



1986

İNSAN HAKLARI DERNEĞİ HUMAN RIGHTS ASSOCIATION

Necatibey Cad. 82/11-12,
06430 Demirtepe-Ankara
TURKEY
Tel: +90 312 230 35 67-68-69
Fax: +90 312 230 17 07
E-mail: ihd@ihd.org.tr,
<http://www.ihd.org.tr>

Submission of the Human Rights Association to the Committee on Enforced Disappearances on "Non-State actors and enforced disappearances in the context of the Convention of the Protection of all persons against Enforced Disappearances"

Ankara, 26 August 2022

The Human Rights Association (İnsan Hakları Derneği – İHD / Turkey), hereby, submits its comments to inform the draft statement of the Committee on Enforced Disappearances on “Non-State actors and enforced disappearances in the context of the Convention of the Protection of all persons against Enforced Disappearances.”

About İHD

İHD is a non-governmental, independent, and voluntary body. The association, which was founded in 1986 by 98 human rights defenders, today has 27 branches and 7 representative offices. İHD is the oldest and largest human rights organization in Turkey and its sole and specific goal is to promote “human rights and freedoms.”

İHD is a member of the International Federation of Human Rights (FIDH), EuroMed Rights and the World Organization against Torture (OMCT). İHD founded and is a member of the Human Rights Joint Platform (İHOP) in Turkey, while it founded the Turkish Coalition for the International Criminal Court and still serves as its speaker. İHD also founded the Human Rights Foundation of Turkey (HRFT) with a group of physicians in 1990.

İHD issues special reports on various human rights issues including annual reports on human rights violations in Turkey. These include but are not limited to violations of the rights of women, freedom of speech, the legal system, prisons, impunity, enforced disappearances, murders by unknown assailants, extrajudicial executions, torture and ill-treatment, and notably gross human rights violations in places where curfews were declared.

İHD is an organization that submits shadow reports before committees at the United Nations and the Council of Europe that Turkey is a party to. İHD works in cooperation with the UN High Commissioner for Human Rights and the CoE Commissioner for Human Rights and special rapporteurs. Furthermore, İHD is an organization that is engaged in exchange of views with diplomatic missions of countries emphasizing the protection of human rights in their foreign policies. İHD cooperates with bodies and institutions working for democracy in Turkey as well.

Human Rights Association (İnsan Hakları Derneği-İHD) is a non-governmental, independent, and voluntary body. The association, which was founded in 1986 by 98 human rights defenders, today has 27 branches, 7 representative offices, and ~8,000 members. İHD is the oldest and largest human rights organization in Turkey and its “sole and specific goal is to promote ‘human rights and freedoms.’”

Introduction

The UN Working Group on Enforced or Involuntary Disappearances (WGEID) visited Turkey in 2016 and held meetings with İHD executives and Saturday Mothers. After its visit to Turkey, the Working Group issued a report on Turkey and submitted it to the UN Secretary-General. The Turkey Report submitted by the UN Secretary-General to the UN General Assembly on 27 July 2016 offered very important findings and recommendations.¹

In Turkey, armed conflict started again as of 24 July 2015 due to the unresolved Kurdish issue. In this process, especially as of 16 August 2015, long-term curfews were declared in various district centers in the eastern and south-eastern regions of Turkey. In the districts where curfews were imposed for long periods, armed clashes directly involving military troops took place and many civilians lost their lives.²

An attempted coup d'état was staged in Turkey on 15 July 2016; it was quenched a day later on 16 July and the plotters were arrested and handed over to the judicial authorities. However, a state of emergency was declared all over Turkey on 20 July 2016, even though it was not legally required, and was in effect uninterruptedly until 19 July 2018. On 26 August 2016, the Turkish military launched a campaign in the Jarabulus-Azez region of Syria. In January 2018, the Turkish army, together with the paramilitary Free Syrian Army (FSA), intervened in Syria's Afrin region. In October 2019, the Turkish army intervened in north-eastern Syria together with the paramilitary structures there.^{3, 4} There are also well-established reports by both the UN Independent Commission of Experts and independent human rights organizations of gross human rights violations in the Syrian territory under its control, where the Turkish army, together with the FSA and other jihadist paramilitary structures and the paramilitary structure later renamed the Syrian National Army (SNA), intervened. There are quite credible allegations that the vast majority of the crimes there have been committed by paramilitary structures in the areas under the control of the Turkish state.

After the coup attempt in Turkey, new allegations have been made about disappearances in custody. In this regard, İHD first released a statement about 11 people who allegedly were subjected to enforced disappearance in May 2017 and submitted the allegations to the WGEID. Subsequently, the association sent applications to the WGEID on an individual case basis regarding the applications lodged on this issue.

We would like to underline that in the intervening 6 years, the recommendations of the WGEID in its report released on 27 June 2016 have not been complied with and that new cases of enforced disappearances have been reported, that many crimes against humanity have been committed in the regions under Turkey's control after its military intervention in Syria, involving paramilitary groups with which Turkey cooperated, and that there are reports by both the UN and human rights organizations on this issue.

Both long-term disappearances and attempted disappearances are covered in detail in İHD's special

¹ <https://digitallibrary.un.org/record/847933>

² <https://en.tihv.org.tr/curfews/>

³ <https://www.ihd.org.tr/irak-suriye-tezkeresi-mgk-kararlari-ve-bagimsizlik-referandumu-kurt-sorunu-uluslararası-bir-sorun-haline-gelmistir/>

⁴ <https://ihd.org.tr/en/ihd-statement-on-the-bid-to-extend-the-governments-mandate-in-iraq-and-syria/>

reports^{5, 6} on enforced statements, interviews, informant-making attempts and abductions through coercion and threats, the first of which was issued on 16 November 2018.⁷ We would like to remind that many submissions were made to the WGEID on enforced disappearance cases after 2016, upon the application of the families of the disappeared persons to İHD.

Saturday Mothers:

In Turkey, the long-term sit-ins or vigils by Saturday Mothers/relatives of the disappeared /human rights defenders in order to find out the fate of those who disappeared in detention and to seek justice continue against all odds.

On 27 May 1995, Baba Ocak, Emine Ocak, Hatice Toraman, Birsen Gülünay, Birsen Gülünay, Asiye Karakoç and İrfan Bilgin, together with human rights defenders, started their peaceful sit-ins in Galatasaray Square in front of Galatasaray High School in İstiklal Street in İstanbul's Beyoğlu District on 27 May 1995 in order to find out the fate of their children who were disappeared in custody and to find the murderers of their children/relatives whose bodies were found and to bring them to justice and to create democratic public opinion in this way.⁸ These vigils, which are the longest-running act of justice and civil disobedience in the history of Turkey, have been named the "Saturday Mothers' Sit-Ins" because they were initiated by the mothers and held on Saturdays. These sit-ins continued for 200 weeks without interruption, but they were stopped in the 200th week due to government pressure. After about 10 years, on 31 January 2009, the Saturday Mothers issued a call to the relatives of the disappeared together with the İHD's local İstanbul branch Commission for the Disappeared with the demand "Find the Disappeared, Prosecute the Perpetrators" and started to hold their peaceful sit-ins the same place uninterruptedly from the 201st week onwards. These sit-ins of the Saturday Mothers and İHD was seen by the then Prime Minister Mr. Erdoğan, and a meeting was held with the mothers and the İHD's İstanbul Branch of İHD on 4 February 2011 at the Dolmabahçe office of the Office of the Prime Minister in İstanbul. Thus, Saturday Mothers' sit-ins were directly recognized as legitimate by the political power. The mothers continued their sit-in protests at the same venue without interruption, even during the 2-year state of emergency declared after the 15 July 2016 coup attempt.

However, on 25 August 2018, the Interior Minister of the time did not allow the 700th week vigil of the Saturday Mothers and the vigil was prevented by police intervention and many people were detained.⁹ The detainees then faced criminal charges for violating Law No. 2911.¹⁰ The case is still pending before the İstanbul 22nd Criminal Court of First Instance.

The 800th vigil of the Saturday Mothers which was to be held on 25 July 2020 was also prevented and 3 people from Saturday People were detained.¹¹ Saturday Mothers' vigil for the 900th week,

⁵ <https://ihd.org.tr/en/ihd-special-report-enforced-statements-interviews-informant-making-and-abductions-through-coercion-and-threats/>

⁶ <https://ihd.org.tr/en/ihd-special-report-enforced-statements-interviews-informant-making-and-abductions-through-coercion-and-threats-in-2021/>

⁷ <https://ihd.org.tr/en/ihd-special-report-on-testimonies-interviews-forced-informant-making-through-methods-of-coercion-and-threat-and-abduction-cases/>

⁸ <https://www.sessizkalma.org/en/defender/saturday-motherspeople>

⁹ <https://www.bbc.com/news/world-europe-45311134>

¹⁰ <https://bianet.org/english/law/241182-lawsuit-against-saturday-people-is-a-threat-to-everyone-demanding-rights>

¹¹ <https://bianet.org/english/human-rights/228073-we-will-not-stop-demanding-justice-for-the-enforced-disappeared>

which was to be held on 25 June 2022, was also prevented while 16 people including Saturday Mothers, İHD Co-chairs Eren Keskin and Öztürk Türkdöğün, İHD executive board members and Saturday People were detained. All the detainees were released on the same day.¹²

On the other hand, families who have been staging sit-ins in front of Peoples' Democratic Party's (Halkların Demokratik Partisi -HDP) Diyarbakır office since August 2019 claiming that their children were forced to join the PKK organization (their children were forced to join at a young age) have been provided with all kinds of support and facilities by state officials.¹³

The Right to Truth

In Turkey, the right to truth about those who were subjected to enforced disappearance in custody is relentlessly denied.¹⁴ The "Cemil Kırbayır Report" of the Grand National Assembly of Turkey's (GNAT) Human Rights Inquiry Commission proves to be quite interesting. After the 12 September 1980 military coup, Cemil Kırbayır was detained and disappeared in Kars in October 1980 and his fate is still unknown. The GNAT Human Rights Inquiry Commission established a sub-commission on 9 February 2011 to inquire this issue and revealed with material evidence that Cemil Kırbayır was subjected to enforced disappearance in custody and killed by torture.¹⁵ After the report was submitted to the Kars Public Prosecutor's Office, the investigation was delayed for a long time and in December 2021 the investigation file was closed due to the statute of limitations. The application lodged by Cemil Kırbayır's siblings to the Constitutional Court through individual application is still pending in the individual application record of the Constitutional Court 2022/10033. As can be seen, the right to truth and access to justice are highly problematic in Turkey. Within the framework of the right to truth, democratic protests and activities of the relatives of the disappeared are constantly banned and prevented. Such state of affairs is maintained as the most important government policy that feeds impunity.

The right to truth is regulated in Article 24 of the Convention. It is useful to remind WGEID's General Comment No. 10 on the right to the truth in relation to enforced disappearance.¹⁶

The report of the UN Independent International Commission of Inquiry on the the Syrian Arab Republic, which was submitted at the 48th session of the UN Human Rights Council, contains very important and remarkable findings. The crimes against humanity committed by non-state armed groups in the areas under their control are particularly grave.¹⁷

We would also like to express our full support for the report of the Independent International Commission of Inquiry on the Syrian Arab Republic, released on 17 June 2022, "Syria's Missing and Disappeared: Is There a Way forward? Recommendations for a Mechanism with an International Mandate."¹⁸ In fact, the issues stated in this report necessitate the investigation of the crimes

¹² <https://gazetekarinca.com/900-hafta-eylemi-galatasaray-meydanina-gitmek-isteyen-cumartesi-annelerine-polis-mudahalesi/>

¹³ <https://www.amnesty.org.tr/icerik/cumartesianneleri>

¹⁴ For comprehensive analyses in the Turkish context see studies by Hafıza Merkezi (Justice Truth Memory Center): <https://hakikatadalethafiza.org/en/>

¹⁵ https://www.tbmm.gov.tr/Files/Komisyonlar/insanHaklari/docs/2011/cemil_kirbayir_raporu.pdf

¹⁶ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/104/45/PDF/G1110445.pdf?OpenElement> (para. 39)

¹⁷ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/223/82/PDF/G2122382.pdf?OpenElement>

¹⁸ https://www.ohchr.org/sites/default/files/2022-06/PolicyPaperSyriasMissingAndDisappeared_17June2022_EN.pdf

committed by military/political structures formed under various names under the supervision/knowledge/direction of states or inter-state coalitions, as seen in the Syrian example, and the responsibility of the states that support these actors.

Further, Amnesty International's 2020 report on unlawful attacks and mass displacement in northwest Syria, titled "Nowhere Is Safe for Us" also incorporates serious findings and allegations regarding crimes against humanity committed by non-state armed groups.¹⁹

DEFINITION OF NON-STATE ACTORS AND RESPONSIBILITY:

Article 3 of the Convention regulates the responsibility of non-state actors. In this regard, we would like to mention an important academic study that we believe will contribute to the draft statement. Dr. Kerem Altıparmak's Ph.D. dissertation titled "Responsibility for the Violation of Human Rights by Non-State Armed Groups"²⁰ addresses the responsibility of non-state actors in its entirety.

In order to reach more precise conclusions on the responsibility of non-state actors, it is necessary to address the various forms of such actors. In this regard, it should be noted that the issues mentioned in Dr. Altıparmak's dissertation are still relevant.

There are unresolved legal gaps in international law. Due to these gaps, there are problems in access to justice regarding the responsibility of both states and non-state actors.

The Geneva Conventions regulate humanitarian law. Common Article 3 of the Conventions concerns the protection of civilians in internal armed conflicts. In armed conflicts within the country, states generally do not recognize the party with which they are in armed conflict legally and apply a different law under the name of the "anti-terrorism" discourse. Since these groups are not recognized as parties under the Geneva Conventions, serious crimes can go unpunished. It should also be noted that the principle of the objectivity of the conflict should be taken as a basis.

With *Prosecutor v. Dusko Tadic* judgement of the International Criminal Tribunal for the former Yugoslavia, the essence of humanitarian law has been gradually extended to apply to internal conflicts. In particular, the choice of means and methods by armed groups to wage war is limited under customary international law. Therefore, the vast majority of violations committed by armed groups are recognized under customary law.²¹ Further, the *Boskoski* judgment of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia brought a new and complete breakdown of the objective indicative factors regarding the criteria of "intensity of the conflict" and "organization of the armed group" developed by the Court since *Tadic*. Thus, it has become clear that the actions of non-state armed groups in internal armed conflicts will be considered within the scope of humanitarian law,²² but we believe that the *Tadic* and *Boskoski* judgments should be frequently reminded to States.

Another problem is that there are terrorist organizations recognized by states or various organizations such as NATO, the EU, etc., other than the individuals or groups recognized as terrorist

¹⁹ <https://www.amnesty.org/en/documents/mde24/2089/2020/en/>

²⁰ Altıparmak, Kerem. "Responsibility for the Violation of Human Rights by Non-State Armed Groups." University of Leeds, 2002, unpublished Ph.D. dissertation.

²¹ Ibid.

²² Esmer, Selahattin. "Uluslararası İnsancıl Hukukta Çatışma Kategorileri ve Minimum Silahlı Şiddet Eşiği." 2016. <https://ihd.org.tr/en/article-international-humanitarian-law/>

organizations and declared as terrorists by UN Security Council resolutions. This situation causes confusion in international law. There should be no definition of terrorism in international law; it should be made a valid rule that only certain crimes are defined as terrorist offences. In other words, the crimes other than terrorist offences defined by UN conventions or protocols or resolutions and the illegal non-state structures related to these crimes should be clarified. For example, in Turkey, the problem of the ambiguity of the definition of terrorism necessitates the application of the Anti-Terrorism Law in every case, thus humanitarian law is not applied.²³

Furthermore, a UN General Assembly resolution should be adopted and recommended for the transposition of the offences defined in the UN Rome Statute into the legislation of UN member states, without waiting for them to become parties to the statute. In fact, Russia's invasion of Ukraine has shown that the Rome Statute should be turned into a UN Charter to be applied directly all over the world without seeking the approval of states. We believe that this is the solution to the problem.

Another problem is the question of the responsibility of non-state actors in cases of armed conflict and war involving permanent members of the UN Security Council. In the recent Russian invasion of Ukraine, there are widespread reports in the press that non-state actors were in the war zone and committed grave crimes. In this case, the UN General Assembly should take decisions to eliminate this drawback.

Another problem is access to justice. For example, access to justice for the crimes committed by paramilitary groups in the Afrin region in Syria, the Jarablus-Azaz region, and the north-eastern region of Syria, which are under the control of Turkey, is de facto not possible because Turkey considers the political structure organized by Kurdish groups there as a terrorist organization and therefore it is not possible for them to bring the violations they have been subjected to to justice in Turkey. In addition, there are other problems regarding access to justice in international law for the groups subjected to violations there. For example, the European Court of Human Rights has responded to the applications lodged before it on this issue holding that the applicants should first exhaust Turkey's domestic law. In this case, more effective measures should be taken regarding access to justice. The question of how non-state groups operating in these areas will be prosecuted should be answered.

Another problem is that so-called "foreign fighters" and their families in the region controlled by the Syrian Democratic Forces (SDF) are not taken back by the states to which they belong. In order to uncover the grave crimes committed by these individuals, their states of nationality should cooperate with the SDF. How else can the 10 October Ankara train station massacre in Turkey, the attacks in European capitals, and in particular the abducted young women and children be uncovered?

Another problem is the need for state authorization to conduct investigations in areas of armed conflict. For example, Turkey has long refused to allow the International Committee of the Red Cross to carry out inquiries. In 2016, the UN High Commissioner for Human Rights was also denied permission, along with their delegation, to conduct on-site inquiry into armed conflict in cities under curfews.²⁴

²³ <https://ihd.org.tr/en/new-ihd-report-human-rights-defenders-in-an-iron-cage/>

²⁴ The Turkish Government has not responded positively to requests by my Office and other parts of the United Nations to visit the region to collect information first-hand."

<https://www.ohchr.org/en/press-releases/2016/05/need-transparency-investigations-light-alarming-reports-major->

THE MINNESOTA PROTOCOL AND MASS GRAVES

The Minnesota Protocol on the Investigation of Potentially Unlawful Death is the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions that was adopted by UN General Assembly Resolution 44/162 dated 24 May 1989. Since the Minnesota Protocol was adopted by a UN resolution, member states must comply with this resolution. However, it is not a convention.

The International Committee of the Red Cross (ICRC) published a guide entitled “Operational Best Practices regarding the Management of Human Remains and Information on the Dead by Non-Specialists” in 2003. The Red Cross document was intended as a guide for civil society and armed forces. It was drafted by drawing lessons from the past.

One of the important tools to be used in the fight against impunity is the Minnesota Protocol. The implementation of this protocol should be frequently recommended, especially in uncovering mass graves where disappeared persons are found. However, UN member states do not fulfil the requirements of this protocol. The most recent mass grave in Turkey, which was found in Hilvan, Şanlıurfa on 7 July 2022, was exhumed without complying with the rules of this protocol and therefore no evidence was collected in a sound way.²⁵

Another incident that did not comply with the Minnesota Protocol was the exhumation of human bones belonging to 263 people buried in a cemetery in Yukarıölek Village in Tatvan, Bitlis which were then sent to the Forensic Medicine Institution.²⁶ It remains unclear who these people were, whether they were people who disappeared in detention or militants of an organization who died in armed clashes. For this reason, the implementation of the Minnesota Protocol is very important.

One of the places where the crimes of disappearance in custody committed by non-state groups are most intense and widespread is the Sinjar region of Iraq. Kurdish Yazidi groups live in this region. The fates of hundreds of women who were detained in the attack carried out by ISIS on 3 August 2014 are still unknown. We believe that an international inquiry commission should be established on this issue.²⁷

Conclusion:

We believe that the above-mentioned points will contribute to the Committee’s draft statement. Our recommendations within this context are as follows:

1. A resolution by the UN General Assembly on the transposition of the types of crimes defined in the UN Rome Statute, and in particular the crime of enforced disappearance, into the criminal legislation of UN member states should be adopted;
2. Syrian civil war should be ended and a special criminal court for Syria, just like the one for Yugoslavia, should be established;

violations

²⁵ <https://m.bianet.org/bianet/insan-haklari/264999-urfa-daki-kazida-insan-kemikleri-bulundu>

²⁶ <https://www.ihd.org.tr/bitlis-ili-tatvan-ilcesi-yukariolek-koyu-yakinlarindaki-mezarligin-279-mezar-ortadan-kaldirilmasina-dair-rapor/>

²⁷ <https://www.ihd.org.tr/ezidiler-nicin-kaciyor/>

<https://www.ohchr.org/en/press-releases/2016/06/un-commission-inquiry-syria-isis-committing-genocide-against-yazidis>

3. UN General Assembly should adopt a resolution on the application of common Article 3 of the Geneva Conventions to internal armed conflicts, recalling the *Tadic and Boskoski* judgments;
4. A special unit within the UN Office of the High Commissioner for Human Rights should be formed, in addition to the International Committee of the Red Cross, for the implementation of the Geneva Conventions;
5. UN General Assembly should adopt a resolution on disappearances in custody to attribute responsibility to states, in addition to the responsibility of non-state actors,
6. Specific reference should be made to the *Boskoski* judgment of the International Criminal Tribunal for the former Yugoslavia;
7. UN General Assembly should adopt a resolution on the exhumation in mass graves in accordance with the Minnesota Protocol to clarify the fate of the disappeared;
8. A reference should be made to the right to the truth and the right to access to justice stating that all democratic protests and activities of the relatives of the disappeared and acts of civil disobedience should be unhindered and closely monitored by the special procedures of the UN Office of the High Commissioner for Human Rights.