniz başta bana. Halk arasında çok mu muhbir vardı? Çok mu hbir gelirdi. Maalesef çok. PKK'dan zarar görenler, PKK karşıtı olanlar vardı. Kıskançlıktan ihbarda bulunanlar, hasmını, iş hayatındaki rakibini tasfiye etmek için ona buna PKK'lı diyenler vardı. Böyle suçlamalarla da ölenler oldu. Mesela... Hakki Kaya'nın ölümüne Muhsin Gül isimli itirafçı neden oldu. Bunun kızı dağda falan

which Aygan stated that Hakki Kaya whose body was buried at the Diyarbakir-Silvan motorway was one of the persons killed by JITEM.⁷⁹ The Government denied the allegations and the existence of any possible link between the perpetrators and the officials. Eventually the Court found the applicant's allegation unsubstantiated due to lack of evidence, stating that the interview given by Abdulkadir Aygan to the *Ülkede Özgür Gündem* newspaper cannot be attached any decisive importance as it is uncorroborated and on the present state of the file, at best circumstantial⁸⁰. It is also stated that Hakkı Kaya had no previous criminal record and the applicants did not submit any convincing argument showing why the domestic authorities might have been involved in the alleged abduction of Hakkı Kaya. The Court concluded that the applicant's allegation that the state is responsible for Hakki Kaya's disappearance remains a matter of speculation and therefore found only a procedural violation of Article 2. While in cases of detention the Court decides through assessing the degree of vulnerability of the deceased, in abduction cases the Court seeks a fine balance; the deceased should not be an armed person, in which case the incident can be framed as 'self-defence' nor totally 'innocent' on the eyes of the authorities, but should have a certain degree of political involvement denounced by the authorities so that the link between the killing and government officials can be established.

Nuray Şen v Turkey case is another important case to examine in relation to the circumstances under which the Court will find a substantive violation of Article 2 where a state fails its positive obligation to protect the right to life. Mehmet Şen was an active member of DEP. According to the applicant who is Mehmet Şen's wife, in November 1994 he was abducted by plain-clothes policemen from the cafe of which he was the owner and taken to a car waiting outside. He was never seen again. The applicant alleged that Mehmet

deyip işi şişirdi ve adamı ihbar etti. Böyle olaylar var. İtirafçı Muhsin Gül belki adamdan menfaat temin etmek istemişti. Adam vermeyince, o da JİTEM vasıtasıyla adamı ortadan kaldırmıştı.)

⁷⁹ JITEM (Jandarma İstihbarat ve Terörle Mücadele) is a gendarmerie intelligence organization claimed to be founded by the state for the struggle against the PKK in 1987. The commission established in the Turkish Grand Assembly for the investigation of the killings in the southeastern Turkey in April 1995 also referred to JITEM in its reports. The existence of the organization has not been officially confirmed.

⁸⁰ Circumstantial evidence refers to the evidence which is based on making an inference to support the assertion of truth as opposed to direct evidence which refers to the type of evidence such as witness testimonies.

Şen was abducted, tortured and killed by the security forces. The government denied the existence of any links between state agents and the death of Mehmet Şen, asserting that his name is not in any of the custody records and an investigation is still pending. Mehmet Şen's body was later found on the Kahramanmaraş-Gaziantep highway construction site. As discussed in the previous Chapter, because torture may only be committed by state officials to be a violation of international law, whether Mehmet Sen was subjected to torture is also a matter of dispute between the parties, as the prospect of his being subjected to torture can attest the link between the killers and government officials.

The applicant saw the body in Gaziantep State Hospital when she entered the morgue to examine her husband's corpse. According to the applicant's description of the corpse the right eye of Mehmet Sen was gauged out, the right side of his head was crushed to pieces; his right arm was broken, his fingers were broken; there were marks of blows to the body, and a bullet wound to the head and one to the neck. There were no traces of blood which implied that the shots had been fired after death. Whereas according to the autopsy report, there was a bullet wound to the left side of the chest, a bullet wound above the right eyebrow fired at almost point blank range and exiting the body from the back of the head, and a bullet wound to the left cheek, which had travelled through the body and lodged in the rib cage. There were no other wounds, blows to the body or head, and that death had been caused by the bullet to the head.⁸¹ The main difference between these two descriptions of the corpse is that in the applicant's version the cause of death is attributed to torture, while according to the autopsy report Mehmet Şen was shot to death, but not tortured. For the applicant the fact that there was no blood despite the bullet traces on the body showed that the shots had been fired not prior to death, as alleged by the autopsy report, but after, which supported her allegation that death was a result of torture and not of shooting. As the practice of torture is significant in detention cases for the Court to find a violation of Article 2, the different descriptions of the corpse became another point of contention between the parties. By framing the cause of death as torture rather than shooting in abduction cases, the applicant aims to convince the Court to associate abduction with detention and the killers with state officials.

⁸¹ Ibid, paragraph 17.

Nuray Şen's allegation that Mehmet Şen died as a result of torture by state officials was dismissed for insufficient evidence. None of the witnesses who were in the cafe at the time of the abduction of Mehmet Şen appeared in the hearings, despite being called by the Commission. The Court eventually decided that it was not proved 'beyond reasonable doubt' that state responsibility was engaged in Mehmet Şen's death, but also signaled its awareness regarding the high number of death incidents occurring in the south-east:

The Court draws attention to its previous findings in similar Turkish cases to the effect that in 1993 and 1994, as a result of the conflict in south-east Turkey, there were rumours that contra-guerrilla elements were involved in targeting persons suspected of supporting the PKK. It is undisputed that there were a significant number of killings which became known as the "unknown perpetrator killing" phenomenon, and which included prominent Kurdish figures. In this respect, the Court considers that the circumstances in which Mehmet Şen met his death, his membership of the DEP Party (allegedly subjected to intimidation, threats and criminal attack), and his political ambitions, might have militated in favour of the applicant's allegations.⁸²

The Court, despite recognizing that the state might be responsible for Mehmet Sen's death, found only a procedural violation of the right to life, since no relation between government officials and the perpetrators was established.

The Court has also considered the extent of the State's obligation to implement protective measures in certain individual cases when the circumstances may require them. However, the Court notes that Mehmet Şen did not report his fears about being followed by possible "hit-men" prior to his abduction, and did not seek protection from the competent authorities.⁸³

Unlike many of the cases taking place in detention centres, where the burden to prove the inaccuracy of the applicant's allegations shifts to the state which in those cases is considered to have the 'exclusive knowledge' about the circumstances of a death incident, in this case, and many other similar abduction cases, the state is responsible only for conducting a proper investigation, since the state officials are considered not to 'know' about Mehmet Şen's fears and possible risks to his life as they remained unreported. For the Court, in order to find a substantive violation of Article 2 on the basis of the government

⁸² Nuray Şen v. Turkey (no. 2) (25354/94), judgment of 30/03/04, paragraph 171.

⁸³ Ibid, paragraph, 180.

failure to protect the right to life, the possible risks to life should have been reported to the authorities so that they could act upon the that information. The paradox, however, is that the applicant's allegation of state killing and the responsibility of protection attributed by the Court are simultaneously attributed on the state. In Mehmet Sen's case, the Court distinguishes between the allegations that Mehmet Sen is abducted, tortured and killed by the state authorities and that the state failed to protect the life of Mehmet Sen despite its awareness that as a member of DEP in south-east context, his life was at risk. Confronted with two contradictory allegations, the Court decided that the state cannot be held responsible for failing to protect the right the life of Mehmet Sen, because it did not know of his fears, and dismissed the first allegation due to insufficient evidence. In so doing, the ECtHR, transforms the subject matter of the dispute into something other than what the applicant views to be the main reason for taking the case to the Court. By doing so, the Court suppresses the trauma that it is set up to resolve; and even, not understanding the trauma that it is supposed to be acting on (Felman, 1999).

Santos argues that modern Western thinking is an abyssal thinking consisting of visible and invisible distinctions; the invisible ones being the foundation of the visible distinctions (Santos 2007). The social reality is divided into two realms along this visible and invisible distinction and "this side of the line" in which visible distinctions operate appear as reality, while the other side of the line, the terrain of invisible distinctions vanishes and become non-existent (Ibid). For Santos, it is non-existent in the sense that it does not exist in any relevant or comprehensible way of being. He characterizes Western modernity 'as a socio-political paradigm founded on the tension between social regulation and social emancipation (Ibid: 2).' However, underneath this distinction there exists another distinction, the invisible one, violence/appropriation, on which the distinction of regulation/emancipation is founded. The Court by continuously finding a procedural violation rather than a substantive one, places the state on "this side of the line", the side in which the social reality appears to exist along the distinction of 'regulation/emancipation'. The acts of the state belonging to "the other side of the line", which unfold in the testimonies of the witnesses and in the Court's own evaluation of facts are expressed within the terminology of the 'legal' when it comes to decision-making: The non-legal state

practices are treated along the distinction of legal/illegal placed in this side of the line governed by the distinction of regulation/emancipation; but never transcend to 'the other side of the line' where there is violence/appropriation.

Knowledge and the Right to Life

There are a limited number of cases in which the Court is convinced of the existence of official involvement in the abduction and killing on the grounds that the particular circumstances point to the possession of knowledge by the government officials regarding the incident. *Mahmut Kaya v Turkey* is one of these cases in which the Court considers the roads that the car used for abducting Hasan Kaya travelled on, as under the control of the state due to the frequency of checkpoints located along the way. Therefore, for the Court, the government should have 'known' about the abduction of Hasan Kaya and taken action to prevent his murder.

Hasan Kaya was a doctor in Şırnak between 1990 and 1992, treating demonstrators injured in clashes with the security forces during the Newroz celebrations. After being put under considerable pressure, he was transferred from Şırnak to Elazığ. Called by his friend Metin Can, a lawyer who was also under pressure for his efforts to improve the conditions in Elazığ prison, regarding a wounded member of PKK, Hasan Kaya meets Metin Can and the two set out for a village outside Elazığ to treat the wounded guerilla. They never return. The other day, their relatives informed the Security Directorate about their disappearance and went to Ankara where they appealed to the Ministry of Interior about their disappearance. Almost one week later, their bodies were found near Dinar Bridge, outside of Tunceli.

Before the ECtHR, the applicant relied on Susurluk Report⁸⁴, Soner Yalçın's book *The Confessions of Major Cem Ersever* where it is disclosed that Mahmut Yıldırım⁸⁵ who was working as a state employee for thirty years was the planner and perpetrator of the Can and Kaya murders. The Commission held two hearings, one in Ankara and the other in Strasbourg in which the delegates listened to the testimonies of the relatives of Metin Can and Hasan Kaya, Elazığ and Tunceli public prosecutors, Soner Yalçın, police and gendarmerie officers. Finally the delegates stated that they were unable to determine who killed Dr Hasan Kaya as there was insufficient evidence to establish that the state agents or persons acting on their behalf had carried out the murder. However bearing in mind that Dr Hasan Kaya was suspected by the authorities of being a PKK sympathiser, as was his friend Metin Can, the delegates asserted that "there was a strong suspicion, supported by some evidence that persons identified as PKK sympathisers were at risk of targeting from certain elements in the security forces or those acting on their behalf, or with their connivance and acquiescence."⁸⁶ The applicant agreed with the Commission and submitted to the Court that in the particular circumstances of the case, Hasan Kaya was suspected of being a PKK sympathiser and disappeared with his friend Metin Can, who was also under heavy suspicion by the authorities and names of both of the men were in the Susurluk report as victims of a contra-guerrilla killing. Further, the way in which they were both transported from Elazığ to Tunceli, through official checkpoints located on the way points to the links between the gendarmerie and the perpetrators, showing that Hasan Kaya did not enjoy the guarantees of protection required by law and that the authorities were responsible for failing to protect his right to life. The state rejected that Susurluk report could have an

⁸⁴ The applicant provided the Commission with a copy of the so-called "Susurluk report", produced at the request of the Prime Minister by Mr Kutlu Savaş, Vice-President of the Board of Inspectors within the Prime Minister's Office. After receiving the report in January 1998, the Prime Minister made it available to the public, although eleven pages and certain annexes were withheld. The introduction states that the report was not based on a judicial investigation and did not constitute a formal investigative report. It was intended for information purposes and purported to do no more than describe certain events which had occurred mainly in south-east Turkey and which tended to confirm the existence of unlawful dealings between political figures, government institutions and clandestine groups.

⁸⁵ Mahmut Yıldırım's name has been raised several times by the media particularly in narratives of the 'deep state.' He is also known as Ahmet Demir and with the code name "Yesil".

⁸⁶ Mahmut Kaya v Turkey (22535/93), Judgment of 28/03/2000, paragraph 74.

evidential or probative value, since the report was prepared with the sole purpose of providing information and making some suggestions to the Office of Prime Minister, as emphasized in the preface of the report by its authors. The government states:

State forces has been "dealing with a high level of terrorist violence since 1984 which reached its peak between 1993 and 1994, causing the death of more than 30,000 Turkish citizens. The situation in the south-east was exploited by many armed terrorist groups including the PKK and Hizbullah, who were in a struggle for power in that region in 1993-94. While the security forces did their utmost to establish law and order, they faced immense obstacles and, as in other parts of the world, terrorist attacks and killings could not be prevented. Indeed, in the climate of widespread intimidation and violence, no one in society could have felt safe at that time. All state officials such as doctors could be said to have been at risk, for example, not only Hasan Kaya."⁸⁷

The Court, as seen in the cases above, to decide whether the state can be charged with a positive obligation to protect the right to life of Hasan Kaya, discusses if there was a real and immediate risk that the state should be aware of. According to the Court, "Hasan Kaya, as a doctor suspected of aiding and abetting the PKK, was at that time at a particular risk of falling victim to an unlawful attack."⁸⁸ Also, the way in which both Kaya and Can were transported from Elazığ to Tunceli through official checkpoints as well as evidence about contra-guerrilla groups show that Hasan Kaya did not enjoy the guarantees of protection required by law and that the authorities were responsible for failing to protect his life. Having been informed of the disappearances the next day that the two men left Elazığ by the relatives, the state is considered by the Court to have known the whereabouts of them, since there is approximately one week in between the abduction and the killing of the two men and the journey included the passing of several official checkpoints. The Court, for these reasons found a substantive violation of Article 2 concluding that the risk to Hasan Kaya's life could in these circumstances be regarded as real and immediate and the authorities must have been aware of that risk.

This attitude of the Court to treat a limited number of cases as state-linked while leaving the majority of them aside raises the question of where the state begins and ends. How is it possible to evaluate the range of what the state can know or its degree of

⁸⁷ Ibid, paragraph 83.

⁸⁸ Ibid, paragraph 89.

connivance in the killing of someone or by failing to protect him/her? What is the tool to evaluate the ken of the state and its degree of jurisdiction that the ECtHR uses and decides on the cases? As seen in the preceding chapter, the Court's understanding of 'detention' is primarily based on an understanding of space in which the state is considered to have full jurisdiction and the exclusive knowledge of the events. If this is the case, what is the point of focusing on the extent of state's knowledge regarding an unlawful incident in circumstances that it is the officials who are accused of the unlawful acts? How are 'judicial oversights' created through the denial of jurisdiction and knowledge by the states and maintained through the Court's way of reasoning and decisions in such cases?

Abduction as Detention

In the cases above, although the Court occasionally found a substantive violation of Article 2 for the state's failing to protect the right to life of the deceased, the judges constantly oscillate between linking the government with abductors and denying the existence of such a link during the proceedings. *Avsar v Turkey* is the only case in which the Court explicitly accuses the government for the abduction and killing, and equalizes abduction with detention. Yet, this time the Court, despite acknowledging the official involvement, does so, through distinguishing between personal motives of the abductors and the official objectives.

Mehmet Serif Avşar with his brothers and another relative was running a company which sold fertilisers to farmers. According to the applicant, in April 1994, five village guards entered fertiliser business premises run by Avsar family in Diyarbakir. They wanted to take Mehmet Şerif Avşar into custody, but he did not submit to them. Then they spoke on a walkie-talkie and two village guards left to find a police officer. They came back with Mehmet Mehmetoğlu and a seventh person. As it is narrated by the applicant, the seventh man acted as if he was in charge and the others referred him as "müdür" (director). The seventh man who spoke proper Turkish and wore glasses, took Mehmet Şerif Avşar from the shop, placing him in a white Toros car. Members of the family followed the car and saw it entering the district central gendarmerie. The family then made complaints to the

authorities about the abduction and the village guards involved in the incident. Upon the accusation of the family, Mehmet Mehmetoglu and the village guards were detained. All denied the existence of a seventh person. Upon the confessions of one of the village guards, the body of Mehmet Serif Avsar was found in Silvan-Diyarbakir highway, killed by two shots in the head.

The trial of the five village guards and Mehmet Mehmetođlu opened in Diyarbakır Criminal Court, during which, in contradiction with their previous statements, the defendants mentioned about the involvement of a seventh person, a gendarmerie special sergeant, in charge of the abduction and the killing of Mehmet Serif Avsar. In Susurluk report, which is one of the evidences that the applicant relies on, it is stated that Gültekin Şütçü⁸⁹ and Mehmet Mehmetođlu are involved in the killing of Mehmet Şerif Avşar. Different from the other abduction cases, in Avsar v Turkey, the link between the abduction and a gendarmerie official was established by the national Courts before the case was brought in the ECtHR.

In his last submission to the Court, the applicant alleges that his brother was arbitrarily killed while in the *custody* of security officials and that there was a failure by the authorities to protect his life and to carry out an effective investigation into his killing.⁹⁰ In addition, according to the applicant, the State did not take operational steps to safeguard the life of Mehmet Serif Avsar, while the authorities were informed immediately of the abduction. In response, the government submits to the Court that their responsibility would be engaged only if it could be proved that the village guards or a gendarme officer had committed the murder on the instructions or with the incitement of the authorities, however the perpetrators acted for personal motives. According to the Court; it is possible that the incident might have been motivated by an official desire to question the Avşars who were known to have relatives in the PKK, yet dismisses this possibility due to lack of evidence.

⁸⁹ Gultekin Sutcu's name was first raised in the trials of the village guards in 1998. He was for the first time taken to the Court in 2007. Because he was a soldier at the time of the incident his hearing was held in Diyarbakir military Court and he was released. In March 2008, he was again tried and sentenced to 30 years by Diyarbakir Heavy Criminal Court. As far as I could see he is the first person to be taken to the court due to accusations for conducting activities within JITEM. <http://www.radikal.com.tr/haber.php?haberno=250751>

⁹⁰ Avşar v. Turkey (25657/94), judgment of 10/07/01, paragraph. 383.

Therefore, the allegations of the applicant that the village guards are sent to the shop with the purpose of taking Mehmet Şerif Avşar away, for the Court, is not proved. Yet, following that the Court also states that "there is insufficient evidence to conclude that the village guards were indeed acting at random in taking Mehmet Şerif Avşar."⁹¹ Making seemingly contradicting statements about whether the village guards were acting in official capacity or by personal motives, the ECtHR acknowledges the official aspect of the incident, yet by creating uncertainty regarding the motivations of the village guards, refrains from making a statement as to the extent of official knowledge of or connivance in the abduction and killing of Mehmet Serif Avsar.

What distinguishes Avsar case from the other abduction cases is that, first the Toros used in the abduction is an official one, which is brought back to the gendarmerie after the perpetrators are finished with it. The Court concludes that the incident takes place in the exclusive knowledge of the authorities for the captain of the station is confirmed to have talked with the village guards and the other two men by the eye-witnesses. In addition, the car with which Mehmet Serif Avsar was abducted was driven into the gendarmerie. In those circumstances, the Court infers that the presence of the village guards, Mehmet Mehmetoğlu, the seventh person and Mehmet Şerif Avşar were known to the gendarmerie. The Court states;

Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.⁹²

Avsar case is the only case, despite its being framed as a case of abduction, the Court takes it as a detention case; thereby equalizing abduction with detention and associating Toros car with custody. What distinguishes Avsar and Mahmut Kaya cases from the other abduction cases is the association that the Court established between the Toros car through which the abduction is carried out. While in the Avsar case the car used itself was an

⁹¹ Ibid, paragraph 318.

⁹² Ibid, paragraph 392.

official one, in Mahmut Kaya case the Toros car used for the abduction went through eight check points where state officials were on duty.

Separation of right to life into Substance and Procedure

For Weber, legal domination constitutes the foundation of the bureaucratic administration, thus of the modern state and modern capitalism which obtain their legitimacy from the existence of a system of rationally made legal rules (Weber cited in Cottarrell, 1983). In an excerpt where he discusses the influence of the form of political authority on the formal aspects of the law, he asserts that during Rome and Middle Ages, ‘‘the rationality of patrimonial sovereign as well as of ecclesiastical hierarchies were substantive in character’’, which means that their major aim was not rational systematization of law and procedure, which in turn would provide juridical precision and prediction; but it was to construct a type of law appropriate to the ethical goals of the authorities (Weber, 1967: 225). Therefore, they did not separate ethics and law. This process resulted in the intermingling of ethical concerns and legal duties to a degree that separating them and the terms of that separation depended on the volition of the authority. In a similar vein, the right to life article, being a legal command and an expression of a fundamental ethical premise –thou shall not kill/murder- is separated into procedural and substantive aspects depending of the volition of the judges at the ECtHR. In one of his dissenting opinion, Judge Bonello, one of the most critical judges of the Court who frequently disagrees with his colleagues, states that ‘‘The Court, by an admirable process of judicial activism ‘‘created’’ the concept of a ‘‘procedural violation’’ of Article 2 in *McCann and Others v. the United Kingdom* in 1995.’’⁹³ The concept is indeed significant, since the procedural obligation of conducting a proper investigation might create the possibility for the domestic authorities to arrest the officials found guilty of ‘unjustified’ killings. Yet, can we really call it a ‘judicial activism’ considering the high number of cases submitted to the Court with allegations of grave human rights violations, in which the government is not found in substantive violation through failing to fulfil its procedural violation? In other

⁹³ The separation first appears in *McCann v UK* and is reinforced in *Kelly and others v UK*, see Mowbray, 2004.

words, in most of the cases outlined above and others in the ECtHR database, the main reason for the Court's inability to decide on the facts of the case 'beyond reasonable doubt', and therefore not finding a substantive violation of the right to life is the deficiencies of the criminal investigation. In many of the cases in which the Court only finds a procedural violation, but not a substantive one due to insufficient evidence, the state's failure to fulfil its procedural obligation to collect evidence and make a proper investigation is what obscures the facts of the case, thereby 'rescuing' the state from an accusation of a substantive violation of the right to life article. In other words, the procedural and substantive aspects of right to life which are separated under the ECtHR legal system are so indissolubly linked to one another that the separation creates a legal lacuna through which the state could get away with a lesser degree of condemnation for the right to life violations. Therefore, the separation bears the risk of reducing the commitment of the state under the Convention to a mere follow-up and of overlooking the ethical principle that the article is meant to favour. This is the case particularly for the allegations of serious violations. Because the facts are in dispute between the parties in such cases, the Court cannot establish the facts of the case with certainty due to lack of evidence and the allegations of the applicant are hardly considered as fulfilling the Court's standard of proof. Thus, in the end, the more severe the violation is, the more likely it becomes for the states to get away with it (Boyle et al, 1997). The two aspects of the article can support one another only in the case that the governments implement proper investigation; otherwise they remain antithetical to one another.

Why is there then such a separation in the ECtHR system whose main function is stated to eliminate human rights violations and promote human rights values? Is it possible to designate the Court as another institution which serves to legitimize the human rights violations? If we are to do so, how are we going to account for many other cases in which the Court strongly condemns the governments' wrongdoings? Or how are we going to explain the fact that even if the Court does not find substantive violation in quite a number of cases, it finds procedural violation on the part of the state? Ronen Shamir argues that there is a paradox in Weber's argument that "law systematically legitimizes the operations of state rulers." He asks "if courts are autonomous, what ensures that they will support

those in power? And if they consistently support the rulers, how do they maintain their own legitimacy (Shamir, 1990: 792)?” For Shamir, one way of inquiring into this riddle is through differentiating between the decisions in which a particular Court sustains and upholds the government operations and the ones where it condemns. Not only the cases for which the Court holds the state actions, but also the ones where it finds a violation of the state are important in the Court’s construction of its autonomy. For Shamir, by occasionally overruling or annulling governmental policies in some "landmark cases", the juridical apparatus asserts its independence from the polity; on the other hand, the court can cast the cloak of legitimacy over the state as a whole by vindicating other decisions that uphold governmental actions as rightful and reasonable (Ibid: 782). Turning back to the cases, by almost always finding a procedural violation of the right to life, the Court constructs itself as an autonomous body revealing the human rights violations of the governments which have set itself up. However, the Court finds only a procedural violation particularly in cases which pose a challenge right to the foundational premises of the state system by manifesting its close relation with violence. However, finding a procedural violation implicates a ‘hope’ by putting the major problem as the ineffective domestic investigation, as the proceedings can be re-opened and reexamined depending on the choice of the domestic systems (Lambert-Abdelgawad, 2008). ‘Hope’ in that context refers to a belief in the possibility of improvement or increase in the degree of expertise that the government has in criminal investigation. In the end, the Court’s constantly finding a procedural violation, yet hardly a substantive one results in the framing of the incidents of death/killing as if stemming from lack of expertise of the government. This approach, however, neglects the political content of the killing/death incidents by obliterating the motives and interests of different agents whereby some are rendered less worthy, therefore more disposable and killable. Instead, expertise emerges as the salient concept which is claimed to overcome the obstacles to social and political development.

Conclusion

In this chapter, I gave examples from different abduction cases to show how the Court's decisions differ from one another depending on the degree of knowledge of the state and the spatial setting in which the abduction was carried out. I argued that the imagining of the state as bounded within certain spatial settings such as a gendarmerie station and the construction of the state's knowledge of the existing risks to life of people to the existence of reports stating that risks result in the Court's finding only a procedural violation of Article 2 in abduction cases. The construction of the state sometimes as an omnipresent entity and other times as a limited body with restricted knowledge and jurisdiction, points to the uncertain character of the state in the human rights discourse. This uncertainty, however, bears the risk of not treating a great majority of the cases as substantive violations of the right to life article in a region where State of Emergency was the rule. The Court's finding only a procedural violation in these cases results in the framing of allegations of grave human rights violations as consequences of the officials' lack of expertise in criminal investigation. This, however, conceals the more profound problem which is how some political ideals and interests render some people less worthy and therefore more killable. In abduction cases, by finding only a procedural violation and trying to evaluate the state's degree of knowledge regarding the incidents, the Court fails to understand the trauma for which the case is taken to Strasbourg.

CHAPTER V

CONCLUSION

“Frequently and regularly the Court acknowledges that members of vulnerable minorities are deprived of life or subjected to appalling treatment in violation of Article 3; but not once has the Court found that this happens to be linked to their ethnicity. Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it. Misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence.”
(Dissenting Opinion of Judge Bonello)

On an October morning in 2002, when the staff of the ECtHR came to the building to start their work, they came across something unusual; the window of the main gate had been broken. A rumor soon began to circulate to the effect that the window was stoned either by an applicant unhappy with a decision of the Court or by someone whose case was among the tens of thousands found inadmissible in the early procedural phases (Morvai, 1998).

Recently the ECtHR gained much importance in the lives of many citizens of the member countries and has appeared as an alternative to the domestic legal system, perhaps the only one, for those who believe their demand of justice will not be dealt with adequately at the domestic legal system. The dramatic increase in individual petitions to the

Court in recent years resulted in the changing of the procedural system of the Court in 1998 with the aim of improving efficiency and shortening the time taken for individual applications. The Court is also frequently regarded as the ‘‘crown jewel of the world's most advanced international systems for protecting civil and political liberties’’ in various circles, both academic and civil society (Helfer, 2008). However, it is important to note that despite being bombarded with individual applications under various articles of the Convention by Kurds, the Court has not used the ‘prohibition of discrimination’ Article until now. This attitude of the Court is frequently criticized by both legal scholars and activists not only in the context of the cases submitted by Kurds but also in relation to Roma people and Muslims in Europe. The strategic litigation cases lodged by NGOs and bar associations continue with the aim of inviting the Court to find a violation for discrimination, which is considered as a potential means of legal recognition of Kurdish identity in the Turkish Constitution. Yet, some ECtHR judges have begun to express their dissatisfaction through dissenting opinions against the Court’s passivity in using the discrimination article. The cases analyzed in this thesis therefore should be considered in light of the growing reputation of the Court in approaching human rights issues and its limitations in eliminating human suffering.

ECtHR decisions are significant in drawing public attention to human rights violations in Turkey. Regardless of verdict, allegations of state violence enter the public realm to shape the public image of the Turkish state in Europe. ECtHR cases confirmed the existing image of the Turkish state as the perpetrator of human rights violations. Activist groups have also instigated Court action with the aim of drawing attention to human rights violations in Turkey. Opinions in such cases, whether dissenting or concurring are also significant gains for such groups. According to Article 45 of the Convention, if a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion. Such dissenting opinions emphasize that the Court is not a single body but rather consists of several judges. For example, the dissenting opinion of Judge Bonello quoted above has become encouraging for activist groups seeking recognition of their allegations of discrimination against Kurds.

By examining several cases (many of which are hundreds of pages long) in detail, I have tried to delineate patterns and processes of reasoning through which the Court evaluates applicant and government claims, establishes the facts of cases and renders its decisions. Taking detention as a spatial category where the government has full power and control, I have tried to illustrate that whether or not a particular incident is to be referred to as detention is often in dispute. I have suggested that in the majority of the detention cases, death constitutes a violation of the right to life only when it is determined that torture is the cause of death. This is related to the case law of the Court establishing that the state must account for detainees' injuries, since detainees are in a vulnerable condition and the detention centers are places where the state has full jurisdiction and knowledge about the events. Torture as a practice is significant for the Court to construct the detainees as vulnerable, suffering beings, while assisting the Court to evaluate the degree of the state's jurisdiction and knowledge about the course of events that led to death. The practice of torture establishes disproportional and therefore unlawful use of force by state officials while the circumstances of torture can be viewed as a means to help the Court to evaluate the question of the state's degree of knowledge and jurisdiction. Even in disappearance cases where the body of the deceased is never examined by forensic experts, the Court finds a violation of Article 3 (Prohibition of Torture) with respect to the applicant rather than the deceased together with Article 2. However, the Court's restriction of the cause of death to torture in order to find a substantive violation of the right to life indicates that many other possible incidents of state killings are not captured and remedied within human rights discourse.

In cases where the applicants allege that the state forces are responsible for abduction and killing, rather than detention, the Court usually finds only a procedural violation for the state's failing to conduct an effective investigation on the grounds that there is insufficient evidence to establish a connection between the abductors and government officials. Restricting the state's knowledge and jurisdiction to certain spatial settings such as detention centers renders the Court incapable of coming to terms with the concerns of the applicants in cases of abduction which should arguably be actionable before the Court. The Court's constantly finding only a procedural violation and occasionally a substantive

violation of Article 2 results in not only the silencing of the underlying relation between nation state and violence, but also in framing of the right to life violations as if emanating from lack of expertise in criminal investigation.

I am aware that this study, aimed at understanding the internal dynamics of legal discourse, is restricted with legal analysis, and I had to leave aside the implications of Court decisions upon the public. To better understand the context in which those cases were submitted to the Court and the cultural and political impact of the Court decisions requires further analysis of the process through which relatives of the victims learn about the ECtHR procedures and get involved in transnational networks; which incidents or killings reach the ECtHR mechanism and which don't; and how the process of submitting a case to the Court shapes the perception regarding the legal, local and national. Only then can we shed light on the question of how common knowledge regarding Turkey's bad reputation on human rights is constituted in European and domestic public opinion despite the Court's decisions which rarely find any substantive violation in cases against Turkey.

BIBLIOGRAPHY

- Asad, T. 2003. *Formations of the Secular: Christianity, Islam and Modernity*. Stanford University Press.
- Avelar Idelber. 2004. *The Letter of Violence : Essays on Narrative, Ethics, and Politics*. New York : Palgrave Macmillan.
- Boyle, Kevin, Hampson Françoise and Reidy Aisling.1997.Gross violations of human rights: invoking the ECHR in the case of Turkey. *Netherlands Quarterly of Human Rights*, 15(2): 161-73.
- Butler. J. 1990. *Gender Trouble: Feminism and the Subversion of Identity*. New York : Routledge.
- Çalı, B. ‘‘The Logics of Supranational Human Rights Litigation, Official Acknowledgement and Human Rights Reform: The southeast Turkey cases before the European Court of Human Rights between 1996-2006.’’ *Law and Social Inquiry*, forthcoming 2010.
- Cottarrel. R. 1983. Legality and Political Legitimacy in the Sociology of Max Weber. In *Legality, Ideology and the State*. Ed. David Sugarman. London: Academic Press.
- Decerteau M. 1984. *The practice of everyday life*. translated by Steven Rendall. Berkeley : University of California Press.
- Dembour, M.B. 2006. *Who Believes in Human Rights?: Reflections on the European Convention*. Cambridge, UK ; New York : Cambridge University Press.
- Duran, L. 1988. *Türkiye Yönetiminde Karmaşa / Lûtfi Duran*. İstanbul : Çağdaş Yayınları
- Fawcett, JES. 1987. *The Application of the European Convention on Human Rights*. Oxford University Press. USA.
- Felman, S. 1999. ‘‘Forms of Judicial Blindness: Traumatic Narratives and Legal Repetitions’’ In *History, Memory and the Law*. Eds Sarat and Kearns. Ann Arbor: University of Michigan Press, c1999.
- Felstiner, W.L.F., Abel R.L , Sarat, A. 1980/1981. The Emergence and Transformation of Disputes: Naming, Blaming, Claiming.... *Law and Society Review*. 15:3/4. p.631

Janis, M.W & Kay, R.S & Bradley A.W. 2008. *European Human Rights Law: Text and Materials*. Oxford ; New York : Oxford University Press.

Lambert-Abdelgawad, E. 2008. *The Execution of Judgments of the European Court of Human Rights*. Strasbourg: Council of Europe Pub.

Mather, L. and Yngvesson B. 1980/1981. Language, Audience and the Transformation of Disputes. *Law and Society Review*, 15:3/4 (1980/1981) p.775

Marks, S. 1997. The Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights. *Oxford Journal of Legal Studies*. Vol: 15: 1.

Muller M. 1996. Ed Robert Olson. in *The Kurdish nationalist movement in the 1990s : its impact on Turkey and the Middle East*. Lexington, Ky. : University Press of Kentucky.

Nagan, W.P and Atkins L. 2001. "The International Law of Torture: From Universal Proscription to Effective Application and Enforcement." *Harvard Human Rights Journal*. Vol. 14: 87.

Santos. B. S. 2007. *Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges*. retrieved in 20.09.2009 from <http://www.eurozine.com/pdf/2007-06-29-santos-en.pdf>.

Sarat A. and Kearns. T.R. 1999. "Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction." In *History, Memory and the Law*. Eds Sarat and Kearns. Ann Arbor : University of Michigan Press, c1999.

Scarry E. 1987. *The body in Pain : The Making and Unmaking of the World*. New York: Oxford University Press, 1987, c1985.

Scott. G. R. 1995. *History of Torture*. London : Studio Editions, 1995

Shamir R. 1990. "Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice. *Law & Society Review*, Vol. 24, No. 3. pp. 781-805

1996. Suspended in Space: Bedouins under the Law of Israel. *Law & Society Review*, Vol. 30, No. 2. pp. 231-258

Silverman, L. 2001. *Tortured Subjects: Pain, Truth, and the Body in Early Modern France*. Chicago : University of Chicago Press.

Raz, J. 1980. *The concept of a Legal System: An Introduction to the Theory of Legal System*. Oxford : Clarendon Press ; New York : Oxford University Press, 1980.

Raz, J. 1980. *The concept of a Legal System: An Introduction to the Theory of Legal System*. Oxford : Clarendon Press ; New York : Oxford University Press, 1980.

Rosen, L. 1980-1981. Equity and discretion in a modern Islamic legal system. *Law & Society Review. Vol. 15*, p. 217.

Üskül, M. Z. 2003. *Olağanüstü Hal Üzerine Yazılar*. İstanbul : Büke Yayıncılık.

Weber. M. 1967. *On Law in Economy and Society*. New York: Clarion Book.

Cases Cited

AA and others v. Turkey (30015/96), judgment of 27/07/2004

Akdeniz v Turkey (25165/94), judgment of 31/08/2005

Akdeniz and Others v. Turkey (23954/94), judgment of 31/05/01

Akdogdu v Turkey (46747/99), judgment of 12/04/2006

Aktas v Turkey (24351/94), judgment of 24/04/2003

Aydin Eren and others v Turkey (57778/00), judgment of 21/05/2006

Bilgin v Turkey (25659/94), judgment of 17/10/2001

Buldan v Turkey (28298/95), judgment of 10/11/2004

Celikbilek v Turkey (27693/95), judgment of 31/08/2005

Ceyhan Demir v Turkey (34491/97), judgment of 13/04/2005

Çakıcı v. Turkey (23657/94), judgment of 08/07/99

Çiçek v. Turkey (25704/94), judgment of 27/02/01

Demiray v Turkey (27308/95), judgment of 04/04/2001

Diril v Turkey (68188/01), judgment of 19/01/2007

Dundar v Turkey (26972/95), judgment of 20/12/2005

Ergi v Turkey, (23818/94) judgment of 28/07/1998

Erikan Bulut v Turkey (51480/99), judgment of 02/03/2006

Erkek v. Turkey (28637/95), judgment of 13/07/04

Ertak v. Turkey (20764/92), judgment of 09/05/00

Fatma Kacar v Turkey (35838/97), judgment of 15/10/2005

Gomi v Turkey, (35962/97), judgment of 21/03/2007

H.Y. and Hu.Y v Turkey (40262/98), judgment of 06/10/2005

Ikincisoy v Turkey (26144/95), judgment of 15/12/2004

İpek v. Turkey (25760/94), judgment of 17/02/04
Kavak v Turkey (53489/99), Judgment of (06/10/2006)
Kaya v. Turkey (22729/93), judgment of 19/02/98
Kaya and others v Turkey (36206/97), judgment of 22/02/2006
Kilavuz v Turkey (8327/03), judgment of 21/01/2009
Mahmut Kaya v Turkey (22535/93), Judgment of 28/03/2000
McCann and Others v The United Kingdom (18984/91), 27/09/1995
Mordeniz v Turkey (45403/99), judgment of 10/04/2006
Nuray Şen v. Turkey (no. 2) (25354/94), judgment of 30/03/04
Orhan v. Turkey (25656/94), judgment of 18/06/02
Osmanoglu v Turkey (48804/99), judgment of 24/04/2008
Ozalp v Turkey (32457/96), judgment of 08/07/2004
Nehyet Gunay v Turkey (51210/99), judgment of 21/01/2009
Nesibe Haran v Turkey (28299/95), judgment of 06/01/2006
Ozgen v Turkey (38607/97), judgment of 20/12/2005
Seker v Turkey (52390/99), judgment of 21/05/2006
Seyhan v Turkey (33384/96), judgment of 30/03/2005
Suheyla Aydin v Turkey (25660/94), judgment of 24/04/2005
Tahsin Acar v Turkey (26307/95), judgment of 08/04/2004
Tanis and others v Turkey (65899/01), judgment of 30/11/2005
Taş v. Turkey (24396/94), judgment of 14/11/00
Tekdag v Turkey (27699/95), judgment of 14/06/2004
Tepe v Turkey (27244/95), judgment of 09/08/2003
Teren Aksal v Turkey (51967/99), judgment of 06/07/2009
Timurtaş v. Turkey (23531/94), judgment of 13/06/00
Togcu v Turkey (27601/95), judgment of 31/08/2005
Turkoglu v Turkey (34506/97), judgment of 17/06/2005
Ucar v Turkey (52392/99), judgment of 11/07/2006
Yasin Ates v Turkey (30949/96), judgment of 31/08/2005
Yazici v Turkey (48884/99), judgment of 05/03/2007

