Introduction

1.1 Apocalypse Now

On 19 December 2015, at around 7:00 p.m., Taybet İnan, fifty-seven years old and mother of eleven, was shot to death by Turkish security forces. She was on her way back from visiting a neighbour across the street. Her ‘crime’ was to step out during a round-the-clock curfew in the Kurdish town of Silopi. As she lay wounded on her doorstep, her family called for an ambulance, which never arrived. Her brother-in-law Yusuf was also shot when he stepped out to help her. The family called the emergency police line again, this time for authorization to bring an ambulance themselves. The authorities said they would be safe to leave as long as they carried white flags. The family obliged, but were nonetheless shot at. After several failed attempts, they watched Taybet and Yusuf bleed to death. Taybet’s husband Halit was able to talk to his wife from afar. Her last words were how cold and thirsty she was. The family were able to retrieve Yusuf from their courtyard into the house, but Taybet remained out on the street. For a week, her body lay in front of her house, while her family repeatedly begged the authorities for permission to retrieve her. Once again, they were told they could leave as long as they carried white flags. They obliged, only to be shot at again. This time, Halit was injured. One of Taybet’s sons later wrote: ‘My mother remained on the street for a whole seven days. None of us could sleep, worrying dogs would come around, birds would perch on her. As she lay 150 meters away from us, we, too, died.1 On 25 December, the authorities finally removed Taybet’s body off the street. When she was buried eighteen days later, only two of her children were allowed to be present at the funeral.

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1 The incident was widely reported in the independent Turkish media. Sertaç Kayar, “‘Dark’ Eid at the House of Mother Taybet, whose Body Lay out on the Street for Seven Days’ [Cenazesı 7 Gün Yerde Kalan Taybet Ana’ının Evinde ‘Kara’ Bayramı], T24, 5 July 2016.
Her husband and nine children were denied a farewell. She was buried without a religious ceremony.

In July 2015, the Turkish military launched an operation in the country’s Kurdish region. It went into densely populated towns with thousands of combat-ready troops, tanks, armoured vehicles and heavy artillery, allegedly to remove the barricades and trenches the Kurdistan Workers’ Party (Partiya Karkerên Kurdistan – PKK) had built in residential areas. The military bombed and razed entire towns, without any regard to the presence of civilians. From August onwards, on grounds of counterterrorism and public security, local authorities declared round-the-clock, open-ended curfews in more than thirty towns and neighbourhoods, which lasted up to several years, affecting 1.6 million people.

Civilians were trapped in curfew zones, without access to food, water, power and emergency health services during long winter months. No one, including the sick, wounded, children, elderly and disabled, was allowed to leave without authorization, while humanitarian aid workers, human rights observers and members of the Grand National Assembly of Turkey (Türkiye Büyük Millet Meclisi – TBMM) were denied access. Journalists who tried to enter were threatened, arrested and, in at least one case, shot. In two reported cases, dead bodies of two presumed terrorists were dragged behind an armoured vehicle and, in the case of a woman, displayed naked. Photographs and video footage circulating on the Internet showed masked Special Operations forces spray-painting buildings with racist messages and playing ultranationalist songs from armoured vehicles. The most alarming reports came from Cizre, where over 100 people who were sheltering in three basements surrounded by
the security forces were allegedly burned to death. Witnesses interviewed by the United Nations (UN) Office of the High Commissioner for Human Rights ‘painted an apocalyptic picture of the wholesale destruction of neighbourhoods’.

During the period of July 2015–December 2016, some 2,000 people, including 1,200 civilians, were killed in the curfew areas. Many died for lack of access to emergency health care. Over 355,000 were displaced, and numerous disappeared or were tortured and subjected to excessive use of force. Satellite imagery showed entire neighbourhoods razed to the ground in the immediate aftermath of security operations. Not a single investigation was opened into any of these incidents. To the contrary, the authorities claimed the deceased were terrorists and responded to their families’ demands for accountability with terrorism charges.

Facing a real risk of being killed and unable to meet their basic needs, individuals trapped in curfew zones did what would be appropriate in a country claiming to be a democracy governed by the rule of law: they went to courts. They requested Turkey’s Constitutional Court (Anayasa Mahkemesi – AYM) to issue an interim measure by ordering the government to end curfews and to either cease military operations or carry them out in accordance with international legal standards. In short, they asked Turkey’s highest court to save lives. One after another, they failed. In a case filed by two Cizre residents, the AYM rejected the petitioners’ requests for immediate relief on the grounds that they failed to prove that their lives were in danger. It then rejected the petition of a TBMM member from the Peoples’ Democratic Party (Halkların Demokratik Partisi – HDP) on the grounds that she lacked victim status.

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5 Ibid., Report on the Human Rights Situation in South-East Turkey, pp. 7–8.
6 Ibid., p. 5.
7 Ibid., pp. 7–8.
8 Pending a final judgment, the AYM can issue interim measures where it sees a serious danger to the life or material or moral integrity of the petitioner. Law on the Establishment and Adjudication Procedures of the Constitutional Court [Anayasa Mahkemesinin Kuruluşu ve Yargılama Usulleri Hakkında Kanun], no. 6216, 30 March 2011, Official Gazette, no. 27894, 3 April 2011, Article 49(5); Internal Regulations of the Constitutional Court [Anayasa Mahkemesi İtüzüğü], Official Gazette, no. 28351, 12 July 2012, Article 73(1).
by virtue of not living in curfew areas. By then, fifty-two curfews had been declared in seven provinces and seventeen towns, where sixty-three civilians had been shot to death or died due to lack of emergency medical care. Yet, the AYM continued to reject the interim measure requests, including by a fifteen-year-old boy with a disability, a nine-months pregnant woman and a man whose arm had to be amputated due to lack of immediate medical care. Doing so, it exclusively and unquestioningly relied on the government’s arguments that the applicants could have called an emergency line for medical care, food and funeral services. This deference was striking, not least because the İnan family, and many others, had called the emergency line and the government was of course aware of the dire humanitarian situation in the curfew zones. So extreme was the AYM’s self-restraint that it did not even review the legality of curfew decisions, let alone engage in a proportionality analysis.

At least, the road to the European Court of Human Rights (ECtHR/Court) was still open. The petitioners next pursued that road, confident that Strasbourg would intervene. The expectation seemed particularly justified after the Council of Europe (CoE)’s Commissioner for Human Rights had issued two separate statements, urging the Turkish government to allow immediate independent access to Cizre and expressing concern about the curfews and ‘the chronic problem of impunity concerning actions of security forces’. Yet, out of the thirty four applications by over 160 applicants between late 2015 and April 2017, the ECtHR denied interim measures in all but five. In four of the latter, Turkey defied the Court’s instructions for immediate hospitalization, resulting in the death of the applicants. In the remaining twenty-nine cases, the ECtHR did not

10 AYM, Meral Danış Beştaş, Application no. 2015/19545, Decision, 22 December 2015.
11 AYM, İrfan Uysal and Others, Application no. 2015/19907, Decision, 26 December 2015.
12 All of the petitioners claimed that curfew orders lacked legal basis under the Turkish law. E.g. AYM, Ayhan Seviktek and Mehmet Oran, Application no. 2016/43, Decision, 8 January 2016; AYM, Ekrem Şen and Others, Application no. 2015/20376, Decision, 20 January 2016.
15 Interview with the applicants’ co-counsel Benan Molu, Berlin, 27 April 2017.
16 Öncü v. Turkey, Application no. 4817/16; Zehide Paksoy and Others v. Turkey, Application no. 3758/16; Ahmet Tunç and Zeynep Tunç v. Turkey and Ahmet Tunç and Gider Yerbasan v. Turkey, Application nos. 4133/16 and 31542/16; Cemil Altun v. Turkey, Application no. 4353/16; and Mehmet Latif Karaman v. Turkey, Application
apply Rule 39\textsuperscript{17} because ‘the elements at its disposal were insufficient’.\textsuperscript{18}

It directed the petitioners to the AYM, which it found to be ‘relevant and potentially capable of providing interim relief’.\textsuperscript{19}

The İnans were among those who were denied an interim measure by the ECtHR. Before applying to Strasbourg, they, too, had sought help from the AYM. Their petition reached the AYM on 6 January 2016 – after Taybet’s body had been taken off the street and before she was hastily buried. The family requested a very specific interim measure: the return of Taybet’s body for proper burial with a religious ceremony. Despite the urgency, the AYM did not respond. Meanwhile, the day after the İnans petitioned the AYM, the government amended the Regulation on the Application of the Law on Forensic Medicine, stipulating that bodies not claimed by families within three days will be handed over to local authorities for burial.\textsuperscript{20} On 8 January, the family petitioned the ECtHR, requesting the same interim measure they sought from the AYM. That same night,\textsuperscript{21} the authorities went to Taybet’s house and asked her illiterate son to sign a document that the family should claim the body until 9:00 a.m. the next day or the authorities would conduct the burial in a place of their choosing. By the time the rest of the family was informed, they were too late; Taybet had been buried. Informing the ECtHR of this development, the family revised their interim measure request; they now wanted to at least hold a religious ceremony by

\textsuperscript{17} Under Rule 39(1) of its rules, the ECtHR ‘may, at the request of a party or of any other person concerned, or of [its] own motion, indicate to the parties any interim measure which [it] consider[s] should be adopted in the interests of the parties or of the proper conduct of the proceedings’. The Court’s jurisprudence in this area predominantly concerns the expulsion or extradition of foreigners. Henrik Jorem, ‘Protecting Human Rights in Cases of Urgency: Interim Measures and the Right of Individual Application under Article 34 ECHR’ (2012), 30 Nordic Journal of Human Rights, 404–428.

\textsuperscript{18} ECtHR Registrar, ‘Requests for Lifting of Curfew Measures in South-Eastern Turkey: The Court Refuses to Indicate Interim Measures for Lack of Elements, but is Pursuing its Examination of Applications’, Press Release, ECHR 016 (2016), 13 January 2016.

\textsuperscript{19} ECtHR Registrar, ‘Curfew Measures in South-Eastern Turkey: Court Decides to Give Priority Treatment to a Number of Complaints’, Press Release, ECHR 054 (2016), 5 February 2016.

\textsuperscript{20} Regulation on Amending the Regulation on the Application of the Law on Forensic Medicine [Adli Tip Kurumu Kanunu Uygulama Yönetmeligiinde Değişiklik Yapilmasina Dair Yönetmelik], Official Gazette, no. 29586, 7 January 2016, Article 1.

\textsuperscript{21} My information was provided by the family’s lawyer. The ECtHR states this date to be 11 January. Mehmet Oran and Others v. Turkey, Application no. 1905/16, Decision, 6 December 2016.
Taybet’s grave. And yet, the ECtHR rejected. On 2 February, the AYM finally spoke, rejecting the family’s now defunct request on the grounds that Taybet had already been buried.\(^{22}\)

During this entire time, the European Union (EU) and its members were remarkably silent, although they were the only ones capable of exerting effective meaningful pressure on Turkey. To make matters worse, they effectively endorsed the Justice and Development Party (\(Adalet ve Kalkınma Partisi – \text{AKP}\)) government by partnering with it for the containment of Syrian refugees in Turkey. Under the leadership of German Chancellor Angela Merkel, the EU and its members turned a blind eye to atrocities against Kurdish civilians for their political and security interests. To appease President Recep Tayyip Erdoğan, they violated established European norms by, inter alia, Merkel’s official visit to Turkey two weeks before the general elections in November 2015 and the European Commission’s decision to postpone the release of its unflattering progress report until after these elections.

1.2 The Research Framework

How, one may ask, has all of this been possible? These atrocities occurred in a country which not only ratified the European Convention on Human Rights (ECHR/Convention) as early as 1954, but is among its drafters. It has been subject to the oversight of the world’s ‘most effective human rights regime’\(^{23}\) for over three decades. The violence unleashed on Taybet İnan and other Kurds showed striking parallels to that of the 1990s,\(^{24}\) regarding which the ECtHR had issued hundreds of judgments. Moreover, this time, Turkey committed these crimes as an EU accession country – a status reserved for supposed adherents to human rights and the rule of law.

In light of all this, how could such egregious abuses occur in the first place? And what explains the AYM’s restraint in situations of life and death? What accounts for the ECtHR’s denial of interim measures

\(^{22}\) Interview with Benan Molu, Berlin, 27 April 2017.
\(^{24}\) Commissioner for Human Rights of the Council of Europe, \textit{Memorandum on the Human Rights Implications}, paragraph 77.
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despite the clear presence of an ‘imminent risk of irreparable damage’?25 How is it that, despite decades of ECtHR oversight, Turkish security forces still enjoy impunity? Is this merely a compliance problem? Or does it also speak to the ECtHR’s effectiveness?

What are the potentials and obstacles for supranational courts to effectively review authoritarian regimes engaged in the physical and political repression of minorities in the context of an ethno-political conflict? I seek to answer this question by taking the ECtHR’s engagement in Turkey’s Kurdish conflict as a case study. On the basis of my empirical findings, I inquire to what extent theories on supranational adjudication and transnational legal mobilization are capable of explaining the impact of regional human rights courts vis-à-vis authoritarian regimes.

Before laying out the state of affairs in these scholarships, let me elaborate on the concepts to which I refer. The notion of effectiveness I propose concerns authoritarian regimes engaged in state violence against their minorities in the context of armed conflicts. Under such circumstances, effectiveness has two dimensions: exhaustiveness and responsiveness. The first concerns whether supranational courts make full use of their adjudicatory tools and doctrines by, for example, flexibly interpreting their evidentiary rules and advancing their substantive doctrine on government accountability. The second refers to the degree to which supranational courts empower domestic movements fighting for justice through, for example, fact-finding hearings. These dimensions are independent of supranational courts’ ability to change state practice, but concern their willingness to exhaust their jurisprudential powers for documenting state violence, ordering remedies capable of bringing real policy change and being (and remaining) open to victims’ justiciable claims.

Inasmuch as scholars have increasingly abandoned the supranational-international distinction in favour of the latter,26 I find the difference between courts accepting individual complaints against states and those exclusively adjudicating inter-state disputes to be relevant. With supranational courts, I mean independent judicial bodies that derive their mandates from intergovernmental treaties, have compulsory jurisdiction

over states, accept individual petitions and issue binding judgments. While I focus on the ECtHR, my empirical findings are also relevant for the inter-American and the African human rights systems.

Despite its proliferation since the end of the Cold War, democracy scholarship is yet to agree on what the term entails. While qualitative studies categorize post-authoritarian regimes with various subtypes of democracy, metadata indexes measure, score and rank the level of democracy in accordance with quantitative indicators. The categorization of countries somewhere between autocracies and democracies has long been contested and the transition paradigm assuming a linear path to democracy has largely been replaced by an understanding that ‘hybrid’ or ‘ambiguous’ regimes are, and will likely remain, in a ‘gray zone’ between dictatorship and liberal democracy. An emerging scholarship has categorized these regimes with subtypes of authoritarianism depending on their proximity to democracy or autocracy.

On the other hand, both authoritarianism and democracy studies have treated hybrid regimes in a wholesale manner. While such regimes indeed display a blend of authoritarian and democratic characteristics vis-à-vis mainstream opposition, they are often full-scale authoritarian towards minorities – particularly in divided societies. Because state violence giving rise to supranational adjudication often targets minority groups, I find Guillermo O’Donnell’s conceptualization most useful with respect to such regimes. In ‘brown’ countries, wrote O’Donnell, the state ‘complexly mixes, functionally and territorially, important democratic and authoritarian characteristics’, where the ‘components of democratic legality . . . fade away at the frontiers of various regions and class, gender

29 E.g. Freedom House, Polity and the Economist Intelligence Unit.
31 Schmitter, ‘Dangers and Dilemmas’.
32 Diamond, ‘Elections without Democracy’.
and ethnic relations'. While these regimes may allow regular and free – though not always fair – elections, and tolerate independent media, judiciary and mainstream opposition (though these are often harasses with subtle forms of repression), they routinely ban minority political parties and media organs, and persecute minority opposition figures by methods ranging from imprisonment to extrajudicial execution. While Levitsky and Way are correct to characterize the judicial branch as an ‘arena of potential contestation’ vis-à-vis the executive when it comes to bread-and-butter procedural democracy issues, more often than not it is itself an actor of state violence against minorities. As I show in this book, Turkey is a classic example of such a regime. It may have looked like a democracy with some adjective for a long time due to its synthesis of regular elections and representative institutions with repression towards the mainstream opposition. But it has systematically and continuously been authoritarian vis-à-vis minorities, particularly the Kurds.

What do I mean by the repression of minorities? My primary focus is violations of the right to personal security and integrity. In the case of the Kurdish conflict, such violations occurred in the form of extrajudicial/summary executions, enforced disappearances, forced displacement and torture. Since the Turkish state has also systematically suppressed the Kurds’ civil, political and cultural rights to subjugate them to what O’Donnell has named a ‘low-intensity civil citizenship’, my secondary focus is on the suppression of group rights claims.

State violence giving rise to supranational adjudication often occurs in the context of internal armed conflicts, where governments justify gross violations on national security grounds and seek legitimacy through constitutional rules of exception. Social science research has shown that under such conditions governments’ formal commitments under international human rights law do not deter their violations thereof. In such contexts, where governments vehemently deny culpability and resort to the counterterrorism defense, supranational courts face unique

37 Ibid., 56.
adjudicatory challenges they do not encounter when overseeing liberal democracies.

1.3 Top-down: The Exhaustiveness of Judicial Oversight

1.3.1 ECtHR’s Effectiveness and the Authoritarian State

In an early work on the ECHR system, Laurence Helfer and Anne-Marie Slaughter defined the effectiveness of a supranational court as the ‘basic ability to compel or cajole compliance with its judgments’.\(^\text{40}\) In addition to equating effectiveness with compliance, they embraced a thin notion of the latter by concluding that the compliance rate with ECtHR rulings was ‘extremely high’.\(^\text{41}\) Adopting this framework, early empirical studies depicted the ECtHR as an effective court, neglecting to inquire the Court’s actual impact in member states.\(^\text{42}\) Social scientists who relied on this scholarship for developing theoretical frameworks on the ECHR system declared the Court to be effective despite its failure in hard cases such as Turkey and Russia.\(^\text{43}\)

In recent years, more nuanced and contextualized studies have assessed the ECHR’s domestic impact with a mindfulness to variations in the political, legal and social cultures of signatory states. They showed that the Court’s impact varies significantly across states, rights claims, political issues and time.\(^\text{44}\) Contesting the depiction of national courts as the ECtHR’s natural allies, they argued that domestic judiciaries are actors with their own interests, which may or may not align with those of Strasbourg.\(^\text{45}\) They showed that the Court had virtually no impact on the rights of minorities in countries with turbulent histories and divided societies.\(^\text{46}\) To the extent that these countries made progress, at least on

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\(^{41}\) Ibid., 296.


\(^{46}\) Dia Anagnostou and Yonko Grozev, ‘Human Rights Litigation and Restrictive State Implementation of Strasbourg Court Judgments: The Case of Ethnic Minorities from