

Confronting the Past: Impunity and High Profile Cases



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Foreword

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With the *Ergenekon* case initiated in 2008, Turkey has been going through a novel process of political trials involving various political issues, actors and eras. Some of these cases, such as “Gendarmerie Intelligence and Fight against Terrorism (*Jandarma İstihbarat ve Terörle Mücadele - JİTEM*)”, “Zirve Yayınevi (*Zirve Publishing House*)”, “Rahip Santoro (*Father Santoro*)”, “Hrant Dink”, “Temizöz et al.” and “12 September” may be grouped under a separate category that can be classified as trials involving a confrontation with the past. These are cases in which perpetrators who committed grave human rights violations such as torture, rape, murders by unknown assailants, extrajudicial killings, assassinations and enforced disappearances are being tried. They can be considered as a step toward the long and arduous path to be travelled to confront the social violence experienced in the past. As the experience of semi-judicial truth commissions established in countries such as Peru and South Africa which

went through comparable processes confirms, the task of confronting the past in a way that satisfies the victims’ demands for justice cannot be accomplished by way of criminal law alone. Furthermore, the bottlenecks in ongoing investigations into murders by unknown assailants or the judgment rendered most recently in the Hrant Dink case illustrate that the criminal justice system in Turkey, which has practically and conceptually developed a normative habit of impunity regarding rights violations committed by public officials against citizens, is reluctant to reform this practice.

Regardless, pursuing justice through these cases can lay the groundwork for the process of confronting with the past that Turkey is bound to go through eventually. Confronting the past by way of trial and fighting against the practice of impunity will call for changing the habits of the judicial actors in concrete ways. Many lawyers and human rights associations in Turkey have dedicated

themselves to resolutely continue this struggle on an individual or organized basis for years. It is necessary to support their efforts and to extend the call to hold perpetrators of past violence accountable to a broader public. Advocacy organizations and human rights lawyers have thus far expended major efforts toward these objectives, and informing broader segments of the public of their experiences and thereby exerting pressure on the government and political parties will be among the concrete steps that can be taken in support of their cause.

As part of our ongoing efforts for two years in the field of “Monitoring Human Rights Trials”, as TESEV Democratization Program we first published a report titled *Disrupting the Shield of Impunity*. The report analyzed the legal and administrative dimensions of impunity within the framework of the high profile cases such as “Temizöz et al.”, “Hrant Dink Murder”, “Engin Çeber” and “JİTEM”. In addition, we organize activities in an effort to bring together various professional and advocacy organizations active in this sphere to facilitate a more

effective joint struggle. Furthermore, we have been monitoring the hearings in the “Temizöz et al.” case that have been going on since December 2010. This is a case where a member of the gendarmerie is being tried under detention for the first time in the context of the grave human rights violations perpetrated by security officials against Kurdish citizens in the 1990s. In the coming days, we will continue monitoring both this particular case and prospective similar ones. With a new website currently under construction (www.failibelli.org), we will keep the public informed regularly of the developments regarding these cases and share data, analyses and research concerning their legal and political backgrounds.

The present study is an evaluation report composed of expert opinions that discuss the progress of past and ongoing trials in the context of confronting the past in order to offer a normative framework. We hope that this report and similar others will render the issue of confronting the past more visible among the public and facilitate the pursuit of justice by wider segments of society.

The Role and Responsibility of the State in Politically-Motivated Disappearances and Murders by Unknown Assailants¹

Mehmet Uçum, Attorney

Considering the relationship between murders and enforced disappearances with a given political system, these acts emerge primarily as legal problems and they are criminal acts in terms of positive law. The perpetrators of these acts receive the heaviest penalties in almost all legal systems. However, if murder and disappearance are taking place to protect or maintain a particular system and/or they are based on preferences with an ideological background, these acts go beyond the domain of law and become political issues.

Therefore, politically-motivated murders by unknown assailants and disappearances cannot simply be considered a legal issue and in accordance with the rules of the legislation in effect. If they were to be considered in this fashion, in other words, if their political aspect is cast aside and the problem is sought to be resolved under the effective rules of criminal and penal law, first, it will never be resolved, and second, justice will never be done even if

the persons who were perpetrators of these crimes are identified and penalized. Therefore, before they are the subject of positive law, politically-motivated murders by unknown assailants and disappearances are the political-legal issues. When this issue is treated within a political-legal framework, the state turns into an actor that is located at the center of the problem.

There are a number of dimensions to the states' central role in politically-motivated murders by unknown assailants and disappearances:

1. The practices in which the state is directly or indirectly involved as far as these crimes are concerned need to be exposed.
2. To redress the material and moral consequences of the crimes perpetrated, a strong political will must urge the state to develop the required solutions, that is, to ensure political and social justice.
3. Legal practices that are necessary in regards to these acts need to be created under criminal and penal law, and the state must play an effective role in ensuring that justice is done in terms of fair laws for individuals.

¹ **We should note: Because the topic is limited to politically-motivated disappearances and murders by unknown assailants, my opinion is that the particular role and responsibility of the state in this context also applies with respect to all other kinds of politically-motivated murders, disappearance, mass murders, deportation and destruction.**

Confrontation means the unearthing of practices in which the state was involved directly or indirectly in regards to politically-motivated murders or disappearances by unknown assailants, the reporting of those practices, and the rewriting of official archives accordingly.

4. To make sure there are no further politically-motivated disappearances and murders by unknown assailants, the necessary transformations to prevent the state, together with its structure and practices, from being the origin of these crimes or being involved in these criminal practices must be put in place.

Therefore, a solution to the problem of politically-motivated disappearances and murders by unknown assailants can only be found if the processes of *confrontation, justice and transformation* are realized concurrently, with the state being the central actor in that realization effort. Simply put, *confrontation* means the unearthing of practices in which the state was involved directly or indirectly in regards to politically-motivated murders or disappearances by unknown assailants, the reporting of those practices, and the rewriting of official archives accordingly. In sum, it amounts to ensuring that the state is condemned politically and in the eyes of the public for its practices in the relevant period of time and as limited to those particular times and events. It is important to note at this point that it is the political-legal entity of the state that is being tried and convicted for direct or indirect acts in certain eras and in particular events, not the natural persons who exercised public authority. Thus, the confrontation in terms of political matters is not a process of accountability involving natural persons; instead, it is a process in which the entire

society, including first of all the victims, holds the political-legal entity of the state accountable. As such, the situation of persons who exercised public authority in the eras in question and carry responsibility and as a result caused the political-legal entity of the state to be convicted remains a matter to be treated within the domain of criminal and penal law.

Over the course of this process of accountability, which needs to move forward so that the state can be confronted in a political sense and entails steps toward ensuring justice and transformation, the state surfaces or should surface in two –seemingly paradoxical- ways: One is the state that is held accountable and tried, and the other is the state that holds accountable and tries. If there is no state that can hold accountable, there is no path to confrontation, justice, and transformation. For such a state to come into being, the political will must act upon its responsibility. A political will that has the power to dominate the state's bureaucratic operations and a political perceptivity that responds to society's need for change can pave the way for state practices that foster accountability. Therefore, the issue of political confrontation first of all needs social legitimacy and requires a political legitimacy zone based on that legitimacy. The condition that ensures social legitimacy is society's need for change in regards to the political system; that is, the state itself, and the social demands that arise out of this particular need.

If one or more political actors, based on social demands for change or relying upon the social desire for change, create a political program and express a willingness to run the state in line with that program, such a political effort is a legitimate one. This means that all activities

of that political actor or these political actors carry political legitimacy. Even though positive law might not permit some of the political activities in that context, political legitimacy remains unharmed. On the contrary, in that case, either positive law will have lost its political and social grounds of legitimacy or it will have become obvious that it did not have any such legitimate ground in the first place. As a result, there emerges a problem of “a system of laws that violates the law of social needs”. In this perspective, pieces of legislation and structures that have lost their legal legitimacy need to be rearranged according to the new legal legitimacy, because they violate the political-legal framework designed by political actors that come into being on the basis of social legitimacy. Thus, this process of re-structuring is also the process in which the state that holds accountable is created, and in which the state that is held accountable is convicted and dismantled at the same time.

Justice, in all of its dimensions, can only be attained if all political structures and actors, social dynamics and jurisdictions play their part. Political justice can be ensured by condemning the previous and/or existing political approaches that do not attribute criminality to the actions of the state that is held accountable. Ensuring this is the job of the institution of politics, which draws support of the public. And social justice can be attained when the public attends to those segments of society, as well as individuals aggrieved by the political crimes of the state, the kind that is held accountable, and when it condemns the social wills that have expressly or implicitly consented to those acts or ignored them in the past. In a sense, political and social justice is a type of self-critique on the part of the

institution of politics and the society, or at least on the part of some segments of the public. Justice for individuals can be achieved when jurisdictions try natural persons responsible criminal and penal law and award appropriate punishments, and when the legal entity of the state, held accountable under the law of damages, is declared responsible for “neglect of function”. This decision can both be a judicial one and a legislative and executive one by way of regulatory procedures.

The concept of “neglect of function” herewith discussed is completely different from “neglect of duty”. Neglect of duty refers to the state being responsible with respect to negligent acts and transactions committed in the performance of legitimate and lawful duties assigned to the state. Neglect of function, however, refers to the commitment of acts, which may never be assigned to the state and have no connection to the notion of public service, that are considered political crimes by way of the practices performed by the state or in which the state is involved. Unlawfulness in the case of neglect of duty emerges in such instances as transgression of limits imposed by positive law, wrongful discretion, exceeding one’s authority, and violation of a higher norm. Neglect of function, however, expresses a true instance of unlawfulness stemming from no respect for the law, discriminatory and oppressive ideological attitudes, and state practices committed to protect or maintain a particular political order vis-à-vis society or one or more segments of the public. Thus, the state that holds accountable assumes a responsibility in a way that compensates all material and morally harmful consequences of the crimes originating from the neglect of function of the state that is held accountable, and thereby brings the individual justice aspect

of the accountability process to completion. All actions of the state that holds accountable at this point will be considered within the “law of damages”. In that respect, the law of damages can be defined as the kind of law the state builds upon a self-critique.

Transformation means dismantling the state that is held accountable and structuring the one that holds accountable. This objective can mainly be ensured through the constitution, as the character, principles, structure and functioning of the state are determined by way of the constitution. Obviously, when a new constitution restructures the state, it may do so as the first step toward a new era, not as the end of a particular process. Thus, the transformation process initially develops in revolutionary fashion, but it immediately acquires an evolutionary, in other words, reformist character. The legitimate source of this reform will be the social and political dynamics. It manifests itself as a legislative activity that restructures the legal system. That is why it is called a legal reform. The reform aims to build a legal system in which the new state structure will function in accordance with the legal needs of social dynamics and requirements.

In conclusion, it will nevertheless be necessary to proceed by way of the state to be able to

hold the state accountable for the crimes in which it was involved, to punish those crimes, and to redress all kinds of material and morally harmful consequences arising from those crimes within the framework of the law of damages. To that end, it will be very meaningful and important to consider two different theses about the state. It must be recognized and acknowledged clearly that loyalty to the principle of the continuity and permanence of the state does not mean complicity on the part of the state that holds accountable for the crimes of the state that is held accountable. In line with this analysis, the problem of politically-motivated enforced disappearances and murders by unknown assailants in Turkey can be resolved through nested or parallel steps involving legislative and commission works in the Turkish Grand National Assembly, compensatory legal practices of the executive and the administrative branches, and judgments of responsibility rendered by the judiciary under criminal and penal law and the law of damages. This can at the same time be seen as a process of social change and political transformation. Meeting the need for a new constitution could thus be the first major step at this point.

Children of a Disappeared Father

Mihdi Perinçek, Diyarbakır Human Rights Association

This article does not discuss individuals with mental disabilities who seclude themselves from their relatives or a part of the public willingly or whose relatives are unable to reach them. Rather, the word ‘disappeared’ here means those disappeared by the state for political reasons.

The phenomenon of disappearance as mentioned in this article should not be treated solely in terms of individual rights and liberties, as that would be an incomplete and mistaken approach. In addition to depriving a person of their liberty and violating their right to life, the disappearance of a person carries a social and political connotation, because disappearance amounts to lifelong torture and a continued state of pain inflicted upon the relatives of the disappeared person, as well as concern and discontent among the public.

There are several international charters and conventions regarding persons disappeared for political reasons. Disappearance of a detained person by a state is considered among crimes against humanity in international instruments.

The Code of Crimes against the Peace and Security of Mankind drafted by the International Law Commission (ILC) in 1996 offers a comprehensive definition of crimes against humanity in Article 18 and delineates the acts that are to be considered among those crimes. Disappearance of a detained person is among the situations and acts listed

there, which supports the argument we make here.

One among the many international conventions concerning this issue is the “International Convention for the Protection of All Persons From Enforced Disappearance” adopted by the United Nations General Assembly on 20 December 2006. This Convention defines enforced disappearance as follows:

“For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

Under the Convention, there are three main elements of the definition of disappearance under detention:

1. Deprivation of liberty takes place against the will of the concerned individual,
2. Agents of the state are implicated in the process by being aware of it,
3. Agents of the state refuse to acknowledge the deprivation or they conceal the fate or whereabouts of the disappeared person.

The state mechanism is equipped with laws, functions and structures that prioritize the interests of the ruling groups. The state therefore repeatedly exercises “legitimate” violence defined under the law against the opposition. Some of the groups suffering from this violence in Turkey are the Armenians, Kurds and the Roma for ethnic reasons; the Alevis, Yezidis, non-Muslims for religious reasons; and workers, leftists, socialists, communists and political opposition parties for sociopolitical reasons. However, in times of increased social opposition, structures and methods that have no place in the laws are operationalized in contravention of existing laws and through the agency of the state in unlawful ways.

Whether considered legitimate under the law or not, any state violence that disregards human dignity is unlawful. Disappearance of detainees sets one example of unlawful state violence. The earliest known case of enforced disappearance in Turkey is that of Salih Bozışık who was a communist opposing the new regime. After he was detained in 1925, he was never heard from again. The number of persons disappeared after being detained kept increasing over the years. We can point to two eras in which there were major leaps in the number of disappearances: The era of the 12 September “fascist military coup” and the 1990s.

The state is responsible for thousands of disappearances in the 1990s. People were detained and disappeared mainly in the provinces of Hakkari, Van, Şırnak, Mardin, Siirt, Diyarbakır, Bitlis, Bingöl, Batman, Ağrı, Kars, Iğdır, Tunceli, Kahramanmaraş, Gaziantep, Muş, Elazığ. As the fact is now out, commando units stationed in the provinces of Bolu and Kayseri played a role in village burnings and evacuations in rural areas, while JİTEM

(*Gendarmerie Intelligence and Fight against Terrorism*) organization figured in the disappearances of detainees in urban centers.

The Human Rights Association Diyarbakır office, where I work as the administrator, holds a demonstration every Saturday for disappearances of detainees, extrajudicial killings and murders by unknown assailants. The demonstrations have been going on for three years, and each week the story of a disappearance is narrated. A child, a mother, a son, or a sibling shares the feelings in a letter. Two among those who shared their feelings are Arjen Özgen, who is the grandchild of Fikri Özgen who was detained and disappeared in Diyarbakır on 27 February 1997 by four men in civilian clothing carrying radios, and Berna Söğüt, who is the daughter of Ömer Söğüt who was disappeared after being detained on 20 May 1995.

It is critical that the following are ensured to make sure that there no further disappearances of detainees:

1. A political will must be created.
2. The laws must be harmonized with international conventions and instruments, and administrative measures to that end must be taken.
3. Current judicial measures must be reinforced and additional regulations must be introduced.

The steps to be taken in regards to the process of restorative justice can be enumerated as follows:

1. State officials must apologize from families and the public for the disappearances.
2. Disappeared persons must be found and their remains must be returned to their families.

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3. Perpetrators of the disappearances must be tried and punished.
 4. Relatives of the slain persons must be paid compensation.
 5. Relatives of slain persons must be provided with psychological support for the shock and trauma they experienced.

International conventions and international law emphasize the responsibility of states parties in regards to enforced disappearances. Geneva Conventions Additional Protocol I, Article 32 envisages “the right of families to know the fate of their [disappeared] relatives”. “International Convention for the Protection of All Persons from Enforced Disappearance” dated 2006 provides as follows in its Article 24:

“Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.”

The interpretation of these articles brings us to the following crucial conclusions:

1. Families and relatives have the right to learn the truth about enforced

disappearances, and this right may not be obstructed. It involves the right to be informed of the progress and consequences of any investigation, the fate and location of the disappeared persons, the circumstances in which disappearance took place and the identity of the perpetrator(s).

2. The right to learn the truth about enforced disappearances must be clearly separated from the right of other individuals (such as representatives or attorneys) who have legitimate connections to persons deprived of their liberty to obtain information about them. The right to obtain information about a detainee is an unconditional right.

In conclusion, the fate of the disappeared must be saved from the labyrinths of “cosmic rooms” of the security bureaucracy and laid bare, and the remains of the disappeared must be delivered to their families. This is first and foremost a matter of conscience and morality. We must all take a side responsibly and sensitively to ensure that the files do not become barred by the statute of limitations and that the perpetrators are not rewarded with no-punishments.

The Problem of (not) Investigating Grave Human Rights Violations in Recent Past

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Topping the list of human rights violations of the recent past are the actions against the right to life. These are crimes known as enforced disappearances and murders by unknown assailants, and they constitute grave violations of human rights. The problem of investigating these crimes is only one ongoing consequence of the trauma in question. In the past decade, there were many changes/shifts and improvements in both legal regulations and in practice, however, public officials responsible for human rights violations can still not be investigated, that is, they remain immune from crimes and punishments, and this continues to be a very serious problem.

Although acts involving some public officials and committed by unlawful organizations have been the subject matter of complaints for a long time, arbitrary and summary executions became prevalent with the 1990s. There was a widespread conviction among the public that it would not be sufficient to struggle against the illegal PKK organization through “legal” means only, and that civilians who supported the organization and organization’s base must be suppressed with “the methods the organization uses”, instead of through lawful procedures. In those years, some security bureaucrats used to say that while helping the PKK was punishable by only a few months in jail, helping the state would be punishable by death. Statements like these openly promoted

the idea that extrajudicial killings targeting civilians were legitimate.

Later, one of the prime ministers of that era, Tansu Çiller, stated that “those assisting the organization would be treated as enemies”, which implied that there was explicit support from the political power to the systematic enforced disappearances and arbitrary killings. In just about everywhere in the region, starting with Diyarbakır, Şırnak, Mardin and Batman, people were being detained, taken from their houses, workplaces, on the street and sometimes at a checkpoint, nearly every day. And their dead bodies would shortly after be found by a roadside or under a bridge, or no further information could be obtained regarding their fate. Between 1993 and 1995, in several places including primarily the district of Cizre, “civilian squads”, who traveled in private cars and wore civilian clothing, joined by people known as “the confessors”, who escaped from the PKK and surrendered themselves to the security forces detained individuals in their houses and shot them dead right in front of their children or right by their doorsteps. No one had the protection of the law or enjoyed a measure of safety provided by the state any longer. On the contrary, anyone’s right to life was subject to a decision that a gendarmerie commander and even a specialist sergeant or a confessor would make. In fact, Kutlu Savaş, the chairperson of the Prime

Ministry Inspection Board noted in the report known as the “Susurluk Report” that there could be extrajudicial killings in any state, but execution decisions in the Southeast could even be made by a specialist sergeant or a confessor, and in some way exposed the gruesome situation and somewhat “criticized” the practice.

In the 1990s, there was neither a judiciary mechanism that could investigate these grave crimes committed against civilians by public officials, nor did the members of judiciary (prosecutors and judges) have any willingness or authority to do so. The official discourse, summed up as “let us not demoralize the security forces in the struggle against terrorism”, acquired a dominant character among both administrators and the judiciary. One could even talk about an implicit pact about protecting and safeguarding the public officials responsible for human rights violations. Prosecutors paid no attention to the complaints regarding extrajudicial killings, and police reports concerning these crimes were being drawn up and submitted to prosecutors’ offices by the very person in charge of the security unit that included the perpetrators. Assuming that these acts “were committed by the illegal PKK organization” on the basis of the letters arriving from the Gendarmerie and Police departments, local prosecutors were forwarding the investigation files to the State Security Courts of the time. Thousands of files that were composed of perfunctory documents were simply being shelved at the prosecutors’ offices. In short, there was no substance to the principle of “rule of law” which was enumerated among the “characteristics of the state” in the Constitution. In such an environment, relatives of the disappeared or the dead were horrified and fleeing the region to avoid suffering a similar fate, given that they

knew exactly who the perpetrators were and they found no help from any public body they appealed to. Those who found the chance sought political asylum in European countries. The environment of horror created as a result of forced evacuation of villages, unlawfulness and arbitrary executions in the 1990s caused major residential areas of the Southeast such as Şırnak, Cizre, Kulp and Lice to become evacuated, with tens of thousands of civilians having to migrate to safer places. Some 15,000 civilians, including seniors, women and children, emigrated out of Şırnak and its districts where arbitrary executions and enforced disappearances became everyday matters, and had to relocate to the United Nations refugee camps in Northern Iraq.

With the help of some lawyers from the region, a very small number of victims were able to take their complaints to the European Court of Human Rights (ECtHR). In its inquiry, the ECtHR determined that these human rights violations were widespread and investigating authorities were unwilling to investigate these grave crimes, and found that there was no right to legal remedies in Turkey’s Southeast and ruled that victims can directly file with the court in Strasbourg without having to follow domestic procedures because remedies under domestic law had no effect. In regards to many applications filed from Diyarbakır and Şırnak in particular, the ECtHR found that agents of the state had responsibility in the executions and held that human rights were violated. Following complaints about arbitrary executions and enforced disappearances in the 1990s, the ECtHR had fact-finding and witness-hearing sessions in the Ankara Courthouse to collect evidence. In these sessions, the Court heard from hundreds of public officials including members of the gendarmerie and police forces, in addition to complainants, and

created records of the evidence for the inhumane crimes perpetrated.

Some senior members of the gendarmerie who were stationed in the region in the 1990s and whose names are directly associated with human rights violations were arrested as part of the 2009 Ergenekon investigation on the grounds that they were involved in efforts to perpetrate a coup to overthrow the government. Since then, the victims, encouraged by the arrests, began getting in touch with prosecutors' offices more easily, and prosecutors became more interested in these investigations as compared to their predecessors. As of that year, persons who could serve as witnesses in relation to these crimes –although they continued to have a serious level of fear and concern- went to courthouses and began offering the truth.

When a witness, who was convicted of an indictable offense, applied to the prosecutor's office in 2009 and provided information about some events he witnessed in the district of Cizre during the said years, the prosecutor's office launched an investigation and found that the witness statement overlapped with the way the cases were discussed in the files shelved in the prosecutor's office for years. The prosecutor's office in charge of the investigation later filed a criminal case with the Specially Empowered Heavy Penal Court of Diyarbakır against Cemal Temizöz, a colonel in the gendarmerie who held the rank of captain in the district of Cizre at the time in question and has been the field officer of the gendarmerie in the province of Kayseri since 2009, as well as several other individuals, based on witness statements heard from two former PKK confessors who were part of the "civilian execution squad" created in the Gendarmerie Office in Cizre in those same

years and other evidence. The case claimed that the individuals in question arbitrarily executed 20 civilians between 1993 and 1995. The case is currently in progress, with five individuals pending trial under arrest. Several other victims and complainants who could not have the chance to tell the truth about the enforced disappearance or execution of their relatives at that time and offer their narratives expressed the facts in the hearing room. For the first time ever, these individuals were telling the facts of the matter in a court of the state to the face of the senior public official whom they knew very well, and they called him to account, while at the same time seeking to fulfill their moral "obligation" toward their relatives whose memory and suffering they have carried with them. Since the fact-finding/witness-hearing sessions held by the ECtHR in the Ankara Courthouse to collect evidence in relation to similar complaints from the 1990s, facts concerning these grave violations that constituted "crimes against humanity" were being officially recorded probably for the first time, and that was happening in a court building. Nevertheless, although there were thousands of arbitrary/extrajudicial executions, the investigations remained limited to this particular case concerning the execution of 20 civilians. Both the statements by complainants and witnesses during the investigation phase, and the review of judicial records by the Cizre Chief Prosecutor's Office led to the finding that between 1993 and 1995, the period in which the primary accused public official in this case was in office, there were about 60 to 70 murders in the region committed in a similar manner to the actions of the civilian squads, with assailants remaining unknown. Of the several murders waiting to be solved, this represents just a fraction that took place in one district. Throughout the region,

parties responsible for thousands of murders by unknown assailants are yet to be investigated and brought before court.

At this time, neither the government nor the public prosecutors who have the duty to investigate crimes on behalf of the people have put forth the requisite willingness and discretion to inquire into these grave crimes. One of the perpetrators in the killing of Musa Anter, the Kurdish intellectual and author, in downtown Diyarbakır in 1991 by the illegal organization known as JİTEM, was arrested in July 2012, that is, 20 years after the murder. Let us not forget, however, that this came about more as a result of the efforts and pursuit of correspondents of a particular newspaper than those of the prosecutor or the police. Public officials who actually planned the crime and gave the orders are yet to be identified. The ECtHR referred to the perpetrators of enforced disappearances and arbitrary executions in many of its decisions, stating that Article 2 of the European Convention on Human Rights (the Convention), which guaranteed the right to life, was violated. However, while the prosecutors should have paid attention to the findings of the ECtHR, and deepened the investigation files accordingly to bring the perpetrators to justice, there was unfortunately no such step that was worthy of note. For instance, the ECtHR found that the fate of Abdulvahap Timurtaş in the district of Silopi was unknown, although his detention in 1993 by gendarmerie officials was evidenced in an official document bearing the signature of the District Gendarmerie Commander (see Timurtaş/Turkey decision dated 13 June 2000 and numbered 23531/94); it also found that two civilians, members of the People's Democracy Party (HADEP), who were identified by way of official documents and witness statements, to have entered the said Gendarmerie Office

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building in the same district in 2001 disappeared under detention, and that a number of Convention provisions were violated as a result (see Tanış and Deniz/Turkey decision dated 2 August 2005 and numbered 65899/01). The Court further found that the fate of Muhsin Taş, detained in the district of Cizre in 1993, was also not known, and therefore Article 2 of the Convention was violated because of disappearance under detention (see Taş/Turkey decision dated 14 November 2000 and numbered 24396794). In the fact-finding session held in Ankara, the ECtHR heard statements of Colonel Cemal Temizöz who was captain in the gendarmerie in the district of Cizre in 1993 and of some members of the “civilian squad” reporting to him. Despite these three ECtHR decisions pointing to the perpetrators, no progress was made thus far with the investigation files being held at the prosecutors' offices.

Healing social wounds and improving the well-being the heavily traumatized public will necessitate the revelation of truth and doing justice in face of the people. Before the evidence for these grave crimes is lost any further and perpetrators remain unpunished any longer, fair and effective investigations need to go forward, so that all citizens can see that the principle of the rule of law applies to all without exceptions.

Prosecuting the Perpetrators of the Coup and Holding the Past Accountable

Levent Pişkin, TESEV Democratization Program

The 12 September 1980 coup represents the third time Turkish Armed Forces seized the government in the brief history of the Turkish Republic. Following the coup, the government was removed from office, the Grand National Assembly was abolished, and the constitution was abrogated. Thus began the nine-year military era in which Turkey was redesigned. After the coup, 650 thousand people were detained, 1683 people were blacklisted, 50 were executed, and 171 were documented to have “died due to torture”.¹ The constitution that the National Security Council, which perpetrated the coup, asked to draw up took effect on 9 November 1982 after the referendum on 7 November 1982. The chairman of the National Security Council, Kenan Evren, was elected president.

The military dictatorship first put on an armor of impunity by way of the temporary Article 15 of the Constitution that was adopted before “formally withdrawing” from government with all the pomp and circumstance. With the Constitution it drafted, the dictatorship took a major step toward building the Turkey it had in mind: The traces of the coup are ubiquitous in a country that has been governed with the constitution, the laws as well as institutions of the coup for 32 years.

The temporary Article 15 can be called a “pardon” the generals who perpetrated the coup granted themselves, and because it results in human rights violations going unpunished, it remained a frequently discussed topic and triggered substantial debates. The ‘82 Constitution was amended 16 times before the referendum on 12 September 2010, but governments did not (could not) express the will necessary to abolish that particular article which foresaw that perpetrators of the coup “cannot be tried”. None of the amendment packages included an effort to repeal temporary Article 15.

The question that needs to be, and in effect frequently was, asked in a legal and political sense is: “Does the existence of temporary Article 15 preclude trials?” It will be useful to refresh our memories in that regard: On 28 March 2000, Adana Prosecutor Sacit Kayasu drew up an indictment on the grounds that Kenan Evren, the leader of the 12 September coup committed a constitutional crime and asked the perpetrators of the coup to be brought to court.² The Kayasu case sets a remarkable example of how institutionalized the coup had become, since the prosecutor was stripped of his professional credentials by the High Council of Judges and Prosecutors, a body that came into

¹ NTV, “Rakamlarla 12 Eylül Darbesi” (*The 12 September coup in numbers*), 2012, <http://www.ntvmsnbc.com/id/24999286/>, accessed 17 July 2012.

² *Wikipedia*, “Sacit Kayasu”, 2012, http://tr.wikipedia.org/wiki/Sacit_Kayasu, accessed 18 July 2012.

being with the coup. Lawsuits were initiated against him. This admirable effort by Prosecutor Kayasu was of course deemed as an unlawful step in a country where Kenan Evren, the perpetrator of the coup, was granted an “honorary law degree”.

Some legal practitioners held the view that the provision added to Article 90 of the Constitution in 2004 made it possible to bring the perpetrators of the coup to court. That provision stipulates that “In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall supersede domestic legislation”.³ If the coup implies, to use the phrase in the constitution, the elimination of “fundamental rights and freedoms” and a complete disregard of human rights, it is then a fact that international legal instruments permit this trial.

As a matter of fact, the complaint brought on 1 July 1982 by five state parties to the Council of Europe (France, Norway, Denmark, Sweden and The Netherlands) against Turkey, also a member state, before the European Commission on Human Rights supports the above mentioned argument.⁴ Before and after the referendum, various NGOs and political parties drew up criminal complaints in which Article 90/5 of the Constitution was proposed as the legal ground, requesting that international agreements be taken into consideration in respect of trials of the coup.

With the repealing of temporary Article 15 as part of the amendment package voted in the 12 September 2010 referendum, that ominous article, allegedly an obstacle before bringing perpetrators of the coup to court, was abrogated and the road to trying the perpetrators was cleared up. There are several criticisms directed against indictment no. 2012/2⁵ which Specially Authorized Prosecutor Kemal Çetin presented to the court on 3 March 2012. The critiques concern the manner in which the pre-coup events are discussed in the general assessment section of the indictment and the fact that no claim was filed against the accused on the grounds that they committed “crimes against humanity”.⁶ The criminal charge related to the offense of “attempting a coup” defined in Articles 146 and 147 of the Constitution that were in effect in the Turkish Criminal Code of 1980, and offenses considered in the current Turkish Criminal Code among crimes against humanity such as torture, cruelty, and deprivation of individual liberty did not find their way into the indictment. According to the Nuremberg Charter,⁷ however, as a mandatory rule of international law, states have an obligation to prosecute and penalize acts considered to crimes against humanity, if these acts materialized and without regard to whether

3 Law Concerning the Amendment of Certain Articles of the Constitution of the Republic of Turkey, no. 5170, 07 May 2004, *The Official Gazette*, issue 25469, 22 May 2004.

4 Osman Doğru, “Yargılanan 12 Eylül”, (12 September on trial), *Radikal İki*, <http://www.radikal.com.tr/Radikal.aspx?aType=RadikalEklerDetayV3&ArticleID=1089398&CategoryID=42>, accessed 29 July 2012.

5 The complete Turkish-language text of the indictment is available at <http://www.hukukum.com/12-eylul-iddianamesi-tam-metin.html>, accessed 29 July 2012.

6 For further information, see: E. Azarkan, “Uluslararası Hukukta İnsanlığa Karşı Suçlar” (*Crimes Against Humanity in International Law*), *Ankara Üniversitesi Hukuk Fakültesi Dergisi (Ankara University School of Law Journal)*, Vol. 52, Issue 3, 2003, pp. 275-299.

7 Refers to the principles of international law adopted in the Charter of the Nuremberg International Military Tribunal and during the trial. Crimes against peace, war crimes and crimes against humanity are mentioned for the first time in this particular charter. “*Yearbook of the International Law Commission*”, 1950, Vol. II.

or not they were committed in violation of the domestic law of a given country. Under Article 90/5 of the Constitution, this particular kind of crime should have been included in the indictment.

With the amendment adopted in the aftermath of the 12 September 2010 referendum, and for the first time ever in the history of the Republic, the specially authorized Ankara 12th High Criminal Court launched, on April 2012, the trial of persons who seized government in the coup. Having started with several “legal and political controversies”, the case has had three sessions, and the accused Kenan Evren and Tahsin Şahinkaya, did not (could not) attend due to the “ill-health” report issued by the Forensic Medicine Institution, another product of the 12 September era that issued controversial decisions multiple times. Bringing the last two of the yet alive perpetrators of the coup to court is a milestone in Turkish political history, and it is probably a last chance. Having the perpetrators of the coup stand before the judge in the capacity of an “accused” is a significant and not-to-be missed opportunity to hold them accountable. We can offer the following reasons for the necessity of the trial, its benefits and the opportunity it presents:⁸

- Through the trial, the gross misconducts, those who committed them and those who suffered from them will be identified. Legal recognition of grievance represents that the suffering is acknowledged officially.
- The process can shed very critical light on some events of the past (pre-coup incidents in the provinces of Maraş, Çorum, and the 1 May 1977 massacres).

8 König cited in: Mithat Sancar, *Geçmişle Hesaplaşma: Unutma Kültüründen Hatırlama Kültürüne (Calling The Past To Account: From a Culture of Forgetting to a Culture of Remembering)*, İletişim Yayınları, İstanbul, 2007, p. 132 et seq.

- The trial will demonstrate and tell the public that a new era has ushered in and that norms different from those of the past will apply in the new era.
- The trial will offer an alternative to feelings of revenge and may provide an intervention into the cycle of violence.
- The trial will have a deterrent role and prevent the past from repeating.

There is quite a bit in the history of the Republic of Turkey that could and should be forgotten: Mass murders, coups, murders by unknown assailants... It is as if political history is composed of “layers of forgetfulness that are on top of one another”.⁹ To replace this culture of forgetting with a culture of remembering, the 12 September trial presents an opportunity that should not be missed. The trial is a threshold in terms of political history. In the words of Tanıl Bora, “*Calling 12 September to account can pave the way for a comprehensive effort to hold coups, military tutelage, irregular warfare operations and the denial of Kurds accountable*”.¹⁰ This is the crucial political significance of the trial, which must be emphasized by public opposition for it to have a louder voice and reach out to wider segments of the society. This trial bears the potential to serve as the key point in holding the past accountable. However, holding the 12 September military coup accountable will entail more than bringing to court the members of the National Security Council. Evren and Şahinkaya must be tried not only for the “act of coup” but also for crimes and violations committed during that era. In addition, all responsible individuals,

9 Tanıl Bora, “Unutmak Her Şeyi Unutmak...” (*Forgetting, Forgetting it all...*), *Radikal İki*, 11 September 2005.

10 Tanıl Bora, “Geçmişle Hesaplaşmak: ‘Söyledim ve Vicdanımı Kurtardım’dan Ötesi”, (*Calling the Past to Account: Moving Beyond ‘I said and I saved my conscience’*) *Birikim*, Issue 248, December 2009.

including the prime minister of the 12 September era, Bülent Ulusu, cabinet members of the 12 September government, members of the Advisory Council, commanders and prison wardens of the martial law period, military intelligence officers in prisons, torturers in prisons and physicians who took part in tortures must all be tried and the scope of the case should thereby be broadened. Multiplying intervention requests and in the meantime creating an effective political framework and background will offer the chance to try “12 September” strategically. In this regard, the letter sent by Prosecutor Kemal Çetin to prosecutors’ offices in 47 provinces is important.¹¹ In this letter, Çetin rests the justification for the decision on the lack of subject-matter jurisdiction upon the allegations of systematic torture inflicted by government officials. He argues that under the Turkish Criminal Code, Article 90/5 of the Constitution, the European Convention on Human Rights and the precedents of the European Court of Human Rights, the statute of limitations cannot apply, and asks prosecutors to launch investigations into complaints that are filed regarding these crimes.

Undoubtedly, this non-binding letter sent by Kemal Çetin to prosecutors’ offices is of immense importance in terms of human rights law. However, because it is a non-mandatory document, it is unable to carry due importance in a practical sense. The general perception of judges and prosecutors, and their state-oriented attitudes¹² might block the initiation of these

The 12 September case is a milestone in terms of the “culture of remembering” that the society of Turkey is not used to. The importance of managing this process properly impinges upon the issue of “holding the past accountable”. Those yearning for a democratic state governed by the rule of law are expected to struggle against instances of unlawfulness and to ensure that these instances and rights violations are not forgotten, and more importantly, to make sure that they are held accountable.

lawsuits. The approach and attitude of the political power and public opposition is important in this regard. In particular, if the political power is concerned about calling coups to account, it needs to take any steps necessary to that end and must, let it be said, encourage the prosecutors. If complaints about the coup era continue and considerable support is gained from public opposition, the prosecutors’ offices will in turn be impacted positively.

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The 12 September case can now shed only a speck of light on the dark Turkish political history replete with mass murders, extrajudicial killings, tortures, and murders by unknown assailants. Turning that speck into rays from a projector and ensuring a collective process of accountability is an essential duty of not just the political authority but also the public opposition.

¹¹ To access parts of this letter, see: *Sabah*, “47 Savcıya 12 Eylül Görevi” (12 September duties to 47 prosecutors), <http://www.sabah.com.tr/Gundem/2012/03/10/47-savciya-12-eylul-gorevi>, accessed 29 July 2012.

¹² E. Ü. Atılğan ve M. Sancar, *Adalet Biraz Es Geçiliyor*, (Skipping Justice A Bit), TESEV, İstanbul, 2009.

On Susurluk

Ufuk Uras, Member of the 23rd Parliament of Turkey

With hindsight, the rupture created among the public as a result of the Susurluk scandal¹ of November 1996 can be discerned more clearly. Actually, there is no reason why there would not be any substance to the cliché “Nothing will ever be the same again.” The otherwise known labyrinths of the deep state have been exposed for the first time so blatantly, causing outrage among broad segments of the public. As a result, the demonstration “One minute of darkness for enlightenment” emerged as a conscientious movement in the form of an act of civil disobedience that received international attention.

People realized that they were not alone in their reactions and understood that they could definitely wipe out one particular residue of the regime with joint reactions. But they also noticed that everything could slip out of their hands unless they created a focal point that could transform power relations within the pragmatism of politics. Voters used their preferences to teach lessons to those political structures that took these issues lightly or lent them support.

Unfortunately, the reactions against the Susurluk scandal could not be prevented from becoming

barely noticeable among the political arrangement of the 28 February process², because we lacked a power composition which the weak civil society dynamics in Turkey could challenge.

In any case, the Susurluk scandal was a significant milestone in revealing the impact of the brewing consciousness that formed against the counter guerrilla, criminal organizations, and perpetrators of the coup. We can now see, although haltingly, the legal consequences of the campaigns initiated against the political figures of that era such as former Prime Minister Tansu Çiller and former Interior Minister Mehmet Ağar.

During the campaigns against the trio of politicians, bureaucrats and the mafia, there were maximalist demands/objectives and scornful reactions. Today, however, it can be seen more clearly that such approaches represent a cheap radicalism that conceal the absence of politics.

While the significance of the public disclosure of the non-public sections of the Susurluk Report, prepared by Kutlu Savaş from the Prime Ministry Inspection Board, is obvious, it is interesting to note that there is no political demand to that end. However, no murder can remain a state secret. The state cannot simply disappear in the face of the murders.

¹ The scandal surfaced with a car crash on 3 November 1996, near Susurluk, in the province of Balıkesir. The victims of the accident included the deputy chief of the Istanbul Police Department, a Member of Parliament and the suspect of mass killings who was on Interpol’s red list. The fact that these three people were on the same car revealed the link between the state and illegal organizations and the relationship between state-politics-mafia.

² 28 February Process: The post-modern military coup, allegedly targeted the reactionary activities, which started with the decisions taken at the meeting of the National Security Council. The bureaucratic and military elite in Turkey which was openly against the rule of Islamist Welfare Party withdrew the government.

That we as citizens are on the side of a transparent society do not imply that the field is so broad as to encompass our private lives. In our “wiretapping” campaign of the era, we filed complaints against illegal wiretapping, but today, we are surprised to observe that we are influential to a degree that would almost pose an impediment to the process of deciphering the Batı Çalışma Grubu (*West Working Group*³). Sometimes certain dynamics overlap and at other times they come up against one another. The reactions against technical surveillance in many cases today are justified, but I think that they could have been much more credible if we were not left alone in regards to the campaigns we initiated and the complaints we filed against illegal wiretapping during the Susurluk era.

When we filed a request to intervene in the Ağar case together with Pervin Buldan⁴ and the relatives of those who lost their lives in the Perpa massacre⁵, we were appalled at the lack of public interest in the case. We are similarly appalled at the indifference toward the Cemal Temizöz case⁶ that is currently being heard in Diyarbakır. This

shows the importance of relentless pursuit of goals and keeping social memory alive in terms of the struggle for democracy in the Turkish political conjuncture where the items on the agenda shift rapidly.

Dismantling the counter guerrilla/criminal organization activities exposed with the Susurluk incident through ensuring systematic public interest and struggle, as in democratic countries, will slow down the resistance against efforts to eliminate the gap that arised with international democratic standards. Bringing a democratic constitution and laws into life and dismantling the 12 September regime, while at the same time cracking down the submarine portion of the iceberg whose dimensions remain unknown to us all, will continue to be a test of sincerity for democratic politics.

The issue that calls for our decision is whether our future will be defined by arbitrariness, lawlessness and chaos or whether our lives will be led by the confidence that comes with a civil framework. This also calls for displaying the courage and resolve to alter the course of politics and impact the lives of future generations.

In the 21st century, I think we are at a point of no-return in terms of both the international conjuncture and the needs of democracy in Turkey. We must realize that we need to do the right thing at the right time for the right reason; otherwise we might suffer very unsavory consequences.

After all this time, the choices are still the same: As a society, are we going to have the resolve to take the steps that will transform the administrative, legal, political structures by confronting the rotten reality of Susurluk, and do so without engaging in tactical calculations and negotiations? Or, are we going to let our lives be eclipsed by choosing to act shamelessly or, to make matters worse, to continue to be implicit in soulless relations?

3 A group within the Turkish Military Forces formed to monitor and evaluate the existing and presumptive reactionary activities. The group is known for paving the way which led to the 28 February process.

4 MP for Iğdır from Barış ve Demokrasi Party (Peace and Democracy Party)

5 The incident, widely known as ‘Perpa Murders’, is the killing of 5 people by the security forces in Perpa Trade Center on the grounds that they are members of Dev-Sol, which was one of the most influential leftist movements in 1970s in Turkey.

6 The court case being heard at the 6th Heavy Penal Court of Diyarbakır, known as the Temizöz and Others Case, which concerns 7 defendants including the retired Colonel Cemal Temizöz who are charged with the crimes of “murder”, “developing an organization to commit crimes” and “soliciting to murder”. For more information: Mehmet Atılğan and Serap Işık, “Disrupting the Shield of Impunity: Securing Officials and Rights Violations in Turkey”, TESEV, March 2012. Accessible at: http://www.tesev.org.tr/Upload/Publication/383a90be-6964-47bc-85b8-5a7471d6132c/11714ENGcezasizlik12_03_12Rev1.pdf

A Journey to Justice and Conscience: Diyarbakır Military Prison

Nimet Tanrıkulu, Commission of Justice and Investigation into Diyarbakır Prison

AIM, METHODOLOGY, A BRIEF HISTORY

Diyarbakır Military Prison No. 5 is a place laden with symbolic and special meaning. As a central location of oppressive policies, it has left its mark on history as a place where torture was inflicted in its most gruesome form at the time of the military coup. Its role as a starting point for the course of the developments in the Kurdish question has prevailed.

While the perpetrators of the coup put their mechanisms of cruelty into action within the confines of the prison and inflicted torture in soulless fashion, they had a specific aim they wanted to reach in terms of the policy toward Kurds. Today, it is time to overcome the fear of facing the truth and reconsider the experiences meted out in Diyarbakır Military Prison in those days. When this study was launched, there was no practice of facing the truth and the past in Turkey, nor was there any practice of ensuring unconditional justice. The years that went by saw no change to any of that, and it is all still the same.

We, as the Generation '78 Initiative, address the issue of the Diyarbakır Prison because this was the bloodiest of all prisons at the time of the 12 September coup and it was home to practices of "atrocities" that were meant to destroy Kurdish identity. Although there are

multiple witnesses to what went on in that prison, the state did not act and do what was necessary, and the society has no idea of what happened there. This complacency toward torture and cruelty is a serious obstacle before imagining a peaceful and freedom-loving society. Therefore, we set up a commission called "Commission of Justice and Investigation into Diyarbakır Military Prison" to unearth the torturous and cruel conditions that prevailed in that prison during the 12 September process.

THE ESTABLISHMENT OF THE COMMISSION

The first step in setting up the Commission of Justice and Investigation into Diyarbakır Military Prison was filing the case of Diyarbakır Military Prison. We took that step on a May 18th, the same date of the protest by "The Four", namely Ferhat Kuntay, Eşraf Anyık, Mahmut Zengin and Necmi Öner who burned themselves on May 18, 1982 to protest the brutal practices in the prison. With a press release on 18 May 2007, we announced to the public that we were embarking on the "journey to truth and justice" in front of İstanbul Sultanahmet Prison and heading to Diyarbakır.

In the summer of 2007, we began the search for people we would set up the Commission with. We identified the names and proceeded

to contact them. The commission was composed of over 50 individuals from various professions including academics, legal practitioners, political scientists, human rights advocates and medical doctors.

In a press release we issued in front of Diyarbakır Military Prison with thousands in attendance on 12 September 2007, we, along with over fifty Commission members, members of parliament representing the region, mayors, nongovernmental organizations, democratic public organizations, professional organizations, trade unions, chambers and countless members of the public, declared that the process had begun to set up the Commission of Justice and Investigation into Diyarbakır Military Prison.

We aimed to approach the establishment of the Commission as a structured process. We needed to identify the basic principles that we would rely on, express those principles in writing and carry out a series of studies to ensure consensus. The discussions and conversations that took place between October 2007 and March 2008 led to a common text that defined the Commission and its duties.

CONFRONTATION MEETINGS

First we held confrontation meetings in İstanbul and Urfa-Suruç on 18 May 2008 with populous groups composed of former inmates who served time in Diyarbakır Prison. We held Diyarbakır Military Prison exhibits in neighborhoods such as Sefaköy, Ümraniye, Okmeydanı, Gazi Mahallesi in İstanbul.

Since July 2008, we have held testimonial meetings in Urfa and its districts Suruç and Hilvan; Antep; Mardin and its district Kızıltepe; Diyarbakır, Batman, Siirt, Hakkâri and its

districts Yüksekova, Çukurca and Şemdinli; Mersin, Adana, Osmaniye, İzmir, Ankara and İstanbul. In these meetings, former inmates of Diyarbakır Military Prison, their spouses, children, parents, attorneys and prosecutors, altogether 517 people, narrated the tortures, rapes and deaths in their capacities as the victims of and witnesses to a period of history that is highly critical for the future of Turkish society. Throughout this process, we completed 517 application forms, 466 forensic medicine forms and 450 trauma test forms, and accumulated 800 hours of voice recording.

32 of our colleagues took part in all operations of the Commission, while 15 of them participated partially. In the meantime, de facto “Regional Commissions of Justice and Investigation into Diyarbakır Military Prison” were established. In local meetings, people got mobilized in their own fields. Local support and solidarity expanded beyond their immediate context and built themselves into the works of the Commission over time.

BEFORE THE PUBLIC

Over time, there emerged a need to share the outcomes of the Commission’s work with the public at certain stages. We presented the results in press conferences we held at İstanbul Chamber of Physicians on 11 September 2009 and at Taksim Hill Hotel in May 2011. We held the symposium “Turkey Faces the Reality of Diyarbakır Military Prison” and the art and photography exhibition “From the Dark of Night to the Light of Dawn” on 25 and 26 June 2010. The same activity was held with a wider scope in Ankara in 2011. On 3 December 2011, we had an even larger symposium in İstanbul.

We organized the exhibition “Where on earth is Diyarbakır Military Prison?” at Karşı Sanat

Çalışmaları Gallery (*Counter Art Gallery*) on 22 September 2011, at the TÜYAP Book Fair on 12-20 November, and in Diyarbakır and Urfa between December 2011 and February 2012. All these efforts were featured at numerous newspaper columns, radio and television shows, talk shows and press releases.

CRIMINAL COMPLAINTS AND INVESTIGATION

The number of criminal complaints we have been filing in three stages since 11 October 2010 has now reached about 1,500. Diyarbakır Chief Public Prosecutor's Office launched an investigation in January 2011. Groups of volunteer lawyers were formed in Ankara, İstanbul and İzmir, with a headquarters at the Diyarbakır Bar Association to follow up with the investigation and the likely lawsuit. The last of the "preliminary reports" drawn up by the Commission of Justice and Investigation into Diyarbakır Military Prison was shared with the prosecutor's office in June 2012 and presented to the evaluation of the judiciary, thinking that it might aid in the investigation being conducted by Diyarbakır Public Prosecutor's Office.

The preliminary report submitted to the prosecutor's office included diligent assessments by members of the Commission coming from different fields such as legal practitioners, sociologists, political scientists, physicians, psychologists, artists, journalists and human rights advocates. Studies conducted on the experiences in Diyarbakır Military Prison revealed the truth that a crime against humanity was perpetrated there by way of torture, brutal and humiliating treatment.

THE CAMPAIGN: "TURN DIYARBAKIR PRISON INTO A HUMAN RIGHTS MUSEUM"

Based on the 100,000 signatures we collected, a campaign was initiated to convert the Diyarbakır Military Prison into a human rights museum. Efforts are currently under way to create an organization that will promptly compile objects such as information, documents, letters, photographs, pictures, drawings, clothing, daily wares and the like, so that the offerings of the museum can be enriched.

MOVING FROM "THERE ARE NO WORDS TO DESCRIBE THE DIYARBAKIR EXPERIENCE" TO A DISCOURSE OF ACCOUNTABILITY

The former inmates who, when the Commission first got to work, were saying "No words can describe Diyarbakır, you can only experience it" came to the point of "Those responsible for what went on in Diyarbakır Military Prison must be held accountable and ways must be found to create the instruments to achieve that accountability" as a result of the process in which meetings with the Commission progressed. The aspiration for accountability taught them to speak in the universal language of the pursuit of truth and justice.

People who lived through the Diyarbakır Prison experience relive their time there when they narrate their stories. There is a bloody heritage that still haunts them. Even though three decades have passed, the experience still creates the same impact on the souls, emotions and thoughts. To document this bloody heritage that still prevails, records are being made of the stories narrated by Kurdish friends who lived those days, and the work

continues at full speed in light shed by their opinions and assistance.

THE RELATIONSHIP BETWEEN THE INTELLECTUAL AND THE PUBLIC

One of the most unique aspects of this initiative was the creation of a broad base of voluntary participants by bringing together people from various professional backgrounds and a group of academicians, without receiving any funds or financial support. In collaboration with Kurdish people, the participants laid down the philosophy of the subject matter collectively after spending months of efforts. Participants who could not attend the panels compensated for their absence by working actively and intensively in the Commission's operations. These activities allowed participants to get face to face with the people of the region.

THE LABOR

The resource that forms the foundation for this effort is neither financial support nor funds to be provided by any particular organization; it is people's labor. The inquiry into a social phenomenon such as this one which would engender results that are so critical could not be conducted as an initiative to be realized with a project management perspective. Accordingly, the kind of support needed was not financial resources; instead, it was necessary to have a spirit of work that did not cast a shadow on revolutionary values and ideals, sought to preserve consistency between goals and means, and one that was based on solidarity and aimed to achieve productivity.

For these reasons, the entire process including all phases of this initiative was founded upon

the value accorded labor and the people. Throughout the process, democratic public organizations, non-governmental organizations, professional associations and individuals spared no contribution. Without the distance financial relations would otherwise create, all participants, the people of the region and municipalities collaborated very sincerely. The work that started with a group of eight to ten people expanded, broadened, intensified and eventually transformed into a major effort that was lent support by hundreds of people over time.

THE AGENDA, MATTERS OF PRINCIPLE AND LEGITIMATE GROUND

Over the course of the four-year process, the Commission created its own agenda within the flow of politics in Turkey. If there was a bottleneck, the work marched forward by taking practical steps based on action. The Commission's insistence to have its own

Considering examples around the world, "Truth and Justice Commissions" of this type generally emerge as a result of changes in government. We are not experiencing a kind of government change which could be said to take place in the name of "democracy". New democratic powers, in addition, are attempting to maintain power by putting grave human rights violations and counterinsurgency organizations in the back burner. At this point, some "area clean-up" turns out to be necessary. No such clean-up takes places in Turkey after governments change. In that case, it is the civil society that brings that need forth, and entities such as this one come into being in spite of the state and in a bottom-up manner. These legitimate commissions are set up as informal "truth commissions" and acquire a formal character over time by paving their own way with their efforts.

independent agenda and chart its own course ensured that its activities took shape on their particular groundwork and maintained continuity. Because the state closes the door to this type of commissions and the pursuit of justice, the Commission needed to develop its own method based on a rigorous scientific approach that emphasizes substantiation. Each participant focused on topics that are in their respective disciplines. The scientific field was fused with artistic, cultural and political fields. In the face of all problems posed by lack of time and resources, all Commission members learned to cooperate, lend a hand to another and to be understanding toward one another. This in turn bolstered participants' sensibilities toward collaborative work and assuming responsibility.

Working as a "legitimate truth commission" in Turkey, we are going through this new experience by working cooperatively. The most important factor that helped us get to this point is that we stood behind what we said when we started out and stayed loyal to the principles we set forth in the beginning. All decisions were made in Commission meetings, taking into account not just the central Commission's opinions but also the input and recommendations from local groups and collectivities. At all phases, the action was in accord with the decision made and the inclinations that emerged; in this regard, the Commission meetings constituted our ground of legitimacy. Alex Boraine, the person in charge of the studies on the South African experience we once participated in had said, "Every country's pursuit of truth will have a unique character." Indeed, we had our own unique trajectory.

SHARING THE PAIN, SHARING THE LIFE

Considering examples around the world, "Truth and Justice Commissions" of this type generally emerge as a result of changes in government. We are not experiencing a kind of government change which could be said to take place in the name of "democracy". New democratic powers, in addition, are attempting to maintain power by putting grave human rights violations and counterinsurgency organizations in the back burner. At this point, some "area clean-up" turns out to be necessary. No such clean-up takes places in Turkey after governments change. In that case, it is the civil society that brings that need forth, and entities such as this one come into being in spite of the state and in a bottom-up manner. These legitimate commissions are set up as informal "truth commissions" and acquire a formal character over time by paving their own way with their efforts.

In sum, this Commission was established to lay bare the brutality that defined Diyarbakir Military Prison, to heal the wounds opened up by this prison through the mediation of law and feelings of justice and to ensure freedom for Kurdish identity and Kurdish language in a time of transition from a process of war to a process of peace. That is one of the essential steps to take to overcome the "rupture" created as a result of the crime against humanity perpetrated by the circles that clung to power after the 12 September coup, as well as to share the pain and to foster coexistence!

Crimes Against Humanity in Turkish Criminal Code

Interview with Attorney Eren Keskin

by Levent Pişkin

1) How can we define crimes against humanity, in your opinion? Can you offer an explanation in terms of legal norms and at a conceptual level, as well as through a few examples from around the world? What are the global developments regarding the definition, for instance, how does its scope expand or how does it become more widely or less applicable in legal practice?

Crimes against humanity were first defined within the framework of the principles of Nuremberg Trials. The definition covers “atrocities and crimes including murder, extermination, enslavement, deportation, imprisonment, torture, rape and other inhumane acts committed against any civilian population; or persecutions on political, racial or religious grounds, whether or not in violation of the domestic law of the country where perpetrated.”

Over time, the definition of crime against humanity has evolved. For example, now in international law there is a United Nations convention on the non-applicability of statutory limitations to crimes against humanity, and there is also a European Commission convention prohibiting the application of statutory limitations to crimes against humanity.

Early on, the definitions of crimes against humanity were confined to armed civil conflicts. With the affirmation of the Rome Statute, however, this connection no longer applies.

Article 7 of the Rome Statute does not stipulate the condition of “armed conflict” and only seeks “widespread or systematic attack directed against any civilian population.”

Also, the definition of crime against humanity involves “active or passive participation of an official government representative.”

Thus, Article 7 of the Rome Statute refers to three conditions when defining crime against humanity:

- 1-) Widespread and systematic attack,
- 2-) Directed against civilian population,
- 3-) The perpetrator committing the act purposefully and with knowledge of the attack including his or her crime.

2) Do you think the definition provided in Turkish Criminal Code is sufficient? Or how can that definition be improved to meet the current needs? Is it open to broader interpretations in light of the provision that international conventions on human rights supersede domestic legal texts?

Crime against humanity is defined in Article 77 of the Turkish Criminal Code. It is noteworthy that this definition has found its way to the criminal code, but the will necessary to enforce it after the text was drafted remains insufficient and reluctant.

The Turkish state is unfortunately resisting becoming a true “state under the rule of law”. While positive law looks fine in comparison with enforcement, it also comes up short. For instance, there is no reference to official state authorities in the definition of crime against humanity in Turkish Criminal Code. Subparagraph 4 of the article provides that statutory limitations are not applicable to these crimes. But then again the real problem has to do with enforcement and implementation...

Up until now, no state official has ever been tried for having committed crimes that would otherwise be defined as crimes against humanity, even though they committed these because of this inadequate definition. In fact, acts that would be considered crimes against humanity such as torture, rape, enforced disappearance and many other acts perpetrated by state officials, are always shielded under “statutory limitations” put before us by the courts and prosecutors’ offices, even though the law explicitly stipulates otherwise.

My understanding of the text of the definition of crime against humanity in Turkish Criminal Code is as follows: the article will apply “if some people get together and form an organization and then commit crime against humanity”. I think that the content of the article in no way intends to imply government officials. However if the judiciary can act independently and take as basis the

international conventions signed by Turkey, it can offer broad interpretations and pursue crimes committed by state officials even though the domestic law is deficient in that regard. We all know, however, that we are still far off that being the case.

3) The judgment rendered by the judge in the Sivas trial stands as the only decision made on this issue so far, but it has received criticism that it is inadequate; especially in regards to the section on “public officials”... For example, it has been left up to the judge to decide whether or not the informants recruited as intelligence staff are public officials, would that not narrow the scope of the crime? Cemal Temizöz and coterie, tried for committing massacres in Diyarbakır and Cizre, should have been tried on the basis of Article 77 of the Turkish Criminal Code.

Ever since the foundation of the Republic, the legislative branch, the executive branch and the judiciary branch have been depending on militarism...

The official state ideology has been quite internalized by these powers. Therefore, while the text of the law “pays lip service” by providing progressive definitions, we don’t see these applied in practice.

In fact, the Sivas trial, Cemal Temizöz trial and the 12 September trial are each sample cases involving the international definition of crimes against humanity. In each instance, official representatives of the state are actively involved. There is deliberate intent in all cases and all of them were committed against the civilian population.

That is the fact of the matter. Had the judiciary

taken international law as the basis and acted independently and the indictments in these cases would have been drafted differently, these trials would conclude much differently. Therefore, what actually needs to be questioned is the military structure of the system that girds the judiciary.

The judiciary protects the state in all respects and ignores the crimes committed by government officials, dilutes those crimes over time and strives to keep them out of sight and mind.

4) Generally speaking, what do you think will be the attitude of high judiciary bodies, in particular the Court of Cassation?

Considering their practices so far, I don't believe that high judiciary bodies will have an attitude that is any different. Sadly, the high judiciary bodies are also defined by the red lines of the militarist system, and they have internalized this state of affairs. All these issues need to be approached as part of an overall democratization framework and the predicaments of the militarist order must be scrutinized through a civilian perspective and in an intense manner.



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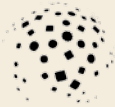
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