The European Court of Human Rights has the Turkish Security Forces Held Responsible for Violations of Human Rights: The Case of Akdivar and Others

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1. INTRODUCTION

In this article, special attention will be given to the recent judgment of the European Court of Human Right in the case of *Akdivar and Others* v. *Turkey*.[1] Since 1985, a violent conflict has raged in the South-Eastern region of Turkey, between the Turkish security forces and sections of the Kurdish population in favour of Kurdish autonomy, in particular members of the PKK (Workers' Party of Kurdistan). Since 1987, 10 of the 11 provinces of South-Eastern Turkey have been subjected to emergency rule, which was in force at the time of the facts complained of. The main issue in this case concerned the fact that during this conflict, a large number of villages have been destroyed and evacuated by the security forces. According to the applicants, the alleged burning of their houses by the security forces constituted, *inter alia*, a violation of Article 3 (the prohibition of torture and inhuman treatment or punishment) and Article 8 (the right of respect for private life, family life, and home) of the European Convention on Human Rights (ECHR), and Article 1 of Protocol No. 1 (property rights).[2]

2. CONTEXT

Although Turkey ratified the European Convention on Human Rights as early as 1954, for decades it did not excel in the protection of human rights

1. Akdivar and Others *v.* Turkey, ECHR, Judgement of 16 September 1996, not yet published.
2. Convention on the Protection of Human Rights and Fundamental Freedoms and Protocol No. 1, ETS 5 (1950-1952).

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and fundamental freedoms. It was only in 1987 that Turkey recognized the right of individual petition to the European Commission of Human Rights;[3] Turkey has accepted the compulsory jurisdiction of the European Court of Human Rights since 1991. With some intervals, it has made use of the right under Article 15 ECHR to derogate from the rights and freedoms laid down in the Convention - in so far as they are not excepted in the second paragraph - in cases of public emergency threatening the life of the nation. It did so for the period from 16 June 1970 to 5 August 1975, from 26 December 1978 to 26 February 1980, and from 12 September 1980 to 19 July 1987. A state of emergency that was declared in 1987 in 10 south-eastern provinces allows the civil governor to exercise certain quasi-martial law powers, including restrictions of the press, removal from the area of persons whose activities are deemed hostile to the public order, and the right to hold suspects in *incommunicado* detention up to 30 days for certain crimes. The state of emergency decree was most recently renewed in October 1995. The situation in South-East Turkey is of particular concern. According to the US State Department:

> [t]he human rights situation [in Turkey] improved in a number of areas, but very serious problems remain. The situation in the south-east was of particular concern. Government security forces and the PKK continued to forcibly evacuate and sometimes burn villages, though at a significantly lower level than in 1994. Various sources estimate that as many as 2 million people have left their homes in the south-east over the past 7 years; village evacuations have been one significant contributing factor and economic reasons were another. [...] The number of deaths in detention, safe house raids, 'mystery killings', and disappearances was down considerably from 1994. Some other forms of extrajudicial killings rose, including those associated with crowd control situations. Torture also continued to be a very serious problem. Police and security forces often employed torture during periods of incommunicado detention and interrogation.[4]

During the period between 1994-1996, the Commission received more than 300 individual complaints against Turkey. Of these complaints, 77 cases

3. According to ECHR Art. 25, the Commission may receive an application from an individual only if the state against which such a complaint has been lodged has expressly recognized the competence of the Commission to receive such applications. At present, all contracting parties to the Convention have accepted this competence of the Commission. Apart from the individual complaint, the parties to the Convention also have the right to lodge a complaint with the Commission regarding any alleged breach of the Convention by another contracting pursuant to ECHR Art. 24, the so-called inter-state complaint.

4. US Department of State, Country Reports on Human Rights Practices for 1995 (1996).

were declared admissible; in six cases the Commission gave its report on the merits of the case.[5] At present, the Court has rendered seven judgments against Turkey. The applicants came from all over Turkey, but especially from the south-eastern part. The complaints concerned allegations of very severe violations, including torture, disappearances, village destruction, unlawful death in detention, and murder. Most of these cases also concern allegations of violations of the right of individual petition under Article 25 ECHR.[6]

The cases so far dealt with can be divided into three categories of violations. The first category concerns violations in isolated cases, where the length of detention and criminal procedures are at stake. The second category concerns allegations of severe police brutality and even of torture during interrogation at police stations. The third category concerns the strategy of the Turkish security forces after the promulgation of the Anti Terrorist Act. Under the state of emergency, the security forces fight against the PKK. In the course of this war against the PKK, these forces follow a scorched-earth strategy, with a vast number of human rights violations such as extrajudicial executions, burning houses, deportations, and bombing of inhabited villages, none of which can be justified under the state of emergency law. The latter cases give a clear indication of a pattern of gross and systematic violations, which took place especially in South-East Turkey where the majority of the population is ethnically Kurdish. In this contribution, I will focus on this situation.

3. CASES OF VIOLATIONS BY THE TURKISH SECURITY FORCES

The cases concern the alleged burning of the applicants' homes and their forced and summary expulsion from their villages by state security forces. According to the applicants, after an attack by the PKK, the security forces carried out an operation in pursuit of the perpetrators. The security forces entered the village and assembled people from part of the village in front of the school. They then carried out searches in that part of the village and proceeded to burn down 10 to 13 houses, including those of some of the applicants. The villagers were told that their houses were being burnt as a

5. European Commission of Human Rights, Survey of Activities and Statistics 28 (1995).
6. *See also* note 3, *supra*.

punishment for helping the terrorists. Most of the inhabitants left their village and went to Diyarbakir. Some of the applicants moved in with relatives while others were left homeless. Some months later, the security forces returned to the villages and set fire to the rest of the houses. According to the Government, after the PKK attack, the villagers began to evacuate their homes voluntarily because they felt insecure there, and the abandoned houses collapsed. After the attack on a gendarme station, searches were made by the security forces in the area and several deserted terrorist shelters were found, but no damage was caused in the villages. After the soldiers had left, PKK terrorists came to the village and set fire to the remaining houses.[7] The first of these cases, the *Akdivar* case, has recently been decided upon by the Court.[8]

4. AKDIVAR CASE: THE PRELIMINARY OBSERVATIONS OF THE RESPONDENT GOVERNMENT

The Government claimed that the failure of the applicants to avail themselves of remedies in South-East Turkey was part of the general policy of the PKK to denigrate Turkey and its judicial institutions and to promote the idea of the legitimacy of terrorist activities. As part of this strategy it was necessary to prove that the Turkish judicial system was ineffective in general and unable to cope with such complaints and to distance the population in South-East Turkey from the institutions of the Republic and, in particular, the courts. The applicants' failure to exhaust remedies in this case had thus a political objective. According to the Government, there was an abuse of process. The Government further submitted that the application should be rejected for failure to exhaust domestic remedies as required by Article 26 ECHR.[9] It stressed in this context that not only did the ap-

7. *See* in this respect Akdivar and Others *v.* Turkey, Report of the Commission of 26 October 1995, Application No. 21893/93, not yet published; Mentes and Others *v.* Turkey, Report of the Commission of 7 March 1996, Application No. 23186/94, not yet published.
8. Akdivar and Others *v.* Turkey, *see supra* note 1.
9. As a general principle of international law, an international body may only take a complaint into consideration after the respondent state has had an opportunity to redress the alleged violation within the framework of its own legal system. In the ECHR this principle is laid down in Art. 26. At the national level, this has two important consequences: First, it should be noted that all the facts that form the subject of the international complaint must have been put forward in the proper national proceedings. Second, it is required that all available local remedies have been exhausted. In principle, this means that

plicants fail to exhaust relevant domestic remedies, but they did not even make the slightest attempt to do so. According to the government, the applicants could have made claims for compensation to the Turkish courts. They could have done so in civil proceedings as well as in administrative proceedings. Finally, the government asserted that the applicants had not substantiated in any way their allegations concerning a fear of reprisals for having recourse to the Turkish courts. They, and a large number of applicants in other cases pending before the Commission, had been able to bring their cases to Strasbourg without harassment.

4.1. The Court's assessment

With respect to the government's allegation of an abuse of process by the applicants, the Commission had already decided in its admissibility decision of 19 October 1994[10] that the government's argument could only be accepted if it were clear that the application was based on untrue facts, which was not the case. The Court recalled that in its findings of fact, the Commission had substantially upheld the applicants' allegations concerning the destruction of their property. Under these circumstances, and *a fortiori*, the Government's plea had to be rejected.[11]

Regarding the application of Article 26 to the facts of the present case, the Court noted at the outset that the situation existing in South-East Turkey at the time of the applicants' complaint was - and continued to be - characterized by significant civil strife due to the campaign of terrorist violence waged by the PKK and the counter-insurgency measures taken by the government in response. In such a situation, it must be recognized that there may be obstacles to the proper functioning of the system and the

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all those remedies provided for, up to the highest level, must have been used insofar as the appeal to a higher tribunal can substantially affect the decision on the merits. In some states, this means that besides the ordinary remedies, the extra-ordinary remedies must also have been used. According to the Strasbourg case law, an individual is dispensed from the obligation to exhaust certain remedies if, in the circumstances of his case, these remedies are ineffective or inadequate. This is not the place to discuss the voluminous case law of the Commission on this point. It is clear, however, that an appeal is ineffective and does not have to be instituted if it is certain that, considering the national case law, it does not offer any chances of success. *See, e.g.*, X *v.* FRG, Application No. 7705/76, 9 ECHR Decs. and Reports (1977), at 196 (203).

10. Akdivar and Others *v.* Turkey, Report of the Commission of 26 October 1995, Application No. 21893/93 (not yet published).

11. Akdivar and Others *v.* Turkey, *supra* note 1, at 12 (para. 54).

administration of justice. In particular, the difficulties in securing probative evidence for the purposes of domestic legal proceedings, inherent in such a troubled situation, may make the pursuit of judicial remedies futile, and the administrative inquiries on which such remedies depend may be prevented from taking place.

With respect to the remedies before the administrative courts, the Court found it significant that the government had not been able to point to examples of compensation being awarded with regard to the allegations that property had been purposely destroyed by members of the security police or to prosecutions having been brought against them. In this respect, the Court noted the general reluctance of the authorities to admit that this type of illicit behaviour by members of the security forces had occurred.

It further noted the lack of any impartial investigation, any offer to cooperate with a view to obtaining evidence, or any *ex gratia* payments made by the authorities to the applicants. Moreover, the Court did not consider that a remedy before the administrative courts could be regarded as adequate and sufficient, since the Court was not satisfied that the administrative courts could make a determination that property was destroyed by members of the gendarmerie.

In assessing the remedy before the civil courts, the Court took into account the fact that the events complained of took place in an area of Turkey subject to martial law and characterized by severe civil strife. The Court noted that it had to bear in mind the insecurity and vulnerability of the applicants' position following the destruction of their homes, as well as their basic needs. Against such a background, the prospects of civil proceedings being successful based on allegations against the security forces must be considered to be negligible, in the absence of any official inquiry into their allegations. Even if the applicants could have secured the services of lawyers, the risk of reprisals against the applicants or their lawyers if legal proceedings were brought alleging the responsibility of the security forces could not be excluded. Accordingly, the applicants demonstrated the existence of special circumstances dispensing them from exhausting remedies. The Court therefore concluded that the application could not be rejected for the failure of exhausting domestic remedies.

As an *obiter dictum*, the Court emphasized that its ruling was confined to the particular circumstances of the present case. It was not to be interpreted as a general statement that remedies were ineffective in this area of Turkey or that future applicants would be absolved from the obligation

under Article 26 ECHR to have normal recourse to the system of remedies that are available and functioning. According to the Court, only in exceptional circumstances, such as those that were shown to exist in the present case, would it allow applicants to address themselves to the Strasbourg institutions for a remedy of their grievances without having made any attempt to seek redress before the local courts.[12]

4.2. The merits of the case

The Court found that the applicants had established that the security forces were responsible for burning their houses and that there was no doubt that deliberately burning houses and their contents constituted a serious interference with the applicants' rights to respect for their family lives and homes and the peaceful enjoyment of their possessions. No justification for these interferences have been provided by the government, which confined its response to denying the involvement of the security forces in the incident. The Court therefore concluded that there had been a violation of both Article 8 of the ECHR and Article 1 of Protocol No. 1.[13] The Court did not find that the evidence established by the Commission enabled it to reach any conclusion concerning the allegation of the existence of an administrative practice in breach of these provisions.

The applicants had also requested the Court to endorse the Commission's opinion that the burning of their homes by the security forces also amounted to inhuman and degrading treatment in breach of Article 3 ECHR. In the absence of precise evidence concerning the specific circumstances in which the destruction of the houses took place and its finding of a violation of the applicants' rights under Article 8 ECHR and Article 1 of Protocol No. 1, the Court did not examine the applicants' Article 3 allegation.[14]

The applicants had further claimed that they did not have access to a court, as guaranteed by Article 6(1) ECHR and that they did not have an effective remedy, contrary to Article 13 ECHR. Unlike the Commission, which found violations with respect to both provisions, the Court held that these complaints reflected the same or similar elements as those issues

12. *Id.*, at 17-19 (paras. 71-77)
13. *Id.*, at 21 (para. 88).
14. *Id.*, at 22 (para. 91).

already dealt with in the context of the objection concerning the exhaustion of domestic remedies. Therefore, it deemed it unnecessary to examine these additional complaints.

The applicants further submitted that the acts of destruction of their property and eviction from their village were part of a deliberate and unjustified policy directed against them because they were Kurds, in violation of Article 14 ECHR (prohibition of discrimination) and Article 18 ECHR (prohibition of *détournement de pouvoir*). However, the Court noted that the Commission had found that, in the light of the submitted evidence, those allegations were unsubstantiated and accepted the Commission's findings on this point.

4.3. The hindrance of the effective exercise of the right of individual petition

In its report, the Commission noted with concern that the applicants, and persons who were thought to be applicants, had been directly asked by the authorities about their petitions to Strasbourg. It considered it inappropriate for the authorities to approach applicants in this way, in the absence of their legal representatives, particularly where such initiatives could be interpreted as an attempt to discourage them from pursuing their complaints. The Commission concluded that the Turkish authorities had hindered the effective exercise of the right of individual petition under Article 25(1) ECHR. The delegate of the Commission had stated before the Court that applicants from South-East Turkey had been contacted by the authorities, who had inquired about their applications before the Commission. These interviews had sometimes resulted in a declaration by the applicant that he or she had never lodged any application or that he or she did not wish to pursue the application. In some cases, statements to this effect were recorded in minutes drawn up before a public prosecutor or a notary, apparently at the initiative of the authorities.

The Government pointed out that it had actively cooperated with the Commission at all stages of the proceedings, and that during the witness hearings each of the witnesses was free to express his or her views. The investigations, in its submission, had no effect whatsoever on the exercise of the right of individual petition or on the ensuing proceedings. It was only if an applicant were actually prevented from exercising the right, irrespective of the presence or absence of a legal representative during such

inquiries, that there could be an obstruction of the right of individual petition.

The Court, like the Commission, deemed it to be of the utmost importance for the effective operation of the system of individual petition, instituted by Article 25 of the Convention, that applicants or potential applicants be able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. The Court continued that given the vulnerable position of the applicant-villagers, and the reality that in South-East Turkey complaints against the authorities might well give rise to a legitimate fear of reprisals, the matters complained of amounted to a form of illicit and unacceptable pressure on the applicants to withdraw their application. Moreover, it could not be excluded that the filming of the two persons who were subsequently declared not to be applicants could have contributed to this pressure. The fact that the applicants actually pursued their application to the Commission did not mean that the authorities' behaviour did not amount to a hindrance with regard to the applicants' right of individual petition.[15]

5. COMMENTS

In my opinion, it is unacceptable that the Court, unlike the Commission in this case, did not even examine the question whether the destruction of the houses and their contents amounted to a breach of the prohibition of inhuman treatment, laid down in Article 3 ECHR. In his partly dissenting opinion, Judge Mifsud Bonnici pointed out why he could not follow the majority in this respect. One of the reasons set out by the Court for not examining the question under Article 3 was the finding of a violation of the applicants' rights under Article 8 ECHR and Article 1 of Protocol No. 1. He rightly took the view that the findings of violations of both Articles stem from the salient fact that the applicants' houses were destroyed. It was procedurally proper to examine the major claim first and abstain from examining a minor one later if the first is deemed to practically absorb the latter. In his opinion, however, a hierarchical approach is more appropriate to attain the aim of guiding contracting states as to the scope of their obli-

15. *Id.*, at 24-25 (paras. 104-105).

gations under the Convention and its Protocols. Therefore, the claim should have been examined by the Court.

It also should be noted that in the same case, the Commission considered that the burning of the applicants' homes by the security forces, resulting in their migration to Diyarbakir in dire personal circumstances, with little or no state assistance, amounted to inhuman and degrading treatment.[16] For that reason alone, the Court should at least have examined the question.

Another point of criticism is the fact that the Court, as well as the Commission, has not been willing to draw the conclusion that there exists an administrative practice of human rights violations in Turkey. It probably goes too far to allege that there is such an administrative practice in the entire country; but it certainly exists in certain areas of Turkey, particularly the south-eastern part. Although Article 26 ECHR requires that all applicants to the Commission must have exhausted domestic remedies prior to having their applications considered, in at least two instances the Commission has waived the exhaustion requirement. In the *Greek* case,[17] the Commission allowed a waiver of the exhaustion requirement under Article 26 where it could clearly be established that the state had implemented administrative practices of torture or ill-treatment. The Commission demanded proof of two elements of such prohibited practices: repetition of acts, and official tolerance. In the case of *Ireland* v. *United Kingdom*, the Court stated that:

> [a] practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system.[18]

'Official tolerance' means that:

> though acts of torture or ill-treatment are plainly illegal, they are tolerated in the sense that the superiors of those immediately responsible though cognisant of such acts, take no action to punish them or prevent their repetition; or that higher authority, in face of numerous allegations, manifests

16. Akdivar and Others *v.* Turkey, *supra* note 7, para. 224. *See also* Mentes and Others *v.* Turkey, *supra* note 7, para. 190.
17. Greek case, Report of the Commission of 5 November 1969, Yearbook ECHR XII, at 195-196.
18. Ireland *v.* United Kingdom, 18 January 1978, 25 Series A., at 64.

> indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings, a fair hearing of such complaints is denied.[19]

In the case of *France, Norway, Denmark, Sweden and the Netherlands* v. *Turkey*, the Commission added that:

> any action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system.[20]

In *Ireland* v. *United Kingdom*, the Court also held that the standard of proof for claims of administrative practice violations under ECHR Article 3 should be 'beyond a reasonable doubt', but also indicated that such a standard of proof may be met through establishing the "coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact [...]."[21] It noted that:

> [i]t is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such practices. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected.[22]

In my opinion, most of the elements mentioned by the Commission and Court are also relevant for the present human rights situation in Turkey. The Court and Commission have not given very convincing reasons why they came to a different conclusion. A finding of the existence of an administrative practice has an important side effect, apart from the advantage for future victims in an identical situation as those in the *Akdivar* case being absolved from the obligation of prior exhaustion of the domestic remedies. It would be a clear message to the Turkish government that the present human rights situation in Turkey does not meet the standards of the Council of Europe. It also could have been an incentive for other member states of the Council of Europe to become more active in the case of Turkey. It seems, until now, that member states are not willing to make use of the

19. Greek case, Report of the Commission of 5 November 1969, Yearbook ECHR XII, at 195-196.
20. France, Norway, Denmark, Sweden and the Netherlands *v.* Turkey, Application No. 9940-9944/82, 35 ECHR Decs. and Reports (1983) at 143 (164).
21. Ireland *v.* United Kingdom, 18 January 1978, 25 Series A., at 64.
22. *Id.*

interstate mechanism against Turkey. The situation in Turkey has reached a point that changes and improvements are urgently needed. The Court has missed a chance to make this explicitly clear. Although the Court will have another chance when it deals with the *Mentes* case, a case that is identical to the *Akdivar* case, that is not a reason to remain passive. An inter-state complaint against Turkey should seriously be considered. In addition, the Council of Europe should become more active in this respect; the Secretary-General of the Council of Europe could make use of his competence under ECHR Article 57 and call on Turkey to show how domestic laws "ensure the effective implementation of any of the provisions of this Convention."

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