

Disrupting the Shield of Impunity:

Security Officials and Rights Violations in Turkey

Mehmet Atılgan
Serap Işık



TESEV
DEMOCRATIZATION
PROGRAM

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Preface

Koray Özdil, TESEV Democratization Program

This report addresses the issue of impunity, which has virtually become the norm, as far as the rights violations committed against citizens by law enforcement units in Turkey are concerned. As the authors of this study, Mehmet Atılğan and Serap Işık reveal the issue of impunity stems from a complicated penal law structure whose existence still prevails in administrative, legal and practical areas. In addition, as pointed out in the “Just Expectations: Compilation of TESEV Research Studies on the Judiciary In Turkey” report (2011), the state institutions’ protection by the judiciary in Turkey is an outcome of a certain mentality. Not only have the members of the judiciary but also many actors among the media and the civil society in Turkey demonstrate this statist mentality. Considering the multi-layered socio-political landscape of Turkey, it is not realistic to expect that the issue of impunity will be resolved in the short run or quickly. Hence, a stronger and more extensive struggle awaits the social actors who want to eliminate the issue of impunity.

In Turkey, there are many dedicated lawyers and human rights organizations carrying out this struggle either through collectively organized campaigns or through individual efforts. In order to understand the structure of the struggle in this area and to produce solutions to rectify the shortcomings, TESEV Democratization Program (DP) held three meetings between November 2010 and April 2011 with a group of lawyers experienced in defending the rights of victims in lawsuits related to human rights violations committed by law enforcement units. In addition, the project team also attended the December 2010-July 2011 hearings of the court case of *Temizöz and Others* being administered at the Specially Empowered 6th

Heavy Penal Court of Diyarbakir. Court cases that reverberated in the public domain, such as the *Hrant Dink Murder*, *Engin Çeber* and *JİTEM* (the Intelligence and Anti-Terrorism Unit of the Gendarmerie) cases were also addressed within the scope of this report. Of course, in terms of the issue of impunity, these court cases are nothing more than striking examples, as similar instances can be seen in the near future of Turkey.

The state officials who are being tried as defendants in these lawsuits are charged with serious offences such as establishing an armed organization, committing torture in detention, unsolved murders, and enforced disappearance of persons. A significant part of these crimes are related to the extrajudicial executions known to be carried out against civilian Kurdish citizens in 1990s as part of the security policy of the state. Hence, these court cases are also of vital importance in a quest for the resolution of the Kurdish Question in a peaceful way. Additionally, these are court cases where the dissident intellectuals, revolutionist dissidents, and the asylum seekers whose rights are deprived of any guarantees under the national laws are also victimized. On the other hand, these cases are very important in terms of the civilian oversight of security institutions in Turkey, and the civilianization process which gained pace in 2000s but still seems to be at a far distance on Turkey’s horizon.

The quest for justice through these lawsuits can only be successful if supported by the victims and witnesses of such cases. It is our hope that the studies carried out by TESEV DP will bring more public visibility to these court cases and encourage a wider population to seek their rights.



Foreword

Yücel Sayman

TESEV Democratization Program's report on the issue of impunity addresses the crimes alleged to have been committed by security forces, such as torture, ill-treatment, use of deadly force, extrajudicial executions, and enforced disappearance of persons. In the study, the concept of impunity is described as the situation in which the forces responsible for the security of the state cannot be held accountable, tried or punished for violation of human rights. Among the factors causing this impunity, the belief in protecting and defending the state is a perpetual phenomenon within the criminal justice system. Many court cases were examined during the diligently executed research phase of the study, and emphasis was put mainly on four cases (*Colonel Cemal Temizöz and Others, JITEM, Hrant Dink and Engin Çeber* cases).

While questioning the factors causing impunity, the report also analyzes the legal, judicial and administrative arrangements which position the state within a protective circle in the organization and functioning of the judiciary.

This satisfactory and meticulous study addressing the issue of impunity is being published in the early stages of the "new Constitution" process of Turkey. If the new Constitution is to eliminate despotism and embrace democracy as the form of government, this research will be one of the studies to be used as a reference in terms of judicial re-organization.

It is crucial to keep in mind the proposals provided in the "Evaluation and Suggestions" section of the report, in regard to the judicial independence and impartiality.

This "Foreword" granted me an opportunity to congratulate those who conducted this substantial and meticulous study, before the report's publication. The issue of "impunity" is utilized as a conceptual framework to shed light on the reasons behind the judicial decisions and practices that have left me confounded for years.



Introduction

Within the framework of the political criteria expected to be met as part of the country's European Union (EU) membership process, Turkey has made significant changes in its legal and institutional arrangements concerning fundamental rights and freedoms during the last five years. The satisfaction with these developments, each of which no doubt constitute a positive step towards democratization, is frequently expressed in the international arena. However, all these positive developments do not change the fact that Turkey has to take some more radical and more permanent steps in terms of legal arrangements and practices in the area of human rights. The Republic of Turkey is defined in its Constitution as a state governed by the rule of law. However, its state institutions are not accountable for the human rights violations committed by its security officials. In democracies, as in all forms of government, the principal duty of the state is to ensure social peace and well-being through security forces. However, in state mechanisms where the supremacy of human rights and humanitarian law is not properly adopted, the security forces become agents who are able to engage in acts and behaviours oriented to strictly protect the prevailing state ideology, and they might easily become accustomed to violation of human rights in their duties and powers. These violations can still be frequently committed by security forces, who, apart from their administrative duties, are in an extremely important position in criminal justice and hence in the manifestation of justice in Turkey. The failure to ensure their accountability is undoubtedly the result of the tradition of impunity invented over time and in collaboration with the various different organs of the state.

Considering impunity under two separate headings as legislative impunity and impunity in practice would be useful in terms of understanding the problems emerging in cases of serious violations of human rights by security forces in Turkey. Legislative impunity encompasses the problems stemming either directly from legal norms or from the legislation. However, effective impunity covers all types of misconduct or negligence at the point of investigation of violations and determination of criminal responsibility by the institutions of the state.¹ Significant among the factors that lead to impunity in serious human rights violations in Turkey is not only the insufficiency of legislative, judicial and administrative arrangements, but also some judicial and administrative practices that have become engrained in the criminal justice system, which itself has developed under the influence of a mentality that is to a large extent based on protecting the "sacrosanct" interests of the state at all costs. The primary manifestations of this statist mentality can be traced back to the Union and Progress Party (*İttihat ve Terakki Partisi*) period of the late Ottoman State. Therefore, impunity in the human rights violations of security forces in Turkey comes to fore as a mentality problem with legal and practical dimensions.²

In this study, the findings leading us to the practices of impunity in human rights violations by security forces are examined in detail within the framework of

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- 1 International Commission of Jurists 2009, "Trial Observation Manual for Criminal Proceedings," *Practitioners Guide No. 5*, p.171
 - 2 Erdal 2006, *Soruşturma ve Dava Örnekleriyle İşkencenin Cezasızlığı Sorunu*, (The Issue of Impunity of Torture with Examples from Investigations and Court Cases), p.16

case examples and concepts. The aim of the report is to interpret the new approaches emerging in the recent years within the scope of international human rights movements through the lens of Turkey's contextual particularity and to point out some solutions that may succeed in surmounting this problem. In order to overcome the tradition of impunity in Turkey, a series of recommendations are addressed in the final section of the report.

METHODOLOGY

In general, this study addresses three different types of impunity. First is the issue of impunity in crimes of torture, ill-treatment and use of deadly force, which are allegedly committed by the police. Next, it discusses impunity in the unsolved murders with strong allegations that they were perpetrated by some deep structures within the state. Last, it studies impunity in crimes of enforced disappearance and extrajudicial execution perpetrated, in addition to the abovementioned crimes, by the gendarmerie and often by intelligence agents who are assigned in breach of the legal framework, especially in the Eastern and Southeastern Turkey.

At both the normative level and the implementation and mentality level, the conditions in which the crime is committed, the lack of supervision upon the said crime's investigation, and the illegalities along with the impunity in the investigation, prosecution and - if penalized- execution phases are outcomes of an over-determined structural process among the socio-political landscape. Such conditions were evaluated in light of information obtained from relevant literature as well as from the media and from interviews conducted with the lawyers of cases which had similar adversities. The project team and the authors of the report have carried out meetings in which the subject was discussed in detail with twelve lawyers who have acted as intervening lawyers and defended either the victims or the victims' relatives in cases related to human rights violations by security forces. Care was taken to make sure that the questions directed to the

lawyers during these meetings were phrased in a way to help in understanding the legal dimension of the developments seen in the investigation and prosecution phases of the cases and the socio-political context represented by these court cases.

Under the research scope, many court cases that had widespread reverberations in the public opinion, especially from 1990 onwards, were addressed. Four specific court cases are addressed with special emphasis: the case of *Colonel Cemal Temizöz and Others*, which concerns the incidents of extrajudicial killings and enforced disappearances in Southeastern Anatolia in 1990s; the *JITEM* case in which sixteen individuals, including one former PKK confessor, who are on trial with allegations of many enforced disappearances and extrajudicial killings with some members of the military in the same period; *the case of journalist Hrant Dink*, who was assassinated in 2007; and *the case of Engin Çeber*, who was killed by torture in detention in 2008. The first three of these cases are on-going, while the latter has been decided by the 14th Heavy Penal Court of Bakırköy. These cases are similar because all of them were filed in relatively new and they can be called relatively 'up-to-date'; in all of these cases none of the victims of the charged crime(s) are alive; and in all of these cases there were significant findings pointing out negligence or deliberate intent by not only the perpetrators put on trial but also by individuals serving in the higher echelons of the bureaucracy. One of the reasons why the report concentrates on these four cases is that these cases have managed to create more reverberations in the public compared to other court cases concerning human rights violations by security forces. Wide segments of the society have been curious about the outcomes of these cases. The significant differences in the way these four cases and the events that constitute their subject matters and prominent actors - who are security forces, prosecutors and judges - have also provided a comparative and comprehensive discussion of the issues for which the report seeks a solution. Of these cases, the Temizöz and Others, being administered at

the 6th Heavy Penal Court with Special Powers of Diyarbakir, and the case of Hrant Dink ongoing at the 14th Heavy Penal Court of Istanbul, were monitored closely by a team of lawyers who were interviewed

under the research scope during the preparation and drafting phases of the report. Observations from these two court cases' monitoring process were also included into the report.

The Structure Preparing the Ground for Violations, and the Problems Encountered during the Investigation Phase

In the criminal justice system, human rights violations by security forces (police and gendarmerie - law enforcement) can happen not only when they are fulfilling their judicial law enforcement functions, but also when fulfilling their administrative law enforcement duties such as maintaining public order, crowd control, etc. Although it is more common in the Kurdish regions of Turkey, the acts allegedly committed by some gendarmerie units, also known to be active in big cities like İstanbul are also considered within the frame of impunity. These units frequently act inside various illegal structures and under the guise of “anti-terrorism” in breach of their actual job descriptions, also with the support of some high-level state officials. In addition to extrajudicial killings and enforced disappearances, some of the other human rights violations allegedly committed by gendarmerie officers who assume the judicial law enforcement duty in rural areas include death under detention, unrecorded detention, and torture. In order to grasp the legislation/implementation problems lying at the root of these violations, and in order to understand the investigation/prosecution processes that generally result in impunity, it is necessary to look at how the judicial law enforcement is positioned in the criminal justice system, and it is necessary to scrutinize the powers given to judicial law enforcement officers.

THE DISTINCTION BETWEEN JUDICIAL AND ADMINISTRATIVE LAW ENFORCEMENT

The duty of the administrative law enforcement is to prevent the disturbance of public order. The judicial

law enforcement, on the other hand is charged with the duty to collect criminal evidence in the event of any act that may be considered a crime, to apprehend the perpetrators and deliver them to judicial authorities, and to ensure the conditions for a sound investigation. Although the distinction between judicial and administrative law enforcement is of practical importance, these duties have become intertwined in the law enforcement organization in Turkey. As specified in the Code of Criminal Procedure (CCP) Article 165/1, and Article 7 of the Judicial Law Enforcement Regulation of 01.06.2005, “other law enforcement units shall also have the obligation to fulfil the judicial law enforcement duty when necessary or when demanded by the Public Prosecutor”. In other words, it is actually not possible to talk about a specialized judicial law enforcement unit regulated by law. These two different law enforcement functions, which are very difficult to distinguish between in terms of their structure of organization and duties, are carried out by officers working under the police or gendarmerie organizations that are under the Ministry of Interior.³ The circulars issued with regard to judicial law

³ In accordance with Article 164 of the Code of Criminal Procedure (CCP) no. 5271 “- (1) Judicial law enforcement means the members of security forces who conduct the investigation procedures specified in Articles 8, 9 and 12 of the Law on the Organization of the Police no.3201 and dated 4.6.1937; Article 7 of the Law on the Organization, Duties and Powers of the Gendarmerie dated 10.3.1983 and no 2803; Article 8 of the Decree-Law on the Organization and Duties of the Undersecretariat of Customs dated 2.7.1993 and no 485; and Article 4 of the Law on Coast Guard Command dated 9.7.1982 and no. 2692.”

enforcement by the Ministry of Interior and Ministry of Justice draw attention to the challenges encountered in positioning such a unit that will work under the orders of the public prosecutor despite being subordinated to the Directorate of Security (i.e. Provincial Police Department).⁴

INVESTIGATION OF SECURITY FORCES

Authorization for Investigation

The distinction between judicial and administrative law enforcement requires extra emphasis in terms of investigation of offenses allegedly committed by security forces. In order for security forces to be put on trial for offences that they have allegedly committed during the execution of their administrative law enforcement duties, an authorization must be issued by the highest-ranking civil administrator of the institution where they are doing their duties in accordance with the Law no.4483 on the Trial of Civil Servants and Other Public Employees. The prosecutors have the authority to investigate *ex officio* in the event of offenses allegedly committed during their judicial duties. Within the scope of the 4th harmonization package prepared as part of the EU membership process, an amendment was made in the Law no. 4483 in 2003, specifying that the requirement for administrative authorization mentioned in the Law shall not be applicable for allegations of torture or ill-treatment. Moreover, the power vested in public prosecutors in accordance with Articles 160 and 161 of the CCP (2005) to directly initiate an investigation about any public employee other than provincial governors and judges (Article 161/5) has, in a sense, rendered defunct the procedure of administrative authorization sought in Law no. 4483.

Although these arrangements may be positive steps towards effective investigation of such allegations, in practice the investigations into offenses allegedly

committed by security officers can be hindered by subjecting them to administrative authorization, thereby giving an open invitation to impunity. In this context, the case of Hrant Dink, still being heard at the 14th Heavy Penal Court of Istanbul, comes to the fore as a dire example. Although probes by the Chief Inspectors of the Ministry of Interior within the scope of the court case determined that the police and gendarmerie officers of Trabzon and Istanbul were at least negligent as per CCP Article 161/5 in preventing the murder of Dink, and although official complaints were filed against these officers, most of the investigations that should have been initiated against these individuals were prevented by withholding administrative authorizations.⁵

It was clearly identified in the expert reports and in the preliminary investigation reports that the officers of the Istanbul Police Department had failed to do their duty as it was necessary due to the letter they had received on 17.02.2006 from the Trabzon Police Department. Accordingly the Provincial Administrative Board of the Governorate of Istanbul had issued authorization to investigate six police officers, including Ahmet İlhan Güler, the Director of Intelligence Division of the Istanbul Police Department.⁶ Yet, as a result of the decisions of the Istanbul Regional Administrative Court⁷, all domestic remedies were exhausted for the charges against officers of the Istanbul Police Department. Hence, the matter was referred to the European Court of Human Rights (ECtHR) by the intervening attorneys.

4 See: Ministry of Interior: Circulars no. 2005/115 and 98. Also see: Human Rights Watch 2008, *Closing Ranks Against Accountability, Barriers to Tackling Police Violence in Turkey*, p.16; Amnesty International 2007, *Turkey: The Entrenched Culture of Impunity Must End*, p. 6.

5 Human Rights Watch, 2008, p. 22

6 Provincial Administrative Board of the Governorate of Istanbul: decisions no.2007/11 and dated 28.02.2007, no. 2007/47 and dated 28.08.2007, and no 2008/14 and dated 20.03.2008.

7 Istanbul Regional Administrative Court: decisions dated 23.05.2007 and no 2007/163 E, 2007/247 K; dated 15.11.2007 and no 2007/510 E, 2007/541 K; and dated 20.03.2008 and no 2008/14.

SUMMARY OF THE HRANT DİNK CASE

Hrant Dink lost his life on 19 January 2007 as a result of an armed attack in front of the building of the head office of the Agos newspaper, where he was the editor-in-chief. Upon admission of the indictment furnished by the Chief Public Prosecutor's Office of Istanbul following the murder, a lawsuit was initiated against a total of 19 defendants, with 8 under arrest and 11 without arrest; under file no 2007/428 of the 14th Heavy Penal Court of Istanbul. The charges include "being a high executive of a terrorist organization, being a member of a terrorist organization, assisting a terrorist organization, premeditated murder, manufacturing explosive material, throwing explosive material, causing deliberate injury, causing damage to property, threatening, hiding a criminal, and carrying arms without license." In the hearing held on 25 October 2010, the file of Ogün Samast, accused of perpetrating the attack and on trial under arrest, was sent to the Juvenile Heavy Penal Court of Istanbul with a decision of "non-jurisdiction." This was in accordance with the Law no. 6008 on Amendment of the Anti-Terrorism Law and Some Laws, on the grounds that he was 17 years of age. The 18th hearing that took place on 30 May 2011, in which the public prosecutor was asked to submit the prosecutor's opinions of the accusations. Despite the court's demand, the then-Governor of Istanbul, Muammer Güler, refused to disclose the identities of the two *Milli Güvenlik Teşkilatı* [National Intelligence Organization, MİT] members who had warned Hrant Dink at the Governor's Office of Istanbul before the murder. The Chief Public Prosecutor's Office of Istanbul determined that acts constituting a crime, such as "neglect of duty," "misconduct in office," "destroying, hiding or altering criminal evidence," and "showing favour to a criminal" had been committed before and after the murder by some police and gendarmerie officers serving in Istanbul and Trabzon; yet, the Chief Public Prosecutor's Office of Istanbul decided non-jurisdiction on the matter. Lawsuits could not be filed against many of these individuals because the authorizations required under Law no 4483 were withheld. It was clearly identified in the expert reports and in the preliminary investigation reports that the officers of the Istanbul Police Department had failed to act appropriately before the murder upon the letter received from the Trabzon Police Department on 17 February 2006. Although the Provincial Administrative Board had issued authorization for the investigation of 6 police officers⁸, all domestic remedies were exhausted for the charges against officers of the Istanbul Police

8 Provincial Administrative Board of the Governorate of Istanbul: decisions no.2007/11 and dated 28.02.2007, no. 2007/47 and dated 28.08.2007, and no 2008/14 and dated 20.03.2008.

Department as a result of the decisions of the Regional Administrative Court of Istanbul.⁹ The matter was referred to the European Court of Human Rights (ECtHR) by the intervening attorneys. Cases were initiated at the 2nd Penal Court of Peace of Trabzon against Ali Öz, Metin Yıldız, Hüseyin Yılmaz, H. Ömer Ünalır, Gazi Günay, Okan Şimşek, Veysel Şahin and Önder Araz on charges of "neglect of duty."¹⁰ Despite all the requests of the intervening lawyers, the court refused to consider the offenses of the defendants within the scope of the offense of "intentional killing by negligent behaviour" as included under Article 83 of the Turkish Penal Code (TCK). In 2010, the intervening lawyers applied to the Heavy Penal Court of Rize, requesting that the *nolle prosequi* previously decided by the Public Prosecutor's Office of Trabzon with regard to the officers of the Trabzon Police Department and the Provincial Gendarmerie Command be lifted on the grounds that the decision was given without examining the evidences that had surfaced against the suspects. The Heavy Penal Court of Rize granted this appeal and sent the file to the Public Prosecutor's Office of Trabzon.¹¹ The Chief Public Prosecutor's Office will send the file back to the Heavy Penal Court of Rize for its decision on whether or not to lift the previous decision of *nolle prosequi*, after completing the procedures requested by the court. The ECtHR has unanimously convicted Turkey for four counts of violation of the European Convention on Human Rights in its decision of 14 September 2010 in the case in which it considered the application filed by Hrant Dink before his death and the five separate applications filed by his family after his death.¹²

9 Regional Administrative Court of Istanbul: decisions dated 23.05.2007 and no 2007/163 E, 2007/247 K; dated 15.11.2007 and no 2007/510 E, 2007/541 K; and dated 20.03.2008 and no 2008/14.

10 2nd Penal Court of Peace of Trabzon: file no.2008/615. At the time of the printing of this report, some of the defendants of this case had been sentenced to imprisonment for 4 to 6 months. The report's findings concerning the Hrant Dink case do not include these latest developments.

11 Heavy Penal Court of Rize: decision dated 11.01.2011 no. 2010/762 D. İş.

12 ECtHR 2010, Dink vs. Turkey decision, Application No: 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010.

Extenuating Interpretations in Defining the Crime

The issue of impunity also comes on the agenda when, in practice, the crimes allegedly committed by security forces are charged under different crime definitions by prosecutors. Under the scope of the Turkish Penal Code no. 5237 (TPC), the administrative authorization system is not sought for offenses such as torture (Article 94), consequential severe torture (Article 95), and violating the limits of authority to use force (Article 256). However, in practice, prosecutors can charge the accused with relatively light offences through an interpretation that not only reduces the minimum requirement of the penalty but that also requires administrative authorization. A striking example is the crimes the security forces were charged with in the indictment prepared by the prosecutors in the case of Engin Çeber, who was killed in detention. The prosecutor conducting the investigation filed the case on charges of the crime of “torment by an ordinary citizen” regulated in Article 96 instead of “torture and consequential severe torture by a public officer,” as regulated in TPC Article 94 and 95 against the police officers, and the crime of “misconduct in office,” regulated in Article 257, instead of “torture committed by negligence” as specified in Article 94/5 against the prison director. Considering the relative lightness of the charged offenses and the relatively lighter penalties foreseen for them, this situation clearly demonstrates that prosecutors are ready to protect the security forces even in cases resulting in death in detention. The fact that the same prosecutor was also responsible for inspecting the prison where Çeber’s death occurred casts a shadow over the effectiveness and impartiality of the investigation.

Counter-charges

Another widespread practice that encourages impunity in cases of human rights violations by security forces is the practice of filing counter-charges against the complainants, and the crime investigations initiated as a result thereof. In the counter-charges brought by security forces, the most common ground used is “use of force or threat to

prevent a public officer from performing his/her duty” as specified in Article 265/1 of the TPC. In these cases, it should be emphasized whether the force used by security forces is proportional to the force or threat allegedly used against them, and whether the circumstances at the time of the event required such an intervention.

However, this is not sufficiently and effectively investigated in reality. The judges and prosecutors often hold security forces in high esteem which often results in the prosecution of individuals who complain of being exposed to ill-treatment. They frequently have charges of “resisting a public officer through violence” even before the necessary prosecutor’s investigation about the security forces against whom the complaint was filed is concluded.¹³ In the case of Engin Çeber, Çeber’s allegations that he was being tortured, filed while he was still alive, were not investigated by the chief public prosecutor’s office, and instead an investigation was launched against him on allegations of resisting the police, which is a dire example of this practice.¹⁴ Similar examples became more frequent with the significant expansion of the police forces’ authority following the amendment of the Law no. 2559 on the Powers and Duties of the Police in June 2007 with the Law no. 5681 on Amendment of the Law on the Powers and Duties of the Police.¹⁵ While investigations and lawsuits

¹³ Human Rights Watch 2008, p. 56

¹⁴ Upon the official complaint filed against Engin Çeber on charges of resisting to Prevent Performance of Duty based on the protocol furnished by the Metris Prison Guard Squad Command of the Gendarmerie, investigation was commenced by the Chief Public Prosecutor’s Office of Bakırköy on the basis of investigation document no. 2008/105565 and on charges of resisting to prevent assigned duty with regard to the officers of the Sarıyer District Police Department by the Chief Public Prosecutor’s Office of Sarıyer on the basis of investigation document no. 2008/8335. Also see: Turkish Grand National Assembly (TGNA) Human Rights Review Committee, 2009, p. 269.

¹⁵ *Milliyet* 2007, “Polis Şiddeti Son Bulmalı” [Police Violence Must End], <http://www.milliyet.com.tr/2007/11/28/guncel/gunoo.html>; *Radikal* 2007, “Kusursuz Polisler” (Police With No Fault), 27 November 2007, <http://www.radikal.com.tr/haber.php?haberno=239958>.

SUMMARY OF THE ENGİN ÇEBER CASE

Engin Çeber was taken into custody in Sarıyer on 28 September 2008, and he lost his life due to torture in the Metris Prison. Çeber's allegations that he was being tortured, filed while he was still alive, were not investigated by the chief prosecutor's office, and instead an investigation was commenced by the Chief Public Prosecutor's Office of Bakırköy against Çeber based on the protocol furnished by the officers of the Command of Metris Prison Guard Squad, for the offence of "resisting so as to prevent a public officer from performing duty," and by the Chief Public Prosecutor's Office of Sarıyer for the offence of "resisting so as to prevent from performing assigned duty" in relation to the officers of the Sarıyer District Police Department.¹⁶ The then-Minister of Justice, Mehmet Ali Şahin, apologized for allegations of torture.¹⁷ The Chief Public Prosecutor's Office of Bakırköy opened cases against 3 prison directors, 39 guards, 13 police officers, 1 physician, and 4 soldiers on charges of "manslaughter by torture, torment, neglect of duty, forgery of official document, and failure to report a crime."¹⁸ The trial started on 21 January 2009, and ended after 16 months, on 31 May 2010. Of the 60 defendants, the 14th Heavy Penal Court of Bakırköy sentenced the prison director Fuat Karaosmanoğlu and the guards Nihat Kızılkaya, Selahattin Apaydın and Sami Ergazi to imprisonment for life. Abdülmüttalip Bozyel and Mehmet Pek were sentenced to imprisonment for 2 years 6 months three times, Yemliha Söylemez to 3 years 1 month and 15 days imprisonment, Aliye Uçak to 2 years and 6 months of imprisonment, and Yavuz Uzun and Murat Çese to 2 years and six months of imprisonment three times. The Court also sentenced 11 guards to 5 months of imprisonment, and deferred the announcement of the verdict.¹⁹ The Court also decided for continuation of arrest for Karaosmanoğlu, Kızılkaya, Apaydın and Ergazi who were sentenced to imprisonment for life. In the *Engin Çeber* case, the efforts and solidarity demonstrated by Çeber's lawyers and civil society organizations made a significant impact on

speedily activating judicial mechanisms. His lawyer informed *Çağdaş Hukukçular Derneği* [Progressive Lawyers Association, ÇHD] about the torture inflicted on his client, following his interview with Çeber at the Metris Prison. Upon this information, ÇHD formed a watch group of 5 lawyers, who on the next day went to the Metris Prison and from there to Şişli Etfal Hospital where Çeber had been admitted. The lawyers talked to the officials at the hospital, and upon learning that Çeber was dead, they announced Çeber's death to the media on the same day. Lawyers of the watch group managed to ensure that competent individuals from the Istanbul Medical Chamber were at the head of the committee making the autopsy, thanks to the contact they had made with the Istanbul Medical Chamber, the Turkish Medical Association (TTB) and the prosecutor's office, while Çeber was still alive. They thereby exercised the "right of the relatives of the deceased to obtain an autopsy by a medical doctor recommended by the defence counsel or representative" which is usually difficult to implement in reality. The lawyers also did not allow the hidden camera images, which recorded Çeber's torture, to be destroyed as is often seen in these kinds of cases, and hence prevented the elimination of important evidence that perhaps enabled the penalization of the defendants. In addition, the commencement of the investigation by judicial and administrative authorities shortly after Çeber was killed in the prison, and afterwards the removal from office of 19 prison guards for the sound execution of the investigation, made it significantly easier to punish the defendants by allowing the detainees who were kept in detention with Çeber to change their statements.²⁰ However, the files of 10 defendants who were convicted by the court have still not been sent to the *Yargıtay* [Supreme Court of Appeal]. The case was concluded in 16 months, but somehow the files could not be sent to the Supreme Court of Appeal although almost 1 year had passed since the conclusion. The lawyer of the Çeber family, in a statement to the media, said the release of defendants under arrest may be put on the agenda in the coming days, reminding that the defendants convicted in the Çeber case were subject to an arrest period of 5 years. Considering that the defendants have been in prison for 3 years, it is possible that the trial at the Supreme Court of Appeal will take 2 years and the defendants will subsequently be released.

¹⁶ Chief Public Prosecutor's Office of Bakırköy: investigation document no. 2008/105565; Chief Public Prosecutor's Office of Sarıyer: investigation document no 2008/8335.

¹⁷ *Sabah* 2008, "Adalet Bakanı İşkence İçin 'Özür' Diledi" (Justice Minister 'Apologized' for Torture), 15 October 2008, <<http://arsiv.sabah.com.tr/2008/10/15/haber,817384B05D7842ADB5A3F1DA60B2FBF2.html>>

¹⁸ Chief Public Prosecutor's Office of Bakırköy: investigation dated 16.06.2006 and no. 2007/170949, indictment no.2008/27662 -2008/17405.

¹⁹ *Halkın Hukuk Bürosu* 2011.

²⁰ TGNA Human Rights Inquiry Committee 2009, 23rd Term 3rd Legislative Year Activity Report, p. 32.

commenced against complainants proceeded promptly, allegations against security forces are administered much slower and with no care. The allegations of the members of the security forces are judicially “verified” to ensure rebuttal of the counter-allegation. This situation gives the impression that currently existing laws are implemented arbitrarily with the purpose of covering up the human rights violations allegedly committed by security forces. With a mentality that the state supersedes human rights, individuals are to be intimidated for admitting a complaint file about a security officer.

Counter-charges can also be filed against the relatives of the victims of the human rights violations allegedly committed by security forces. According to a report published by the Amnesty International in 2007 on the practices of impunity in Turkey, even if these unfounded charges do not result in prosecution, they are very effective in discrediting the reputations of the families of the victims.²¹ In the report, it is stated that such investigations are possibly intended to represent the victim and their immediate circle as guilty and may therefore constitute an attempt to influence a court to be more lenient on members of the security forces on trial for human rights violations. A dire example is the case in which the wife and brother of Ahmet Kaymaz, who along with their 12 year-old son Uğur, were killed by the police in their homes at Mardin, Kızıltepe in 2004, and were accused of being PKK members. The prosecutor’s indictment for this accusation was dismissed on grounds of insufficient evidence by the Chief Public Prosecutor of Diyarbakır, but the allegation against the relatives of the victim has served to legitimize the public perception of the trial.

Dismissal from Office and Suspension

There is no distinction made between judicial and administrative law enforcement entities and the boundaries of the duty domains of security forces are not clearly drawn. Security forces who have allegedly

committed crimes are investigated by their subordinate units, which creates a situation where evidence could be spoiled. Security forces who were involved in many cases of serious human rights violations continue to work as an employee of the authorities from which pertinent evidence and information must be demanded during the investigation and prosecution phases. Failure to suspend security officers from active duty as a pre-trial measure could jeopardize the security of the witnesses.²² Since it is generally the institutions under which they serve that decide on the suspension or relocation of the public employees who are on trial, this situation creates major problems in terms of the impartiality and independence of the investigation and trial phases.

Provisions regarding whether members of the armed forces or security forces against whom a lawsuit has been filed can continue their office are regulated in various different laws. According to Article 65 of the Law on the Personnel of the Turkish Armed Forces, “members against whom a public suit has been filed due to an offense that requires sentence of death or heavy imprisonment or due to an infamous crime or due to an offense, other than negligent offense, that requires 5 years or more imprisonment or due to the offenses of insistent insubordination, physical assault on superior or senior, insult to superior or senior, or resistance, can be suspended from duty by their relevant ministries.” However, this law provision that dates back to 1967 was implemented for the first time in 2010 in the occurrence of suspension of some military personnel from duty in the case filed within the framework of the Sledgehammer (*Balyoz*) coup plan. However, it requires the amendment which gives discretionary power to the institution that has the power to decide.

Suspension of members of the police from office is regulated in the Law no. 657 on Civil Servants. Article 137 of the Law specifies that “Suspension from Office

21 Amnesty International 2007, p. 10

22 Amnesty International 2007, p. 12

is a precautionary measure taken against civil servants whose presence in office may be considered risky in cases necessitated by the state's public services." According to Article 138, those who have the authority to suspend from office are the superiors who have assignment jurisdiction, inspectors of the ministry and the general directorate, and district governors in districts and provincial governors in provinces. On the other hand, Article 140, which regulates suspension from office during criminal prosecution, says "Civil servants who are the subject of criminal proceedings by courts can also be suspended from office by those authorized in Article 138." It is clear that these articles, with their current wording, give a very wide discretionary power to authorized officials with regard to suspension of members of the police from office.

Apart from these arrangements, Article 3 of the Law on Prevention of Some Acts that Disturb Public Order, published in 1971, virtually gives full protection to members of the police and gendarmerie against dismissal from office, in the event of lawsuits initiated against them. In the first two articles of the law, the cases are listed in which the police are authorized to use arms. Article 3 reads as follows: "Preliminary investigation against members of the police or gendarmerie who use arms within the framework of the provisions of this law shall be carried out personally by Public Prosecutors or their deputies. When the lawsuit is initiated, the defendant may be held exempt from attending the hearing and shall not be subjected to suspension or dismissal from office." The existence of such a wide-scope protective provision for security forces in case of a trial against them shows that there is an urgent need of reform in the legislation concerning the trial of public employees.

Numerous cases examined within the scope of the research show that the legal protection of the security forces during the investigation and prosecution phases following allegations of serious human rights violations cause very negative consequences in terms

of combating impunity. One of the most unfortunate examples is the Hrant Dink murder case: Many gendarmerie and police officers whose role in the murder had already been identified during the investigation phase were not suspended from duty by their institutions, and the prosecutors failed to use their existing powers to this end, resulting in an ongoing failure to make any significant progress in the trial of the security forces in question.²³ In the case of Temizöz and Others being heard at the 6th Heavy Penal Court of Diyarbakir, Colonel Cemal Temizöz, former Commander of the Provincial Gendarmerie Regiment of Kayseri who is on trial under arrest for nine counts of heavy life imprisonment, was not suspended from office for the six months till his retirement despite these grave accusations, and instead he was removed from duty by way of retirement. The investigation initiated in 2004 into the police officers who had killed Ahmet Kaymaz and his 12 year-old son Uğur in their home in Mardin, Kızıltepe was carried out by police officers working at the Kızıltepe Police Department, where the accused police officers also worked. Such situations cast shadow over the independence of the investigations and they play a big part in the consequent impunity of these security officers.²⁴ Similarly, the police officer being tried in the case of Nigerian asylum seeker Festus Okey, who died in 2007 with a single bullet wound while under detention at the Beyoğlu District Police Department, signed the police protocol related to the event and was even assigned for the execution of the investigation; moreover, the public prosecutor was called in not immediately as required under the Code of Criminal Procedure (CCP), but almost three hours after the incident, giving the impression that the security forces had mobilized all efforts to cover up the incident and pervert the course of justice.²⁵

23 Çetin 2011, *Fourth-Year Report on Hrant Dink's Murder*, www.hranticinadaleticin.com/tr/dokuman/HrantDinkCinayeti4yilRaporu.pdf.

24 Amnesty International 2007, p.19

25 Human Rights Watch 2008, p. 7

In the case of Engin Çeber, the strong solidarity among Çeber’s lawyers and civil society organizations and their efforts played a significant role in speedily activating the relevant judicial mechanisms. Çeber’s lawyer, Taylan Tanay, informed *Çağdaş Hukukçular Derneği* [Progressive Lawyers Association, ÇHD] on the torture inflicted on his client after interviewing Çeber at the Metris Prison where he was brought after his arrest. Upon receiving this information, a monitoring group of five lawyers was set up by the ÇHD, and the next day these lawyers visited the Metris Prison and the Şişli Etfal Hospital where Çeber had been taken. After talking to the officials in the hospital and being informed about Çeber’s death, lawyers immediately informed the press about Çeber’s death. Following the report issued by the İstinye Public Hospital while Çeber was still alive and verifying that no traces or signs of battery or forcing was found on Çeber’s body, the lawyers of the watch group managed, after insistent applications, to get a report from the Şişli Etfal Hospital, which confirmed that Çeber had been tortured. Due to the contact made by the lawyers of the watch group with the Istanbul Medical Chamber, the Turkish Medical Association and the prosecutor’s office while Çeber was still alive, it was ensured that competent individuals from the Istanbul Medical Chamber were included in the committee conducting the autopsy. This allowed the exercise of the right of the relatives of the deceased to have a medical doctor recommended by the defence counsel or representative, which is usually hindered in reality.²⁶ The lawyers also made sure that the hidden camera images recorded during the torture of Çeber were taken to eliminate any chance of spoilage of evidence, as it is often seen in incidents of this nature, thereby preventing the removal of perhaps the most important evidence that allowed the penalization of the defendants. The course of the execution of the *Engin Çeber* case shows that, in cases that involve human

rights violations by security forces, solidarity between lawyers and civil society organizations at the early stages of the violations is very important in combating impunity.

Another important aspect of the Engin Çeber case is that the political will played a clear role in revealing the culprits and ensuring their due punishment from the early stages of the case, which differs from the experiences of many other cases involving human rights violations by security forces. Effective administration of the court case and punishment of the offenders came to the fore as a rare opportunity to embody the discourse of “zero tolerance to torture,” which was frequently emphasized in the program and statements of the Justice and Development Party within the framework of the EU harmonization process. In this scope, the Minister of Justice of that time, Mehmet Ali Şahin, apologized to Çeber’s relatives soon after the release of reports confirming Çeber’s cause of death as torture. Such a statement was undoubtedly effective in the determined stance demonstrated throughout the trial process by the court to punish the offenders.

Collection of Evidence and Decision of Non-Disclosure

In accordance with Article 160 of the Code of Criminal Procedure (CCP), in the event of a criminal investigation, the duty of the prosecutor is to initiate research to decide whether to file a public suit immediately upon hearing about the commission of an offence; to collect all the evidence that may be in favour of or against the accused, either directly or through the judicial law enforcement officers under his/her command; and to ensure the protection of all collected evidence. In other words, the prosecutor, performing the duties of collecting and protecting the evidences via the judicial law enforcement, also has the obligation to inspect whether all evidence was collected and protected with due care to ensure a fair trial.

However, it is frequently observed that prosecutors, who are responsible for inspecting the civil servants

²⁶ In accordance with CCP No. 5271, Article 87 “Autopsy,” which has been in effect since 2004, the medical doctor provided by the defence counsel or the representative may also be present during the autopsy.

and superiors carrying out an investigation under the prosecutor's orders, and who have the power to directly initiate investigation if their orders are not obeyed, in addition to having the power to initiate investigation as per TPC 257 into officers who do not provide the requested information, are reluctant to commence investigation into offenses such as torture, ill-treatment, death in detention and enforced disappearance allegedly committed by security forces, and virtually turn a blind eye on the spoliation of evidences in the investigations that are somehow initiated.

Another practice that creates a situation for spoliation of evidence is the practice known as "decision of non-disclosure": In accordance with CCP Article 153/2, the power of the defence counsel to review the file may be restricted, upon motion of the public prosecutor, by decision of the judge of the penal court of peace –if a review will hinder the aim of the ongoing investigation. In paragraph 5 of the same article, it is stated that the representative of the victim shall also enjoy all the rights provided by the Article. In the same Law, Article 234 "The rights of the victim and the claimant" in paragraph 4 stipulates that in cases where it is in accordance with Article 153, the victim and the claimant shall have the right to ask his representative to review the documents of investigation. In other words, the rights of the victim, the representative of the victim and/or claimant (i.e. the intervening party) and the rights of the defence counsel are equal. Hence, any such decision of non-disclosure or restriction also covers the representative of the victim and/or claimant and the individuals affected by the crime. Although the rationale given for this article is to achieve the aim of the investigation, in the investigation of offenses involving grave human rights violations by security forces, a decision of non-disclosure works, to a large extent, against the person(s) affected from the crime and the victim. Although the legislation allows a decision of non-disclosure for a specific part of a file, in practice this decision is usually applied to the entirety of the file and the non-disclosure decision remains in effect until

the suit is filed. Consequently, neither the defence counsel nor the representative of the victim or the person affected from the offence can access the file. Thus, judges and courts who deny any objections rose against the decision which virtually encourages spoliation of evidence. In cases concerning human rights violations by security forces, the intervening party functions as a sort of private prosecution counsel together with the prosecutor; therefore, this deprives the investigation from any contribution by the intervening party and it casts a shadow on the soundness of the investigation.

The events witnessed during the investigation and prosecution of the perpetrators following the murder of Hrant Dink constitute one of the grave examples in which security forces facing serious allegations could not be put on trial because prosecutors and courts refused to exercise the powers vested in them by laws. As expressed by Fethiye Çetin, one of the joint attorneys of the case, in her "Fourth-Year Report on Hrant Dink's Murder" ("*Hrant Dink Cinayeti Dördüncü Yıl Raporu*"), it was revealed that the security and intelligence units had hidden, altered or destroyed information and documents that were of the nature to unearth the factual truth and identify the motive for the murder. They had also attempted to mislead the investigating authorities by giving false statements, and they had tampered with the evidence. Even though each and every one of these acts were crimes requiring severe penalties, no investigations were initiated against the security and intelligence officers regarding these crimes, and there was no attempt to launch an investigation by investigating prosecutors which were left inconclusive by other authorities.²⁷

²⁷ Çetin 2011, p. 8.

THE ISSUE OF IMPUNITY IN THE OFFENCES OF ILLEGAL, ARBITRARY AND EXTRAJUDICIAL KILLINGS AND ENFORCED DISAPPEARANCE: THE JİTEM AND TEMİZÖZ AND OTHERS CASES

All of the problems addressed in the previous section(s) also come to the forefront in the investigation and prosecution of the crime of enforced disappearance, which encompasses many human rights violations such as the right to life, security and integrity of a person, protection from inhumane and cruel treatment, and fair trial. The main problem that encourages impunity in crimes of enforced disappearance allegedly committed by security forces is the social perception that commission of these types of crimes, which are included within the scope of crimes against humanity in the name of protecting the “sacrosanct” interests of the state can be considered legitimate or excused, the case for the crime of torture included. This perception is common not only among various segments of the society but also among the indispensable elements of the criminal justice system, i.e the judges, prosecutors, and security forces suspected as the perpetrators of the crime. In the recent years, especially in the Eastern and Southeastern regions of Anatolia, some lawsuits were initiated on allegations that these crimes were committed by security forces under the guise of ‘anti-terrorism’ and umbrella of some state institutions, in an organized manner and within a chain of command. However, it is seen that investigations in regions where security forces allegedly committed the crimes of enforced disappearance or other crimes of deadly use of force, law enforcement reviews and detention or interrogation methods do not conform to the currently effective provisions of the criminal justice system.²⁸

²⁸ Article 36 of the Constitution of the Republic of Turkey guarantees the right to fair trial and freedom to apply for remedy, with the provision “Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures”.

In incidents of enforced disappearance/disappearance under detention, many investigations are carried out by security forces who are allegedly the perpetrators of the crime, and these individuals prepare the reports and the statement/testimony records in a fashion that will avoid prosecution. Proving the crime of enforced disappearance and other crimes in which security forces are alleged to have used deadly force requires detailed autopsy reports and witness statements to enable collection of other evidence. Security forces, who often furnish the records arbitrarily, obtain their impunity shield due to the fact that the autopsy reports are prepared by the Council of Forensic Medicine, which is subordinate to the Ministry of Justice and its independence and scientific quality is widely disputed.

The JİTEM Case

The allegations made in the JİTEM case point out the existence of an illegal execution team established and directed with the orders of high-level military officials, and a secret structure with its roots extending over many echelons of the state. Perhaps the gravest issue among these allegations is the difficulty of identifying and punishing the human rights violations and other offenses committed by security forces, as well as the fact that various civilian elements were involved in this crime mechanism within the framework of institutions that were regulated by laws.²⁹

Although JİTEM’s existence and its activities were denied by the state officials, the allegations and findings mentioned above and the lawsuits filed against members of the gendarmerie/confessors/village guards, on charges of “continuous multiple killings with unidentified perpetrators”, and “setting up an organization to commit crime” strengthen the allegation that extrajudicial executions and enforced disappearances have been going on in a concentrated manner for the last 30 years with impunity.

²⁹ Confessors and village guards come to the foreground as key actors in the formation of the structures mentioned in the allegations.

SUMMARY OF THE JİTEM CASE

The lawsuit initiated in the 1990s in the Eastern and Southeastern regions of Anatolia with regard to the crimes of enforced disappearance and killing allegedly committed by security forces is commonly known as the *JİTEM case*. JİTEM is the abbreviation for the Intelligence and Anti-Terrorism Unit of the Gendarmerie. The JİTEM case has had wide reverberations in the public in recent years. It is still continuing at the 6th Heavy Penal Court with Special Powers of Diyarbakir, and two separate case files were joined.

In the indictment of the first case, 7 defendants, including Retired Colonel Abdülkerim Kırca who committed suicide in 2009, Mahmut Yıldırım with code name “Yeşil,” PKK confessor Abdülkadir Aygan, and Specialized Sergeant Uğur Yüksel, were charged with establishing an organization to commit crimes “illegally but allegedly in the name of the state under the name JİTEM,” torturing to force confession of a crime, and premeditated murder.³⁰ The deceased victims of the case had been recorded as unsolved murders committed by the PKK shortly after the bodies were found; and no significant progress was made during the preliminary investigation into the incidents from 1992 to 2005. However, the case gained a new dimension in 2004 when Abdülkadir Aygan, a former PKK member who started working for the gendarmerie after benefiting from the scope of the effective remorse law, publicly announced through the media from Sweden the involvement of these military individuals and the village guards, whose duties are also regulated by laws, in many incidents of enforced disappearance and killings. The investigation widened after the discovery of bodies strangled and discarded in sacks in a village near Diyarbakir, in line with the statements provided by Aygan, who himself was one of the defendants in the case. The Chief Public Prosecutor’s Office of Diyarbakir filed a suit against the accused by joining 8 separate files in 2005; due to decisions of non-jurisdiction, the lawsuit into these 8 murders went back and forth between military and civilian courts until 2009. In the end it was decided to have the case administered by the “civilian” courts with special powers in Diyarbakir. It took as long as 13 years for the prosecutor to prepare the indictment, and the case file was turned into a matter of dispute due to jurisdictional conflict, by the Heavy Penal Court, Heavy Penal Court with Special Powers and Military Court. The

competent court for the JİTEM case could only be determined after 17 years.

In the other case, 11 defendants consisting of PKK confessors, including Abdülkadir Aygan, and members of the gendarmerie intelligence unit, are charged under TCK no.765 with “creating an organization to commit crime” as per Article 313 “through involvement in the JİTEM organization”, and “killing multiple persons” as per Article 450.³¹ In this file of 11 defendants, which is called the “real JİTEM case” by the public, the two separate cases were merged. The first case which formed the basis of the file, actually started in 1997 when an individual of Syrian nationality named Hacı Hasan - who was living in Turkey under the fake identity of “İbrahim Babat” and serving his sentence at the Kırklareli Prison after being convicted from a prosecutable offense - sent a 11-page letter to the Turkish Grand National Assembly (TGNA) Susurluk Research Commission. Later on, Babat also testified to the members of the TGNA Susurluk Research Commission, stating that when he was a member of the illegal PKK organization, he was caught by village guards and handed over to gendarmerie officers and no legal action was initiated against him. He was recruited into JİTEM under the fake identity of “İbrahim Babat” by Major Ahmet Cem Ersever and Arif Doğan, carried out illegal activities for this organization for years, and that he was involved in and/or had witnessed numerous crimes of killing, injury, bombing, torture etc. mainly in the Southeastern Anatolia and other various places. The information imparted by Babat in his statement was sent by the TGNA to the prosecutor’s offices of the places where the events he described had taken place, and the case file for 11 defendants was created by merging this information with the “blank” investigation files containing “only the crime scene protocol and/or autopsy protocol”, which were already in the hands of the prosecutors. Due to jurisdictional discord, this case file was also the subject of discord for 10 years between the Heavy Penal Court, State Security Court (DGM), Military Court and Heavy Penal Court with Special Power. The competent court with jurisdiction over the case could be determined only at the end of this 10-year period. These two cases, one involving 7 and the other involving 11 defendants, were combined in May 2010. Currently, none of the defendants are under arrest. An arrest warrant in

30 Chief Public Prosecutor’s Office of Diyarbakir: indictment no. 2005/3479 dated 29.03.2005 and with preliminary investigation no. 1992/999.

31 Public Prosecutor’s Office of the State Security Court of Diyarbakir: indictment no. 1999/570 dated 21.06.1999 with preliminary no. 1999/1234.

absentia, since he is living abroad, was issued for defendant Abdülkadir Aygan as a result of the concentrated efforts of the intervening lawyers. All of the defendants are being tried without arrest. Arif Doğan, who testified for the case and who is one of the defendants in the Ergenekon case, stated that he himself had set up JİTEM, and official documents of JİTEM were found in the search conducted in his house. However, in the response letter sent to the court by the General Command of Gendarmerie upon the court's request for information regarding the existence of JİTEM, it was stated that "a unit named JİTEM does not exist in the organization and cadres of the General Command of Gendarmerie, and such a cadre had also never been set up in the past either." Hanefi Avcı, who served as Director of the Intelligence Division of the Diyarbakır Police Department between 1984 and 1992, described JİTEM's activities in his deposition via court order, and said "These [activities] were within the knowledge and under the supervision of his superiors." While the trial was ongoing, the court requested from the Ministry of Interior the new population registry information of Ali Ozansoy, Hüseyin Tilki, Fethi Çetin and Kemal Emlük, whose identities had been changed. The Ministry of Interior responded that it should not expose these individuals, since a lot of money had been spent to protect these confessors by changing their faces, providing them and their families new identities, job placement and reintegration into society. Upon this response, the court reminded the Ministry of Interior that anyone who provides an opportunity for an offender to escape from investigation, apprehension, arrest or execution of sentence shall be punished, and thus managed to get the identity information from the Ministry. The last hearing of the case was held on 22 March 2011. Defendants Fethi Çetin, who was on trial without arrest, and Adil Timurtal, who was under arrest due to another offense, participated in the hearing. The court heard Fethi Çetin's testimony and postponed the hearing to 28 June 2011 after granting the demand made by Mustafa Özer, former Chairman of the Bar Association of Diyarbakır, to become a party to the case on grounds that the bomb found in his car was placed by the defendants. According to statements made by Abdülkadir Aygan from abroad, the murder of Musa Anter, committed in 1992, is also linked to the defendants of this case. The JİTEM case is in progress and it digs "deeper" into the graves of human rights violations committed in 1990s.

As addressed in the previous section, many of the problems regarding the investigation and trial processes are also encountered in the JİTEM case. First, the real names of the individuals involved in the incidents could not be accessed during the investigation phase and no testimonies could be taken from any of the defendants, forcing the prosecutors to suffice with only the autopsy reports from 1990s, the period when these executions had been committed, as evidence. Many of these autopsy reports, almost most of them stating that there was no trace or sign of torture or ill-treatment found on the body, had been signed by the director of the Diyarbakır branch of the Council of Forensic Medicine; and it raises some deep suspicions about the objectivity of these reports when the same director continued to serve in the same position from 1990s to mid 2000s. As mentioned in the previous section, there are problems encountered in demanding and obtaining information from public institutions. It should be emphasized that the 6th Heavy Penal Court of Diyarbakır was able to receive the information it had requested from the Ministry of Interior with regard to the identity information of some of the names who had gone through an identity change and were included in the indictment, only after the Court issued an interim decision to file a criminal complaint against the officials unless such information was sent to the court by the Ministry of Interior. In the hearings following 2010, the year in which the Ministry of Interior sent the identity information of some of the defendants to the court, no arrest decisions were issued for these defendants. As of April 2011, an arrest warrant has only been issued for one defendant, Abdülkadir Aygan, who was declared a fugitive by the court only by the end of 2010 and whose extradition from Sweden to Turkey is required for trial. Aygan's extradition to Turkey carries great significance in terms of enlightening many executions that are expected to reach prescription.

SUMMARY OF THE TEMİZÖZ AND OTHERS CASE

In the court case being heard at the 6th Heavy Penal Court with Special Power of Diyarbakır concerns 7 defendants with 1 under arrest, including the Retired Colonel and Former Commander of the Gendarmerie Regiment of Kayseri, Cemal Temizöz, and former Mayor of Cizre, Kamil Atağ, who are charged with the crimes of “murder”, “developing an organization to commit crimes” and “soliciting to murder”, which are all crimes defined under the Turkish Penal Code (TCK).³² The prosecution asks for sentences of heavy life imprisonment: nine times for Cemal Temizöz, seven times for Kamil Atağ, twice for Temer Atağ, seven times for Adem Yakin, three times for Hıdır Altuğ, six times for Fırat Altın (Abdulahkim Güven), and once for Kukel Atağ. In the indictment, it is alleged that the defendant Colonel Temizöz had “set up a group consisting of village guards, confessors and specialized sergeants” starting from 1993 when he first entered office in Cizre under the guise of “combating terrorism”. Through this group, he interrogated, caused enforced disappearance of or killed 22 people whom he thought were aiding the terrorist PKK organization or whom he had detained for personal reasons, using torture and under the guise of anti-terror activity. Mehmet Nuri Binzet, former village guard and brother of Kamil Atağ, who is one of the defendants of the ongoing case and who was the Mayor of Cizre from 1993 to 1995, sent a letter to the prosecutor of Midyat in 2009, when he was under arrest at the Midyat Prison due to a prosecutable offense. In the letter, he made statements about many activities which he claimed had been perpetrated by Temizöz and his team and which he had either witnessed or were partially involved in himself. The autopsy reports and the testimonies given, and later withdrawn, by two anonymous witnesses whose trials continue as defendants in the case because they confessed their involvements in the alleged crimes, also verified Binzet’s statements. In fact, Binzet was an anonymous witness and his testimonies were not made public, but some of the relatives of the 20 people who had been killed petitioned to prosecutor’s offices, and as a result the files pertaining to some of these incidents were joined with the general investigation file. The trial process commenced in September 2009 upon admission of the indictment by the 6th Heavy Penal Court of

32 Chief Public Prosecutor’s Office of Diyarbakır (Jurisdiction over Crimes Specified in Article 250 of the CMK): indictment with investigation no. 2009/906, no 2009/1040 - 2009/972 dated 14/07/2009.

Diyarbakır.³³ In this case, some anonymous witnesses withdrew their testimonies. One of the witnesses withdrawing his testimony was Mehmet Nuri Binzet, who first initiated the investigation by reporting the incidents. Binzet did not acknowledge that he was under pressure in the hearings where he was a witness, expressed that the investigating prosecutor had made some promises to him and due to those promises he had testified in that manner in the previous phases of the investigation. In addition, he expressed that the testimony record contained some statements which did not belong to him. Of the defendants, confessors who were heard as anonymous witnesses also withdrew their testimonies.³⁴ An unsigned letter was sent to Osman Bulgurlu, who was the Governor of Cizre at the time of the events and who is currently the deputy governor of Antalya, and read during the hearing of 18 February 2011 by the Chief Judge Menderes Yılmaz, and the witnesses were warned against giving testimonies against the defendants.³⁵ All of the defendants stated that they were combating terrorism and that it was unfair to be put on the defendant’s chair instead of being rewarded for their deeds. Some members of the military who were heard as witnesses during the investigation and prosecution phase gave testimonies with important information on the existence and activities of an ‘interrogation team’ led by Temizöz consisting mainly of confessors and village guards, and some of this information matched the testimonies given by various civilian witnesses. During the trial, various arguments broke out between the intervening lawyers and the representatives of the defendants and the chief judge of the court. In two of these arguments, some of the intervening lawyers were taken out of the courtroom. In the ongoing trials, the court continues to hear witness testimonies.

33 6th Heavy Penal Court of Diyarbakır (With Jurisdiction based on CMK Article 250), file no: 2009/470.

34 *Tüm Gazeteler* 2011, “Üçüncü Gizli Tanık da İfadesini Geri Çekti” [Third Anonymous Witness Also Withdraws Testimony], <http://www.tumgazeteler.com/?a=5373906&cache=1>

35 *Moral Haber* 2011, “Vali Yardımcısına Albay Temizöz Tehdidi” [Deputy Governor Threatened by Colonel Temizöz], 20 February 2011, <http://www.moralhaber.net/turkiye/vali-yardimcisina-albay-temizoz-tehdidi/>.

The Temizöz and Others Case

In Temizöz and Others, case, the hearings were executed in the “serial procedure,” with one hearing every week during the interrogation of the defendants. It is an exceptional case for the Turkish judiciary to manage 22 hearings in two years. The court did not grant the intervention requests of democratic mass organizations, chamber of professions and civil society organizations, who also watched the hearings from time to time. Occasional problems were encountered in translation, since the Kurdish translator brought in during the testimonies of the injured parties was a civil servant working for another court and not a professional translator. The translation facility provided for victims was limited only to their testimonies. The victims were unable to hear the testimonies of the defendants and the witnesses, and hence could not use their right to pose questions. In some hearings, various arguments occurred between the chief judge and the representatives of the defendants; in two of these arguments, some of the intervening lawyers were taken out of the courtroom. Both the defendants and the intervening lawyers refused the panel of judges on grounds that the court had lost its impartiality for various reasons, yet these requests were not granted by the court reviewing the refusal.

All the defendants of the case frequently expressed in their statements that they were fighting against terrorism to protect the interests of the state, that their actions could not be counted as criminal and that it was unfair that they were made defendants instead of being rewarded. However, detailed testimonies heard by many witnesses during the investigation and in hearings raise deep suspicions as to the legitimacy of the actions of the defendants.

Tahir Özdemir, who could not hear any word or news of his brothers Abdullah Özdemir and İzzet Patır, who were detained after their village was raided in 1994 by special units and village guards. Özdemir’s brothers were afterwards taken to the District Gendarmerie Command of Cizre where Colonel Temizöz was the

commander. In the hearing of 15 October 2010, Özdemir stated that his family had continuously tried to determine the fates of Özdemir and Padır, that they had petitioned the prosecutor’s offices of Cizre, İdil and Silopi with no results to their enquiries. When asked why they did not file their complaints with the Gendarmerie Command of Cizre, Tahir Özdemir said: “We did not go to the District Gendarmerie Command of Cizre because going there was not a possibility for us. Those who were taken there never came back. Cemal Temizöz even told me at the District Gendarmerie Command of Silopi, while we were with the District Gendarmerie Commander Hüsam Durmuş, ‘Why are you behaving treacherously? Why are you petitioning?’ Hence, it was impossible for us to petition the District Gendarmerie Command of Cizre to learn about what had happened to these people.”³⁶

Some members of the military testifying as witnesses in the investigation phase and in the hearings provide important information on the existence and activities of the ‘interrogation team’ consisting of mostly confessors and village guards led by Temizöz; some of this information matches the statements given by some civilian witnesses.

Tahir Elçi, the lawyer of the relatives of one of the victims who was allegedly killed, pointed out that the statements of anonymous defendants had been taken at a time when they were suspects and not yet defendants. Elçi emphasizes that the statements taken from individuals by granting their constitutional rights and without forcing them to testify against their selves constitute evidence. Elçi underlined that the previously given statement could be withdrawn, yet such a withdrawal would not render the statement null, and he suggested that the withdrawal of statements by anonymous witnesses indicated that these witnesses were not safe and instead were under

³⁶ Yüksekova Haber 2010, “Kamil Atak’tan İtiraf” [Confession from Kamil Atak] 16 October 2010, <http://www.yuksekovahaber.com/haber/kamil-ataktan-itaraf-39137.htm> [accessed on 21 May 2011].

pressure.³⁷ Taking testimonies from anonymous witnesses disregarding the fact that these same individuals are the defendants in the case is a legal problem on its own. While the defendants' quality as a witness is debatable, prosecutors basing their indictments on the statements given by anonymous defendants violate the legislation instead of finding a more effective and more valid legal instrument of proof and such a situation raises suspicions about the seriousness of the cases. In light of these cases filed on the basis of anonymous witness testimonies given by defendants or suspects at the investigation phase, their contribution to truth and justice is debatable.

Evaluation

Both the *JİTEM* case and the *Temizöz and Others* case are indisputably a big opportunity to highlight the unsolved murders and incidents of enforced disappearances committed in Eastern and Southeastern regions of Turkey since late 1980s, and punish the perpetrators. Effective execution of these cases without impunity is also of great importance in terms of giving meaning to the "democratic initiative" program brought on the agenda within the framework of the EU harmonization process in 2009 by the Justice and Development Party. Particularly after the arrest of miscellaneous active and retired officers, including an army commander, since 2008 under the scope of the Ergenekon case, many witnesses and victim relatives applied and testified to the Chief Public Prosecutor's Office of Cizre. They did this with the help of the Bar Association of Şırnak, with regard to the crimes allegedly committed by Temizöz and his team and with the influence of the favourable atmosphere created. They could not find the courage to petition judicial authorities since late 1980's. As stressed before, the determined political will towards surmounting impunity in cases concerning human

rights violations by security forces had a positive effect on judges and prosecutors. On the other hand, the withdrawal of statements by some witnesses testifying in the *Temizöz and Others* case during the trial phase and the serious allegations that these witnesses were under pressure to act in such a manner points out the mechanisms responsible for the reluctance of these individuals to file complaints earlier are still present and are of a quality that can hurt the complainants. The positive attempts of prosecutors and judges for an effective and expedient trial in the *Temizöz and Others* cases can hardly be evaluated as the downfall of the entrenched culture of impunity in Turkey or as a start of a consistently new course in cases where the security forces are tried.³⁸ As such, other than the *Temizöz and Others* and *JİTEM* cases, no investigations were initiated into the many murders by unknown perpetrators or many incidents of enforced disappearance, allegedly committed by the security forces during the same period with the number of victims killed allegedly numbering thousands. All these shortcomings and problems show that political will is crucial in illuminating and eliminating impunity in court cases addressed in this report and the incidents of enforced disappearances and murders committed by unknown perpetrators in the Eastern and Southeastern regions of Turkey.

37 *Bianet* 2009, "Gizli Tanık İfadesini Çekse de Kanıttır" [Anonymous Witness Testimony Remains Evidence Even If Withdrawn] 20 July 2009, <http://bianet.org/bianet/insan-haklari/115983-gizli-tanik-ifadesini-cekse-de-kanittir>.

38 Erdal 2010, p. 318

Problems Encountered in the Prosecution Phase

PROBLEMS STEMMING FROM THE AUTHORITIES OF THE HIGH COUNCIL OF JUDGES AND PROSECUTORS

The understanding of holding the interests of the state above the principles of rule of law and human rights is prevalent in *Hakimler ve Savcılar Yüksek Kurulu* [High Council of Judges and Prosecutors, HSYK]. When evaluated in view of the wide influence domains within the judicial system, this broadly restricts the capacities of local courts to give independent and fair decisions. This mentality, which adopts the survival of the state rather than the insurance of justice as its final goal, is extremely influential particularly in the decision phases of cases concerning human rights violations by security forces, which are evaluated within the scope of this report.

HSYK Decisions Remaining outside of Judicial Review

In accordance with Article 159 of the Constitution, the High Council of Judges and Prosecutors shall deal with the admission of judges and public prosecutors of courts of justice and of administrative courts into the profession, appointments, transfers to other posts, the delegation of temporary powers, promotion, and promotion to the first category, the allocation of posts, decisions concerning those whose continuation in the profession is found to be unsuitable, the imposition of disciplinary penalties and removal from office.” Although the recent constitutional amendment, of 2010, opened the road for an appeal against HSYK decisions concerning the penalty of removal from office, the provision that there shall be no appeal to any judicial instance against the other

decisions of the Council has been maintained. Holding the decisions of the HSYK, which is an administrative organ with power to decide on matters that concern the personnel rights of judges and prosecutors, free from judicial review does not conform to the principle of the rule of law in any way whatsoever.³⁹

The fact that the HSYK decisions other than those concerning removal from profession are not subject to judicial review deprives members of the judiciary from professional security and thereby casts a shadow over the impartiality and independence on judicial decisions. This judicial immunity is continuously challenged when evaluated in the light of the fact that the Council often uses its power to remove judges and prosecutors from office, especially in cases that involve the interests of the state.

A striking example is the Şemdinli case, where the trial process is still ongoing. In the bomb attack of 9 November 2005 against the Umut Bookstore (*Umut Kitabevi*) where one person was killed, two non-commissioned officers (NCO) of the Gendarmerie Intelligence Organization (JİT) and one PKK confessor were arrested by citizens. Multiple lists of names along with numerous sketches, weapons and similar materials were found in the automobile used by the gendarmerie NCOs, and gendarmerie ID cards were found on the persons of the caught perpetrators. The General Commander of the Gendarmerie of the time, Fevzi Türkeri, said in his statement about the incident that the bombing was a local incident, while the Land

³⁹ Yazıcı 2010, “Judicial Reform Project: High Council of Judges and Prosecutors” in “A Judicial Conundrum: Opinions and Recommendations on Constitutional Reform in Turkey”, TESEV Publications, İstanbul, p.17.

Forces Commander, Yaşar Büyükanıt, declared that he knew one of the perpetrators, NCO Ali Kaya, and asserted that Kaya did not commit the crime. The indictment prepared by the Public Prosecutor of Van, Ferhat Sarıkaya, who had also carried out the investigation, included some witness statements implicating some commanders. This included the Land Forces Commander of the time, Yaşar Büyükanıt, and evaluated Büyükanıt's statement of "I know him, he is a good kid" with regard to NCO Ali Kaya, who was one of the defendants of the case, as an "attempt to influence the judiciary." In light of these allegations, the inspectors of the Ministry of Justice initiated an investigation on Ferhat Sarıkaya, the public prosecutor preparing the indictment; moreover, on 20 March 2006, while the investigation on the prosecutor was still underway, the Turkish General Staff published a declaration stating that "the personnel has been exposed to accusations that are irrelevant to reality" and calling all constitutional institutions to do their duty with regard to the indictment and the prosecutor. In the report they prepared following their investigations, the inspectors expressed their opinion that Sarıkaya should be given a disciplinary penalty on grounds that he had "included matters that should not have been included in the indictment" and "overstepped his authority."⁴⁰ Approximately one month after the declaration of the General Staff, the HSYK removed Sarıkaya from his position, with its decision dated 20 April 2006. In the rationale of the decision for removal from his position, it was stated that Sarıkaya had acted in violation of the circular on investigations concerning military personnel⁴¹ and hence that he had overstepped his authority.

The prosecution phase of the ongoing Şemdinli case shows that members of the judiciary are under the influence of many pressure mechanisms that serve to

defend the best interests of the state on any ground in cases concerning crimes allegedly committed by security forces and illegal structures organized in the institutions of the state in Turkey. For the first time in Turkey's history, the civilian judiciary was able to bring on trial the military personnel for extensive and serious accusations. Unlike the Susurluk case in which the allegations of 'deep state' came on the agenda for the first time, the charges brought against the defendants of the Şemdinli case were evaluated outside the scope of the "prosecutable crime of forming a gang." The accused NCOs were arrested on grounds of committing the crime of "disrupting the unity of the state and integrity of the country."⁴² However, this rationale, for which Abdullah Öcalan and PKK administrators had also been tried before, disturbed many segments including the Turkish Armed Forces (TSK); and the arrest of TSK members within the scope of crimes against the state received huge reactions from the media and non-governmental organizations with nationalistic political tendencies. As a result, the declaration issued by the General Staff, with open support from some media groups and some non-governmental organizations, had a significant effect on removal of the case's prosecutor, Sarıkaya, from profession by HSYK. The transfer of the case from the civilian judiciary to the military judiciary following Sarıkaya's removal and reappointment of judges to other posts, and the other changes that took place during the process showed that, contrary to expectations, the members of the judiciary still did not have enough guarantees against agents of pressure who virtually mobilized all efforts to ensure impunity for the security forces in the name of protecting the interests of the state.⁴³ On the other hand, the High Council of Judges and Prosecutors, or HSYK, whose decisions of removal from office were opened to judicial review with the Constitutional amendment of 2010, cancelled the decision that had removed Sarıkaya from profession in May 2011, and reassigned him as the Public Prosecutor of Ankara.

40 *Hürriyet* 2006, "Müfettişler Disiplin Cezası İstediler" [Inspectors asked for Disciplinary Punishment] 29 March 2006, <http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=4165539&p=2>.

41 *Asker Kişiler Hakkındaki Soruşturma* [Investigations concerning Military Personnel], bearing the signature of Justice Minister Cemil Çiçek, dated 1.1.2006 and no. 23.

42 Erdal 2010, p.23.

43 *Op. cit.*, p. 177.

Apart from removals from profession, the relocation and transfer decisions often issued by the HSYK with regard to members of the judiciary are seen by many judges and prosecutors as a practice that stains the independence of the judiciary.⁴⁴

Problems Stemming from the Scoring System

In accordance with Article 28 of the Law on Judges and Public Prosecutors, “Through legal remedy reviews, the Chambers of the Supreme Court of Appeal (*Yargıtay*) and the Council of State (*Danıştay*) shall give scores as very good (*çok iyi*), good (*iyi*), mediocre (*orta*) and fail (*zayıf*) to the singularly or collectively deciding judges and to the public prosecutors preparing the indictment, participating in the hearing in which the verdict was announced, and applying for legal remedy.” In accordance with Article 29 of the same Law, the HSYK decides on the promotions of judges and prosecutors based on the scores given.

Since the decisions of judges and prosecutors are reflected on their promotions to the extent that they are accepted by the higher courts, these high courts function as some sort of a control mechanism over local judicial organs. Due to the scoring system, which is incompatible with the principle of judicial independence, judges and prosecutors who can affirm their positions as respectable members of the judiciary only through rulings that do not conflict with the decisions of higher courts generally feel obliged to act within the narrow framework drawn by the judicial elite. This is because appeal is not possible against the decisions of the assemblies of civil chambers, which are the highest appeal authority although the judges and prosecutors have the right to resistance. A large majority of the decisions ruled by high courts have no rationale, they conflict even among

themselves, and such decisions cannot be discussed at the assembly of unification of conflicting judgements because of the conflict of case-laws between grand chambers. These observations show that the appeal process in the Turkish judiciary does not conform in any way to the universal principles of law.

On the other hand, since the reflex to protect the best interests of the state is very strong at the Supreme Court and the Council of State, it is not easy for local courts to rise above these ideological patterns in cases where security forces are on trial. Above all, it is seen that many judges and prosecutors unconditionally adopt the mentality that prefers defending the interests of the state to the rule of law, independent from the influence of high courts or other mechanisms that exert pressure on local courts.⁴⁵ Perhaps the most important factor triggering impunity in the trial process of state employees is the ossified mentality adopted by the Turkish judiciary and politicians, which advocates the protection of the state under all circumstances, and implicitly approves the dismissal of the universal principles of democracy and human rights when it is necessary.

TWO-HEADED NATURE OF THE JUDICIARY: MILITARY JUDICIARY-CIVIL JUDICIARY

The military judicial system’s constitutional groundwork was laid in the 1961 Constitution. It maintained its existence in the 1982 Constitution and its scope was further widened via legislative arrangements which are incompatible with judicial unity and its principles.

Military justice is regulated in Article 145 of the 1982 Constitution. In terms of civilians, significant changes have been made in this system, which, until recent years, allowed trial of civilians in military courts and which subjected the military offenses as well as any other offenses committed by military persons to the

44 This topic is addressed in detail in TESEV’s study titled “Just Expectations: Compilation of TESEV Research Studies on the Judiciary in Turkey.” Aydın, S., Erdal, M., Sancar, M., Atılğan, E.Ü. 2011.

45 Aydın, S., Erdal, M., Sancar, M., Atılğan, E.Ü. 2011.

military judicial system. In 2010, Article 145 of the Constitution was amended as follows: “[...] Cases regarding crimes against the security of the State, constitutional order and its functioning shall be heard before the civil courts in any event. Non-military personnel shall not be tried in military courts, except war time.”⁴⁶ This constitutional amendment came into force following the referendum of 12 September 2010. As a result of the amendment, the trial of civilians by military courts during peacetime is constitutionally prohibited, and trial of military personnel in civil courts is enabled for specified offenses.

The amendments are a positive step for civilians. However, the trial of members of the gendarmerie organization and of other military personnel in critical lawsuits concerning organized crimes committed together with civilians and with roots reaching the organs of the state also brings forth jurisdictional conflicts originating from the distinction of civil-military justice. These conflicts negatively affect the trial processes and arise as a problem that results in impunity.⁴⁷ In the Şemdinli case addressed in the previous section, there was a jurisdictional conflict between the military and civil justice. The 3rd Heavy Penal Court of Van sentenced the NCOs to heavy imprisonment of 39 years 5 months and 10 days for the crimes of “murder”, “organizing a gang” and “attempt of murder”. The ruling was appealed, and the 9th Criminal Chamber of the Supreme Court reversed the judgement on procedural basis with its decision of May 2007 and ruled that the crimes with which the defendants were charged were under the jurisdiction of the military court. Afterwards, in its first hearing on 14 December 2007, the Military Court of Van decided for the release of the defendants, and on 22 January 2010 the court ruled non-jurisdiction and decided for the transfer of the file to the Heavy Penal Court of Hakkari. Finally, on 18 February 2011, the Chief Prosecutor’s Office of the Military Court of Cassation announced its opinion that according to the latest

constitutional amendments, the defendants of the Şemdinli case should be tried at the Heavy Penal Court of Hakkari. The Şemdinli case is one of the most important examples demonstrating how the jurisdictional disputes between the military and civil justice negatively affect the trial process and the dissimilar attitudes of these two judiciary systems are demonstrated more clearly when it comes to trial of military personnel.

The hampering of the trial process due to jurisdictional conflicts and the public questioning of the independence and impartiality of the military justice in trials of military personnel in critical court cases that are linked to the “deep state” have raised questions about the reason for the existence of the military justice. Abolishment of military high courts, limitation of military justice to disciplinary trials and ensuring conformity with the principle of natural law by ensuring judicial unity are among some pertinent suggestions.⁴⁸

STATUTE OF LIMITATIONS

The concept of prescription, or statute of limitations, means the state remits litigation and/or penalty by not performing the necessary transactions within a specified time limit. It is a legal concept which was transferred from private law into criminal law in terms of its theoretical basis. The legal basis of prescription and its ways of implementations are controversial issues for the cases of serious human rights violations such as torture, extrajudicial execution, enforced disappearance or death in detention, or murders by unknown perpetrators. In the recent years, the institution of prescription/statute of limitation in Turkey is the target of heavy criticism as it has been transformed into almost a cloaked pardon in terms of the criminal law and within the scope of the crimes included under the criminal code, it has deepened the practices of impunity. Although Articles 66 and 68/1 of

46 Law no. 5982 adopted on 7 May 2010.

47 Erdal 2010, p. 85, 93.

48 Erdal 2010, p.88; Kardaş 2009b, “Yargının Temel Sorunu Çift Başlılık,” [Judiciary’s Main Problem is its Double-Headed Structure] *Taraf*, 14 February.

the Turkish Penal Code no. 5237 have extended the statute of limitations for both action and penalty to overcome the adversities created by this institution, the statute of limitations continues to bother the public conscience as the amendments remain ineffective just as the shortened arrest periods have remained ineffective in practice. In a court case that was extensively covered by the media, the murderer of Kemal Türker, killed in 1980, was acquitted in September 2010 as the case was dismissed due to statute of limitations. Many murders committed in the Eastern and Southeastern Anatolia, mostly in the early 1990s, now risk hitting the statute of limitations by 2012. The report *Gizli Af: Zaman Aşımı* [Implicit Amnesty: Statute of Limitations] prepared by the Chamber of Commerce of Ankara indicates that every year on average, 486,000 files are dismissed due to statute of limitations in Turkey.⁴⁹ According to data from the Ministry of Justice, an average of 20% of the cases is dismissed due to statute of limitations every year.⁵⁰

Although the effects of the extended statute of limitations for action and penalty will be felt in the coming days, the slow-running, cumbersome structure of the judiciary in Turkey with its heavy work load attempts to deliberately prolong the legal processes. On the one hand this violates the “right to public hearing within a reasonable time” enshrined in Article 6 of the ECtHR, and on the other hand it creates impunity. In Articles 76-78 of the Turkish Penal Code, the crimes of genocide (76), offenses against humanity (77) and forming organized groups or engaging in management of such groups to commit these crimes (78) are regulated, and it is stated that these offenses are not subject to statute of limitations. In accordance with Article 77 of the Turkish Penal Code, the following

acts, if committed systematically under a plan against a sector of the community for philosophical, political, racial or religious reasons, create the legal consequences of an offense against humanity and are not subject to statute of limitations:

“a) Voluntary manslaughter b) Acting with the intention of giving injury to another person, c) Torturing, infliction of severe suffering, or forcing a person to live as a slave d) To restrict freedom e) To make a person to be subject to scientific researches/ tests f) Sexual harassment, child molestation g) Forced pregnancy h) Forced prostitution.” However, this Article does not include the crime of enforced disappearance. In Article 5 of the UN Convention for the Protection of All Persons from Enforced Disappearance,⁵¹ to which Turkey is not a signatory, it is stated that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as it is defined in the applicable international law and shall attract the consequences provided for under such applicable international law. According to the Article 7 of the Rome Statute of the International Criminal Court, which is not recognized by Turkey, definition of a crime against humanity includes any of the specified acts intentionally committed as part of a widespread or systematic attack directed against any civilian population. Such a definition does not exclude enforced disappearance of persons among these acts.

49 Ankara Ticaret Odası 2006, “Gizli Af Zaman Aşımı,” [Cloaked Pardon: Statute of Limitations] March 2006, <http://www.atonet.org.tr/yeni/index.php?p=355>.

50 Adalet Bakanlığı Adli Sicil ve İstatistik Genel Müdürlüğü, Adli İstatistikler Arşivi [Ministry of Justice, DG Criminal Records and Judicial Statistics, Judicial Statistics], http://www.adlisicil.adalet.gov.tr/ist_arsiv.html.

51 United Nations General Assembly 2006.

Evaluation and Suggestions

EVALUATION AND SUGGESTIONS FOR THE MEDIA, CIVIL SOCIETY ORGANIZATIONS, LAWYERS AND OTHER WATCH GROUPS

The Role of the Media and the Public in Illuminating the Cases

In the *Engin Çeber* case, which was examined within the scope of this report, “extrajudicial activities” such as lawyers informing the media without delay and media sharing its archive footage with the public were the most important factors which enabled the punishment of the security forces. In the case of *Temizöz and Others*, the petition filed with the prosecutor’s office by the lawyers of the Bar Association of Şirnak following the statements made by Tuncay Güney in 2008, played a big part in creating a public opinion and hence in the initiation of the lawsuit.

However, although almost all lawsuits that concern human rights violations are of a nature that can attract public attention, media organs sometimes remain indifferent towards these lawsuits. An important reason for this indifference is that public organizations and lawyers do not share enough material or announcements related to these lawsuits with media organs.

Ensuring an Effective Organization in Monitoring Trials

Nowadays, at a time when judicial reform is one of the main topics of the political agenda in Turkey, the final goal of the practice of organized court monitoring is to ensure that necessary legal and practical changes are

incorporated into the reform scope in areas that are the subject of court cases, ensure conformity with international standards and accountability in trial practices, and finally to prevent impunity.

Since studies conducted within the scope of programs for monitoring cases of human rights violations by security forces aim to produce suggestions, it is very likely that there will be some reactions from various segments within the structure of the state. However, it is the support of these segments that is needed in order to achieve these goals. Hence, it is extremely important that the findings and suggestions obtained as a result of the monitoring are reported and communicated to the parties of trial processes and to law-makers, decision-making mechanisms, politicians, civil society organizations and the media. Campaigns or meetings should be organized with these key actors if necessary and an environment of information and opinion exchange should be created, so as to raise the standards, solve the problems and realize the reforms.

However, many lawyers interviewed within the scope of this study complain that these institutions and organizations are reluctant to engage in a continuous and effective solidarity. It is observed that most of the bar associations, which can play one of the most effective roles in a qualified organization, do not perform their duty of defending and upholding the human rights. This is a duty which is conferred on them by the Lawyers Act, and like many institutions of the state, they have adopted a mentality that holds the interests of the state above the rights of the injured party in cases concerning human rights violations by security forces.

Another problem emphasized by the interviewed lawyers is the security of the individuals monitoring the cases. Many of the lawyers have expressed that in cases concerning human rights violations by security forces, the witnesses, the victims, the victim relatives, the lawyers and the other persons participating in the court watch programs can be exposed to threats or verbal or physical attacks from the defendants or their supporters. Against such threats and attacks, the courts should diligently deliver on their obligation to ensure the security of these individuals. On the other hand, all the lawyers interviewed have also observed that the lack of security decreases as the number of individuals participating in court watch programs increases. However, the initial interest shown to the cases by lawyers, the media and relevant NGOs diminishes towards the final phases of the trial process. These problems encountered in court watch practices can negatively affect not only the security of the participants but also the just and fair conclusion of the cases. At this point, the final goal of a central organization of human rights lawyers will ensure that these cases are watched and defended professionally.

EVALUATIONS AND SUGGESTIONS FOR THE GOVERNMENT

- In the absence of a specialized judicial law enforcement unit that is regulated by laws, there is an urgent need to establish an independent grievance mechanism with the power to expediently, impartially and effectively investigate the allegations of human rights violations by security forces. Until a mechanism with these qualities becomes functional, security forces against whom there are allegations of rights violations should be prevented from serving in the investigation of these allegations. The power to investigate should be transferred to the prosecutor's office without delay, and support should be requested from different units if necessary.
- The administrative authorization system, which is necessary in order to initiate an investigation on security forces against whom there are serious allegations of rights violations, should be abolished by making amendments in all relevant legislative arrangements and primarily in the Law no.4483. It should be ensured that any member of the security forces as well as any public employee who is accused of such heavy crimes can be put on trial regardless of their ranks or their seniority.
- When investigating allegations of human rights violations by security forces, prosecutors should keep in mind the superordinate-subordinate relations. All the cases examined in this report, except for the Engin Çeber case that is still in the appeal stage, are cases in which the responsibilities of security officers who are positioned high on the chain of command or who can be called the instigator of the alleged violations come on the agenda, but in which these individuals cannot be tried. High-level officials who are or who should be informed/aware of the commission of these violations but who have not taken any precautions or punished the perpetrators should also be included in the investigation scope, and they should be subjected to proportionate penalties or sanctions if necessary.
- In order to ensure effective implementation of legislative arrangements, it should be guaranteed that data on serious human rights violations by security forces are compiled in a central, effective and up-to-date system.
- The police and gendarmerie stations should be equipped with devices for audio-visual recording of the interrogations of detained persons, and it should be ensured that these devices always actively record during all interrogations. These records should not be tampered with or erased, and they should be sent to the public prosecutors in an orderly manner without losing time so that they can be used by prosecutors in investigations into human rights violations. It should be ensured that all evidences remain in their original locations

until being delivered to the public prosecutors. Public prosecutors should act without delay to make sure that the evidence is complete, unaltered or not lost.

- Necessary measures should be taken to ensure that medical reports and forensic examinations related to torture or ill-treatment are carried out more effectively. The Council of Forensic Medicine (*Adli Tıp Kurumu*) should be restructured as an institution that is operationally and officially independent from the Ministry of Justice. Necessary arrangements should be made so that the courts can accept as evidence the medical and psychiatric reports prepared by the research and education hospitals of universities and by other specialized institutions.
- Sanctions should be imposed against security units who disregard court orders when they are called to court as witness or defendant.
- Witness protection programs should be strengthened.
- Enforced disappearance should be defined as a crime in the Turkish Penal Code and should be included among the crimes against humanity.
- Individual torture, enforced disappearance and other serious human rights violations should be excluded from the scope of statute of limitations.
- The tangible and intangible losses of the victims should be effectively indemnified. In this context, it should be ensured that the perpetrators of the crime are made to pay the compensations in a way that will not burden the taxpayers, especially in cases in which Turkey is convicted to pay compensation to plaintiffs by the ECtHR.
- The military high courts should be abolished, military justice should be limited to disciplinary trials, and judicial unity and its conformity to the natural judge principle should be ensured.
- In countries where there are conditions of internal conflict or civil war or which have newly recovered

from authoritarian regimes and which are endeavouring to institute or reinstitute democracy, the truth commissions continue to be the most effective method in combating impunity. Truth Commissions provide great benefits in terms of ensuring social reconciliation and peace. In the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity,⁵² dated 8 February 2005 and based on the UN Vienna Declaration and Programme of Action, truth commissions are defined as official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years, and are evaluated within the framework of the right to know. Truth commissions often work as official units of the state that make recommendations for reparation of such violations and for preventing their repetition. The priority of these research commissions is to investigate and record the violations taking place in the recent history. It is crucial that human rights violations by security forces, as addressed in this report, are investigated by a truth commission in which various experts, academicians, human rights advocates and the representatives of political parties work together. The truth commission should be authorized and charged with the duty to make all necessary research, based on a model suitable for Turkey, as soon as possible.

⁵² Salman, 2011, “Cezasızlıkla Mücadelenin Uluslararası İlkeleri” [International Principles of Countering Impunity] *Diyalog*, <http://content.yudu.com/Library/A1kni5/DYALOG3/resources/8o.htm>, For original English text: <http://derechos.org/nizkor/impu/principles.html>.

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