Background documents
Exploring strategies for transnational litigation: the case of Turkey

International Conference
7 - 8 July 2017

Crimes against Humanity and War Crimes in Southeast Turkey 2015-2016
Access to Justice for Victims
Table of Contents

Agenda

Documents


3. Human Rights Watch (HRW); Turkey: State Blocks Probes of Southeast Killings. Allow UN to Investigate Cizre Abuses; Repeal New Law to Block Prosecutions, July 2016.


5. Emergency Architects Foundation (EAF); Report On The Building Damage Assessment Diyarbakir, Silvan and Cizre in the Wake of the Curfews Emergency Architects Foundation, October 2015.


7. Emre Turkut; Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?, December 2016.

8. Registrar of the European Court of Human Rights (ECtHR); European Court of Human Rights looks into complaints about curfew measures in Turkey (Press Release), December 2016.

9. Deutsche Welle (DW); German lawsuit accuses Turkey of ‘war crimes’ in military operations against Kurds, June 2017.

10. Maarten P. Bolhuis and Joris van Wijk; Alleged war criminals in the Netherlands: Excluded from refugee protection, wanted by the prosecutor, October 2014.

Program
July 7, 11 a.m. – 6 p.m.
The Hague Institute for Global Justice
Sophialaan 10, The Hague

Moderator: Clements Durand, lawyer, Toulouse Bar
Bülent Aşşa, lawyer, İstanbul Bar

The facts and their legal classification
Screening of video of Cizre-incidents
Victim, Witness and expert statements:
- Victim statements
- Dr. Önder Özkalipoğlu, Physicians for Human Rights
- Dr. Şebnem Korur Fincancı, President Human Rights Foundation of Turkey
- Patrick Coulombel, Architectes de l'urgence
- Faysal Sarıyıldız, witness Cizre events

1.30 p.m. Lunch

The classification of the conflict and legal framework for accountability
Panel discussion
- Deniz Gedık, lawyer
- Öztürk Türkdoğan, lawyer
- Deniz Arbet Nejbir, Queens University Belfast
- Michiel Pestman, lawyer
- Dr. Uğur Kara

Concluding observations international experts

6 p.m. Drinks and Bites
July 8, 9 a.m. - 6 p.m.
The Hague Institute for Global Justice
Sophialaan 10, The Hague

Moderator: Frederiek de Vlaming, War reparations Center University of Amsterdam/Nuhanovic Foundation

National litigation and ECHR jurisprudence

- Joke Callewaert, lawyer, on the PKK case in Belgium: criminal law, terrorism or international humanitarian law?
- Besra Güler, lawyer and managing director MAFDAD, on the German case against Erdoğan
- Ercan Kanar, lawyer, on the Turkish case against Erdoğan
- Deniz Gedik, lawyer, on curfews in Turkey: legal framework in Municipal Law
- Faik Özgür Erol, lawyer, on the ECHR jurisprudence on Turkey

12:00 Lunch

Investigating and prosecuting war crimes and crimes against humanity

- Carolyn Edgerton, International Criminal Tribunal for the former Yugoslavia (ICTY)
- Tom Hannis, former ICTY prosecutor, defence counsel Special Tribunal Lebanon
- Dr. Jill Coster van Voorhout, The Hague Institute for Global Justice
- Geoffrey Robertson, barrister & academic and former president of the Special Court for Sierra Leone

Final observations and next steps

- Öztürk Türkdoğan, Human Rights Association (IHD) Turkey and
- Frederiek de Vlaming, War reparations Center University of Amsterdam/Nuhanovic Foundation
Contents

I. EXECUTIVE SUMMARY ................................................................................................................. 2

II. AN OVERVIEW OF REPORTED HUMAN RIGHTS CONCERNS ............................................. 5

A. Right to life .................................................................................................................................. 7

B. Destruction and expropriation of property, including housing .................................................. 9

C. Right to health ........................................................................................................................... 13

D. Enforced disappearances .......................................................................................................... 14

E. Internally displaced people ....................................................................................................... 14

F. Physical and mental integrity .................................................................................................... 15

G. Right to liberty and security ...................................................................................................... 16

H. Access to justice, fair trial and effective remedies ................................................................. 18

I. Rights to freedoms of opinion and expression, to freedom of association and to participate in public affairs ........................................................................................................... 20

J. Labour rights .............................................................................................................................. 23

III. CONCLUSIONS AND RECOMMENDATIONS ..................................................................... 23
I. Executive Summary

1. The present report provides an overview of key human rights concerns in South-East Turkey\(^1\) between July 2015 and 31 December 2016, particularly in relation to security operations conducted by the Government of Turkey.

2. Between July 2015 and December 2016, some 2,000 people were reportedly killed in the context of security operations in South-East Turkey. According to information received, this would include close to 800 members of the security forces, and approximately 1,200 local residents, of which an unspecified number may have been involved in violent or non-violent actions against the State. The Office of the United Nations High Commissioner for Human Rights (OHCHR) documented numerous cases of excessive use of force; killings; enforced disappearances; torture; destruction of housing and cultural heritage; incitement to hatred; prevention of access to emergency medical care, food, water and livelihoods; violence against women; and severe curtailment of the right to freedom of opinion and expression as well as political participation. The most serious human rights violations reportedly occurred during periods of curfew, when entire residential areas were cut off and movement restricted around-the-clock for several days at a time.

3. Since July 2015, when OHCHR started receiving detailed and credible allegations of serious human rights violations taking place in South-East Turkey, several United Nations human rights mechanisms, including Special Procedures of the Human Rights Council and Human Rights Treaty Bodies, as well as the regional human rights mechanisms in Europe, notably the Commissioner for Human Rights of the Council of Europe, have expressed concern about the reported allegations.

4. In May 2016, the High Commissioner for Human Rights requested the Government of Turkey to grant a team of OHCHR human rights officers full and unhindered access to the concerned area in order to substantiate facts and ascertain reported human rights concerns\(^2\). OHCHR repeatedly followed up on this request but, as of February 2017, it had not received any formal reply from the Turkish authorities.\(^3\)

5. In June 2016, in the absence of access, the High Commissioner initiated a monitoring process based at the OHCHR Headquarters in Geneva, in furtherance of his mandate under United Nations General Assembly Resolution 48/141\(^4\). This

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\(^1\) This refers to a geographic zone of the Republic of Turkey encompassing the provinces of Adıyaman, Batman, Bingöl, Bitlis, Diyarbakır, Gaziantep, Hakkâri, Kahramanmaraş, Kilis, Malatya, Mardin, Siirt, Şanlıurfa and Şırnak.

\(^2\) On 11 May 2016, the High Commissioner wrote a letter to the Permanent Representative of Turkey to the United Nations Office at Geneva and other international organizations in Switzerland requesting permission for an OHCHR team to conduct a monitoring mission in South-East Turkey with a view to independently examining the allegations it had received. On 22 December 2016, OHCHR reiterated its request for permission through a Note Verbale to the Permanent Representative of Turkey.

\(^3\) OHCHR acknowledges the receipt of a Note Verbale by the Permanent Mission of Turkey to the United Nations Office at Geneva and other international organizations in Switzerland dated 8 February 2017, and the invitation extended therein for the visit to Turkey of the United Nations High Commissioner for Human Rights. While grateful for the invitation, OHCHR regrets the absence of an agreement by the Turkish authorities to provide access to its technical team to the affected areas in South-East Turkey.

\(^4\) The United Nations General Assembly Resolution 48/141 calls on the United Nations High Commissioner for Human Rights, inter alia, to: “a) promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights;… f) play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations; g) engage in a dialogue with all Governments in the implementation of his/her mandate with a view to securing respect for all human rights.”
monitoring has been conducted according to the standard OHCHR methodology. Some developments which affect the whole country, such as the response of the Government of Turkey to the 15 July 2016 coup attempt and its national counter-terrorism policies, are reflected in this report when relevant (directly or indirectly) to the situation in South-East Turkey.

6. This report is based on the information received, verified and analyzed by the OHCHR remote monitoring team. Methods of information gathering and verification included interviews with multiple victims, witnesses and relatives of victims; analysis of information provided by the Government of Turkey, as well as Turkish and international non-governmental organizations (NGOs); official records; open source documents; satellite images, video, photographic and audio materials; and other relevant and reliable materials. OHCHR has exercised due diligence to corroborate, to the extent possible, the validity of the information received within the constraints of remote monitoring. OHCHR is committed to the protection of its sources and ensures the preservation of their confidentiality. It therefore does not disclose any information that may lead to the identification of sources, except with their informed consent.

7. While grateful for the information provided by the Permanent Mission of Turkey to the United Nations Office at Geneva and other international organizations in Switzerland on the situation in South-East Turkey, OHCHR regrets the absence of direct access to the affected places, people and to various Government, independent and non-governmental sources in South-East Turkey. This has prevented the establishment of a dialogue and has made direct corroboration of received allegations against information available to the local authorities impossible. Thus, at the time of writing this report, OHCHR did not have the capacity to verify all allegations brought to its attention. This report therefore does not provide a comprehensive account of the human rights situation in South-East Turkey but presents a sample of cases of concern in the area between July 2015 and December 2016.

8. The enjoyment of human rights in South-East Turkey is further undermined by violent attacks, such as killings or kidnappings, as well as acts of terrorism which, according to Government sources, have been committed by the Kurdistan’s Workers Party (PKK) targeting among others, members of the ruling Justice and Development Party (AKP) in the region. The Government has reportedly responded by intensifying its military activity in the region, as well as by employing disproportionate security measures. This prevailing violence and insecurity is exacerbated by the political instability and deepening social divisions, and spurred on by the absence of any effective institutional platform to facilitate social dialogue in South-East Turkey.

9. It appears that the domestic protection of human rights in South-East Turkey has effectively been non-functioning since at least July 2015, as demonstrated by the reported lack of a single investigation into the alleged unlawful killing of hundreds of people over a period of 13 months between late July 2015 and the end of August of 2016. According to the information received from family members and lawyers representing the victims, local prosecutors have consistently refused to open investigations into the reported killings, in violation of constitutional and international human rights law obligations.

10. A series of laws, including Law No. 6722, which was adopted on 23 June 2016, created, as reported by various NGOs, an atmosphere of “systematic impunity” for the security forces.

5 PKK is listed as a terrorist organization by the Government of Turkey, some States, EU and NATO.
6 http://www.resmigazete.gov.tr/eskiler/2016/07/20160714-1.htm
11. The United Nations strongly condemned the attempted coup of 15 July 2016 in Turkey, which was followed by the state of emergency enacted on 15 July and extended for an additional three months as of 19 October 2016. On 21 July 2016, the Government of Turkey notified the United Nations Secretary-General of its derogation under article 4 of the International Covenant on Civil and Political Rights from the obligations in articles 2, 3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27 of the Covenant. The Government also notified the Secretary-General of the Council of Europe of its derogation from provisions of the European Convention on Human Rights and Fundamental Freedoms. OHCHR recalls that any measures restricting the rights that were derogated from should be limited to the extent strictly required by the exigencies of the situation, meaning that they must be proportional and limited to what is necessary in terms of duration, geographic coverage and material scope.

12. OHCHR recognizes the complex situation that Turkey has been facing by almost simultaneously conducting the security operation in South-East Turkey, addressing the 15 July 2016 attempted coup and dealing with a number of terrorist attacks. However, OHCHR is seriously concerned about the adverse effects on the enjoyment of human rights by the measures undertaken following the declaration of the state of emergency. In South-East Turkey, these measures appear to have largely targeted dissent in general and political parties of the opposition in particular, disproportionately affecting citizens of Kurdish origin. Of particular concern is the massive scale of dismissals of public officials, especially of school teachers; the mass arrest of members of parliament belonging to the People’s Democratic Party (HDP) and of municipal mayors in majority Kurdish areas; and the closure of almost all Kurdish language local and national media outlets and the arrests of their journalists. Moreover, decrees published using emergency powers have severely restricted access to justice and fair trial guarantees.

13. OHCHR takes note of the reports received from the Government of Turkey indicating that the PKK had conducted a number of violent attacks that caused deaths and injuries among Turkish security forces and other individuals. The PKK has also been involved, according to the Government, in kidnappings, including of children; digging trenches and placing roadblocks in cities and towns; and preventing medical services from delivering emergency health services.

14. The number of reported displaced persons (IDPs) in South-East Turkey is estimated between 355,000 to half a million people, mainly citizens of Kurdish origin. The displaced population is reported to have moved to neighbouring suburbs, towns and villages, or to other regions within Turkey.

15. Humanitarian assistance to over 355,000 internally displaced people has reportedly been very limited. According to available information, no international organization has been granted access to assess humanitarian needs and provide assistance to the population in South-East Turkey, including internally displaced persons. Local NGOs reported that Government assistance has been conditioned upon having a clean criminal record, in violation of basic humanitarian principles governing emergency humanitarian responses.

16. The aim of this report is to bring serious human rights concerns in South-East Turkey to the attention of the competent authorities with a view to promoting means to address them, including by conducting full and independent investigations. To fully corroborate and verify the information presented in this report, OHCHR

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9 See Human Rights Committee, General Comment No. 29, “Article 4: Derogations during a State of Emergency” (CCPR/C/21/Rev.1/Add.11)
requires direct and unfettered access to South-East Turkey for a field-based human rights monitoring. OHCHR is looking forward to a dialogue with the Government of Turkey and extends its support to the Government’s efforts in addressing the human rights challenges in South-East Turkey.

II. An overview of reported human rights concerns

17. Since July 2015, the Turkish Government forces have been conducting security operations in a number of provinces of South-East Turkey involving thousands of troops serving with combat-ready infantry, artillery and armoured army divisions, as well as the Turkish Air Force. According to Turkish authorities, this was in response to the operations that were allegedly conducted by the PKK in the region, which reportedly included setting up of barricades and digging trenches in residential areas during the period leading up to July 2015.

18. As part of their response to “terrorist activities” allegedly conducted by the PKK, the authorities reportedly initiated security operations in at least 30 urban and a number of rural locations throughout South-East Turkey, which eventually allegedly resulted in a number of persons being killed, displaced or disappeared, as well as in wide-scale destruction of housing stock in the affected areas. The authorities also reportedly imposed extended around-the-clock curfews on over 30 towns and neighbourhoods prohibiting any movement without permission for periods of time lasting up to several weeks, thus preventing the evacuation of IDPs trapped in the middle of security operations. Lack of access of emergency services to the sick and wounded, ultimately contributed to the high death toll of the operations. In total some 2,000 people were reportedly killed between July 2015 and August 2016, including local residents, amongst whom women and children, as well as close to 800 members of the security forces.

19. The killings were reportedly invariably followed by mass displacement of the survivors and the destruction of their homes and of local cultural monuments. Over 355,000 South-East Turkey residents, mainly citizens of Kurdish origin, were displaced. Satellite image analysis, provided by UNITAR’s Operational Satellite Applications Programme (UNOSAT), indicates that the damage caused by security operations in densely-populated urban centres is commensurate with the use of heavy weapons and, possibly, air-dropped munitions Furthermore, UNOSAT’s report indicates that heavy armoured vehicles were seen deployed in and around institutions such as schools (see image 1, 2 and 3).

20. Apart from unlawful deaths and the excessive use of force (such as shelling densely populated areas with heavy artillery and tanks), OHCHR has also documented numerous cases of enforced disappearances; torture; destruction of housing and cultural heritage; incitement to hatred; prevention of access to emergency medical care, food, water and livelihoods; violence against women; and severe curtailment of the rights to freedom of opinion and expression as well as interference with the right to participate in public life.

21. The most serious incidents that caused the greatest number of deaths were reported in Cizre (province of Şırnak), but other serious incidents that caused deaths and destruction were also reported in Sur, Silvan and Lice (province of Diyarbakır),
Nusaybin, Dargeçit (province of Mardin), Şırnak Centre, Silopi, İdil (province of Şırnak), and Yüksekova (province of Hakkâri).

22. One of the most concerning aspects of the situation is the reported absence of monitoring, and failure to investigate alleged human rights violations and prosecute those responsible. International NGOs, as well as Turkish national and local NGOs from South-East Turkey, report having been actively prevented from accessing the areas of concern, conducting human rights monitoring, and gathering and transmitting evidence of violations to the concerned authorities and international organisations. Where they nevertheless attempted to do so, NGOs report having been subjected to intensive state surveillance and harassment. Furthermore, it has been reported that the authorities had failed to launch a single investigation into any of the allegations presented in this report.

A. Right to life

“On 25 February, my family was summoned by the public prosecutor. We were given three small charred pieces of what he claimed was my beloved ablams (sister)'s body.”

- Statement given to OHCHR by the brother of a woman who was killed in Cizre, in early 2016.

Deaths in the context of security operations

23. According to the information that OHCHR received from several sources, around 2,000 people were killed in South-East Turkey between July 2015 and December 2016 in the context of security operations. Reports generally put the number of local residents killed at, approximately 1,200, of whom an unspecified number may have been involved in violent or non-violent actions against the State, it is difficult to ascertain such statistics in the absence of reliable open-access casualty data.

24. According to official Government sources, “in the course of the terrorist campaign since July 2015 (as of 28 November 2016), 323 civilians and 799 security personnel were murdered; 2,040 civilians and 4,428 security personnel were wounded; 231 civilians were kidnapped by the PKK”\(^9\). A report published by a Turkish NGO in August 2016\(^1\), identifies by name 321 local residents who were allegedly killed between 16 August 2015 and 16 August 2016, including 79 children, 71 women and 30 people over the age of 60. Up to 189 local residents are believed to have been killed in the town of Cizre alone (Şırnak province) in three related incidents.

25. In late January and early February 2016, in the town of Cizre, men, women and children trapped in basements of buildings were reportedly subjected to shelling by security forces. Witnesses and family members of the victims of Cizre

\(^9\) Initial observations by Turkey on the Memorandum of Commissioner Muižnieks observations by Turkey on the counter-terrorism operations in south-eastern Turkey, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?coeReference=CommDH/GovRep(2016)26

\(^1\) http://tihv.org.tr/wp-content/uploads/2016/08/16-A%C4%9Fustos-2016-Soka%C4%9Fa-%C3%87%C4%B1kma-Yasa%C4%9F%C4%B1-Bilgi-Notu.pdf
interviewed by OHCHR painted an apocalyptic picture of the wholesale destruction of neighbourhoods where up to 189 persons, mostly IDPs fleeing security operations, were trapped for weeks in basements without water, food, medical attention and power, during the coldest months of the year. Some of the victims trapped in the basements were calling for the attention of the world community through mobile telephone conversations with NGOs and members of parliament, begging to be saved from shelling. According to families of victims killed at Cizre, and as reported by several NGOs, the bodies of an undetermined number of people were completely or partially destroyed in fire induced by shelling and the subsequent rushed demolition of the location of the incident. The subsequent demolition of the buildings destroyed evidence and has therefore largely prevented the basic identification and tracing of mortal remains. Moreover, instead of opening an investigation into the circumstances surrounding the reported excessive use of force, recourse to heavy weapons and the resulting deaths, the local authorities accused the people killed of participating in terrorist organizations and took repressive measures affecting members of their families.

26. OHCHR spoke to the brother of a woman who died in Cizre in February 2016. Her family was invited by the public prosecutor to collect her remains, which consisted of three small pieces of charred flesh, identified by means of a DNA match. The family did not receive an explanation as to how she was killed nor a forensic report. The victim’s sister, who called for accountability of those responsible for her death and attempted to pursue a legal process, was charged with terrorist offences.

27. Another witness account by a middle-aged married couple from Cizre described the general atmosphere as one of reckless disregard for human lives and the inappropriate response by the Government to the crisis. According to them, a 24-hour curfew was imposed (for the second time) on 14 December 2015, and water, electricity and food deliveries were then interrupted to all residents, which they interpreted as a form of collective punishment. Parts of the Jafes, Nur, Sur, and Cudi neighbourhoods of Cizre were evacuated, but up to 189 people, mostly displaced, remained trapped in the basements of several adjoining buildings where they were taking shelter, known to the authorities. According to the witnesses, the city was under heavy shelling and police snipers were located on rooftops all over the town, reportedly shooting randomly even after the cessation of fire. They stated that ambulances were prevented from entering the curfew area to remove the sick and wounded, causing deaths that could have been prevented.

28. The witnesses described the mistrust between the central authorities, represented by the provincial Governor\textsuperscript{12} who is appointed by the central Government, and the municipal authorities, who were mostly of Kurdish origin. They noted that these divisions had tragic consequences for the population. The Governor’s crisis committee reportedly did not include any municipal employees. The police, who report to the Ministry of Interior, reportedly harshly treated the residents, who were afraid to approach them for help.

29. OHCHR received accounts of other incidents across South-East Turkey that caused the death of local residents, although on a lesser scale, such as in Sur, Silvan and Lice (province of Diyarbakır), Nusaybin, Dargeçit (province of Mardin), Şırnak Centre, Silopi, Idil (province of Şırnak), and Yüksekova (province of Hakkâri). The killings were reportedly invariably followed by mass displacement of the survivors and the destruction of their homes and of local cultural monuments.

30. Based on the information received from a variety of sources within and outside of Turkey, the death of some local residents in the context of security operations could have been prevented by (i) avoiding excessive use of force, notably by

\textsuperscript{12} Turkish provinces (formerly governorates) are headed by governors appointed by the national cabinet and accountable to the Ministry of Interior.
limiting the use of firearms only to cases where there was an imminent threat to life or of serious injury and avoiding the use of heavy weapons; (ii) timely opening up humanitarian corridors for the evacuation of the residents; and (iii) opening up road blocks to ambulances for the evacuation and treatment of wounded and sick residents who eventually died for lack of urgent health care.

31. According to the information that OHCHR received from a number of family members of victims, local prosecutors have been consistently refusing to open investigations into the reported killings. OHCHR has seen no evidence that effective and independent investigations had been conducted into the reported killings. Residents who were trying to trace the mortal remains were reportedly taken to the police station and interrogated.

B. Destruction and expropriation of property, including housing

32. Since July 2015, the ongoing security operations have caused substantive damage to housing, business and public buildings and spaces in South-East Turkey, ranging from minimal damage to extensive destruction, particularly in Nusaybin (see image 4) of Mardin province and Sur (see image 5) district of Diyarbakır province, where shelling reportedly caused a permanent change in the population, patterns of ownership and architectural character of entire cities.

Image 4: Nusaybin, Mardin Province 25 May, 2016

Produced by UNITAR – UNOSAT, Copyright: DigitalGlobe, Inc.
33. The most intensive period of destruction started in the immediate aftermath of security operations, when the authorities reportedly prevented the displaced population from returning and reconstructing their own homes and brought in machinery to raze entire city quarters to the ground, including lightly damaged buildings and cultural heritage. The centres of towns and cities across South-East Turkey have been described as empty moonscapes and vast parking lots.

34. While comprehensive statistics on destroyed housing are not available, the analysis of satellite imagery provided by UNOSAT shows extensive damage across South-East Turkey. Some of the most extensively damaged sites are Nusaybin, Derik and Dargeçit (Mardin); Sur, Bismil and Dicle (Diyarbakır); and Cizre and Silopi (Şırnak). In Nusaybin (Mardin province), for example, a UNOSAT damage assessment through satellite imagery identified 1,786 damaged buildings, 398 of which were completely destroyed, 383 severely damaged, and 1,005 moderately damaged (see images 6 and 7). Based on satellite image analysis, UNOSAT attributes such damage to the use of heavy weapons and, possibly, air-dropped munitions.
35. Satellite images show that the Government continued to destroy private property and public buildings in the aftermath of security operations. For example, in the densely-populated Diyarbakır district of Sur, destruction was carried out by heavy machinery. Satellite imagery taken between June 2015 and July 2016 shows the wrecking crews outlining a section of the city at a time and indiscriminately removing damaged and undamaged building (see image 8 and 9).

36. According to local sources, residents have not been authorized to enter the clearance area to remove their belongings or reconstruct their property, and the construction rubble, which may still contain mortal remains of victims, has reportedly been dumped onto the banks of the near-by Tigris River. The clearance appears to have intensified in spring 2016, reaching a peak during the month of August 2016 of approximately 1,000 m$^2$ of land area per day. Three hectares (or 30,000 m$^2$) of urban dwellings in the 2,000 year-old city centre of Diyarbakır were thus razed to the ground in August 2016. During the eight-month period from January to August 2016, the total size of razed urban dwellings was estimated at 18.7 hectares. Diyarbakır’s local government estimates that 70 per cent of buildings in the eastern part of Sur neighbourhood were destroyed by shelling. 45,000 out of the 120,000 residents of Sur have reportedly fled the area and have not been allowed to return or reconstruct their homes. The local government further reported that at least seven sites with significant historical, cultural or religious value were damaged.
during the spring operations. The area designated as “Suriçi Urban Archaeological Site” reportedly lost its unique street and physical structure.  

Image 8: Sur, Diyarbakir Province 22 June, 2015


37. Diyarbakır’s 2,000 year-old city walls surrounding the Sur district are a UNESCO-protected site of World Heritage. Municipal reports indicate that during the period of shelling of the Sur district, between September 2015 and May 2016, the Government took measures not to damage the city walls while systematically demolishing entire neighbourhoods within the area surrounded by the walls. This illustrates the systematic nature of destruction of private properties.

38. The local government in the province of Diyarbakır reported a decision by the Turkish Council of Ministers, in March 2016, to expropriate up to 100 per cent land of plots in the Sur city centre, alleging that this would result in a wholesale change of the demographic structure of the area, which has been largely populated by citizens of Kurdish origin. City residents and the Municipality of Diyarbakır were reportedly never involved in, nor informed about, the expropriation plans and fear being left out from the reconstruction plans.

39. According to human rights organizations from South-East Turkey, the Government has conditioned financial compensation for destroyed housing upon the signature of a declaration by owners that their property was destroyed by “terrorist activities”. Families who have reportedly been forced to sign such declarations see


Idem
this as an effort to falsify the historic record of the 2015-16 events, which could impede future efforts for accountability. OHCHR sources claim that families who were compelled to abandon their destroyed homes during the period of the security operations in late 2015 and early 2016 were also forced to sign away ownership of their dwellings without being allowed to take their personal belongings or to return to their homes after the security operations.

40. On 4 September 2016, the Government announced a reconstruction and economic development package for South-East Turkey. According to the plan, Turkey would spend USD 21 billion in the regions “destroyed by the PKK since July 2015”. The Housing Development Administration is to build or re-build more than 30,700 houses (including 7,000 in the Sur district of Diyarbakır) and to construct 800 factories, 36 sports stadiums and 15 new hospitals. The plan also includes micro-grants, investment in social services and monetary compensation for the damages. OHCHR is concerned that the Government’s development plan may be implemented in the absence of any investigations and accountability measures for the allegations pointing to the massive and unnecessary destructions.

C. Right to health

Access to emergency medical care

"Ambulances were refusing to attend to the wounded in locations under military presence, asking the wounded to meet them at another location instead."

- Eyewitness of the Cizre shelling

41. Reports of serious human rights violations committed in South-East Turkey during security operations highlight that blanket, round-the-clock curfews imposed by security forces contributed to such violations restricting the capacity of Government entities to deliver essential services to the affected population.

42. The curfews, which the authorities reportedly imposed on over 30 towns and neighbourhoods, prohibited any movement without permission, for extended periods of time lasting up to several months. During the curfews, authorities reportedly cut off water, electricity and food supplies to entire cities for prolonged periods of time. Local residents report that even with permission, movement was very difficult, including to access health facilities for the sick and wounded. Furthermore, security forces reportedly systematically hampered or prevented access for medical emergency teams to the affected areas during curfews. This resulted in a number of preventable deaths.

43. Moreover, there were allegations of attacks on medical facilities and personnel, punishment of medical personnel for attending patients, as well as the use of medical facilities for military or security purposes. For example, according to an NGO report, in early September 2015, State forces moved troops to Cizre state hospital, occupying the entire third floor of the hospital. According to the same

report, an ambulance driver and a number of nurses were reportedly shot at and killed either by police fire or unknown gunmen in September 2015 while carrying out their duties.\footnote{Idem, p. 18 and 19}

44. OHCHR received reports indicating that military authorities administering the curfews reportedly blocked access to health care (including emergency medical treatment for life-threatening injuries or illnesses). These reports allege that Turkish security forces interfered with medical transport units through the use of blockades and checkpoints and failed to provide adequate protection to emergency transport vehicles. The security forces reportedly used hospitals as dormitories and offices, and barred health professionals from entering certain areas of the hospitals or health centres they worked in. Reports provided to OHCHR by the Government indicated that the barricades and trenches in various residential neighbourhoods were blocking the access of medical emergency vehicles and fire engines to the affected areas.

D. Enforced disappearances

45. NGOs reported the enforced disappearances of three men from South-East Turkey, in separate incidents, in Istanbul, Şanlıurfa and Lice, during August 2016. The victims were allegedly detained by the police but family members could not trace them. In addition, OHCHR was informed of the disappearance, in November 2016, in Ankara, of a member of the Democratic Regions Party (DBP) from Diyarbakır. The relatives of the victim alleged that the victim could be held in an unacknowledged police detention facility.

46. The United Nations Working Group on Enforced or Involuntary Disappearances visited Turkey in March 2016, and expressed concern “at the increasingly worrisome situation in the South-East of the country and its wide impact on human rights,”\footnote{http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18477&LangID=E} which is conducive to all human rights violations, including enforced disappearances. The Working Group received allegations of extrajudicial executions committed in South-East Turkey as well as testimonies of families unable to access the bodies of people killed during security operations and of bodies being disposed of.\footnote{A/HRC/33/51/Add.1, para. 12.} It called for a thorough and impartial investigation into all allegations of human rights violations in the context of security operations in South-East Turkey.\footnote{Idem, para. 66.}

E. Internally displaced people

47. According to various sources, the total number of IDPs as a result of the security operations in South-East Turkey was estimated between 355,000\footnote{https://www.hrw.org/news/2016/07/11/turkey-state-blocks-probes-southeast-killings} and half a million.\footnote{https://www.amnesty.org/en/latest/news/2016/12/turkey-curfews-and-crackdown-forcehundreds-of-thousands-of-kurds-from-their-homes} The highest number was reported to be displaced from Sur where, according to local reports, 95 per cent of the population was displaced at the end of the security operations. The population displaced from areas affected by security operations is reported to have either moved to neighbouring towns and villages; to Diyarbakır, Van and Batman city centres; or to other regions within Turkey. Many of the IDPs now have no home to go back to, either because they were destroyed in the course of security operations or because the Government proceeded with plans...
of demolition and / or expropriation, all of which are significant obstacles to the return of IDPs.

48. The Government reportedly has not granted full access for independent and impartial assessment by humanitarian agencies of the humanitarian and protection needs of IDPs. The humanitarian assistance and basic social services that the Government has been providing to the affected population has reportedly been insufficient and inadequate contrary to Turkey’s international human rights obligations, including those enshrined in the International Covenant on Economic, Social and Cultural Rights. Moreover, local NGOs have alleged that the Government has conditioned such assistance upon having a clean criminal record, which would be a violation of humanitarian principles governing emergency humanitarian responses.

F. Physical and mental integrity

Torture and ill-treatment

49. International and national NGOs have documented an increased number of reports of torture and ill-treatment of detainees in police custody and other places of detention in the context of security operations in South-East Turkey since July 2015 and, in particular, following the coup attempt.

50. According to a report published by an NGO in South-East Turkey torture and ill-treatment methods include police beating and punching of detainees; sexual violence, including rape and threat of rape; deprivation of basic needs, such as water, food and sleep; deprivation of medical supplies (due to which some prisoners allegedly contracted hepatitis B); forcing detainees to kneel handcuffed from behind for hours; and verbal abuse, psychological violence and intimidation. Some victims were reportedly photographed nude, leaving them fearful that those images could be used for blackmail or published to humiliate them further. OHCHR has received reports that medical personnel have been under pressure not to release medical reports showing evidence of torture or ill-treatment, for fear of harassment and retaliation by the authorities.

51. In May 2016, the United Nations Committee against Torture expressed concern about numerous credible reports of law enforcement officials engaging in torture and ill-treatment of detainees while responding to perceived and alleged security threats in the south-eastern part of the country (e.g. Cizre and Silopi). At the end of his visit to Turkey, including South-East Turkey, in November 2016, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment noted that Turkey’s institutions and legislation provide sufficient safeguards against torture and ill-treatment. However, the Special Rapporteur indicated that testimonies received from inmates and their lawyers suggested that, in the days and weeks following the failed coup, torture and other forms of ill-treatment were widespread, particularly at the time of the arrest by police and gendarmerie officials or military forces and during subsequent detention in police or gendarmerie lock-ups as well as in unofficial places of detention.

22 https://www.amnesty.ch/en/?set_language=en&cl=en&gclid=CjwKEAiAirXFBRCOqvL279Tnx1ESJAB-GQvssipkiW7SVa4NHmBLUarP1h_aAYmuYHltuvtlcBoCXHXw_wcB, p. 18-19
24 CAT/C/TUR/CO/4, para. 11 and 12.
25 Preliminary observations and recommendations of the United Nations Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr. Nils Melzer on
Failure to address violence against women

52. Since the central Government started replacing elected mayors with politically appointed “trustees” in municipalities of Southeast Turkey in September 2016, the Kurdish community has reported that centres for women’s rights protection were closed down in Cizre and Silvan and across South-East Turkey, particularly in the municipalities most affected by security operations and destruction in early 2016. In the past, such centres had been providing much needed protection for women and children victims of domestic violence, and promoted their engagement in social and political life.

53. The Government has reportedly urged women victims of domestic violence to report attacks to the police and the centrally appointed municipal authorities. NGOs, however, point out that women citizens of Kurdish origin, fearing police abuse and public shaming, are not only reluctant to discuss domestic violence outside their community but also fearful that police involvement would further increase the incarceration of Kurdish men, without resolving the issue of violence and its underlying cultural, social and economic causes. NGOs further report that confidential personal documentation was confiscated by the police from the closed centres and stored at an unknown location, potentially endangering the privacy and safety of thousands of former beneficiaries and members of their families.

G. Right to liberty and security

“My husband was a police officer serving in Mardin province. He was arrested on 22 July 2016. Five months later, my husband has not been charged yet. He is brought before a judge once per month only to hear that his detention is being prolonged for another month.”

- Wife of a police officer detained in a South-East Turkey prison following the attempted coup -

54. In the wake of the July 2016 attempted coup, according to the statement of the Minister of Justice, issued on 22 November 2016, legal proceedings, which entailed detentions, legal investigations and arrest warrants, were opened against 92,607 people, of whom 39,378 were placed under arrest. The number of people arrested and detained in South-East Turkey is not known. The speed and number of arrests raises concerns about the arbitrariness of many detentions and arrests and reportedly put great strain on police resources and the capacity of judicial authorities to oversee the detention of such a great number of people, raising concerns about the legality and conditions of detention.

55. According to NGO sources, lawyers based in South-East Turkey had been reporting a steady deterioration of detention safeguards even before the coup attempt. However, after the wave of mass arrests conducted between July and
December 2016, the authorities allegedly started holding detainees in unofficial places of detention, such as sports halls, and preventing them from having access to their lawyers and families. According to lawyers, some detainees reported being forced to sign documents they had not read and being coerced into incriminating other detainees who were picked from various lists of names and publicly available photographs.

56. Many lawyers all over the country also reported having had severely curtailed access to their clients, with their contact time reduced to only one hour or less per week, under routine surveillance by the security authorities, and subjected to voice recording. The restrictions on the access of lawyers to meet with people in police custody and pre-trial detention were authorized by a Government decree on 23 July 2016 (KHK/676), allowing prosecutors to bar detainees from meeting with a lawyer during the first five days of police custody. The decree also extended police custody to up to 30 days and placed restrictions on the right to private communications between lawyers and their clients held in pre-trial detention.

57. While lawyers’ associations have reported having a sufficient number of qualified lawyers to deal with the present number of detainees, people arrested in the wake of the coup attempt have reported facing great difficulties in securing the services of lawyers. Some stated that few lawyers appeared to be prepared to defend them, due to fear from retaliation by State bodies.

58. One of the cases that OHCHR reviewed concerns a police officer arrested on 22 July 2016 while serving in the Mardin province. According to the information received, he was initially held for a week in an overcrowded room at the local police station, receiving inadequate food once a day, and having no access to a lawyer or family visits. A week into his detention, he was reportedly arraigned before a judge who extended his detention and transferred him to a prison. During the hearing he was reportedly only asked about the reasons for selecting his lawyer, who was subsequently arrested. His lawyers have reportedly had no access to his files for the first two months of his detention. At the time of writing, six months after the arrest, the police officer was still being held in detention, with limited access to lawyers and family, and had not been charged with any crime. His detention is extended on a monthly basis. His assets have been frozen, making it difficult for him to meet his legal costs and support his family.

H. Access to justice, fair trial and effective remedies

“There was heavy military and special police presence in each neighbourhood in Cizre and special police snipers on rooftops of many buildings during the curfew. During the siege of the basements where people were hiding, soldiers were singing chauvinistic songs, taunting the people trapped inside. Nur neighbourhood had water and electricity cut off for a full week in January 2016.”

- Eyewitness of the Cizre shelling and curfew-

59. One specific case highlights some of the obstacles that victims in South-East Turkey face while seeking justice. On 14 July 2016, the former Chief Ombudsman of Turkey, Mr. Nihat Ömeroğlu, dismissed a case (Complaint No: 2016/737) brought by local authorities in South-East Turkey relating to the killing of civilians in Cizre during the shelling by the Turkish Army in January and February 2016. During the security operations, notably on 25 January 2016, the Cizre local authorities had urged the Ombudsman to intervene with the security forces in order to save the people trapped in the basements of several adjoining buildings. The decision of the Ombudsman issued on 14 July 2016, demonstrates that he failed to alert the military authorities or attempt to negotiate a safe passage for civilians trapped in Cizre, focusing instead on a legal analysis of the situation. In his decision, the Ombudsman found that the decisions of the security authorities which led to the killing of up to 189 people were “justified, sufficient, reasonable and convincing,” and that these authorities “acted in line with the good governance principles.”

60. The difficulty for victims in South-East Turkey to access justice is further compounded by the measures adopted by the Government in the aftermath of the coup attempt. At least 2,745 judges and prosecutors were reportedly suspended within hours of the 15 July 2016 attempted coup. By the end of December 2016, over 3,000 judges and prosecutors had reportedly been dismissed following an abbreviated investigation and dismissal procedure. The dismissals significantly weakened the functioning of the judiciary and put pressure on the whole system by fostering a climate of intimidation and threat towards judges and prosecutors. The number of dismissed judges and prosecutors in South-East Turkey is not known.

61. Five United Nations Special Procedures mandate holders, namely the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on summary or arbitrary executions; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the

30 Idem
31 See decisions of the High Council of Judges and Public Prosecutors:
   http://www.resmigazete.gov.tr/eskiler/2016/08/20160825-5.pdf,
   http://www.resmigazete.gov.tr/eskiler/2016/10/20161006-5.pdf,
32 In September 2016, Judge Aydin Sefa Akay, a member of the panel of UN judges reviewing the case of a former Rwandan minister, was detained in relation to allegations connected with the events of 15 July 2016. On 9 November 2016, President Judge Theodor Meron presented the fourth Annual Report of the Mechanism for International Criminal Tribunals (MICT) to the United Nations General Assembly and briefed the Assembly on the ongoing detention of a Judge of the Mechanism. He called upon Turkey to release judge Akay from detention:
Chair-Rapporteur of the Working Group on arbitrary detention, called upon the authorities, on 19 July 2016, to release and reinstate the arrested and suspended judges and prosecutors “until credible allegations of wrongdoing are properly investigated and evidenced.”\(^{33}\) They expressed alarm at the sheer number of judges and prosecutors who had reportedly been suspended and arrested, and stressed that, according to international law, judges can only be suspended or removed on grounds of serious misconduct or incompetence, following a fair and transparent process.\(^{34}\)

62. A series of laws, including Law No. 6722, which was adopted on 23 June 2016, created, according to some NGOs, an atmosphere of “systematic impunity” for the security forces. The law requires the authorization of political authorities for the investigation of soldiers or public officials suspected of having committed crimes in the context of counter-terrorism operations. According to the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, the law grants counter-terrorism forces immunity from prosecution for acts carried out in the course of their operations, thus rendering investigations into allegations of torture and ill-treatment by the involved security forces more difficult, if not impossible.\(^{35}\) NGOs have expressed concern that the provisions of the law were designed to pre-empt prosecutions of army and law enforcement officials for violations carried out in the course of security operations, such as in the case of the killing of Cizre in January and February 2016. Moreover, the decree KHK/667,\(^{36}\) issued on 22 July 2016, regulating measures on the implementation of the state of emergency, stipulates that persons who have adopted decisions and fulfilled their duties within the scope of this decree, bear no legal, administrative, financial and criminal liabilities. OHCHR is concerned that the decree may be used to reinforce impunity among law enforcement officials.

63. NGOs have reported that similar frameworks tying the prosecution of public officials to administrative permission (e.g. Law No. 4483 or Statutory Decree No. 430) were introduced during the state of emergency in South-East Turkey in the 1990s. They contributed to the systematic impunity of security forces for allegations of serious human rights violations, including extrajudicial killings, enforced disappearances, torture, and unlawful destruction of thousands of homes.\(^{37}\) Apart from allowing systematic impunity, such laws reportedly instilled a general fear of security forces within the population.


\(^{34}\)Idem


I. Rights to freedoms of opinion and expression, to freedom of association and to participate in public affairs

Interference with freedom of opinion and the media

“On 20 January 2016, we were trying to film and document what was happening in Cizre. We were in the Cudi neighbourhood, unarmed, in a group with other unarmed people. We were carrying a white flag and filming people removing dead bodies. As we were trying to cross a street, my cameraman was shot at from distance.”

-A journalist of Kurdish origin -

64. As of end of December 2016, more than 160 media outlets had reportedly been shut down since the coup attempt in July 2016 and over 130 journalists were reported to be in pre-trial detention across Turkey, most of them facing terrorism related charges, including many journalists writing for Kurdish language newspapers in South-East Turkey and other parts of the country. According to the Committee to Protect Journalists, by 1 December 2016, the authorities had detained or imprisoned more than a third of all journalists imprisoned worldwide on that day, most of whom were awaiting trial at the time of writing this report.[38]

65. Examples of restrictions imposed on media outlets perceived to be critical to the Government’s policies include the oldest national daily newspaper, Cumhuriyet, whose 12 journalists and other staff were detained on 31 October 2016.[40] Ten of them were accused later of committing crimes on behalf of both the PKK and the Gülen movement facing terrorism charges. 25 journalists and editors of the oldest Kurdish language newspaper, Özgür Gündem, were detained and the IT equipment was confiscated on 15 August 2016, while the newspaper was permanently closed down on 29 October 2016. A number of independent columnists, writers and human rights defenders who acted as symbolic co-editors for a day with Özgür Gündem showing solidarity for the situation in South-East Turkey were prosecuted for spreading terrorist propaganda and other charges, facing aggravated life prison term. Other closed down media included the Diyarbakır Kurdish-language daily, Azadiya Welat; the Kurdish-language Özgür Güm TV (whose programming was taken off air by its commercial satellite provider, Türksat); and another eight channels (including six Kurdish-language channels, one channel considered leftist and other channels critical of the government). As of the end of December 2016, most of the independent and Kurdish language media outlets were shut down, including JINHA one of the few world’s news agencies run entirely by women.

66. Moreover, an undetermined number of novelists and other prominent intellectuals were reportedly detained. Some 6,300 academics were dismissed from service while 15 universities have been shut down, affecting tens of thousands of students all over the country. At the end of his one-week official mission to Turkey, [38] https://cpj.org/imprisoned/2016.php, accessed on 15 December 2016.

[39] One of the detained journalists, Ms. Eren Keskin, is a member of the executive board of the Human Rights Association of Turkey and a recipient of the United Nations Voluntary Fund for Victims of Torture grants in support of victims of sexual abuse in detention.

on 18 November 2016, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, expressed grave concern about the "draconian" measures being used to erode independent opinion and expression in Turkey. According to the Special Rapporteur, the press, individuals online, artists, opposition voices and many others were facing unprecedented pressure, from censorship to outright detention.41

Right to form and join in associations

67. Many NGOs have reported an environment of fear and intimidation in relation to their work. On 22 November 2016, through decree KHK/677, the authorities permanently closed down and seized the assets of 375 associations, including many operating in South-East Turkey. The decree indicated terrorism or national security related grounds for the closures. According to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, civil society organizations continued to face increased government control, censorship and administrative pressures.42 Among the banned organizations were the Association of Libertarian Jurists (ÖHD) and the Contemporary Lawyers Association (ÇHD) whose members represented all of the deputies, executives and members of the pro-Kurdish parliamentary political party, the HDP.

Incitement to violence or hatred

68. OHCHR has received reports that offices of the political party HDP in South-East Turkey had been attacked immediately after the 15 July 2016 failed coup attempt by groups shouting religious slogans and carrying Turkish flags. Local NGOs attributed such attacks to vigilante groups motivated by the hate speech heard from high-level State officials in mainstream media. Several politicians and high-ranking officials are reported to have engaged in hate speech against minorities and other vulnerable groups during the parliamentary election campaign in June 2015 and following the declaration of the state of emergency.

69. OHCHR received allegations of instances of Turkish soldiers writing inflammatory racist and sexist graffiti on the houses they had been occupying during the curfew in Cizre between December 2015 and March 2016. The graffiti, which were painted throughout the town, allegedly glorified violence and insulted the residents’ values and beliefs. According to a local NGO, some soldiers shared photographs of their graffiti on social media, which they interpreted as an indication that soldiers had acted with deliberate intent to insult citizens of Kurdish origin.

Restrictions to participation in public affairs and decision-making

70. In May 2016, the Turkish Parliament adopted a law that stripped 138 legislators of the immunity from prosecution, including 50 of the 59 HDP members as well as 51 (out of 113) members from the main opposition People’s Republican Party (CHP), 27 (out of 317) from the ruling Justice and Development Party (AKP), 9 (out of 39) from the Nationalist Action Party (MHP), and one independent (out of 2). The law was proposed by AKP based on accusations that the HDP had been affiliated with the outlawed PKK. The HDP is the third largest party represented in the Turkish Parliament, with 10.8 per cent of the vote won during the last general

election. OHCHR received an information note\textsuperscript{43} by the Government of Turkey noting that on 4 November 2016 the courts had issued “compulsory attendance order or arrest warrants for 12 members of the HDP declining an earlier invitation to be summoned”. According to the Government’s note, the members of parliament were facing criminal proceedings involving terrorism-related charges in a judicial process that was reportedly carried out in compliance with principles of the rule of law and Turkey’s international human rights obligations. By the end of 2017, eleven HDP parliamentarians, including the two party co-chairs, Mr. Selahattin Demirtaş and Ms. Figen Yüksekdağ, had been arrested on various terrorist charges.

71. According to the HDP official statement issued on 2 January 2017,\textsuperscript{44} since July 2015, the number of detained HDP executives, members, and supporters had reached 8,711. Reportedly, as of 29 December 2016, the number of those arrested was 2,705. According to the HDP, 4,457 (more than half) of detentions and 1,275 arrests had taken place after the coup attempt of 15 July 2016.

72. On 1 September 2016, using emergency powers adopted after the attempted coup, the Government adopted a decree (KHK/674)\textsuperscript{45} permitting it to appoint “trustees” in lieu of elected mayors, deputy mayors or members of municipal councils suspended on charges of terrorism. The decree thus allows the Minister of Interior to appoint such “trustees” in metropolitan municipalities, whereas provincial governors appoint “trustees” for second tier municipalities, known as district municipalities. The first “trustees” were appointed in early September 2016 to replace the elected mayors of the municipalities of Sur and Silvan.

73. Decree KHK/674 may result in the wholesale replacement of elected officials of Kurdish origin throughout South-East Turkey. By the end of December 2016, reportedly 69 municipal co-chairs of the pro-Kurdish Democratic Regions Party (DBP) had been arrested, 58 had been dismissed and most had been replaced with “trustees”, in 50 municipalities,\textsuperscript{46} or around 50 per cent of all municipalities held by DBP. In most cases, the “trustees” were appointed immediately following the arrest of the democratically elected officials, indicating a high degree of coordination between the judiciary and the executive branches.

74. The removal from office of democratically-elected representatives of citizens of Kurdish origin appears to have had an unexpected negative consequence on women’s human rights in South-East Turkey. Since the early 2000s, municipal authorities of Kurdish origin in the region had been appointing a pair of officials to executive positions, consisting of a man and a woman, both of whom had the title of “co-chair” or “co-mayor” or held similar functions, with the aim of promoting equal representation of women and men at all municipal levels. The “trusteeship” appointments have interrupted this progressive practice.

\textsuperscript{43} Internal information note provided by the Permanent Mission of the Republic of Turkey to the United Nations Office and other international organizations in Geneva, on 6 November 2016, INFORMATION NOTE ON THE DETENTION OF MEMBERS OF PARLIAMENT IN TURKEY.


\textsuperscript{45} http://www.resmigazete.gov.tr/eskiler/2016/09/20160901M2-2.pdf

J. Labour rights

Large-scale dismissals

75. Following the failed military coup of 15 July 2016, over 100,000 people were reportedly dismissed and suspended throughout Turkey from public or private sector jobs for suspected links with the coup organizers. The Government conducted mass permanent dismissals of close to 85,000 people through a number of emergency decrees as well as suspensions of civil servants, police officers, military personnel, and academics. The Ministry of Education was most affected, with over 40,000 staff reportedly dismissed, mostly teachers. This included some 10,000 teachers in South-East Turkey, over 90 per cent of whom were serving in Kurdish-speaking municipalities. They were reportedly largely dismissed as a precautionary measure based on suspicion of having links with the PKK. Peaceful protests organized by the dismissed teachers in Diyarbakır were violently broken up by the local police. When the Government announced the suspensions and dismissals of teachers in September 2016, it did not specify how such a large number of teachers were identified as having had links with the PKK.

76. The collective nature of the dismissals and suspensions pose the question of legality of the grounds for dismissals and the arbitrariness of the “precautionary” nature of announced dismissals, the absence of a legal remedy, and the political or racial profiling of members of an ethnic group. Local community leaders in South-East Turkey allege that the measure was introduced as a form of collective punishment of a category of State employees based on their ethnic origin and language. Furthermore, they consider that the measure was a violation of the right to education of hundreds of thousands of school children who were to lose experienced teachers days before the beginning of the new school year. According to the Ministry of National Education, the process of recruiting new teachers would be completed by June 2017. At the time of reporting, it was not clear what were the measures undertaken by the Government to ensure continuous education for all children affected by the dismissals of teachers. OHCHR considers that the mass dismissal of civil servants raises the question of the State’s compliance with the prohibition of discrimination.

III. Conclusions and Recommendations

77. OHCHR recognizes the complex situation that Turkey has been facing by almost simultaneously conducting the security operation in South-East Turkey, addressing the 15 July 2016 attempted coup and dealing with a number of terrorist attacks. OHCHR is nevertheless deeply concerned at the significant deterioration of the human rights situation in South-East Turkey since July 2015, in particular the thousands of deaths, widespread destruction of private and cultural property and significant levels of displacement of the local population.

78. OHCHR is particularly alarmed about the results of satellite imagery analysis, which indicate an enormous scale of destruction of the housing stock by heavy weaponry. It is also concerned about the post-security operation policies of

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47 See Government Decrees:
expropriation (such as the Council of Ministers’ March 2016 decision to expropriate up to 100 per cent of all land plots in Diyarbakır’s Sur area) and the destruction of large urban areas (also seen in Diyarbakır’s Sur).

79. Furthermore, of particular concern are the measures taken by the Government that may lead to a lack of effective prosecution of security officials implicated in alleged serious human rights violations, especially due to the implications of Law No. 6722 and the reportedly deliberate destruction of evidence through the rushed and complete demolition of areas and buildings in which alleged serious violations of the right to life took place (such as in Cizre).

80. It appears that insufficient consideration has been given to the humanitarian and protection needs of hundreds of thousands of displaced and other people affected by the security operations. Similarly, it appears that the local population has not had an opportunity to participate in a meaningful way in the reconstruction planning.

81. Other significant concerns include the use of counter-terrorism legislation to remove from office democratically elected officials of Kurdish origin; the severe curtailment and harassment of independent journalists; the closure of independent and Kurdish language media and citizens’ associations; and the massive dismissals of civil servants, including teachers, on unclear grounds and without due process.

82. This report presents a range of early warning indicators, which need to be addressed meaningfully in order to remove the danger of further escalation of human rights violations in South-East Turkey and other parts of the country. Special attention needs to be paid to severe inequalities, lack of effective access to justice, lack of meaningful consultation in the development and reconstruction process, lack of democratic space for an active civil society, and lack of independence of the media.

83. In order to substantiate facts and ascertain the allegations presented in this report, OHCHR reiterates its request to the Turkish Government for a full and unhindered access to South-East Turkey. OHCHR stands ready to provide support to the Government of Turkey in the spirit of open dialogue and cooperation.

84. OHCHR invites Turkey to consider implementing the following recommendations:

85. Ensure that every loss of life that occurred in the course of security operations in South-East Turkey is duly investigated and that perpetrators of unlawful killings are brought to justice;

86. Discontinue the imposition of unannounced, open-ended, 24 hours curfews;

87. Take the measures necessary to guarantee that security and law enforcement officials do not resort to excessive use of force during security operations;

88. Ensure effective reparations for victims and family members whose human rights have been affected by security operations;

89. Ensure guarantees for the right to the truth in relation to alleged enforced disappearances in particular by, as a first step, establishing a publicly accessible and complete register of persons killed and detained in the context of security operations;

90. Allow access for independent, victim-centred and gender-sensitive assessment of the humanitarian and protection needs of the displaced population;

91. Ensure that reconstruction programmes are planned and implemented through meaningful consultation with and participation of the affected
population, including by protecting the cultural heritage of the region and by addressing the root causes of grievances in South-East Turkey;

92. While taking note of the preliminary observations of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment, following his visit to Turkey, OHCHR encourages Turkey to continue cooperating with the Special Rapporteur under his mandate;

93. In relation to deprivation of liberty, fully respect the provisions of article 9 of the International Covenant on Civil and Political Rights. To the extent that Turkey derogates from this provision, following its notification of July 2016, any measures taken in that respect should not exceed those strictly required by the exigencies of the situation in accordance with article 4 of the Covenant.

94. Carry out an independent review of the effects and extent of the counter-terrorism legislation and measures imposed on unclear grounds and without due process, which result in severe limitations upon the work of journalists and academics; the closure of Kurdish language media; citizens’ associations and universities;

95. While taking note of the preliminary observations of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression following his visit to Turkey, including his call for immediate release of all those held in prison for exercising their rights to freedom of opinion and expression, OHCHR encourages Turkey to continue cooperating with the Special Rapporteur under his mandate;

96. While taking note of the information provided by the Government of Turkey, including the reasons for the deprivation of liberty of some members of parliament, reconsider the collective arrests and/or removal from office of democratically elected parliamentarians and municipal representatives in South-East Turkey and ensure that the judicial proceedings are effectively conducted in line with the principles of the rule of law and in compliance with the State’s human rights international obligations;

97. Revoke the provision of Decree KHK/674, which provides for the appointment of “trustees” at the municipal level in South-East Turkey and reinstate the democratically elected co-mayors. Ensure in this regard due consideration to the right to vote, women’s rights and the right to be free from discrimination;

98. Take the necessary measures to guarantee that officials refrain from pronouncing messages of intolerance and that may incite violence, hostility or discrimination, and condemn publically such statements;

99. Create legal, structural and other conditions to establish a national human rights institution fully compliant with international standards, as well as a National Preventive Mechanism under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as appropriate;

100. Following the declaration of the national state of emergency and the related derogation from certain civil and political rights, revisit emergency measures so that they are limited to the extent strictly required by the exigencies of the situation, meaning that they must be proportional and limited to what is necessary in terms of duration, geographic coverage and material scope.
EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

TURKEY

OPINION

ON THE LEGAL FRAMEWORK GOVERNING CURFEWS

Adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016)

on the basis of comments by

Mr Joao CORREIA (Member, Portugal)
Mr Ghazi JERIBI (Member, Tunisia)
Mr Jan VELAERS (Member, Belgium)
Ms Hanna SUCHOCKA (Former Member, Poland)
# TABLE OF CONTENTS

I. Introduction .......................................................................................................................... 3

II. Preliminary remarks ........................................................................................................... 3
   A. Background .......................................................................................................................... 3
   B. Scope of the present opinion .............................................................................................. 4

III. International legal framework ............................................................................................. 5
   A. Curfew as an exceptional measure .................................................................................... 5
   B. Emergency situations – international provisions on human rights .................................. 6
   C. Exceptional measures outside the derogation mechanism ................................................. 9

IV. The national legal framework applying to curfews. Analysis ............................................ 9
   A. Constitutional provisions .................................................................................................... 9
      a) Curfew in the context of emergency rule ......................................................................... 9
      b) Rules applying to restrictions on fundamental rights ....................................................... 10
      c) State of emergency – constitutional framework ............................................................ 10
      d) Parliamentary supervision ............................................................................................. 11
      e) Judicial review ................................................................................................................. 11
      f) Means of application – requirement of legality ............................................................... 12
   B. Legislative provisions governing curfew ........................................................................... 12
   C. Legal basis of the curfews imposed in South-East Turkey ................................................ 13
      a) Position of the authorities ............................................................................................... 13
      b) Relevant case law ............................................................................................................ 14
      c) Analysis .......................................................................................................................... 15

V. Conclusions .......................................................................................................................... 19
I. Introduction

1. The Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe wrote to the Venice Commission on 15 March 2016, requesting its opinion on the compatibility of the legal framework governing curfews in Turkey with European standards (see CDL-REF(2016)028).

2. A rapporteur group consisting of Mr J. Correia, Mr G. Jeribi, Ms H. Suchocka and Mr J. Velaers was set up to prepare this opinion. A delegation from the Venice Commission visited Ankara on 26 and 27 April 2016 for discussions with the competent authorities (the Ministry of Justice, the Ministry of the Interior, the Undersecretariat of Public Order and Security, the Constitutional Court) and representatives of the political parties and civil society. The Commission wishes to thank the Turkish authorities for the excellent manner in which the visit was organised and all those whom it met for their readiness to assist and for the information supplied. The Turkish authorities also transmitted to the Commission, on 9 June 2016, their written observations on the draft Opinion.

3. This opinion is based on the French translation of the constitutional and legislative provisions to be examined, which was itself based on the English-language version of the provisions, as supplied by the Turkish authorities. Given that the translation might not be entirely faithful to the original, it is possible that some of the issues raised may be due to translation errors rather than to the content of the provisions themselves.

4. The present opinion was prepared on the basis of the contributions of the rapporteurs; it was discussed at the meeting of the Sub-Commission on fundamental rights on 9 June 2016 and was subsequently adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016).

II. Preliminary remarks

A. Background

5. For several months now, Turkey has been experiencing an upsurge in violence and terrorism which is reflected in the scale and growing number of attacks against civilians and the security forces.

6. Since the summer 2015, moreover, South-East Turkey has seen an unprecedented increase in violence and full-scale acts of war between Turkish security forces and armed groups operating in the region, with severe consequences for the local population.

7. Since August 2015, as part of the security operations, some sixty curfews have been declared by governors or sub-governors in a number of towns and around twenty districts in the region (in Cizre, Silopi, Idil - Şırnak, in Dargeçit - Mardin and in Sur - Diyarbakır), for periods ranging from several days to several weeks, or even months in some cases. According to information received from the Ministry of the Interior in April 2016, the curfew had been imposed as follows: in Cizre – a total of 75 days (the measure was still in force), in Silopi – 75 days, in Sur – 87 days and in Idil – 11 days, with breaks during which the ban on going out was lifted; almost 200,000 people have been directly affected. Meanwhile, unofficial sources report cases of curfews maintained for long periods, continuously.

8. Despite these exceptional circumstances, however, the Turkish authorities have invoked, to impose the curfews, neither the provisions of the Turkish Constitution, nor international human rights treaties authorising, under certain procedural and substantive conditions, derogations from certain human rights obligations.

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1 See reports by: Amnesty International, Human Rights Watch, International Crisis Group, Fédération Internationales des Droits de l'Homme (FIDH), Human Rights Association of Turkey (IHD), Human Rights Foundation of Turkey (HRF), Diyarbakır Bar Association etc.
9. At the same time, numerous local and international sources have reported an alarming deterioration in the situation of the people living in the areas concerned in recent months. Depending on the source of information, between 100,000 and 200,000 inhabitants have left the region because of the clashes. According to unofficial observers, 1 500 000 people in the region have been affected, directly or indirectly, by the current state of affairs. Large-scale damage to and loss of property and, most importantly, the hundreds of lives lost among civilians and the security forces during the clashes, together with the widespread allegations of violations of rights and freedoms, have sparked a widespread response both nationally and internationally.

10. Following his recent visit to Turkey, including the south-eastern areas worst affected by the fighting, the Council of Europe Commissioner for Human Rights noted that the most striking aspect of the anti-terrorist operations since August 2015 had been the "round-the-clock, open-ended and increasingly long curfews declared in entire neighbourhoods or cities in South-Eastern Turkey." While recognising that Turkey had the right and a duty to fight terrorism and to protect the population, the Commissioner stressed the need to find a balance between security considerations and human rights. "The Commissioner unequivocally condemned all terrorist actions and violence targeting Turkish citizens and the state, including by the PKK ["Kurdistan Workers’ Party"] and Daesh". At the same time, he urged Turkey to "avoid straying from human rights and rule of law principles in this fight, which would also ultimately serve the interests of these very organisations".

11. On 10 May 2016, the United Nations High Commissioner for Human Rights in turn declared that he had “received a succession of alarming reports about violations allegedly committed by Turkish military and security forces in south-east Turkey over the past few months”. In his press release, the High Commissioner stated as follows: “I strongly condemn violence and other unlawful acts committed by the youth groups and other non-state agents, allegedly affiliated with the PKK [Kurdistan Workers’ Party], in Cizre and other areas, and I regret any loss of life as a result of terrorist acts wherever they have occurred.” He felt, however, that “while Turkey has a duty to protect its population from acts of violence, it is essential that the authorities respect human rights at all times while undertaking security or counter-terrorism operations – and international law prohibiting torture, extrajudicial killings, disproportionate use of lethal force and arbitrary detention must be observed.”

B. Scope of the present opinion

12. The Venice Commission wishes to underline, as it has done on previous occasions, that it strongly condemns all acts of terrorism. Such acts strike at the heart of the values enshrined in the European Convention on Human Rights (ECHR) and can never be justified. The Venice Commission further reiterates that a democratic state is entitled to defend itself when attacked and has a duty to protect its population from such acts. It is aware of the gravity of the situation facing the Turkish authorities, the complex nature of the challenges to be addressed in their fight against terrorism and the heavy responsibility weighing on them in

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2 See reports published by: Amnesty International, Human Rights Watch, International Crisis Group, International Federation of Human Rights (FIDH), the Human Rights Association of Turkey (IHD), the Turkish Human Rights Foundation (HRF), Diyarbakır Bar Association, etc.


this regard, as well as of the fact that PKK has been listed by the EU as a terrorist organisation.

13. In the fight against terrorism, however, the common European values of freedom, democracy, respect for human rights and fundamental freedoms, and respect for the rule of law, must be guaranteed. While it is legitimate for any state to defend its security against any acts which threaten its population and its territory, the measures taken must be consistent with the principle of legality, justified by necessity and proportionate.

14. The scope of this opinion remains confined to the examination, in the light of the obligations under international law, in particular the ECHR and Council of Europe standards, of the legal framework governing curfew in Turkey and the legal basis for the decisions by which curfews have been imposed, since August 2015, in certain towns and districts in South-East Turkey. Among the legal issues which will need to be examined are the constitutional basis for curfew and how it is reflected in Turkish legislation, the legal basis on which administrative authorities (local governors) have declared a curfew, the restrictions on rights and fundamental freedoms, the relevant safeguards, and the compatibility of these arrangements with European standards.

15. Given its mandate and the request that has been submitted to it, the purpose of the Venice Commission's assessment is not to comment on the specific measures taken by the authorities in connection with the curfew, or on the extent to which they comply with the provisions of international conventions (in particular the ECHR and the ICCPR) governing exceptional situations, like the one in South-East Turkey. It is not within the mandate of the Venice Commission either to take a stand on the different allegations of violations of rights and freedoms.

III. International legal framework

A. Curfew as an exceptional measure

16. Although the possibility of imposing curfews exists in all political regimes, there is no internationally recognised definition of the term. Curfews can, however, be defined by their distinguishing features, as found in different legal systems.

17. Firstly, curfews were originally conceived as an exceptional measure for exceptional circumstances, and are usually associated with a state of emergency or martial law. Curfews are part of the armoury of measures which may be taken by the state to preserve, maintain and restore law and order and to protect the lives and property of its citizens in times of unrest, when there is a high likelihood of violence or when violence escalates (against the state, against the government itself or between different sections of the population).

18. Secondly, like any exceptional measure, curfews imply restrictions on the everyday rights and freedoms to which everyone is normally entitled for the period of time during which the curfew is in operation. Curfew restrictions a priori designed to prevent and control public disorder, riots and violence are generally considered to be both desirable and necessary or, at worst, a necessary evil. The catalogue of rights and freedoms liable to be affected by a curfew may vary in length depending on the particular context in which it is imposed and the specific measures associated therewith: the right to liberty and security of the person; the right to private and family life; the freedom of assembly; the freedom of association; the freedom of religion; the freedom to receive and impart information; the right

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5 While consistently acknowledging in its case law the validity of the fight against terrorism, the European Court of Human Rights has repeatedly pointed out that this legitimate fight must be conducted in a way that respects the rights provided for in the ECHR (see Öcalan v. Turkey, application no. 46221/99, 12 May 2005, §104); Ramirez Sanchez v. France, Application no. 59450/00, 4 July 2006, §§ 84, 115

6 The International Covenant on Civil and Political Rights
to peaceful enjoyment of property; the right to education; or the prohibition of torture and inhuman or degrading treatment, as well as the right to life and to physical integrity.

19. At the very heart of the concept of curfew, the right to free movement is the first to be affected. In common parlance, curfew means “an order or law that requires people to be indoors after a certain time at night”, or an ordinance specifying a precise time in the evening after which certain rules apply, in particular the one which decrees that no one – whether civilians or any other category of unauthorised persons – may be outdoors, or that places where people gather in public must be closed. Anyone who appears on the streets is liable to face sanctions, including possibly arrest and imprisonment and may even, during more restrictive curfews (martial law), “be shot to death simply for appearing on the streets without official knowledge and permission”.

20. In practice, beyond the commonly accepted meaning of the term, a curfew may vary according to: its duration (a certain number of hours per day or, far more rarely, a permanent, round-the-clock curfew); whether it is for a specified or unspecified period; geographical coverage (village, urban district or wider geographical area/territorial unit); the substance of the associated restrictions, which may not necessarily be confined to a ban on going out. Clearly, the impact which curfew has on the social, economic, cultural and political life of the community concerned and the exercise of fundamental rights will depend to a large extent on these factors. Hence the need for a suitable legal framework that can help both to address the problems engendered by any emergency situation and to reduce the risk of abuse of state authority, so as to ensure, via the law, the optimum balance between imposing an exceptional measure dictated by exceptional circumstances and considerations relating to human rights and freedoms.

21. Insofar as curfews are usually linked to a formal declaration of a state of emergency (or martial law), the rules are, in principle, clear. Most states lay down (often in their constitutions) special legal rules which apply in exceptional circumstances, stipulating the essential conditions and procedure for introducing a state of emergency/martial law, the measures which may be taken under this emergency rule, including curfew, and the safeguards associated with any restrictions on fundamental rights. The specific manner in which such measures are to be implemented is prescribed by legislation. As pointed out by the Venice Commission in its Report on emergency powers: “If not unreasonable or arbitrary, a State may infringe upon what might otherwise be regarded as constitutionally protected rights if it is necessary to protect public health, safety and welfare in an emergency.” In this context, states are bound to comply with the provisions of the international conventions governing derogations from fundamental rights to which they are entitled to have recourse in the event of an emergency.

22. The situation is different where the state decides not to formally declare a state of emergency and allows a curfew to be imposed in “normal” times. In those circumstances, any restrictions on fundamental rights arising from such a decision will have to comply with the specific limitations clauses contained in the international instruments with respect to the rights in question (see below).

B. Emergency situations – international provisions on human rights

23. Emergency situations involve both changes to the way in which responsibilities and prerogatives are allocated among the various authorities and organs of state and derogations from normal human rights standards. It is crucial that these derogations be regulated by law as experience has shown that the most serious violations of human rights tend to occur during emergency situations.

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7 Merriam-Webster Dictionary
9 Emergency Powers, op. cit., p.6
10 Emergency powers, op. cit., p.4
24. This regulation is provided, in international law, by the derogation clauses with regard to emergencies contained in the main international human rights instruments: Article 15 ECHR, Article 4 ICCPR, Article 27 of the American Convention on Human Rights (ACHR). Derogation procedures thus afford the international institutions concerned a means of monitoring all acts performed by states, including any which violate fundamental rights for the purpose of protecting the life of the nation.

25. Accordingly, Article 15 of the ECHR affords to governments, in exceptional circumstances, the possibility of derogating,\(^{11}\) in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

26. Article 4 of the ICCPR states:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

27. As pointed out in General Comment No. 29 on Article 4 ICCPR,\(^{12}\) measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature and, before a state moves to invoke them, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the state party must have officially proclaimed a state of emergency.\(^{13}\) “The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional...

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\(^{11}\) In the early 1990s, citing threats to its national security and the need to combat them through more robust measures, and invoking Article 15 ECHR, Turkey submitted a number of declarations empowering the Government to take stringent measures in derogation from ECHR guarantees such as banning publications, shutting down printing presses, suspending or requiring permission for strikes, ordering the evacuation of villages or residential areas or ordering persons to settle in a place outside the state of emergency zone, and transferring public officials to other posts. After limiting the scope of its notice of derogation with respect to Article 5 ECHR (right to liberty and security) in 1993, Turkey withdrew these declarations in January 2002.

\(^{12}\) ICCPR, General Comment No. 29. States of emergency (Art.4),CCPR/C/21/Rev.1/Add.11, 31 August 2001

\(^{13}\) See, for further information on the characteristics that a situation must have to qualify as a state of emergency and the principles that states are required to respect in states of exception, CDL-AD(2016)06, §§ 27-28
and other provisions of law that govern such proclamation and the exercise of emergency powers [...]."

28. In addition, Article 18 ECHR states that "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed", while Article 17 prohibits activities or acts "aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

29. Among the standards and references taken into account by the Venice Commission in its assessment, mention could also be made of Recommendation 1713 (2005) of the Parliamentary Assembly of the Council of Europe,14 which noting that "the need for security often leads governments to adopt exceptional measures", stresses that "these must be truly exceptional, as no State has the right to disregard the principle of the rule of law, even in extreme situations". The same recommendation provides that "[e]xceptional measures in any field must be supervised by parliaments and must not seriously hamper the exercise of fundamental constitutional rights".

30. More recently, in its Resolution 2090(2016),15 while recognising the importance of the fight against terrorism, the Parliamentary Assembly warned against the risk that "counterterrorism measures may introduce disproportionate restrictions or sap democratic control and thus violate fundamental freedoms and the rule of law, in the name of safeguarding State security."

31. In this context, the Venice Commission refers to its "Rule of Law Checklist",16 which also includes the following criteria for invoking exceptions in emergency situations:

Are exceptions in emergency situations provided for?

i. Are there specific national provisions applicable to emergency situations (war or other public emergency threatening the life of the nation)? Are derogations to human rights possible in such situations under national law? What are the circumstances and criteria required in order to trigger an exception?

ii. Does national law prohibit derogation from certain rights even in emergency situations? Are derogations proportionate, that is limited to the extent strictly required by the exigencies of the situation, in duration, circumstance and scope?

iii. Are the possibilities for the executive to derogate from the normal division of powers in emergency circumstances also limited in duration, circumstance and scope?

iv. What is the procedure for determining an emergency situation? Is there parliamentary control and judicial review of the existence and duration of an emergency situation, and the scope of any derogation thereunder?"

32. The Commission has likewise considered these issues in its thematic work and its opinions on national legal rules governing emergency situations.17

33. It appears from all the above-mentioned rules that, as regards the use of exceptional measures such as curfews:
- states are allowed in principle to adopt exceptional measures in the fight against terrorism;
- an essential condition is the declaration of a state of emergency. The review of the manner in which the state of emergency was introduced is carried out with reference to the constitutional and legislative provisions governing the exercise of emergency powers;

16 CDL-AD(2016)007, Rule of Law Checklist, 11-12 March 2016
17 See footnote n° 5.
the measures taken must nevertheless: be prescribed by law, meet the criteria of necessity (be directed at a real and imminent danger) and proportionality; be temporary in nature (cease when there is no longer a threat); be supervised by a parliamentary assembly; not seriously hamper the exercise of fundamental constitutional rights; ensure full respect for inviolable rights; be amenable to judicial scrutiny.

C. Exceptional measures outside the derogation mechanism

34. The decision by a state not to avail itself, under Article 15 ECHR, of its right to derogate from Convention rights, is tantamount to accepting the Convention in its entirety, it being understood that no obstacle, whether in domestic law or international law, may stand in the way of its application.

35. Such a decision also paves the way for “normal” supervision of the state’s compliance with all of its obligations under the Convention, in relation to all the Convention rights and not only the non-derogable ones. According to the right in question, the Convention imposes on states not only negative obligations to refrain from certain acts but also a whole range of positive obligations, both substantive and procedural.

36. Accordingly, any exceptional measure taken by a state (such as curfew) and the restrictions on fundamental rights which arise therefrom will be considered in relation to the provisions of the Convention, as they apply in “normal” times, and will have to meet the conditions laid down in the limitation clauses specific to each of the rights concerned: are they prescribed by law (in accordance with the requirements for accessibility, clarity and predictability)? Do they pursue a legitimate aim and are they necessary in a democratic society? Do they meet the proportionality test?

IV. The national legal framework applying to curfews. Analysis

A. Constitutional provisions

a) Curfew in the context of emergency rule

37. In Turkish law, curfew is expressly mentioned as one of the measures that may be deployed in the context of two exceptional situations governed by the Constitution, involving the possibility of overriding some of its provisions, particularly those relating to fundamental rights: (1) states of emergency declared after widespread acts of violence and serious public disorder; and (2) martial law.

38. The fact that the Turkish Constitution contains express provisions dealing with the state of emergency, setting out clear conditions, rules and procedures for the formal declaration of such state and the general principles by which the authorities must abide during the state of emergency, should be welcomed. The Venice Commission has already pointed out that the constitutionalisation of emergency rule helps to strengthen safeguards against abuses, in terms both of the requirements for its declaration or extension and the measures authorised during its application.

39. The Venice Commission was not asked to provide a detailed study on the constitutional and legislative framework governing such powers in Turkey or to assess whether the related legal systems were compatible with international standards and principles. However, it has to be said that, in principle, it is for such emergency situations that curfew is provided for in Turkey as it is the legislation governing such situations which refers expressly to it.

18 Similar consequences will arise if a state decides not to avail itself of Article 4 ICCPR.
19 See Khashiyev and Akayeva v. Russia (Applications Nos. 57942/00 and 57945/00), 24 February 2005, § 97.
20 Emergency powers, op. cit.; see also CDL-AD(2015)006, §46
21 See § 52 of this opinion.
40. It is important therefore that when the Commission examines the legal basis for the recent curfew measures, it begins by determining the legal arrangements for such a measure provided for by the Turkish Constitution, namely those made in the context of emergency situations. More specifically, for a measure which, by its very nature, results in restrictions to fundamental rights, the question which arises is that of the safeguards with which it is combined to ensure full compliance with the constitutional principles and international obligations accepted by Turkey in this sphere. It should be pointed out that under Article 90 of the Constitution, once they have entered into force, international treaties ratified by Turkey carry the force of law. In cases of conflict, the provisions of treaties on fundamental rights take precedence over Turkish legislation.

b) Rules applying to restrictions on fundamental rights

41. The Commission begins by noting that there are specific provisions in the Turkish Constitution governing potential restrictions to fundamental rights depending on whether these restrictions are applied in a normal situation (Article 13) or an exceptional one (Article 15).

42. Article 13 of the Constitution reads as follows: “Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter or spirit of the Constitution, the requirements of the democratic order of society or the secular Republic or the principle of proportionality”.

43. In exceptional situations, drawing on Article 15 of the ECHR, Article 15 of the Constitution lays down the general principle whereby “in times of war, mobilisation, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partly or entirely suspended, or measures derogating from the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated. Even under the circumstances described in the first paragraph, the individual’s right to life, and the integrity of his body and mind shall be inviolable except where death occurs through acts in compliance with the law of warfare…”

c) State of emergency – constitutional framework

44. The constitutional principles governing states of emergency are enshrined in Articles 119 to 121 of the Constitution. Articles 119 and 120 set out the material and formal conditions for the declaration of a state of emergency including its duration and geographical scope while Article 121 establishes the rules on its approval.

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22 In the context of this opinion, the Venice Commission will look mainly into the constitutional and legislative framework relating to the states of emergency.
23 Article 122 of the Constitution sets out the constitutional rules applying to the martial law.
24 Article 119 relates to the declaration of states of emergency following a natural disaster or a serious economic crisis.
25 Declaration of a state of emergency because of widespread acts of violence or serious public disorder

Article 120 - In the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious public disorder because of acts of violence, the Council of Ministers, meeting under the chairmanship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months.”

26 Rules regarding states of emergency.

Article 121 - In the event of a declaration of a state of emergency under the provisions of Articles 119 and 120 of the Constitution, this decision shall be published in the Official Gazette and shall be immediately submitted to the Grand National Assembly of Turkey for approval. If the Grand National Assembly of Turkey is in recess, it shall be immediately assembled. The Assembly may alter the duration of the state of emergency, may extend the period for a maximum of four months each time at the request of the Council of Ministers, or may lift the state of emergency.
d) Parliamentary supervision

45. A noteworthy positive point illustrating the exceptional nature of such decisions is that the formal arrangements for declarations of states of emergency by the Council of Ministers meeting under the chairmanship of the President of the Republic require parliamentary approval in addition to prior consultation with the National Security Council. States of emergency may be declared in one or more parts of the country or the entire country for a limited duration not exceeding six months. Declarations must therefore be approved by the Grand National Assembly, which may also decide to change the duration of the state of emergency, to extend it by a period of up to four months, or to lift it (Article 121).

e) Judicial review

46. The Constitution also provides that once a state of emergency has been declared, the Council of Ministers, chaired by the President of the Republic, may issue any decrees with the force of law required by the situation. While the clause of Article 121 requiring approval of such decrees by the parliament should be welcomed, it should also be noted that decrees issued during a state of emergency may not be challenged in the Constitutional Court on the ground of unconstitutionality with regard to their form or substance (see Article 148 of the Constitution). It is also worth pointing out that under Article 91 of the Constitution, rights and freedoms may, as a matter of exception, be governed by decrees during periods of martial law and states of emergency. Since the instrument declaring a state of emergency takes the form of a parliamentary resolution, it also escapes any constitutional review.

47. Furthermore, as confirmed by the authorities, since they are the preliminary stage of a legislative process, decrees of the Council of Ministers issued during a state of emergency do not fall within the jurisdiction of the administrative courts.

48. At the same time, while other administrative “decisions/acts” adopted by the authorities under a state of emergency are subject to the usual judicial review, under a state of emergency, stays of execution of the administrative act concerned may not be issued (Article 33 of the State of Emergency Law, based on Article 125 of the Constitution).

49. In the light of this information, it is uncertain whether a decree intended to impose curfew measures can be subject to a review of legality. The Commission refers to the comments it made in its Opinion on the draft Constitutional Law on “Protection of the Nation” of France as to the primary importance of judicial supervision of derogating measures and decisions taken by the authorities during a state of emergency. It recommends that the Turkish
authorities set up a suitable system to enable an effective review of the legality, including the necessity and proportionality, of all measures taken by the authorities under states of emergency.

f) Means of application – requirement of legality

50. On the subject of determining the obligations that may be imposed on the public during a state of emergency (once it has been officially declared) and the measures to be adopted to meet the needs of the situation, the applicable procedures and the changes in the authorities' responsibilities during the exceptional regime, Article 121 refers to the relevant law (the State of Emergency Law). All obligations and measures connected with a curfew must therefore be prescribed by law.

51. It can also be welcomed that a clause in Article 121 requires that any restriction or suspension of rights or freedoms must be in conformity with the principles of Article 15 of the Constitution. This is tantamount to saying that such measures must only be taken "to the extent that the situation requires" – and therefore it is duly pointed out that the principle of proportionality also applies during any exceptional regime – and in accordance with the international obligations entered into by the Turkish state, all of which implies of course that the authorities must announce any derogations to the provisions of the ECHR and the ICCPR protecting fundamental rights. In addition, the State of Emergency Law itself refers to the requirements of Article 15 of the Constitution, which contains a list of non-derogable rights which apply even during exceptional circumstances representing a key constitutional safeguard for the protection of the rights in question.

B. Legislative provisions governing curfew

52. Article 11(a) of Law No. 2935 of 25 October 1983 on States of Emergency (hereinafter the "State of Emergency Law") provides expressly that the measures taken to protect general security, safety and public order and to prevent the spread of acts of violence may include the "imposition of a limited or full curfew". In the same way, Article 3 (l) of Law No. 1402 of 13 May 1971 on Martial Law mentions curfew as one of the measures that may be authorised where necessary. However, there is no text which defines curfew or the material or formal requirements for it to be imposed, the means of implementation or the limits on its application.

53. In view of the serious consequences of a state of emergency, this does not seem acceptable. The Venice Commission recommends that the authorities review the provisions mentioned above without delay and take the necessary steps for a clear, precise and detailed set of rules including all the conditions and guarantees associated with exceptional measures to be provided for by Turkish legislation with regard to curfews.

54. The Venice Commission notes at the same time that the Turkish Code of Criminal Procedure cites the "violation of a curfew measure taken on the basis of Law No. 5442 of 10 June 1949 on Provincial Administration" (Article 91(4)(e)) as an offence for which police custody may be ordered. Nonetheless, no express reference to curfew is made in Law No. 5442 of 10 June 1949 on Provincial Administration (hereinafter the "Provincial Administration Law").

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31 "Even under the circumstances described in the first paragraph, the individual's right to life, and the integrity of his body and mind shall be inviolable except where death occurs through acts in compliance with the law of warfare; no-one shall be compelled to reveal his/her religion, conscience, thoughts or opinions or be accused on account of them; offences and penalties shall not be made retroactive, nor shall anyone be held guilty until so proven by a court ruling".

32 Venice Commission, Emergency powers, op. cit.

33 Law No. 5271 of 4 December 2004 amended.

34 Paragraph 4 of Article 91 of the Code of Criminal Procedure was introduced by an amendment of 27 March 2015 to the Code, pursuant to Article 13 of Amending Law No. 6638.
C. Legal basis of the curfews imposed in South-East Turkey

a) Position of the authorities

55. In the management of the disturbances that have arisen in South-East Turkey since July 2015, no reference has been made, when imposing curfews, to the constitutional and legislative provisions on exceptional situations.

56. However, according to a written communication sent to the rapporteurs by the Turkish authorities, the necessary legal conditions were met to declare a state of emergency under Articles 119, 120 and 121 of the Constitution and the State of Emergency Law or even to declare martial law under Article 122 of the Constitution and there was a sufficient majority in parliament to adopt such decisions. Instead of this, the authorities preferred to apply curfews on the basis of Article 11 of the Provincial Administration Law.

57. The authorities claim to have made this choice to avoid even the partial suspension of the ECHR (in accordance with Article 15 of the ECHR and Article 15 of the Constitution) and “to avoid any backsliding in the field of fundamental rights and freedoms” and preserve the gains made on the road to democracy and demilitarisation. Accordingly, they explain that, under these circumstances, it is for the benefit of the local population that curfews are applied “as a flexible way to maintain … civil initiative and to protect fundamental rights and freedoms”. According to the authorities, the imposition of curfews forms part of the government’s positive obligations in the human rights field in urban areas where hundreds of militants from the terrorist organisation are deployed and are targeting the security forces from among the masses where hundreds of booby traps have been installed. The note states that the Republic of Turkey’s first priority in the fight against terrorism is to differentiate members of the armed terrorist organisation from civilians and to prevent civilian casualties. Therefore, the curfews essentially serve this purpose.

58. In the authorities’ view, this choice makes it easier to protect the lives and property of persons during fighting with armed groups because, since only local authorities may apply curfews, they are decided on and implemented according to need. The authorities also consider that for measures intended to protect fundamental rights, this choice makes for more flexibility and proportionality. In this connection the authorities state that curfews are implemented only in parts of cities or districts where security operations are taking place and only for the duration of the operations. At the same time, they point out that constant efforts have been made to meet the basic needs of the people concerned, particularly to provide access to food and healthcare.

59. More specifically, the Turkish authorities refer to the following provisions of the Provincial Administration Law as the legal basis for curfew decisions (see CDL-REF(2016)028):

- Article 11(a), authorising the governor to take the “necessary measures to prevent crimes from being committed and protect public order and security”, relying for this on the state’s general and special law enforcement forces;
- Article 11(c), providing that it is one of the tasks of the governor (valı) “to secure peace and security, personal immunity, safety of private property, public well-being and the authority of preventive law enforcement”;
- Articles 32(b) and 32(c) assigning the same powers, in similar terms, to sub-governors (kaymakam), at provincial district level;
- Article 66, which provides that in the event of social disturbances threatening public order or the public security or safety of persons and property, those who go against the measures taken by the governor or sub-governor to secure public order are liable to a prison sentence of 3 months to 1 year.

35 Information note sent to the Venice Commission by the Turkish authorities, 24 April 2016, p.3
36 Information note, 24 April 2016, p.4
60. According to the Turkish authorities, even if curfew is not mentioned by the Provincial Administration Law, the fact that Article 91(4)(e) of the Code of Criminal Procedure refers to it as a measure which may be implemented under the Provincial Administration Law would tend to indicate that curfew decisions may be adopted on the basis of this law alone, without any formal declaration of a state of emergency.

61. The Venice Commission has been informed that the curfew orders adopted by some governors and sub-governors in South-East Turkey were all based on provisions of the Provincial Administration Law. For example, in September 2015, the governor of Sirnak issued a statement to the press in which he said that in order to capture members of the separatist terrorist organisation and protect people’s lives and properties, a curfew was declared in Cizre District in accordance with Article 11(c) of Law No. 5442 on Provincial Administration and would be valid from 4 September 2015 from 8 p.m. until further notice.

b) Relevant case law

62. The Turkish authorities refer, in the information forwarded to the rapporteurs, to a number of decisions given by the administrative courts and the Constitutional Court, along with the European Court of Human Rights following complaints of alleged violations of fundamental rights under curfew measures. In requesting interim measures, the applicants also contested the lawfulness of curfews. In the authorities’ view, these decisions show that curfews are subject to judicial review and even strengthen the validity of the legal basis referred to.

63. The Commission notes that the Turkish courts, taking account of the seriousness of the situation, the violence involved and the risks to which the people were exposed, considered that curfews could not be regarded as unfounded and rejected the complainants’ requests.

64. The Constitutional Court for its part considered the information provided by the applicants to be insufficient and refused to order the interim measures they had requested while urging the authorities to examine the situation and to assist the people in difficulty according to the needs identified. In its judgment of 11 September 2015, the Court, having noted the reasons given for imposing a curfew (to apprehend members of the terrorist organisation and protect lives and property during terrorist attacks), found that “it could not be argued that the declaration of a curfew by the governor for the reasons referred to above was unfounded”. In all its subsequent decisions on curfews, the Court has systematically referred to this finding, holding that there was no reason to depart from it.

65. The Commission would like to point out, however, that when they met the representatives of the Constitutional Court, the rapporteurs were told that the Court had not yet examined the merits of the questions of legality that had been raised and that the rejection of interim measures should in no way be interpreted to mean that the Court had given the green light to curfews.

66. The European Court, for its part, which has received a few dozen requests for interim measures in connection with curfew measures in Turkey since December 2015, has decided to give priority treatment to a number of complaints. While in some cases the Court has indicated interim measures, calling on the Turkish authorities to take all necessary measures to protect the life and physical integrity of injured applicants, in several others it has rejected the requests for reasons including the lack of detailed information on the actual circumstances alleged by the applicants. Here again, it is important to state that at this stage, the European Court has not yet examined the legality of the curfew decisions in question.

37 See for example the decision of the Diyarbakir Administrative Court, 3. Idare Mahkemesi, Esas No: 2015/803, Karar No: 2015869, Turkish Constitutional Court, interlocutory decision on a provisional injunction, case no. 2015/19907, 26/12/2015.
38 Turkish Constitutional Court, Mehmet Girasun and Others (case no. 2015/15266), 15/09/2015, §14
39 See Press release issued by the Registrar on 5 February 2016.
Analysis

i. States’ margin of discretion when deciding on emergency powers

67. The Venice Commission has already pointed out in previous opinions that in international law, states have a margin of discretion to assess whether a public emergency exists and derogations are needed. It is for the national authorities to assess, in view of the seriousness of the situation and taking account of all the relevant factors, if and when there is a public emergency threatening the existence of the nation and if a state of emergency needs to be declared to combat it. Likewise, it is for the state authorities to decide on the nature and extent of the derogations needed to overcome the emergency. However, although states have a wide margin of discretion in this area, their powers are not unlimited and the European Court of Human Rights exercises some supervision over these powers.

68. From 1987 onwards, the provinces of South-East Turkey were repeatedly placed under a state of emergency and in 1990, 1991, 1992 and 1993, the Turkish authorities even notified the Secretary General of the Council of Europe that because of “the intensity and variety of terrorist actions” conducted by the PKK in South-East Turkey, they would be derogating from some of the rights enshrined in the ECHR pursuant to Article 15. In its judgment of 18 December 1996 in the Aksoy v. Turkey case, the European Court of Human Rights found that the extent and, in particular, the impact of PKK terrorist activity in South-East Turkey had undoubtedly created, in the region concerned, a public emergency threatening the life of the nation.

69. The Venice Commission notes that although they refer to “the PKK terrorist activities” in South-East Turkey to justify curfews, the Turkish authorities have chosen not to argue that the situation is a “public emergency threatening the life of the nation” and hence not to claim that this is an exceptional situation which would warrant a temporary, limited and supervised derogation to their obligation to safeguard the rights and freedoms enshrined in the ECHR.

70. Therefore, the current legal situation differs from that of the 1980s and 1990s and reflects a political choice, made by the Turkish authorities despite their claims that all the prerequisites would be met for them to declare emergency rule. At the same time, there is no obligation for a state to make use of the possibility under the constitution and international treaties to derogate from its fundamental rights obligations in times of war or emergency. On the contrary, it should be a welcome development when a state shows its commitment to complying with these obligations even in difficult times.

71. The Venice Commission has duly noted this choice and the reasons given by the authorities, and has taken particular note of the emphasis they place, when justifying their choice, on the use of curfews as a means of protecting individuals’ rights.

ii. Curfew in “normal” situations - legal implications

72. The Commission notes, however, that curfew measures are provided for expressly in the Constitution and the legislation in force in Turkey. In Turkey therefore curfew amounts to an institution based on legal principles, prescribed by the law (two laws governing the specific legal systems that apply in two exceptional situations which have their basis in the Constitution) and dependent on the declaration of a state of emergency or martial law. The power to declare and implement these two states is defined thoroughly and in detail. There is therefore neither any kind of legal vacuum nor any ambiguity which could give rise to differing interpretations.

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41 See ECHR, Brannigan and McBride v. the United Kingdom, Application no. 14553/89; 14554/89, 25 May 1993, §43; Aksoy v. Turkey, application no. 21987/93, 18 December 1996, §68; A and Others v. the United Kingdom, Application no. 3455/05, 19 February 2009, ¶173.
42 Aksoy v. Turkey, application no. 21987/93, 18 December 1996, §70
73. In addition, since the curfew system is by its very nature an exceptional measure entailing restrictions to fundamental rights, the texts governing it must be interpreted narrowly, in terms both of substance and of competence and scope.

74. In these circumstances, the Commission questions whether it is legally acceptable to derogate from a special law referring to curfew (the State of Emergency Law, which forms part of a special system set up by the Constitution) by means of a general law (the Provincial Administration Law) assigning decision-making powers on the subject to provincial governors, despite the fact that Article 120 of the Constitution gives the power to decree a state of emergency in one or more regions or throughout the country to the Council of Ministers, meeting under the chairmanship of the President of the Republic, and that Article 11 of the State of Emergency Law lists curfews among the measures that may be taken “whenever a state of emergency is declared”.

75. If such a derogation were to be considered acceptable because of a political choice made by the authorities, two key questions would have to be addressed nonetheless to ensure that the decisions concerned were taken in accordance with the requirements of the rule of law and respect for fundamental rights:

(1) it would have to be ensured firstly that all the conditions and safeguards established by the Constitution and the State of Emergency Law to delimit curfews in the context of exceptional regimes are also satisfied when a curfew is applied at “normal” times on the basis of the legislation referred to by the authorities;
(2) secondly, it would be essential to ascertain that, as a measure restricting fundamental rights, a curfew decided on in “normal” times fulfils the requirements of the Constitution and those resulting from Turkey’s international obligations in relation to fundamental rights.

76. The Commission would point out that in the context of the choice made by the authorities, the provisions of Article 13 of the Constitution apply to all restrictions of rights and freedoms, together with the requirements of the ECHR and the ICCPR. Furthermore, respect for these rights and freedoms and any infringements thereof should also be assessed in the light of the authorities’ positive obligations vis-à-vis these rights.

1. **Conditions and safeguards applying to recent curfew measures**

77. As already stated, the rules on states of emergency which authorise curfews in Turkey provide for the following array of safeguards (see Chapter IV.A.a above): a collective decision-making process within the Council of Ministers under the chairmanship of the President of the Republic; consultation of the National Security Council; a maximum duration of six months; publication in the official gazette; immediate referral for approval to the Grand National Assembly, which may also decide to lift the state of emergency and hence to cancel the curfew; notification of the international institutions concerned. Otherwise, decrees with force of law may also be issued by the Council of Ministers under the Chairmanship of the President of the Republic and submitted for approval to the Grand National Assembly, which therefore has the possibility of rejecting them and, in this way, to cancel any recourse to curfew measures.

78. The above safeguards are totally missing from the Provincial Administration Law, Article 11 of which assigns governors and sub-governors very broad powers as part of their duty “to secure peace and security, personal integrity, safety of private property [and] public well-being”. No information is included in this law about the material conditions required or any procedure which must precede decisions to implement a curfew and still less about any assessment of the proportionality of such a measure and its limits and means of application, let alone any requirement to notify international institutions. It is worth noting that recourse to a derogation under Article 15 of the Constitution would have also opened up the possibility of international supervision of any derogating measures adopted.
79. As to the “time” criterion, requiring that any such measure must be limited and temporary, whereas on the ground there were curfews of varying length (lasting from a few hours up to, in extreme cases, permanent curfews lasting several weeks), there is a similar lack of any provision on this subject in the Provincial Administration Law. Nor is the length of curfews set down in governors’ decisions.

80. In the same way, all prior parliamentary approval of the adoption of curfew measures is excluded; neither were they any indications, according to the information obtained by the rapporteurs on their visit to Turkey, concerning any subsequent review of such measures (as the parliamentary committee in charge of such requests had not yet been able to visit the areas covered by curfews).

81. The Commission fully understands that in practice, such an important decision will not be taken unilaterally by the governor. As has been confirmed by the authorities, governors (as the local representatives of the state) will generally consult with the Ministry of the Interior and other government bodies (particularly the security department) before taking any such decision. Their discussions undoubtedly cover the necessity of curfew measures, their extent (in geographical area and time) and the measures needed for their application. The authorities see this as an application of the principles of subsidiarity and proportionality, which are quite clearly very important in the case of exceptional measures. In the Commission’s opinion, however, these are isolated discussions, which cannot replace the general implementing conditions prescribed by the law or be equivalent to the supervision exercised by the parliament over exceptional measures, making it possible in particular for a parliamentary debate to be held on any such measures planned by the executive before their approval.

82. In the same way, it is true that governors’ decisions include a brief description of the reasons justifying curfew measures, which the Commission cannot question, just as it is true that such decisions are announced to the public, published and subject to judicial review, just like any other administrative measure taken under ordinary rules in accordance with Article 125 of the Constitution. The fact remains nonetheless that this decision, which gives rise to restrictions to fundamental rights protected by the Constitution, is taken formally by a state official on the basis of a law which does not expressly assign that official any powers with regard to curfews. Despite this, penalties which may extend to imprisonment can be imposed for non-compliance.

83. In the light of the foregoing, the Venice Commission cannot conclude that the guarantees associated with curfews in the special legislation governing the use of this measure (based on the provisions of the Constitution which apply to exceptional regimes) are met when this measure is applied on the basis of the Provincial Administration Law.

2. Curfew as a restriction on fundamental rights

84. As already stated, the main implication of curfews is a restriction on freedom of movement. This freedom is guaranteed by Article 23 of the Turkish Constitution. Freedom of movement is also guaranteed by Article 2 of Protocol No. 4 to the ECHR, which Turkey

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43 “Recourse to judicial review shall be available against all actions and acts of administration”.
44 “Everyone has the right to freedom of residence and movement. Freedom of residence may be restricted by law for the purpose of preventing offences, promoting social and economic development, ensuring sound and orderly urban growth, and protecting public property; freedom of movement may be restricted by law for the purpose of investigation and prosecution of an offence, and prevention of offences” (Article 23 of the Turkish Constitution, unofficial translation).
45 “1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of order public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
has signed (on 19 October 1992) but not yet ratified, and by Article 12 of the ICCPR, which it has ratified. General Comment No. 27 on Article 12 of the ICCPR sets out the conditions under which freedom of movement may be restricted, which include the following:

- the law itself has to establish the conditions under which the rights may be limited;
- laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution;
- restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected;
- the principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.

85. In the light of these comments and the criteria resulting from the ECHR’s case law, the legal basis of the curfew measures implemented in South-East Turkey may be called into question. Firstly, in the Venice Commission’s view, it cannot be concluded that the restrictions on the right to freedom of movement imposed by the recent curfew measures are “prescribed by the law”. 46

86. The Commission considers instead, in view of its findings (see above), that the legislative provisions used as a basis to impose the curfew raise serious problems in terms of the quality and foreseeability of the law and, more generally speaking, legal certainty for the population concerned. 47 The fact relied on by the authorities that because of the country’s recent history, the population is already familiar with and used to curfews cannot in anyway compensate for this gap in the regulations.

87. The Venice Commission also points to the importance of the principle of proportionality. This requirement must apply both to curfew decisions and to their implementation, and to related measures capable of affecting other rights and freedoms, which may consist of additional restrictions that may be imposed on the population during the curfew, such as the closure of schools or businesses, restrictions on the provision of public services or bans on public events, or of security operations carried out in this context by the authorities. Like curfews themselves, all of these measures must be proportionate to the threat and its immediacy, must not last any longer than the threat itself and must only apply to the regions affected by it. The importance of the proportionality principle is confirmed by article 13 of the Turkish Constitution.

88. The Commission points out that in the context of the choice made by the authorities, the only restrictions to rights and freedoms that are authorised are those provided for by the law and which can be justified in the terms set out in the relevant provisions of the Constitution and international instruments relating to fundamental rights.

89. In the absence of specific provisions in the legislation referred to, the Commission wishes to recall how important it is to ensure that rules are in place for the “security operations” carried out during curfews, the use of force and the deployment of armed forces and the supervision of their operations (decision-making powers, consideration of the need for and proportionality of the scale and length of operations and the apportionment of tasks between the gendarmerie, the police and army units). In particular, such rules are crucial to

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4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”

46 The Commission itself pointed out in its Opinion on the Protection of Human Rights in Emergency Situations that while the protection of national security and public safety may justify restrictions on some fundamental rights or even derogations from some obligations in this field, “restrictions of human rights and freedoms, and derogations must, however, be regulated by law and preferably have a foundation in the Constitution. … The law must indicate in which cases limitations may be justified and preferably should define the states of emergency that may justify derogating measures, in order to create guarantees against abuse of the power to take restricting or derogating measures for other aims or to a larger extent than is allowed under domestic law and the ECHR.”


47 See also § 53 of this opinion.
the state in the context of its obligation to protect the right of citizens to life and physical integrity, which is a non-derogable right guaranteed by Article 2 of the ECHR and Article 17 of the Turkish Constitution. As it did in its Opinion on the Protection of Human Rights in Emergency Situations, the Commission would like to point out again that “the obligation to avoid or minimise the risk of losses of lives not only applies to security forces in planning and executing an operation, but also to the executive authorities and the legislature, who have to put into place an adequate administrative and legislative framework to regulate the use of force”.

90. Questions might also be raised about the direct consequences of an extended curfew on the right to liberty protected by Article 5 of the ECHR and Article 19 of the Turkish Constitution and the compatibility of the restrictions on these rights with Article 5.1 of the ECHR.

91. It is not for the Venice Commission to comment on the implementation of curfew decisions, the impact of their implementation on the other rights and freedoms of the population or the allegations of abuses and violations during curfews. The Commission would like to point out nonetheless that, because of their positive obligations with regard to these rights, it is for the authorities to take appropriate measures to ensure that they are protected and effectively exercised, and to protect citizens from abuses on both a practical and a legal level.

92. The legislative provisions relied on for the adoption of the recent curfew measures do not provide any legal framework for the adoption and application of curfews or indicate what measures or other steps should be adopted (where appropriate, pursuant to other legislation) to protect the civilian population before, during and after them. Thus, it is difficult to ascertain how the authorities intend to ensure that the potential limitations on rights and freedoms are compatible with the clauses of the relevant provisions of the Constitution and international treaties.

V. Conclusions

93. The Venice Commission has taken note with concern of the developments occurring since summer 2015 in South-East Turkey, where there have been particularly violent confrontations and major losses of human lives, including a large number of civilian losses, along with considerable material damage.

94. The Commission also recognises the scale and complexity of the challenges facing the Turkish authorities given the seriousness and the number of terrorist attacks which have been carried out recently in the country. Their efforts and their commitment to combating terrorism are legitimate.

95. The Commission would like to point out, however, that although it is a state’s duty to muster all its resources to combat the terrorist threat and protect its citizens from such attacks, it is also crucial in a democratic society to strike the right balance between security
needs and the exercise of rights and freedoms, showing due regard for the requirements of
the rule of law.

96. Despite the seriousness of the situation they were facing, the Turkish authorities chose
not to declare a state of emergency to engage in the security operations they considered
necessary in the areas concerned, whereas these operations and the related measures
(such as curfew) inevitably entail restrictions to rights and freedoms, which sometimes have
extremely serious consequences.

97. The Venice Commission has taken note of the authorities’ choice, which they justify
through their desire to protect rights and freedoms in all circumstances including in a context
in which, as they themselves state, all the prerequisites to declare a state of emergency
were met.

98. The Commission therefore notes that the curfews imposed since August 2015 have not
been based on the constitutional and legislative framework which specifically governs the
use of exceptional measures in Turkey, including curfew. To comply with this framework, any
curfew measure should be associated with emergency rule, as provided for in Articles 119 to
122 of the Constitution. This would also be in keeping with the approach of the Commission,
which has stressed in its work that de facto emergency powers should be avoided and it is
better to declare them officially along with their accompanying lists of obligations and
guarantees including the obligation to inform international organisations of any derogations
from fundamental rights and the reasons for these, thus subjecting their application to the
supervision of these organisations or to parliamentary debate and approval. .

99. In the Venice Commission’s opinion, the Provincial Administration Law, on which
decisions imposing curfews were based, and the decisions themselves do not meet the
requirements of legality enshrined in the Constitution and resulting from Turkey’s
international obligations in the area of fundamental rights, in particular under the ECHR and
relevant case-law.

100. To remedy this situation, the Venice Commission invites the Turkish authorities to
implement the following recommendations in particular:

- to no longer use the provisions of the Provincial Administration Law as a legal basis
  for declaring curfews and to ensure that the adoption of all emergency measures including
curfews is carried out in compliance with the constitutional and legislative framework for
exceptional measures in force in Turkey, showing due regard for the relevant international
standards and complying with national rules and international obligations with regard to the
protection of fundamental rights;

- to review the legal framework on states of emergency to ensure that all exceptional
decisions and measures such as curfew taken by the authorities when a state of emergency
is formally declared are subject to an effective review of legality including, in particular,
consideration of their necessity and proportionality;

- to introduce all the necessary amendments to the State of Emergency Law so that
there is a clear description in the law of the material, procedural and temporal arrangements
for the implementation of curfews, particularly the conditions and safeguards to which they
must be subject (including parliamentary and judicial supervision).

101. The Venice Commission remains at the disposal of the Turkish authorities for any
assistance they may require.
Turkey: State Blocks Probes of Southeast Killings

Allow UN to Investigate Cizre Abuses; Repeal New Law to Block Prosecutions

(Istanbul) – The Turkish government is blocking access for independent investigations into alleged mass abuses against civilians across southeast Turkey, Human Rights Watch said today. The alleged abuses include unlawful killings of civilians, mass forced civilian displacement, and widespread unlawful destruction of private property. The government should promptly grant the United Nations Office of the High Commissioner for Human Rights permission to enter the area and investigate according to its standards.

Since the July 2015 breakdown of a peace process to end the decades-long conflict between the Turkish state and the armed Kurdistan Workers’ Party (PKK), violence and armed clashes in the southeast region have escalated. During security operations since August, the authorities have imposed blanket, round-the-clock curfews on 22 towns and city neighborhoods, prohibiting all movement without permission. The curfews also prevent non-governmental organizations, journalists, and lawyers from scrutinizing those operations or any resulting abuses by security forces or armed groups. Authorities have blocked rights groups – including Human Rights Watch, Amnesty International and Physicians for Human Rights – from trying to document abuses even after curfews and operations ended.
“The Turkish government’s effective blockade of areas of the southeast fuels concerns of a major cover-up,” said Emma Sinclair-Webb, senior Turkey researcher at Human Rights Watch. “The Turkish government should give the UN and nongovernmental groups immediate access to the area to document what’s going on there.”
Most of the deaths, destruction, and mass displacement occurred in nine towns, including Cizre. More than 355,000 people have been temporarily displaced within towns or to other nearby towns and villages, or to other regions of Turkey. At least 338 civilians have been killed in places where security forces and the Civil Protection Units (YPS), the armed group linked to the PKK, have clashed.
Satellite imagery recorded before and after building demolition in the neighborhoods of Cudi and Sur.

Human Rights Watch reviewed lists of the dead compiled by Cizre-based lawyers which show that as many as 66 Cizre residents, including 11 children, were killed by gunfire or mortar explosions during security operations between December 14 and February 11, 2016. According to witnesses and victims interviewed by Human Rights Watch, in some cases the security forces opened fire on civilians on the streets carrying white flags. The available information also indicates that security forces surrounded three buildings and deliberately and unjustifiably killed
about 130 people – among whom were unarmed civilians and injured combatants – trapped in the basements.

The majority of deaths of Cizre residents occurred in neighborhoods where the YPS had erected barricades and dug trenches, and clashes took place between security forces and armed groups. However, some civilians were killed in neighborhoods where there were no clashes or barricades.

Satellite imagery © 2016 CNES- Airbus DS

In April, the police blocked Human Rights Watch from interviewing families of victims and witnesses to the deaths. Before authorities obstructed its work, however, Human Rights Watch was able to document in detail eight civilian deaths in Cizre. In addition, Human Rights Watch had already documented eight deaths that occurred in September 2015, also during a curfew and security operations.
Human Rights Watch also documented widespread property destruction in Cizre and interviewed people whose homes and property had been damaged during the clashes, and in some areas subsequently demolished.

Human Rights Watch assessed the scale and extent of building demolition in Cizre using satellite imagery recorded between February and June 2016 and identified two distinct demolition zones in the city measuring approximately 95,000 m² (9.5 hectares) in total area. The majority of building demolition occurred between late February and late May, and was concentrated in the neighborhoods of Cudi and Sur. A second, smaller round of building demolition occurred between late May and early June in the Nur neighborhood.

Demolition in Cizre. © 2016 CNES-Airbus DS
There has been little sign of effective investigations by Turkish prosecutors into civilian deaths and destruction of civilian property in Cizre and other towns in the southeast. The Cizre prosecutor told Human Rights Watch that some investigations were under way, but no family Human Rights Watch interviewed had been called by the prosecutor’s office to give a statement about relatives killed between December and February. The Cizre district governor did not respond to Human Rights Watch requests for a meeting to discuss the events in Cizre and its research findings.

“Credible accounts of Turkish security forces deliberately killing civilians, including children, when they were carrying white flags or trapped in basements should be ringing loud alarm bells,” said Sinclair-Webb. “The prosecutor in Cizre should conduct a full, effective, independent investigation capable of delivering justice for the victims.”

The Turkish government has not responded to UN High Commissioner for Human Rights Zeid Ra’ad al Hussein’s public statement in May, nor to his letter requesting permission for a UN team to conduct an investigation in the region to examine potential violations by the security forces during military operations in urban areas against armed groups associated with the PKK. The government has indicated that Zeid himself would be welcome to visit Turkey. Turkey’s international partners should urgently express support to the request for access made by the UN High Commissioner for Human Rights, Human Right Watch said.

Concern that blocking the UN and local and international human rights groups from documenting the events in the region indicates efforts to cover up abuses and prevent accountability for serious crimes is compounded by parliament passing a new law on June 23. The law will require pre-authorization from the prime minister’s office or the local district governor’s office (depending on the rank of the implicated soldier or official) to investigate and prosecute soldiers and public officials alleged to have committed crimes in the course of counterterrorism operations. Similar frameworks tying the prosecution of public officials to administrative permission (Law No. 4483), and others introduced during the state of emergency in the southeast in the 1990s (Statutory decree No. 430), contributed to the systematic impunity enjoyed by security forces despite widespread violations of the most serious kind including extra-judicial killings, enforced disappearances, torture, and the unlawful destruction of thousands of homes.

Turkey is party to both the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), which protect the rights to life, bodily integrity, and security. Turkey’s history of failing to carry out effective investigations into killings in the southeast, in particular in cases in which state agents were alleged to have been responsible for unlawful killings, resulted in a series of rulings by the European Court of Human Rights that Turkey violated the right to life.

The court also ruled on multiple occasions that the laws that required pre-authorization from administrative or political authorities to prosecute state employees for offenses committed when exercising official duties led to violations under the European Convention on Human Rights, as they prevented effective, independent investigations of violations of the convention. The new law is likewise incompatible with Turkey’s obligations under the convention.
The deaths of an estimated 130 people trapped in three basements in the Cudi and Sur neighborhoods during security operations in Cizre in early February urgently require a full investigation, as the circumstances that have emerged to date suggest they could be the result of unlawful killings constituting extrajudicial killings or murder. The seriousness of the potential crime means it should be a priority for investigation by the UN fact-finding mission if it is granted access, Human Rights Watch said.

Just before the deaths of those trapped in the basements, the European Court of Human Rights had issued separate injunctions – known as “interim measures” – in five cases involving injured people in Cizre neighborhoods requiring Turkish authorities to protect their life and physical integrity. Only one of the five applicants in whose favor the court had issued an injunction was given medical treatment. The other four died, and their bodies were later recovered. The Court had rejected other applications for interim measures, including from those trapped in basements who later died, but will review their cases before the court as a matter of priority.

“Amid a mounting death toll and a spiralling conflict, real accountability in Turkey’s southeast is crucial” Sinclair-Webb said. “Prosecutors should thoroughly and effectively investigate all allegations of abuse by state forces and armed groups, and no legal or extra-legal measures should be taken to try to ensure impunity for personnel responsible for these crimes.”

Blanket Curfews
The deaths in Cizre occurred during the period that Turkish authorities placed the town under a 79-day blanket curfew, from December 14, 2015 to March 2, 2016 as well as during a nine-day curfew in September 2015.

The government has justified the curfews based on Turkey’s Provincial Administration Law, which gives governors powers to take “decisions and measures” to ensure “peace and security, protection of the person, public well-being.” Before August 2015, the law had not been interpreted for use to impose blanket, round-the-clock curfews. According to the Human Rights Foundation of Turkey, it has been used in this way 65 times since August. On June 13, the Council of Europe’s Venice Commission issued an opinion on the legal framework governing curfews. The opinion found that “the Provincial Administration Law, on which decisions imposing curfews were based, and the decisions themselves, do not meet the requirements of legality enshrined in the Constitution and resulting from Turkey’s international obligations in the area of fundamental rights, in particular under the ECHR and relevant case-law.” The Commission recommended that the Turkish authorities end the imposition of curfews on the basis of the Provincial Administration Law.

Violations of the curfew are subject to a fine of 100 Turkish Lira (US $30), but in practice those who have ventured out have also risked being shot at or detained, as demonstrated in some of the cases documented by Human Rights Watch.

During the recent curfew, joint police and military operations were conducted against the armed Civil Protection Units (YPS), which had sealed off neighborhoods with barricades and trenches planted with explosives. The group was formerly named the Patriotic Revolutionary Youth Movement (YDGH) and renamed itself the Civil Protection Units (YPS) in December 2015.
Rights Groups’ Fact-Finding Efforts
Fact-finding missions in Cizre undertaken by Turkey’s leading human rights groups, Mazlumder, the Human Rights Foundation of Turkey, and the Human Rights Association have been unable to arrive at a final estimate of civilian deaths. A report by the Peoples’ Democratic Party (HDP) puts the combined number of dead among named civilians and combatants at 251, while highlighting that the identification of bodies is continuing. A much higher but unknown number of people sustained injuries, the human rights groups said.

Human Rights Watch carried out research in Cizre in early March and mid-April. Researchers spoke to victims and witnesses, lawyers, and nongovernmental organization representatives. In mid-April, police officers from the Anti-Terror Branch blocked Human Rights Watch from interviewing families of victims in Cizre and said that permission was needed from the Cizre district governor to conduct such interviews.

There is no legal basis for requiring official permission for a third party to interview consenting victims or witnesses. Among the 66 civilians identified as killed, Human Rights Watch documented eight deaths in detail, including those of a 3-month-old baby and two children ages 13 and 11. The circumstances, location, and witness accounts all suggest that security forces killed these eight civilians outside of the context of active hostilities.

The Turkish Armed Forces stated on February 22 that in Cizre 665 PKK members had been “rendered ineffective,” which usually means killed and apprehended. However, there has been no official acknowledgement of any civilian deaths. Media reports estimate that 23 soldiers and police were killed during the operations in Cizre between December and February.

More than three months after the operations in Cizre ended, the Turkish authorities have made no official announcement about an investigation into what occurred in the town.

After domestic human rights groups Mazlumder, the Human Rights Foundation of Turkey, and the Human Rights Association documented violations of the right to life and multiple other abuses in reports about Cizre, President Recep Tayyip Erdoğan on April 7, criticized them strongly, although he did not explicitly name the groups, and challenged their role in sending large delegations to the region and writing such reports. Following the speech, police and local authorities prevented several domestic groups from operating in Cizre. A delegation from the international nongovernmental organization Physicians for Human Rights was not allowed into the town in May and Amnesty International researchers were prevented from visiting in June.

The Conflict in the Southeast
The breakdown in July 2015 of a ceasefire and political process lasting over two years to end the decades-long conflict between the Turkish state and the PKK has led to spiralling violence in southeast Turkey and a resumption of armed clashes, which are taking a huge toll on the Kurdish civilian population. Unlike in previous periods, when hostilities between Turkish armed forces and the PKK took place in rural areas, there has been a major shift to urban-based hostilities.

There is no agreement on the overall death toll since August. The Turkish military claimed in May that 6,623 “terrorists” had been “rendered ineffective”, of whom 4,571 were killed. Media
reports indicate that more than 450 soldiers and police have been killed since July. The Human Rights Foundation of Turkey estimated the overall civilian death toll during curfews to be at least 338 by late April. On top of this, media reports indicate that the PKK killed at least 76 civilians between January and June in attacks in Diyarbakır province, Ankara, and Istanbul. That death toll included 16 civilians killed in May when a PKK truck bomb exploded in a village near Diyarbakır.

With the breakdown of the peace process, the PKK urban youth wing groups – originally known as the Patriotic Revolutionary Youth Movement (YDGH) and since December as the Civil Protection Units (YPS) – recruited local youth, including children, and tightened their grip on some neighborhoods of towns in the southeast by planting explosive devices at neighborhood entrances and organizing guard duty at barricades. The PKK ensured that guns, ammunition, rockets, and improved explosive devices were stockpiled, according to government reports. Some municipal officials and mayors in the southeast simultaneously made symbolic declarations of self-governance, which led to the arrest and detention on terrorism charges of hundreds of political representatives. Eighteen elected co-mayors of Kurdish political parties are currently in pretrial detention.

In response to the sealing off of neighborhoods by the PKK, the government authorized police and military operations that involved the use of armored personnel carriers and, increasingly, heavy artillery. These operations were conducted under extended strict curfews. In addition to civilian deaths, there has been huge temporary displacement of civilians since August 2015. The health minister said on February 27 an estimated 355,000 people had been driven from their homes, and security operations since then have displaced large parts of the populations of İdil, Şırnak, Nusaybin, and Yüksekova.

Entire neighborhoods of towns such as Diyarbakır’s Sur district and several parts of Silopi and Cizre sustained damage during armed hostilities and were subsequently demolished under government orders. Tens of thousands of residents from those neighborhoods face prolonged displacement. The towns of Nusaybin and Şırnak remain under curfew. Meanwhile, the operations of the security forces, which were initially led by the police, have increasingly become led by the military.

**Killings of Civilians in Cizre**

*Miray and Ramazan İnce, Sur Neighborhood*

On December 25, in an area of Sur where no barricades had been erected and no armed groups were operating, members of the security forces fired on and killed a 3-month-old baby, Miray İnce, and her 82-year-old great-grandfather, Ramazan İnce, relatives of the victims told Human Rights Watch.

Ramazan İnce’s son, Abdurrahman İnce, 61, said:

> As baby Miray, my brother Hasan’s granddaughter, was carried down the steps in the courtyard by her aunt they were shot at from the hill opposite where the military had placed snipers and armored vehicles. Miray was hit by a bullet. At first we thought she
was dead but then she cried and we called 155 [the police] to get her to hospital. The emergency services told us that we should go as two men and a woman carrying a white flag as far as the ambulance. That’s exactly what we did.

My brother Hasan and his wife Rukiye and my father Ramazan set off with baby Miray, holding up a white flag. Despite all these precautions and guarantees and giving clear information to the police, my father Ramazan and baby Miray were shot again from the open hill where the security forces were positioned. We weren’t able to reach them and when we phoned 155 again, the police asked us if two injured people were our relatives, but we had no idea what they were referring to because they were shot at a distance of 200 meters from our house and we didn’t see it. My brother’s wife was wounded in the shooting too. Finally, a member of parliament, Faysal Saryıldız, got an ambulance to them but both my father and baby Miray died. My father lived for some hours and died in hospital in Adana.

Even when the police told you things were safe, the security forces kept on shooting.

Abdurrahman İnce said that although a police team sent by the prosecutor’s office had inspected the locations where Miray and Ramazan were fatally shot, at the time of the interview in mid-April no one from the family who had witnessed the incident had been called to give a statement to the prosecutor. Nor had the family been given information about progress in the prosecutor’s investigation. Abdurrahman İnce told Human Rights Watch in June that he had subsequently gone in person to the courthouse and had requested to give a full statement to the prosecutor. This had been accepted.

*Dağkapi Neighborhood*

There were no armed clashes between security forces and armed groups in Cizre’s Dağkapı neighborhood and no barricades or trenches. However, the Cizre state hospital is strategically located south of the neighborhood near Şahin Hill and security forces had taken over the hospital at the outset of the curfew, moving patients from the top floor to accommodate security forces and positioning tanks and armored vehicles in the hospital grounds. Human Rights Watch was able independently to confirm with satellite imagery the presence of several military vehicles within the state hospital compound on four separate dates: 18 and 24 December 2015 and 12 and 27 January 2016. Hospitals, and all medical and healthcare facilities and units, are civilian structures with special protection and should not be the object of military operations. Medical personnel and patients should not be endangered or harmed by military operations and the presence or occupation by military forces of hospital premises puts the hospital at risk of becoming a target, and unjustifiably interferes with access to healthcare.

The areas between the hospital and Şahin Hill were entirely under security force control throughout the curfew, although Turkish media reported that, on December 17, groups associated with the PKK attacked the hospital with rockets. Human Rights Watch documented two incidents in which the evidence indicates security forces located between the hospital and the hill fired mortar rounds on the neighborhood and shot at residents in Dağkapı neighbourhood.
Yusuf Akalın, Büşra Yürü, and Dilan Akalın

On January 14, mortars fired at the Dağkapı neighborhood killed two children – Yusuf Akalın, 13, and his cousin Büşra Yürü, 11, and seriously injured Yusuf’s sister Dilan Akalın, 10.

Mehmet Yürü, 42, Büşra’s father, a construction worker, said:

Our street, Mirabdal Street, looks directly on to the cemetery and rising up beyond it is Şahin Hill and to the left the Cizre State Hospital. There were no trenches and barricades near here. That’s why our relatives came to stay here on the very first day of the curfew from the part of Sur neighborhood where there were a lot of trenches. On January 14, at around 1 or 1:30 p.m., mortar rounds were fired at our front door behind where the children were playing. There is a large hole in the metal front door and holes in the metal shutters of the building next door.

I believe the mortars came from the direction of Şahin Hill, where there were military positions including tanks and armoured vehicles visible to us from here. My nephew Yusuf and my daughter Büşra died in hospital. My niece Dilan was badly injured but is recovering now.

After burying the two children we moved to Kızıltepe and everyone moved out of this area.

Halil Yürü, 22, Büşra’s brother, a student, said:

The children were playing downstairs behind the front door with my aunt’s two sheep. We had made a place for them under the stairs in the entrance to the building. We were in the sitting room upstairs. We heard three explosions and rushed downstairs to see the children covered in blood, their feet blown off. I can’t remember much about it because we were all in shock. My cousin Orhan Akalın ran out into the street crying and shouting for an ambulance and they fired at him too.

Orhan Akalın, 25, Yusuf’s brother, confirmed this when Human Rights Watch spoke to him. No one in the family knew if there was an ongoing investigation into the killings and, in early June, said the prosecutor’s office had not contacted the family or called them to give a statement though the police had visited to record the details of what had happened.

Halil and Nihat Sömer

On January 7, two brothers, Halil Sömer, 41, who worked as a driver, and Nihat Sömer, 21, who worked at the Provincial Forestry Directorate, were fatally shot from the direction of the Şahin Hill or Cizre state hospital.

Their sister Asiye Sömer, 37, told Human Rights Watch:

There were no clashes in our Dağkapı neighborhood, and no barricades or trenches.

We were at home and at about 7 p.m. on January 7. Nihat was talking on the phone and went to the end of our street where the mobile phone reception is better. That area is
overlooked directly by Şahin Hill and to the left the Cizre State Hospital. I looked out of
the window and someone shouted that Nihat had been shot, so I ran outside with his older
brother Halil to get him. There was shooting from Şahin Hill or from the direction of the
hospital and we couldn’t get to Nihat. All the neighbors were there too and Halil threw
himself on the ground and crawled toward Nihat to get him. We didn’t realize at first that
as he was doing this he too was shot. He had managed to reach Nihat but was shot.

Our neighbors called 112, the ambulance services, but were told they couldn’t come. We
phoned a member of parliament, Faysal Sarıyıldız, and he sent the municipal ambulance.
It was raining heavily at that time and the shooting continued and the ambulance had to
withdraw two or three times before it finally reached the two.

When a Human Rights Watch researcher examined the place where the two were shot in April,
she saw the wall of a pharmacist’s shop on one corner of the street that had recently been
plastered to hide at least 24 bullet holes, and several visible holes where bullets had exited
through the metal shutter of a shop on the opposite corner of the street. The family said they had
had the wall plastered because Halil and Nihat’s father had begun to visit the site and cry there
every day and they did not want there to be a constant visible reminder of the loss of two of his
sons.

The family showed Human Rights Watch photos showing the same location with the 24 bullet
holes before it was plastered. The location of the holes on the pharmacy wall and angle of the
entry and exit points of the bullet that hit the metal shutters on the opposite corner were
consistent with shots fired from a position between the hospital and Şahin Hill, under security
force control, though it was not possible to assess the firing range.

Human Rights Watch found no claims or evidence of any attack or activity by armed groups in
the neighborhood where the Sömer brothers lived on January 7 to which the security forces could
have been responding.

İlhan Sömer, 30, another brother, said that police officers beat him at the hospital where his
brothers died:

I ran into the ambulance as it was leaving the neighborhood and initially had no idea my
brothers had been shot. My father, Ali Sömer, and I went with them in the ambulance to
the Cizre state hospital. I saw that Nihat had been shot in the throat, chest, belly, and
shoulder and Halil in the chest and legs. They died at the hospital. I was beside myself
when I heard the news that one then the other was dead despite efforts to give them blood
transfusions.

I shouted at the police and a group of them attacked me and beat me. I hope there was a
camera at the hospital to show it. They took me to a room and one said, “Kill him, let him
be the third.” They saw me as a terrorist. A plainclothes police officer stopped the others
who were in uniform and then gave me a cigarette. I was terribly upset and my 60-year-
old father was crying. We took the bodies to the morgue in Şimak. We couldn’t bury my
brothers in Cizre because of the curfew and we buried them near İdil.
I feel there is no law here that the state regards us all as terrorists. If there was law here this wouldn’t have happened.

The prosecutor’s office sent a police unit to conduct an on-site investigation of the location where the Sömer brothers were fatally shot, and the Cizre prosecutor’s office told Human Rights Watch that an investigation into the two deaths is under way.

In mid-April, however, Ilhan Sömer told Human Rights Watch that, although he had spoken to the police unit when it came to investigate, no one from the family had been called to give a statement to the prosecutor about the incident.

**Abdülhakim Poçal, Selman Erdoğan, and others, Şah and Cudi neighborhoods**

Human Rights Watch interviewed five witnesses to an incident that occurred around midday on January 20, when the security forces opened fire on a group of civilians, including local council members, municipal workers, and journalists and led by Faysal Sarıyıldız, the Şırnak member of parliament from the Peoples’ Democratic Party (HDP). The group of about 30 people carried white flags and walked from the municipal building in Şah neighborhood across one of Cizre’s main streets, Nusaybin Street, into the Cudi neighborhood to retrieve dead bodies and injured people. Sarıyıldız said the group had decided to take this action after hearing many reports that ambulances were prevented from reaching injured people or collecting the dead in Cudi:

> After the district governor failed to answer my repeated calls to his mobile phone, I informed him by SMS that as a group we were going to go into the Cudi neighborhood to collect injured people and dead bodies. We carried white flags and proceeded in daylight and the security forces saw us go without preventing us. We collected several dead bodies and injured people and as we were coming back with them, we were shot at.

Selahattin Ecevit, 42, a Cizre local council member, and the acting mayor at the time, was among the group:

> We went as a group of people including Faysal Sarıyıldız and council members, the deputy mayor, and some older people to retrieve the bodies and injured and put them on two hand-carts. Faysal had informed the district governor. We held white flags as we crossed the main Nusaybin Street and were clearly visible to the security forces in armored vehicles. Again we carried white flags as we crossed back again. On the return journey across the Nusaybin Road all of a sudden and without warning the security forces opened fire on us from armored vehicles in the direction of Dört yol.

Everyone fled in all directions, some back into Cudi, some into Sur and some fell down in the street. I was hit in my left foot along with several others. Our council member, Hamit Poçal, died of his injuries and so did another man whom I didn’t know called Selman Erdoğan. Faysal managed to call the municipality ambulance for the badly injured. We managed to get to a house across the street with Faysal and others and then had to stay there for three hours. Faysal was repeatedly calling the district governor who
still didn’t answer his calls.

In the end he had to get the head of the Chamber of Trade and Industry, Süleyman Çağlı, to call the district governor to convey the message. It’s disgraceful that a district governor can ignore a member of parliament’s urgent phone calls! Only hours later did we get the municipal ambulance, which we called because the state ambulance, which we’re meant to call, didn’t turn up on the grounds that it was too risky because there was a clash. The state Anatolian Agency reported the incident saying that three terrorists had been killed and nine injured in a clash. There was no clash.

The municipal ambulance came to us very late because it had picked up the badly injured and then got stopped by the police and searched.

All the bones in my left foot were smashed, I spent eight days in hospital in Batman and am still (nearly two months later) walking with difficulty.

Refik Tekin, a cameraman for the IMC TV station, was among the group and was shot in the leg but managed to continue filming the incident. The United Nations Office of the High Commissioner for Human Rights later issued a statement condemning the shooting of Tekin while expressing broader concerns about restrictions on media and developments in the southeast. Tekin said:

We went as a group with HDP Member of Parliament Faysal Sarıyıldız to fetch the dead bodies and some injured people from Cudi neighborhood. We carried a white flag. I was among the group and there was a colleague from the Dicle News Agency. We crossed Nusaybin Street, and I could see clearly that there were tanks and armored vehicles on both ends of that street.

We went into Cudi, where the bodies were. As we left the neighborhood, we took another route and again crossed Nusaybin Street, and on the road there were tanks and armored vehicles everywhere.

All of the sudden there were the sounds of gunshots. At first bullets were being fired very closely above our heads, so people started crouching and tried to get out of the line of fire, but two seconds later they started to fire salvoes at us. The shots came from the eastern end of the road [Dörtyol direction], from one side. Suddenly people started dropping to the ground. I felt a heat on my leg and I fell down and crawled. There was blood everywhere, people were on the ground. I kept filming.

An ambulance and funeral vehicles came. Both belonged to the municipality. The MP had immediately called for them, and because the municipality building was about 500 meters away they could come quickly. When the ambulances arrived on the scene, the shooting stopped. I really do not know what would have happened if those ambulances had not shown up. I think they might have killed us all right there and then. Two people were killed in the shooting. Some of the injured were put into the funeral vehicles because there were so many wounded. I was put in the ambulance with two others who
were also injured.

The ambulance was stopped by the police near the deputy governor’s building. They dragged everyone out of the ambulances and started hitting them, including myself. I could see that they had also forced the ambulance driver out of the vehicle. He was standing pressed up against a wall, and policemen were hitting him, shouting abuse at him and saying: “Why did you go to that place without our permission?”

I told the police that I was with the press, and I showed them my press card, but they hit me anyway.

A policeman dragged me along the ground to the ambulance. He could see that I was hurt. The policeman shouted at me, telling me not to look at him, ordering me to close my eyes while he kept hitting me. He said: “You are all terrorists, you will see the strength of the Turks!” This struck me as an especially strange thing to say. Am I not a citizen of this country? He said unspeakable things to me, curses I do not even want to repeat. The police kicked my leg and my head. All this happened in front of the deputy governor’s building. The policeman who had hit me then ordered me to get back into the ambulance, but I couldn’t stand up. I tried to crawl, and he dragged me, and finally lost patience and shouted at the ambulance driver to put me back into the ambulance.

In front of the Cizre state hospital there were many soldiers and special operations police. There were so many that I could not even see the ground. They all took my picture with their phones, and we were kept there still in the ambulance while everyone was taking pictures of us and shouting and cursing. It felt like they gave the policemen and soldiers that time to take pictures to boost their morale, so they could show that they had “caught terrorists.” After about five or six minutes of that I was put in a wheelchair.

When they took me past the soldiers all the soldiers hit me hard on the head while I was in the wheelchair. Everyone who was able to reach me hit me. They shouted abuse at me, like: “We will finish you all off,” “You are all terrorists,” and “You will see the strength of the Turks.” This happened all the way from the ambulance to the hospital entrance.

While I was in the hospital the police started an investigation against me, for “being a member of a terrorist organisation.” Right after the events of January 20, the Anatolian News Agency announced in their report that I was a “terrorist.” I was questioned in the anti-terror branch of the Mardin police force after I was discharged from hospital, but the prosecutor in Cizre decided to drop my case. When I gave my statement in Mardin I told the prosecutor that I wanted to file two formal complaints: one against the people that opened fire on us, and another against the policemen who had hit and insulted me. So far I have not been called to make a statement in either case, and as far as I know there has not been any progress in the investigation.

The Anatolian News Agency and Hürriyet newspaper reported that three “terrorists” had been killed and nine injured in a clash with security forces, among them a TV cameraman, that a gun had been recovered from a coffin and that the municipal ambulance and funeral vehicles had
attempted to get the “wounded terrorists” out of the neighborhood. A photograph purporting to show a police officer removing a pistol from a coffin was published with the news report. The news reports did not identify any source for this information or account of events.

Having interviewed five witnesses involved in the incident, Human Rights Watch believes that the news reports have no credibility and the accounts reproduced in the papers represent a deliberate attempt by authorities to cover up an incident in which the security forces opened fire, killing and injuring civilians who presented no threat and were seeking only to rescue injured people and retrieve dead bodies.

The authorities should conduct an effective investigation into the events that is capable of leading to the identification and prosecution of those among the security forces responsible for the shooting, and any criminal investigations into the actions of the group of civilians seeking to recover injured persons and retrieve dead bodies should be dropped.

Allegations of Extra-Judicial Killings of People in Three Basements
The death of an estimated 130 people in three basements in the Cudi and Sur neighborhoods at the end of the security operations in Cizre in early February raises serious concerns that many of the dead may have been victims of extrajudicial killings, and the circumstances of the deaths urgently require a full investigation.

So far, the picture of what happened in the three basements is incomplete. The evidence suggests, however, that the basements were fully surrounded by the security forces at the time the alleged killings took place. Furthermore, the authorities have given no compelling explanation as to why it was not possible in these circumstances to detain individuals alive or to evacuate allegedly injured people and civilians who were among those sheltering in the basements. The government has not claimed that those sheltering in the basements violently resisted while being evacuated.

The picture of what happened after the alleged killings is also incomplete. Municipal workers told Human Rights Watch that they transported the bodies to the morgue in body bags after the military and police ordered them to collect the bodies from streets near the buildings where the three basements were located.

The municipal workers also said some of the bodies were burned, in some cases so charred as to be unrecognizable, and that others were missing limbs and heads. An imam who saw some of the bodies gave a similar account. Human Rights Watch also saw eight of the autopsy reports on the recovered bodies, which indicated that six bodies lacked body parts and four were burned. The autopsy reports note that such findings could be consistent with an explosion though did not explain why some were partially “carbonized”, and in three cases determined people had been shot dead.

The Istanbul Forensic Medical Institute is conducting DNA testing to establish the identity of the dead. Of the around 130 people who died in the basements it remains unclear how many were civilians and how many were injured combatants. It is also unclear how many uninjured armed combatants had taken refuge in the basements.
Interviews with alleged survivors have been published in the media and by the HDP in the Cizre report, but Human Rights Watch could not reach any alleged witnesses to what happened in the basements.

Faysal Sarıyıldız, the parliament member who was in telephone contact with people in the basements and made efforts to get permission for ambulances to reach them to secure their evacuation, said:

There were 25 named individuals in the building known as the first basement and the bodies of six who died while they were there or before. It became known that people were sheltering there around January 23 and we repeatedly spoke to them by phone and negotiated hard for their evacuation and provision of ambulances to reach them as they were injured or in an exhausted and defenceless state. I knew many of the names personally and they were not armed combatants, they were civilians and students. The bodies of all of those in the first basement were burned. In the second basement, which came to light a few days later, there were around 62 people and in the third basement about 40 people. Again we knew many of them and there were civilians and badly injured people there too. It was all over in early February and they were all killed. I call them the basements of barbarity.

Three other HDP parliament members in Ankara supported Sarıyıldız’s efforts to secure permission for ambulances to evacuate people from the first basement, in Bostancı Street in Cudi neighborhood. In late January they embarked on intense negotiation with the prime minister and interior minister for the evacuation and medical treatment of injured people. Twenty-five people in the Bostancı Street basement provided a list of their names in the course of the negotiation and among them were at least two juveniles, students, political activists, and a journalist.

On January 28, Human Rights Watch executive director, Kenneth Roth, met with a senior government minister in Ankara and reminded the Turkish government about its obligation to permit injured people access to medical treatment, regardless of their identity, and asked for detailed information on whether the basement was surrounded by security forces and if the area was entirely under their control. The minister did not answer Roth’s question but claimed that those in the basements were providing “contradictory information.” He did not explain what he meant by this. The minister also said those in the basements did not want the ambulances provided by the state and were seeking to escape from the basements without being caught.

On January 30, there was a three-way telephone negotiation between those in the first basement, the HDP parliament members, and the interior minister during which an agreement was reached to allow ambulances to retrieve everyone in the basement if everyone agreed to come out. At a February 1 news conference, the HDP played excerpts of the recordings of these negotiations, which support their assertion that such an agreement had been reached.

On the recordings it is possible to hear from within the basement sounds of explosions and shooting and screams suggesting that at the very moment the evacuation plan was supposed to be implemented the basement may have come under attack or been stormed. At that point the phone connection with those in the basement was lost. However, there is one further final brief
telephone call, during which the speaker from the basement shouts that they are all under rubble and unable to move. After that all communication with the first basement was reportedly completely cut.

HDP deputy co-chair and member of parliament for Adana, Meral Beştaş Danış, who was involved in the negotiation said:

We struggled for days to get the government to agree to get ambulances to those in the basement so they could be evacuated. On the final day while we were having a three-way telephone negotiation with those in the basement, the interior minister and health minister on the phone. We had got to a point where five or six ambulances were being sent to the basement and we were following that. It was all agreed and I was telling those in the basement on the phone to prepare themselves to come out to the ambulances. We waited for information, then we heard sounds down the phone line of the basement being stormed. Communication was cut. In the next conversation the person I spoke to shouted that they were under rubble. After that all communication was cut and we don’t know exactly how those people were killed but it is clear to us that efforts to get them out of that basement were deliberately prevented and they were all killed by the security forces.

The published recording of excerpts of the telephone negotiations corroborates this account.

Further local efforts were made to secure the evacuation of people in the other two basements. Two of those sheltering in those basements telephoned television stations from mobile phones, describing the situation they were in and alleging that the security forces had started a fire in the basements that had caused the deaths of several injured people who had been unable to avoid the fire.

On February 7, the state-owned television channel TRT reported in one bulletin that 60 PKK members had been killed in Cizre, but subsequent bulletins the same day did not repeat the claim and reduced the figure to 30. The following day the Şırnak governor said that there had been 10 PKK deaths. The authorities issued no confirmation of the veracity of media reports on February 10, claiming that in the midst of clashes two senior members of the PKK hiding in the basements had been killed.

On February 11, the interior minister announced that the security operations in Cizre had been successfully completed and the security forces were in full control of the town.

During the period from February 11 to March 2, the curfew in Cizre was maintained on the grounds that the security forces needed to clear neighborhoods of mines, improvised explosive devices, and other dangerous weapons that made the area unsafe for citizens. During this period a lot of demolition was also carried out in the town and rubble carried from the area in trucks to a site on the edge of the Dicle River. Lawyers and a forensic pathologist showed Human Rights Watch the decayed remains of a human arm discovered among the rubble dumped by the Dicle River and partially dug up again after children had buried it. That was also reported to the prosecutor and raises concerns that there may be other body parts and evidence among the rubble removed from the Cudi and Sur neighborhoods.
Representatives of the Şırnak bar association told Human Rights Watch that during the 19-day period prosecutors did not carry out an on-site investigation of the basements, nor did they oversee the collection of bodies from the basements or other places in the neighborhoods. The lack of prosecutorial involvement or oversight at the scene raises concerns that basic procedure on the collection of evidence for any potential criminal investigation was not followed and that critical evidence was not collected.

It is significant that in January the European Court of Human Rights issued interim decisions with respect to five people injured in Cizre neighborhoods calling on the Turkish government to “take all measures within their powers to protect the individual’s life and physical integrity.” These interim decisions were issued pursuant to the “rule 39 procedure,” which allows the court to respond rapidly to an urgent situation in which an individual is judged to be at great risk.

The European Court’s intervention came after Turkey’s Constitutional Court had repeatedly rejected lawyers’ applications on behalf of families seeking emergency medical treatment for relatives injured in the Cizre clashes. Of the five individuals in whose favor the Court issued the decisions, only one was provided with medical treatment. The others all died and only their bodies were recovered. The European Court had decided not to issue similar decisions in respect of dozens of other individuals or to grant collective applications for similar measures.

The population of Cizre and large sections of Turkey’s Kurdish population believe that what happened to the people trapped in the basements was an atrocity crime in which the security forces deliberately killed a group of vulnerable people, many of whom were weak and injured and others who were not armed combatants, to take full control of Cizre and end their security operation. The persistence of a blanket curfew for days after all security operations had finished in Cizre, the failure by the Turkish government or local authorities to provide any compelling explanation of how the deaths could have lawfully occurred, the published excerpts of the telephone communications, and the signs that the prosecutors are not carrying out a proper investigation all help fuel speculation of a government cover-up. The streets where the basements were are among those entirely demolished after the security forces’ operations.

Methodology
In March and April, a Human Rights Watch researcher visited Cizre and spoke to witnesses to human rights abuses, victims, their families, municipality workers, members of the local municipal council, lawyers from the Şırnak bar association, and civil society groups. Human Rights Watch carried out in-depth interviews with 26 people and spoke to dozens of others. The majority of the interviews were conducted directly in Turkish and a few in Kurdish with the assistance of an interpreter. During the April visit, the researcher was obstructed from carrying out further interviews by officers from the Anti-Terror Branch of the police who informed her that permission from the district governor was needed to conduct visits to families in Cizre. There is no legal basis for requiring such permission. Human Rights Watch met with the Cizre prosecutor in April to discuss research findings and to emphasize the obligation to conduct full investigations in all allegations of abuses. In June, Human Rights Watch sought a meeting with the Cizre district governor to share research findings and in order to be able to incorporate the
views of the authorities in its report. Human Rights Watch received no response to its request for a meeting.
Southeastern Turkey: Health Care Under Siege

August 2016
About PHR

For 30 years, Physicians for Human Rights (PHR) has used science and medicine to document and call attention to mass atrocities and severe human rights violations.

PHR is a global organization founded on the idea that health professionals, with their specialized skills, ethical duties, and credible voices, are uniquely positioned to stop human rights violations.

PHR’s investigations and expertise are used to advocate for persecuted health workers and medical facilities under attack, prevent torture, document mass atrocities, and hold those who violate human rights accountable.

Acknowledgments

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The report has also undergone external review by Michele Heisler, MD, MPA, PHR board member and medical advisor, professor of internal medicine and health behavior and health education at the University of Michigan Medical School, and associate director of the University of Michigan Medical School’s Global REACH program.

PHR is deeply indebted to the activists, lawyers, families, and medical personnel who shared their experiences with the PHR team, as well as the staff of nongovernmental organizations who have dedicated their lives to support the well-being of all those living in Turkey, irrespective of political, religious, or ethnic identity.

The research protocol for this report was approved by PHR’s Ethics Review Board.
## Table of Contents

3    Glossary  
4    Executive Summary  
8    Methodology  
8    Challenges and Limitations  
9    Background  
10   Protracted Curfews in Southeastern Turkey  
11   Kurds: An Ethnic Minority Without a State  
12   Findings on Access to Health Care in Southeastern Turkey  
12    Military Occupation of Hospitals and Health Centers  
13   Failure to Protect Health Facilities  
13    Attacks on Health Facilities  
14   Obstruction of Access to Emergency Medical Transport and Care  
16   The Cizre Basements  
18   Attacks on Health Personnel  
19    Legal Actions against Health Professionals  
22    Impact of Curfews on Access to Health Care  
23   Lack of Investigations into Denial of Care and Other Violations  
25   Turkey’s Legal Obligations  
25    Medical Neutrality and the Right to Health  
26   Right to an Effective Remedy  
26    Conclusion  
28    Recommendations  
29    Endnotes  

## Glossary

- **AKP**: Justice and Development Party  
- **CHC**: Community Health Center  
- **ECHR**: European Court of Human Rights  
- **FHC**: Family Health Center  
- **HDP**: People’s Democratic Party  
- **HRFT**: Human Rights Foundation of Turkey  
- **KESK**: Teachers’ Union in Turkey  
- **PKK**: Kurdistan Workers’ Party  
- **SES**: Health Workers’ Union in Turkey  
- **TAK**: Kurdistan Freedom Falcons  
- **TMA**: Turkish Medical Association  
- **TPC**: Turkish Penal Code  
- **TMK**: Anti-Terror Act  
- **YDG-H**: The Patriotic Revolutionary Youth Movement
Executive Summary

In May 2016, Physicians for Human Rights (PHR) sent a team of investigators to southeastern Turkey to investigate alleged human rights abuses against the largely Kurdish population. This research provides the basis for the following report. On July 15, 2016, as the report was being finalized, a faction of the Turkish military attempted to overthrow Turkish President Recep Tayyip Erdoğan and his government. The military’s failed attempt has drastically altered the human rights conditions within the country.

The imposition of a three-month, nationwide state of emergency by President Erdoğan and his government in the immediate aftermath of the failed coup is, in many ways, an expansion of a de facto state of emergency that has kept the country’s Kurdish-dominated southeast under intermittent siege since July 2015 and silenced any criticism of the government’s tactics against the Kurds. These tactics included widespread, round-the-clock curfews which cut off entire cities and resulted in hundreds of civilian deaths.

This report details the widespread grave human rights violations committed by Turkish security forces in the southeast over the past year. The Turkish government’s response to Kurdish opposition has failed to respect international human rights norms, and is a warning for political dissidents in the rest of the country. Under the state of emergency, Turkey is blatantly abdicating its human rights responsibilities in its quest to eradicate political dissent and silence critics of any kind.

In addition to declaring a state of emergency, in the weeks immediately following the failed coup President Erdoğan dismissed nearly 60,000 people from their posts at every level of the government – from the Ministry of Education to the Prime Minister’s office. Thousands of military personnel, including a third of the force’s senior leadership, were arrested, and the judiciary ground to a halt after nearly 3,000 judges were dismissed from their jobs overnight for suspected links to the attempted coup. Rule of law has disintegrated in Turkey, and the authorities – led by President Erdoğan – have flouted human rights norms with impunity. In addition to wide-ranging restrictions on freedom of expression, the potentially arbitrary arrests of nearly 10,000 people and reports of ill-treatment in detention raise serious concerns.

The implications for people living in Turkey, and particularly those in the southeast, are devastating.

Members of Turkey’s pro-Kurdish Peoples’ Democratic Party argue with police as they try to enter the Kurdish-dominated city of Cizre, blocked by Turkish security forces, on September 10, 2015.
Photo: Ilyas Akengin/AFP/Getty Images
Since July 2015, the Turkish authorities have waged a campaign against the population of southeastern Turkey, imposing a succession of 24-hour sieges, known as curfews, which have blocked access to health care – including emergency medical treatment for life-threatening injuries or illnesses – cut off water, food, and electricity to whole cities, and resulted in thousands of deaths.

Even before the failed coup, the government punished any individuals or organizations that challenged the government’s use of harsh military tactics to quell an armed uprising by Kurdish youth in the southeast. The sweeping post-coup purges in the education, legal, and security sectors, combined with relentless persecution of people voicing dissent – including human rights defenders and journalists – is devastating for the Kurds specifically, and the people of Turkey generally.

For the Kurds, there is no longer any space for journalists or human rights activists to document persecution of the Kurdish population and demand equality and justice. The justice system, which has largely failed the Kurds over the past 30 years, has now been stripped of any vestiges of independence, causing serious concerns about access to justice or redress for the violations described in this report. For the people of Turkey generally, the message is clear: no criticism of the government will be tolerated.

President Erdoğan has repeatedly claimed that the coup was an attack on democracy and the rule of law. Now, it is crucial that he demonstrate his commitment to adhering to Turkey’s obligations to uphold international legal standards that protect the rights of all people living in Turkey – even in times of public emergency.

Since July 2015, the Turkish authorities have waged a campaign against the population of southeastern Turkey, imposing a succession of 24-hour sieges, known as curfews, which have blocked access to health care – including emergency medical treatment for life-threatening injuries or illnesses – cut off water, food, and electricity to whole cities, and resulted in thousands of deaths.

State media and officials report at least 7,561 deaths between July 24, 2015 and May 23, 2016 related to the conflict between government forces and Kurdish fighters in the southeast, a period which coincided with the imposition of dozens of curfews on civilian towns in the area.¹ The state figures do not include estimates of civilian deaths as a direct or indirect result of the military campaign and imposition of the curfews. The Human Rights Foundation of Turkey, a nongovernmental organization, has independently documented reports of at least 338 more deaths of local residents, including 72 children, between August 16, 2015 and April 20, 2016.²

The blanket curfews have disastrously impacted access to health care services for the affected areas’ Kurdish populations, and have facilitated human rights violations by the Turkish authorities. International human rights law states that in times of “public emergency which threaten the life of the nation … States … may take measures derogating from their obligations” under the International Covenant on Civil and Political Rights, to which Turkey is state party. But it stipulates that those measures must be strictly proportional to the threat, and may not infringe upon the rights to life, freedom from torture, and equal recognition before the law.³ Further, the curfews constitute collective punishment, a practice strictly prohibited by international humanitarian law, even in times of public emergency and threats to a nation’s sovereignty, as collective punishment is a tool used by governments to punish entire communities for suspected dissent or other actions deemed offensive to the state.⁴ The indefinite curfews imposed by Turkish authorities have failed to meet international standards governing public emergencies, including the conduct of counterterrorism operations.⁵

Residents of Diyarbakır protest in March 2016 against curfews imposed on the Sur district of the city. Photo: İlyas Akengin/AFP/Getty Images
During 11 months of curfews in the southeast, Turkish security forces deliberately and illegally obstructed access to health care by using state hospitals for military purposes, preventing the free movement of emergency medical vehicles, and punishing health professionals for delivering treatment to the wounded and sick. Several emergency medical personnel came under active fire, as security forces did not respect their neutrality and status as humanitarian workers. Local residents were shot at, and some were killed, for attempting to move their wounded family members to safety. In one case, in the southeastern city of Cizre, more than 100 people with injuries were trapped in three basements for several weeks between January and February 2016 without access to care. Turkish authorities imposed a round-the-clock curfew on the entire city from December 14, 2015 to March 2, 2016 – a total of 79 days. Despite orders from the European Court of Human Rights to provide those trapped with medical care, Turkish authorities ignored the Court, resulting in the death of all the people trapped in the basements. Turkish authorities also refused to investigate the deaths and disappearances of those trapped in the basements even after the curfew ended on March 2. In fact, Turkish authorities demolished the buildings over the basements with bulldozers immediately after the curfew ended, effectively destroying any remaining evidence of the alleged crimes.

Health professionals working in the emergency rooms of hospitals across the southeast testified that, during the curfews, security forces used hospitals as dormitories and offices and barred health professionals from entering certain areas of the hospitals or health centers they worked in – effectively militarizing hospitals, in violation of international law.

Turkish security forces and armed opposition groups have both interfered with medical transport units through the use of blockades and checkpoints, failed to provide adequate protection to emergency transport vehicles, and failed to prevent the targeting of emergency response vehicles.
Medical workers providing assistance to the wounded and sick are afforded special protections under international law. Turkish security forces routinely violated these protections in southeastern Turkey between July 2015 and June 2016. PHR documented indiscriminate attacks on emergency health personnel, indicating that parties to the armed struggle have failed to distinguish between a combatant and non-combatant, resulting in the targeting of non-combatants by both sides.

Since July 2015 numerous health care workers have been charged with the crimes of "making terrorist propaganda" and "being part of an illegal organization." Those not formally charged have been subjected to administrative inquiries by the Ministry of Health for participating in protests calling for peace in the southeast, making statements to the media about the need for peace, and, in some cases, for providing medical treatment in areas under curfew to alleged members of armed opposition groups. These groups have included the Patriotic Revolutionary Youth Movement (YDG-H), a youth militia founded in 2014, and the Kurdistan Workers’ Party (PKK), an armed group that has fought the Turkish state for greater political autonomy for Turkey’s Kurdish population since 1984.

The shutdown of the health care system during the prolonged unrest and persistent curfews has had predictably disastrous effects on people’s ability to access health care services – resulting in death and exacerbating the consequences of untreated injuries and illnesses – and has debilitated the region’s health care infrastructure and resources. It has also potentially given cover to serious human rights violations that have not been effectively investigated. In fact, human rights groups have reported rampant impunity for human rights violations against civilians in southeastern Turkey. These violations have included a lack of effective investigations into deaths, whether caused by Turkish security forces or armed groups (PKK and YDG-H). Family members and their lawyers told PHR that local prosecutors consistently refused to open investigations into reports of unlawful killings.

Physicians for Human Rights recommends that the Turkish government act without delay to:

- Remove all obstructions to accessing medical care, including ending indefinite curfews that violate Article 4 of the International Covenant on Civil and Political Rights; removing security forces, including police, from state hospitals and other health facilities; and ceasing the use of health facilities for any purpose other than strictly medical.
- Provide adequate security and resources to emergency health responders to address calls for emergency medical assistance in areas under curfew and active operations in a timely manner.
- Allow medical professionals to deliver emergency medical treatment and other health services to all individuals seeking treatment, without discrimination or reprisal for their actions, in accordance with international law, medical ethics, and Turkish domestic law (Articles 97 and 98 of the Turkish Penal Code).
- Cease legal actions against individuals for lawfully exercising their right to freedom of expression.
- Cease legal actions against health professionals for adhering to medical ethics and providing impartial treatment without discrimination.
- Ensure that all allegations of human rights violations are investigated in an independent, impartial, and timely manner, and, where evidence amounts to individual criminal responsibility, that the perpetrator is prosecuted in a court meeting international fair trial standards.
- Allow access for international monitors to the southeast to ensure security forces are complying with international norms – a measure that is now all the more urgent following the coup attempt and subsequent state of emergency.
Methodology

The findings of this report are based on two-week investigations between April 25 and May 10, 2016 in Istanbul, Ankara, and various cities in Southeastern Turkey, including Diyarbakir, Mardin, and Midyat. A Physicians for Human Rights (PHR) research team of two gathered independent evidence – including witness testimonies and documentation – of violations of human rights and international humanitarian law. The researchers focused on violations of the principle of medical neutrality – non-interference with medical services during times of unrest or conflict – under the curfews imposed in the southeast after the dissolution of the ceasefire between the Kurdistan Workers’ Party (PKK) and Turkey’s government in July 2015.

PHR’s delegation visited Istanbul and Ankara to meet with state officials, including representatives of the Department of Forensic Medicine in Istanbul, the Ministry of Justice, and the Ombudsman Institute in Ankara. PHR also met with the director of the Diyarbakir branch of the Forensic Medicine Department under the Ministry of Health, and the mayors of Sur and Bağlar districts in Diyarbakir. PHR sought meetings with the Ministry of Internal Affairs, including the governors of Diyarbakir and Şırnak, Ministry of Defense, and various departments of the Ministry of Health in Ankara, Diyarbakir, and Cizre, but official requests remained unanswered. Upon completion of the investigation, PHR also sent letters requesting a response from the Turkish authorities to PHR’s findings. Those requests, too, remain unanswered.

PHR experts met with a wide range of civil society groups based in Ankara, Istanbul, Diyarbakir, Cizre, Mardin, Silopi, Şırnak, and Nusaybin, including the Human Rights Foundation of Turkey, Human Rights Association (Ankara, Diyarbakir, and Cizre), Diyarbakir Bar Association, Turkish Medical Association (Istanbul, Ankara, and Diyarbakir), SES Health Workers’ Union (Ankara, Diyarbakir, and Cizre), Mesopotamia Lawyers’ Association, Mazlumder (Association for Human Rights and Solidarity for the Oppressed), the Turkish Red Crescent, the Rojava Association, and Gündem Çocuk Derneği (a child rights organization). PHR researchers examined documentation, including secondary and primary sources collected by several of these organizations, as well as legal documents filed by lawyers of the organization on behalf of victims of human rights violations and their families. PHR interviewed 20 family members of victims of alleged human rights violations committed by Turkish security forces. These included both male and female members of the families – including fathers, mothers, brothers, and sisters of the victims. In addition, PHR interviewed 33 health professionals working in various cities of the southeast about violations of medical neutrality, including obstruction of access to health services under curfew and legal actions taken against health professionals by the state for carrying out their duties to treat all patients impartially, regardless of political affiliation. The team interviewed five doctors, including two general practitioners and three forensic medicine specialists, working in Istanbul; ten doctors, primarily general practitioners, based in Ankara; one emergency physician, six general practitioners, two oncologists, and one nurse working in various hospitals in Diyarbakir; two general practitioners and one dentist working in Cizre; four general practitioners working in Mardin; one general practitioner working in a health clinic in Şırnak; and one pediatric orthopedist in Izmir.

Interviews were conducted in Turkish and Kurdish, with the assistance of local interpreters speaking Turkish, Kurdish, and English. The names of people interviewed during the course of research have been withheld for reasons of security and confidentiality. The only exceptions are when the family member or health professional has specifically requested to be named in the report, and PHR has evaluated the level of acceptable risk to the individual and family.

For all interviews, the PHR team obtained informed oral consent from each interview subject following a detailed explanation of PHR, the purpose of the investigation, and the potential benefits and risks of participation.

Interviews were conducted using semi-structured interview instruments developed by PHR staff medical and legal experts and approved by PHR’s Ethics Review Board (ERB), a body established by PHR in 1996 to protect the integrity of individuals PHR interviews during the course of investigations and research. PHR’s ERB regulations are based on Title 45 CRF Part 46 provisions, which are used by academic Institutional Review Boards. All of PHR’s research and investigations involving human subjects must be approved by the ERB and conducted in accordance with the Declaration of Helsinki as revised in 2000.

Challenges and Limitations

Given the ongoing security operations and clashes between armed groups and security forces, access to cities and towns under curfew was strictly prohibited by Turkish authorities. Access to areas recently under curfew was also severely restricted, making independent documentation of violations extremely challenging, and understanding the true scale of violations of human rights and medical neutrality difficult. Despite scheduled appointments with several local officials and promises from the Ministry of Foreign Affairs of unimpeded
access for international observers, the PHR team was
denied access to Cizre, a city in Şırnak province, at a
checkpoint manned by police on May 3, 2016. Given
these barriers to accessing information and evidence,
the report is subjected to limitations in scope. However,
the data gathered provides a solid basis on which to
make informed recommendations on the violations
addressed within the scope of this report.

Background

The imposition of weeks-long and sometimes months-
long 24-hour curfews and their deadly consequences
were the latest manifestation of a conflict between the
Turkish authorities, the Kurdistan Workers’ Party (PKK),
and PKK-linked youth militias. The conflict, which has
varied in intensity over the years, has characterized the
Kurdish-dominated southeast of the country since 1984.
The PKK was founded in 1977 and over the years has
used violent methods to demand self-determination and
cultural independence for the substantial Kurdish
minority population within Turkey. Between 1985 and
2016, the conflict has claimed over 30,000 lives.

The political rise of President Recep Tayyip Erdoğan at
first appeared positive for the Kurdish minority in
Turkey. After Erdoğan became prime minister in 2003,
he took steps to repeal laws prohibiting expressions of
Kurdish identity, including the use of Kurdish language
in schools and the celebration of Kurdish cultural
holidays. In 2013, Erdoğan oversaw the establishment of
an historic ceasefire with the PKK. He also began
allowing prison visits for the PKK’s founder and
ideological leader, Abdullah Öcalan, who had been
incarcerated since 1999. Corralling Kurdish support for
his leadership potentially contributed to Erdoğan’s
election as president in 2014. In February 2015,
Erdoğan’s government announced the creation of a 10-
point plan for a peaceful resolution to the now low-level
conflict, including measures such as disarmament of the
PKK and enhanced autonomy for Kurdish districts.

However, renewed tension was already brewing. In
2014, the main Kurdish military force in Syria, the
People’s Defense Units (YPG), made advances against
the self-declared Islamic State (IS), also called ISIS or ISIL,
which had occupied Kurdish majority areas in Syria. Iraqi
and Turkish Kurds, eager to support Syrian Kurds in
their battles against the IS, were stymied as Erdoğan
refused to open the borders to allow fighters and
convoys to cross. Erdoğan, according to media coverage,
appears to view the Kurdish YPG as a threat to Turkey
equal to the IS. The Kurds in Turkey, enraged by what
they perceived as Turkish support of the Islamic State
against the Syrian Kurds, erupted in protests across the
southeast, resulting in deaths and injuries as
demonstrators clashed with security forces. Soon
afterwards, Erdoğan reversed his position on the peace
talks, instead vowing to eliminate the PKK.

Protesters throw rocks as police use a water cannon during a demonstration in Diyarbakır on December 22, 2015 to
denounce security operations against Kurdish fighters in southeastern Turkey.
Photo: Ilyas Akengin/AFP/Getty Images
Protracted Curfews in Southeastern Turkey

In the summer of 2015, in response to the government crackdown against the Kurdistan Workers’ Party (PKK), the youth militia Patriotic Revolutionary Youth Movement began to build barricades in the cities and towns of the southeast, declaring them “autonomous zones.” Armed fighters linked to the PKK also killed members of the Turkish security forces, including two police officers in Şanlıurfa (a large town close to the Turkey-Syria border) on July 22, 2015. President Erdoğan responded by sending thousands of Turkish soldiers and special operations police forces into the southeast to quell the uprising. Thousands of local residents fled. Those who lacked the resources to leave remained behind and risked being caught in crossfire as Turkish security forces and youth fighters clashed in the streets.

On August 16, 2015, government forces imposed the first curfew on Muş, a city in Varto district. For the following 11 months, curfews were imposed at least 65 times in 22 districts and seven major cities.

The curfews meant round-the-clock sieges imposed on whole neighborhoods and, in some cases, cities, which lasted for days or weeks at a time. Under curfews, access to water, food, and electricity was cut off, and residents risked being shot by snipers or caught in crossfire if they attempted to leave their homes.

Local residents and activists told Physicians for Human Rights that the curfews were largely imposed with little warning. Cizre, a city of 100,000 people in Şırnak province in Turkey’s southeast, was one of the hardest hit by the fighting between Turkish security forces and Kurdish rebel fighters in 2014 and 2015. The first of two round-the-clock curfews in Cizre began with little warning on September 4, 2015. “They would go around with loudspeakers announcing the start of a curfew,” said Dr. B.K. from Cizre’s public hospital. “If you happened to be outside the city, you would never be able to get back in. If you were inside the neighborhood under curfew, you would have a hard time getting out.”

The second curfew in Cizre lasted 79 consecutive days, from December 14, 2015 to March 2, 2016.

International humanitarian law prohibits collective punishment – even in times of threats to the state – and prohibits governments from depriving populations of the means of survival, including access to food, water, and medical care. Article 4 of the International Covenant on Civil and Political Rights (ICCPR), to which Turkey is a state party, says that in times of “public emergency which threaten the life of the nation … States … may take measures derogating from their obligations” under the ICCPR, but stipulates that those measures must be strictly proportional to the threat, and may not infringe upon the rights to life, freedom from torture, and equal recognition before the law. The indefinite curfews imposed by Turkish authorities have failed to meet international standards governing public emergencies, including the conduct of counterterrorism operations.

By June 2016, three cities in the southeast remained under curfew – Şırnak, Nusaybin, and Yüksekova (Hakkâri province). According to local activists who relocated from those cities, approximately 10,000 - 15,000 local residents (non-combatants) remained in Nusaybin, living under curfew, while 2,000 remained in Şırnak.

From the start of the curfews, residents from the areas under curfew reported that the Turkish military blocked access to urgent medical care for the sick and wounded, that there were government-ordered cuts in water, food, and electricity, and that Turkish authorities were taking legal actions and otherwise harassing human rights activists, including health professionals who called on the government to respect international human rights law. These practices were continuing in Nusaybin and Şırnak in May 2016, with apparent increases in harassment of those criticizing the state.

The curfews in the southeast have no legal basis. Prior to the outbreak of fighting in July 2015, Turkish authorities relied on the imposition of emergency rule under the State of Emergency Law to respond to armed opposition groups operating in the southeast from 1987 to 2002. Since July 2015, provincial governors, or valis, have cited the Law on Provincial Administration to invoke a vague and broadly defined provision granting the governor power to “take measures against social unrest.” The provision includes no definition of a curfew, or the procedure for imposing one. According to a lawyer based in Ankara, the authorities used this provision to expedite imposing the curfews. Declaring a state of emergency is a multi-step process that requires the government to secure approval from the Council of Ministers on the duration and scope of any measures taken under an emergency. The provincial law, on the other hand, allows the governors to impose curfews through executive order.
Kurds: An Ethnic Minority Without a State

The Kurds are an ethnic group that inhabits an area comprised of parts of eastern and southeastern Turkey (Northern Kurdistan), western Iran (Eastern or Iranian Kurdistan), northern Iraq (Southern or Iraqi Kurdistan), and northern Syria (Western Kurdistan or Rojava).

The Kurdish people have been persecuted throughout the 20th century. In 1962, Syria stripped 120,000 Syrian Kurds of their citizenship, leaving them stateless – only a few have been reinstated since President Bashar al-Assad came to power. In Turkey, Kurdish language, broadcasts, cultural traditions, and political representation were severely curtailed or outright banned for decades (with some reforms introduced in 2003). In Iraq, Saddam Hussein famously carried out the al-Anfal campaign in 1988 that killed between 50,000 and 180,000 Kurds through mass killings and the use of chemical weapons.

The struggle for a Kurdish homeland has spanned much of the 20th and 21st centuries, since the end of World War I. Some Kurds have sought a unified Kurdistan as an independent sovereign state, while others have merely called for greater cultural freedoms and political representation within their respective countries.

Historically, Turkey has viewed Kurdish aspirations as a threat to its national security and stability – potentially leading to the destruction of modern nation-state borders drawn by colonial powers and the Turks after World War I.

In 1920, world leaders gathered in France to draw up the Treaty of Sèvres, which divided the territories controlled by the recently dissolved Ottoman Empire. The treaty allowed for the establishment of an independent Kurdistan. Mustafa Kemal Ataturk rejected the agreement, causing the Treaty of Lausanne to replace it by 1923 – this time omitting any mention of a Kurdish homeland. This resulted in the Kurdish population being divided between Iran (8.1 million), Iraq (5.5 million), Syria (1.7 million), and Turkey (14.7 million), and constituting minorities in all states. The Kurds are the largest ethnic minority in the world without a sovereign state.

Kurds take part in funerals for people killed during clashes between Turkish forces and Kurdish fighters in Cizre on September 13, 2015, following a week-long curfew imposed to support a military operation against Kurdish fighters. Photo: Ilyas Akengin/AFP/Getty Images
Findings on Access to Health Care in Southeastern Turkey

During 11 months of protracted round-the-clock lockdowns imposed on residential areas in Turkey’s southeast, Turkish security forces deliberately and illegally obstructed access to health care by using state hospitals for military purposes, preventing the free movement of emergency medical vehicles, and punishing health professionals for delivering treatment to the wounded and sick. Several emergency medical personnel came under active fire, as security forces did not respect their neutrality and status as humanitarian workers. Local residents were shot at, and even killed, for attempting to move their wounded family members to safety.

As of June 2016, curfews were lifted in all but two major cities, and security forces had moved out of state hospitals in those areas. Medical and police personnel were still stationed in the Nusaybin Public Hospital and Şırnak Public Hospital as of June 2016, as both Şırnak and Nusaybin were still under curfew. But the curfews and closures had lasting consequences for the provision of health care in the southeast. For example, Cizre’s eight health centers were all closed during a 79-day curfew ending on March 2; only five had reopened by May 2016, as the remaining three were destroyed during fighting. In addition, many health care professionals fled or transferred out of the southeast during that period.

Military Occupation of Hospitals and Health Centers

Health professionals working in the emergency rooms of hospitals across the southeast testified that, during the curfews, security forces used hospitals as dormitories and offices, and barred health professionals from entering certain areas of the hospitals or health centers they worked in.

Doctors and lawyers within the curfewed areas also testified that the curfews meant extensive body searches and identity checks for patients and staff at all entrances to the hospitals, measures they said acted as major deterrents to local residents seeking medical care. Dr. A.K., a member of the Mardin Medical Chamber of the Turkish Medical Association (TMA), said about the emergency room in Nusaybin State Hospital during one of the curfews: “People were generally scared to come into the hospital because the security forces were there, and if they had gunshot wounds, sometimes the state would say automatically that person had been fighting.”

The de facto occupation of hospitals often happened immediately after the curfews were imposed and served several strategic purposes for military personnel. Occupation of state hospitals – the last remaining health care option for local residents and injured militants – provided opportunities to capture injured militants, prevent care of enemy combatants, prevent medical documentation of potential human rights violations, and inhibit the ability of health professionals to provide treatment by intimidating and harassing staff in the hospitals.

In early September 2015, on the same day the provincial governor declared a curfew, Turkish security forces moved troops into Cizre State Hospital, a new building constructed at a strategic location on a hill slightly outside the city center. According to Dr. B.K., soldiers and police officers of the anti-terror police branch turned the third floor of the hospital into a makeshift dormitory and office space. Soldiers continually patrolled the first floor, with large tanks and personnel stationed outside the hospital, at the gates, at all entrances, and in the courtyard of the hospital. “They were in full armor. On their legs, they carried knives, they had ammunition belts on their jackets, guns slung over their backs. They were wearing green army uniforms, like camouflage,” Dr. B.K. said.

Dr. C.K., a doctor at Nusaybin State Hospital, told Physicians for Human Rights (PHR) that security forces began moving into the third and fourth floors of the hospital soon after the start of the curfews in Nusaybin in November 2015. Dr. C.K. estimated that between 150 and 200 police and other security forces were stationed there by May 2016.

PHR visited parts of Sur and Bağlar districts in Diyarbakır on April 29, 2016 and observed three family health centers occupied by police. Likewise, the SES Health Workers’ Union told PHR during an interview at their offices in Diyarbakır that the Governor’s office and the Director of Public Health in Diyarbakır verbally communicated to the administrators at four family health centers to close their centers, since the building would be transferred for use by the security forces.

“When we finally entered, the emergency room was like a military base. There were sandbags lining the walls, men with guns everywhere. It wasn’t a hospital, it was a fortress.”

I.Y., resident of Cizre
Health professionals working in the southeast have argued that the use of hospitals by security forces has put the buildings at risk for attack.33 34 35

Dr. B.K., from Cizre’s public hospital, experienced this first-hand. On September 5, 2015, she was making her evening rounds in the newborn intensive care unit when she heard the sound of gunshots. “The nurses from the first floor came rushing through the door saying that security forces were downstairs swearing at them and telling them to get out of the way. We could hear gunfire on the roof, as well as the first floor. We moved all the patients into the corridors, away from the windows and tried to use shelving units as shields. The hospital was under attack for the whole night,” Dr. B.K. said. “I can’t remember exactly how long the fighting lasted – when the curfew started we lost our cell phone connection. But all of us, the patients and medical staff, were confined to the second floor, in the hallways, just waiting for it to end,” she said.36

Failure to Protect Health Facilities

Many hospitals and clinics throughout Turkey’s southeast have been damaged by fighting between security and opposition forces, particularly when they are positioned near a police station or security force checkpoint.37

International humanitarian law requires parties to a conflict to put in place protective measures to ensure the continued operation of health facilities. The right to health under international human rights law mandates that the state take measures to protect the functioning of health services and ensure they continue delivering health care to the highest attainable standard.38

Yet the Turkish authorities have taken few measures to ensure the continued operation of primary health care centers (family health centers) or to ensure access to alternative medical care for residents living in neighborhoods under curfew – measures the state is required to take under international human rights law.39 Turkish security forces and Kurdistan Workers’ Party (PKK)-linked youth militias have also destroyed three family health centers in Cizre out of a total of eight, one family health center in Hani, and another in Bismil (both neighborhoods in Diyarbakir city), and inflicted significant damage to health centers in all other cities subjected to armed clashes, including Şırnak, Silopi, Yüksekova, and Nusaybin, among others.40

In several instances, not only did state security forces fail to adequately protect hospitals and health care centers during clashes, they used disproportionate force when addressing protests occurring near hospitals or health centers, and affected the functioning of the hospital and health care workers. In Nusaybin, the TMA documented one case in which health workers and patients were injured by the use of pepper spray by security forces around the hospital. Dr. C.K said security forces used large amounts of tear gas and pepper spray to scatter protesters gathered near Nusaybin hospital, which in turn interfered with the operations of the emergency room.

“Back in July 2015, when the youth began to build the barricades and dig the trenches, our hospital was very close to where the first trenches were dug. Children would hang around and throw stones at the military vehicles passing. One morning, the police came and released an enormous amount of tear gas around the hospital. The emergency unit of the hospital was full of patients. The tear gas filled the emergency room and courtyard of the hospital,” he said.41

Attacks on Health Facilities

Health care facilities have also been directly attacked or subjected to search and seizure of suspected militants, preventing health care professionals from providing needed care to the wounded and ill. F.K., an emergency medical worker, told Şırnak Bar Association about the invasion of Beytüşebap State Hospital in Şırnak province on September 24, 2015: “I was in the x-ray room when I heard yelling and gunshots .... We went to the emergency room. I saw

A health care facility in Diyarbakır’s Bağlar neighborhood that was being turned into a police station, according to the Health Workers’ Union (SES).
that everybody was lying on the ground facedown or on their back. Nobody was standing, so I lay down too until the security forces left."  

F.K.’s testimony was corroborated by colleagues. All of the accounts given to the Şırnak Bar Association of this particular raid describe nine heavily armed men, dressed in uniform, entering the hospital, demanding identification, and pointing their weapons at several doctors and other staff.  

One health worker assigned to the hospital on temporary duty said the security forces conducting the raid were looking for evidence that the hospital was harboring “terrorists.” The health worker was present in the room when security forces interrogated one of the doctors who was treating an 18- or 19-year-old boy the security forces suspected of being a combatant.  

Obstruction of Access to Emergency Medical Transport and Care  

Turkish security and opposition forces have interfered with medical transport units by preventing their passage through blockades and checkpoints, by failing to provide adequate protection to emergency transport vehicles, and by failing to prevent the targeting of emergency response vehicles. The Human Rights Foundation of Turkey has documented the deaths of 338 civilians in the southeast from August 2015 to April 2016, 76 of them because of obstacles in accessing medical treatment, either for gunfire or artillery wounds, or for treatment for chronic illness.  

Hali Inan, 61 years old, is a resident of Silopi. His wife, Taybet Inan, was shot and killed outside their home on December 17, 2015, during the curfew in Silopi. He told PHR that his wife would not have died if the security forces had permitted ambulances to respond to his calls for medical assistance.  

"On the third day after the curfew was declared, Taybet had gone outside to deliver some tools to our neighbor across the street. The streets are very narrow and everything was quiet – she said she would go, and come right back. We suddenly heard gunfire outside and my son-in-law heard Taybet shout. We ran out into the courtyard, and hid behind the wall. We could see Taybet lying in the street outside of the courtyard wall. I could see her wounded, she was shot in the leg. I started to run out into the street and she screamed for me to keep away. She was afraid they would shoot me, too.  

"My brother, Yusuf, and I called the emergency numbers, both for ambulances and the police. The police told us to take white flags and go out onto the street. We tried three times to go onto the street with white flags, but each time snipers shot the flags, so we retreated. As we took cover behind the wall of our courtyard again, my brother, Yusuf, was shot in the abdomen and started bleeding. We had to leave Taybet in the street overnight. We found out later she had died during the night. At 7 a.m. the next morning, my brother died. We had to leave his body in the basement of our house.  

"After eight days, the security forces came through and collected the dead bodies from the houses and the streets, and took them to a temporary morgue at the Silopi customs border point (border with Iraq). They kept the bodies there for two weeks before calling us to come and bury them.  

"The doctors told me both Taybet and Yusuf died from bleeding. I believe that if they were both taken to the hospital, they would have survived. They wouldn’t be dead."  

Mr. Inan has filed complaints against Turkish security forces for firing the shots that killed his wife.
Netice Çubuk lost her 16-year-old son when he bled to death just a few blocks from a hospital, but behind a police barricade blocking access to Sur district in the city of Diyarbakır, where police had fired at civilians gathering to protest the start of another curfew in Sur district. Çekvar Çubuk was shot and killed, allegedly by security forces, on December 2, 2015. His mother told PHR about a conversation she had with a woman who stayed with Çekvar after he was shot, waiting for an ambulance or other assistance for several hours. She was unsure of the exact time when her son was shot.

“A woman [who] was with him ... told me later that the police didn’t allow the ambulance to come beyond the checkpoint until 3 p.m. ... The doctors told me that he died from blood loss .... I waited in that square until 6 p.m. When I went home, I saw on the news that two people were killed – they showed pictures. In one of the pictures, I could tell it was my son from his clothes, even though they blurred his face .... Later, we heard some injured people were taken to Gazi Yaşargil Hospital, so I went to that hospital. They took me to the morgue. His body was lying on a metal cart, and his face was white as snow. I kissed him and I thought he would open his eyes and kiss me back. I couldn’t believe he was dead.”

Mehmet Paksoy gave similar testimony. He told PHR that his brother, Huseyin, died from blood loss as a result of being hit by shrapnel in Cizre after emergency responders were unable to locate him and withdrew before completing the search. Mehmet Paksoy was outside the curfewed area when he received a phone call on January 16, 2016 letting him know that his brother was wounded, and that he was at a local gas station.

“I called the emergency number, 112 .... They told me, ‘We can’t go anywhere because there is a curfew and no security. You’d better call the police.’ I called the police and they told me they would direct an ambulance to the gas station. But then they never called me back. They never sent the ambulance.”

Paksoy appealed to his local member of parliament, who called the governor and the police, but to no avail: “They all said the conflict was too intense and no one would send ambulances.”

The next day, with his brother still missing, Paksoy filed an application to the European Court of Human Rights (ECHR) with the help of a lawyer in Ankara, seeking an interim decision to compel the authorities to send an ambulance to find Huseyin. The ECHR – which hears human rights complaints from Council of Europe states, including Turkey – issued an interim decision granting Paksoy’s request on January 18. That same day, the fire department in Cizre finally sent an ambulance, but withdrew when they did not immediately find Paksoy. “I think my brother may have lost consciousness,” Mehmet Paksoy told PHR. “The next day, the security forces went into that part of the district and reached the area behind the gas station. They called municipal authorities telling them they had found a dead body.”

The Ministry of Justice defended the government’s actions, in this case asserting to the ECHR that “both medical personnel and security officers exerted maximum efforts to provide Huseyin Paksoy with medical assistance and ensure his survival.” The government also stated that Huseyin Paksoy had been charged with being “a member of an armed terrorist organization” on November 6, 2014, after surrendering himself to the Cizre District Security Directorate. The inclusion of the applicant’s criminal record in the government’s response might indicate its reluctance to provide emergency care for those charged with a crime, in contravention of its obligation under international law to ensure health care for all without discrimination of any kind.
The Cizre Basements

One of the most egregious cases of wholesale denial of emergency medical care was reported in Cizre in early 2016. During the second curfew imposed on Cizre between mid-December 2015 and March 2016, 130 to 190 people were trapped in the midst of heavy clashes and round-the-clock curfews for several weeks in three different basements in Cudi and Nur neighborhoods. According to local activists and lawyers, many of those trapped were injured and repeatedly called for medical assistance, which the authorities denied. All of those who were trapped died, or remain missing. It is unclear if they died from the injuries, lack of access to food and water, or if they were deliberately and extrajudicially executed. Before the authorities lifted the curfew in Cizre on March 2, security forces removed bodies from the basements and transported them to various hospitals. It is unclear whether some bodies were left in the basements, as there was no oversight of the operation or visit to the site by government officials until March 3. Immediately after the curfew was lifted, authorities razed the buildings above the basements, and as of June 2016, no official investigations had been launched.

The sister of two of the victims told PHR she was in frequent contact with her brothers while they were trapped. She said one of her brothers, Mehmet Tunç, repeatedly called to Turkish media and local politicians in Cizre to request medical assistance. However, before that plea could be granted, Mehmet was killed during a security force raid on the basements on February 7. Orhan, his younger brother, survived the attack, which reportedly killed between 30 and 60 people trapped in the basements. The sister told PHR: “The last conversation I had with Orhan was when Orhan called me on February 10 and said the police were going to take them out of the basements and transfer them to the hospital.”

However, nobody was brought to the hospital that day. “The next day, they called me to the hospital to identify their bodies … I saw Orhan’s body myself. There was a bullet mark on his throat, and his left leg was burnt … We were given an autopsy report at the hospital but it didn’t contain any detail on how he was killed. It said he was killed by a gunshot wound and because he was a terrorist. The autopsy report also said the basement contained a lot of ammunition.” The exact circumstances of the basement lockdown and subsequent deaths have not
Men look at a collapsed building over the site of one of the Cizre basements, where 130 to 190 people died. The sites were later razed, reportedly on the orders of Turkish security forces.

been clarified. In mid-January, family members of Orhan Tunç and others had filed a request with the ECHR seeking interim measures to grant access for ambulances and emergency responders to the neighborhoods where the applicants were trapped in basements. The Court granted the interim measure on January 19, but Orhan's sister and several human rights groups say the measure was never implemented by the Turkish authorities.\(^5\) The local government released a statement denying the claims that medical assistance had not been provided to those trapped in the basements, noting that “10 ambulances along with two other vehicles were sent to the address, but no one showed up even after several hours of waiting.”\(^5\)

On February 7, Prime Minister Ahmet Davutoğlu released a statement to the media noting that “60 PKK terrorists were killed during a raid on a basement in the district of Cizre.” The prime minister went on to say that “only official statements should be taken into account regarding the clashes,” and that “reports are being manipulated to create the image that security forces execute wounded terrorists.”\(^5\) On February 11, Minister of Interior Efkan Ala stated that Turkish security forces had completed their operations in Cizre “in a very successful fashion.”\(^5\)

Media reported that Turkish security forces sent bulldozers into Cizre to level the ruins when the curfew was lifted.\(^5\) Although PHR was denied access to Cizre, the neighborhoods where the basements were located are visible from a nearby hilltop. Buildings and other rubble had been cleared from a significant swath of the city – including the sites where the basements had been located.

As of June 2016, some families who reported that their relatives were in the basements and remain missing have not received a body or confirmation of death. The Tunçs’ sister said she was not permitted to keep a copy of the autopsy report.

Forensic medical experts and lawyers working on collecting evidence from Cizre’s basements expressed significant concern about an executive order issued on January 16, 2016 that they believed would allow security forces to obscure evidence of extrajudicial killings, especially in Cizre’s basements.\(^5\) The order stated that “in case of public security concerns by authorities, government officials may decide to bury bodies unidentified.”\(^5\) Forensic doctors and human rights groups were concerned that the change in procedure gave sweeping authority to security forces to bury bodies without making an effort to identify them, or to conduct an investigation into the cause of death. Forensic experts were also concerned about the decision to prohibit lawyers and independent forensic experts from observing autopsies.\(^5\)

The TMA, which conducted an assessment of health service delivery in cities and towns under curfew between July 20 and October 4, 2015, reported the widespread absence of security measures to protect health workers and facilities responding to calls for medical assistance from residents trapped in neighborhoods during armed clashes and curfews.\(^5\) When ambulances attempted to respond to emergency calls, security forces responded in one of two ways: they either blocked ambulance access through checkpoints and blockades, saying that they could not guarantee the safety and security of the ambulance and emergency response personnel, or they permitted access but rarely provided additional security escorts for ambulances and emergency response personnel. When security forces did allow access for emergency responders, it was often delayed for hours, or even days in some cases – with deadly results.

Access to emergency medical care in the southeast has been the focus of several petitions to the ECHR. In a decision issued on February 2, 2016, the Court underscored the requirement that the curfews end and that Turkish authorities take all necessary steps within their powers to protect the right to life and physical integrity of those seeking immediate access to medical assistance. On January 26, however, the Court had rejected the petitions from 14 people in Cizre who were requesting immediate medical assistance on the grounds that the applicants had not yet exhausted domestic remedies before
When ambulances attempted to respond to emergency calls, security forces responded in one of two ways: they either blocked ambulance access or they permitted access but rarely provided additional security escorts for ambulances and emergency response personnel. When security forces did allow access for emergency responders, it was often delayed for hours, or even days in some cases – with deadly results.

approaching the ECHR. The applicants applied to the Constitutional Court of Turkey, as directed, which issued a decision on January 29 that the ECHR deemed “relevant” and illustrating the Constitutional Court’s willingness to monitor the situation. However, all the people listed in the ECHR and Constitutional Court applications between February and May 2016 have either been confirmed dead or reported missing by their families – casting doubt on the ECHR’s decision to defer to the Constitutional Court of Turkey.

Attacks on Health Personnel

Medical workers providing assistance to the wounded and sick are afforded special protections under international humanitarian law. Few of these protections were respected in southeastern Turkey between July 2015 and June 2016. PHR documented indiscriminate attacks on emergency health personnel, indicating that, at the very least, parties to the armed struggle failed to distinguish between a combatant and non-combatant, something they are obligated to do under the laws of war. Various civil society organizations have independently documented assaults on health care workers attempting to provide care to the wounded and sick in neighborhoods under curfew. Whether these deaths constitute extrajudicial or indiscriminate killings, they must be investigated in accordance with Turkey’s obligations under international law to protect against violence and ensure justice for human rights violations.

A girl looks at a dead body amid the rubble of damaged buildings on March 2, 2016, following heavy fighting between government troops and Kurdish fighters in Cizre. Photo: Ilyas Akengin/AFP/Getty Images
On September 24, an ambulance driver named Şeyhmus Dursan was killed, allegedly by police fire, in Beytüşebap, a town in Şırnak province, while responding to a call for emergency assistance at the police headquarters there. A nurse and emergency technician, A.S. and F.K., were with him when he was shot and killed.

A.S. told the Şırnak Bar Association that the ambulance had responded to a directive from the Emergency Service to retrieve casualties near the police headquarters, and had been clearly marked when it came under fire: “We activated the ambulance siren so no one would shoot at us. About 15 meters away from the police checkpoint, we heard gunshots and we stopped the ambulance. We were getting hit, and we couldn’t even get out of the ambulance.”62

A.S.’s colleague, Şeyhmus Dursan, was seriously wounded, but the emergency workers were forced to leave him to avoid being targeted themselves: “şeyhmus was hit and wounded badly. His blood spilled on my face, hair, and all of my body. The rest of us, including myself, leapt out of the vehicle and ran away from the police checkpoint, and we pulled off our duty vests since they are luminous and bright-colored, making us targets.”

Even as the emergency medical personnel tried to retrieve their colleague when the shooting had subsided, they were still targeted. F.K. told the Şırnak Bar Association, “We went out and we heard the police starting to fire their guns in the air. I went to take Şeyhmus’s pulse to learn if he was alive or not, but he was already dead. Then the security forces started firing more, and the crossfire intensified, so I retreated to the house where we had taken refuge. We saw some people take Şeyhmus away to the hospital with a small van.”63

The following day, Eyüp Ergen, a nurse and member of the Health Workers’ Union (SES) who worked in the emergency room of Cizre State Hospital, was shot, allegedly by police, on his way home from the hospital. Local residents called for emergency help, but Ergen’s friends and colleagues say that the police denied the ambulance permission to enter the neighborhood, despite the fact that there was no curfew in the neighborhood at that time.64

Aziz Yural, a nurse working at Cizre State Hospital and a board member of SES in Cizre, was killed while on duty on December 31, 2015. According to testimony from Yural’s uncle, Sabri Yural, Yural was shot by an unknown gunman while attempting to aid an injured woman in the street outside his home in the Nur neighborhood of Cizre.65 Yural had been providing treatment to injured people in the neighborhood who couldn’t reach the hospital. Gunes, a daily newspaper aligned with President Erdoğan’s Justice and Development Party, reported on January 4, 2016 that Aziz Yural was a “terrorist” and had been killed in a confrontation with security forces. The news article also reported that Yural and other health workers were organizing attacks on security forces alongside the PKK.66

These allegations have not been proven and there have been no investigations opened into the circumstances of Yural’s death. Moreover, the TMA, the civil society organization Mazlumder, the SES, and the Human Rights Association all have documented that Yural had been running an informal first aid center out of his home in Cizre, and had gone out onto the street to help a wounded woman when he was shot and killed.

**Legal Actions against Health Professionals**

Turkey has a long history of harassing medical providers and of attempting to inhibit the delivery of emergency care as required by Turkish law and international medical ethics.67 In 2013, Physicians for Human Rights conducted an investigation in Turkey immediately after the protests at Gezi Park. This research demonstrated that, in addition to the use of excessive and unnecessary force by security personnel, Turkish authorities attacked and intimidated the health professionals who provided emergency treatment to wounded protesters – which they did in the absence of an adequate emergency response from state-authorized medical personnel.68 At Gezi Park, the state not only abdicated its responsibility to provide emergency medical care without discrimination but went on to pass a bill that was used to take legal action against medical personnel who treated injured protesters in accordance with their professional ethics.69

In one case, two doctors, Erenç Dokudan and Sercan Yüksel, were charged with “protecting perpetrators by extending them first aid,” convicted in October 2015, and sentenced to 10 months in prison.70 In addition, the Turkish Ministry of Health took legal action against the TMA’s Ankara Chamber of Medicine on January 27, 2014, demanding that the entire board of the Ankara medical chamber be removed from office for its role in organizing urgent medical care for protesters injured during the Gezi Park demonstrations. PHR filed an amicus brief in support
of the TMA on March 26, 2014, arguing that the criminalization of emergency medical care runs counter to the rights to health and life, and to the professional and legal duty of health workers to provide urgent care when and where needed. An Ankara court dismissed the case against the TMA on February 20, 2015.

The Turkish government’s crackdown in the southeast prompted further harassment and intimidation of medical professionals who speak out against military action or provide impartial treatment to the wounded and sick under curfew. The TMA has again come under attack by the authorities, including the Ministry of Health. Members of the SES have also come under attack by the authorities.

Between July 2015 and June 2016, numerous health care workers have been either charged with the crimes of “making terrorist propaganda” and “being part of an illegal organization,” or have been subjected to administrative inquiries by the Ministry of Health for participating in protests calling for peace in the southeast, making statements to the media about the need for peace, and, in some cases, for treating alleged members of the Revolutionary Youth Movement or PKK in hospitals in areas under curfew. The TMA and SES contracted lawyers to represent many of these health workers. The TMA Secretary General and SES Ankara Chamber and Diyarbakır Chamber estimate that hundreds of cases, both administrative and criminal, have been brought against their members since July 2015.

One such case is that of Abdullah Köçeroğlu, a 24-year-old general practitioner who was tried before a court in Mardin for “providing first-aid medical education to terrorist organization members” after he documented gunshot wounds at the hospital in Nusaybin. Dr. Köçeroğlu was also charged under sections 220/7, 312/2 of the Turkish Penal Code and Anti-Terror Act for “being a member of an illegal organization.” Dr. A.K., a member of the Mardin Medical Chamber, said that after Dr. Köçeroğlu had sent the documentation of injuries to Mardin Medical Chamber, he was kept under close surveillance by the security forces and forcibly transferred to Kuşzültepeh, a small city outside of Mardin that was not experiencing armed clashes, curfew, or security operations. Dr. Köçeroğlu was arrested on January 18, 2016 and faced a prison sentence of up to 15 years if convicted.

Köçeroğlu and his lawyer argued that the charges against him were fabricated, and were in fact a punitive measure for Köçeroğlu’s treatment of suspected militants in Nusaybin’s emergency room as well as his use of Kurdish language when speaking to patients. A court in Mardin ultimately dismissed the charges against Köçeroğlu for lack of sufficient evidence, but he was held in pre-trial detention from January 18 until May 12, 2016. Under international law, Turkey has an obligation to provide an effective remedy to those who have been subjected to arbitrary deprivation of liberty.

These legal actions undoubtedly had a deterrent effect on health care providers speaking out about the abuses happening in the curfewed areas. Köçeroğlu’s lawyer, N.K., moved out of Nusaybin when a curfew was declared in April 2016. She told PHR: “The situation in Nusaybin State Hospital is not good. Köçeroğlu was one of a few who stayed. For months, it has been almost entirely run by security forces. The upper floor of the hospital is occupied by security forces. There is a lot of pressure on the nurses and doctors over there. They are afraid to report any harassment from the security forces. They will not give us lawyers any signed document or testimony for fear that they will lose their jobs, or be transferred out of Nusaybin, or have a criminal case brought against them.”

Another nurse in Nusaybin State Hospital who works closely with Köçeroğlu told N.K. that police officers threatened them if they treated members of the PKK or YDG-H, and instructed health staff to withhold blood transfusions if a member of the YDG-H came into the hospital.

“The situation in Nusaybin State Hospital is not good …. For months, it has been almost entirely run by security forces. The upper floor of the hospital is occupied by security forces. There is a lot of pressure on the nurses and doctors over there. They are afraid to report any harassment from the security forces. They will not give us lawyers any signed document or testimony for fear that they will lose their jobs, or be transferred out of Nusaybin, or have a criminal case brought against them.”

N.K., lawyer of a doctor who was charged under anti-terrorism laws after documenting protesters’ gunshot wounds in Nusaybin

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Southeastern Turkey: Health Care Under Siege

20
Legal actions, both criminal and administrative, that serve to punish medical personnel for carrying out medical activities are in direct violation of the Turkish state’s obligation to protect medical personnel as they perform their duties. Moreover, arresting medical personnel for providing care may amount to a violation of the protection against arbitrary arrest and detention, even if it is done lawfully under national legislative frameworks.\textsuperscript{80} International humanitarian law states that medical personnel cannot be punished for carrying out activities that are compatible with medical ethics.\textsuperscript{81}

Further, the UN General Assembly on the Principles of Medical Ethics mandates that states should not punish medical personnel for carrying out medical activities compatible with medical ethics, or compel them to undertake actions that contravene these standards. The treatment or provision of first aid to anyone, regardless of affiliation, cannot be criminalized, as it is in accordance with the principles of medical ethics to ensure emergency care in situations that are life-threatening.\textsuperscript{82}

The routine practice of bringing criminal charges and administrative inquiries against health professionals for providing emergency care in the southeast is part of the government’s objective of suppressing dissent expressed by anyone in all parts of Turkey. Dr. A.K. was charged with “insulting the President” for his participation in a demonstration condemning an October 10, 2015 bombing in Ankara.\textsuperscript{83} As of June 15, 2016, his trial was ongoing. If convicted, he faces a two-year prison sentence. “Our crime is said to be that during the protest we chanted ‘Murder Erdoğan!’ – which, of course, we didn’t,” he said.

The Ministry of Health opened an administrative inquiry into Dr. A.K.’s involvement at the protest. This inquiry could result in either reassignment to another city, or – more onerously – dismissal from his job at the Mardin State Hospital. The state hospital system is the largest employer for medical professionals in Turkey. If dismissed from a state hospital, health professionals told PHR they are rendered unemployable by state medical institutions, and virtually unemployable by private ones.

Another general practitioner and member of the Mardin Medical Chamber, Dr. D.K.,\textsuperscript{84} also faced both criminal charges and administrative inquiry from the Ministry of Health for allegedly “being a member of the PKK and making propaganda for them,” after he participated in several protests organized by the SES and TMA to advocate for peace in the region.

“We don’t see the state as an enemy, but the state looks at people from this [Kurdish] region as enemies. The state wants me to look at the people around me, the people I treat, as enemies, and I cannot do that. My aim is not to be a doctor working for the state, but a doctor working for his people. The police and security forces are protecting the state – that is their duty, but the state expects the same from us [doctors]. That is inconsistent with our oath and obligation as doctors to serve the people.”

When Dr. D.K. spoke to PHR in May 2016, the criminal proceedings against him were still ongoing, but he had heard informally about the results of his administrative hearings: his contract with the state hospital was cancelled. He would be dismissed upon receiving formal notification of his contract’s cancellation – a potentially career-ending penalty.

Another doctor, a member of the TMA’s Istanbul Medical Chamber and general practitioner at a public hospital in Istanbul, had also been the subject of an administrative inquiry after his participation in a protest calling for peace in the southeast. Dr. E.K.\textsuperscript{86} said he was asked 12 questions by hospital administrators, including: “‘Peace now, today,’ and ‘Peace for the children, no to war,’ are slogans that belong to the PKK – they are widely used by the PKK. So, why would you use those slogans? What do you think and feel when shouting such slogans?”\textsuperscript{87}

The list of questions presented to Dr. E.K. are consistent with questions posed to other doctors interviewed by PHR who are facing administrative inquiries by the Ministry of Health.

“\textit{The state wants me to look at the people around me, the people I treat, as enemies, and I cannot do that. My aim is not to be a doctor working for the state, but a doctor working for his people.}”

\textit{Dr. D.K., a general practitioner in Mardin who lost his job and faces criminal charges for taking part in a protest advocating for peace in Turkey’s southeast}
Impact of Curfews on Access to Health Care

The shutdown of the health care system during the prolonged unrest and persistent curfews has had predictably disastrous effects on people’s ability to access health care services, and has been debilitating for the region’s health care infrastructure and resources.

The TMA’s 2015 assessment found that health center closures and the presence of security forces at state hospitals severely interrupted access to health care for local residents in at least 13 provinces. All primary health care centers in Cizre, Diyarbakır (Sur district), Hakkâri, Mardin, and Şırnak were closed during the first wave of curfews starting in August 2015, affecting a population of approximately 470,000 people. In addition, the state hospitals in each area were occupied by Turkish security forces, a presence which discouraged people living in each area from seeking treatment short of a life-threatening emergency.

Dr. B.K. at Cizre State Hospital told PHR that, normally, between 250 and 300 patients are treated at the hospital every day. But, during curfews that began on September 4, 2015, and then again on December 14, Dr. B.K. said that no more than 15 patients on average were being treated daily at the hospital, part of which had been occupied by military forces. “There was no reason given for why the security forces had settled in the hospital. During the second curfew, we were not allowed to go to the third floor, and there were no beds open for service at all,” she said.

Nusaybin State Hospital previously had 200 beds, but, by June 2016, no longer treated civilians. All cases were then transferred to Mardin State Hospital, approximately 62 kilometers to the northwest of Nusaybin. The Bağlar district of Diyarbakır city had 420,000 residents, served, before the beginning of the curfews and armed clashes, by 23 family health centers. Four have since been converted to police stations, with no known plans to replace the health services to the local community that those centers provided.

Even when hospitals stayed open during the curfews and military occupation, the presence of security forces and the apparently random shutdowns and shootings in the streets had a decidedly chilling effect on residents, who only sought out care when forced to. One resident of Cizre described entering Cizre’s public hospital during the second curfew after his one-year-old daughter had shut a finger in the kitchen door and needed stitches. Fearful he would be unable to return home after leaving the house, he waited for two days to take his daughter to the hospital, until the finger’s failure to heal made the trip a necessity. “When we arrived, armed guards checked our identity cards at the entrance of the emergency room. Then they searched me. They also searched my one-year-old baby, including in her diaper. When we finally entered, the emergency room was like a military base. There were sandbags lining the walls, men with guns everywhere. It wasn’t a hospital, it was a fortress.”

In Cizre, residents reported that they were often unable to reach the public hospital, their last remaining health care option after the city’s eight health care centers closed, and rarely attempted to travel to the hospital during curfews unless in an emergency.

Moreover, the functioning of public hospitals and family health centers appears to have been severely compromised in all areas placed under curfew.

Many public health centers closed under curfew either because health professionals were not able to reach the centers, or because the general insecurity and threat of indiscriminate attacks damaging the centers prevented health professionals from treating patients. In Cizre, three family health centers were destroyed in the fighting. In the Sur district of Diyarbakır, all of the family health centers were destroyed or converted to stations and lodging for police and military officers.

With the closing of public health centers, public hospitals became the only option for health care.
However, the services offered at public hospitals during security operations were severely limited. The staff of hospitals in areas under curfew and security operations had been reduced by approximately 75 percent, as resident health professionals either fled or were forcibly or voluntarily transferred out of the area. Of 60 medical specialists working in Nusaybin State Hospital, 45 were transferred to other hospitals, including Dr. C.K., ostensibly for security reasons. Doctors employed by the military replaced some of them, and provided emergency services only.

Some health professionals posted to state hospitals and health centers in southeastern Turkey have requested transfers and re-posting to safer areas. This means maintenance of an adequate health care workforce has become a challenge, despite the lifting of curfews in some areas. In the curfewed Sur district of Diyarbakir, by May 2016 all health staff had been relocated to centers elsewhere in city, leaving the residents of the newly reopened parts of Sur with no access to primary health services in their district. Although residents of Sur district can visit health centers in other parts of the city, the services they can access without insurance, or by being a registered resident of that district, are limited. In some areas under curfew, volunteers were sent from other parts of Turkey by the Ministry of Health; this potentially lowered the quality of care, as, according to local medical chambers, the majority of the volunteers do not speak Kurdish.

While the state hospitals in areas no longer under curfew are beginning to restore services, the region’s network of primary health care – comprised of family health centers and community health centers – face a long road to returning to their pre-unrest level of care.

Lack of Investigations into Denial of Care and Other Violations

The protracted curfews in southeastern Turkey have not only had a devastating effect on the region’s health care system, they have also potentially given cover to serious human rights violations – such as those described in this report – that have not been effectively investigated. In fact, human rights groups have reported impunity for human rights violations against civilians in southeastern Turkey. These include a lack of effective investigations into deaths, whether caused by security forces or armed groups (the Kurdistan Workers’ Party [PKK] and the Patriotic Revolutionary Youth Movement [YDG-H]). Family members and their lawyers told Physicians for Human Rights (PHR) that local prosecutors consistently refused to open investigations into reports of unlawful killings. Forensic doctors and lawyers reported that prosecutors concealed forensic medical evidence such as autopsy reports and failed to use them in opening criminal investigations into allegations of human rights violations. Many family members did not even report human rights abuses, discouraged by a precedent for impunity.

Since July 2015, the government, both provincial and national, has made numerous statements through the media regarding the number of “terrorists made ineffective” and the deaths of state security forces killed in the line of duty. However, the government has failed to address, or even mention, the deaths of ordinary citizens in the region, despite the significant levels of reporting on civilian injuries and deaths by human rights groups in Turkey, and growing concern from the international community.

Documentation and reporting of human rights violations have been made even more challenging for civil society organizations, lawyers, and international observers by the lack of access to places where violations have been committed, and by the legal persecution of health professionals who document killings. The result has been severely compromised justice processes.

In Cizre, the very site of potential violations was demolished. On the day the curfew was lifted, a lawyer from the Mesopotamia Lawyers’ Association went to Cizre with a group of other lawyers and visited the basements where more than 100 people had been trapped for weeks. She told PHR that the authorities were very reluctant to investigate what had happened there, and in fact actively destroyed evidence:

“We went to the chief prosecutor of Cizre and petitioned him to make an investigation into these killings. His answer to us was, ‘What is wrong with you? The soldiers and army died, too.’ When he finally agreed to make visits to the basements, he came in an armored police car, wearing a bullet-proof vest. He told us he didn’t feel safe. ‘It’s not secure, the walls might collapse on me,’ he said. We told him there are body parts in the basements and that he must inspect. He told us to bring them out to show him. So, we did that. A few days later, the police demolished the basements through an order of the governorship with the help of the military.”
Many activists and lawyers who PHR spoke with expressed anger and suspicion about the length of the second curfew in Cizre, which lasted 79 days in total. Some alleged that the extension of the curfew allowed the security forces to remove bodies from the basements without the local prosecutor conducting a proper crime scene investigation. Five nongovernmental groups concluded in separate reports that no investigations had been carried out into the allegations that well over 100 people were killed in Cizre’s basements.

But individual cases were also not investigated. Fifteen days after her 16-year-old son, Çekvar, was shot and left to bleed to death without access to emergency care, Netice Çubuk filed a complaint with the prosecutor in Diyarbakır. Her lawyer also requested a copy of the autopsy report from the hospital. However, Çubuk said that when they received the report, there was only an empty sheet. The report had not been filled out.

“In the complaint to the prosecutor, we wrote that my son was shot on his leg, and again on the left side of his stomach, but the main reason he died was because of blood loss. If he had been taken to the hospital, he would have survived today,” Çubuk said. “The prosecutor is doing nothing about the complaint – if he refuses to do anything about investigations, I will file a case with the European Court of Human Rights.”

Lawyers and families in other cases also described the refusal of local prosecutors to open investigations into allegations of civilian deaths.

Rozerin Çukur, 15, was shot and killed on January 8, 2016, allegedly by Turkish security forces. Rozerin had ventured into Sur district in Diyarbakır just after a nine-day curfew was lifted, and a few hours before another curfew was declared in the neighborhood. Her father, Mustafa Çukur, said he and his wife were unable to contact their daughter after her cell phone’s battery lost its charge, and the curfew continued for several weeks. They found out Rozerin had died on the evening news.
Turkey’s Legal Obligations

Medical Neutrality and the Right to Health

The severe limitations on access to health care documented in this report – including deliberate attacks on health care transport and personnel – run counter to Turkey’s obligations under both international human rights and humanitarian law. Regardless of whether or not the armed clashes in the country’s southeast qualify as an internal conflict, a state of emergency, or a crackdown on alleged criminal activity, the Turkish authorities are obligated to ensure access to emergency health care as well as effective protection for health care workers to allow them to provide care for all. Where rights are infringed, the authorities must investigate. As this report shows, the Turkish government has systematically ignored these obligations.

International humanitarian law strictly prohibits the use of health facilities in times of armed conflict for any purposes other than for health care needs.105 Moreover, international human rights law requires that states respect the right to health by not allowing any kind of interference with access to medical care.106

The state’s obligation to maintain a functioning health care system, and to protect medical personnel’s ability to fulfill their professional duties according to their ethical responsibilities, remains the same during peacetime as in situations of armed conflict or internal unrest.107 Governments should protect health professionals’ independence and impartiality in treating the sick and injured.108

Respect for medical neutrality109 requires:

- the protection of medical personnel, patients, facilities, and transport from attack or interference;
- the provision of unhindered access to medical care and treatment;
- the humane treatment of civilians; and
- non-discriminatory treatment of the injured and sick.110

Medical neutrality also protects medical personnel from interference by criminalization or other state measures to influence or penalize health professionals for impartially treating the sick and injured, regardless of political affiliation, ethnicity, race, gender, or other factors. The arrest of medical personnel for delivering treatment may amount to arbitrary arrest and detention under the International
Covenant on Civil and Political Rights (ICCPR), to which Turkey is a state party.\textsuperscript{111}

The right to health encompasses states’ obligations to ensure equal access to the highest attainable standard of care without discrimination based on socioeconomic status, geographic location, ethnicity, or any other factor.

The right to health is contained in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ratified by Turkey in 2003).\textsuperscript{112} Under international human rights law, states have the obligation to maintain a functioning health care system in both peacetime and in times of armed conflict or internal unrest.\textsuperscript{113} They must maintain essential primary health care, access to minimum essential food, basic shelter, housing, and sanitation, and an adequate supply of safe and potable water, as well as provide essential drugs, while respecting the principles of non-discrimination and equitable access.\textsuperscript{114}

In addition, Articles 97 and 98 of Turkey’s penal code criminalize medical professionals who neglect their duty to provide emergency medical aid. Under Turkish law, medical professionals not only have an ethical obligation to provide care without discrimination, they are also criminally responsible if they fail to do so. Thus, the Turkish government’s arbitrary restrictions under Article 46 of the health bill on the provision of emergency medical aid by “unauthorized” personnel not only violate Turkey’s international human rights obligations but also compel medical professionals to break national law.

Right to an Effective Remedy

Turkey’s human rights obligations extend not only to preventing violations of the right to life and taking all necessary measures to protect that right, but also to effectively investigating all deaths resulting from use of force. The purpose of effective investigations is to ensure accountability in all cases, and in particular to contribute to the protection of the right to life by ensuring appropriate use of force by state security forces.\textsuperscript{115}

The duty to investigate a victim’s right to an effective remedy forms part of the duty of all states as recognized in international human rights law and standards, including Articles 2(3), 6, and 14(1) of the ICCPR.\textsuperscript{116} State obligations in this regard are further spelled out in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and include the rights to reparation and access to justice.\textsuperscript{117}

In addition, ensuring the right to know the truth about past human rights abuses – for victims and family members as well as the general public – is recognized in international human rights law as part of a state’s obligation to investigate and provide remedy for violations of human rights.\textsuperscript{118} States must take measures to:

- Establish the truth about the crimes, including the reasons, circumstances, and conditions of the human rights abuses.
- Document the progress and results of any investigation.
- Reveal the identity of perpetrators, and in the event of death or enforced disappearance, the fate and whereabouts of the victims.

Truth is crucial in helping victims and their families understand what happened to them, counter misinformation, and highlight factors that led to abuses. It helps societies to understand why abuses were committed, so that they can prevent repetition.

Conclusion

The renewal of open hostilities between Turkish security forces, the Kurdistan Workers’ Party (PKK), and affiliated youth militias in July 2015 ushered in a period of widespread violations of health rights and medical neutrality, in particular on the part of the Turkish government. Turkish security forces have besieged entire cities in the southeast, unlawfully used health facilities for military purposes, obstructed and denied access to emergency medical treatment, destroyed health facilities, attacked and persecuted health workers, and otherwise violated the rights to health and life of local residents.

Armed groups, including the PKK and linked youth militias, have contributed to civilian loss of life and obstruction of emergency medical assistance by conducting indiscriminate attacks that have caused serious damage to health facilities, building barricades that make entry to neighborhoods under curfew difficult, and instigating clashes with Turkish security forces in densely populated urban neighborhoods, thereby exacerbating the damage to civilian life.

The presence of visibly armed security personnel in the courtyards and emergency rooms of state hospitals has created a climate of fear for local residents seeking emergency medical services at
public hospitals. State security forces have consistently failed to make a clear distinction between combatants and non-combatants during security operations in the southeast, and have treated local health professionals as sympathetic parties to the PKK cause, likely to aid and abet terrorism. Residents who remained behind in areas under curfew are viewed with suspicion by security forces as cooperating with, sheltering, or otherwise harboring sympathies for the PKK-backed fighters.

Doctors and other health professionals have been targeted with legal harassment for doing their jobs, and many have fled or been forcibly transferred out of the region. The predictable result of all these factors has been a weakening of the health care system throughout the southeast, and hundreds of unnecessary and preventable deaths and injuries to local residents.

In addition, Turkish authorities have failed to hold security forces accountable for alleged human rights violations, and have violated human rights by imposing indefinite curfews and a nationwide attack on free speech to suppress those protesting military intervention in the southeast. The opposition PKK and Patriotic Revolutionary Youth Movement have also failed to take measures to protect civilian life by constructing barricades and planting explosives in densely populated urban areas.

The counterterrorism operations conducted by Turkish security forces have been directly supported and lauded by Turkish authorities, including President Erdoğan, who have failed to acknowledge any civilian deaths or address allegations of human rights violations. Turkish authorities have actively obstructed any efforts toward monitoring and accountability for actions in the southeast by denying access to international observers, and by persecuting civil society attempting to seek justice for victims of human rights violations.

As the latest iteration of the 33-year conflict between Turkey and the PKK drags on, it is essential that Turkey adhere to international human rights and humanitarian law to prevent the loss of more life and to address the entrenched alienation of an entire population that has suffered during the course of the decades-long struggle.

Physicians for Human Rights (PHR) calls upon the Turkish government to demonstrate its respect for the rights of all citizens by ceasing unlawful practices that obstruct access to health care and by investigating all allegations of human rights abuses committed since July 2015 in the southeast, including by Turkish security forces. PHR also calls on the Turkish government to respect the rule of law and international human rights standards during the three-month state of emergency imposed on July 21, 2016. Turkey must reinstate compliance with the European Convention of Human Rights – suspended during the state of emergency – cease the blanket arrest and detention of tens of thousands of people without providing due process, and provide protection from torture and other ill-treatment for anyone detained during the government crackdown.

A man sits in front of his home in Cizre, destroyed by fighting between government forces and Kurdish fighters, on March 2, 2016.
Photo: Cagdas Erdogan/Getty Images
Recommendations

To President Recep Tayyip Erdoğan, Prime Minister Binali Yıldırım, and the Turkish Government:

- Immediately cease and prohibit unlawful practices that violate Turkey's human rights obligations under international law, including:
  - Obstructing access to medical care, including, but not limited to, indefinite curfews.
  - The use of state hospitals for military purposes. Turkish security forces must immediately withdraw personnel from all state hospitals, and prohibit the future use of state hospitals and other health facilities for any purpose other than the delivery of health care for the sick and wounded.
  - Punishment of medical personnel for exercising their right to freedom of expression and for carrying out activities in accordance with international principles of medical ethics – this includes criminal charges and administrative action taken against medical personnel by the Ministry of Health.
  - All attacks on medical personnel who provide emergency assistance to injured protesters. Hold accountable all perpetrators of violence against medical personnel and/or facilities, according to international standards.
  - Disregard for Articles 97 and 98 of the Turkish penal code, which make it a crime for medical personnel to neglect their duty of providing emergency medical care to those in need. Turkey must repeal 2014 legislation criminalizing the provision of “unlicensed” or “unauthorized” emergency medical care by independent medical personnel.
- Immediately cease barring international observers from full and independent access to all areas of the southeast, including those under curfew and subjected to ongoing security operations.
- Support a country visit to Turkey by the Office of the UN High Commissioner for Human Rights, and other international monitors requesting access to southeastern Turkey.
- Cease legal actions against all individuals for exercising lawfully their right to freedom of expression, including journalists, lawyers, health professionals, and academics.
- Ensure that all allegations of human rights violations are investigated in an independent, impartial, and timely manner, and where evidence amounts to individual criminal responsibility, that the perpetrator is prosecuted in a court meeting international fair trial standards.

- Ensure effective forensic investigation and documentation of deaths and alleged abuses in accordance with international Minnesota Protocol and Istanbul Protocol standards.

To the European Union:

- Recognize that Turkey’s refusal to act on cases filed to the Constitutional Court eliminates the requirement for exhausting domestic remedies prior to referral to the European Court of Human Rights and other international mechanisms. This includes suits challenging the legality of curfews and alleged extrajudicial killings of civilians during curfews, and cases brought by those facing criminal charges for exercising their right to freedom of expression – including doctors criminalized for providing impartial treatment according to international medical ethics.
- Support trips by independent international observers and investigators to southeastern Turkey, including areas under curfew, to facilitate effective and transparent monitoring of human rights conditions.

To the Kurdistan Workers’ Party (PKK), Patriotic Revolutionary Youth Movement (YDG-H), and other opposition armed groups:

Note: The PKK and other armed groups operating in the southeast have not exercised de facto control over towns and cities in the southeast and thus are not legally bound by the laws of war. Nonetheless, PHR recommends that the PKK and other armed groups respect the rules of distinction and proportionality in conflict situations, namely by enacting the following:

- Immediately cease all indiscriminate attacks that violate obligations under international law to protect the right to life for those not party to the conflict, including:
  - Obstructions to accessing medical care, including, but not limited to, the construction of barricades and the deliberate or indiscriminate targeting of health facilities. This includes damage to health facilities when either occupied by, or in close proximity to, Turkish security forces which armed groups view as a legitimate military target.
  - Attacks on state hospitals occupied by Turkish security forces. Under no circumstances can a functioning hospital or health facility be viewed as a legitimate military target.
  - Indiscriminate attacks causing civilian deaths.
  - Indiscriminate attacks on medical personnel who provide emergency assistance to injured protesters.
being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives; Additional Protocol I, Article 12.4: “Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.”
4 Turkish authorities have charged health care workers using both provisions under the Turkish Penal Code and Law on Fighting Terrorism. The Law on Fighting Terrorism defines selected provisions in the Turkish Penal Code as “terrorist offences” and prescribes specific criminal procedures for addressing them when committed on behalf of a terrorist organization, as defined by Article 1 of the Law on Fighting Terrorism. Provisions often used include: Article 220 of the Turkish Penal Code: “A person who makes propaganda through the medium of press and media about the goals of an organization which has been established in order to commit crimes” can be imprisoned for three to nine years; Article 7(2) of the Law on Fighting Terrorism: “Those who assist members of organizations constituted in the manner described above or make propaganda in connection with such organizations shall be punished with imprisonment of between one and five years.” Article 7(1) of the Law on Fighting Terrorism includes Articles 313, 314, and 315, which include offences committed as part of an illegal organization, which are then criminalized under the Law on Fighting Terrorism when committed for an organization defined by Article 1 of the Law.
5 The Syrian Kurds’ fighting force is known as the People’s Defense Units (called the YPG), and is the armed wing of the Democratic Union Party in Rojava, Syria, considered the historic homeland of the Kurdish people.
6 Protocol II to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts, Articles 7: Protection and care – “All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected,” and 8: Search – “All possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead... and decently dispose of them.”
7 See “Turkey’s Legal Obligations” p. 25 of this report for more details; Ethical Principles of Health care in Times of Armed Conflict and Other Emergencies, General Principle 4, International Committee of the Red Cross; Geneva Convention IV, Article 18: “In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended...
22 PHR interviews with a member of the Şırnak Bar Association (anonymity requested) in Diyarbakır on May 1, 2016, and members of the Mardin Medical Association (anonymity requested) on May 2, 2016 in Mardin.
26 Email correspondence with Senem Dağoğlu, lawyer at the Human Rights Foundation of Turkey, between March 21 and 24, 2016.
28 PHR interview with general practitioner working in one of the family health centers in Cizre on May 3, 2016 at a roadside stop outside of Cizre.
30 PHR interview with Dr. A.K. in Mardin on May 2, 2016.
31 PHR interview with Dr. C.K. in Mardin on May 2, 2016.
32 PHR interview at the SES Union of Health Workers’ office in Diyarbakır on April 29, 2016.
33 Thereby violating Article 18 of the Fourth Geneva Convention, and Article 12, section 4 of the Additional Protocol 1 to the Geneva Conventions.
Southeastern Turkey: Health Care Under Siege

PHR interview with Dr. B.K. on April 27, 2016 in Istanbul: “Actually, security forces settled into the hospital on Friday and so tension started to rise when they settled there,” she said in reference to an attack on Cizre State Hospital the following night.

PHR interview with Dr. Raşit TÜKEL, vice-president of the Turkish Medical Association in Istanbul on April 26, 2016: “It’s very important to remember that because the soldiers were in the [Cizre] hospital, it’s a target for the PKK. For example, in December 2015, a rocket hit a room of the hospital – the Turkish military were fighting from the hospital.”

PHR interview with Dr. B.K. on April 27, 2016 in Istanbul.


Turkish Medical Association, “Rapid Assessment of Health Services in Eastern and Southeastern Anatolia Regions in the Period of Conflict Starting from 20 July 2015,” October 2015, copy provided to PHR by the Turkish Medical Association on April 27, 2016.

PHR Interview with Dr. C.K. in Mardin on May 2, 2016.

Written copy of F.K.’s testimony was provided to PHR by the Şırnak Bar Association on May 1, 2016 during interviews in Diyarbakır.

Written copy of testimonies provided to PHR by the Şırnak Bar Association on May 1, 2016 during interviews in Diyarbakır. PHR was unable to independently interview the health personnel who gave testimony to the Şırnak Bar Association due to denied access by Turkish police to areas of Şırnak province, which included Cizre and Silopi.

Written copy of testimonies provided to PHR by the Şırnak Bar Association on May 1, 2016 during interviews in Diyarbakır.


Human Rights Department, Ministry of Justice, Republic of Turkey, “Information on the Interim Measure Concerning the Application No. 3758/16 Paksoy vs. Turkey,” dated January 25, 2016, copy on file with PHR.


Interview with PHR on May 4, 2016 in Midyat, Turkey.


Courts should initially have the opportunity to determine questions regarding the compatibility of domestic law with the Convention.”

European Court of Human Rights, “Curfew measure in south-eastern Turkey: Court decides to give priority treatment to a number of complaints,” Press release February 5, 2016, ECHR 054 (2016), accessed online June 6, 2016, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi00PbfqZTNAhWC2D4KH8YCV4QFggcMAA&url=http%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F3library%2FECHR%26id%3D003-5293529-6585232%26filename%3DCurfew%2520measures%2520in%2520south-eastern%2520Turkey%2520%2520priority%2520treatment%2520complaints.pdf&usg=AFQjCNGD4rbtcR_q2UU3xhFDwOAPC9Zg8aqg2=S7fw_NnGc3I5AfO3OJ1zA&bvm=bv.123664746,d.cWw.

Mazlumder Conflict Investigation and Resolution Group, “Cizre Investigation and Monitoring Report on Developments During the Round-the-Clock Curfew Imposed Between December 14, 2015 and March 2, 2016.” The report is based on interviews with local officials in Cizre, including the chief prosecutor, mayors, district governor, and neighborhood muhtars (community leaders), as well as representatives of civil society organizations, lawyers, and families of victims. PHR also independently corroborated the allegation that individuals represented by ECHR applications were confirmed dead or remained missing by interviews with families of some of the victims, and lawyers and forensic medical doctors with the Human Rights Foundation of Turkey who conducted examinations of the basements on March 3, 2016, the day after the curfew was lifted and they were permitted to enter Cizre.

PHR interview with members of SES leadership in Diyarbakır on April 30, 2016. The President of SES presented PHR with a list of deaths of health personnel recorded by SES. The union has documented a total of four deaths of health personnel since the beginning of the conflict; PHR interview with Ergen’s colleague, Dr. B.K. in Istanbul on April 27, 2016.

PHR was unable to independently interview Sabri Yural due to denied access into Cizre by police at a checkpoint outside of Cizre. A delegation from the civil society organization Mazlumder (Association for Human Rights and Solidarity for the Oppressed) visited Cizre from March 4 to 6, 2016 after the

Southeastern Turkey: Health Care Under Siege
second curfew ended, and interviewed Sabri Yural as part of their visit.


67 Turkish Penal Code, Art. 97: “Any person who abandons another person who is under protection…
due to state of disability bound to old age or sickness, is sentenced to imprisonment from three months to two years.” Art. 98: “Any person who fails to render assistance to an old, disabled or injured person at the extent of his or her ability, or fails to notify the concerned authorities in time, is punished with imprisonment up to one year or punitive fine.”


69 Article 46 of Turkey’s Health Bill (draft bill as of 2013, and passed by Parliament and signed by the President in January 2014). The provision was then used to criminalize doctors retroactively for treating protesters at Gezi Park.


73 Turkish authorities have charged health care workers using both provisions under the Turkish Penal Code and Law on Fighting Terrorism. The Law on Fighting Terrorism defines selected provisions in the Turkish Penal Code as “terrorist offenses” and prescribes specific criminal procedures for addressing them when committed on behalf of a terrorist organization, as defined by Article 1 of the Law on Fighting Terrorism. Provisions often used include: Article 220 of the Turkish Penal Code: “A person who makes propaganda through the medium of press and media about the goals of an organization which has been established in order to commit crimes” can be imprisoned for three to nine years. Article 7(2) of the Law on Fighting Terrorism: “Those who assist members of organizations constituted in the manner described above or make propaganda in connection with such organizations shall be punished with imprisonment of between one and five years.” Article 7(1) of the Law on Fighting Terrorism includes Articles 313, 314, and 315, which include offences committed as part of an illegal organization, which are then criminalized under the Law on Fighting Terrorism when committed for an organization defined by Article 1 of the Law.

74 PHR interviews with members of the Health Workers’ Union in Ankara and Diyarbakır (SES), the Turkish Medical Association in Istanbul, Ankara, Diyarbakır, Mardin, and Cizre (TMA), all facing criminal charges and/or administrative sanctions for participating in protests, demonstrations, or treating alleged “members of terrorist organizations.” Copies of testimonies as recorded by PHR, and legal documents, including indictments and records of questions asked during administrative inquiries in these cases, on file with PHR.

75 Turkish Penal Code, section 220/7: “Any person who knowingly and willingly helps an organized criminal group although not taking place within the hierarchic structure of the group, is punished as if he is a member of the organized group; 312/2: Enlisting to an organized criminal group.

76 Mardin City E-type Prison.

77 The authorities also invoked sections 58/9 and 53/1 of the Turkish Penal Code in Köçeroğlu’s case. Section 58/9: “Recidivism and offenses of special risk” says that if he commits the crime again, he would be imprisoned even if the option of an administrative fine is available. Section 53/1 disqualifies the accused of certain rights, including the right to vote, and the undertaking of a permanent or temporary public service, including an office in any department of the State, province, or municipality, or employment in an institution and corporation controlled by these administrations. As Köçeroğlu is employed by the Ministry of Health as part of the state system, his ability to practice at a state hospital or health facility is effectively terminated.

78 Name withheld for security purposes.
The Islamic State claimed responsibility for the deadly bombing in Ankara that killed 103 people, the Human Rights Committee. 

These rights are derived from the same rules of humanitarian law as a medical practitioner’s responsibilities: the First, Second, and Fourth Geneva Conventions; Additional Protocol I, Part II (Articles 8-34); Additional Protocol II, Part III (Articles 7-12); and customary humanitarian law.

General Comment No. 6 of the Human Rights Committee, Resolution 37/194 of the UN General Assembly on the Principles of Medical Ethics http://www.un.org/documents/ga/res/37/a37r194.htm: “Convinced that under no circumstances a person shall be punished for carrying out medical activities compatible with medical ethics regardless of the person benefiting therefrom, or shall be compelled to perform acts or to carry out work in contravention of medical ethics.” Articles 2.2. and 3 of the ICESCR, the right to health must be exercised without discrimination, General Comment No. 14 of the Human Rights Committee.


PHR interview with Dr. D.K. on May 2, 2016 at the Mardin Medical Chamber in Mardin city, Turkey.

PHR interview with Dr. D.K. on May 2, 2016 at the Mardin Medical Chamber in Mardin city, Turkey.

Name withheld for security purposes.

PHR interview with Dr. A.K. on May 4 in Mardin, Turkey.

PHR interview with Cizre residents at a roadside stop outside of Cizre on May 3, 2016.

PHR interview with Dr. C.K. in Mardin on May 2, 2016.

PHR interview with Cizre residents at a roadside stop outside of Cizre on May 3, 2016.

PHR interview with Cizre residents at a roadside stop outside of Cizre on May 3, 2016.

PHR interview with Cizre residents at a roadside stop outside of Cizre on May 3, 2016.

PHR interview with Cizre residents at a roadside stop outside of Cizre on May 3, 2016.

PHR interview at the SES Health Workers’ Union office in Diyarbakır on April 29, 2016.

PHR interview with Cizre residents at a roadside stop outside of Cizre on May 3, 2016.

PHR interview at the SES Health Workers’ Union office in Diyarbakır on April 29, 2016.

PHR interview with Cizre residents at a roadside stop outside of Cizre on May 3, 2016.

PHR interview with Cizre residents at a roadside stop outside of Cizre on May 3, 2016.

PHR interview with Cizre residents at a roadside stop outside of Cizre on May 3, 2016.

Name withheld for security purposes.

PHR interview with Dr. D.K. on May 2, 2016 at the Mardin Medical Chamber in Mardin city, Turkey.

Name withheld for security purposes.

PHR interview with Dr. D.K. on May 2, 2016 at the Mardin Medical Chamber in Mardin city, Turkey.

Name withheld for security purposes.

PHR interview with Dr. D.K. on May 2, 2016 at the Mardin Medical Chamber in Mardin city, Turkey.

Name withheld for security purposes.

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PHR interview with Dr. D.K. on May 2, 2016 at the Mardin Medical Chamber in Mardin city, Turkey.

PHR interview with Dr. D.K. on May 2, 2016 at the Mardin Medical Chamber in Mardin city, Turkey.

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PHR interview with Dr. D.K. on May 2, 2016 at the Mardin Medical Chamber in Mardin city, Turkey.

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military objectives, it is recommended that such
hospitals be situated as far as possible from such
objectives;” Additional Protocol I Article
12.4: “Under no circumstances shall medical units be used in an
attempt to shield military objectives from attack.
Whenever possible, the Parties to the conflict shall
ensure that medical units are so sited that attacks
against military objectives do not imperil their
safety.”
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Article 12, International Covenant on Economic,
Social and Cultural Rights.
107
Human Rights Committee, General Comment 14
on Article 12, International Covenant on Economic,
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108
Drawing on the Declaration of Geneva, the World
Medical Association formulated a more detailed code
of ethics, which states: “A physician shall be
dedicated to providing competent medical services in
full technical and moral independence, with
compassion and respect for human dignity.” See
WMA International Code of Medical Ethics. See also
Art. 5 of the WMA Declaration of Tokyo, which states:
“A physician must have complete clinical
independence in deciding upon the care of a person
for whom he or she is medically responsible. The
physician’s fundamental role is to alleviate the
distress of his or her fellow human beings, and no
motive, whether personal, collective or political, shall prevail against this higher purpose."

109 In a groundbreaking investigation that helped define “medical neutrality,” PHR’s 1989 medical investigation in El Salvador reported on allegations of the assault, arrest, intimidation, and execution of health care workers. PHR has published pieces on medical neutrality since 1988, including reports on the West Bank and Gaza Strip (1988); Panama (1988); Chile (1988); El Salvador (1990); Kuwait (1991); Burma (1992); Somalia (1992); Thailand (1992, 2010); India (1993); Mexico (1994); former Yugoslavia (1996); Turkey (1996); Iraq (2003); United States (2003–2007); Libya (2011); Bahrain (2011, 2012); and Syria (2012).

110 Annas and Geiger, War and Human Rights, 37.


115 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Article 22 and 23 under “Reporting and Review Procedures:” 22. Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11 (f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control; 23. Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependents accordingly.

116 Article 2(3) ICCPR: “Ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; Human Rights Committee General Comment No. 6: Article 6 (Right to Life) section 4: “States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances that may involve violation of the right to life”; Article 14(1): Equality before the law.


Report On The Building Damage Assessment
Diyarbakir, Silvan and Cizre in the Wake of the Curfews
Emergency Architects Foundation

27-28 October 2015
### Table of Content

Assessment Mission and Team Composition ................................................................. 3

Location and localization of the assessment .............................................................. 4

Damage assessment in Sur (Diyarbakir) ..................................................................... 6

On Sunday, 25 October and Monday morning, 26 October a meeting took place with the vice mayor of Diyarbakir, a representative of the municipality, and an architect familiar with the evaluated area. Several buildings were visited corresponding to an estimated 50% of the destruction according to the local representatives. .......................................................... 6

General appearance .................................................................................................. 6

Route tracking .......................................................................................................... 6

Observations analysis ............................................................................................... 8

Damage causes ......................................................................................................... 11

Silvan damage assessment ....................................................................................... 13

General appearance .................................................................................................. 13

Route tracking .......................................................................................................... 13

Observations analysis ............................................................................................... 15

Damage causes ......................................................................................................... 17

Damage assessment in Cizre ................................................................................... 19

General appearance .................................................................................................. 19

Some repairs have been carried out to restore the walls but almost all of projectile impacts and observable traces remain ........................................................................... 19

Route tracking .......................................................................................................... 19

Observations analysis ............................................................................................... 21

Damage causes ......................................................................................................... 23

Conclusion ................................................................................................................ 24
Assessment Mission and Team Composition

The Emergency Architects Foundation (EAF), upon the request of the Union of Municipalities of Southeast Anatolia (Güneydoğu Anadolu Bölgesi - GABB), participated in an assessment mission to evaluate the damage caused to buildings during the curfew period established by government authorities in September and October 2015 in several cities of the region.

The assessment was coordinated by the GABB and carried out by the Union of Chambers of Turkish Engineers and Architects (Türk Mühendis ve Mimar Odaları Birliği - TMMOB). Site visits were organized by the EAF and conducted with the agreement and implementation support of the municipalities.

The EAF assessment mission team was composed of architects, and engineers that have experience in damage assessments caused by natural disaster (Nepal 2015, Philippines 2013, Haiti in 2010) and conflict (Libya 2012, Aceh 2010, Chad, 2010, Sri Lanka in 2008, North and South Lebanon in 2007). The mission took place from 24 to 28 October 2015.

EAF is a recognized “public utility” non-governmental organization that has been involved in the evaluation of damaged buildings in 33 countries since 2001. It is committed to the principles of humanity, impartiality, neutrality and independence and therefore is oriented towards the vital needs of populations at risk while excluding other criteria (i.e. political, religious, ethnic, social etc.). The foundation has offices in France, Canada and Switzerland.

The GABB coordinated assessment has two main components: Ecology and Human Rights, both of which conclude a heavy death toll, not included in this report and subject to controversy. EAF’s approach has been purely technical and largely based on factual interviews and site visits.

The assessment took place during daylight hours and always in the company of Municipal representatives. Relations with officials and local inhabitants was always serene. Access to the damaged areas was not subject to the control of the security forces. The team was able to move freely and whenever necessary to enter inhabited buildings. Members of security forces were neither visible at the scene of assessments nor encountered.
Pre-evaluation context

Following decades of violence in the area, a new round has been established in 2015. According to the French newspaper "Le Monde" of 25 July 2015: "The fragile truce between Turkey and Kurdish rebels was broken by the double major offensive launched Friday, July 24th by the Turkish army against the Kurdish Workers Party (PKK) and the organization Islamic state (EI), housed in the same boat "terrorist."

"The conditions of maintaining the cease-fire [enacted in 2013] were broken, said the People’s Defense Forces (HPG), the military wing of the PKK, in a statement on their website. Faced with these attacks, we have right to defend ourselves."

"The Turkish strikes began four days after the deadly suicide attack attributed to EI that targeted the border town of Suruç. Since the attack, PKK rebels have stepped up attacks against Turkish security forces, criticizing the supposed complacency of Ankara towards the Islamic state.

Location and localization of the assessment

The assessment was concentrated on the area with the largest density of damage, which was located in urban, modest or poor neighborhoods and in the old centers. The team has visited the neighborhood of Sur in Diyarbakir; the areas of Miscet, Tekel and Konak in Silvan, and the Nur area of Cizre.

The map below identifies the location of the relevant cities and indicates distances between them. The good quality of road infrastructure has helped to overcome constraints related to the short time allocated to cover large distances. The proximity of the Syrian and Iraqi borders had no significant impact on the mission.
Map 1: Localization of the three cities in which the evaluation was conducted
Damage assessment in Sur (Diyarbakir)

On Sunday, 25 October and Monday morning, 26 October, a meeting took place with the vice mayor of Diyarbakir, a representative of the municipality, and an architect familiar with the evaluated area. Several buildings were visited corresponding to an estimated 50% of the destruction according to the local representatives.

General appearance

This old part of the city and its winding streets holds a rich heritage primarily of religious buildings (mosques of XVI century, churches of early Christianity), and secondly urban buildings in colorful two-storey houses.

All rubble and barricades, which could be evacuated, had been removed except for rare cases (see picture D11). Shooting waste (cases) have been cleared and were all gone. Traffic was free. Residents and children were normally walking and playing in the street. Security forces were not visible.

However, projectile impact and fire traces had not been removed.

Route tracking

The map below localizes the circuit that was followed at the assessment team’s request during the evaluation. Landmarks were GPS-localized, and numbered. The number corresponds to the photo (sometimes several photos) taken to illustrate the nature of the damage.
Map 2: Localization of sites assessed in the neighborhood of Sur (Diyarbakir).
Observations analysis

The table below presents main comments and describes the GPS localization for each site, the GPS number corresponding to the photo presented and provided in the Annex.

The column “liveability” is further elaborated in the rightmost column with a description of the intensity of damages to the building.

Among the sites visited, and where the team has been able to penetrate, only one, D5a of Özgür Yurttas Dernegi Hasirli Mahallesi (Free Association of Citizens, Hasirli neighborhood) is stored in the red category (Heavy rehabilitation or reconstruction is needed. The building can in the state regain its function). The other buildings require consistent work (light and dark green) in the presence of the usual occupants or temporarily not compatible (orange) with the presence of the usual occupants, at least in the rooms where work is underway.

Damages were caused to religious buildings: D1, D2, and D12. The principle of intentionally firing at D12 or that of collateral damage on cultural buildings (D1) must be reported rather than levels of the severity of damage as no bearing on the building structure was detected.

Note that some targeted buildings are public buildings: Churches and Mosque D1, D2, D12 are used for social activities and D12 was used for worship before curfew. The school used by snipers has received some impact for a probable "anti sniping" purpose and Özgür Yurttas Dernegi building served the community before being strafed and burned.

<table>
<thead>
<tr>
<th>SUR (Diyarbakir) Building Damaged Assessment (BDA)</th>
<th>(Sur Neighbourhood)</th>
</tr>
</thead>
<tbody>
<tr>
<td>PLACE</td>
<td>NORTH</td>
</tr>
<tr>
<td>Armenian church Muallak SK</td>
<td>37°54’31.6</td>
</tr>
<tr>
<td>Building</td>
<td>Latitude</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Armenian catholic church</td>
<td>37°54'30.9</td>
</tr>
<tr>
<td>Rue Muallak SK</td>
<td></td>
</tr>
<tr>
<td>House</td>
<td>37°54'29.9</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Building for women</td>
<td>37°54'31.0</td>
</tr>
<tr>
<td>Karadenz 4.SK</td>
<td></td>
</tr>
<tr>
<td>Primary School Mardin</td>
<td>37°54'32.3</td>
</tr>
<tr>
<td>Kapi İlköğretim Okulu</td>
<td></td>
</tr>
<tr>
<td>Location Description</td>
<td>Coordinates</td>
</tr>
<tr>
<td>----------------------</td>
<td>--------------</td>
</tr>
<tr>
<td>Özgür Yurttas Dernegi Hasirli Mahallesi (Free association of citizens, Hasirli).</td>
<td>37°54'32.3 040°14'30.4</td>
</tr>
<tr>
<td>Hole of 2,90 meters with 1 m depth in the the garden</td>
<td>37°54'32.3 040°14'30.4</td>
</tr>
<tr>
<td>Could be a buried gas tank set on fire to destroy the surroundings. A splinter stuck in a trunk at ground level and shrapnel found nearby.</td>
<td></td>
</tr>
<tr>
<td>Impact on the rear wall of a garage</td>
<td>37°54'33.6 040°14'31.4</td>
</tr>
<tr>
<td>On the other side of the wall (basalt) were 16 persons. The bullet could not pierce basalt but the plaster felt in the kitchen on the other side of the wall upon impact</td>
<td></td>
</tr>
<tr>
<td>House</td>
<td>37°54'34.5 040°14'29.1</td>
</tr>
<tr>
<td>It was not possible to assess from inside</td>
<td></td>
</tr>
<tr>
<td>Impact of 100 mm the occupant, an old lady, was safe because she was in the hospital</td>
<td></td>
</tr>
<tr>
<td>House</td>
<td>37°54'35.2 040°14'26.2</td>
</tr>
<tr>
<td>Impact of explosive device, Perforation but residents had taken refuge in the back rooms.</td>
<td></td>
</tr>
<tr>
<td>Location</td>
<td>Coordinates</td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td>---------------</td>
</tr>
<tr>
<td>Burnt room in 1 floor</td>
<td>37°54’37.1 040°14’25.6</td>
</tr>
<tr>
<td>House at T crossroads</td>
<td>37°54’41.0 040°14’27.9</td>
</tr>
<tr>
<td>Kursunlu camii Fati Pacha</td>
<td>37°54’43.0 040°14’29.4</td>
</tr>
<tr>
<td>Passage (previously blocked by a barricade)</td>
<td>37°54’44.5 040°14’30.2</td>
</tr>
<tr>
<td>A wall riddled of bullets</td>
<td></td>
</tr>
</tbody>
</table>

**Damage causes**

- The analysis of impacts on buildings reveals that the weapons used were of the following caliber:
- NATO 5.56 (which is confirmed by the use of casings found on the roof of a house) See photo D11
• 7 to 8 mm caliber (military weapons)
• projectile exploding when impacting (sometimes piercing a metal door or house wall) probably by a rifle grenade launcher or rocket launcher (see picture D3, D8, D9).

The fire that destroyed the building of the Free Association of Citizens, neighborhood Hasirli (D5a, 5b, 5c) is the result of small arms fire and piercing projectiles. According to testimonies collected on the spot, the men entered the building in order to set fire to the building. The D10 dwelling house caught fire because of its proximity to a vacant house which had been deliberately set on fire by the security forces, according to testimonies gathered on site.

It is difficult to attribute all of the impact to the actions of Turkish security forces as testimonies from independent journalists show that Kalashnikovs are used by PKK fighters, in Cizre for example (Le Monde 31 July 2015). Also, tangential impact on the walls indicate fire from crossing directions or that the same camp returned and fired in both directions, or that two opposing camps shot at each other. This point seems to be the case with two hand-dug holes atop the school wall Mardin Kapi İlköğretim Okulu (see D4a) which, according to several witnesses, was used for security force snipers that received 7 small arms impacts in an obvious attempt against sniping. It could also be fighting that occurred at different times. Finally, the fighters have taken care to remove the cases that would have facilitated identification of the origin of firing.

However, ammunition used (including the 5.56 NATO); the fact that the impacts are most often perpendicular to walls and doors and reveal that the fire was deliberately turned towards residential houses from the street, and the photographic evidence available on the Internet show the reality of the use of weapons of war against private or public buildings inhabited by civilians.

The trace of a violent explosion has no clear origin. This is a crater of 2.90 m diameter on the ground near the trees in the garden between a school (Mardin Kapi İlköğretim Okulu) and the building of Özgür Yurttas Derneği Hasirli Mah. A metallic shrapnel is driven into the nearby tree (see D6), another was found nearby (see D6a). Testimonies collected on the spot indicate the explosion of a gas cylinder in order to damage nearby buildings. The hypothesis of an explosive device to be triggered at the fighter’s passage is not to be excluded. The surrounding buildings do not seem to have specifically suffered from the explosion.

Finally, note, a light weapons strafing at a blank wall that does not have a detectable "military" objective. This is a likely shooting for "communication" to signify a disagreement with graffiti (D14).
Silvan damage assessment

On Monday afternoon, 26 October 2015, the EAF team was received in the town hall of Silvan then accompanied by a representative of the municipality to the crucial part of destruction registered in the city according to the local representative.

General appearance

In this old urban area with winding streets, the rich heritage is linked to an apparently intact castle. Rubble and barricades were still in place. Shooting waste (cases) have generally gone but the remnants of unexploded devices remain accessible and safe building implementation was not carried out. Residents and children were normally walking and playing in the street. Few people in arms were visible and at the time of the visit were being interviewed by a European TV channel. Security forces were not visible. Projectile impact and fire traces were not removed.

Route tracking

The map below localizes the circuit followed during the evaluation in accordance with the EAF team’s request. Landmarks were GPS-localized, and numbered. The number corresponds to the photo (sometimes several photos) taken to illustrate the nature of the damage.
Map 3: Localization of sites assessed in a neighborhood of Silvan.
## Observations analysis

The table below provides main comments and describes the GPS localization for each site, the GPS number corresponding to the photo and presented in the Annex.

The column "liveability" is further elaborated in the rightmost column with descriptions of the intensity of damage to the building.

Note that for Silvan, it is possible to use "street view" by Google Earth to view the status of the buildings in 2015, i.e. before curfews.

Among the sites visited, and where we have been able to enter, three (photos S1, S2 and S3) are placed in the red category (Heavy rehabilitation or reconstruction is needed). The other buildings require consistent work (light and dark green) with the presence of the usual occupants or temporarily incompatible (orange) with the presence of the usual occupants, at least in the rooms where works are under way. Without having precisely identified them, the number of uninhabitable houses without heavy work amounts to several dozen.

Note that the community health center and family center, n°4, housed in the same building were the subject of some automatic weapons fire. Their windows were also smashed. These health centers were closed during early incidents and so remained as we passed by.

Of the three sites visited during the mission, Silvan is the most severely affected as far as building damage is concerned.

<table>
<thead>
<tr>
<th>SILVAN Building Damaged Assessment (BDA)</th>
<th>(Mescit, Tekel, Konak Neighbourhoods)</th>
</tr>
</thead>
<tbody>
<tr>
<td>PLACE</td>
<td>NORTH</td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
</tr>
</tbody>
</table>
| Adjacent houses | 38°08'22.5 | 041°00'29.0 | S1a | S1b, S1c | Previous state 07/2015 available on street view  
Firings with shells (tanks ?)  
House to be repaired before living in it | Simple operations are necessary and the family can remain in |
<table>
<thead>
<tr>
<th>Property</th>
<th>Previous State</th>
<th>Repair Needed</th>
</tr>
</thead>
<tbody>
<tr>
<td>House</td>
<td>Previous state 07/2015 available on street view, Systematic large caliber shots at the roof base, House to be repaired before living in it.</td>
<td></td>
</tr>
<tr>
<td>Reinforced concrete entrance portal of a six storey-building</td>
<td>Previous state 07/2015 available on street view, Reinforced concrete pole base destroyed by a large caliber direct blow, House to be repaired before living in it.</td>
<td></td>
</tr>
<tr>
<td>Parapet roof of a 4 storey-building</td>
<td>Previous state 07/2015 available on street view, Methodical shots at the parapet limit to neutralize the roof.</td>
<td></td>
</tr>
<tr>
<td>Houses uninhabitable without major repair</td>
<td>Previous state 07/2015 available on street view, Shootings with big guns.</td>
<td></td>
</tr>
<tr>
<td>Location</td>
<td>Coordinates</td>
<td>Notes</td>
</tr>
<tr>
<td>----------------</td>
<td>---------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Pole broken by direct (tank?) shells</td>
<td>38°08'23.2, 041°00'25.0</td>
<td></td>
</tr>
<tr>
<td>Pole damaged by direct (tank?) shells</td>
<td>38°08'21.3, 041°00'21.1</td>
<td></td>
</tr>
<tr>
<td>Health center n°4</td>
<td>38°08'15.8, 041°00'22.1, S6</td>
<td>Closed since the first fighting Ten holes, many broken windows</td>
</tr>
<tr>
<td>Mosque</td>
<td>38°08'16.5, 041°00'36.3, OK</td>
<td>A gentleman asks that we find that it is unhurt. It's the case.</td>
</tr>
</tbody>
</table>

**Damage causes**

The analysis of impacts on buildings reveals that the weapons used were of the following calibers:

- 7 to 8 mm caliber (military weapons)
- 12 to 15mm caliber - Heavy machine guns (see S4)
- projectile exploding when impacting (sometimes piercing a metal door or house wall) and probably launched by rifle grenade launcher or rocket launcher (see S5b).
- projectile exploding when impacting (sometimes piercing a metal door or house wall) and probably fired by tanks (see S1c, S2, S3)
It is difficult to attribute all of the impact to the actions of the Turkish security forces as testimonies from independent journalists show that Kalashnikovs are used by PKK fighters in Cizre for example (Le Monde 31 July 2015). Moreover, tangential impacts on the walls indicate fire from crossing directions or that the same camp returned and has fired in both directions, or that two opposing camps shot at each other. It could also be fighting that occurred at different times. Finally, the fighters have taken care to remove the cases that would have facilitated identification of the origin of firing.

However, ammunition used (including tank shells); the fact that the impacts are most often perpendicular to walls and doors and reveal that the fire was deliberately turned towards residential houses from the street, and the photographic evidence available on the Internet show the reality of the use of war weapons against private or public buildings inhabited by civilians.
Damage assessment in Cizre

On Tuesday, 27 October 2015, the team met the vice mayor of Cizre and a representative of the municipality to assess what corresponds to the crucial part of destruction registered in the city according to the local representatives.

General appearance

In this seemingly poor neighborhood, the straight streets record the biggest part of the destructions, winding streets are less affected.

Some repairs have been carried out to restore the walls but almost all of the projectile impacts and observable traces remain. Rubble and barricades were still in place. Shooting waste (cases) have generally gone but the remnants of unexploded devices remain accessible. Residents and children normally walk and play in the street and security forces are not visible.

Some repairs have been carried out to restore the walls but almost all of projectile impacts and observable traces remain.

Route tracking

The map below localizes the circuit followed by the team, as per their request, during the evaluation. Landmarks were GPS-localized, and numbered. The number corresponds to the photo (sometimes several photos) taken to illustrate the nature of the damage.
Map 4: Localization of sites assessed in a neighborhood of Cizre.
Observations analysis

The table below provides main comments and describes the GPS localization for each site, the number of the corresponding photo as presented in the Annex.

The column "liveability" is further elaborated in the rightmost column with a description of the intensity of damages to the building.

Among the sites visited, and where we have been able to penetrate, only one (CS) is stored in the red category (*Heavy rehabilitation or reconstruction is needed*). The other buildings require consistent work (light and dark green) with the presence of the usual occupants or temporarily compatible (orange) with the presence of the usual occupants, at least in the rooms where works are under way.

Note that no building targeted and evaluated is a public building.

<table>
<thead>
<tr>
<th>CIZRE Building Damaged Assessment (BDA)</th>
<th>(Nur neighbourhood)</th>
</tr>
</thead>
<tbody>
<tr>
<td>PLACE</td>
<td>NORTH</td>
</tr>
<tr>
<td>HDP building</td>
<td>37°20’05.64</td>
</tr>
<tr>
<td>Entry of the barricades street</td>
<td>37°20’08.4</td>
</tr>
<tr>
<td>No.</td>
<td>Coordinates</td>
</tr>
<tr>
<td>-----</td>
<td>-------------</td>
</tr>
<tr>
<td>N°21</td>
<td>37°20'12.8</td>
</tr>
<tr>
<td></td>
<td>37°20'13.15</td>
</tr>
<tr>
<td>Red house caught on fire on the ground floor</td>
<td>37°20'11.9</td>
</tr>
<tr>
<td>House completely burned Kupami Sokagi</td>
<td>37°20'10.7</td>
</tr>
<tr>
<td>Door 18</td>
<td></td>
</tr>
<tr>
<td>Parapet</td>
<td></td>
</tr>
</tbody>
</table>
Damages causes

The analysis of impacts on buildings reveals that the weapons used were of the following calibers:

- 7 to 8 mm caliber (military weapons)
- 12 to 15mm caliber - Heavy machine guns (see C3b)
- projectile exploding when impacting (sometimes piercing a metal door or house wall) and probably launched by rifle grenade launcher or rocket launcher (see C4a).
- projectile exploding when impacting (sometimes piercing a metal door or house wall) and probably fired by tanks (see C3a, C5)

It is difficult to attribute the full impact to the actions of the Turkish security forces as testimonies from independent journalists show that Kalashnikovs are used by PKK fighters in Cizre for example (Le Monde 31 July 2015). Moreover, tangential impacts on the walls indicate fire from crossing directions or that the same camp returned and has fired in both directions, or that two opposing camps shot at each other. It could also be fighting that occurred at different times. Finally, the fighters have taken care to remove the cases that would have facilitated identification of the origin of firing.

However, ammunition used (including tank shells); the fact that the impacts are most often perpendicular to walls and doors (C6) and reveal that the fire was deliberately turned towards residential houses from the street, and the photographic evidence available on the Internet show the reality of the use of war weapons against private or public buildings inhabited by civilians.
Conclusion

Damage to buildings by small arms fire and heavy weapons during curfews imposed by the Turkish government authorities are numerous in the sites visited by the EAF team in Diyarbakir, Silvan and Cizre. This damage is concentrated in certain neighborhoods and within neighborhoods in some streets and particular places.

Among the sites visited, and where the team was able to penetrate, a color code was established by EAF to categorize liveability levels (red: people must leave during a reconstruction phase; orange: residents must temporarily leave some rooms during work, and green: work is necessary but people can stay in the building). We had few buildings classified in the red category in Sur (Diyarbakir) and Nur (Cizre). The observed destructions are heavier (tens in red category) in Silvan. Other assessed buildings require consistent work (light and dark green) with the presence of the usual occupants or temporarily not compatible (orange) with the presence of the usual occupants, at least in the rooms where works are under way.

Damage mainly affect homes (detached houses and apartment buildings) many of which were, in the words of the people, occupied at the time of the fight. The death toll (heavy, according to both parties) is not yet finalized, but many families have owed their survival to an escape through a wall pierced at the last second, to a shelter in a room placed opposite the street, to escape.

In Sur, the cultural buildings, a school and a community center were damaged, in Silvan a health center was hit. The nature of firings (very short range, shooting through metal doors and walls not always able to stop the heavy arms ammunition and tanks shells), the buildings targeted and the weapons used, create a doubt on the point that every precaution was taken so that civilian deaths had been avoided.
DAMAGE ASSESSMENT REPORT

CULTURAL HERITAGE
DAMAGE ASSESSMENT REPORT
ON SUR, DIYARBAKIR

AFTERMATH of the ARMED CONFLICT

Diyarbakır Metropolitan Municipality

30th of March, 2016
World Cultural Heritage in Sur

Since it is located in a transition area between Eastern Anatolia and Mesopotamia plains, Diyarbakır has been the heart of caravan routes since ancient times up until today. Diyarbakır Fortress and the city are rare examples that could survive until 21st century, at the same time, symbolize development of the urban history as well as all phases of historical heritage. The first settlement in the city took place at Amida mounds in İçkale (Inner Castle) during 5000 BC. Topographical characteristics of this district have engendered an effective self-defence environment for the people that resulted in more and more settlements and higher population density across time. The first structure functioning as a fortress was built around 3000 BC by Hurrians domineering the region in that era.

Diyarbakır Fortress and Hevsel Gardens landscape managed to preserve its historical value for thousands of years thanks to its geo-strategical location that is the intersection area of the west and the east. The city not only preserved different cultures but also inscribed them as its identity. Since its geo-political significance, the city that has been considered by various civilisations and states as a regional capital as it is evident in the history of Persian, Roman, Sassanid, Byzantine and Islamic empires. Thus the city is a world heritage with its’ multi-lingual, multi-cultural and multi-layered characteristics. Within the archaeological site, genuine examples of civilian architecture, mosques, churches as well as inns, hammams (public baths) can be seen all together as cultural assets of Sur. In total, there are 595 registered historical buildings of which 147 can be categorized as memorial and 448 civil architecture examples.
Suriçi district as a whole, including İçkale was registered as “Diyarbakır Urban Archeological Site” in 1988. Since the first master plan to protect this area could not be functional, a new draft of the master plan was prepared and put into action in 2012. Following adoption of the new master plan, Diyarbakır Metropolitan Municipality started to work for recognition of Diyarbakır Fortress and Hevsel Gardens as world heritage by the UNESCO as of 2012. In parallel to this, “Site Management Plan” was prepared with participation of related institutions, NGOS, scholars and mukhtars.

Site Management Plan was conveyed to World Heritage Center in August 2014. During 39th meeting that took place in 4th of July, 2014, World Heritage Center approved Diyarbakır Fortress and Hevsel Gardens as a cultural landscape that is the world heritage. Diyarbakır Fortress, İçkale, Anzele Water Body and Hevsel Gardens are considered as the heritage zone while Suriçi and Tigris Valley area were registered as the buffer area. Since that date, in addition to national laws in Turkey, international agreements signed by Turkey as well accepted the responsibility of protecting the Suriçi buffer area.

Management site is under protection of a series international laws as well as by Cultural and Natural Heritage Protection Act no. 2863 in Turkish constitution. These international agreements signed by Turkey as well are: UNESCO Universal Declaration on Cultural Diversity (2001), The Convention for the Safeguarding of Intangible Cultural Heritage (Paris, 2003), Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 1972), Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954), Venice Charter (1964) and The Declaration of Amsterdam (1975).

Any damage in Suriçi would mean losing prestige on international arena, but more importantly, that means losing a world heritage bestowed by different civilisations and any devastation in Sur is irreversible.
Armed Conflict in Sur

Including Diyarbakır Fortress and Hevsel Gardens (registered as cultural heritage areas) and Sur district (registered as buffer area), Governor’s Office declared curfew in this zone for 6 times in 6 neighbourhoods (Cevat Paşa, Dabanoğlu, Fatih Paşa, Hasan, Cemal Yılmaz and Savaş neighbourhoods) on following dates: 06.09.2015, 13.09.2015, 10.10.2015 - 13.10.2015, 28.11.2015 - 29.11.2015, 02.12.2015 - 10.12.2015 and 11.12.2015. The last one still continues as of today. Another curfew declaration covered 5 more neighbourhoods (Ziya Gökalp, Süleyman Nazif, Abdaldede, Lalebey ve Alipşa) in Sur district that went into action during 27.01.2016 – 03.02.2016 period. During curfew process, due to armed clashes and the use of heavy weaponry in those above mentioned neighbourhoods, we diagnosed serious level of devastation in genuine urban texture of Sur district and in registered historical buildings located in the urban archeological site.

Experts from Monitoring and Investigation Unit of Site Management Directorate visited Cevat Paşa, Dabanoğlu, Fatih Paşa, Hasan, Cemal Yılmaz ve Savaş neighbourhoods in listed dates (15.09.2016 - 16.09.2015, 15.10.2016-20.10.2015, 11.12.2015) and prepared reports after examinations of damage on the ground. During curfews which still continues for more than 3 months since 11.12.2015, Monitoring and Investigation Unit archived photos and footages released by national media and official authorities which evidence the extent of damage in those above-mentioned neighbourhoods. All related reports prepared by the unit were presented to the attention of Turkish Culture and Tourism Ministry, Turkish National Commission For UNESCO, Turkish National Commission For ICOMOS, Turkish National Commission For ICORP with the demand for inclusion of Directorate of Site Management in all assessment, rehabilitation and adjustment processes.

Findings of Reports:

Kurşunlu Mosque, which is a registered intangible cultural heritage located in Fatihpaşa neighbourhood, was damaged irrevocably in northern front walls as well as its’ stoop pillars located within the mosque. A fire outbreak took place within the sanctuary and distortions in walls, decorations and ornaments happened as a result of the fire. Moreover, the fountain of the mosque that was reconstructed later on is now totally destroyed (Photos 1 & 2).

Sheikh Muhattar Mosque, that is quite well-known with its Minaret on the Four-Pillars is among cultural assets damaged during armed clashes. Two of four carrier pillars of the minaret were targeted by heavy weaponry and carrier lintels of the minaret were also damaged as it is evident in photos (Photo 3). Moreover, visual evidence also shows that walls of the mosque were partially destructed to facilitate entrance of armoured vehicles into the street (Photo 4). With the same pretext, registered historical shops were destructed which are located at Yeni Kapi Street which adjoin the biggest Armenian church in the Middle East, Saint Giragos and Chaldean Church next to it and thus historical texture of the street was also destroyed too (Photo 4).
One of 7 public baths/hamams in Suriçi which could survive up until today, Pasha Hamam, firstly damaged in the early days of armed clashes. Then photos released afterwards showed that cooling section of the hamam was totally destructed as a result of a fire outbreak. (Photo 5).

Another registered historical building, an example of traditional civil architecture, turned into Mehmed Uzun Museum House by Diyarbakir Metropolitan Municipality was partially destructed, according to photos taken from sky. Amongst the part destructed, there is also kabaltı (street veil) section, which represents one of rare examples of traditional street texture of Diyarbakır which enabling pedestrians to walk under the physical structure. Furthermore, it is also detected that a series of other historical civil architecture examples were partially or totally destructed. As a result of devastations, the area characterised as “Urban Archeological Site” has lost its’ unique street and physical structure fabric in a way that cannot be restored (Photo 6).

Armed clashes which emerged after curfews and blockades have caused serious damages in Suriçi Urban Archeological Site in all respects. Besides the damage on architecturally valuable structures, it has also caused rupture of social and authentic life cycle in this district. Curfews causing forced migration of people living in the area also resulted in disruption of handicraft production and related commercial activities, which is a tradition that has survived for thousands of years (App. 1- Photo 7). According to assessment reports by the Monitoring and Investigation Unit, as a result of devastation and destructions, large volumes of ruins were piled up within the urban archaeological site and those ruins also include physical parts of registered historical buildings.

In order to not to lose architectural elements and materials which came out from demolitions, an examination on the field must be conducted that should be followed by further works to preserve unique construction materials on their original locations. All future endeavours must have a participatory program and perspective of related projects must be aware of the fact that a thousands-year-old world heritage city is at stake. Nevertheless, Directorate of Cultural Landscape Site Management and related municipal bodies are not included into the process of rehabilitation by the central government. Nonetheless, Directorate of Environmental Protection (Diyarbakır Metropolitan Municipality) officially reported that the Culture and Tourism Ministry formed a commission with local institutions and extracts ruins without any examination of demolitions and those extractions are removed to an area that is not officially a dump site (App. 2). Since Suriçi region is registered as a buffer area of World Heritage Site, according to all related national and international laws, any works carried out in the area must collaborate with Directorate of Diyarbakır Fortress and Hevsel Gardens Cultural Landscape Site Management for the sake of coordination.
Decree on Expropriation of Sur

After armed conflicts ended, Council of Ministers decided to expropriate 6292 of 7714 parcels available in Suriçi with relying on Expropriation Law no. 2942 on 21st of March, 2016 (App. 3). According to this decree, 82 percent of all parcels available in Sur will be expropriated. Remaining 18 percent of parcels in Sur either belong to TOKİ (Housing Development Administration of Turkey) or already owned by State Treasury. Overall, at the end of this process, every parcel in Suriçi will be turned into public property (App. 4).

Sur is one of rare cities in which human history is embedded in. Traditional manufacture and commerce, neighbourhood culture that relies on solidarity and spirit of sharing along with its’ multi-cultural, multi-lingual and multi-religious structure make Sur a unique historical living space. In order to develop Suriçi in a way considering the balance of protection and utilisation, a series of projects aiming at developing tourism were put forth and many of historical buildings were restored with collaboration of municipalities, civil entrepreneurs and public enterprises. For instance: *Cemil Paşa Mansion* was renovated then turned into a museum for passing urban historical culture to next generations, a group of historical buildings in Íçkale were restored and turned into Archeology Museum, Hasan Pasha Inn, Sülüklü Inn and some other civil architecture buildings were revitalised as cafes and restaurants, Saint Gragos Church was restored then opened for worship and visits. With all these news developments, traditional architectural fabric of the historical city invigorated along with commercial, social and cultural life in Sur.

Nevertheless, collective memory of Sur formed within thousands of years will face a rupture due to changes in property ownership and demographic structure if expropriation decision taken after the end of armed conflicts will be implemented.

Those registered historical buildings damaged seriously during armed conflicts must be restored in compliance with historical urban fabric and with relying on scientific principles as well as in a participatory manner including all parties in the city. nevertheless, without any assessment and reporting, efforts for extracting ruins from Suriçi still continues as of today. Without any diagnosis and reportage of demolitions emerged during the armed conflict, efforts now continuing in urban archeological site to remove ruins show the extent of devastation that is irreversible (Photos 8-9).

30th of March, 2016
PHOTO 1 - KURŞUNLU MOSQUE

PHOTO 2 - COURTYARD OF KURŞUNLU MOSQUE
PHOTO 3- The MINARET ON FOUR PILLARS (ON THE LEFT)

PHOTO 4- THE STREET OF ‘THE MINARET ON FOUR PILLARS'
PHOTO 5- HISTORICAL PASHA HAMAM

PHOTO 6- HASIRLI NEIGHBORHOOD- YIKIKAYA STREET
PHOTO 7- SARAYKAPI -DİREKHANE STREET

PHOTO 8- DESTRUCTION IN SUR
PHOTO 9- DESSTRUCTION IN SUR

PHOTO 10- DESSTRUCTION IN SUR
PHOTO 11- ARMENIAN CATHOLIC CHURCH - BEFORE/AFTER
PHOTO 12- DEVASTATION OF STREET TEXTURE

PHOTO 13- DEVASTATION OF HISTORICAL BUILDINGS
PHOTO 14- DEVASTATION OF SUR

PHOTO 15- DEVASTATION OF HISTORICAL BUILDINGS
PHOTO 16- CONCRETES PLACED ON DIYARBAKIR FORTRESS BY SECURITY FORCES
PHOTO 17- CEMIL PASHA MANSION IN SUR RENOVATED AND TURNED INTO CITY MUSEUM BY DIYARBAKIR METROPOLITAN MUNICIPALITY
PHOTO 18 - SÜLÜKLÜ INN, BEFORE/AFTER
Appendix 1- Information of Displaced People in Sur District and the Support Provided by Diyarbakır Metropolitan Municipality

Information on forcibly displaced People as a result of the curfew in the Sur district of the Diyarbakır province

Status 01.03.2016 – Curfews have started in end of August 2015, since then six times a curfew has been declared, the ongoing curfew is valid since 1st of December 2016.

The Diyarbakır Metropolitan Municipality (DBB) has created a coordination with the district municipalities Yenişehir, Bağlar, Kayapınar and Sur, the Rojava Aid and Solidarity Association and several NGO’s in order to organize aid for the displaced people from the Sur district.

Number of supported displaced families: 4758
Number of supported families in the Yenişehir district: 1208
Number of supported families in the Bağlar district: 1390
Number of supported families in the Kayapınar district: 860
Number of supported families in the Sur district: 1300
(some of the displaced people changed their location from the eastern parts, which are mainly affected by the curfew and clashes, to the western parts of the Sur district)

Number of total supported people: 30,000

Estimated total number of displaced people from the Sur district: 45,000
- Around 15,000 people have not yet applied to the DBB and the four district municipalities or live in villages around the city or in other districts of the Diyarbakır province.
- The DBB registers digitally all families which get regularly aid.
- 95% of the population in the Sur district is poor.

It is estimated that two thirds of the displaced people (mostly two-three families together) have rented new apartments in the other parts of the city.
One third of the displaced people live in apartments of relatives or friends, hereby mostly a family is distributed in several apartments.

It is supposed that around 70% of the buildings in the eastern part of the old city (six neighborhoods under curfew) have been destroyed fully or partly by the operation of the police and military.

The organized aid consist of: Dry Food, Blanket and Quilts, Kitchen equipment, Cleaning supplies, Health supplies, Children food and health supplies.
Additionally in compliance with the DBB private persons support families with cash in order to pay the rent.
The aid packages are prepared for the need of a family for the period of a month.
Appendix 2- Official Report by Diyarbakır Metropolitan Municipality That Rubbles Being Taken Out of Historical Sur District Without Any Assessment
Appendix 3- Official Decree on Expropriation of Sur by Turkish State

Karar Sayısı: 2016/8659


Recep Tayyip ERDOĞAN
CUMHURBAŞKANI

Ahmet DAVUTOĞLU
Başbakan

N. KURTULMUŞ
Başbakan Yardımcısı

M. ŞİMŞEK
Başbakan Yardımcısı

Y. AKDOĞAN
Başbakan Yardımcısı

Y. T. TÜREŞ
Başbakan Yardımcısı

L. ELVAN
Adalet Bakanlığı

B. BOZDAĞ
Aile ve Sosyal Politikalar Bakanlığı

S. RAMAZANOĞLU
Avrupa Birliği Bakanlığı

V. BOZKIR

F. İŞİK
Bilim, Sanayi ve Teknoloji Bakanlığı

S. SOYLU
Çalışma ve Sosyal Güvenlik Bakanlığı

F. G. SARI
Çevre ve Şehircilik Bakanlığı

M. ÇAVUŞOĞLU
Dojileri Bakanlığı

M. ELİTAŞ
Ekonomi Bakanlığı

B. ALBAYRAK
Enerji ve Tabii Kaynaklar Bakanlığı

A. Ç. KILIÇ
Gençlik ve Spor Bakanlığı

F. ÇELİK
Güda, Tarsus ve Hayvanlilik Bakanlığı

M. TÜFENKCI
Gümrük ve Ticaret Bakanlığı

E. ALA
İçişleri Bakanlığı

C. YILMAZ
Kalkınma Bakanlığı

M. ÖNAL
Kültür ve Turizm Bakanlığı

N. AĞBAL
Maliye Bakanlığı

N. AVCI
MİR Eğitim Bakanlığı

I. YILMAZ
MİR Savunma Bakanlığı

V. EROĞLU
Orman ve Su İşleri Bakanlığı

M. MÜEZZİNOĞLU
Sağlık Bakanlığı

B. YILDIRIM
Ulaştırma, Denizcilik ve Havacılık Bakanlığı
Appendix 4- Expropriation Map of Sur

(Red: Recently Expropriated / Blue: Already Owned by State Treasury)
The Report Prepared by:

Nevin SOYUKAYA / Archeologist
*Directorate of Diyarbakır Fortress and Heusel Gardens*
*Cultural Landscape Site Management*

Orhan BALSAK / Architect
*Director of KUDEB (Protection, Implementation and Inspection Unit)*

V. Sermed AZİZOĞLU / Architect
*KUDEB (Protection, Implementation and Inspection Unit)*

Metin KAHRAMAN / City Planner
*Directorate of Diyarbakır Fortress and Heusel Gardens*
*Cultural Landscape Site Management*

To get further information please contact with:

International Relations Office, Diyarbakır Metropolitan Municipality

international@diyarbakir.bel.tr

+904122232346
Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?

On 8 December 2016, in the case of *Zihni v. Turkey*, (App. No. 59061/16) the European Court of Human Rights (hereinafter “the Court”) rejected a second application arising out of alleged violations in Turkey in the aftermath of the attempted coup on 15 July 2016.

The Court’s dismissal of the complaint for failure to exhaust available domestic remedies (Article 35 of the European Convention on Human Rights – hereinafter “the Convention”) is consistent with its 17 November 2016 decision in the case of *Mercan v. Turkey* (App. No. 56511/16), so it came as no surprise. In the *Mercan* case, the Court similarly dismissed the application, which concerned the unlawfulness, length and conditions of a judge’s pre-trial detention in the absence of any evidence.

In *Zihni v. Turkey*, the applicant was suspended from his duties as a school’s deputy headmaster on 25 July 2016 and subsequently dismissed from public service, together with 50,874 other civil servants, by the list appended to the *Decree no. 672* on 1 September 2016, on account of his alleged “membership of, affiliation, link or connection” to terrorist organizations.

The application before the Court in *Zihni* cited numerous rights violations: (1) lack of access to a court (Article 6, Article 13 and Article 15); (2) no punishment without law (Article 7); (3) violation of the right to respect for his family life (Article 8); and (4) discrimination on account of his dismissal (Article 14).

While the basis of the Court’s dismissal in each case articulates a settled rule for admissibility to the Court’s jurisdiction, both decisions ring hollow in the context of the so-called availability of domestic remedies in present-day Turkey. No doubt that the state of emergency casts these cases in a somewhat different light, but even under such circumstances the fundamental rights at issue in these cases are not novel to the Court. What the Court may have failed to appreciate is that these dismissals may effectively deprive the applicants of any meaningful justice whatsoever, by requiring that they first try to navigate the legal chaos in Turkey.

In *Zihni v. Turkey*, the applicant lodged his application without having first brought proceedings before the national courts including an individual application before the Turkish Constitutional Court (hereinafter “the TCC”). To explain his failure to do so, the applicant asserted that no effective remedies capable of allowing him to challenge his dismissal before the national courts were available since the measures taken by decree-law within the framework of the state of emergency would not be subject to appeal. He also claimed that the TCC was not in a position to reach an effective decision impartially, referring to a decision by the TCC on 9 August in which it decided to dismiss two of its members. Nevertheless, in the *Zihni* case, the Court ruled that (para.30) there were *no special circumstances* absolving the applicant from the obligation to exercise the domestic remedies available to him under Turkish law, namely an administrative action and an individual appeal to the Constitutional Court.

Yet, in the past, the Court, when assessing whether certain domestic remedies were effective, has examined the positions of the parties involved in great detail, also taking into account the reports and reactions of domestic institutions as well as international institutions. (*Salah Sheekh v. the Netherlands*, among many others). In both the *Mercan* and *Zihni* cases, however, the Court has failed to assess the actual – rather than theoretical – availability or accessibility of domestic remedies. Instead, without any further inquiry or accompanying analysis the Court simply accepted the accessibility to, and effectiveness of, domestic remedies in Turkey as fact. In light of recent events, it seems that the Court – by requiring these applicants to seek domestic remedies – is elevating form over substance, in effect depriving them of any realistic opportunity to seek meaningful justice.
In doing so, the Court has ignored the opinions and memoranda of the organs of the Council of Europe, and NGO reports. Thus, in a recent memorandum, the Council of Europe Commissioner for Human Rights noted that he was informed personally by the Turkish Minister of Justice that persons whose names are annexed to decrees are considered to be dismissed by a law, and therefore do not have a judicial remedy. The Commissioner also concludes that it would be a ‘significant challenge’ for Turkey to prove that:

“even in a context where close to 3,500 members of the judiciary have been dismissed and thousands imprisoned, Turkish courts can still provide effective remedies for potential human rights violations caused by arbitrary measures taken by the executive or the administration, or even by the judiciary itself.”

Later on, in its recent opinion of 12 December, the Council of Europe’s Venice Commission regrets that the dismissals (in the appended lists) “apparently” are not subject to judicial review by Turkish ordinary courts. It is also meaningful that the Venice Commission discusses (paras.195-216) that even “the accessibility of the judicial review remains a matter of controversy”, let alone the effectiveness thereof.

As to effective access to a domestic remedy in the form of an administrative action, the Court notes that (para.24):

“In its judgment of 4 November 2016, the Supreme Administrative Court had examined an application for judicial review lodged by a judge who had been dismissed following a decision issued by the Supreme Council of Judges and Public Prosecutors under emergency legislative decree no. 667. Although the Supreme Administrative Court had found that it did not have jurisdiction to examine the merits of that application, it had remitted the case to the first-instance court, holding that it was primarily for the administrative courts to examine such applications.”

As regards to the question of whether administrative courts can be regarded as an effective remedy and afforded a reasonable prospect of success, the decision of Trabzon Administrative Court on 30 September might be in point. The Trabzon Court rejected a case concerning the dismissal of a schoolteacher in the state of emergency context in which it found that the decrees (Kanun Hükûmünde Kararnameler, KHK) are the functional equivalent of legislative actions (not administrative actions) and therefore, cannot be subjected to judicial review by administrative courts. Thus, while administrative courts are theoretically seemingly capable of providing an appropriate remedy, in practice, there is little if any chance of success.

With regard to the individual application mechanism of the TCC, the Court still views it as being effective and impartial. In both the Zihni and Mercan cases, the Court clearly stated that the arguments submitted by the applicants were insufficient to cast doubt on the effectiveness of the TCC, noting that the fears of the applicants as to the impartiality of the TCC’s judges (based on the dismissal decision) does not, prima facie, relieve an applicant of the obligation to lodge an application before that court.

The Court, however, has failed to elaborate this assertion. Rather it sufficed citing a number of judgements of the TCC, which predate the state of emergency decrees and the subsequent “hands off” decision of the TCC, in support of its position (e.g. a judgment of the TCC rendered on 25 February 2016 concerning journalists Erdem Gül and Can Dündar).

Is that a reasonable assessment by the Court? It is true that, starting in late 2014, the TCC has ruled in support of the fundamental rights and freedoms; but those decisions are unreliable predictors of how or whether the TCC would perform similarly meaningful legal review in assessing alleged rights violations in the context of state of emergency
decrees. Nor does it ensure impartiality in the face of the Turkish government’s crisis mentality that has led to far-reaching measures that disregard fundamental human rights.

Moreover, in its decision of 9 August, the TCC dismissed two of its members based solely on “the information from the social circle” and “the common conviction formed by the members of the TCC”. The relevant question for the Court then becomes: How can the TCC provide an effective remedy for massive dismissals when the same court dismissed its own members based entirely on ‘information’ and ‘conviction’ without verifiable evidence? Does this reasoning not cast substantial doubt on the impartiality and thus, the effectiveness of the TCC? These questions should have been clearly answered by the Court.

Also relevant is that on 12 October, the TCC rejected the appeals (here and here both in Turkish) seeking annulment of a number of provisions of the emergency decrees. The TCC ruled that it has no jurisdiction to review the constitutionality of emergency decrees (in abstracto) under Article 148 of the Turkish Constitution. This decision is acknowledged by the Court in Zihni case, where it states that (para.12):

“…the fact that the [Turkish] Constitutional Court had ruled on the constitutionality of a law, in the context of a challenge to constitutionality, did not prevent members of the public from lodging an individual appeal before that court against specific decisions taken in application of the provisions of that particular [decree] law.”

As the Court correctly points out, according to Article 148 § 3 of the Turkish Constitution, the TCC is competent to examine the implementation of emergency decrees through the individual application mechanism after exhaustion of the ordinary remedies. Now that the Supreme Administrative Court of Turkey has held that the first-instance administrative courts will examine the dismissals, the TCC will most likely reject, for non-exhaustion of ordinary legal remedies, the more than 60,000 currently pending cases arising from the emergency decrees since 15 July. If, as expected, the TCC refers those cases to the administrative courts, individual application mechanism to the TCC may well prove to be wholly ineffective. It will result in extraordinary delays that, judging from the Trabzon Court’s decision, will ultimately be of no avail, theoretically then permitting individual application to the TCC. In such a scenario, even under the most favourable circumstances, the TCC would be unable to provide appropriate remedies in a timely fashion.

In conclusion, the Court’s reasoning in Zihni and Mercan raises serious questions. Did the risk of a significant increase in the Court’s docket (with more than 3,000 cases are currently pending) influence the Court to adopt such a narrow approach? Without question, there is potential for a flood of applications to the Court from Turkey. Or did the larger context of a state of emergency influence the Court’s decision? Examination of case law deriving from the Convention reveals that the Court has steadily afforded a wide margin of appreciation to the presence of an emergency and to the nature and scope of the derogations necessary to avert it. It is possible that the Court would have interpreted the procedural constraints on access to justice differently if the application were not related to the measures taken in a state of emergency context.

Nonetheless, and leaving aside the legitimacy of the state of emergency measures in Turkey generally, the dismissals of Zihni and Mercan based on a failure to exhaust domestic remedies may be subject to criticism due to the uncritical assumptions implicit as to accessibility and availability of such remedies. It is an open question as to whether such domestic remedies are truly “effective and available” in today’s Turkey, a question that the Court has failed to answer.
The European Court of Human Rights (the ECtHR) has decided to communicate various complaints to the Turkish Government in the 34 applications listed below concerning the curfew measures taken in Turkey since August 2015 and has asked them to submit their observations. Some other complaints were declared inadmissible. The ECtHR’s ruling in the cases will be given at a later date.

The complaints which have been communicated are related, among other things, to allegations of: unlawful killings and failure to take steps to protect the right to life; ill-treatment; and, unlawful deprivation of liberty on account of some of the applicants’ confinement to their homes for extended periods. They rely on Article 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment) and Article 5 (right to liberty and security) of the European Convention on Human Rights. Some of the applicants also complain about the arrest and detention in prison of their legal representative and the Government’s alleged failure to comply with a number of interim measures under Rule 39 of the Rules of Court, in breach of Article 34 (right to individual application).

The ECtHR started receiving these 34 applications in December 2015, including more than 40 requests for interim measures from (or on behalf of) over 160 persons in the context of the curfews imposed by local governors in certain towns and villages of south-eastern Turkey (see also the press releases of 13 January 2016 and 5 February 2016). Most of the requests concerned incidents that had taken place in the towns of Cizre and Sur.

Notably, five of those requests for interim measures were subsequently accepted and the ECtHR indicated to the Turkish Government to take all measures within their powers to protect the lives and physical integrities of five injured applicants who were waiting to be taken to hospitals. Following the deaths of four of the applicants, allegedly because of the Government’s failure to comply with the interim measures to take them to hospital, and the taking into hospital of the fifth applicant, the ECtHR lifted the interim measures.

A further 43 persons in six of the applications, claiming to have been injured and trapped in the basements of three buildings in Cizre at the time of the introduction of their applications, lost their lives shortly afterwards, allegedly when the buildings in which they had taken refuge were bombed by members of the security forces. Relatives of some of those deceased persons expressed their wish to pursue the applications.

In the context of its examination of the requests for interim measures, the ECtHR decided to give priority treatment to the majority of these 34 applications in accordance with Rule 41 (order of dealing with cases) of the Rules of Court.

Abdullah Kaplan v. Turkey (no. 4159/16)  
Adem Tunc v. Turkey (no. 4552/16)  
Ahmet and Zeynep Tunc v. Turkey (no. 4133/16)  
Ahmet Tunc v. Turkey (no. 39419/16)  
Alpaydinci and Others v. Turkey (no. 10088/16)  
Altun v. Turkey (no. 4353/16)  
Balcal and Others v. Turkey (no. 8699/16)

1 In accordance with Rule 54 of the Rules of Court, a Chamber of seven judges may decide to bring to the attention of a Convention State’s Government that an application against that State is pending before the Court (the so-called “communications procedure”).
Bedri and Halime Duzgun v. Turkey (no. 901/16)
Caglak v. Turkey (no. 2200/16)
Cengiz Abis and Others v. Turkey (no. 10079/16)
Dagli and Others v. Turkey (no. 6990/16)
Dolan v. Turkey (no. 9414/16)
Erkanplan v. Turkey (no. 10085/16)
Eroglu v. Turkey (no. 478/16)
Gecim v. Turkey (no. 5332/16)
Gorgoz v. Turkey (no. 480/16)
Inan v. Turkey (no. 2105/16)
Irmak v. Turkey (no. 5628/16)
Karaman and Cicek v. Turkey (no. 6758/16)
Karaman v. Turkey (no. 5237/16)
Kaya v. Turkey (no. 9712/16)
Koc and Others v. Turkey (no. 8536/16)
Omer Elci v. Turkey (no. 63129/15)
Oncu v. Turkey (no. 4817/16)
Oran v. Turkey (no. 1905/16)
Paksuy v. Turkey (no. 3758/16)
Sariyildiz v. Turkey (no. 4684/16)
Seniha Surer and Others v. Turkey (no. 10073/16)
Sevikte v. Turkey (no. 2005/16)
Sultan and Suleyman Duzgun v. Turkey (no. 891/16)
Tunc and Yerbasan v. Turkey (no. 31542/16)
Uysal v. Turkey (no. 63133/15)
Vesek v. Turkey (no. 63138/15)
Yavuzel and Others v. Turkey (no. 5317/16)

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Press contacts
echrpressechrcoe.int | tel: +33 3 90 21 42 08
Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)
Denis Lambert (tel: + 33 3 90 21 41 09)
Inci Ertekin (tel: + 33 3 90 21 58 77)
George Stafford (tel: + 33 3 90 21 41 71)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.
A group of German lawmakers and rights activists on Monday filed a civil lawsuit against Turkish President Recep Tayyip Erdogan for alleged "war crimes" committed in ongoing military operations in the Kurdish populated southeast of the country.

Lawyers Britta Eder and Petra Dervishaj filed the more than 200-page document with Federal prosecutors in Berlin as "an ethical obligation to bring charges here in Germany against Turkey for war crimes." The complaint also mentions former prime minister Ahmet Davutoglu and other top officials from the government, military and police.

The accusations echo those of Turkey's Kurdish opposition and human rights groups, which have documented widespread abuses during months of counter-terror operations in southeast Turkey.

**Peace process broken**

Since a peace process and ceasefire broke down last year, several thousand soldiers and Kurdish militants have been killed, as well as more than 300 civilians caught between the warring parties.

In response to Kurdistan Workers' Party (PKK) militants occupying urban areas in the southeast, Turkish security forces used heavy handed tactics - including tanks and artillery - and open ended curfews to root out the rebels. More than 1.5 million people were impacted by the curfews, according to the Turkish Human Rights Foundation.

Ulla Jelpke, an MP from Germany's Left Party, said it was important to increase awareness among the public and government so that "in the future there will be much stronger and clearer protests against the actions of a NATO member against the Kurds and opposition."

**Cizre actions**

The lawsuit centers largely on
More than 6,000 buildings across the southeast have been destroyed in fighting, according to the government.

According to the complaint, in the first half of September last year 21 people were killed. Many were shot by security forces near their homes during a state of emergency in the city.

In another allegation, 178 people were killed between December 2015 and March 2016. The 178 deaths occurred during what has come to be known as the “basement massacre,” when Turkish security forces stormed three residential basements where civilians were hiding. The security forces are alleged to have set fire to the crowded basements, or shot and killed civilians before torching the corpses.

The Turkish government has refrained from investigating the massacres and vowed to continue to fight terrorism. Human rights organizations and the UN have called for investigations into collective punishment, destruction of property, torture, arbitrary arrest and killings.

**Turkish law for military immunity**

The lawsuit comes a week after the Turkish parliament passed a law giving military officers immunity from prosecution for any human rights abuses committed during counter-terrorism operations.

While in many ways symbolic, the lawsuit adds to growing list of contentious issues between Berlin and Ankara at a time Chancellor Angela Merkel is relying on Turkey to implement a migration deal with the EU.

Merkel faces increasing criticism at home for not taking a harder stance on Turkey over a crackdown on the press, human rights abuses and deterioration of democracy in the country. A German parliament Armenian genocide resolution passed earlier this month is also testing relations.

Walking on rubble

After more than three months of urban warfare, Turkish forces are pulling out of Diyarbakir, where they've been trying to eradicate militants linked to the Kurdistan Workers Party (PKK). On Monday, shopkeepers were seen sweeping up broken glass and reopening stores in areas once held under curfew, but fighting continues in six districts, which remain closed to the public.
Alleged war criminals in the Netherlands: Excluded from refugee protection, wanted by the prosecutor

Maarten P. Bolhuis and Joris van Wijk
Center for International Criminal Justice, Department of Criminal Law and Criminology, Faculty of Law, VU University, The Netherlands

Abstract
On the basis of Article 1F of the Refugee Convention, alleged perpetrators of international crimes can be excluded from refugee protection. This paper explains why the Netherlands – which is among the countries that apply Article 1F most actively – has, despite administrative commitment, so far successfully prosecuted only 4 out of approximately 800 excluded individuals. On the basis of an analysis of 1F files and interviews with policy makers, representatives from the National Prosecution Office and investigators, we identify the most relevant legal and practical challenges. Although domestic prosecution of suspects of international crimes is already complicated in itself, this article presents a number of additional factors that make prosecuting excluded persons even more challenging.

Keywords
1F exclusion clause, prosecution, universal jurisdiction, war crimes

Introduction
An important field of criminological studies emerging these days deals with the complexities of crime and crime control in a globalized world. In this body of literature authors typically discuss, and critically reflect on, (inter)national policy developments in the war on terror, immigration control, the fight against transnational (organized) crime and cybercrime (Aas, 2013; Jaishankar and Ronel, 2013; Mullard and Bankole, 2007; Pakes, 2012; Stumpf, 2006). Surprisingly little attention, however, has been given to
how law enforcement agencies and other institutional bodies in this increasingly glo-
balized world deal with (the threat of) possible war criminals, genocidaires and other
perpetrators of international crimes entering their territory. This lacuna is particularly
striking because, over the last decade, major legal and policy developments have taken
place in this regard and an increasing number of European and North American coun-
tries, in particular, in the context of so-called ‘no safe haven policies’ have been trying to
identify alleged perpetrators of these crimes and exclude them from refugee protection.1
Additionally, with the creation of the International Criminal Court in 2002, many coun-
tries have decided to prosecute the alleged perpetrators of war crimes, crimes against
humanity and genocide residing in their territory.2

If a person enters the European Union and ‘serious reasons for considering’ that he has
been involved in the commission of war crimes and crimes against humanity arise, Article
1F of the Refugee Convention can be invoked to exclude him from refugee protection.3
The European Council recited, in its Decision 2003/335/JHA of 8 May 2003, that:

Member States are to ensure that, where they receive information that a person who has applied
for a residence permit is suspected of having committed or participated in the commission of
genocide, crimes against humanity or war crimes, the relevant acts may be investigated, and, where justified, prosecuted in accordance with national law.

This article evaluates the extent to which the Netherlands has succeeded, to date, in
excluding and prosecuting the alleged perpetrators of international crimes. Our analysis
is based on a review of academic literature, policy documents and eight interviews with
experts, including four representatives from the Immigration and Naturalisation Service
(Immigratie en Naturalisatie Dienst, IND), two representatives from the National
Prosecution Office’s Department for International Crimes and two investigators from the
police’s International Crimes Unit (Team Internationale Misdrijven). Additionally, and
unique to this study, we will present data from a file analysis of all the exclusion deci-
sions in the Netherlands that were made between 2000 and 2010. As very few member
states disclose information on their ‘exclusion policy’, little knowledge exists about the
characteristics of this group. For most countries, for example, it is unclear what crimes
these perpetrators are typically believed to have committed, what level of responsibility
they are believed to have held and on what type of information the immigration authori-
ties have based their decision to exclude them. The information that is available is
incomplete, sketchy and dispersed. The file analysis enables us, for the first time, to
provide a systematic overview of the characteristics of this group and offer new insights
into the problematic relationship between the exclusion from refugee protection and the
prosecution of international crimes.

File analysis

At our request, the IND provided a list of 1498 file numbers of asylum seekers who,
according to its administrative system, were associated with Article 1F and had had their
asylum requests processed between January 2000 and November 2010. This list con-
tained a total of 67 nationalities; with 720 files, Afghan nationals constituted the biggest
group by far. With the file numbers in hand we gained access to the corresponding digitalized copies of the files in IND’s administrative system and identified files of individuals who had received a 1F decision (‘beschikking’) that was definite in the sense that it was not revoked or had not (yet) been successfully appealed at the moment of data collection (November 2010–February 2011). We identified 745 definite decisions, of which 448 related to Afghans and 297 to non-Afghans. Considering the heavy workload and anticipated homogeneity of the Afghan group, which will be explained further on, we decided to take a systematic sample \((n = 61)\) of the Afghan files. The 297 non-Afghan and 61 Afghan files were scored and analysed with the help of three research assistants.

The remaining 753 files were dismissed from our analysis for various reasons. The majority concerned relatives of 1F-excluded persons (442 cases). In some instances a 1F decision by the IND had been overruled in court or revoked in anticipation of a court decision (139 cases). In 160 cases IND had not (or not yet) come to a decision to exclude, or files were inaccurately labelled as ‘possible 1F files’ since no 1F lead whatsoever could be found. Finally, a limited number of 12 files were – owing to the fact that we analysed digitalized copies – incomplete or (partially) inaccessible.

Files of 1F-excluded persons typically contain hundreds of pages with a wide range of documents, ranging from extensive reports of the different asylum hearings and letters from legal representatives, to country reports from the Ministry of Foreign Affairs and non-governmental organizations (NGOs) and court files. The fact that information most relevant to the study was not always clearly listed in IND’s registration system often made scrolling through the large number of documents necessary. Coupled with the complexity of the files and the limitations of the registration system, this made determining the (then) current status of a decision both time consuming and at times difficult. Whenever information from the file analysis is used, reference will be made to the file codes used for internal communication such as ‘(J6)’ or ‘(C5)’.4

The application of 1F in the Netherlands

In the Netherlands, the applicability of Article 1F is considered within the context of the usual refugee status determination procedure. The Vreemdelingencirculaire (Aliens Manual) 2000 determined that the organization responsible for status determination is the IND. Since 2001, if any indications arise during an initial asylum hearing that Article 1F might be applicable, officers of the IND refer the case to a specialized ‘1F unit’. Current Dutch policy with regard to the application of Article 1F originates from a letter to parliament from the State Secretary of Justice of 28 November 1997,5 which mentions three guiding principles: Article 1F is to be interpreted restrictively; at the same time, the opportunities to apply it must be exploited to the utmost; and, finally, further consequences are to be connected to any exclusions made on the basis of 1F.

In line with the first principle, Dutch administrative courts have ruled that the arguments for applying Article 1F must meet high standards.6 Until 1998, 1F was indeed applied rarely: the State Secretary’s letter mentions that roughly 30 exclusion decisions were issued. Of those, the decision was appealed in 11 cases, in 4 of which the court upheld the decision.7 The State Secretary’s letter marked a change in attitude from a prioritization of the first principle to the second. After 1997, the number of invocations
increased rapidly: between 1997 and 2011, Article 1F was invoked against 810 persons, that is, an average of about 54 times a year. This seems a lot compared with other countries, although few states publish or even record the number of 1F decisions they issue. During a conference regarding exclusion policies in June 2011 in which 13 states participated, it transpired that, between 2006 and 2011, their ranking order in terms of the number of exclusion decisions, from high to low, was the UK, Canada, the US, France, the Netherlands, Germany, Belgium, Sweden, Norway, Australia, Denmark, Ireland and New Zealand. Although this suggests that the number of 1F exclusions in the Netherlands is probably not more than average, this picture is biased because most of the exclusion decisions were issued before 2006 (93 percent of the analysed decisions concerning Afghan nationals were issued before 2006; 79 percent of the decisions regarding non-Afghans were issued before 2006). Regarding the country of origin of the excluded persons, Figure 1 shows that the majority of excluded persons in the Netherlands came from Afghanistan (448 individuals), followed by Iraq (62), Angola (26), Congo (23), Sierra Leone (20), the former Yugoslavia (20), Turkey (18) and Iran (17).

Because Dutch courts lack competence over the ‘serious non-political crimes’ listed under sub (b) of Article 1F since they are, by definition, committed outside the Netherlands and, in principle, are not subject to universal jurisdiction, ideally the cases in which Article 1F(b) was applied are excluded from the analysis. It turns out that in most cases, however, both sub (a) and (b) are deemed applicable because most of the crimes listed under sub (a) are understood to constitute ‘serious non-political crimes’ under sub (b) as well (see Article 6.2.8. of the Dutch Aliens Manual 2000 C(2)). Therefore, we distinguished between cases in which 1F(a) is deemed applicable as opposed to cases in which it is not. Of the 297 definite decisions concerning non-Afghans, 1F(a) was deemed not applicable by the IND in 48 cases (16 percent). In relation to Afghans this was true in only 1 out of the 61 decisions in the sample (1.6 percent). In 3 cases, it was not clear from the file whether they belonged to the first or second category. These 52 cases were not included in the analysis that follows.

The interpretation of Article 1F in Dutch policy

Although 1F is seen to stand at the crossroads of criminal law and refugee law, it is important to note that assessments considering the possible application of Article 1F by the IND are made within the framework of administrative law. Concepts familiar in criminal law that strengthen the position of a criminal suspect, such as the presumption of innocence and the availability of defences, are absent or interpreted differently in refugee law. Discussing these differences in detail is outside the parameters of this article, but two elements stand out that need some elaboration in order to understand how 1F is interpreted in Dutch policy.

First, the ‘serious reasons for considering’ standard poses a lower threshold for assuming involvement in the crimes listed under 1F than the ‘beyond reasonable doubt’ threshold posed by criminal law in common law systems (UNHCR, 2003: 38). The serious reasons do not have to be substantiated with criminal evidence, but they have to be carefully motivated (UNHCR, 2003). Second, in order to establish whether there are ‘serious reasons’ to believe that someone has been involved in the crimes mentioned
in Article 1F, the IND applies the personal and knowing participation test, developed in Canadian jurisprudence. This test is used to assess whether an individual had, or should have had, knowledge of the crime that was committed, and whether he has personally participated in it. Knowledge of the crime is understood in such a way that membership of an organization that is, according to influential reporting, involved in the widespread or systematic commission of 1F crimes can be reason enough for establishing ‘knowing participation’, because it is deemed unlikely that members of the organization could remain unaware of such involvement.

Personal and knowing participation are also assumed if a person belongs to a category of persons that the Minister of Justice has determined falls within Article 1F, unless the applicant can show that his case represents a ‘significant exception’; here, the burden of proof is reversed. A ‘categorical exclusion’ such as this, for instance, has been in place for persons who have worked in certain positions in several designated Afghan organizations. This explains, as noted previously, why the great majority of the subjects of this study are Afghan nationals. In the case of the KhAD/WAD security services, for instance, every non-commissioned officer and officer who has served in the organization who applied for asylum in the Netherlands was excluded on the assumption that he had, in order to be promoted to the rank of non-commissioned officer or higher, necessarily taken part in arrests, interrogations, torture and executions, to show his commitment to the regime. The file analysis shows that 72 percent of the individuals in the sample of Afghan applicants had worked as a (non-commissioned) officer for the KhAD/WAD.
Extradition of excluded persons

On several occasions the Dutch government has stressed that the consequences connected to the invocation of 1F should inter alia consist of criminal prosecution on the basis of universal jurisdiction.\(^{16}\) By explicitly referring to the *aut dedere aut judicare* principle of international law in his 1997 letter, the State Secretary of Justice suggested there is even an international obligation resting on the Dutch authorities under several international treaties to take action – in the form of extradition or adjudication – against individuals to whom 1F is applied. 1F crimes can indeed be seen to fall under this obligation, although it must be noted that not all manifestations of the crimes under 1F are subject to it, and that the obligation does not extend beyond submitting the case to the competent authorities for ‘the purpose of prosecution’ (Larsaeus, 2004: 71; Rikhof, 2012: 461–2). The obligation under international law to prosecute or extradite people to whom Article 1F is deemed applicable is therefore limited.

Whether there is an obligation or not, the Dutch authorities have committed themselves to ensuring that the Netherlands is not a ‘safe haven’ for excluded persons.\(^{17}\) Therefore, to be consistent with Recital 7 of EC Decision 2003/335/JHA, all files of asylum applicants against whom 1F is invoked are submitted to the public prosecutor, who initially reviews whether excluded persons can be extradited and prosecuted elsewhere. Extradition – understood here as either transfer to another state or surrender to an international criminal tribunal – is difficult for mainly two reasons. First, extradition to a state almost always requires a bilateral or multilateral instrument and can occur only at the request of the state in which the crime was committed (Rikhof, 2012). Second, the reasons that extradition requests are refused often revolve around expected human rights violations in the receiving state and, in particular, the right to a fair trial.\(^{18}\) So far, only one excluded individual has been extradited (to Bosnia).\(^{19}\) Surrender to international criminal courts does not occur on a vast scale either. As Rikhof (2012) points out, although human rights concerns are less likely to be an issue with surrender in this sense, the policy, mandate and practical limitations of these courts limit the scope of their activities and jurisdiction. In the Netherlands, for example, so far only two people against whom Article 1F was invoked have been surrendered to an international criminal tribunal (both Rwandan nationals, to the International Criminal Tribunal for Rwanda (ICTR)).\(^{20}\)

In the following sections we will discuss why the domestic prosecution of suspects of international crimes is already complicated in itself, while a number of additional factors make prosecuting (suspected) excluded persons even more challenging.

Prosecution of excluded persons

If extradition or transfer is not possible, the prosecutor will then assess which 1F files are to be sent to the specialized international crimes team of the police which carries out the investigations. In principle all the files would qualify for (further) investigation, as the former Dutch Minister of Justice, Hirsch Ballin, in 2006 emphasized that the application of Article 1F is about ‘more than merely a suspicion of 1F crimes’. The Minister also stated that the threshold for applying Article 1F is somewhat ‘between’ suspecting and
proving. Although many lawyers would most probably be very reluctant to compare thresholds of administrative law with criminal law, this suggests that the ‘serious reasons for considering’ threshold, according to the Minister, can be regarded as being at least equal to criminal suspicion, and maybe more (Van Wijk, 2011: 320). That they are de facto treated as criminal suspects is reflected in the practice of submitting every 1F file to the prosecutor.

So far in the Netherlands only four excluded asylum applicants (0.5 percent) have been irrevocably convicted for committing international crimes. Although this number may seem low, there are few indications that other European countries have been any more successful. In the UK, Germany or France for example, the total number of convictions on the basis of universal jurisdiction is even lower (Rikhof, 2012: 465). In this section we will discuss why the domestic prosecution of excluded persons is such a challenge.

Challenges to the domestic prosecution of suspects of international crimes

A number of factors make criminal investigations and the prosecution of international crimes a very complex and resource-intensive matter. That they are resource-intensive becomes clear, for instance, from a 2008 report from the Canadian Department of Justice which demonstrated that the total cost of domestically prosecuting an African perpetrator of international crimes amounted to approximately 4 million Canadian dollars (Department of Justice Canada, 2008: 92). Below we will identify the most relevant factors that, according to academic literature and our experts, have an impact on the successful domestic prosecution of suspects of international crimes and link these to the characteristics of the group of excluded persons in the Netherlands.

The passage of time. The basis for the extraterritorial prosecution of international crimes is universal jurisdiction. Although the aut dedere aut judicare obligation may extend to the crime of torture, genocide and war crimes, jurisdiction for such crimes is not self-evident. In line with the jurisprudence of the Dutch Supreme Court, domestic courts in the Netherlands can claim jurisdiction when the perpetrator is present on Dutch territory. Until recently, however, this was true only with respect to war crimes committed after 1952 and crimes of torture committed after 1989, when the War Crimes Act and the Torture Convention Implementation Act respectively came into force (Van der Vlugt and Van Zadelhoff, 2013: 183). The International Crimes Act (Wet Internationale Misdrijven, WIM), which came into force on 1 October 2003, expanded the reach of Dutch jurisdiction to cover crimes of genocide and crimes against humanity outside the Netherlands by and against non-nationals that were committed after that date. On 1 April 2012, a law came into force that further expanded this reach with respect to genocide, by making the broad jurisdiction of Art. 2 WIM apply retroactively to the Genocide Convention Implementation Act, adopted in 1970. Before this law came into force, Dutch courts had no competence to prosecute excluded individuals associated with genocide committed before 1 October 2003 unless they could be prosecuted on charges of war crimes or torture, as happened in the case against Joseph Mpambara (Van den Herik, 2009a). Besides this legal challenge, the passage of time also restricts the prosecutor’s ability to gather
evidence in order to establish individual criminal liability for these crimes. International crimes prosecutions have so far shown that the main source of evidence in such cases is witness testimony, because documentary and forensic evidence are often unavailable (Combs, 2010: 12–14). Gathering reliable testimonies in relation to international crimes is already complicated by trauma, language barriers and cultural issues (Combs, 2010; Witteveen, 2010). With the passage of time the chance of finding reliable witnesses who may have died or moved away from the crime scene decreases, as does the reliability of witness testimony.

Our analysis of Dutch 1F cases demonstrates that this general problem of the domestic prosecution of international crimes restricts the prosecutor’s opportunities in several ways. 1F cases submitted to the prosecutor are cold cases. Of the excluded Afghans in the sample, the vast majority (83 percent) are associated with crimes committed before 1990. Of the excluded persons of other nationalities, the alleged crimes generally occurred more recently: three-quarters of the excluded persons are associated with crimes committed between 1990 and 2000, and one-fifth with crimes committed before 1990. The majority of the international crimes that excluded persons are associated with occurred before the WIM came into effect, so Dutch courts have competence over these crimes only if they constitute war crimes, torture or (since April 2012) genocide. Furthermore, as noted above, the passage of time, for obvious reasons, makes it difficult to get to witnesses and reduces the reliability of witness testimony.

Access to, cooperation of, and safety in the country of origin. Other practical barriers that typically hinder the domestic prosecution of international crimes on the basis of universal jurisdiction are access, cooperation and the safety restrictions that exist in the countries where the alleged crimes were committed. The crucial access to witnesses often depends on the willingness of a state to cooperate with criminal investigations on its territory and the degree to which the safety of witnesses and/or investigators can be guaranteed (REDRESS/FIDH, 2010: 23–6). Access to witnesses also depends on the availability of, and access to, (reliable) interpreters, who are indispensable in gathering testimony. According to a representative of the prosecution office, the prosecution of suspects from countries to which the prosecutor has no access or where the investigators cannot work in safety will therefore be put aside, unless there are other ways of building the case or until these circumstances change.25

Our file analysis illustrates that most of the excluded persons typically come from countries where access and safety issues limit the possibility of conducting proper investigations. Countries such as Afghanistan, Congo and Iraq for example have in recent years been subject to wars and an overall situation of insecurity. In Karstedt’s (2012: 505) Violent Societies Index 30 of extremely violent societies, Iraq, Afghanistan and Congo, for instance, were ranked numbers 1, 2 and 11 respectively in the period 2000 to 2009. Although other countries of origin have been relatively safer, their governments can often be considered uncooperative and not very reliable. Angola, for example, issued a general amnesty in 2002 and makes no effort at all to prosecute any alleged war criminals (Van Wijk, 2012); the likelihood that the authorities would assist Dutch investigators in doing so is very low indeed. The same argument goes for Afghanistan, which also has several amnesty laws in place. A country that, according to a representative of the
prosecution office, has over the years proven to be accessible, safe and cooperative is Rwanda. In addition there is extensive information on Rwanda available from ICTR prosecutions, which forms a good starting point for criminal investigations. These factors, in combination with the fact that Rwandan authorities and NGOs actively lobby and push for prosecutions, could partially explain why successful prosecutions on the basis of universal jurisdiction in Europe relatively often involve (former) Rwandan nationals.

**Position and reputation.** Especially when time has passed, the higher a suspect’s position or the bigger his reputation, the greater the chances that investigators can find witnesses who recognize or are able to remember the perpetrator of the crime. Rank and notoriety matter. It is easier to identify witnesses who can testify about the acts of a well-known (local) politician, a general or rebel leader than those of a regular foot soldier. The four convictions of excluded asylum applicants in the Netherlands confirm this to be relevant: the Afghans Hesam and Jalalzoy were, respectively, the former director of the KhAD and the former director of the KhAD’s interrogation department, and the Congolese Sébastien Nzapali, commander of the Garde Civile in Matadi, had an infamous reputation among the population and within the Garde Civile as the Roi des Bêtes (King of the Beasts). Being part of an established family of traders and the son of a former mayor, Joseph Mpambara was also well known locally.

Our analysis ranges from people in the lowest ranks, such as foot soldiers who have fought for the Uganda People’s Defence Force or UNITA’s rebel force in Angola, to high-level Afghan provincial governors and Rwandan politicians. If we make a distinction between high command, mid- to low-level command and low-level executors, however, we can see clear differences between non-Afghan and Afghan cases. Whereas the majority of non-Afghans were low-level executors (Figure 2), Afghans predominantly held the higher ranks (Figure 3).

Of the group of non-Afghan low-level executors, the file analysis shows that about one-third are believed to have played a facilitating role rather than having been directly involved in the commission of crimes. It would be extremely hard, from a prosecutor’s perspective, to allocate individual criminal responsibility to members of this group.

**Problems specific to the domestic prosecution of excluded persons**

In addition to the challenges described above, there are specific issues that complicate the prosecution of excluded persons even further. It is important to realize that the framework in which the IND assesses the applicability of 1F is completely different from that in which a prosecutor and the police would normally start to conduct a criminal investigation. A criminal investigation typically starts with, or is based on, police information from ongoing investigations, a Europol or Interpol alert or a criminal complaint made by a victim, bystander or interest group who identified the suspect as a potential perpetrator. Our analysis demonstrates that the IND’s decision to exclude an applicant was hardly ever started by, or based on, these conventional sources of information. In only a few of the analysed cases were police investigations, (international) arrest warrants or court records that made specific reference to the excluded individual referred to in 1F decisions.
Instead, IF exclusions typically start with, and are largely based on, information provided by the asylum applicants themselves during their interviews with the IND and might typically start, for example, when an applicant claims to have worked for a certain organization which is believed to be responsible for having committed serious crimes. A second type of source upon which the exclusion decisions are usually based is ‘authoritative’ reports that describe the activities of the organization that the applicant claimed to have worked for in general terms. If these two sources – the information stemming from

**Figure 2.** Type of function that the excluded person is associated with, of non-Afghan nationality.

**Figure 3.** Type of function that the excluded person is associated with, of Afghan nationality.
the asylum interviews and the authoritative reports – do not contain many specifics about the alleged crimes, or their credibility or reliability is questionable, this could seriously hinder the successful prosecution of excluded persons.29

**Accounts during asylum interviews.** When officers of the IND have indications that Article 1F might apply to a certain applicant, they refer the case to the 1F Unit. This unit conducts additional interviews aimed at establishing whether there are serious reasons for considering that someone has personally and knowingly participated in the crimes included under 1F. Through these interviews, the IND tries to determine the level of the applicant’s involvement in the alleged crimes. In particular, the statements made during the first interviews – when applicants may not have been aware of the existence of Article 1F – are very important in establishing whether 1F applies. This is especially true for those applicants who can be categorically excluded by merely stating that they worked, for instance, as a (non-commissioned) officer for the KhAD/WAD. For prosecution purposes, however, such statements offer little basis. Of the excluded Afghans associated with the KhAD/ WAD, 95 percent actually denied having had any personal involvement in the crimes the security services – and therefore they themselves – were associated with.

The majority (54 percent) of the excluded non-Afghans had (initially) admitted during the asylum interview that they had been personally and directly involved in 1F crimes, for example by having killed civilians in times of war or by facilitating acts of torture. Later on in the asylum procedure, 27 percent also maintained this position; in most of these instances, the applicants argued that they had acted under duress or out of self-preservation. Some Angolans, for example, claimed to have joined the UNITA rebel forces as teenagers after their families were killed (J15, J39). Other applicants from Angola (J1) and Congo (C7, C8) argued that they were forced to take drugs before they participated in 1F crimes. Almost 20 percent of the applicants denied their involvement in crimes later on, claiming, for instance, that their accounts had been mistranslated (J49), or that they had believed that confessing their crimes would help their application (M84) or that they had lied because they did not know what 1F was (J77, LE9, LE24); 7 percent admitted to the acts but denied criminal responsibility for them, claiming to have acted under superior orders (for instance an Iraqi who was given the order to fire SCUD rockets at random villages in Israel and Iran, LI26) or stating that the acts were legitimate in the context in which they occurred – a man from Congo Brazzaville who claimed to have killed one person out of self-defence and carried out the execution of another, which had resulted from a ‘fair trial’ (C5), a Russian army unit commander who ordered his units to make sure that no one left the village of Samashki while other forces committed acts of ethnic cleansing (C113) or a man from the former Yugoslavia who denied the illegality of his treatment of prisoners of war (J84).

Dutch courts have accepted the use of asylum accounts in criminal procedures.30 On the face of it, one might expect self-confessed accounts about involvement in serious crimes to be a very good starting point for prosecution; however, it should be taken into account that opportunity-seeking asylum seekers may have a vested interest in making things up (see, for example, Neumayer, 2005; Van Wijk, 2010). It cannot be ruled out that applicants who are unaware of the existence of Article 1F might embellish or fabricate stories about defection or rebellion, hoping that this will convince immigration
officials that they risk persecution upon return and that it will thus increase their chances of obtaining refugee protection. Our file analysis contains several examples that suggest that applicants exaggerated or even fabricated their role in organizations and crimes. One Nepalese applicant (J129), for instance, alleged that he had been a member of the Maobadi, a Maoist rebel group, and claimed to have witnessed a great number of attacks in a certain region at a given time. The IND noted that the number and scale of the alleged attacks did not correspond with what was known of the region at that time. The man also claimed to have been involved in an attack in a particular region of the far east of Nepal, but this region was not known as an area where the Maobadi were active. In addition, he seemed to know little about the internal structure of the Maobadi. Despite the fact that he revoked his statements later on, the IND maintained that Article 1F should still apply. Consistent with established practice in case law, initial statements carry more weight than contradictory statements at a later stage.31 This means, in practice, that, if an asylum applicant states in the initial hearing that he has committed crimes or belonged to an organization that is believed to have been involved in 1F crimes, there is hardly any way out. In this particular case, the IND argued that, although he may have confused times and places, he mentioned so many incidents in which he was involved that it is likely that his statements were accurate – even though not all of the incidents were known to have taken place. Another man (J111) claimed during his interview to have been involved in the execution of the well-known Guinea Bissauan rebel leader Ansumane Mané in 2000 and was able to provide details about the superior who gave the order. The IND argued that his account was credible because it largely matched the information in an online publication on a well-known French website. This website however, which also made reference to the name of the superior, is publicly available, which begs the question whether the applicant reproduced this information from personal experience or from the very same website consulted by the IND. The accounts given in the above cases may suffice for a 1F exclusion but, for a prosecutor, accounts such as these, from a credibility perspective, may not be a very appealing start for a criminal investigation.

Apart from the possibly untruthful accounts, which are difficult to cross-check, there are also cases – as we have already mentioned above – in which applicants bluntly acknowledged they had told a white lie about being involved in crimes, hoping that this would increase their chances of being granted asylum. We encountered the case of a person (LE24), for example, who claimed to have been the bodyguard of five different warlords in the early 1990s. He said that his units were responsible for the killing of civilians, purely on the basis of ethnicity, and to have been involved in pillaging. He was excluded in 2002. Seven years later – he had remained in the Netherlands throughout this time – he re-applied for asylum, claiming to have fabricated a story during his first application, providing evidence that he had studied in Nigeria and Ghana for most of the 1990s and presenting a passport and references from universities and colleges that proved to be original. At the time of our analysis the procedure was still pending; in the meantime this file has become part of the prosecutor’s caseload of ‘suspected war criminals’. Again, one should take into account that the available information in cases such as these when an applicant has initially lied about his involvement in crimes is enough for him to be excluded on the basis of Article 1F, but not enough for a prosecutor with few leads to
prosecute successfully. A reliable estimate of the percentage of applicants fabricating stories cannot be given.

**Authoritative reports.** In most cases, information from the interviews is complemented with the authoritative reports from (inter)governmental organizations and NGOs and reports in the media and on the internet. The most frequently used reports are the country reports (the Algemeen Ambtsbericht, AAB) issued by the Dutch Ministry of Foreign Affairs and reports from NGOs such as Human Rights Watch and Amnesty International. From a prosecutor’s perspective, the first problem with these sources, be they NGO reports or AABs (which are partially based on NGO reports themselves, ACVZ, 2006: 18), is that they are not specific: they draw general conclusions about possible crimes committed but typically do not provide explicit leads about individuals involved, except perhaps the most notorious. They are, therefore, often not suitable as a basis for starting individual criminal prosecution. A second problem with these sources is that, even if they were more concrete in identifying possible perpetrators, recent history has illustrated that information in governmental and non-governmental reports can be unreliable. In the case against Guus Kouwenhoven, a Dutch national accused of delivering weapons to Charles Taylor, the Court of Appeal ruled that frequent references to the defendant as ‘the usual suspect’ in reports from governmental and non-governmental organizations were not enough to establish individual criminal liability. More specifically, this case demonstrated that the information that Global Witness, an NGO, had published regarding the alleged complicity of Kouwenhoven was not reliable. As Van den Herik (2009b) concluded:

> In terms of using appropriate evidentiary standards, the acquittal of Kouwenhoven ... sends a serious message to NGOs, such as in this case Global Witness, to be cautious when pointing the accusatory finger to individuals in public reports. Like sanctions committees, NGOs should also be encouraged to explain the evidentiary basis on which they publicly denounce individuals. 33

Although internationally operating NGOs such as Amnesty International, Human Rights Watch and Global Witness perform extensive and valuable research and are, in many cases, among the few parties actually ‘on the ground’ in conflict situations, it must be borne in mind that their documentation of human rights violations serves their own specific purposes. Even the most well-established NGOs have an agenda, may be advocacy driven and – often for security reasons – do not always provide substantial or transparent methodological substantiation to support their conclusions. Referring to these reports may suffice to fulfil the conditions of a 1F exclusion, but relying on this information as a starting point for prosecution could very well frustrate a criminal case.

**Conclusion**

In this increasingly globalizing world, European governments constantly develop new strategies to react to external threats. A relatively new development is that they actively try to domestically prosecute immigrants who allegedly committed war
crimes, crimes against humanity and genocide in their countries of origin. In this article we have identified the most relevant legal and practical challenges the Netherlands faces in prosecuting individuals who were excluded on the basis of Article 1F(a) Refugee Convention.

We argued that a first problem domestic prosecutors are faced with is that the threshold to exclude someone from refugee protection is much lower than the ‘beyond reasonable doubt’ criterion needed to hold someone individually liable in criminal law. Further investigations are therefore necessary. An additional problem is that many of the individuals who were excluded between 2000 and 2010 are suspected of having committed crimes in a period with respect to which Dutch courts lack competence, and the passage of time can create many practical problems hindering proper investigation. Furthermore, our data demonstrate that excluded persons typically come from countries that are unsafe and difficult to access and cooperate with. Whereas the excluded Afghans held relatively high positions in the KhAD/WAD, the majority of excluded non-Afghans were low-level executors, which makes finding leads and witnesses very problematic. In addition, 1F exclusions are largely based on information provided by the asylum applicants themselves in combination with authoritative reports. These sources often do not contain any specifics about the alleged crimes, and the credibility and reliability of the asylum accounts and the NGO reports may also be questionable.

Although the European Council in 2003 emphasized the need to investigate and, when justified, to prosecute excluded individuals, this article demonstrates why even the Netherlands, with its specialized prosecution and investigations teams, has such a low success rate compared with the total number of exclusions. Building criminal cases around 1F exclusions demands extremely resource-intensive trajectories that have little chance of success. This begs a number of questions which warrant further (criminological) research. For example, what happens to all the excluded individuals illegally residing in Europe who are not (successfully) prosecuted? Are they deported? If they are not, do they pose a threat to (inter)national security by committing (more) crimes? Or do they, following the line of thinking of Drumbl (2007) and Smeulers (2008) that most perpetrators of international crimes come to commit crimes only in the abnormal contexts of war and conflict, generally continue to live as law-abiding citizens?

The ongoing instability in the Middle East, combined with the continuous efforts of European governments to hold perpetrators of international crimes accountable, will in the near future only increase the debate among policy makers on how to deal with 1F-excluded individuals. We believe criminologists can – and should – add to this debate by critically evaluating existing and future laws and policy developments.

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Notes

1. Refugee protection is understood here as the protection offered by the United Nations Convention relating to the Status of Refugees (hereinafter the Refugee Convention), adopted in 1951.

2. The preamble to the Rome Statute of the International Criminal Court of 17 July 1998 ‘recall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’.

3. Article 1F reads: ‘The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.’ In this paper, the term ‘exclusion’ refers solely to Article 1F; the other exclusion clauses (Articles 1D and E) are not addressed. Whenever mention is made of ‘excluded persons’, that is, applicants who have been denied refugee protection due to Article 1F, for practical reasons the masculine pronoun is used.

4. These denominations have no value other than for the researchers’ recording purposes.


10. Article 1F(c) is not considered to be sufficient in itself to serve as an independent ground for invoking Article 1F in the Netherlands, but can be when it is cited in combination with 1F(a) or 1F(b) (see the State Secretary’s Letter of November 1997 to parliament, note 5).

11. Although the availability of defences in (Dutch) refugee law and international criminal law may be similar, the results are different in that, whereas a successful appeal to a defence in criminal law will probably lead to mitigation of sentence, in refugee law (because it has a binary approach) it will lead to exclusion.


15. Persons in certain positions within the Hezb-i-Wahdat (Islamic Unity Party of Afghanistan) and the Sarandoy (Afghan police) are also categorically excluded. See the letters of the State Secretary of Justice to parliament of 19 December 2000 (TK 2000–2001, 19 673, number 553) and 7 November 2002 (TK 2002–2003, 19 637, number 695). A categorical exclusion has also been in place for high officials of the Iraqi security services and corporals and non-civilian leaders of the Sierra Leonean RUF (see letters of the Minister of Immigration and Integration to parliament of 8 April 2004, TK 2003–2004, 19 637, number 811, and 23 June 2004, TK 2003–2004, 19 637, number 829). The data show that all of these groups are considerably smaller than the group of KhAD/WAD (non-commissioned) officers.


18. Looking at Rwanda, for instance, for years extradition requests were refused because there was no bilateral extradition treaty and because of humanitarian (most notably fair trial) concerns (Van den Herik, 2009a: 1118; Rikhof, 2012: 470). Because the law was adapted, enabling extradition for crimes of genocide on the basis of the Genocide Convention, and because of investments made in the Rwandan justice system, extradition to Rwanda has recently become much more likely. In fact, on 20 December 2013, the Dutch extradition chamber approved the request for the extradition of Jean Claude I (The Hague District Court, ECLI 2013:18505). This decision, which is being currently appealed, fits in with a trend that began with the first expulsions and transfers from the US, Canada and the ICTR in 2011. It seems, however, that Rwanda is an exception in this respect.

19. The Hague District Court, 5 June 2009, ECLI BI7753.


22. Two Afghans (Hesamuddin Hesam and Habibullah Jalalzoy were sentenced to 12 and 9 years respectively on charges of war crimes and torture), one Rwandan (Joseph Mpambara, to life imprisonment on charges of war crimes) and one Congolese (Sébastien Nzapali, to 2 years and 6 months on charges of torture). One excluded Afghan, Abdullah F., was acquitted.

23. Criminal Division, 11 November 1997, No. 3717 AB; cited in the State Secretary’s Letter of November 1997, see note 5.


25. The letter of the Minister of Justice to parliament (TK 2007–2008, 31 200-VI no. 193) of 9 September 2008 describes the process of selecting 1F cases suitable for prosecution and mentions several other considerations, both legal and practical.


28. ‘Low-level executor’ is defined here as the military ranks of sergeant, corporal or private, or comparable positions in semi-military organizations. Also included are people associated with non-military organizations who are not in management positions. Mid- to low-level command includes local governance or the military ranks of (or comparable to) lieutenant and captain. High command is defined as central or regional governance, or the military ranks of (or comparable to) major and higher. ‘Unspecified’ are cases in which the rank or position was not known or could not be inferred from the file.

29. A third source to which the IND refers in its decisions are personal reports (Individuele Ambtsberichten, IABs), which are composed in a similar way to the AABs. IABs are not referred to very often in the 1F decisions and, if they are, this is rarely done to substantiate conclusions regarding personal involvement in 1F crimes. In the non-Afghan cases, in only
8.0 percent is reference made to an IAB, of which 4.7 percent concern personal involvement in 1F crimes. Although reference is made to IABs more often in the assessed Afghan cases (23.0 percent), in only one case (1.6 percent) did the IAB referred to in a 1F decision concern the personal involvement of an individual in 1F crimes.

30. For instance, in the criminal cases against Hesam and Jalalzoy from Afghanistan (Van Sliedregt, 2007). The use of asylum accounts in criminal cases has been criticized by some authors as compromising the right not to incriminate oneself (see, for instance, NJCM, 2002, or Mettraux, 2006).

31. See Council of State, 23 June 2003, no. 200300240/1 (Kesbir), District Court of The Hague AWB 0a/1813 (Rushdie) and District Court of Maastricht AWB 02/42704 = 03/18329 (Akbari).


33. Recently, Pre-Trial Chamber I in the case against Laurent Gbagbo before the ICC expressed its concerns about the heavy reliance of the prosecutor on NGO reports, which in their turn rely heavily upon anonymous hearsay evidence. The Chamber notes that such evidence is difficult to corroborate and puts the defence in a ‘difficult position’. See ICC-02/11-01/11-432, para. 28 and further via http://icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/icc0-2110111/court%20records/chambers/pretrial%20chamber%20i/Pages/432.aspx (accessed 26 January 2014).

References


The Criminalisation of the Intentional Destruction of Cultural Heritage

Ana Filipa Vrdoljak, University of Technology, Sydney
The Criminalisation of the Intentional Destruction of Cultural Heritage

Ana Filipa Vrdoljak

Introduction

The Arch of Titus on the Via Sacra in Rome was erected in 82 AD to commemorate the sacking of Jerusalem by the Roman Emperor Titus. The south panel depicts the procession of spoils from the Temple with the Menorah being carried in the centre of the relief. Hugo Grotius in De jure belli ac pacis (1625) noted that Titus Flavius Josephus, who served Titus during the siege of Jerusalem, argued that the Temple’s destruction was ‘in accordance with the law of war’.1 This relief which has survived two millennia remains a powerful symbol of the deliberate destruction and pillage of the cultural heritage and subjection of a people. As the ancients acknowledged such acts were integral to the conduct of war and belligerent occupation as a means of demoralising enemy and accelerating their conquest.2 However, since the nineteenth century and the earliest efforts to codify the laws and customs of war, the international community has sought to condemn such acts and hold the perpetrators to account. This chapter examines how modern international law is protecting world heritage (‘the cultural heritage of all humanity’) by criminalising the intentional destruction of cultural heritage.

[insert Fig.1 Arch of Titus, Rome, Italy].

The permanent recording of the sacking on the Temple in Jerusalem, over and above the physical act of destruction itself, is telling. The intrinsic propaganda value was not lost on the conquered or the inhabitants of the conqueror. In the digital age of the twenty-first century, which has witnessed a proliferation of deliberate acts of destruction, damaging and pillaging of World Heritage sites and its broadcasting via social media and the Internet, this potential continues to be exploited. This chapter examines the evolving rationales for the intentional destruction of cultural heritage since the early twentieth century and international law’s response to such acts. First, there is an analysis of its initial criminalisation with the codification of the laws and customs of war and their interpretation by the Nuremberg

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* Professor, Faculty of Law, University of Technology Sydney.


2 Ibid., at pp.658-661.
Tribunal in 1945 through to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court, The Hague. Next, I consider how these developments were extended to crimes against humanity and genocide which enabled deliberate, targeted destruction of cultural heritage to be viewed as intrinsic to gross violations of international humanitarian law and systematic abuses of human rights. Finally, I examine the transformative impact of the digital age on the deliberate destruction of world heritage and the efforts of the international community, through the UN Security Council and UNESCO, to cooperate in curbing incitement and holding perpetrators to account for crimes against the common heritage of humanity.

**War crimes**

Modern international law has prohibited the deliberate seizure, destruction or damaging of cultural property from the first codifications of the laws and customs of war in the nineteenth century. These earliest efforts made clear that although cultural and religious sites and monuments, and works of art and science, may be bounded to the territory of a state, they attracted international protection because of their importance to all humanity, such acts constituted war crimes, and perpetrators of such acts would be held to account. These basic tenets have been reiterated repeatedly in successive multilateral instruments for over 150 years.

**Codification and the Nuremberg Judgment**

The destruction of Strasbourg’s cathedral and library during the Franco-Prussian War of 1870–71 and the ensuing public outcry led to an international conference in mid-1874, which adopted the International Regulations on the Laws and Customs of War (Brussels Declaration). Although it never entered into force, it contains the core elements of the protection of cultural property during armed conflict in place today. It provides that during belligerent occupation, ‘all seizure or destruction of, or wilful damage to, institutions dedicated to religion, charity and education, the arts and sciences’, historic monuments, works of art and science should be *made subject of legal proceedings by the competent authorities* (Article 8 (emphasis added)).

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4 International Declaration concerning the Laws and Customs of War, 27 August 1874, not ratified, 1 American Journal of International Law (1907) vol.1(supp.), p.96.
The first binding international obligations for the protection of cultural heritage related to the rules of war emerged from the series of international conferences held in 1899 and 1907.\(^5\) The Regulations annexed to the Convention (II) with Respect to the Laws and Customs of War on Land (1899 Hague II Convention) and Convention (IV) respecting the Laws and Customs of War on Land (1907 Hague IV Convention),\(^6\) were found to be customary international law and ‘recognized by all civilized nations’ by the International Military Tribunal (IMT) at Nuremberg in 1945.\(^7\) A decade earlier, jurist Charles de Visscher noted that this immunity was granted because these objects and sites were ‘dedicated to an ideal purpose’.\(^8\) He added that ‘international conventional law has established such acts as genuine violations of the law of nations, the perpetrators of which are marked out for collective repression by the signatory States’.\(^9\) Under the Hague Regulations, during hostilities ‘all necessary steps should be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected’ as long as they are not used for military purposes, marked with the distinctive sign, and have been notified to the enemy (Article 27). During occupation, the ‘property of the communes, that of religious, charitable, and educational institutions, and those of arts and science’ is protected as private property with no reference to military necessity. Seizure, destruction, or wilful damage to these institutions, historical monuments, works of art or science, ‘is forbidden’, with violations ‘to be made subject to legal proceedings’ (Article 56 (emphasis added)).

These prohibitions were tested with the widespread, deliberate destruction of cultural property during the First World War, especially on the Western Front including Louvain University’s library and Reims Cathedral.\(^10\) The Preliminary Peace Conference of Paris of 1919 established the Sub-Commission III of the Commission on Responsibilities, which was

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\(^9\) Ibid.

instructed to investigate and make recommendations on the violation of the laws and customs of war perpetrated by Germany and her allies.\textsuperscript{11} The draft list of war crimes it prepared included the 'wanton destruction of religious, charitable, educational and historic buildings and monuments'.\textsuperscript{12} Unable to secure trials before an inter-Allied criminal tribunal, affected countries pushed for extradition of suspects to stand trial before their own national courts.\textsuperscript{13} France sought extradition of several suspects for violations against cultural property;\textsuperscript{14} however, these requests proved fruitless and they were tried in absentia.

During the Second World War, Allied Powers made successive announcements stating their intention to hold Axis nationals who had violated the laws and customs of war to account at the end of the conflict.\textsuperscript{15} The Hague Regulations and work of the 1919 Commission proved vital in the indictment and prosecution of the Nazi and Axis war criminals. The jurisdiction of the International Military Tribunal (IMT) at Nuremberg covered violations of the laws and customs of war including ‘plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity’.\textsuperscript{16} The indictment of the major war criminals charged that part of their ‘plan of criminal exploitation’ the ‘destr[truction of] industrial cities, cultural monuments, scientific institutions, and property of all types in the occupied territories’.\textsuperscript{17} Alfred Rosenberg had headed ‘Einsatzstab Rosenberg’, a programme involving the confiscation of cultural objects from private German collections and occupied territories.\textsuperscript{18} The U.S. Prosecutor argued that: ‘[T]he forcing of this treasure-house by a horde of vandals bent on systematically removing to the Reich these treasures which are, in a sense, the heritage of all of us...’\textsuperscript{19} The IMT found that Rosenberg had

\begin{thebibliography}{99}
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\item[12] Ibid.
\item[14] Ibid.
\item[16] Art.6(b) of the Charter of the International Military Tribunal, Nuremberg annexed to the Agreement by United Kingdom, United States, France and USSR for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279.
\item[19] Trial of the Major War Criminals, note 17, vol.IV, p.81.
\end{thebibliography}
directed that the Hague Regulations ‘were not applicable to the Occupied Eastern Territories’; and that he was ‘responsible for a system of organised plunder … throughout the invaded countries of Europe’. He was found guilty and sentenced to death. There were also examples covering the deliberate destruction of cultural property. For instance, the French Permanent Military Tribunal found a civilian guilty of a war crime for destroying a statute of Joan of Arc and a monument commemorating the First World War dead, on the order of a German official, in violation of Articles 46 and 56 Hague Regulations, the 1919 Commission List, and Article 257 of the French Penal Code.

The Nuremberg Judgment proved influential in the codification efforts of UNESCO which led to the adoption of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention). Its travaux noted that the Nuremberg Tribunal has ‘introduced the principle of punishing attacks on the cultural heritage of a nation into positive international law’. The Convention’s preamble speaks of the universal importance of the cultural heritage:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection ...

For the first time there is reference to ‘cultural heritage’ rather than ‘cultural property’ in a multilateral instrument, which emphasises its intergenerational importance. This aspect was reaffirmed by a resolution adopted at the first meeting of the High Contracting Parties to the Convention which noted that ‘the purpose of the Convention … is to protect the cultural property belonging to any people whatsoever, since each people makes its contribution to the culture of the world; and that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection ...

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22 14 May 1954, into force 7 August 1956, 249 UNTS 240.
23 UNESCO Doc.7C/PRG/7, Annex I, at p.5.
25 UNESCO Doc.7C/PRG/7, Annex II, at p.20.
heritage of all peoples for future generations’. The ‘importance’ of the protected cultural site or object is not determined exclusively by the state where it is located; rather, it extends to ‘people’. Also, the Convention applies to international and non-international armed conflicts. In respect of international armed conflict each of the parties to the conflict is bound to the Convention’s obligations ‘as a minimum’ (Article 19(1)). If one of the parties is not a High Contracting Party, the treaty obligations remain binding on the High Contracting Parties and any other party which declares that it accepts and applies the obligations (Article 18(3)). The travaux indicates this is because of the ‘moral obligation to respect the cultural property of an adversary not party to the Convention, such property belonging to the international community as well as the State concerned.’ Its application to non-international armed conflict is recognised in customary international law. Also, the United Nations has stated that its peacekeeping forces observe the 1954 Hague Convention.

The 1954 Hague Convention defines obligations for the safeguarding and respect of cultural property by the High Contracting Parties during peacetime, armed conflict, and belligerent occupation. The obligation to respect arising during hostilities is engaged with the declaration of war or an armed conflict between two or more High Contracting Parties, even if not recognised as a state of war by one of them (Article 18). It applies to total or partial occupation of the territory of the High Contracting Party even if there is no resistance. The obligation to respect includes respect for cultural property situated within one’s own territory as well as the territory of other High Contracting Parties, by not using the property and its immediate surroundings for purposes that could expose it to destruction or damage (Article 26).

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26 UNESCO Doc.CUA/120, at p.22. The draft recital had read: ‘Being convinced that damage to cultural property results in a spiritual impoverishment for the whole of humanity’: UNESCO Doc.7C/PRG/7, Annex II, at p.20.


29 UNESCO Doc.7C/PRG/7, Annex I, at 5–6.

30 Prosecutor v Duško Tadić, Interlocutory Appeal on Jurisdiction Judgment, No IT-94-1-A, Appeals Chamber, ICTY, (2 October 1995) at 98 and 127.

31 Secretary-General’s Bulletin on the Observance by UN Forces of International Humanitarian Law, 6 August 1999, UN Doc.ST/SGB/1999/13, para.6.6.

32 The travaux notes that the obligation to respect ‘means abstention from endangering cultural property and the arrangements which ensure its safeguarding, and abstention from prejudicing them’: UNESCO Doc.7C/PRG/7, Annex, at p.8.
Second, they must not engage in any act of hostility against such property, with the obligation being waived if ‘military necessity imperatively requires’ (Article 4(2)). This qualifier was confirmed in the Second Protocol (Article 6). During belligerent occupation, the High Contracting Party as occupying power must cooperate with and support the competent national authorities in protecting the cultural heritage (Article 5, 1954 Hague Convention). The provision extends to informing insurgent groups of their obligation to respect cultural property. Article 9 of the Second Protocol provides that the State Party must prevent and prohibit any illicit export, other removal, or transfer of ownership of cultural property; archaeological excavations except when ‘strictly required to safeguard, record or preserve’ cultural property; and changes to the cultural property intended to hide or destroy ‘cultural, historical or scientific evidence’. This protection afforded cultural heritage during occupation is augmented by the First Protocol concerning the removal and return of movable heritage.

The distinction made in the 1954 Hague Convention between general protection (Chapter I) and special protection (Chapters II of Convention and Regulations) is significant for the purposes of the prosecution of war crimes, that is, grave breaches of international humanitarian law. However, the criteria laid down for attracting special protection were so onerous that very few sites or properties were listed. By the late twentieth century, only one site (the Vatican) was nominated. Reiterating the obligation contained in the 1907 Hague Regulations, the 1954 Hague Convention requires High Contracting Parties to ‘undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality’ who commit or order to commit violations of its obligations (Article 28). The provision’s weak wording and subsequent failure of High Contracting Parties to enact enabling legislation was noted by a 1993 review of the 1954 Hague Convention.  

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37 Boylan, note 33 at p.93.
in the shadow of the Yugoslav conflicts, its recommendations to address this limitation were realised in the Second Hague Protocol adopted in 1999.

**Bombing of Dubrovnik, ICTY and 1999 Hague Protocol**

The jurisprudence of the International Criminal Tribunal for the former Yugoslavia established in 1993 picked up where the Nuremberg Tribunal had left off almost a half century before. During Yugoslav wars of the 1990s, the combatants deliberately targeted the cultural and religious property of the opposing side, including World Heritage listed sites. In response, the United Nations indicated that it would investigate and prosecute those responsible. The adoption of the ICTY Statute during the Yugoslav wars was intended to have punitive and deterrent objectives. The relevant provision covering crimes against cultural property reflect the wording of Article 56 of the 1907 Hague Regulations, and not the 1954 Hague Convention and its Protocol, even though all belligerents were parties. Article 3(d) ICTY Statute covering war crimes including: ‘[S]eizure, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.’ Under this provision, it must be shown that the international or internal armed conflict existed and had a close nexus with the alleged acts.

The most significant cases on this count pertain to the bombardment of the fortified city of Dubrovnik in early October 1991. The leading cases involved Miodrag Jokić, a commander of the Yugoslav People’s Army and responsible for the forces which attacked Dubrovnik on 6 October 1991, and Pavle Strugar, his superior found to have ‘legal and effective control’ over the forces in the area. When deciding which property falls within the protection afforded

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41 Prosecutor v Duško Tadić, Appeal Judgment, No IT-94-1-A, Appeals Chamber, ICTY (2 October 1995) at 66–70.

under Article 3(d), the tribunal has referenced definitions contained in conventions covering both during armed conflict and peacetime including the Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention). In *Strugar*, the Trial Chamber emphasised the Old Town’s inscription on the World Heritage List. It noted that the List included ‘cultural and natural properties deemed to be of outstanding universal value from the point of view of history, art or science’ and a reasonable trier of fact could conclude it came within the meaning of cultural property in Article 3(d). With the *actus reus* element of Article 3(d), the ICTY considered customary law concerning attacks on cultural heritage. In *Strugar*, it emphasised that the cultural property’s use rather than its location was determinative of loss of immunity. The tribunal found it was presumed to enjoy the same general protection afforded to civilian objects, except where they had become military objectives because ‘their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.’ For the *mens rea* requirement of this crime, it was necessary to show that the defendant committed the acted wilfully, that is, deliberately or with reckless disregard for the substantial likelihood of the destruction or damage of a protected cultural or religious property. The perpetrator must act with the knowledge that the object is cultural property. In *Strugar* this was established because Dubrovnik was on the World Heritage List; and in *Jokić* the tribunal found that the 1954 Hague emblem was manifestly visible at the relevant time. In the sentencing phase for war crimes against cultural property, the tribunal has stated that ‘this crime represents a violation of values especially protected by the international

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43  16 November 1972, into force 17 December 1975, 1037 UNTS 151.
44  Prosecutor v Pavle Strugar, Rule 98bis Motion, No IT-01-42-T, Trial Chamber II, ICTY (21 June 2004), at 80–81; and Prosecutor v Miodrag Jokić, Trial Judgment, No IT-01-42/1-S, Trial Chamber I, ICTY (18 March 2004) at 49 and 51.
46  Prosecutor v Radoslav Brđanin, Trial Judgment, Case No IT-99-36-T, Trial Chamber II, ICTY (1 September 2004) at 596. The court also noted even non-state parties to Additional Protocol I, including the United States, Turkey, and India, recognised the customary law nature of Art.52(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, in force 7 December 1978, 1125 UNTS 3, during the diplomatic conference called for the Second Hague Protocol in 1999: at footnote1509.
48  Jokić, Trial Judgment, note 44 at 23 and 49; and Strugar, Trial Judgment, note 45 at 22, 183, 279, 327 and 329.
community'. In Jokić, the Trial Chamber held that while ‘it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site’. A site once destroyed could not be returned to its original status. Jokić was sentenced to seven years’ imprisonment; and Strugar for eight years.

The Second Protocol to the 1954 Hague Convention, adopted in 1999, provides further detail concerning the obligation to prosecute violations of the laws and customs of war relating to cultural property. Parties to the Second Protocol must introduce domestic penal legislation (establishing jurisdiction and appropriate penalties) concerning serious violations occurring within their territory or perpetrated by nationals (Articles 15(2) and 16(1)). Serious violations are defined as acts committed intentionally and in violation of the Convention or Second Protocol, namely, attacks on property under enhanced protection, using such property or its immediate surroundings in support of military action, extensive destruction or appropriation of cultural property covered by general protection, making such property the object of attack, and theft, pillage, or misappropriation of property under general protection (Article 15(1)). Universal jurisdiction must be established for the first three of these serious violations (Article 16(10)(c)). If a Party does not prosecute, it must extradite to a country that can and which meets minimum standards in international law (Articles 17 and 18). Further, a Party may introduce legislative, administrative, or disciplinary measures which suppress the intentional use of cultural property in violation of the Convention or Second Protocol (Article

49 Jokić, Trial Judgment, note 44 at 46.
50 Ibid, at 53.
51 Ibid, at 52.
53 This sentence was reduced on appeal to seven and a half years imprisonment: Strugar, Appeals Judgment, and pardoned by Decision of the President on the application for pardon or commutation of sentence of Pavle Strugar, No IT-01-42-ES (16 January 2009).
55 The Summary Report of the Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (June 1999) at 6, at 26 and 27 records drafters intended this provision to be consistent with Art 85, Additional Protocol I and the Rome Statute. However, serious concerns were raised about the initial draft particularly by the ICRC which questioned the omission of intentional attacks and pillage as war crimes.
56 It also provides for grounds for refusal of extradition (political crimes or racial, religious etc motivations) and provision of mutual legal assistance: Arts 19 and 20.
21). The Committee for the Protection of Cultural Property in the Event of Armed Conflict’s Guidelines for the Implementation of the 1999 Protocol require Parties to report on the implementation of these obligations, but to date has not provided guidance on how this is to be done.57

Sacking of Timbuktu and International Criminal Court

By the close of the twentieth-century, international legal obligations prohibiting the deliberate destruction and pillage of cultural property were broadly reaffirmed in the governing statutes of several international criminal tribunals. The Yugoslav wars and the ICTY Statute influenced the wording of the provisions relating to the war crime against cultural property in the Rome Statute for the International Criminal Court (ICC). It defines the war crime of ‘intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes’ and ‘historical monuments’.58 The first indictment by the ICC under these provisions arose in respect of the situation in Mali during 2012, under a warrant issued in September 2015.

In 2012, Mali requested that the ICC Prosecutor investigate and indict the perpetrators of attacks on religious and cultural sites including the World Heritage site in Timbuktu.59 Pursuant to the principle of complementarity under the Rome Statute, Mali as a State Party has primary jurisdiction over war crimes committed on its territory or by its nationals; with the ICC exercising jurisdiction following a referral by a State Party which is not or cannot prosecuting in its domestic courts or a referral from the UN Security Council (Article 13). Significantly, the Mali’s referral was made by the transitional government against rebel forces. In the days leading up to the referral, the ICC Prosecutor and the Security Council had noted the destruction of monuments in the World Heritage site in northern Mali with alarm. The ICC Prosecutor advising: ‘Those who are destroying religious buildings in Timbuktu


should do so in full knowledge that they will be held accountable and justice will prevail.'

The Security Council adopted Resolution 2056(2012) under Chapter VII of the UN Charter which: ‘Condemn[ed] strongly the desecration, damage and destruction of sites of holy, historic and cultural significance, especially but not exclusively those designated UNESCO World Heritage sites, including the city of Timbuktu…’. It stressed that such attacks violated Additional Protocol II of the 1949 Geneva Conventions and the Rome Statute and that the perpetrators would be brought to justice. The UN Secretary-General called on the Security Council to impose sanctions on the perpetrators of attacks on sites that are designated as ‘part of the indivisible heritage of humanity’. The ICC Prosecutor found a prima facie case of war crimes including intentionally directing attacks against protected objects (Article 8(2)(e)(iv) Rome Statute) whose ‘value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of the people’. She noted that the series of intentional attacks against nine of the 16 mausoleums and two of three great mosques in Timbuktu, on the World Heritage List since 1988, ‘shocked the conscience of humanity’. The Prosecutor concluded that: ‘[T]he destruction of religious and historical sites in Timbuktu appears grave enough to justify further action by the Court.’ On 26 September 2015, following the issue of a warrant for war crimes committed in Timbuktu between 30 June and 10 July 2012, Ahmad Al Mahdi Al Faqi was surrendered by Niger to the ICC.

Subsequent Security Council resolutions on Mali affirmed the importance of justice and holding perpetrators to account for the peace process in the country through its cooperation

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62 SC Res.2056(2012), paras 13 and 16.


64 International Criminal Court Prosecutor (ICCP), Situation in Mali Article 53(1), Report, 16 January 2013, pp.31 and 34.

65 Ibid., pp.31-32.

66 ICC, Press Release: Situation in Mali, Ahmad Al Faqi Al Mahdi surrendered to the ICC on charges of war crimes regarding the destruction of historical and religious monuments in Timbuktu, 26 September 2015, Doc.ICC-CPI-2015926-PR1154.
with the International Criminal Court. A 2014 resolution extended the mandate of the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) whose mandate included ‘assist[ing] the Malian authorities, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO.’ An Agreement on Peace and Reconciliation was signed by the Malian government and several armed rebel groups in mid-2015. The Security Council resolution, acknowledging this agreement, reiterated earlier calls for Malian authorities to cooperate with the International Criminal Court and extended MINUSMA’s mandate, including its support for cultural preservation. Subsequently, the Security Council expressed alarm at ceasefire violations and the slow pace of MINUSMA’s work. Nonetheless, the Secretary-General also noted positively the work of UNESCO including the reconstruction of 14 mausoleums in Timbuktu.

**Crimes against humanity, cultural landscapes and human rights**

For millennia, combatants have deliberately targeted the cultural property affiliated with their enemy during armed conflict and belligerent occupation. The Nuremberg Trials highlighted that the cultural patrimony of targeted cultural, religious and ethnic communities was intentionally damaged, destroyed or seizure to persecute and ultimately eliminate them. Such acts were not confined to the theatre of war or occupation, but were perpetrated by States upon their own inhabitants. The extension of international criminal law to crimes against humanity and genocide has served as in important means of reinforcing that the targeted, intentional destruction of cultural property is intrinsic to gross and systematic abuses of human rights.

**Crimes against humanity, persecution**

In the mid-twentieth century, the atrocities of the Axis forces went beyond the established time and space parameters of existing international humanitarian law as defined by the Hague

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Regulations. They had occurred prior to the commencement of war and were often perpetrated by states against their own nationals within their own territory. Allied declarations reflective of the Hague Conventions made no reference to such acts. However, Article 6(c) of the London Charter extended the IMT’s jurisdiction to encompass crimes against humanity including ‘persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated’.\(^{73}\) Count Four of the Nuremberg Indictment detailed how ‘Jews [were] systematically persecuted since 1933 … from Germany and from the occupied Western Countries were sent to the Eastern Countries for extermination’.\(^{74}\) The IMT held that confiscation and destruction of religious and cultural institutions and objects of Jewish communities amounted to persecution that was a crime against humanity.\(^{75}\) The prosecution of crimes against humanity without reference to ‘time and place and national sovereignty’ reflected the Charter’s centrality in the promotion of human rights.\(^{76}\) Rosenberg was found guilty of crimes against humanity including the persecution of the Jews through acts like the plunder of Jewish homes in the Occupied Eastern Territories.\(^{77}\) Julius Streicher was also found guilty on Count Four for his role in the destruction of the Nuremberg synagogue in 1938 and incitement of the persecution and extermination of Jews as editor of the newspaper, Der Stürmer.\(^{78}\)

The international and hybrid criminal tribunals established under the auspices of the United Nations since the 1990s have invariably extended jurisdiction to the crimes against humanity of persecution.\(^{79}\) The ICTY reopened the question of persecution as it related to cultural...
heritage. During the first years of the Yugoslav conflicts, the International Law Commission in its 1991 Report on the Draft Code of Crimes Against Peace and Security related persecution on social, political, religious, or cultural grounds to ‘human rights violations … committed in a systematic manner or on a mass scale by government officials or by groups that exercise de facto power over a particular territory …’. It observed that the systematic destruction of monuments, buildings, and sites of highly symbolic value for a specific social, religious, or cultural group was persecution. This definition included the suppression of language, religious practices, and detention of community or religious leaders. Under the ICTY Statute, crimes against humanity are covered by Article 5. This provision does not list acts against cultural property nor does it define ‘persecution’. However, the ICTY has found the destruction or damaging of the institutions of a particular political, racial, or religious group is a crime against humanity of persecution under Article 5(h). Referring to the Nuremberg Judgment, the 1991 ILC Report and its own jurisprudence, the ICTY Trial Chamber in Kordić and Ćerkez held: ‘[W]hen perpetrated with the requisite discriminatory intent…manifests a nearly pure expression of the notion of “crimes against humanity”, for all humanity is indeed injured by the destruction of a unique religious culture…’. The tribunal affirmed that the attacks must be directed against a civilian population, be widespread or systematic, and perpetrated on discriminatory grounds for damage inflicted to cultural property to qualify as persecution. This requirement is intended to ensure that crimes of a collective nature are penalized because a person is ‘victimised not because of his individual attributes but rather because of his membership of a targeted civilian population’. Similarly, cultural property is protected not for its own sake, but because it represents a particular group.

Prosecution of Crimes committed during the period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004, Doc.NS/RKM/1004/006.

81 Ibid.
82 Prosecutor v Dario Kordić and Mario Ćerdež, Trial Judgment, No IT-95-14/2-T (26 February 2001) at 207.
83 Ibid., at 206 and 207.
84 Prosecutor v Zoran Kupreškić and Others, Trial Judgment, Case No IT-95-16-T, Trial Chamber, ICTY (14 January 2000) at 544; and Prosecutor v Tihomir Blaškić, Trial Judgment, Case No IT-95-14-T, Trial Chamber, ICTY (30 March 2000) at 207.
85 Prosecutor v Duško Tadić, Opinion Trial Judgment, No IT-94-1-T, Trial Chamber, ICTY (7 May 1997) at 644.
The ICTY has held that a vital element of crimes under Article 5 is that they are part of ‘a widespread or systematic attack against a civilian population’. Acts should not be examined in isolation but in terms of their cumulative effect. The Trial Chamber found that an act must reach the same level of gravity as the other crimes against humanity enumerated in Article 5; however, it was not limited to acts listed in Article 5 or elsewhere in the ICTY Statute, ‘but also include the denial of other fundamental human rights, provided they are of equal gravity or severity.’ Persecution requires a specific additional mens rea element over and above that needed for other crimes against humanity, namely a discriminatory intent ‘on political, racial or religious’ grounds’ (not necessarily cultural). Although the actus reus of persecution may be identical to other crimes against humanity it was distinguishable because it was committed on discriminatory grounds.

Genocide

Several indictments brought before the ICTY for the deliberate destruction or damage of cultural property of religious or ethnic groups included counts of persecution and genocide. Such acts have been used to establish the mens rea of a defendant, that is, the discriminatory intent required for proving genocide and persecution. However, the targeting of cultural property may amount to actus reus in respect of the crime of persecution, but the ICTY has not included such acts per se within the definition of genocide under Article 4 of its Statute.

Two months after the Nuremberg Judgment, the UN General Assembly adopted the resolution on the Crime of Genocide (Genocide Resolution). The Resolution states that genocide ‘is a crime under international law’, without reference to a nexus to armed conflict. Its preamble notes that genocide ‘shocked the conscience of mankind [and] resulted in great losses to humanity in the form of cultural and other contributions represented by these groups’. Yet, it goes on to define genocide as ‘a denial of the right to existence of entire human groups, as homicide is the denial of the right to live for individual human beings’.

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86 Prosecutor v Radislav Krstić, Trial Judgment, Case No IT-98-33, Trial Chamber, ICTY (2 August 2001) at 535.
87 Kupreškić and Others, Trial Judgment, note 84, at 615.
88 Krstić, Trial Judgment, note 86, at 535; and Prosecutor v Radoslav Brđanin, Appeals Judgment, Appeals Chamber, ICTY (3 April 2007) at 296–297.
89 Blaškić, Trial Judgment, note 84, at 283; Krstić, Trial Judgment, note 86, at 480; and Kordić and Čerkez, Trial Judgment, note 82, at 211 and 212.
91 GA Res 96(1), para.1.
beings’. The travaux of the Genocide Convention show that early drafts included the ‘systematic destruction of historical or religious monuments or their diversion to alien uses, or destruction or dispersion of documents or objects of historical, artistic, or religious interest and of religious accessories’ in the definition of genocide. However, the only ‘cultural’ element in the definition of genocide of the Convention on the Prevention and Punishment of Genocide was adopted by the General Assembly in 1948, is the reference to the removal of children from the group (Article II). This narrower definition of genocide has been repeatedly reaffirmed by the international community.

Article 4 the ICTY Statute contains the same definition of genocide as Article II of the Genocide Convention and does not require that the acts occur during an armed conflict. The acts must have been perpetrated with a specific intent (dolus specialis), that is, ‘to destroy, in whole or in part, a national, ethnic, racial or religious group as such…’. The ICTY has emphasised that there are two elements to the special intent requirement of the crime of genocide: (a) the act or acts must target a national, ethnical, racial, or religious group; and (b) the act or acts must seek to destroy all or part of that group. In the case of Radoslav Krstić, the defendant was charged with atrocities which took place during the fall of Srebrenica in 1995 and the ICTY Trial Chamber took the opportunity to re-examine the issue of whether acts directed at the cultural property of a group amounted to the international crime of genocide. It observed that: ‘[O]ne may … conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community.’ It added that, unlike genocide, persecution was not limited to the physical or biological destruction of a group but extended to include ‘all acts designed to destroy the social and/or cultural bases of a group.’

The ICTY found that the drafters of the Genocide Convention expressly considered and

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92 Committee on the Progressive Development of International Law and its Codification, Draft Convention for the Prevention and Punishment of Genocide, prepared by the Secretariat, 6 June 1947, UN Doc.A/AC.10/42, draft Art.3(e)


94 See Art.2, ICTR Statute; Art.6, Rome Statute; Art.9, Statute of the Special Court for Cambodia; and Art.4, Law on the Establishment of Cambodian Extraordinary Chambers.

95 Krstić, Trial Judgment, note 86, at 480.

96 Ibid, at 551–553.

97 Ibid, at 574.

98 Ibid, at 575.
rejected the inclusion of the cultural elements in the list of acts constituting genocide.\textsuperscript{99} Indeed, it observed that despite numerous opportunities to recalibrate the definition of genocide, Article II of the Convention was replicated in the statutes of the tribunal for Rwanda, the 1996 Draft ILC Code of Crimes Against Peace and Security of Mankind,\textsuperscript{100} and Rome Statute. The Trial Chamber in \textit{Krstić} found these developments had not altered the definition of genocidal acts in customary international law and felt confined by the principle of \textit{nullum crime sine lege}. The Appeals Chamber in \textit{Krstić} confirmed that the Genocide Convention and customary international law limited genocide to the physical or biological destruction of the group, noting with approval that ‘the Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition’.\textsuperscript{101} Yet, the Trial Chamber in the \textit{Krstić} used evidence of the destruction of the cultural and religious property of Muslims to prove the specific intent element of genocide. It found that: ‘[W]here there is physical or biological destruction there are often simultaneous attacks on cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.’\textsuperscript{102} The Appeal Chamber pronounced that genocide was ‘crime against all humankind’ because the perpetrators ‘seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide.’\textsuperscript{103}

The \textit{Genocide} case bought by Bosnia and Herzegovina against Yugoslavia (later Serbia and Montenegro) before the International Court of Justice in 1993 concerned Yugoslavia’s alleged violations of its obligations under the 1948 Genocide Convention. Unlike the cases before the ICTY which covered individual criminal responsibility, this action concerned the culpability of a State in respect of the international crime of genocide. Accepting that there was ‘conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group’,\textsuperscript{104} the ICJ reaffirmed the ICTY’s interpretation in \textit{Krstić} that the definition of genocide had not evolved beyond Article II. It concluded that the destruction

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\item \textsuperscript{99} Ibid, at 576.
\item \textsuperscript{100} Art.17, Draft Code of Crimes Against the Peace and Security of Mankind, 51 UN GAOR Supp. (No 10) at p.14, UN Doc.A/CN.4/L.532, corr.1, corr.3 (1996).
\item \textsuperscript{101} Prosecutor v Radislav Krstić, Appeals Judgment, Case No IT-98-33-A (19 April 2004) at 25.
\item \textsuperscript{102} Krstić, Trial Judgment, note 86, at 580.
\item \textsuperscript{103} Krstić, Appeals Judgment, note 101, at 36.
\item \textsuperscript{104} Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ, Judgment of 26 February 2007, at p.344.
\end{thebibliography}
of the historical, religious, and cultural heritage of a group only goes to proving the *mens rea* of the crime of genocide and not the *actus reus.*\(^{105}\) In early 2015, in the *Genocide* case between Croatia and Serbia, the International Court reiterated this interpretation by stating ‘that there was no compelling reason in the present case for it to depart from that approach.’\(^{106}\)

**Crime against the common heritage of humanity**

From the deliberate destruction of the monumental Buddhas in Bamiyan, Afghanistan by the Taliban in 2001 to the systematic and intentional destruction of successive World Heritage sites in Syria and Iraq in 2014-2015, the motivation for such acts by the perpetrators has evolved beyond solely demoralising the local populace of the territory where the sites are located. The digital age, and the Internet and social media with it, has proliferated and globalized the propaganda potential of such acts of destruction of cultural heritage. Often the monuments, sites and shrines are not directly related to the cultural and religious practices of present-day inhabitants; instead, they are evidence of the multi-layered history and diversity of these sites. It is this cultural and religious diversity which the perpetrators find abhorrent and seek to expunge through such acts. The recording of these acts of destruction and their circulation on social and traditional media is designed to demoralise not only the local populace but the international community as a whole. Accordingly, the acknowledged universal importance of these sites and monuments to all humanity has increasingly elicited a co-ordinated response by intergovernmental organisations like the United Nations and its agencies, including UNESCO, to hold the perpetrators to account.

**Intentional destruction: UNESCO Declaration and SC Resolutions**

The obligation to prosecute those engaged in acts of deliberate destruction of cultural property was reinforced in the twenty-first century with UN Security Council resolutions covering Iraq, Afghanistan and Syria, and UNESCO instrument covering the intentional destruction of cultural heritage. These resolutions take this obligation beyond the States Parties to the 1954 Hague Conventions and its Protocols, by articulating a legally binding obligation on all UN Member States to cooperate in preventing such acts and holding perpetrators to account.

\(^{105}\) Ibid.

The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage was adopted in response to the deliberate destruction of the monumental Buddhas in the World Heritage listed site of Bamiyan, Afghanistan on 1 March 2001.107 A month earlier, the Taliban had issued an edict requiring the destruction of all non-Islamic shrines in Afghanistan. Within days, the UN General Assembly denounced the ‘deliberate ongoing destruction of these relics and monuments which belong to the common heritage of humankind.’108 The UNESCO General Conference in November 2001 adopted Resolution on Acts constituting a crime against the common heritage of humanity,109 which called on Member States not party to the relevant conventions including the 1954 Hague Convention and its Protocols and the 1972 World Heritage Convention to do so ‘in order to maximize the protection of the cultural heritage of humanity, and in particular, destructive acts’.110 It reiterates that these obligations should guide ‘governments, authorities, institutions, organizations, associations and individual citizens’.111 It requested the Director-General prepare a draft convention on intentional destruction for adoption by the General Conference. The rationale contained in the preamble of the 1954 Hague Convention was reaffirmed by the Declaration concerning the Intentional Destruction of Cultural Heritage adopted by the UNESCO General Conference in 2003. It states in part:

*The international community recognizes the importance of the protection of cultural heritage and reaffirms its commitment to fight against its intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding generations.*112

The Declaration covers cultural heritage ‘linked to a natural site’; acts occurring outside the theatre of war; and within the territory of a State. In support it invokes, not only the 1954 Hague Convention, Additional Protocols I and II to the 1949 Geneva Conventions, 1899 Hague II and 1907 Hague IV Conventions, but the relevant provisions of the Rome Statute and the ICTY Statute and related jurisprudence.

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111  SC Res.26(2001), para.3.
112  Intentional Destruction Declaration, para.1.
The deliberate destruction of cultural heritage again became the focus of international attention in 2014 with atrocities committed by extremist groups, including Al Nusrah Front (ANF) and Islamic State of Iraq and the Levant (ISIL), in Iraq and Syria. The Security Council had called ‘on all parties to immediately end all violence which has led to human suffering in Syria, save Syria’s rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria’s World Heritage Sites’. It stressed that there was a need to ‘end impunity for violations of international humanitarian law and abuse of human rights’ and that those responsible be brought to justice. The Human Rights Council likewise expressed deep concern for the ‘rampant destruction of monuments, shrines, churches, mosques, and other places of worship, archaeological sites and cultural heritage sites’. It called on the Iraq government to investigate all alleged violations of international humanitarian law and abuses of human rights and ‘prosecute the perpetrators of such attacks’. Likewise, UNESCO’s Executive Board, recalling the 2003 Declaration, noted that these acts ‘damage the cultural heritage of all humankind’ and could amount to war crimes under the Rome Statute.

The Security Council adopted resolution 2199 of 12 February 2015 which condemned ‘the destruction of cultural heritage in Iraq and Syria particularly by ISIL and ANF, whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects’. The resolution was adopted pursuant to Chapter VII of the UN Charter and is therefore binding on UN Member States and takes precedence over any conflicting treaty obligations. In their Namur Call, the Committee of Ministers of the Council of Europe in April 2015 recorded that they ‘deplor[ed] the deliberate destruction of cultural heritage … which constitute[d] an impoverishment of the common heritage and incur[red] our collective responsibility with regard to future generations.’ It reinforced European cooperation on

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legal instruments like those covering unlawful destruction of cultural heritage. In a resolution on ‘Saving the cultural heritage of Iraq’ adopted in mid-2015, the General Assembly referencing the 1907 Hague Regulations, the 1949 Geneva Conventions, the 1954 Hague Convention and its Protocols, 1970 UNESCO Convention, 1972 World Heritage Convention, UN Convention against Transnational Organized Crime, and the UNESCO Declaration on the Intentional Destruction of Cultural Heritage and ‘resolved to stand up against attacks on the cultural heritage of any country as attacks on the common heritage of humanity as a whole’. Yet, the deliberate destruction continued. On 4 September 2015, the Committee for the Protection of Cultural Property in the Event of Armed Conflict condemned the destruction of the temples of Baal Shamin and Bel, in Palmyra built almost 2,000 years ago, and part of a World Heritage site. It advised that this ‘systematic destruction’ was a violation of international law and possibly a war crime. It urged the international community ‘to unite and intensify its efforts to confront this unprecedented situation, caused by terrorist groups, such as ISIS.’

Incitement in the digital age

Since ancient times, these acts of deliberate destruction of cultural heritage were designed to demoralise the enemy and civilian populations into submission. As noted earlier, is a strategy condemned and prohibited by the international community since the late nineteenth century. However, what distinguishes the intentional acts of destruction by groups from the Buddhas of Bamiyan to the various World Heritage listed sites in Syria is that they are not necessarily affiliated in a cultural or religious affiliation with local communities. Instead, they are sites which are defined as belonging to the cultural heritage of all humanity. Equally, their destruction is not simply directed to combatants in the conflict on the ground as was traditionally the case. Rather, the Security Council has acknowledged that cultural heritage has another significant potential for these groups. The deliberate destruction of historic sites for propaganda value had successfully garnered worldwide attention through social and

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121 GA Res.69.281 on Saving the Cultural Heritage of Iraq, 28 May 2015, UN Doc.A/RES/69/281, PP2 and 4.
123 Ibid.
traditional media. The Parliamentary Assembly of the Council of Europe had noted in 2004 observed that culture and its manifestations was ‘increasingly the target of terrorism’. It maintained that globalisation and our information society not only enable unprecedented cultural interaction but ‘potentially foster terrorism and the ideologies that encourage it …leading to a new form of international terrorism with an “a-territorial” and “a-cultural dimension”’. A decade later the Security Council, in SC Res.2170(2014), defined the ‘need for Member States to act cooperatively to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms…’

The deliberate destruction of cultural and religious monuments, including those listed as World Heritage in Syria and Iraq have been broadcast by ISIL through social media and the Internet. The General Assembly observed that: ‘[A]ttacks on cultural heritage are used as a tactic of war in order to spread terror and hatred’ and it called on ‘community leaders to stand up and reaffirm unambiguously that there is no justification for the destruction of humanity’s cultural heritage…’ The UN Analytical Support and Sanctions Monitoring Team noted that ‘[t]he extremist, violent ideology of the Al-Qaida movement relies on propaganda’ but that the transnational nature of social media meant that any collective, multilateral response is complicated because ‘social media providers operate across borders.’ It noted that prosecutions for incitement in domestic jurisdictions where this is possible it serves as a deterrent. In SC Res.2199(2015), the Security Council ‘express[ed] concern at the increased use…by terrorists and their supporters, of new information and communication technologies, in particular the Internet, to facilitate terrorist acts, as well as their use to incite, recruit, fund or plan terrorist acts.’ In mid-2015, the UN Analytical Support and Sanctions Monitoring Team against referred to the need to address the ‘growth of high-definition digital terror’, and recommended that Internet and social media provides brief the Team on their

126 GA Res.69/281(2015), paras 2 and 8.
128 UN Doc.S/2014/770, para.22.
strategies in responding to the ‘exploitation of their services’ by these terrorist organisations.\textsuperscript{129}

\textbf{Criminalisation and cooperation}

These recent Security Council resolutions covering deliberate destruction of cultural heritage have repeatedly called on States to cooperate to ensure that perpetrators are held criminally responsible for such crimes. The 2003 UNESCO Declaration is an important reference point because it provides for State and individual responsibility for intentional destruction of cultural heritage (Articles VI and VII); and outlines the obligation to cooperate in respect of protecting cultural heritage against intentional destruction (Article VIII). It calls on States to establish jurisdiction and effective criminal sanctions against individuals who commit or order others to commit such acts. It requests States to cooperate with one another and UNESCO including through information sharing; consultation in cases of actual or impeding destruction; assist in respect of educational, awareness-raising and capacity-building programmes for prevention and repression; and assist judicial and administrative processes. States are also encouraged to establish jurisdiction and effective criminal sanction against individuals ‘who have committed or have ordered to be committed acts referred to [individual criminal responsibility] and who are found present on its territory, regardless of their nationality and the place where such act occurred’ (para.VIII(2)). The Declaration requires states to recognise ‘international rules related to the criminalization of gross violations of human rights and international humanitarian law, in particular, when intentional destruction of cultural heritage is linked to those violations.’\textsuperscript{130} Like the ICTY jurisprudence, this link had been highlighted by the Human Rights Council in 2007 recognised ‘intentional destruction of cultural heritage may constitute advocacy and incitement to national, racial or religious hatred and thereby violates fundamental principles of international human rights law’ and that States bore primary responsibility to ‘prohibit, prevent, stop and punish’ such acts.\textsuperscript{131}

Intergovernmental bodies, like the Council of Europe and the United Nations, have instruments that cover unlawful acts against cultural heritage and provide guidance to States

\textsuperscript{129} Seventeenth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2161(2014) concerning Al-Qaida and associated individuals and entities, 16 June 2015, UN Doc.S/2015/441, para.44.

\textsuperscript{130} Intentional Destruction Declaration, para.IX.

\textsuperscript{131} HRC Res.6/11 on Protection of cultural heritage as an important component of the promotion and protection of cultural rights, 28 September 2007.
Parties on how these obligations can be translated into domestic law and cooperation between them to achieving these objectives. The Council of Europe Recommendation No.R(96)6 on the protection of Cultural Heritage against unlawful acts emphasises that it is preventative in purpose and it is primarily focused on identifying and managing risks to cultural property through unlawful acts or negligence. It preamble states: ‘[P]revention should primarily concerned with educating and informing owners, professionals and the public about conservation and respect for cultural heritage and with encouraging a multidisciplinary approach to prevention, using all available human, physical and electronic means’.\(^{132}\) The European Convention on Offences relating to Cultural Property adopted by the Council of Europe in 1985 is primarily geared towards curbing the illicit trade in cultural objects.\(^{133}\) It covers acts including ‘appropriating cultural property through violence or menace’ and States Parties may choose to extend its application to ‘destruction or damaging of cultural property of another person’.\(^{134}\) States Parties are obliged to establish jurisdiction to prosecute offences committed on its territory, outside its territory by a national or resident, or outside its territory against its own property or that of a national or original located in its territory (Article 13). Likewise, the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences, provide detailed strategies in respect of crime prevention, criminal justice policies, and international cooperation facilitate national and international efforts for the protection of cultural heritage but is largely centred on the illicit traffic of cultural objects.\(^{135}\)

**Conclusion**

The Arch of Triumph which formed part of the 2,000 year old Roman city of Palmyra was destroyed by ISIL forces in mid-2015 which circulated video and photographs of these acts on social media and the Internet. The organisation had already destroyed in Lion of Al-lāt, the Temple of Bel and Temple of Baal Shamin in the World Heritage listed Syrian city. Like the Taliban before it in 2001, it has ordered the deliberate destruction of Islamic and non-Islamic monuments, shrines and statues on Syrian and Iraqi territories under its control.

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\(^{132}\) Recommendation No.R(96)6, PP12.

\(^{133}\) European Convention on Offences relating to Cultural Property, 23 June 1985, not entered into force, CETS No.119.

\(^{134}\) European Convention on Offences relating to Cultural Property, Appendix III, paras 1 and 2.

justified on the basis on their interpretation of religious teachings. These monuments and sites which have been destroyed in Palmyra evidenced how cosmopolitan and cultural diversity this city has been throughout its long history. The intended impact of ISIL’s visual recording of their acts of destruction and broadcasting globally via the Internet and social media goes beyond these occupied territories. Instead, it is addressed to a global audience. Both the perpetrators and the intended audience of these images understand these sites and monuments to be of universal significant to humanity as a whole. It is for this reason that it has repeatedly elicited international condemnation and calls in international fora like the Security Council and UNESCO for the perpetrators to be held criminally responsible.

[insert Fig.2, The destruction of the Temple of Baal Shamin, Palmyra, Syria in mid-2015. Kyodo, AP Images].

In various multilateral instruments since the mid-nineteenth century, the international community had repeatedly and consistently confirmed its prohibition against the deliberate destruction of cultural and religious sites and the requirement that violations be subject to legal proceedings. The nature of international law has invariably meant that the obligation for holding perpetrators criminal responsible has primarily fallen to the territorial State where the acts occurred or the state of nationality of the offender. However, States have often been unable to fulfil these obligations for a variety of reasons including the lack of control over their territory and its inhabitants or the violation of international humanitarian law and human rights law by the government itself. The obligation then falls to the international community through intergovernmental organisations like the UN Security Council and international tribunals like the International Criminal Court. Recent acts of intentional destruction of monuments at World Heritage sites have engaged both the Security Council and the ICC which have called upon all Member States to cooperate in bringing the perpetrators of these international crimes to justice. New technologies will prove vital in the evidence gathering and reconstruction processes. Yet history shows that such actions have met with limited success and are by definition reactive. Significantly, multilateral instruments which have included the criminalisation of deliberate acts of destruction against cultural property have consistently incorporate preventative and punitive obligations. Accordingly, existing preventative measures like those contained in the 1954 Hague Convention and its Protocols

and the initiative to extend the mandate of UN peacekeepers so that they can be deployed to protect World Heritage have a potentially significant, proactive impact.\textsuperscript{137}