

The Sense of Justice and Criminal Law:
Coming to Terms with Enforced Disappearances
in Turkey

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Abstract

“The Sense of Justice and Criminal Law: Coming to Terms with Enforced Disappearances in Turkey”

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During 1980s and 1990s, enforced disappearances, which is generally known in Turkey as being “missing in custody,” became prevalent in the regime’s hands as a means of suppressing the regime’s opponents. It has been important in Southeast Anatolia which became state of emergency. It is admitted that enforced disappearances were executed with the agency of paramilitary forces that are not formally part of the state but were condoned by government. Beginning in the 2000s, especially after the declaration of Turkey’s candidacy for full-membership in the EU, coping with past abuses such as enforced disappearances became prominent, and transitional justice mechanisms have been used. But the absence of political will to disclose the truth and the insufficiency of Turkey’s judicial system have led to obstacles in this process. In the peace process, it has been believed that peace can be constructed without justice for past atrocities. However, I argue that to demand peace and create reconciliation in a society that has experienced human rights violations, the sense of justice of this society should be satisfied. Retributive justice means are an adequate, indispensable way to do justice. I inquire into the role of retributive justice mechanisms in generating a sense of justice vis-a-vis past human rights abuses and more specifically in cases of enforced disappearances in Turkey by examining Turkish legal system, the conduct of the judiciary, the perspective of cause lawyers who work on this crime, international criminal law, and case studies of states that experienced enforced disappearances.

49,000 words

Özet

“Adalet Algısı ve Ceza Hukuku: Türkiye’de Zorla Kaybetmelerle Yüzleşme”

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Doçent Z. Umut Türem, Tez Danışmanı

Özellikle 1980 askeri darbesi sonrası, zorla kaybetmeler – Türkiye’de bilinen adıyla “gözaltında kayıplar”- mevcut rejimce rejim karşıtlarını bastırmak amacıyla yaygın kullanılır hale gelmiştir. Bu uygulama 80’li ve 90’lı yıllar boyunca özellikle Türkiye’nin, aynı zamanda olağanüstü hâl bölgesi de olan, Güneydoğu Anadolu bölgesinde önem kazanmıştır. Bu dönemde zorla kaybetmelerin devletin resmi bir parçası olmayan ancak hükümetçe göz yumulan paramiliter güçlerce işlendiği kabul edilmektedir. 2000’li yılların başı ve özellikle Türkiye’ye AB’ye tam üyelik için aday ülke statüsü verilmesi ile geçmişle yüzleşme çabaları öne çıkarken, geçiş dönemi adaleti mekanizmaları da işletilmeye başlandı. Ancak hakikati ortaya çıkarmaya dair siyasi iradenin yokluğu yahut Türkiye’nin hukuk sisteminin eksiklikleri bu süreç önünde engel teşkil ettiler. Barış süreci boyunca, geçmişteki ihlaller adına adaleti sağlamakla barış ortamının kurulabileceğine inanıldı. Bu tezdeki esas sav ise; şayet insan hakları ihlalleri yaşamış bir toplumda barışı sağlamayı ve toplumsal uzlaşmayı yaratmayı hedefliyorsak bu toplumun adalet algısını tatmin etmemiz gerektiği ve cezalandırıcı adalet mekanizmalarının hem bu adaleti temin etmeye muktedir hem de adaleti sağlayabilmek için zaruri araçlar olduğudur. Bu savın doğruluğunu araştırmak adına, Türk hukuk sistemi, Türkiye’de yargının tutumu, zorla kaybetmeler alanında çalışan dava avukatlarının bakış açısı, uluslararası ceza hukuku ve benzer deneyime sahip örnek devletler gibi unsurlar dikkate alınarak, Türkiye’de geçmiş ihlallere – özellikle zorla kaybetmelere- dair adalet algısını üretmede cezalandırıcı adalet mekanizmalarının rolü incelenmiştir.

49.000 kelime

Gülhiz ve Oktay'a

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Abbreviations and Acronyms

ANC	The African National Congress
AKP	Adalet ve Kalkınma Partisi / Justice and Development Party
CAT	Convention Against Torture, and Other Cruel Inhuman or Degrading Treatment or Punishment
CEH	Comisión para el Esclarecimiento Histórico / Commission for Historical Clarification
CONADEP	Comisión Nacional Para la Desaparición de Personas / National Commission on the Disappearance of Persons
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HML	Historical Memory Law /Ley de Memoria Histórica
HRC	Human Rights Committee
IACFDP	Inter-American Convention on the Forced Disappearance of Persons
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICPPED	International Convention for the Protection of all Persons from Enforced Disappearances
ICTFY	International Criminal Tribunal for the former Yugoslavia
ICTJ	International Center for Transitional Justice

JİTEM	Jandarma İstihbarat ve Terörle Mücadele / Gendarmerie Intelligence and Counter-Terrorism Unit
NGO	Non-governmental organizations
MINUGUA	United Nations Verification Mission
OHAL	Olağanüstü Hal / State of emergency
TBMM	Türkiye Büyük Millet Meclisi / Grand National Assembly of Turkey
TCK	Türk Ceza Kanunu / Turkish Criminal Code
TJMC	Truth Justice Memory Center / Hakikat Adalet Hafıza Merkezi
TrC	Truth Commissions
TRC	The Truth and Reconciliation Commission (South Africa)
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNRG	Guatemalan National Revolutionary Unity
US	United States
PKK	Partiya Karkerên Kurdistanê / Kurdistan Workers Party
REHMI	Recovery of Historical Memory Project

NOTE: The in-house editor of the Atatürk Institute has made recommendations with regard to the format, grammar, spelling, usage, and syntax of this thesis in compliance with professional, ethical standards for the editing of student, academic work.

Introduction

*qui tacet consentire videtur.*¹

The prohibition of burial and the concealment of the fate and whereabouts of persons as sanctions against a regime's opponents have been the atrocious and violent consequences of power relations in states due to "survival of the state" for centuries. Moreover, the prohibition of burial is beyond the mere sanction of one person.

The dead, the murdered person is turned over to his or her family for the fulfillment of religious rituals. The refusal to give the body of a person who has been murdered to his or her family also means preventing them from mourning, and the loss of the process between death and the cemetery. Although the family does not believe the lost one will return, it is suspended in a vacuum between a hopeful wait and the process of mourning.²

Burial and mourning after death are indispensable rituals in various traditions and cultures. This feature of a regime's politics also constitutes a punishment

1 Latin idiom that means in English: "s/he who is silent appears to consent."

2 Özgür Sevgi Göral, Ayhan Işık and Özlem Kaya, *The Unspoken Truth: Enforce Disappearances* (Istanbul: Truth Justice Memory Center, 2013), 71.

of victims' families and communities by attacking their culture. It influences the victims' themselves and the society as a whole or social strata to which victims belong. However, an even more cruel sanction method is the obfuscation of the fate or whereabouts of persons who are opponents of a regime. The relatives of disappeared persons always desire to know where their loved ones are. The questions of whether victims are alive and if they are dead, where are their graves are a lifelong suffering for their relatives and a trauma for society.

The politics of rulers toward the prohibition of burial and the concealment of the fate of persons who are adversaries of their regime have not ceased for thousands of years. The main difference nowadays is not a shift in state policy; the distinction derives from the classification of this crime which is differentiated from other homicides or abduction crime. This act now has a name; enforced disappearances. It is a crime against humanity with regard to international human rights principles. with the development of human rights lawn – especially after World War II (because prominent examples of enforced disappearances occurred during this war) –, the crime of enforced disappearances began to be differentiated from murders and abductions committed by states in international plan. Because “Enforced disappearance has frequently been used as a strategy to spread terror within the society[,] the feeling of insecurity generated by this practice is not limited to the close relatives of the disappeared, but also affects their communities and society as a whole.”³ I consider that due to the features of this crime related to society in addition to only victims and their relatives, the agenda today is dealing with cases of enforced disappearances as accountability for past human rights violations that have been parts of silent years.

Accountability for past abuses is broad subject, and because of that I focus on only one type of crime (enforced disappearances) and one type of accountability mechanisms (retributive justice). I inquire into the role of retributive justice mechanisms in generating a sense of justice concerning past human rights abuses, more specifically in cases of enforced disappearances in Turkey. Because of the subject of this work related with grave human rights violations

3 “International Day of the Victims of Enforced Disappearances 30 August,” *United Nations* online, accessed April 2, 2018. <http://www.un.org/en/events/disappearancesday/>.

that affect society as a whole, I use the term of sense of justice with reference to not mere individual and moral conception, but collective and legal conception. Dubber defines the sense of justice “in terms of empathy, ... the emotional capacity that makes law possible by giving us vicarious access to the experience of others.”⁴ It is a form of equilibrium which society – that certainly includes victims but beyond them due to the personal revenge, – state’s institutions, and legal system seek to achieve accountability for crimes and punishment of responsible persons. I argue that if the consolidation of peace in society is desired, this sense of justice of the society should be satisfied. And retributive justice, particularly criminal prosecution of alleged perpetrators and punishment of the persons responsible, is an adequate and indispensable way of achieving justice.

Widespread, systematic human rights violations, crimes against humanity, and accountability for past human rights abuses within a criminal justice framework are the starting points of this work. Among the acts considered as crime against humanity by the International Criminal Court (ICC),⁵ I focus on just enforced disappearances. According to the Declaration on the

4 Markus Dirk Dubber, *The Sense of Justice: Empathy in the Law and Punishment*, New York: New York University Press, 2006.

5 UN General Assembly, *Rome Statute of the International Criminal Court*, A/CONF.183/9 of 17 July 1998, 2187 UNTS 3, (entered into force 1 July 2002).

Article 7: Crimes against humanity.

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Protection of All Persons from Enforced Disappearance, an enforced disappearance is serious violation of human rights when:

Persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.⁶

I focus on the crime of enforced disappearances because of three distinct features. First, enforced disappearances are not isolated from state policy. This crime is committed as government policy or as the widespread, systematic practices of groups that are tolerated and condoned by the government. Enforced disappearances are realized through the agency of the state's own institutions or through the tendentious silence of the state which is the consequence of defaulting on its negative obligations vis-à-vis the persons responsible for these human rights violations. This political and legal feature of enforced disappearances is one of the reasons for my interest in this subject. The second reason for my inquiry is this crime's complex relation with the legal system and differentiation from other types of human rights violations. Essentially, this crime violates the habeas corpus principle,⁷ but also diverges from other habeas corpus violations. Alan Hunt argues that "legal relations are interpellative in the sense that they can exist only through calling into existence or play social as 'legal subjects.' The legal subject does not coincide with the natural person."⁸ In any enforced disappearance case, both the legal and natural person are evaporated at the same time. These practices cause

6 UN, General Assembly, *Declaration on the Protection of All Persons from Enforced Disappearance*, A/RES/47/133, 92nd plenary meeting.

7 Habeas corpus literally means "that you have the body" and refers to the responsibility of state institutions against unlawful imprisonment and detentions.

8 Alan Hunt, *Exploration in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993), 254.

individuals to be taken out of the protection of law by obscuring their legal situation: we no longer know whether they are alive or dead. They just no longer exist in the legal system. The third reason for my inquiry is the feature that enforced disappearances affect society as a whole. This crime goes beyond the murder of opponents of a regime because this practice of the state places such persons outside the protection of the law attacking both victims and their communities. It is practiced not only to punish the opponents of regime but to terrorize, intimidate, suppress, and dominate the communities to which victims belong. The characteristics of enforced disappearances – the prohibition of burial and the concealment of the fate and whereabouts of persons – are crueler and more gruesome mechanisms than straightforward homicides committed by state for the reason that they cause lifelong suffering for the victims’ relatives and intense fear among opponents of the regime.

§ 1.1 The Rise and Fall of Enforced Disappearances in Turkey

Enforced or involuntary disappearance is generally known in Turkey as being “missing in custody.” This crime has been utilized against opponents of regime, and the main targets have been Kurdish citizens of the Republic of Turkey. The causes of this policy and the current conflict in Southeastern Turkey stems from the historical and political context of the concept of nationality in the Turkish republic. Kurdish populations saw themselves as a part of a new social system through a Turkish-Kurdish collaboration to overwhelm foreign invaders in World War I and the Turkish War of Independence. However, “From the mid-1920s until the end of the 1980s, the Turkish state ‘assumed’ that there was no Kurdish element on Turkish territory. [...] Whenever the Kurdish question was mentioned [...] it was mentioned as an issue either of political reaction, tribal resistance or regional backwardness, but never as an ethno-political question.”⁹ The reactions to the failure of the state’s policy to recognize of Kurdish issue as an “ethno-political question” have appeared in

9 Mesut Yeğen, “The Kurdish Question in Turkish State Discourse,” *Journal of Contemporary History* 34, no. 4 (October 1999): 555, accessed March 5, 2017, <http://www.jstor.org/stable/261251>.

the form of various rebellions. The cycle of violence increased over the years. Furthermore, the longest period of armed Kurdish rebellion in Turkey commenced with the establishment of the Kurdistan Workers' Party (PKK). Although Kurds in Turkey are not all inclined toward the PKK, as Uçarlar puts it, the state's attitude of identifying Kurdishness with the armed struggle of PKK rather than with the Kurdish population itself worked in the PKK's favor.¹⁰ "It developed broad organizational structures and displayed enormous capacity to mobilize Kurds both within and without Turkey[.]"¹¹ On 15 August 1984, the official war between the PKK and Turkish Army was triggered by a PKK attack. The Turkish state continued assimilation, repression, and containment policies vis-à-vis the Kurdish population and employed violence by military forces. PKK guerrilla activities also incorporated violence. The armed conflict intensified in the late 1980s and the 1990s. It is estimated that 44 to 100 thousand civilians on both sides have been killed between 1984 and the present in the armed conflict.¹²

Particularly with 12 September 1980 coup d'état in Turkey, enforced disappearances became prevalent at the hands of the regime, along with killing and torture, to suppress opponents because enforced disappearance was a more forceful mechanism to frighten adversaries of the regime. After the military coup, the Grand National Assembly of Turkey (TBMM) was closed, the constitution was repealed, and political parties were disbanded. In this

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- 10 Nesrin Uçarlar, and DISA (Onarıcı Adalet ve Barış İnşası Araştırma Projesi), *Hiçbir Şey Yerinde Değil: Çatışma Sonrası Süreçte Adalet ve Geçmişle Yüzleşme Talepleri*, ed. Tanıl Bora (İstanbul: İletişim Yayınları, 2015), 110.
- 11 Konrad Hirschler, "Defining the Nation: Kurdish Historiography in Turkey in the 1990s," *Middle Eastern Studies* 37, no. 3 (2001): 146, accessed March 5, 2017, <https://doi.org/10.1080/714004406>.
- 12 It is true that human rights violations during the 1990s in Southeast Turkey included acts of violence by both the PKK and Turkish army. However, the PKK is classified as a terrorist organization, so lawful acts are not expected from this kind of organization. Furthermore, persons kidnapped and murdered by the PKK members cannot be defined as enforced disappearances because the two elements of the crime are not present: State involvement and being placed outside of the protection of law. No organization except the state can place a person outside of the protection of law so long as the state is itself the main source of law. Because of that, human rights crimes committed by the PKK are subject for another project.

atmosphere, “where politics became detached from the citizens and limited to the professional activity of politicians, liberty was replaced with security concerns and state-backed violence came to be ignored.”¹³ During this period, enforced disappearance began to be used more broadly against the Kurdish population, and this crime was “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, ... by, or with the authorization, support or acquiescence of, a state or a political organization,” in line with the Rome Statute of the International Criminal Court’s description of crimes against humanity.¹⁴

In the late 1980s, Turkish state’s officials approach to the Kurdish issue changed by the agency of two significant acts which provided the basis for enforced disappearances. The first move was the implementation of a state of emergency (OHAL). Due to widespread violence in some regions of Turkey, martial law had been in place since 1978. OHAL was declared in eight provinces on 1 March 1984.¹⁵ The Governorship of the Region in OHAL was established on 19 July 1987. The Emergency Region Governorates – also known as “Super Governorates” – had extremely broad powers by the statutory decrees. “The status and practices of this institution were carried entirely beyond the law,” and they governed the OHAL region with military, security, and paramilitary forces.¹⁶ The OHAL offered impunity to state officials and members of law enforcement in cases where enforced disappearances were committed. Diyarbakır, Hakkari, Siirt, Van, Bingöl, Elazığ, Mardin, Bitlis, Batman, and Şırnak were under the OHAL regime. The implementation of OHAL was

13 Gökçen Alpkaya et al., *Enforced Disappearances and the Conduct of the Judiciary* (Istanbul: Truth Justice Memory Center, 2013), 11.

14 *Rome Statute*, Art. 7/2.; Öznur Sevdiren, *Türkiye’nin Cezasızlık Mevzuatı* (Istanbul: Hakikat Adalet Hafıza Merkezi, 2014), 43.

15 The Council of Ministers, Decree No. 84/7781, accessed March 5, 2017, <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d17/coo3/bo41/tbmm170030410006.pdf>.

16 Özgür Sevgi Göral, Ayhan Işık, and Özlem Kaya, *Executive Summary of “The Unspoken Truth: Enforce Disappearances”* (Istanbul: Truth Justice Memory Center, 2013), 3; Uçarlar, *Hiçbir Şey Yerinde Değil*, 99. Hayri Kozakçioğlu (1987-1991), Mehmet Necati Çetinkaya (1991-1992), Ünal Erkan (1992-1996), Necati Bilican (1996- 1998), Aydın Arslan (1998-1999) and Gökhan Aydiner (1999- 2002) successively served as Emergency Region Governors.

extended every four months by the assembly forty-six times, and the final expansion of regime ended on 30 November 2002 in Diyarbakır and Şırnak. If martial law is considered as a state of exception, these regions have been exceptional spaces for twenty-three years, and the shield of impunity for enforced disappearances was undisrupted in the OHAL region for decades.

The second policy that reflects a change in state's official approach to the Kurdish issue and provides the basis for enforced disappearances was the "village guard system." The PKK received logistic support and cooperation in the region to a degree from civilians. The Turkish state argued that "it was not possible for the army to prevail over guerilla forces using conventional methods of warfare, and ... it was necessary to implement an integrated restricting strategy in line with the principles of 'irregular warfare'."¹⁷ The village guard system was one of the symbols of new enemy concept. They were civilian villagers "who were provided with arms and joined the military operations alongside the armed forces."¹⁸ The temporary, voluntary village guard units were established by law and have served the state since 26 March 1985.¹⁹ In this atmosphere, "little indication of who supported the PKK rendered everyone a potential supporter," and the village guard system was used "to differentiate 'loyal citizens' from 'traitors.'"²⁰ In many cases, the persons who were forcibly disappeared and the village guards who were alleged perpetrators of enforced disappearances were both Kurdish and living in same village. This situation was promoted to suppress opponents through the constant surveillance by the state through the agency of village guards, and this system was continuously employed during 1990s.²¹ The main strategy of enforced disappearances was

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- 17 Özgür Sevgi Göral, Ayhan Işık, and Özlem Kaya, *Konuşulmayan Gerçek: Yargının Tutumu* (Istanbul: Hakikat Adalet Hafıza Merkezi, 2013), 17.
- 18 Yeliz Budak, "Dealing with the Past: Transitional Justice, Ongoing Conflict and the Kurdish Issue in Turkey," *International Journal of Transitional Justice* 9, no 2 (July 2015): 228, accessed February 27, 2017, doi: 10.1093/ijtj/ijv002
- 19 Article 74 of 1924 Village Law No 422, amended: 26/3/1985 - 3175/1, <http://www.mevzuat.gov.tr/MevzuatMetin/1.3.442.pdf>
- 20 Budak, "Dealing with the Past," 228.
- 21 "By 20 June 2003, in the OHAL region provinces, 58,511 temporary village guards and 12,279 volunteer village guards were on duty." In Göral et al., *Executive*, 4.

to spread terror within society, and village guards effectively served this mission.

Between the 1980 coup d'état and 1993, the total number of forcibly disappeared persons was seventy-seven.²² However, this number sharply increased with the security strategies of the 1990s. Turkish military forces were reformed to effectively fight against the PKK guerilla forces, and the 1990s in the OHAL region were shaped by the concept of "low intensity conflict" and "irregular warfare" and especially by a special security strategy prepared in 1993 titled "Regional Supremacy and the Prevention of the PKK's Habitation in the Region."²³ The main purposes of the government's strategy was to prevent civilian support of the PKK in the region and to maintain regional dominance. Alongside the Turkish army, gendarmes, police forces, counterguerrilla and paramilitary organizations such as the Gendarmerie Intelligence and Counter-Terrorism Unit (JİTEM),²⁴ village guards, informants who were former members of the PKK, and civilian elements of the gendarmerie intelligence were employed in the OHAL region, and these groups comprised the main group of alleged perpetrators of enforced disappearances.²⁵ "The paramilitary/counter guerrilla structures formed during this period were equipped

22 "Türkiye'de Zorla Kaybetmeler Gerçeği," *Hakikat Adalet Hafıza Merkezi* online, accessed November 17, 2017, <http://hakikatadalethafiza.org/turkiyede-zorla-kaybetmeler-ve-cezasizligadair-temel-bilgiler/turkiyede-zorla-kaybetmeler/>

23 In 1993, the team led by Prime Minister Tansu Çiller and Chief of General Staff Doğan Güneş put into action this concept.

24 As for JİTEM, "there was and is still no available public record of the unit's existence despite unofficial acknowledgement of its existence on various occasions over the years by some senior members of the security and intelligence services." Human Rights Watch, *Time for Justice; Ending Impunity for Killing and Disappearances in 1990s Turkey*, (September 3, 2012), accessed March 05, 2017, <https://www.hrw.org/report/2012/09/03/time-justice/ending-impunity-killings-and-disappearances-1990s-turkey>.

According to the responses of the Ministry of the Interior to questions asked within the scope of a legal investigation: "It has been determined that the entity called JİTEM was established by the elusive initiative of the Gendarmerie General Command, without the approval of the Ministry of the Interior or the opinion of the Presidency of General Staff." in Sevdiren, *Türkiye'nin Cezasızlık Mevzuatı*, 48.

25 Göral et al., *Konuşulmayan Gerçek*.

with unlimited powers that their members were protected with a shield of impunity even if they did commit crimes, and were accountable to no other institution within the state.”²⁶

Enforced disappearances visibly increased with the new policies of 1990s, particularly from 1993 to 1995. Documented enforced disappearances, mostly occurred between years 1991 and 1999. The numbers of persons forcibly disappeared in 1993, 1994, and 1995 were respectively 108, 532, and 235, but these numbers generally originate from state data, are inconclusive, and should be confirmed.²⁷ The number of individuals forcibly disappeared is estimated at 1,352 persons, and the 1993-1996 period, in which irregular warfare strategies were extensively implemented, was the most intense period for disappearances.²⁸ Diyarbakır, Şırnak, Mardin, Batman, İstanbul, Hakkari, Tunceli, Şanlıurfa, Adana, and Bitlis were the top ten provinces where persons were forcibly disappeared during those years. These locations where the crime was committed generally correspond to the OHAL regions in the 1990s, but some large cities such as İstanbul and Ankara were also on the list. The persons who were forcibly disappeared outside of the OHAL regions were frequently “politicians, notable figures and local leaders of Kurdish society.” Based on this feature, the practice of enforced disappearances was a consequence of Turkey’s policies in the 1990s to end the armed conflict between Turkish army and the PKK; however, the crime also encompassed civilians who belong to the extended spectrum of the political opposition. Enforced disappearances were not used to exterminate Kurdish society as a whole; rather the crime was committed to exterminate and suppress all the opposition parties in Kurdish society that were opposed to the regime. For instance, in some cases the perpetrator and victim were the same ethnicity. Likewise, the attempt to differentiate between “loyal Kurds” and “traitors” with the village guard system was a symbol of political reasoning beyond ethnical or national reasoning.

On the other hand, the unilateral ceasefire of the PKK and the capture of Öcalan in 1999 were milestones in the attempts to make peace after years of

26 Ibid., 4; Budak, “Dealing with the Past,” 228.

27 “Türkiye’de Zorla Kaybetmeler Gerçeği,” *Hakikat Adalet Hafıza Merkezi* online.

28 Ibid.

violence. Besides, during the 2000s, politicians in Turkey were still concerned about the demands of Kurd population, but in order to “be competitive in the ‘globalized world order’ and take its place in the European Union (EU)..., it must create a lasting peace in the southeast”²⁹ and start processes of historical reconciliation particularly with communities that suffered their share of state violence. From 2000 to November 2015 (when the last achievable update of disappeared persons’ number), the total number of persons who remained forcibly disappeared was twenty-eight,³⁰ and transitional justice processes commenced.

§ 1.2 Dealing with Enforced Disappearances: Peace, Justice, and Law

Accountability efforts in Turkey have not been specific to enforced disappearances; they encompass past acts of systematic state violence against certain ethnic or religious communities. For instance, minority rights, the Armenian question (which refers to “the physical annihilation of Armenian people living in the Ottoman Empire from spring 1915 through autumn 1916”),³¹ the events of 6-7 September 1955 (a riot against non-Muslims of Turkey in the context of the nationalization and homogenization of the economic sphere),³² military interventions by the Turkish army – especially human rights violations after the 1980 coup d’état –, and the Kurdish question (which refers to problems of ethnicity and nationalism, minority rights, and attempts to resolve them with military rather than political solutions from the beginning of the Republic of

29 Cemal Özkahraman, “Human Rights Violations in South-east Turkey: Failed Peace Talks Followed by Increasing Violence,” *Open Democracy* online, May 6, 2016, accessed February 28, 2017, https://www.opendemocracy.net/cemal-zkahraman/human-rights-violations-in-south-east-turkey-failed-peace-talks-followed-by-increasi#_edn7.

30 “Türkiye’de Zorla Kaybetmeler Gerçeği,” *Hakikat Adalet Hafıza Merkezi* online.

31 United States Holocaust Memorial Museum. “The Armenian Genocide (1915-16): Overview,” *Holocaust Encyclopedia*. accessed April 15, 2018, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10008187>

32 Dilek Güven, “Riots Against the Non-Muslims of Turkey: 6/7 September 1955 in the Context of Demographic Engineering,” *European Journal of Turkish Studies*, December 2011, accessed February 20, 2018, <http://journals.openedition.org/ejts/4538>

Turkey to the present) have been significant subjects in the accountability process of Turkey. Momentous events such as the Dersim Massacre (air strikes and ground operations in Dersim – now called Tunceli – that caused the death of 6 to over 13 thousand people, according to various official and non-official sources, between 1936 and 1939), Sivas Massacre (in which a mob set fire to the Hotel Madımak on 12 July 1993 causing the death of thirty-five people, most of whom were Alevi intellectuals), and the assassination of Hrant Dink (an Armenian journalist, prominent figure of Armenian-Turkish reconciliation efforts, and minority rights activist) are included in efforts to deal with past. Memory studies and attempts at reconciliation for these and other traumatic events commenced in the 2000s in Turkey. For instance, minority studies gained traction in academia; Armenian genocide discussion arose; Prime Minister Recep Tayyip Erdoğan apologized “on the state’s behalf” for deaths caused in the Dersim operation in the late 1930s;³³ he also used the liberal discourse in his speech, saying that “the Turkish state had made mistakes in the past” using “the term ‘the Kurdish question,’” and promising “to resolve it by means of more democracy, more citizenship law, and more prosperity” in 2005;³⁴ the official policy of the 1990s with respect to the Kurdish question changed in the first half of the 2000s especially through the “Kurdish Opening” and the “peace process;” masses of people from various ethnicities participated in the funeral of Hrant Dink as a sign of solidarity against extreme nationalism; and Provisional Article 15 of 1982 Turkish Constitution, which offered amnesty to persons responsible for the 1980 coup by preventing their prosecute, was abandoned in a referendum. The general tendency in Turkey to cope with past abuses were in line with restorative justice mechanisms, such as memory studies, apologies, social demonstrations, and photography exhibitions. And it has been attempted to restore the peace process by use of these tools. However, this positive atmosphere aside, reality was different. These

33 “First Official Apology for Killings in Dersim”, *Hurriyet Daily News* online, November 24, 2011, accessed February 27, 2017, <http://www.hurriyetaidailynews.com/first-official-apology-for-killings-in-dersim-7663>

34 “Erdoğan’dan Diyarbakır’da tarihi konuşma: Hataları yok sayamayız,” *Milliyet*, August 12, 2005, <http://www.milliyet.com.tr/2005/08/12/son/sonsiyo8.html>, in Yeğen, “The Kurdish Question,” 5.

tools were neither sufficiently employed nor properly combined with judicial mechanisms in order to political reasons that continue to offer impunity to perpetrators in reality.

Beginning in the 2000s, coping with the enforced disappearances of the 1990s was also part of these transitional justice attempts. The peace process was an opportunity, but it halted at the end of 2015. However, I argue that the failure of the possibility of peace in Turkey did not commence in this year. The process was erroneous since its beginning. What was problematic was the belief that peace could be accomplished without coming to terms with past human rights abuses via legal mechanisms. The single-minded “forward looking nature” of the peace process in the early 2010s Turkey has led to a problematic (mis)belief that peace can be constructed without justice for past human rights violations. Because of this misbelief, there was huge gap between justice and attempts to create peace in the Turkish case. Positive steps as the implementation of a few political reforms and de facto ceasefire periods create an illusion of peace, democratization, and possibility for dealing with past; nevertheless, I suggest peace and justice are not merely desirable, they are peremptory. One is not an alternative for the other. Nor should one be sacrificed for the other. One does not exist without the other. The absence of political will to disclose the truth and the insufficiency of the judicial system in Turkey led to obstacles for the transitional justice process. The practice of enforced disappearances changed in 2000s, but the state policy of offering impunity for past abuses remained same because the state did not choose to use legal means due to accountability.

The role of retributive justice tools (law and criminal prosecution) in generating a sense of justice and the role of justice in consolidating peace in this period establishes my main inquiry in this work. The scrutiny of the judicial attitudes of the Turkish state about human rights crimes committed in the violent years of armed conflict in the southeast reveals that there was not possibility of a peace process because there was no justice. In order to reveal absence of justice during attempts to create peace, I will investigate the efforts to seek justice in Turkey, the attempts to prosecute of enforced disappearances domestically, and the conduct of Turkey’s judicial system vis-a-vis these efforts for retributive justice. Furthermore, I argue that law (especially criminal

law concerning enforced disappearances) is an indispensable component of justice efforts. But the conduct of the Turkish judicial system, which offered impunity to perpetrators, demonstrates that justice cannot be realized by law in case of Turkey. The solution for this disengagement between justice and law is neither to abandon legal measures nor to replace law with restorative justice in order to come to terms with enforced disappearances in Turkey. These preferences are obstacles to long-lasting peace and harmony in society, as the transitional justice processes of states that pursued only restorative measures show. The sense of justice cannot be satisfied merely through mechanisms of restorative justice without legal tools. We should include criminal law in our peace and justice attempts, but how? What are the expectations from law in the current circumstances in Turkey? I endeavor to answer questions such as what are the expectations concerning criminal prosecution for enforced disappearances, the deficiency or politicization of the judicial system, notwithstanding? What were those expectations and how have they changed over time? What are the current expectations for retributive justice? Or is there still any expectation of accountability via these? And what is the place of criminal prosecution, or more broadly, the place of law in the sense of justice?

§ 1.3 Methodology and Plan of Thesis

When human rights violations such as enforced disappearances have occurred in the past, we can choose two routes: silence and impunity or justice and accountability. The first chapter of this work will focus on the relation between accountability for past abuses and various forms of impunity, blanket amnesties, forgiveness and forgetfulness. In the post-Cold War area, after the collapse of military rule in some states or after regime changes in countries that experienced long-term violent conflicts, efforts to “cope with the past” and memory studies became the dominant opposition to the politics of forgetting. The need for accountability for human rights crimes of a prior regime after a regime change prompted the development of mechanisms to bring about justice. The term for these tools in the literature is “transitional justice mechanisms,” which refers to “the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of

massive human rights abuses.”³⁵ In transitional justice theory, approaches called “retributive justice” concentrate on the past and include criminal prosecutions, trials, purges of the military and government, and reparations. Others, called “restorative justice” are future-oriented and include reconciliation, and reestablishment of rule of law. The debates in the literature concerning accountability for past abuses – such as justice vs. truth, accountability vs. impunity, remembering vs. forgetting, retributive justice vs. restorative justice, punishment vs. restoration, criminal prosecution vs. truth commissions (TrC), etc.) will be discussed in the first chapter. I scrutinize TrCs as an example of restorative justice tools and criminal prosecution as an example of retributive justice mechanisms. However, my main interests are the legal aspects and judicial approaches to dealing with the crime of enforced disappearance, so I will continue with the specific retributive justice mechanisms of criminal prosecution in the following chapters.

The second chapter of this work is about the choice and also the link between peace and criminal justice. My argument is that although the political will of states is required to keep responsible persons from being held accountable for past crimes in the name of peace, the societies of these states in general neither support amnesties for perpetrators nor forget their violent acts. The political will remains ambiguous as a concept, but in this work, I use this term as a sufficient intend of political actors to support (or not support) the accountability for past abuses. If there is not the fundamental lack of capacity of governments or the insufficiency of legal system that cannot be overcome, but yet there are also not any accountability efforts, there is the lack of political will to bring about justice.³⁶ Despite of the political will of states that does not hold responsible persons accountable for their crimes, the societies depend on their right to truth and justice and demand the criminal prosecution of alleged perpetrators. Briefly, I will emphasize the prominence of criminal law for the

35 “What Is Transitional Justice?” *ICTJ* online, accessed April 15, 2016, <https://www.ictj.org/about/transitional-justice>

36 In the context of Turkey specific to enforced disappearances, I argue that the political will to bring about justice is absent, because the insufficiency in Turkish legal system and some deficiencies in Turkish criminal code can be overcome by the conduct of judiciary but it is not. I will discuss this subject in next chapters.

sense of justice and for reconciliation in societies that experienced human rights violations in their pasts. The development and limits of enforced disappearances in international law, the first reference to enforced disappearances as a crime, its shift toward a specific form of crime against humanity, and the duty to punish enforced disappearances will be discussed in this chapter in order to examine the relation between law and this crime. After introducing this framework, I will provide examples of some states that underwent various transitional justice processes to deal with their violent pasts in order to illustrate the relation between domestic and international law, the demands of society, the necessity of justice, the importance of criminal law, and Turkey's position among them. The crime of enforced disappearance, which is an international problem, is not restricted to specific regions of the world, but well-known cases of systematic enforced disappearances of persons will be considered in this part. Such enforced disappearances were prevalent during the 1970s and early 1980s, particularly in Latin America. Argentina was infamous for enforced disappearances during its "dirty war," Chile experienced a brutal coup d'état in 1973, and Guatemala experienced "victor's injustice". South Africa became famous for its TrC which had judicial rights, and Spain became famous for criminal prosecutions of past crimes that occurred seventy years earlier.

The third chapter of this work focuses on legal framework of Turkish case specific to the crime of enforced disappearances as an example of transitional justice and a part of the efforts for accountability. As mentioned, I examine the historical background and utilization of enforced disappearances, the shift in Turkish policy towards transitional justice, and its consequences. Also in the third chapter, coming to terms with enforced disappearances in Turkey, the place of law, power relations, and the politics of the state during the transitional justice process will be investigated. The place of enforced disappearances in the Turkish legal system, its elements in domestic law, and its deficiency vis-à-vis international law will be investigated to understand the criminal prosecution of enforced disappearances, current trials, and the conduct of the Turkish judicial system. I affirm that there is an obvious insufficiency in this judicial period, but even so, the criminal prosecution of this crime is achievable for the case of Turkey. Furthermore, it is not possible to

perfectly fit the case of Turkey into transitional justice theory. Turkey is different from other transitional justice cases and the theory because of the persistence of the crime under both military and civilian regimes, the ongoing nature of the conflict in Turkey, and the absence of a regime change before the attempts for accountability. This feature of the example of Turkey will be discussed in the final part of the third chapter to describe the relation between peace and justice as well as between the sense of justice and law.

The link between criminal law and a sense of justice is the main statement of this work. In the fourth chapter, I focus on the sense of justice of cause lawyers who work on enforced disappearances cases in Turkey to depict the sense of justice related to law and criminal justice. I have two reasons for choosing cause lawyers instead of victims. First reason is that victims' expectations do not always overlap with criminal justice, especially given the negative conduct of the Turkish judiciary. Second, it might be expected that lawyers in a state such as Turkey where human rights crimes were committed in the past would not abandon retributive justice mechanisms and would not only favor restorative justice, the existence of an ongoing conflict and a disrupted judicial system, notwithstanding. But in the fact, being advocate for retributive justice is not choice for these lawyers. It is their professions and they do not work in this field for money. At least, they must believe that retributive justice should take place in transitional justice process.

I conducted personal and group in-depth interviews with eight human rights lawyers (See Bibliography for the information about interviews with lawyers). Six are well-educated and live in big cities outside of the former OHAL region. Four of these six are currently the lawyers in enforced disappearances cases in Turkey and all work in the field of enforced disappearances. Three of these big-city lawyers are young and did not experience the beginning of these cases at first hand. The remaining two lawyers with who I conducted interviews are also young and were born, raised, studied, and now work under the bar associations in former OHAL regions as cause lawyers in enforced disappearances cases. I endeavored to understand their positions on transitional justice by asking questions such as the following: Why is criminal prosecution a necessary mechanism for accountability in enforced disappearance cases? What were their expectations from criminal prosecution at the

beginning of the investigations and how did they change during process? After the ends with acquisition of trials, what did their expectations transform to? What are their general expectations from the criminal justice process? According to them which is more fair in the case of Turkey: punishment of the individuals who themselves make forcibly disappeared persons or those who ordered the crime? Does Turkish criminal law and the judicial system allow for fair prosecution of enforced disappearances? Is the judicial system inadequate in Turkey or are other factors the real obstacles? Is it possible to obtain effective results through the Turkish Criminal Code (TCK) if all legal actors (judges, public prosecutors, lawyers) aim to punish these crimes? How does the transfer of cases affect the judicial process? What is the relationship between victims' families and lawyers? Is the relationship between victims and lawyers who are working in the region different from that between victims and lawyers who are not in the region? How is the relationship between these two different categories of lawyers? Are domestic law and criminal prosecution assumed to be just steps toward the European Court of Human Rights (ECtHR)? What are their expectations from the ECtHR? I answer these and other questions by focusing on the attitudes of human rights lawyers in the last chapter. And in conclusion, I endeavor to understand the position of criminal prosecution as a part of retributive justice in the sense of justice for enforced disappearances cases. I illustrate the place of law in the sense of justice, its indispensability for peace, and the peculiar, indispensable character of law and criminal prosecution for enforced disappearances in the case of Turkey that differentiates from transitional justice theory and other cases.

Transitional Justice Theories

In order to turn a new leaf, pardons and amnesty policies can be used during any regime change as a part of forgetting the past. Forgiveness and forgetting in societies consolidated by pardons and amnesties are not always pernicious policy. However, with respect to crimes against humanity that have occurred in past, pardons and amnesty policies are key components of impunity for these crimes. The English word “amnesty” comes from the Greek *amnestia*, which means forgetfulness. In Athens, the opposite of amnesty was *mnēsikakeía*, the Greek root of which is the word for “memory” word, which means “one seeks revenge.”¹ Beyond the etymological relation among these words, impunity, amnesty, and forgetting are also conceptually linked. Arendt suggests that for any wrongdoer, the most powerful armor to escape punishment is to forget the crime. “The greatest evildoers are those who don’t remember because they have never given thought to the matter, and, without remembrance, nothing can hold them back.”² The contradiction between forgetfulness and memory reflects the conflict between impunity and accountability for past abuses. If human rights violations have occurred in the past of a state, it can be chosen two different routes: impunity or accountability. In some

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- 1 Nicole Loraux, “Of Amnesty and Its Opposite,” in *Mothers in Mourning*, trans. Corinne Pache, (Ithaca, New York: Cornell University Press, 1998), 87, accessed: February 9, 2017, https://www.sas.upenn.edu/~cavitch/pdf-library/Loraux_Amnesty.pdf
 - 2 Hannah Arendt, *Responsibility and Judgement* (New York: Schocken Books, 2003), 95.

countries that experienced long-term violent conflict and human rights violations endeavored to cope with the past and memory studies became the dominant opposition to the politics of forgetting. This need for accountability and remembering prompted the development of mechanisms to bring about justice. The term for these tools in the literature is “transitional justice mechanisms” which refers to “the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses.”³ In the transitional justice theory, there are two prominent approaches: restorative justice and retributive justice. The former, restorative justice, is described as a future-oriented and victim-centered mechanism that is depending on forgetting and forgiveness, associated with truth, and ultimately aims reconciliation in society. Furthermore, the other approach, retributive justice, is described as a past-oriented and perpetrator-centered tool that is depending on remembering and memory, associated with justice, and ultimately aims punishment of responsible persons. Accountability for past abuses will be discussed with a focus on the debates in the literature – such as justice vs. truth, accountability vs. impunity, remembering vs. forgetting, retributive justice vs. restorative justice, punishment vs. restoration – in this chapter. And then, I will examine transitional justice theory by focusing on its mechanisms – TrC as an example of restorative justice and criminal prosecution as an example of retributive justice – which have different tendencies for interpreting the discussion in the literature.⁴

§ 2.1 Impunity vs Accountability for Past Human Rights Violations

Amnesty International, which is non-governmental organization working on human rights, defines impunity extensively as:

3 ICTJ, “What Is Transitional Justice?”

4 Turkey has a unique feature with regard to the transitional justice theory, the transitional justice in ongoing conflict theory, and the examples of states that will be examined in this work. I will discuss this differentness of Turkey’s process of the transitional justice in last two chapters.

A sense of wrongdoers escaping justice or any serious form of accountability for their deeds. Impunity can arise at any stage before, during or after the judicial process: in not investigating the crimes; in not bringing the suspected culprits to trial; in not reaching a verdict or convicting them, despite the existence of convincing evidence which would establish their guilt beyond a reasonable doubt; in not sentencing those convicted, or sentencing them to derisory punishments out of all proportion to the gravity of their crimes; in not enforcing sentences.⁵

Impunity is “the dictator’s greatest and most potent weapon, ... the victim’s ultimate injury, ... [and the] international community’s most conspicuous failure.”⁶ Impunity is a worldwide problem; it is not bounded by the borders of states. Because of its extensive feature, there is no one specific definition of impunity. But some different definitions are useful for this work. For instance, Professor Bassiouni suggests that

While amnesty is a deliberate positive action (the act of amnesty), impunity is an act of exemption, an exemption from punishment, or from injury or loss. ... Impunity can also result from *de facto* conduct, ... for example, measures ... taken by a government to curtail or prevent prosecutions [, or] ... it can be the product of either the failure to act or through more deliberate procedural and practical impediments that preclude prosecution.⁷

Furthermore, Soza suggests that “impunity can take various forms in society, but in the last analysis it always involves legitimizing falsehood,” meaning that

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- 5 Amnesty International, (ACT 33/001/1994), “Disappearances and Political Killings: Human Rights Crisis of the 1990s: A Manual for Action,” (February 1, 1994), 118.
 - 6 Meg Mary Margaret Penrose, “Impunity - Inertia, Inaction, and Invalidity: A Literature Review,” *Boston University International Law Journal* 17, (2000), 270, accessed: October 19, 2016, <https://ssrn.com/abstract=2510030>
 - 7 M. Cherif Bassiouni, “Searching for Peace and Achieving Justice: The Need for Accountability,” *Law & Contemporary Problems* 59, no. 4 (Autumn 1996), 19, accessed October 22, 2016, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1013&context=lcp>

it fails to provide justice.⁸ Baeza describes impunity as “a human decision, an action, a behavior, an act of denial of concrete reality: it is an act of violence.”⁹ The crimes and perpetrators remain anonymous by the agency of impunity. Penrose says that “forced silence, via impunity, is unacceptable and merely serves to perpetuate the cycles of violence.”¹⁰

Especially following military rule, impunity from criminal prosecution for members of the armed forces is assumed to be a precondition for the transition to civilian government. In some states that experienced a transition from military rule, such as Argentine, Chile, El Salvador, Guatemala, and Uruguay, criminal prosecution was considered dangerous because military rulers would refuse to transfer power to a civilian regime in the face of a threat of prosecution. Forgiveness for and forgetting of past abuses are elaborated as the keys to a bloodless transition; “the only viable means to coax dictatorships to step down, and then to prevent right-wing reversals and establish stable democracies.”¹¹ However, according to McSherry and Mejía, impunity is the cornerstone of state terrorism. It is the main tool for the maintenance of political and social control by those in power, and “even after transitions from military rule, agents or organizations of the state’s coercive apparatus, armored by impunity, can continue to limit democratic dissent and political opposition by maintenance a frightening presence in state and society.”¹² If the past abuses of these regimes were crimes against humanity, impunity policies not only affect victims but society as whole. Because of this effect of impunity, civilian governments should not avoid bringing perpetrators to justice instead of forgetting the past.

8 Raul Soza, “The Church: A Witness to Truth on the Way to Freedom,” in *Impunity: An Ethical Perspective: Six Case Studies from Latin America*, ed. Charles Harper, World Council of Churches (1996), 60-66 in Penrose, “Impunity,” 274.

9 Paz Rojas Baeza, “Breaking the Human Link- The Medico-Psychiatric View of Impunity,” in *Impunity..*, supra note 3, 73, 75-76., in *Ibid.*, 275.

10 *Ibid.*, 290.

11 J. Patrice McSherry, and Raúl Molina Mejía, “Introduction to Shadows of State Terrorism: Impunity in Latin America,” *Social Justice* 26, no. 4 (78) (1999), 4, accessed October 22, 2016, <http://www.jstor.org/stable/29767172>

12 *Ibid.*, 1-2.

Some authors suggest that forgetting, like remembering, can provide a basis for peace and reconciliation in societies that have experienced human rights violations during an internal conflict. Forgetfulness is inherent to amnesty laws which arise from a government's aim to break with the past by declining to punish wrongdoers. Amnesty is controversial for transitions from dictatorships to democracy and in peace processes following internal conflict. Although amnesty can have positive results in short run, long-term consequences of non-punishment bring about destructive circumstances for both victims and society as a whole. Especially in Latin America examples, the memory and remembering began to replace forgetting.

Until the recent past, history was considered a presentation of society, while memory was the presentation of an individual area. However, Maurice Halbwachs, a French sociologist worked on the social framework of memory and the reconstruction of past, argues that even individual memories are part of "collective memory."¹³ He also suggests that a person cannot create an individual mind, but comes to belong to group memory in the process of socialization. Assmann proposes that once persons take place in society it is no longer possible to differentiate between their individual perception and their external or social perception.¹⁴ The selection of what to remember depends on society, which functions as a filter for memory, outside of which this filter disappears. Collective and cultural memory decide what must not be forgotten by society; thus "not only remembering but also forgetting is social act."¹⁵ States – particularly nation states–the pasts of which include dark times vis-à-vis with human rights abuses, concentrate on their own national grief by ignoring the other's pain. Where there is a conflict between historical fact and their perception of themselves, they endeavor to transform the past. This is a

13 Maurice Halbwachs, *On Collective Memory* (Chicago and London: The University of Chicago Press, 1992), 37-41.

14 Jan Assmann, *Kültürel Bellek: Eski yüksek kültürlerde Yazı, Hatırlama ve Politik Kimlik* (Istanbul: Ayrıntı Yayınları, 2005), 39-40.

15 Mithat Sancar, *Geçmişle Hesaplaşma: Unutma Kültüründen Hatırlama Kültürüne* (Istanbul: İletişim Yayınları, 2008), 42-46.

“prohibition on remembering the past.”¹⁶ This social forgetfulness and re-structuration of the past have been used by the powerful to disburden themselves of past throughout history. However, the call for forgetting serves to reverse its purpose by unceasingly recalling the past. For instance, from the fourth century BC to the present we continue to remember the name of Herostratus.¹⁷

After 1980, the rise of memory began to be observed in the international arena. “Coming to terms with past,” “coping with the past,” “accounting for the past,” and “accountability for past abuses” were terms used to explain how to handle the gross human rights abuses of a prior regime. They concern revealing the truth and providing justice. After the Second World War, accountability for the past had been elaborated as a problem belonging to the societies of Germany, Japan, and few European states. Forgetting and forgiving were the main tools for this problem; however, the late 1980s and early 1990s were milestones for the notion of accountability. The failure of military regimes in Latin America states, the collapse of the racist regime in South Africa, and the dissolution of the Soviet Union revealed the need for accountability for the human rights crimes of prior regimes after a regime change. This is called “transitional justice,” which refers to “how societies ‘transitioning’ from repressive rule or armed conflict deal with past atrocities, how they overcome social divisions or seek ‘reconciliation,’ and how they create justice systems so

16 Ibid., 18.

17 “On July 21, 356 BC, Herostratus in his quest for fame set fire to the Temple of Artemis. Herostratus proudly claimed credit in an attempt to immortalize his name in history. He surrendered to the temple authorities and was imprisoned. The Ephesian authorities not only executed him, but also condemned him to a legacy of obscurity by forbidding mention of his name under penalty of death. This did not stop Herostratus from achieving his goal because his name is still remembered and lived on in classical literature. His name has become a metonym for someone who commits a criminal act in order to become famous.” *in* “Herostratic Fame Relates To Herostratus Who Burned The Beautiful Temple Of Artemis To Become Famous,” *Ancient Pages* online, accessed: February 17, 2018, <http://www.ancientpages.com/2017/01/06/herostratic-fame-relates-herostratus-burned-beautiful-temple-artemis-become-famous/>

as to prevent future human rights atrocities.”¹⁸ This situation has not been limited to societies in a transition process due to a regime change; past atrocities and human rights crimes began to be investigated although they were committed long before, such as in the cases of Spain which began accounting for past crimes committed thirty years earlier. Moreover, accountability and transitional justice actually did not cover only transition processes. For instance, despite of the absence of a regime change, El Salvador and Guatemala tried to deal with their pasts of violent internal conflict; Colombia and Peru endeavored to provide justice in and ongoing conflict.

Bassiouni assumes that accountability is the antithesis of impunity, amnesties, or any form of forgiveness and forgetfulness.¹⁹ Accountability means “recognizing the moral responsibilities that arise from the past, even if little can be done at a given moment to enforce those responsibilities.”²⁰ The cornerstones of accountability are truth, justice, and redress. The indispensable principles of accountability include “the cessation of the conflict and thereby the ending of the process of victimization; prevention of conflicts in the future; deterrence of conflicts in the future; rehabilitation of the society as a whole and of the victims as a group; and reconciliation between the different peoples and groups within the society.”²¹

In reality, there are millions of victims of conflicts of and international or non-international character, of purely internal conflicts, and of the crimes of despotic regimes. But with few exceptions, there has been no accountability, no justice, despite the commission of crimes against humanity. Why are there so few examples of accountability and especially of criminal prosecution? Bassiouni answers this by arguing that “the practice of impunity has become the political price paid to secure an end to the violence of ongoing conflicts or as

18 Charles T. Call, “Is Transitional Justice Really Just?” *Brown Journal of World Affairs* 11, no. 1 (Fall 2004): 101, accessed October 22, 2016, www.jstor.org/stable/24590500.

19 Bassiouni, “Searching for Peace”, 19.

20 Aryeh Neier, “What Should Be Done About the Guilty?” *The New York Review of Books*, (February 1, 1990), 32, accessed: October 22, 2016, <http://www.unz.org/Pub/NYRevBooks-1990febo1-00032>

21 Bassiouni, “Searching for Peace”, 23-24.

a means to ensure tyrannical regime changes. ... Victims' rights become the objects of political trade-offs, and justice becomes ... the victim of the means of *Realpolitik*.”²² Furthermore, political leaders are also responsible for human rights violations by committing, ordering, allowing, or condoning crimes in many cases. Because of this situation, political discourse about ending the conflict is organized around a choice between justice or peace – around the glorification of reconciliation and forgiveness among social groups or between victims and perpetrators – instead of around a search for accountability. After the collapse of forgetting politics, especially in the 1990s, “the past crimes of society became to be integrated in collective memory as ‘negative memory’ through public acceptance.”²³ New politics that continue to endeavor to avoid accountability for past crimes do not depend on forgetfulness but on a different remembrance of events – a distortion of historical facts. This can be defined as repression for public silence rather than real forgetting. Our contemporary problem is no longer a conflict between policies of forgetting and remembering but a conflict among divergent policies of memory of the various social actors in a society.²⁴ However, as Adorno assumes, the repression of the past is to revictimize the victims, while unilateral remembrance of past abuses can provoke revenge and violence in society.²⁵

§ 2.2 Transitional Justice Mechanisms

Accountability for the past reflects a strict choice to settle accounts instead of repressing the past. Transitional justice consists of both the social-psychological element of reconciliation and the legal structural element of the restoration of the rule of law.²⁶ In the present, by the agency of modern approaches

22 Ibid., 11-12.

23 Sancar, *Geçmişle Hesaplaşma*, 52.

24 Ibid., 55.

25 Ibid., 58.

26 Craig Kauffman, “Transitional Justice in Guatemala: Linking the Past and the Future” (presentation, the ISA-South Conference, Miami, FL, November 3-5, 2005): 2, accessed October 17, 2016, http://www.academia.edu/5339698/Transitional_Justice_in_Guatemala_Linking_the_Past_and_the_Future

to accountability such as non-judicial remedies, truth commissions (TrCs), lustration laws, and reparations, criminal prosecution is no longer considered a unique and inevitable apparatus to cope with gross human rights violations that occurred in the past in the context of transitional justice. Because various aspects of justice serve different purposes, there are debates among scholars about transitional justice mechanisms and their strategies. Transitional justice undertakes the unification of divided societies and can be defined as a bridge between the past and future. Because of this feature of transitional justice, academic debate focuses on past-future dichotomy. Some scholars and practitioners concentrate on forms of justice that focus on the past (criminal prosecutions, trials, purges of the military and government, and reparations), and while others elaborate future-oriented forms of justice (reconciliation and reestablishment of rule of law) by arguing that “the past must be forgotten (or at least left alone) in order to construct a better future, because focusing on the past risks a return to violent conflict.”²⁷ The past-oriented form of justice that focus on legal structural elements is called “retributive justice” by some academics. And the future-oriented form of justice that focuses on the psychological element of past atrocities is called “restorative justice” or “reconciliatory justice.”

Although the main purposes of these “justices” are the same with respect to dealing with the past, and preventing reoccurrence of crimes and conflicts, they are situated against in opposition to each other because of their respective perceptions of accountability. Among some academics, the dichotomy between retributive and restorative justice is considered a conflict between judicial and non-judicial approaches. Retributive justice means “holding the perpetrators of past abuses accountable by punishing them for their crimes. It is focused on the offender and on the past.”²⁸ Law and rule of law are inherent to retributive justice; national and international courts and the reform of the judicial system are part of it. Retributive justice encourages the victims of past crimes “to pursue justice through the state rather than through vigilantism” through trials.²⁹ Military tribunals, ad hoc tribunals, national courts that apply

27 Ibid., 1.

28 Ibid., 3.

29 Ibid.

universal jurisdiction principles or their own judicial system, special courts, the International Court of Justice (ICJ), and the ICC can be considered apparatus of retributive justice. After all that, it should be noticed that proponents of retributive justice do not assume that restorative justice rejects the legal system outright but civil remedies suggested by restorative justice do not serve the same strategies as criminal prosecutions. “The trial of the wrongdoer is not for the purpose of furnishing redress to the person or persons injured—that is left to the processes of the civil law. The purposes of the criminal law are rather to punish the wrongdoer for his offense against the mores of society and to deter others from acting likewise.”³⁰ On the other hand, restorative justice “is focused on the future, in particular the future relationship between the perpetrators and victims. It is focused on the victim and is designed to reduce the causes of hostility and division in society and repair social relationships.”³¹ Non-judicial approaches such as compensation, memorials for the victims, and official acknowledgment are parts of restorative justice. Amnesty laws and TrCs can be considered as the main apparatuses of restorative justice. Amnesty laws have traditionally been considered the only viable way to transition to a peace process, but it caused and causes the persistence of human right crimes. Because of the notorious utilization of amnesty laws, there is now “a distinction between permissible and impermissible amnesties ... by giving international acceptance to the former only.”³² According to Vicente, TrCs establish “a new form of dealing with the past that could be located between amnesty laws and international or national tribunals, and sometimes is applied together with one of these two mechanisms.”³³ TrC are not real trials – they have no judicial power –, but they “inquire [into] and document torture, murders,

30 Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” *The Yale Law Journal* 100, no. 8, Symposium: International Law (June, 1991): 2570 supranote 141, accessed December 5, 2016, <http://www.jstor.org/stable/796903>

31 Kauffman, *Transitional Justice in Guatemala*, 4.

32 Alejandra Vicente, “Justice against Perpetrators, the Role of Prosecution in Peacemaking and Reconciliation,” (working paper no:2, Badil Resource Center for Palestinian Residency & Refugee Rights, Bethlehem, Palestine, April 2003): 4.

33 Ibid.

and other human rights violations that otherwise would be denied and covered up by repressive regimes.”³⁴

In next part of this chapter, these different approaches to transitional justice are examined with a focus on judicial and non-judicial approaches. I consider TrCs to investigate restorative justice and, conversely, criminal prosecutions as a tool of retributive justice. First, I scrutinize the proponents of criminal prosecution against traditional policies of amnesty and forgetting. Then I show the reaction of restorative justice proponents to the incompleteness of classical accountability approaches such as criminal punishment. And finally, I examine responses to the omissions of notions of restorative justice based solely on forgiveness and reconciliation, and other perceptions of accountability that encompass both retributive and restorative justices.

2.2.1 *Criminal Prosecution as Retributive Justice*

“The UN Human Rights Committee, ... has said that blanket amnesty laws and pardons ... create ‘a climate of impunity’ and they deny the victims this ‘right to a remedy.’”³⁵ Policies of pardon separate individual good from public good and seize the latter in favor of the former. But some authors insist that “the right of punishing ... belongs not to any individual in particular but also to society in general.”³⁶ The capacity of the judicial system and its failure or success plays a role in lives, hopes, and despair of victims and of society as a whole. Punishment or pardon and accountability or amnesty law are stark dichotomies for transitional justice. The major challenges to the climate of impunity are the process of building the rule of law and deterrence theory.³⁷ The criminal prosecution is a significant part of accountability because of its

34 Ibid.

35 Juan E. Méndez, “Accountability for Past Abuses,” *Human Rights Quarterly* 19, no. 2 (May 1997): 259, accessed October 16, 2016, 10.1353/hrq.1997.0018

36 Cesare Beccaria, *On Crimes and Punishments* (1764), trans. David Young, (Indianapolis, IN: Hackett, 1986) in Rebecca Saunders, “Questionable Associations: The Role of Forgiveness in Transitional Justice,” *The International Journal of Transitional Justice* 5, (2011): 131, accessed: October 17, 2016, doi:10.1093/ijtj/ijr003

37 McSherry and Mejía, “Introduction to”, 5.

“potential role in ending cycles of state violence and promoting consolidation of democratic transitions.”³⁸ The core characteristics of criminal prosecution are insurance against future repression, respect for the rule of law, and the dignity of individuals.³⁹

Despite the fact that the full accountability for past atrocities is obviously necessary against impunity, why do new governments fail to accomplish it and why do they avoid criminal prosecutions? Penrose answers these questions with fundamental reasons such as political stability, public support for democracy, military presence in governmental affairs, limited resources (whether financial or judicial), and the absence of political will.⁴⁰ “When, after sixteen years of military rule, General Augusto Pinochet prepared to turn the Chilean government over to an elected civilian president, he warned: ‘No one is going to touch my people. The day they do, the state of law will come to an end.’”⁴¹ This is an example of the menace of a withdrawing military force that attempted to discourage civilian governments from bringing them to justice and to force the civilian administration to create amnesty laws and pardons. The main argument in opposition to criminal prosecution occurs in that point. It is argued that new democracies can be polarized and unstable, and “fragile democracies may not be able to survive the destabilizing effects of politically charged trials ... , prosecutions could reinforce the military's propensity to challenge democratic institutions.”⁴² According to some scholars and diplomats, the possibility of prosecution after the negotiation of peace is precarious obstacle to any peace agreement, especially after an internal conflict. Many civilian government use official discourse as indictment to seek justice that is assumed to be an obstacle to the transition to democracy. “Supporters of amnesties argue that those bearing the greatest responsibility for atrocities have

38 Orentlicher, “Settling Accounts,” 2541-2542.

39 Ibid.

40 Madeline Morris, “International Guidelines Against Impunity: Facilitating Accountability,” in *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of The Siracusa Conference 17-21*, ed. Christopher C. Joyner, (September 1998) in Penrose, “Impunity,” 278.

41 Orentlicher, “Settling Accounts,” 2539, supranote: 3.

42 Ibid, .2544-2545.

no interest in laying down their arms unless they believe that they will not face criminal charges.”⁴³ Amnesty laws may be used as an instrument of reconciliation for the consolidation of democracy and the restoration of social division in these circumstances. Sacrificing justice to end a conflict and secure peace is deemed realistic by the proponents of amnesties, because any investigations that start before the transition process endanger both justice and peace.⁴⁴

The first counterargument of retributive justice proponents concerns these “fragile” democracies. The moderate opponents of amnesty laws argue that these laws “can be used to promote national reconciliation provided they do not cover atrocious crimes which international law requires states to punish.”⁴⁵ But many proponents of retributive justice are opposed to the utilization of amnesty laws to end conflicts and consolidate peace. First of all, amnesties and pardons are not one and only route to peace. For instance, in the Democratic Republic of the Congo, although government did not accept demands for amnesty, peace negotiations continued. And despite the menace of war in Chile, this prediction did not come about. There were also cases as those of Angola and Sierra Leona in which blanket amnesty failed to protect the peace situation. There are also amnesty laws that work as predicted; however, in the long run, the “lack of accountability can be fertile ground for those who seek to manipulate history to sow seeds of new conflict in order to achieve their own political ends.”⁴⁶

The second component of criminal prosecution vis-à-vis forgetting policies concerns revenge and “collective guilt,” which means that society is in solidarity with the perpetrators and does not take responsibility in the face of victims.⁴⁷ “Without individualizing guilt, the notion of collective responsibility for crimes has greater resonance, and it is easier for blame focused on a

43 Human Rights Watch, *Selling Justice Short Why Accountability Matters for Peace*, 1-56432-508-3 (July 2009), 2.

44 *Ibid.*, 9; 3.

45 Orentlicher, “Settling Accounts,” 2550.

46 Human Rights Watch, *Selling Justice Short*, 5.

47 Sancar, *Geçmişle Hesaplaşma*, 147.

group to be passed from one generation to the next.”⁴⁸ If the guilt for gross human right violations is placed on one group in society, the desire for revenge by the victim group will not allow the unification of this divided society. The focus of criminal justice is mainly “to know truth, to record and find the causes of the conflict, and to determine who is responsible for what.”⁴⁹ Briefly, criminal prosecution is not only associated with deterrence; it is the most powerful route to separate collective guilt from individual guilt and to remove “the stigma of historic misdeeds from the innocent members of communities that are collectively blamed for the atrocities committed on other communities.”⁵⁰ Furthermore, some scholars of transitional justice who oppose criminal prosecution argue that trials support the emotions of revenge among victims and that it is an obstacle to reconciliation in society. Justice is far from being any form of revenge. First, trials determine individual guilt and thus prevent the assigning of responsibility for a crime to a whole group. Second, the judicial system provides for the fair judgment and punishment of perpetrators, and in so doing, it prevents victims from resorting to personal revenge.⁵¹ “Fair trials also assist in restoring dignity to victims by acknowledging their suffering and help to create a historical record that protects against revisionism by those who will seek to deny that atrocities occurred.”⁵² The ICC further states that “trials are beneficial because (...)they can express the community’s abhorrence of atrocities committed and because they ‘can placate a victim’s desire for vengeance.”⁵³

The third debate on criminal prosecution during transitional justice relates to the assumption of mandatory prosecution. Opponents of prosecutions argue that if the state decides to use judicial methods, it can bring to trial and

48 Human Rights Watch, *Selling Justice Short*, 6.

49 Vicente, “Justice against Perpetrators,” 12.

50 Méndez, “Accountability for Past Abuses,” 274.

51 McSherry and Mejía, “Introduction to,” 5.

52 Human Rights Watch, *Selling Justice Short*, 6.

53 Cf. www.victimstrustfund.org/info/abouticc.html#4. (accessed November 25, 2004) in Thomas Brudholm, “Revisiting Resentments: Jean Améry and the Dark Side of Forgiveness and Reconciliation,” *Journal of Human Rights* 5, no.1 (September 22, 2006): 19 <http://dx.doi.org/10.1080/14754830500519714> (accessed: December 21, 2012)

punish little more than small fraction of the responsible group. This is obviously true in cases such as that of Argentina where hundreds of people disappeared during the military junta. However, the purpose of criminal prosecution is not necessarily the prosecution of every responsible person. The principles of prosecution are to ground the deterrence rational for repetition of notorious crimes, and “to vindicate the authority of the law ... [,] it is not necessary that a transitional government prosecute all who participated in a previous system of violations. These and other objectives served by post-transition prosecutions can be accomplished with exemplary trials.”⁵⁴ Orentlicher argues that prosecution under customary international law is for “those who were most responsible for designing and implementing a system of human rights atrocities.”⁵⁵ This selective prosecution is capable of fulfilling its role as a deterrent; however, the failure to punish any of those responsible is *de facto* amnesty and impunity. The selectivity of prosecution always entails a risk of arbitrariness. There are two principles of lawful selection: First, government can immunize low-level soldiers and officers from prosecution, but “individuals should never be exonerated or exempted from prosecution for grave human rights violations on the ground that they were ‘following orders’, although this circumstance can be considered in mitigation of punishment.” And second, “a government should not cynically prosecute a group of scapegoats.”⁵⁶

Bassiouni’s explanation is appropriate to resume the perception of retributive justice:

Truth is, therefore, an imperative, not an option to be displaced by political convenience because, in the final analysis, there truly cannot be peace (meaning reconciliation and the prevention of future conflict arising out of previous conflictual episodes) without justice (meaning, at the very least, a comprehensive exposé of what happened, how, why, and what the sources of responsibility are).⁵⁷

54 Orentlicher, “Settling Accounts”, 2598-2600.

55 *Ibid.*, 2599.

56 *Ibid.*, 2603.

57 Bassiouni, “Searching for Peace”, 24.

Proponents of retributive justice criticize restorative justice and TrC by arguing that there can be no sense of justice without the punishment of some responsible person. The term “reconciliation” has been utilized by governments to conceal the truth either because the governments were themselves implicated in past human rights abuses or they were freighted by previous regimes. Radical assessments against reconciliation argue that

In the transitional era, reconciliation discourse mitigated the crisis of legitimacy caused by granting amnesty to torturers and entering into a power-sharing arrangement with former apartheid leaders ... Reconciliation was the Trojan horse used to smuggle an unpleasant aspect of the past (that is, impunity) into the present political order⁵⁸

This historical interpretation of reconciliation as “forgetting” situates retributive justice in opposition to reconciliatory or restorative justice in the transitional justice context. However, the perception of restorative justice distinguishes between forgetfulness and forgiveness. As does retributive justice, restorative justice assumes that forgetting is a part of amnesty and that amnesties have no place in transitional justice. But forgiveness, which is inherent to reconciliation, belongs neither to amnesty nor to criminal prosecution.

2.2.2 *Truth and Reconciliation Commissions as Restorative Justice*

When societies that experienced massive violations of human rights have set out to deal with these gross violations in their pasts, “they encountered with the fact that the classical/traditional judicial mechanisms were insufficient ... or dangerous for various reasons.”⁵⁹ In some cases, the abandonment of prosecution was seen as “an unfortunate but necessary cost of peace.”⁶⁰ Besides, the judicial system itself is a subject of the democratic transition process and of the past that must be rendered accountable. TrC emerge as an inevitable consequence; they are a response to the question of what is possible rather than

58 Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), 97.

59 Sancar, *Geçmişle Hesaplaşma*, 108.

60 Kauffman, *Transitional Justice in Guatemala*, 7.

what is necessary. They are an alternative that forecloses impunity for past violence through the agency of blanket amnesties, pardons, or other methods. The definition, TrC are official, non-judicial, temporary institutions founded in an attempt to determine the facts, causes, and consequences of past human right violations.⁶¹ They are instituted by presidential or governmental directives, with the support of non-governmental organizations and religious institutions and upon the initiative of political opposition parties. The mission of TrC is completed with the preparation of a report that includes the results of the investigation and recommendations. TrC strive to disclose the truth about past, to encourage perpetrators to take responsibility for their crimes, to create a public platform for victims, to be a catalyst for public discussion, to make suggestions with regard to recompense and legal or structural reforms, and to facilitate social reconciliation.⁶²

At first, TrC originated from necessity, but restorative justice advocates began to notice the clear advantages of these commissions and develop and implement them. Criminal prosecution aims foremost to receive to material fact. Both the plaintiff and defendant attempt to persuade the judge of their own rightfulness. The main duty of the judge is to decide what the truth is in a given case, and acceptance of the judge's determination of the truth is obligatory for both sides. Per Agamben,

As jurists well know, law is not directed toward the establishment of justice. Nor is it directed toward the verification of truth. Law is solely directed toward judgment, independent of truth and justice. ... The ultimate aim of law is the production of a *res judicata*, in which the sentence becomes the substitute for the true and the just, being held as true despite its falsity and injustice.⁶³

61 Murat Çelikkan, *Hakikat Komisyonları* (Istanbul: Hakikat Adalet Hafıza Merkezi, 2014), 24

62 Sancar, *Geçmişle Hesaplaşma*, 111-117.

63 Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive*, trans. Daniel Heller-Roazen (New York: Zone Books, 1999), 18.

However, a TrC can be described “as acknowledging the truth rather than finding the truth.”⁶⁴ “Many truth commissions have argued that without granting amnesty, it is virtually impossible to gain the participation of the perpetrators, which is essential to uncovering the truth.”⁶⁵ The participation of perpetrators a key role in the disclosure of the truth and the reconciliation process, but their participation is impossible and unrealistic if the prosecution process will probably end with punishment. According to Sancar, we cannot refer to ethic of discussion, which is based on reconciliation, in trials.⁶⁶ But TrC have the capacity to gather information from various sources – from victims and also perpetrators.

The second significant advantage of TrC is their process which “(...) is usually established by which the victims and their families are ‘listened to’ and respected in their dignity as they have been before.”⁶⁷ Instead of perpetrator-oriented aspect of criminal prosecutions, a TrC is a victim-centered approach as are all mechanisms of reconciliation. Because of this, cases that cannot be subject to prosecution due to the death, escape, or lack of criminal responsibility of perpetrators can take place in a TrC. TrCs have validity in the investigation of gross human right violations, but TrCs are explicitly legitimized in the cases in which real victims not alive and enforced disappearances, because there are some facts non-reversible and real victim cannot be subject of trial. The law does not embrace the idea to regulating the past. Taciturnity or insufficient judgement of past crimes creates a second crime; proper criminal prosecution prevents the second crime, but not change the burden of first crime.⁶⁸ Minow presents a therapeutic approach to TrC, explaining that “a truth commission proceeds on the assumption that it helps individuals to tell their stories and to have them acknowledged officially.”⁶⁹ Furthermore, in cases where

64 Penrose, “Impunity,” 306.

65 Kauffman, *Transitional Justice in Guatemala*, 7.

66 Sancar, *Geçmişle Hesaplaşma*, 100.

67 Méndez, “Accountability for Past Abuses,” 275.

68 Sancar, *Geçmişle Hesaplaşma*, 125.

69 Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (1998), 61 in Penrose, “Impunity,” 304.

information a crucial role, such as with forced disappearances, TrC may obtain more information than an investigation and prosecution process.

Restorative justice proponents also criticize another vital argument of criminal justice: the individualization of guilt by prosecution. It is true that the individualization of guilt prevents collective guilt. However, after ethnic or purely internal conflicts, it provokes to acquit all persons who are not investigated and risks blocking the broader investigation of the crimes' political, cultural and moral sources.⁷⁰ The strengthened positions of victims and perpetrators in trials may have destructive effects; particularly after a transition out of ethnical conflict, it may the cycle of resume violence in society. However, reconciliatory justice signifies “the restoration and sometimes the establishment of a hitherto non-existent relationship of trust’ or the ‘coming together after a rift, a rift that undermines trust between the parties.”⁷¹

More radical restorative justice advocates refer to other advantages of eliminating criminal prosecution. It can be said that they opt for collective goals rather than individual rights. They generally argue that due to the “justice radicalism” that insists on prosecution and punishment, there is no other path for a cruel regime except to remain in power and continue committing crimes.⁷² According to Nino, “[m]andatory retribution, which values punishment raises the issue of whether equality before the law is infringed when the need to protect valuable institution, like democracy, leads to a selection of agents who will be prosecuted for human rights abuses.”⁷³ He suggests that

70 Sancar, *Geçmişle Hesaplaşma*, 135.

71 Villa-Vicencio (2000), 208 and Govier and Verwoerd (2002b), 185 in Neelke Doorn, “Forgiveness and Reconciliation in Transitional Justice Practices,” *Ethical Perspectives* 15, no. 3 (2008): 391, accessed October 17, 2016, doi: 10.2143/EP.15.3.2033157

72 Ibid., 132-133.

73 Carlos S. Nino, “The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina,” *Yale Law Journal* 100, no. 8, Symposium: International Law, (June 1991): 2620, accessed October 22, 2016, <http://links.jstor.org/sici?sici=00440094%28199106%29100&3A8%3C26%3ATDTPPA%3E2.o.CO%3B2-C>

criminal prosecution must be limited and counterbalanced with the purpose of preserving democratic system.⁷⁴

Méndez says that “[t]he most extreme form of tokenism ... results when a truth commission is proposed as an alternative to criminal prosecutions and not as a step in the direction of accountability.”⁷⁵ It can be moderately suggested that groups that hesitate to pursue criminal prosecutions or absolutely oppose them have – more or less, explicitly or implicitly – the intention of glossing over a past that is full of abuses.⁷⁶ The purpose of forgetting or forgiving without punishment is a vital issue of criticism of TrC and reconciliation mechanisms.

2.2.3 *Forgiveness: A New Form of Impunity or a Principle of Reconciliation?*

The forgiveness earned a reputation in the reconciliation and restoration perspectives of transitional justice practices (especially into TrC) with the critical legal studies that focus on limiting retributive justice. Enright and his colleagues, who are important figures in the study of forgiveness, define forgiveness as “willingness to abandon one’s right to resentment, negative judgment and indifferent behavior toward one who unjustly hurt us, while fostering the undeserved qualities of compassion, generosity, and even love towards him or her.”⁷⁷ And most scholars defend “a bilateral view of forgiveness”⁷⁸ that depends on an apology from wrongdoers and a response from victims. Some scholars definitely describe “reconciliation as the end of a process, the ultimate goal ... [, and] forgiveness is the necessary means to reach

74 Ibid.

75 Juan E. Méndez, “In Defense of Transitional Justice,” 1-27, in *Transitional Justice and the Rule of Law in New Democracies*, ed. A. James McAdams, (University of Notre Dame Press, 1997), 15.

76 Sancar, *Geçmişle Hesaplaşma*, 133.

77 Robert D. Enright, Suzanne Freedman and Julio Rique, “The Psychology of Interpersonal Forgiveness,” in *Exploring Forgiveness*, eds. Robert D. Enright and Joanna North, Madison, (WI: University of Wisconsin Press, 1998), 46-47, in Saunders, “Questionable Associations,” 122.

78 Doorn, “Forgiveness and Reconciliation,” 383.

reconciliation. ... [F]orgiveness is possible without reconciliation [but] reconciliation ... is not possible without forgiveness."⁷⁹ In the course of the South African TRC, Archbishop Desmond Tutu, the chairperson said: "It is clear that if we look only to retributive justice then we could just as well close up shop. Forgiveness is not some nebulous thing. It is practical politics. Without forgiveness, there is no future."⁸⁰ In his works on transitional justice, forgiveness is related to *Ubuntu*,⁸¹ reconciliation, restorative justice, and the abandonment of prosecutorial and retributive justice.⁸² Forgiveness is assigned as "a form of resistance to 'blame culture' and 'punishment-obsessed modernity'."⁸³ The proponents of forgiveness regularly equate retributive justice with revenge, antagonism, and cruelty. Advocates of forgiveness argue that people can avoid any interaction in the private sphere; however, in the public sphere this preference is not possible; relationship is unavoidable.⁸⁴ One group in society cannot ignore the existence of others. For instance, white South Africans cannot ignore the existence of black South Africans.

The sharpest criticism of a forgiveness-based restorative justice perspective comes from the criminal justice-oriented retributive justice approach. Philosophers such as Derrida,⁸⁵ think forgiveness is contrary to justice. It can perpetuate injustice, and wrongdoers may consider forgiveness a route to

79 Ibid., 390.; D. Pollefeyt, "Forgiveness after the Holocaust," *After-words, Post-Holocaust Struggles with Forgiveness, Reconciliation, Justice*, ed. D. Patterson and J.K Roth, Seattle, (London: University of Washington Press, 2004), 63, in Ibid.

80 Simon Wiesenthal, "Desmond Tutu," *The Sunflower: On the Possibilities and Limits of Forgiveness* (Knopf Doubleday Publishing Group, 2008), 298.

81 In humanist philosophy of Southern Africa *Ubuntu* means "humanity", "humanity towards others", and "the belief in a universal bond of sharing that connects all humanity" in a more philosophical sense.

82 Saunders, "Questionable Associations," 123. It must be added: "Tutu never develops a systematic theory of forgiveness, relies heavily on these associations for definition and largely treats forgiveness as an a priori good. He has, however, advocated for post-TRC prosecutions."

83 Ibid., 124 supranote: 20.

84 Doorn, "Forgiveness and Reconciliation," 390.

85 Jacques Derrida, "Justice, Law and Philosophy-an interview with Jacques Derrida," *South African Journal of Philosophy* 18, no. 3 (1999), accessed October 17, 2016, <http://dx.doi.org/10.1080/02580136.1999.10878189>

circumvent justice.⁸⁶ In many reconciliation mechanisms, truth is more important than justice; however, the right to know is equal to the right to justice. If the right to justice is jeopardized, “a society that is unable to convince individuals of its ability to exact atonement for injury is a society that runs a constant risk of having its members revert to the wilder forms of justice.”⁸⁷ Moreover, forgiveness advocates and some restorative justice proponents who consider forgiveness to be the only alternative to retributive justice suggest that criminal prosecution is equivalent to revenge. It is true that laws orderly contain revenge, but the “desire for vengeance may not be as reprehensible, or socially destructive, ... particularly when moderated by a judicial system, it may function as an important source of resolve for restoring moral order, reinstating the personal dignity of an aggrieved party, compensating for loss and publicly affirming that wrongdoing bears consequences.”⁸⁸

Critiques of forgiveness-oriented restorative justice context not only originate from retributive justice advocates, but also from critical reconciliation studies. There are three main problematic issues regarding forgiveness in transitional justice practices. The first concerns forgiveness between groups instead of between persons and is called the collective feature of forgiveness. Collective emotions refer “to emotions experienced by a significant percentage of the individuals comprising the collective.”⁸⁹ Forgiveness is still experienced on the individual level but it happens in the public sphere. Forgiveness needs collective guilt and apology. However, Walser argues that the term “shame” is linked to collectivity – to the public sphere; the term guilt, on the other hand, belongs to the private sphere, to individual consciences.⁹⁰ In the case which the forgiver is new regime, Bassiouni’s argument is appropriate to explain that

86 Saunders, “Questionable Associations,” 128.

87 Susan Jacoby, *Wild Justice: The Evolution of Revenge* (New York: Harper and Row, 1983), 10. in *Ibid.*, 131.

88 *Ibid.*, 133.

89 Doorn, “Forgiveness and Reconciliation,” 384.

90 Aleida Assmann, “Two Forms of Resentment: Jean Améry, Martin Walser and German Memorial Culture,” *Taboo, Trauma, Holocaust, New German Critique*, no. 90, Duke University Press (Autumn 2003): 129, accessed October 17, 2016, <http://www.jstor.org/stable/3211112>

Forgiveness is not a legal action; rather forgiveness is primarily a relationship between persons. The arena of resentment and forgiveness is individual and personal in a way that legal guilt and responsibility are not. Institutions, states, and systems of justice cannot forgive: They can pardon and act in mercy.⁹¹

The second issue is the neglect of emotions such as anger, remorse, and shame in many reconciliatory transitional justice literatures. The remorse of the wrongdoer and forgiveness of the victim are considered as given. In many cases, although the perpetrator may feel remorse and apologize for the past, victims may not believe in their sincerity or may not be ready to forgive their abusers. To counter this criticism, there are non-sentiment-based varieties of forgiveness such as Digeser's. His concepts and of political forgiveness "does not depend on the emotions or internal states of the forgiver," its core is truth-telling, and "[t]he burden of forgiveness would thus be on perpetrators and investigators, rather than on victims, and might guard against reconciliation being merely a form of submission."⁹² Otherwise, there are few officials or military officers willing remorse or apologize. Many of think of themselves as responsible but not guilty. The other problem is the absence of agency or the person who is forgiven. In Arendt's view, a victim can only forgive a person, not a crime. "The greatest evil perpetrated is the evil committed by nobodies, that is, by human beings who refuse to be a person."⁹³ If a perpetrator do not undertake their own responsibility, the crime remains rootless. "[o]ne doesn't 'forgive' inanimate objects or natural disasters. Hence, how would one forgive a person who has surrendered his/her agency?"⁹⁴

The third problem is the encouragement of forgiveness by others. In many reconciliation processes, victims are compelled to forgive without being able to take their own decision under consideration whether they want to or not.

91 Bassiouni, "Searching for Peace", 24.

92 Peter E. Digeser, *Political Forgiveness*, Ithaca, (New York: Cornell University Press, 2001), 33 in Saunders, "Questionable Associations," 127.

93 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963), 289.

94 Saunders, "Questionable Associations," 137.

Large scale reconciliation mechanisms, such as public apologies, pressure victims to forgive; thus, they cannot feel free to offer forgiveness. However, this is “false forgiveness,” and “[i]f not sufficient social justice is ensured to complement the individual healing process, the national forgiveness attempts can be experienced as ‘false reconciliation’ by victims, especially in the absence of full truth and justice.”⁹⁵ For instance, in opposition to the aforementioned assertion of Desmond Tutu that “there is no future without forgiveness,” one South African woman said: “What really makes me angry about the TRC and Tutu is that they are putting pressure on me to forgive, (...) The oppression was bad, but what is much worse, what makes me even angrier, is that they are trying to dictate my forgiveness.”⁹⁶ Many forgiveness proponents accept the “reframing process” that “paint[s] the wrongdoer as an object of compassion” and constrains victims “to understand the offender’s personal history, current pressures, and basic human worth” as “re-humanizing” wrongdoers.⁹⁷ The criticism to reframing arises the question of why; why should victims understand offenders? And why should they be the ones to re-humanize them? I agree with Saunders’s question: “What possible good comes from empathizing with a person’s ability to torture or kill (or order the torture or killing of) another human being?”⁹⁸ And if this is considered the dark side human nature, how can someone forgive humanity?

Robert Enright and colleagues distinguish between forgiveness and accepting, tolerating, ceasing being angry, feeling good, forgetting, and even reconciling.⁹⁹ Some scholars maintain that forgiveness is the keystone of reconciliation but at the same time criticize the forms of forgiveness that involve

95 Doorn, “Forgiveness and Reconciliation,” 388.

96 C. Villa-Vicencio, “Getting on with life: a move towards reconciliation,” in *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. C. Villa-Vicencio and W. Verwoerd (Cape Town: University of Cape Town Press, 2000), 201, in Brudholm, “Revisiting Resentments,” 23.

97 Norvin Richards, “Forgiveness as Therapy” in *Before Forgiving: Cautionary Views of Forgiveness in Psychotherapy*, ed. Sharon Lamb and Jeffrie G. Murphy (New York: Oxford University Press, 2002), 76 in Saunders, “Questionable Associations,” 134.

98 *Ibid.*, 135.

99 *Ibid.*, 121, supranote: 5.

coercion or pressure and apology-response elevated to the public level despite its interpersonal nature. They argue that forgiveness is not *sine qua non* for reconciliation; rather, relational wholeness is the central notion.¹⁰⁰ For instance, Carse and Tirrell depart from the classical model of forgiveness (a call followed by a positive or negative response) preferring an emergent model in which the call and response are not central role and not explicit, just symbolic. They believe that “forgiveness is possible, even in the wake of grave world-shattering wrongs, but not without what we call shared ‘world-building’ ... [that] consists in cooperative work through which victims and perpetrators are joined in developing shared moral norms, embodied in emerging but stable social practices.”¹⁰¹ Instead of disconnection, mutual recognition and understanding between perpetrator and victim slowly develop in the emergent model. After grave wrongs, the perpetrator and survivor should be brought together through any form of cooperation. Forgiveness will commence with “cohabitation within community and small gestures of reconciliation, which slowly build trust.”¹⁰² Carse and Tirrell exemplify their argument with a hypothetical case in Rwanda: “Let Aimee be a Tutsi survivor and widow, and Berta be a Hutu whose husband is in prison. After working together for several years, Berta’s question to Aimee is unlikely to be ‘Will you please forgive me?’ but rather ‘Have you forgiven me?’”¹⁰³

This model may serve social reconciliation to a degree; however, neither the emergent model nor its example case is adequate for forgiveness-based transitional justice. First of all, this model cannot be implemented in deeply-divided societies or those with ongoing conflicts. Second, if the real victim is dead or disappeared and the perpetrator is in jail, who is being forgiven by whom? Cohabitation of the families of victims and perpetrators is vital for the future of society, but it is not a reflection of accountability for past. It is true

100 Doorn, “Forgiveness and Reconciliation,” 391.

101 Alisa L. Carse and Lynne Tirrell, “Forgiving Grave Wrongs,” in *Forgiveness in Perspective*, ed. Christopher Allers & Marieke Smit (Rodopi Press, 2010), 45, accessed October 20, 2016, <http://philpapers.org/archive/CARFGW.pdf>

102 *Ibid.*, 53.

103 *Ibid.*, 54.

that most perpetrators and victims are men. However, “the idea of offering forgiveness toward unrepentant perpetrators in an effort to help a woman free herself from anger is dangerous and plays into deep stereotypes of women’s ‘essential’ nature ... and is too consistent with the perpetrator’s own worldview that allows him to excuse his behavior.”¹⁰⁴ The social position argument of criminal prosecution by restorative justice proponents can be similarly addressed to forgiveness. Forgiveness can also “encourage victims to continue to play the same role in relational [or societal] dramas, rather than find new possibilities.”¹⁰⁵ The primary notion for sustainable reconciliation is neither cooperation nor forgiveness. Forgiveness can diminish a victim’s self-respect after suffering a human rights violation. The fundamental senses are “self-worth” and “recognition by the other;” only after the emergence of these senses can survivors and victims “enter into the long process of rebuilding relationship of trust with former wrongdoers.”¹⁰⁶ To sum up, forgiveness is not a useless practice in the course of healing. It might be said that the problematic aspect of forgiveness does not originate from its utilization in transitional justice but derives from its acceptance as an *a priori* harmless good.

After the late 1980s, the assumption that an attempt to break the impunity cycle is a menace to democratic stability – that is, the assumption that demand for justice is a menace to any possibility of peace – began to dissolve. International Law clearly suggests that certain core rights, that can be violated by torture, enforced disappearances, and extrajudicial execution, cannot be deferred even “in time of public emergency which threatens the life of the nation and

104 Sharon Lamb, “Introduction: Reasons to Be Cautious about the Use of Forgiveness in Psychotherapy,” in *Before Forgiving: Cautionary Views of Forgiveness in Psychotherapy*, ed. Sharon Lamb and Jeffrie G. Murphy (New York: Oxford University Press, 2002), 162. in Saunders, “Questionable Associations,” 139.

105 Janice Haaken, “The Good, the Bad, and the Ugly: Psychoanalytic and Cultural Perspectives on Forgiveness,” in *Before Forgiving: Cautionary Views of Forgiveness in Psychotherapy*, ed. Sharon Lamb and Jeffrie G. Murphy (New York: Oxford University Press, 2002), 173 in *Ibid.*, 128.

106 Doorn, “Forgiveness and Reconciliation,” 395.

the existence of which is officially proclaimed.”¹⁰⁷ Méndez specifies that the endeavor to choose between legalistic and moralistic positions is a mistake for human rights: “We must, therefore, be ready to take a sober and realistic view of political constraints in proposing accountability measures. Such a view ... does not necessarily result in realpolitik and surrender of principle”¹⁰⁸ I agree with the opponents of a strict separation in transitional justice who demand to avoid “false dilemmas.”

The first dilemma is between the concepts of forgiving and forgetting. Vicente says that forgiveness does not mean forgetting, which involves burying the past, and that must have a part in the reconciliation process.¹⁰⁹ Furthermore, the distinction between forgetting and forgiving is not important in reality, because there is no proof that policies of forgiveness or forgetting automatically prevent the reoccurrence of abuses in future. For instance, “... in Haiti it is easier to make the case that the opposite is true: each self-amnesty by the military has only led to further interruptions of democracy and to further atrocities.”¹¹⁰

The second misconception is a tension between making peace and doing justice, or more broadly a truth-justice dilemma. Figures such as Krauthammer, Pastor, and Forsyth propose that truth is an alternative to justice.¹¹¹ They argue that trials are vindictive mechanisms and promote reconciliation instead. For instance, in Bosnia, “some observers have proposed closing down the war crimes tribunal and replacing it by a ‘truth commission’ modeled after Chile’s and El Salvador’s.”¹¹² However, truth-telling is just one step toward full

107 UN, General Assembly, *International Covenant on Civil and Political Rights*, RES: 2200A (XXI), (December 16, 1966) United Nations, Treaty Series, vol. 999. Entry into force March 23, 1976. Part II, Art.4 (1).

108 Méndez, “Accountability for Past Abuses,” 257.

109 Vicente, “Justice against Perpetrators,” 19.

110 Méndez, “Accountability for Past Abuses,” 265.

111 Ibid., 266-267.

112 Robert Pastor, of the Carter Center, cited in “The Nation: Nuremberg Isn’t Repeating Itself,” *The New York Times*, 19 November 1995; David Forsyth, “The UN and Human Rights at Fifty: An Incremental but Incomplete Revolution,” *Global Governance* 1 (1995), 297–318. in Ibid., 265.

accountability for past. The UN Commission on Human Rights “seeks to avoid any possible implication that the work of truth commissions is an alternative to the essential role of the judiciary in protecting human rights[.] ... That truth commissions are not intended to act as substitutes for the civil, administrative or criminal courts” is explicitly affirmed.¹¹³ There is no fix-all mechanism for dealing with the past. Insisting on both a judicial approach and TrC may cause even more human suffering; justice and truth are necessary conditions for transitional justice, but are insufficient without the other.

The third false assumption is that criminal prosecution is inherently adversary to peace and reconciliation methods. Although there is a clear obligation to prosecute in the era of international law, the international human rights movement has been hesitant to use terms like “reconciliation” due to their infamous utilization by advocates of impunity. In fact, human rights organizations are no obstacle to real reconciliation.

[T]rue reconciliation cannot be imposed by decree; it has to be built in the hearts and minds of all members of society through a process that recognizes every human being’s worth and dignity. [It] requires knowledge of the facts. Forgiveness cannot be demanded (or even expected) unless the person who is asked to forgive knows exactly what it is that he or she is forgiving. [And] reconciliation can only come after atonement.¹¹⁴

To sum, the priority of transitional justice is to render accountability for past atrocities for all parts of a society. According to Brudholm, “the surviving victim cannot ‘move on’ in/with a society that has not recognized the moral horror of the crime committed in its name and which has been tolerated by the masses”¹¹⁵ In the society deeply divided, the politics of forgetting cannot produce reconciliation or there cannot be any relationship restored by forgiveness between victims and the other parts of society which committed the crimes or

113 UN Commission on Human Rights, *Promotion and Protection of Human Rights Impunity, Report of the independent expert to update the Set of Principles to combat impunity* (by Diane Orentlicher) E/CN.4/2005/102 18 February 2005. §22.

114 Méndez, “Accountability for Past Abuses,” 269.

115 Brudholm, “Revisiting Resentments,” 16.

kept quiet about it. It is true that forgiveness and reconciliation do not result in impunity in all cases, but if a society is ethnically divided or in an ongoing conflict and if there is no relationship to be reconstructed, yet there is a crime against humanity, judicial approaches might be more substantial in the first phase such as some states' experiences, that will be examined in the next chapter, show us. The next chapter focuses on the place of legal approaches to crimes against humanity in transitional justice.

Developments and Limits in the Punishment of Enforced Disappearances

Enforced disappearance, a missing person and a homicide do not same content. Enforced disappearance is a tool of power against its adversaries. It influences the victims themselves and society as a whole, or at least the social strata to which victims belong, because it includes three important policies: deprivation of freedom, concealment of the fate or whereabouts of those persons, and in place of this one prohibition of their burial. The first two features influence victims and their loved-ones, but the prevention of appropriate burial is a punishment of victims' families and communities. Furthermore, this crime is a state strategy to spread terror within society and merges social, psychological, and legal aspects. In this chapter, I concentrate on the legal aspects of this crime to examine different assumptions about justice in societies and the place of law and criminal prosecution within those assumptions. In first part, because of the broad variety of domestic criminal laws of various states, I elaborate on international law, which has a unique feature with respect to enforced disappearances and bringing about justice. The occurrence of enforced disappearance, its designation as "enforced disappearance," its recognition as a crime in the international sphere, and the methods of justice for it are elaborated in the first section. The second section is about case states that have experienced human rights violations such as enforced disappearance in their past and which endeavored to make a peaceful transition to a new future.

Latin American states, South African Republic and Spain will be examined. Their culture of impunity before, during, and after the transition, their preferences vis-à-vis restorative justice and retributive justice mechanisms, their preferences vis-à-vis peace and justice, and the causes and consequences of those choices are in the last section of the first chapter.

My argument in this Chapter is that although the political will of states is required to sidestep holding responsible persons accountable for their crimes as a result of their political interests or their assumptions about peace; the societies of these states have not generally agreed with offering amnesties to perpetrators with reference to their right to truth and justice and by demanding the criminal prosecution of perpetrators. The abandonment of justice in favor of peace is the main problem for these states. States prefer not to cope with their pasts and to use restorative justice tools in lieu of retributive justice which is considered an obstacle to peace and reconciliation in society. However, the absence of retributive justice tools generally caused impunity, and the tentacles of impunity affected both their present and future society.

Societies that suffered from enforced disappearances demanded their rights to truth and justice despite the absence or non-utilization of these rights in their domestic legislation. How is it possible that their criminal law and justice demands are considered legitimate in spite of the limitations of domestic law? On this point, international human rights provide an opportunity for people to defend their rights. It seems that the demands of victims' relatives and the international human rights principle regarding criminal prosecution generally overlap. In order to emphasize the importance of international law, it is not necessary to apply to the international mechanism for the punishment of those responsible. Despite the corruption of domestic judicial systems, the limitations of legislation, and the absence of political will, a domestic criminal prosecution process can be triggered with reference to international principles. In fact, in states such as Turkey, victims' relatives do not know their truth and justice rights in the international scheme; however, their legal defenses depend on international principles because domestic criminal law is lacking. In my opinion, the demands of victims' relatives that are already legitimate become legal with reference to international law. Therefore, in this chapter I present two aspects of criminal prosecution for past abuses: the international

understanding of the prosecution of enforced disappearances and its developments and limitations, and the demands for retributive justice in states that experienced enforced disappearances in their past but chose to resort only to restorative justice mechanisms. Also, international and various national approaches to criminal justice for past abuses serve as comparisons to understand the case of Turkey. Case study states show the causes and consequences of neglecting retributive justice, the differences between the demands of society and the interests of political power, and the similarity between the international principle of enforced disappearances and the sense of justice in societies.

§ 3.1 International Law and Enforced Disappearances

The term impunity is simply defined as the “[e]xemption or protection from penalty or punishment.”¹ McSherry and Mejía argue that there is a direct link between impunity and state terrorism by defining impunity as “freedom from accountability of punishment for state crimes or abuses of power.”² In the consideration of the state as a unique, legitimate agent for criminal prosecution, the exemption from punishment is directly related to the political will of the state. Serious human rights violations and international crimes reflect a state’s attitude toward impunity and its pernicious consequences for victims and society as a whole. International human rights law and international criminal law are two significant areas in which to observe international attitudes against impunity and for accountability. It should be examined these attitudes in order to comprehend what opportunities are offered by international law for fighting impunity in cases of enforced disappearances and to comprehend how the limitations of international efforts can be overcome.

1 Black’s Law Dictionary, 6th edition,(1990), 758 in Penrose, “Impunity.”

2 McSherry and Mejía, “Introduction to,” 1.

3.1.1 *Enforced Disappearances as a Crime against Humanity*

Part II, Article 5 of the Rome Statute of the ICC³ recognizes that “the most serious crimes of concern to the international community as a whole” are under the jurisdiction of the Court and defines these international crimes as the crime of genocide, war crimes, crimes of aggression, and crimes against humanity.⁴ Because the pillar of this dissertation is enforced disappearances, this chapter focuses on crimes against humanity and war crimes, which include enforced disappearances. Enforced disappearance, until decades later when it received its own independent, international status and legislation, was first mentioned in Part I, Article 6 of the Charter of the Nuremberg International Military Tribunal in 1945 as a crime within the larger categories of “crimes against humanity,” “war crimes,” and “crimes against peace” (the latter of which is labelled “crimes of aggression” in the contemporary international law literature).⁵ After decades, in the 1990s, the Charter of the International Criminal Tribunal for the former Yugoslavia (ICTFY) (1993) and practices of the International Criminal Tribunal for Rwanda (1995) further developed the content of crimes against humanity; however, they continued to define it as “crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population.”⁶ This limited

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- 3 The ICC is an intergovernmental organization and international tribunal that sits in The Hague in the Netherlands. The ICC investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, and crimes against humanity. The court is participating in a global fight to end impunity, and through international criminal justice, the court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again. The Court cannot reach these goals alone. As a court of last resort, it seeks to complement, not replace, national courts. Governed by an international treaty called the Rome Statute, the ICC is the world’s first permanent international criminal court. “About”, ICC online, accessed November 11, 2016. <https://www.icc-cpi.int/about>
 - 4 The Rome Statute, Part II., Art. 5.
 - 5 Nuremberg Trial Proceedings, vol. 1, “Charter of the International Military Tribunal,” Part I, Art. 6, accessed November 12, 2016, <http://avalon.law.yale.edu/imt/imtconst.asp>
 - 6 S/RES/827 (1993), May 25, 1993, Art.5, in United Nations, *Updated Statute of The International Criminal Tribunal for The Former Yugoslavia*, S/RES/1877 (2009), July 7, 2009.

explanation of these crimes did not refer to any non-war characteristic of crimes against humanity.

Finally, the Rome Statute of the ICC, which was circulated on 17 July 1998 and entered in force on 1 July 2002, defines crimes against humanity more broadly. In place of the expression in former definitions “crimes ... committed in armed conflict,” Article 7/1 of the Rome Statute describes crimes against humanity as crimes “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁷ This means that the widespread or systematic character of any attack is sufficient to consider it a crime against humanity by the ICC, regardless of the existence of armed conflict on the national or international level. There is no concrete definition of the meaning of “widespread” in the works of international criminal prosecution organs, but this term is generally used to describe a significant number of victims.⁸ “Systematic” means aggression deliberately organized by policy, not haphazard aggression. “Attack directed against any civilian population” signifies “a course of conduct involving the multiple commission of acts [referred to Article 7/1 which will be listed below] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁹ According to the Elements of Crimes of Rome Statute that came into force on 9 September 2002, this policy “requires that the State or organization actively promote or encourage such an attack against a civilian population.”¹⁰ From Protocol Additional I to the Geneva Conventions of 12 August 1949, the “civilian population” is considered to be persons who do not belong to one or the other party of armed conflict, and “[i]n case of doubt

7 The Rome Statute, Art. 7/1.

8 Kayishema vd. (ICTR-95-1-T), May 21, 1999, para. 123; Kordic vd. (IT-95-14/2-A), 17 Aralık 2004, para. 94; Blaskic (IT-95-14-T), 3 Mart 2000, para. 206; Bagilishema (ICTR-95-1A-T), June 7, 2000, para. 77 in Sevdiren, *Türkiye'nin Cezasızlık Mevzuatı*, 25.

9 The Rome Statute, Art.7/2 (a).

10 The ICC, *Elements of Crimes*. RC/11, 2011. 5 (The structure of the elements of the crimes of genocide, crimes against humanity and war crimes follows the structure of the corresponding provisions of Art. 6, 7 and 8 of the Rome Statute), accessed: November 12, 2016 <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/o/ElementsOfCrimesEng.pdf>

whether a person is a civilian, that person shall be considered to be a civilian.”¹¹

Acts considered crimes against humanity in the Rome Statute Article 7/1 are listed: extermination, enslavement, deportation or forcible transfer of a population, murder, massacres, dehumanization, human experimentation, extrajudicial punishments, death squads, persecution against any identifiable group or collectivity on a political, racial, national, ethnic, cultural, religious, or gender basis, military use of children, kidnappings, unjust imprisonment, cannibalism, torture, rape or any other form of sexual violence of comparable gravity, and enforced disappearances of persons.¹² Enforced disappearance is explained as

The arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.¹³

The year that the Rome Statute entered into force, 2002, was the first time this crime was defined under the heading of crime against humanity in the international sphere, but of course, enforced disappearances of persons were not a new type of crime in world history.

3.1.2 *Enforced Disappearances as a Specific Form of Crime against Humanity*

The “Nacht und Nebel Erlass” (Night and Fog Decree) made known enforced disappearances for the first time during the Third Reich on 7 December 1941. The aim of the Nazis was “to seize persons in Nazi occupied territories that

11 United Nations, Protocol Additional I to the Geneva Conventions of 12 August 1949, adopted at Geneva on 8 June 1977, Art. 50, accessed November 12, 2016 <https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17512-english.pdf>

12 The Rome Statute, Art.7/1.

13 Ibid. Art. 7/2 (i).

were ‘endangering German security’ and make them vanish without a trace.”¹⁴ Although the purposes of the Reich were similar to those of enforced disappearances in Latin America that can in the late 1960s, the designation of this crime was not created until a Latin American non-governmental organization categorized it as “*desaparición forzada*,”¹⁵ which means enforced disappearances in Spanish.

Differentiating it from other types of human rights violations, enforced disappearances of persons are complex because of its two extensive characteristics. First of all, this crime does not originate from personal intention as other crimes against humanity; it is not isolated from state policy.¹⁶ The perpetrator of this crime is not a person but the state or a political organization acting with the state’s consent to any degree. Second, this crime is a composite crime. It simultaneously encompasses a range of human rights violations such as:

the right to security and personal dignity; the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; the right to humane conditions of detention; the right to legal representation; the right to a fair trial; the right to a family life; and even the right to life, when the abducted person is killed.¹⁷

According to Amnesty International, enforced disappearances occur when people are detained, arrested or abducted by state officials and/or other actors who acts with the explicit or implicit cooperation and consent of the state.¹⁸

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- 14 Dalia Vitkauskaitė-Meurice and Justinas Žilinskas, “The Concept of Enforced Disappearances in International Law,” *Jurisprudence* 2, no. 120 (2010): 197-198, accessed December 3, 2016, https://www.mruni.eu/upload/iblock/934/9Vitkauskaite_Meurice.pdf
- 15 Prof. Dr. Gökçen Alpkaya, “Uluslararası Hukukta Zorla Kaybetmeler,” in Alpkaya et al., *Zorla Kaybetmeler ve Yargının Tutumu*, (Istanbul: Hakikat Adalet Hafıza Merkezi, 2013), 49.
- 16 Vitkauskaitė-Meurice and Žilinskas, “The Concept,” 206.
- 17 Boot, M.; Hall, C. K. *Crimes against Humanity. In Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article*. Second Edition. Triffterer, O. (ed.). C.H. Beck-Hart Nomos, 2008, 221. in *Ibid.*, 198.
- 18 “Disappearances,” *Amnesty International* online, accessed December 4, 2016, <https://www.amnesty.org/en/what-we-do/disappearances/>

Those actors deny the fact that this person is in their custody and refuse to identify the location of the person. “People literally disappear, from their loved ones and their community, ... [o]ften people are never released and their fate remains unknown” to their relatives.¹⁹ By obscuring the fate of this person, this crime violates the habeas corpus principle of customary law. Habeas corpus means “you have the body” in Latin and it is the responsibility of state institutions to prevent unlawful imprisonment and detentions. Although many habeas corpus cases such as torture cases and extrajudicial executions physically attack the natural person, in enforced disappearances cases, both the legal and natural person are simultaneously evaporated. These practices cause individuals to be taken out of the protection of law by obscuring their legal situation: we no longer know whether they are alive or dead. They just no longer exist in the legal system. They are deprived to their rights.

In the contemporary period, especially after the Latin American cases, the crime of enforced disappearances is considered under the umbrellas of international humanitarian law, international human rights law, and international criminal law. First, international humanitarian law is a branch of law concerning war and armed conflicts that was established by the Geneva Conventions and its Additional Protocols of 1977. It has no specific prohibition of enforced disappearances. Moreover, the rules concerning serious human rights violations in international armed conflicts, Common Article 3 of the four Geneva Conventions that regulate conflicts of a non-international character, and customary law strictly prohibit several human rights violations that cover the crime of enforced disappearances. Second, in the scope of human rights law and international criminal law, enforced disappearance is considered a unique type of international crime instead of as part of various human rights violations. The first milestone of this consideration was the Working Group on Enforced or Involuntary Disappearances (Working Group) established by the United Nations Commission on Human Rights (UNCHR) on 29 February

19 Ibid.

1980.²⁰ And on 18 December 1992, the General Assembly accepted the Declaration on the Protection of all Persons from Enforced Disappearance.²¹ The declaration was not legally binding for the UN states parties but has been a considerable resource for subsequent documents, declarations, and conventions. On 6 September 1994, the Inter-American Convention on the Forced Disappearance of Persons (IACFDP) was ratified in a region where enforced disappearances were intense.²²

As mentioned before, after a long period initiated by the Nuremberg Principals, the Rome Statute of the ICC came into force in 2002. It was a remarkable moment in international criminal law and for human rights with respect to enforced disappearances because of the definition of responsibility: enforced disappearances are committed “by, or with the authorization, support or acquiescence of, a State or a political organization.”²³ No previous document, declaration, or convention had mentioned a political organization as potentially responsible for this crime other than states. With ratification of the Rome Statute – especially Article 7/1 and 7/2 –, state-like organizations began to take part in human rights law in addition to states. In 2007, the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED) was opened for signature under the scope of the UN, and the Convention entered into force on 23 December 2010. Although developments in the Rome Statute about the acceptance of state and state-like organizations as perpetrators of enforced disappearances, the ICPPED “... returned to the state-oriented concept of enforced disappearance”²⁴ by declaring that enforced disappearances of persons are considered “to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by

20 “Working Group on Enforced or Involuntary Disappearances,” *UN Human Rights Office of the High Commissioner* online, accessed December 4, 2016, <http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx>

21 UN, *Declaration on the Protection*

22 General Secretariat of the Organization of American States, *Inter-American Convention on the Forced Disappearance of Persons*, (09 June 1994, entered into force: 28 March 1996), accessed November 3, 2016, <http://www.oas.org/juridico/english/sigs/a-60.html>

23 The Rome Statute, Art.7/2 (i).

24 Vitkauskaitė-Meurice and Žilinskas, “The Concept,” 207.

persons or groups of persons acting with the authorization, support or acquiescence of the State.”²⁵ In 2011, a monitoring organ of the ICPED, the Committee on Enforced Disappearances, was established. Enforced disappearances were defined²⁶ and considered a crime, and it was declared that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.”²⁷

3.1.3 *Duty to Punish Enforced Disappearances: Jus cogens or Permissible?*

During the evolution of legal concepts related to international crimes including genocide, war crimes, and crimes against humanity, these crimes became *jus cogens* – meaning “compelling law” or “peremptory norm” – and the legal obligations with respect to these crimes became *obligatio erga omnes* – meaning “flowing to all,” including the heads of states – as a result of this *jus cogens* character. The legal statute of such crimes consists of certain obligations: the responsibility to prosecute these crimes under national or universal jurisdictions, the non-applicability of limitations and immunities without exceptions for heads of state, the non-applicability of these crimes in times of peace, war, and national security or state of emergency conditions. If these obligations are deemed *obligatio erga omnes*, impunity cannot be authorized; however, there is a gap between these “legal expectations and legal reality [,] ... the practice of the states evidences that, more often than not, impunity has been allowed for *jus cogens* crimes,[and] the theory of universality has been far from being

25 UN, A/61/488, *International Convention for the Protection of All Persons from Enforced Disappearance*, (opened for signature 6 February 2007, entered into force 23 December 2010), Art.2.

26 “An enforced disappearance is defined by three cumulative elements:
 (1) Deprivation of liberty against the will of the person;
 (2) Involvement of government officials, at least by acquiescence;
 (3) Refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person.” Accessed November, 2016,
<http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx>

27 UN, *International Convention for the Protection*, Part I, Art. 1/2.

universally recognized and applied.”²⁸ The normative framework of international human rights and international criminal law have gaps and weakness because of their subjective features and the absence of compulsory legal rules able to override the modern state-centric international system in which the principle of sovereignty is pivotal.

The first problem about the universalization of legal obligations vis-à-vis international crimes is its subjective feature. For instance, according to the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) Article II, “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”²⁹ Bassiouni argues that a single murder that intends to destroy a group in whole or in part is considered genocide and a *jus cogens* crime; however, due to the subjective interpretation of the articles, “the killing of an estimated 2 million Cambodians is not genocide because it is not by one ethnic, religious, or national group against another, but by the same national, religious, and ethnic group against its own members, and for political reasons.”³⁰

Another problematic feature for the universality of legal obligations derives from a philosophical debate about state sovereignty as the cornerstone of international law. Proponents of natural law suggest the highest legal values and norms – such as human rights – supersede all other norms; they argue that international crimes at the level of *jus cogens* and *obligatio erga omnes*. However, proponents of legal positivism and realpolitik advocate that all rules have “same dignity,” there is no hierarchy; they are proponents of the principle of *nullum crimen sine lege* – “no penalty without a law” – vis-à-vis the international obligations contributed by customary law. They argue that “every conflict is *sui generis* and that ... they cannot be categorized or characterized

28 M. Cherif Bassiouni, “International Crimes: Jus Cogens and Obligatio Erga Omnes,” *Law and Contemporary Problems* 59, (Autumn 1996):66, accessed October 19, 2016, <http://scholarship.law.duke.edu/lcp/vol59/iss4/6>

29 UN, RES/ 260 A (III), *The Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, (entry into force: 12 January 1951), accessed October 19, 2016, <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>

30 Bassiouni, “International,” 69, *supra* not: 27.

in a way that a common international legal regime can apply to all these heterogeneous conflicts.”³¹ According to them, the primary source of international law is either customary law nor declarations but international treaties ratified by sovereign states. As realists, proponents of “cultural relativism”³² oppose the existence of universal human rights principles and international criminal law.

Despite the weakness of international criminal law within the existing international system, not all norms and principles are insufficient to prosecute international crimes. While “there are indeed sufficient norms; what is lacking is the political will to enforce them.”³³ Furthermore, it is important that the international legal system is not composed of law in the traditional legal meaning of the word; it is “an amalgamation of law, politics, culture and countervailing interests of state-sovereignty.”³⁴ International criminal jurisdiction threatens to intervene in an area for states that has one of the most protected cornerstones of state sovereignty: criminal prosecution. However, through the agency of the development of international criminal law over the decades, the prosecution of gross violation of human rights that occurred in the recent pasts of various states became indispensable for current governments to legitimate their power in the national and international communities. On the other hand, the prosecution of the gross violations of human rights of a prior regime are difficult for governments due to problems of political stability, public constraint for democracy, and the fact that “prosecutions could reinforce the military's propensity to challenge democratic institutions.”³⁵ But as discussed in the chapter I, “a modern approach to accountability is that criminal punishment for gross violations of human rights no longer remains the only option.”³⁶ There are different approaches to dealing with past including non-

31 Bassiouni, “Searching,” 13.

32 “The term “cultural relativism” refers to the tendency to base decisions on whether to honor certain rights and whether to require the enforcement of certain rights on cultural notions of propriety or acceptability.” in Penrose, “Impunity,” 280, *supra* note: 35.

33 Bassiouni, “Searching,” 18.

34 Penrose, “Impunity,” 277-281.

35 Orentlicher, “Settling,” 2245.

36 Penrose, “Impunity,” 303.

judicial approaches – amnesty laws, pardons, truth and reconciliation commissions, compensation for victims, and civil remedies – that are occasionally considered as substitutes for judicial approaches – international criminal investigations, military tribunals, ad hoc tribunals, the ICC and the ICJ, and national criminal investigations. Indeed, radical opponents of judicial approaches suggest that non-judicial approaches are as “an alternative to criminal prosecutions and not as a step in the direction of accountability.”³⁷

Whether states have the duty or just the power to punish human rights violations, and whether this punishment is obligatory or permissive are most contentious edges of human rights literature. I argue that the criminal prosecution of crimes against humanity is obligatory in international texts. The Nuremberg precedent, first international duty for prosecution, stated that “a person who committed crimes against humanity was ... *hostis humani generis* – ‘an enemy of all mankind’ – over whom any states could assert criminal jurisdiction.”³⁸ In the post-Nuremberg period, interstate treaties were generally silent about prosecution, but human rights conventions specified a duty to prosecute. The CPPCG and the Convention Against Torture, and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) suggest the most explicit obligations to punish. Although the idea of universal jurisdiction remains ambiguous in these texts, domestic jurisdiction takes part. The CPPCG affirms that “[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed.”³⁹ The CAT’s language on punishment is even more explicit than that of the CPPCG. Orentlicher reveals this difference “stem[ming] from the nature of the conduct proscribed in two treaties. Genocide is, by its nature, likely to involve state complicity. ... [T]orture, ... is more likely than genocide to be inflicted by state agents acting in contravention of official policy.”⁴⁰ Like genocide, enforced disappearances are

37 Juan E. Méndez, “In Defense of Transitional Justice,” in *Transitional Justice and The Rule of Law In New Democracies 1*, 8-9, ed. A. James McAdams (1997), 15 in *Ibid.*, 305.

38 Orentlicher, “Settling,” 2556-2557.

39 The CPPCG, Art. VI.

40 Orentlicher, “Settling,” 2567, *supranote*: 120.

committed pursuant to state policy; this aspect of the crime constrains international conventions from using explicit language about the punishment of a state crime. For instance, the part of the International Covenant on Civil and Political Rights (ICCPR), on state's duties, uses phrases such as "each State Party to the present Covenant undertakes to take the necessary steps," "to offer an effective remedy," and "to develop the possibilities of judicial remedy."⁴¹ Despite the absence of enforced disappearances in the ICCPR, the Human Rights Committee (HRC) "has interpreted [ICCPR] to impose a duty to 'investigate, punish and compensate' when disappearances occur," and the Inter-American Court of Human Rights stated that "the states must prevent, investigate and punish any violation of rights recognized by the [IACHR]."⁴² Regardless of whether the language is permissive or compulsory, international law requires the duty for investigation of the truth and bringing about justice though criminal punishment. The reason for the couched language might be to respect national sovereignty, but it does not offer preferability for prosecution. Instead, it can be understood as political correctness. Furthermore, because the obligation to prosecute does not imply an obligation to punish in all situations, whether the alleged perpetrator is guilty or not, the state sovereignty is not violated by the duty to prosecute.

§ 3.2 Transitional Justice Cases

In light of debates about the obligations of international criminal law and debates in the literature of accountability (such as between justice and truth, accountability and impunity, retributive justice and restorative justice, and criminal prosecution and TrC), various states that did or did not punish the misconduct of prior regimes and prosecute crimes against humanity that occurred in the recent past will be elaborated upon next part. For political, legal, and social reasons, these states avoided criminal prosecutions and used non-criminal tools such as amnesty laws, forgiveness policies, pardons, and TrC.

41 The CPPCG, Part II, Art. II (2), (3/a), (3/b).

42 In *Bleier v. Uruguay*, Comm. No. R.7/30, 37 U.N. GAOR Supp. (No. 40) Annex X, U.N. Doc A/37/40 (1982). *Quinteros v. Uruguay*, Comm. No. 107/1981, 38 U.N. GAOR Supp. (No. 40) Annex XXII, U.N. Doc. A/38/40 (1983). in Orentlicher, "Settling," 2574.

They endeavored to accomplish peace in society without sufficiently using legal mechanisms, and generally, they maintained an attitude of impunity instead of accountability for the past. Because of the broad character of accountability for crimes against humanity, only the best-known cases of enforced disappearances will be considered in this part: First of all, I examine some Latin American states where enforced disappearances were prevalent especially during the 1970s and early 1980s and that have significant positions in the literature of transitional justice – particularly, the three most infamous examples for enforced disappearances such as Argentina where this crime committed during its “dirty war,” Chile that experienced this crime after a brutal coup d’état in 1973, and Guatemala that experienced “victor’s injustice.” These three cases are also examples of restorative justice mechanisms which cannot sufficiently cope with these states’ pasts. Second, I scrutinize South Africa that became famous for its TrC that had the right to grant amnesty to perpetrators who publicly and completely testify and confess to the breaches of the past regime. It was a unique example of any TrCs owing to this strong judicial power. Third, I examine Spain that became famous for its criminal prosecutions process of past crimes that occurred seventy years earlier. These cases will be useful for this work in situating the case of Turkey and pointing to its unique features with regard to transitional justice theory and the experiences of other states, and in exemplifying the role of retributive justice in transitional justice processes.

3.2.1 *Latin American States: Transition after Enforced Disappearances*

The Cold War was the post-World War II period when geopolitical tensions between two main states – the United States (US) and the Soviet Union – were pursued without direct use of violence against each other. Both sides of conflict endeavored to “neutralize” their own environments by expanding their regions in order to relatively secure themselves.⁴³ They expanded geographically and ideologically. The US side of conflict used the “threat of communism” discourse to ideologically expand across its target region, especially Latin America. From the 1960s to the early 1980s, mainly US-backed military

43 Oral Sander, *Siyasi Tarih 2 (1918-1994)* (Ankara: İmge Kitabevi, 1996).

forces in Latin American states staged coup d'états in order to prevent and suppress revolutionary and popular movements that were considered a "communist threat" during the Cold War years. "A key aim of these states was to depoliticize and demobilize politically active groups and movements ...[.] These movements were identified not as legitimate political opposition but as subversive threats."⁴⁴ The "countersubversive" mission of military rule caused those regimes to regard their own citizens as a potential national threat – an "internal enemy." To eliminate "subversives," military and police forces of Argentina, Chile, El Salvador, Guatemala, and Uruguay committed widespread human rights crimes. Almost every transition from a military regime was actualized through negotiations between the state army and moderates among the civil opposition. *Impunidad* (impunity) was generally a central demand of authoritative rule as a precondition of the transition. Impunity was regulated by civil-military pacts of transition, executive decrees and pardons, amnesties or other legislation, and military court decisions.⁴⁵ Military regimes declared no tolerance for the abrogation of amnesty laws in the future. Payne briefly explains the paradox of conservative strategies of civilian governance in Latin America:

Moderation, institutionalization, and gradualism have successfully eliminated the threat of coups. But in the process, they have exaggerated authoritarians' control over the political system and weakened democratic stability. Authoritarians no longer need to overthrow the political system. The conservative strategy capitulated to their demands, incorporated them into the political system, and indefinitely 'postponed' reforms that might threaten elites.⁴⁶

44 McSherry and Mejía, "Introduction to," 3.

45 Ibid., 2.

46 Leigh A. Payne, "Violence on the Right and Threats to Democracy in Post-Authoritarian Latin America," (paper presentation, the Latin American Studies Association XX International Congress, the panel on Civil Violence and Democratization in Post-Authoritarian Polities, Guadalajara, Mexico, April 17-19, 1997): 2, accessed February 21, 2017, <http://lasa.international.pitt.edu/lasa97/payne.pdf>

However, the consideration of criminal justice as an obstacle to democracy or a means of revenge and the refusal to cope with past abuses cause a loss of the democratic government's legitimacy. Furthermore, forgiveness and forgetfulness policies of the new government designed to protect democratic stability is a signal of the lack of independence of the government in relation to still-powerful military forces. McSherry and Mejía argue that this situation can be defined as "semi-democracy": "Stabilizing a semi-democratic system is one thing, but democratization is another; to set aside concepts fundamental to liberal democracy, such as equality before the law and judgment of horrific crimes, is to create a flawed system, a shadow of democracy."⁴⁷

Dirty wars officially ended but their effects did not end in reality; "the long shadows of state terrorism still haunt Latin America" because the "tentacles of impunity" affect both the present and future – both individuals and society.⁴⁸ With the end of the Cold War, military regimes that had been domestically and internationally supported to combat communism remained unbacked. Liberal democracies and human rights principles were enhanced in a changing international climate. Survivors, victims' families, nongovernmental organizations (NGO), political parties, judges and lawyers, academics and students, and civil society began to demand justice vis-à-vis the emergent model of "democratization with impunity,"⁴⁹ of the "schizophrenic state" (meaning that the "contradictory coupling of the 'rule of law' and 'state crimes' was established within the judicial system").⁵⁰ In October 1998, the arrest of Chilean dictator Augusto Pinochet by British police forces and the extradition request from Spanish Judge Baltasar Garzón to prosecute his human rights violations was a milestone in the international era. In next section, I scrutinize some Latin American states, the causes and consequences of their preference for

47 Ibid., 5.

48 Ibid., 1, 3.

49 Andreu, Federico, "The International Community in Haiti: Evidence of the New World Order," in *Impunity in Latin America*, ed. Rachel Sieder (London: Institute of Latin American Studies, 1995), 35 in Ibid, 6.

50 Javier Giraldo, S.J. "Corrupted Justice and the Schizophrenic State in Colombia," *Social Justice* 26, no. 4 (1999): 28-29, accessed October 16, 2016, <http://www.socialjusticejournal.org/?product=javier-giraldo-s-j>

restorative justice or retributive justice, the failure to create peace and reconciliation in society due to the absence of retributive justice tools, and the similarity between the demand of societies and international human rights law in terms of criminal prosecution.

3.2.1.1 Argentina

In 1976, the army of Argentina seized power in a coup d'état, which was one of various US-backed Latin American coups, for reasons that included the political violence of radical leftist movements and the failure of Peron governments.⁵¹ New military regime enforced a discourse of civilization and barbarity to justify its bloody policies. The military regime defined terrorists as “who propose ideas contrary to Western civilization and Christianity.”⁵² From 1976 to 1983, under the rule of military regime, people who opposed the regime, whether leftist or Peronist, were disappeared by military forces and their intelligence units. The report titled *Nunca Más (Never again)*, that was published in 1984 by the *Comisión Nacional Para la Desaparicion de Personas* (CONADEP, or National Commission on the Disappearance of Persons), “compiled two lists of victims of the repression. The first of these is of those persons who disappeared; the second, of those who although they are still missing, have been seen in secret detention centers.”⁵³ There are 8,960 people in first category and 1,300 people in the second by including their complete names and surnames, but these numbers are not exhaustive.⁵⁴ It is estimated that in reality 10 to 30 thousand people were disappeared during military rule.⁵⁵

51 Çelikkan, *Hakikat Komisyonları* , 81.

52 Venkatesan Natarajan, “The power of Memory: Military Officers, Trials, and Aftermath of Argentina’s 1976-1983 Military Rule” (PhD diss., New York University, September, 2014), 12.

53 The CONADEP, *Nunca Más (Never Again): The report of National Commission on the Disappearance of Persons*, (1984) Part II. Introductory Notes, § 1.

54 Ibid., § 4.

55 The ICTJ, *Accountability In Argentina: 20 Years Later, Transitional Justice Maintains Momentum* (August 01, 2005), 1. <https://www.ictj.org/publication/accountability-argentina>, (accessed: February 21, 2017)

After being defeated in the Falklands War against Britain,⁵⁶ the military government lost its legitimacy. In 1983, the military army enacted an Amnesty Law for military officers two weeks before free elections in Argentina.⁵⁷ Two main candidates emerged in the election: Italo Luder of the Peronist Party and Raúl Alfonsín of the Radical Part. Alfonsín “enounced the Peronist Party position as part of a pact with the military, [...] promised to investigate human rights violations and to bring to trial both military chiefs, [...] and the officers.”⁵⁸ Alfonsín was elected president on 10 December 1983. On 15 December 1983, the Decree establishing the CONADEP was promulgated to investigate past abuses – especially enforced disappearances – during the dirty war, and the famous report of the CONADEP, *Nunca Más*, was released in 1984.⁵⁹ As mentioned before, some cases of enforced disappearance were listed, but the total number remains obscure. The Alfonsín government preferred to limit criminal prosecutions to high-level military members and officers.⁶⁰ The trials of nine junta members and several officers, in which Videla and Massera received life sentences, were executed between 22 April and 9 December 1985.⁶¹

After the transition, military forces began to re-strengthen, taking advantage of the vulnerability of and unrest in the new regime. “Some officers ... attempted to rouse the troops by claiming that the trials were part of a plan to dissolve the armed forces.”⁶² The threat of a coup d’état became more real after the junta trials. Because of the growing menace against new regime,

56 “It began on 2 April 1982, when Argentina invaded and occupied the Falkland Islands (and, the following day, South Georgia and the South Sandwich Islands) in an attempt to establish the sovereignty it had claimed over them. On 5 April, the British government dispatched a naval task force to engage the Argentine Navy and Air Force before making an amphibious assault on the islands. The conflict lasted 74 days and ended with the Argentine surrender on 14 June 1982, returning the islands to British control. In total, 649 Argentine military personnel, 255 British military personnel, and three Falkland Islanders died during the hostilities.” https://en.wikipedia.org/wiki/Falklands_War

57 Çelikkan, *Hakikat Komisyonları*, 81.

58 Nino, “The Duty to Punish,” 2622-2623.

59 Ibid., 2623; Çelikkan, *Hakikat Komisyonları*, 81; The ICTJ, 8.

60 Sancar, *Geçmişle Hesaplaşma*, 220-221.

61 The ICTJ, 8; Ibid., 221; Orentlicher, “Settling,” 2596.

62 Nino, “The Duty to Punish,” 2627.

President Alfonsín enacted the *Ley de Punto Final* (Full Stop Law) on 24 December 1986, “which set a 60-day limit on the initiation of new criminal complaints relating to human rights violations committed during ‘dirty war.’”⁶³ This law was an opportunity to prosecute military officers, but at the same time, it was an obstacle given the 60-day deadline. Although this law was harshly criticized in the domestic and international arenas, it “had a boomerang effect to awakening the courts of interior who were presumably unwilling to be responsible for the eternal impunity of some criminals, more than 450 people were indicted.”⁶⁴ Due to this revitalization of trials, some officers refused to obey new law and military forces openly threatened the government by launching a military rebellion called “Operation Dignity” in 1987.⁶⁵ To counter military discontent, President Alfonsín tried to secure the democratic system by the agency of the *Ley de Obediencia Debida* (Due Obedience Law) which was implemented on 4 June 1987. According to this law, “when a crime was committed in the execution of an order of service, the superior who gave order will be sole responsible person, and a subordinate will only be considered accomplice when he has exceeded in [the] fulfillment of that order.”⁶⁶ The reversal by the Alfonsín government detracted from its prosecution of past junta members and “arguably emboldened military rebels to launch further revolts.”⁶⁷

After the failure both of attempts to bring about accountability for past and of the economy policies of Alfonsín government, Carlos Menem’s government took power in 1989. Menem preferred a “reconciliation” discourse and granted pardons for military members who had been sentenced in previous trials.⁶⁸ Criminal justice in Argentina stagnated in the 1989-1995 period. However, 1995 was significant and affected both domestic and international society. In 1995, a navy captain Adolfo Scilingo admitted to the existence of death flights.

63 Orentlicher, “Settling,” 2597, supranote: 265.

64 Nino, “The Duty to Punish,” 2628.

65 Ibid.

66 Ibid., 2625.

67 Orentlicher, “Settling,” 2597.

68 Sancar, *Geçmişle Hesaplaşma*, 222; Çelikkan, *Hakikat Komisyonları*, 83.

In his interview he said that: after “they [victims] received an initial dose of anesthetic[,] ... they were stripped naked and thrown into the waters of the South Atlantic from the planes during the flight.”⁶⁹ The Congressional debates over the annulment or the derogation of the two amnesty laws – Full Stop and Due Obedience – were triggered in 1998, but the status quo endured until 2001.⁷⁰ In 2001, Federal Judge Gabriel Cavalio declared that Amnesty Laws violated the international duty of Argentina which originate in treaties signed by state.⁷¹ In 2003, Néstor Krichner announced the abandonment of the previous government’s reconciliation policies, and “the 2003 Congress majority concluded that military violence counted as crimes against humanity, Due Obedience and Full Stop Laws forbade the state to investigate crimes against humanity ... [.]”⁷² After this progress, criminal prosecutions in Argentina resumed after decades. And in accordance with my argument, this revival began with international human rights arguments.

The prosecution of crimes is generally the result of the achievements of human rights groups – for instance, the famous *Asociación Madres de Plaza de Mayo* (Mothers of Plaza de Mayo), which is an association of mothers whose children were forcibly disappeared under the military regime between 1976 and 1983, have gathered at the *Plaza de Mayo* in Buenos Aires since 1977 in order to learn the fates of their children. For instance, human rights organizations pressured the judiciary which collaborated with the former regime.⁷³ The domestic courts were preferred for the prosecutions by arguing that “unless Argentina prosecutes its own soldiers, other countries will begin to do so, and Argentina will lose its sovereignty.”⁷⁴ It does not allow for any statute of limitation for enforced disappearances and other human rights crimes committed with acquiescence of state authority. The laws have been retroactively applied. Although all these principles are part of international assumptions

69 Verbitsky, 1995 in Natarajan, “The power of Memory,” 14.

70 Ibid., 37-38; Çelikkan, *Hakikat Komisyonları*, 83.

71 Çelikkan, *Hakikat Komisyonları*, 83.

72 Sancar, *Geçmişle Hesaplaşma*, 224; Natarajan, “The power of Memory,” 41.

73 Natarajan, “The power of Memory,” 53.

74 Ibid., 36.

and beyond domestic legal obligations, they generally overlapped with sense of justice of society. Of course, there were persons who found the law and justice system insufficient for crimes such as enforced disappearances. *Esrache*, which means public shaming of alleged perpetrators, has been an important part of the prosecution process.⁷⁵ Furthermore, trials have importance beyond being part of the judicial system; they are theater: “Judges’ adjudication of innocence and guilt is only a small part of what actually transpires within court proceedings.”⁷⁶ After years of silence, amnesty laws, and a discourse of “reconciliation”, Argentina had no other choice than to resort to criminal justice because of the discontent of society as a whole.

3.2.1.2 Chile

Due to tensions between President Salvador Allende and the Chilean congress, which was composed of a majority of conservatives, and due to economic pressure from the US trying to curtail the possibility of emergence of a Marxist regime in Chile, the military coup was implicitly supported from 1970 to 1973.⁷⁷ Allende was overthrown by a coup d’état led by Augusto Pinochet in 1973, and General Pinochet stayed in power until 1990. National security doctrine, internal enemies, and “torture against the germ of communism” were popular discourses in those seventeen years. Opponents of the military regime were murdered in custody and by throwing them into the sea from airplanes.⁷⁸ It is estimated that the murders, tortures, and enforced disappearances continued to be committed for all seventeen years. Dictator Pinochet assured amnesty for military leaders via *Decreto Ley* No. 2191 that was consolidated in Chilean Constitution on 19 April 1978. *Decreto Ley* No. 2191 is “an example of the type of amnesty widely referred to as ‘self-amnesty’ or ‘blanket amnesty’,”

75 Ibid., 53-54.

76 Ibid., 99-100.

77 Kristian C. Gustafson, “CIA Machinations in Chile in 1970: Reexamining the Record,” *Studies in Intelligence: Journal of American Intelligence Professional* 47, no. 3 (2003): §1-2, accessed February 22, 2017, <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol47no3/article03.html>

78 Sancar, *Geçmişle Hesaplaşma*, 227.

i.e. an amnesty of broad and sweeping scope, usually enacted by outgoing dictators;” and statutes of limitations were part of their policy of forget and forgive.⁷⁹ The 1988 referendum on the preference between a transition to civil regime or the perpetuation of military rule resulted in 55 percent voting against perpetuation and 43 percent for.⁸⁰ Before the transition to civilian government under President Patricio Aylwin, Pinochet protected himself and other military leaders with amnesty laws. These amnesties are given as an example of non-permissible amnesties in the international area. The new constitutional system of Chile is “a poor-quality democracy in which has autonomous authoritarian islands.”⁸¹

Chile’s attempts to cope with past atrocities are divided into two phases by Vicente – a political phase and a judicial phase.⁸² The political phase, which refers to the period of the first civilian successor government, is determined with obstacles to the prosecution of crimes committed by the Pinochet regime. Although judicial limits existed, the government endeavored to deal with the past via restorative justice apparatuses. In 1990, the *Comisión Nacional de Verdad y Reconciliación* (The National Commission for Truth and Reconciliation) was established with the efforts of President Aylwin to examine deaths and enforced disappearances that occurred between 1973 and 1990 under the military regime. The Rettig Report of the Commission was published by the government on 9 February 1991.⁸³ On 8 February 1992, the National Reparation and Reconciliation Corporation was established in the light of the “inalienable right of relatives to find ‘disappeared’ family members” and sixty million dollars was provided as compensation.⁸⁴

Despite the documentation of 3,428 enforced disappearance, execution, torture, and kidnapping cases, the names of perpetrators were not given in the

79 Fannie Lafontaine, “No Amnesty or Statute of Limitation for Enforced Disappearances: The Sandoval Case Before the Supreme Court of Chile,” *Journal of International Criminal Justice* 3, issue 2 (May 1, 2005): 470-471, accessed October 19, 2016, <https://ssrn.com/abstract=915720>

80 Sancar, *Geçmişle Hesaplaşma*, 227; Çelikkan, *Hakikat Komisyonları*, 84.

81 Sancar, *Geçmişle Hesaplaşma*, 231.

82 Vicente, “Justice against Perpetrators,” 5.

83 Ibid.; Çelikkan, *Hakikat Komisyonları*, 86.

84 Vicente, “Justice against Perpetrators,” 5; Çelikkan, *Hakikat Komisyonları*, 86.

Retting Report and this report did not gather sufficient information about disappearances.⁸⁵ Although all the findings and evidence were sent to the prosecutor's office, only few cases of disappearances and political conspiracy were brought to trial.⁸⁶ Despite the approval of the report by President Aylwin, the military did not approve it. The measures of political phase "failed mainly due to the power that the military still retained in Chilean institutions."⁸⁷ The lack of any judicial process which was undertaken in parallel by a TrC, the absence of political will to abrogate the Amnesty Law, and the replacement of truth and justice with insufficient rights caused the re-traumatization of victims and their families.⁸⁸

The second phase, the so-called judicial phase, is correlated with the period of President Eduardo Frei's government, which was elected in 1993.⁸⁹ In 1997, following the efforts of domestic and international human rights activists, the Supreme Court of Chile rejected the 1978 Amnesty Law and Statute of Limitations for crimes committed by the Pinochet regime.⁹⁰ The Court confirmed the primacy of the Geneva Conventions in the constitutional order and the supremacy of international law over those amnesty laws. The duty to prosecute also originated from international treaties signed by Chile. Furthermore, another argument of the Court to reject the laws was the ongoing nature of criminal acts such as enforced disappearances. Like Article III of Inter-American Commission on Human Rights (IACHR), the Court stated that "it does not appear reasonable to invoke the application of 'amnesia' or 'forgetfulness' when in practice the perpetration of the crime is not finished."⁹¹ In 1998, Pinochet was arrested by British police officers. In 1999, five high-level military officers were prosecuted for the enforced disappearances of seventy-five persons under the Pinochet regime.⁹² One year later, trials regarding three

85 Çelikkan, *Hakikat Komisyonları*, 86.

86 Ibid.

87 Vicente, "Justice against Perpetrators," 5.

88 Sancar, *Geçmişle Hesaplaşma*, 233; Çelikkan, *Hakikat Komisyonları*, 85.

89 Vicente, "Justice against Perpetrators," 5.

90 Ibid.; LaFontain, "No Amnesty," 471.

91 Court of Appeals' judgment, §30 in LaFontain, "No Amnesty," 472.

92 Çelikkan, *Hakikat Komisyonları*, 87.

different crimes began for Pinochet.⁹³ His immunity from prosecution was a complicated issue. Due to his poor health, he was put under house arrest in 2004, and he died in 2006.⁹⁴

Briefly “[t]he law has been both an obstacle and a source of new opportunity” for Chilean society.⁹⁵ Society was not content with a non-judicial mechanism of coping with the past and they reacted against political immobility. Although there is criticism that the term “enforced disappearances” was not used and of certain imperfections in the Supreme Court’s decision, it was important step toward breaking impunity. Moreover, this significant step by the Supreme Court of Chile was grounded in international conventions and treaties about human rights and the principle of the supremacy of international law. I argue that this situation can be considered as the correlation between international principles and a sense of justice among Chileans – that criminal prosecution of responsible persons who committed crimes against humanity is an obligation for states. It is another example of the prominent place of criminal justice within the sense of justice.

3.2.1.3 Guatemala

The Guatemalan Civil War officially happened between 1960 and 1996; however, its political roots extend back to 1954, which is year of a CIA-backed military coup to overthrow President Jacobo Arbenz Guzmán who had tried “to carry out socio-economic reforms, including a land redistribution campaign that challenged the interests of Guatemala’s wealthy landlords and US business interests.”⁹⁶ Unequal distribution of income and the semi-feudal economic and political systems of Guatemalan society were major sources of war. These social inequities also had a racial component: indigenous groups

93 Ibid.

94 Sancar, *Geçmişle Hesaplaşma*, 238; Ibid., 86-87.

95 Alexandra Barahona de Brito, “Passion, Constraint, Law and Fortuna: The Human Rights Challenge to Chilean Democracy,” in Vicente, “Justice against Perpetrators,” 6; Nigel Biggar, *Burying the Past, Making Peace and Doing Justice after Civil Conflict* (Washington, DC: Georgetown University Press, 2001), 175.

96 Kauffman, *Transitional Justice in Guatemala*, 9.

(especially the Maya population) were historically discriminated against.⁹⁷ After the ousting of Arbenz, an insurgency aimed at a socialist revolution commenced in 1960 and strengthened more and more during the 1970s.⁹⁸ The diverse groups that opted armed conflict against the regime unified as the Guatemalan National Revolutionary Unity (UNRG) in 1982.⁹⁹ During the 1980s, the military forces of Guatemala started a counter insurgency campaign, and its human rights violations targeted both armed groups and also the civilian population. During this process, insurgents also increased their use of violence.¹⁰⁰ According to final report of the *Comisión para el Esclarecimiento Histórico* (CEH, Commission for Historical Clarification), over 200 thousand persons were killed or disappeared.¹⁰¹ The URNG were responsible for 3 percent, but “state forces and related paramilitary groups were responsible for 93% of the violations ... [,] including 92% of the arbitrary executions and 91% of forced disappearances. Victims included men, women and children of all social strata ... [,] in ethnic terms, the vast majority were Mayans.”¹⁰² Because of 83 percent of the victims belonged to the Mayan population, the CEH labeled “the counter-insurgency policy as genocide.”¹⁰³

During the process of the dissolution of the Soviet Union, the political climate of Guatemala commenced to change. In 1990, negotiations for peace were launched between the government and the URG, and on 29 December 1996, the Agreement for Firm and Lasting Peace, which included thirteen peace accords, were signed and the Civil War officially ended.¹⁰⁴ In Guatemalan society, justice included institutional changes and also “a number of steps

97 Ibid.

98 Ibid.

99 Ibid.; Çelikkan, *Hakikat Komisyonları*, 96.

100 Çelikkan, *Hakikat Komisyonları*, 96.

101 Historical Clarification Commission, *The Report of the Commission for Historical Clarification, Conclusions and Recommendations: Guatemala Memory of Silence* (February 1999), §2, accessed February 22, 2017, 86, §15. https://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf

102 Ibid.

103 Kauffman, *Transitional Justice in Guatemala*, 10.

104 Çelikkan, *Hakikat Komisyonları*, 97; Ibid., 10.

to begin healing the divisions within ... society.”¹⁰⁵ For instance, official, public declarations of gross violations of human rights’ were acknowledged by the government, which was a significant step after a long period of denial. Because of this circumstance, the agreement for the CEH signed in June 1994 and the creation of the UN Verification Mission (MINUGUA) were positive steps.¹⁰⁶ However, the work of the CEH – which had no search-and-seizure power, no ability to summon witnesses, no right to announce the names of perpetrators, and which granted blanket amnesty to perpetrators in some conditions – was postponed until 1997 after the implementation of the Law of National Reconciliation.¹⁰⁷

Given the failure and insufficiency of the CEH, the Human Right Office of the Catholic Church established the Recovery of Historical Memory Project (REHMI) in 1998 as an unofficial TrC to seek the truth.¹⁰⁸ Bishop Gerardi, the head of REHMI, was beaten to death by members of the Presidential General Staff (“a military intelligence unit with a well-known history of human rights abuses and political terror”) on 26 April 1998, only two days after the pronouncement of the “Guatemala: *Nunca Más!*” report which transparently listed the names of persons responsible for killing and enforced disappearances and recommended structural and social reforms.¹⁰⁹

“Although the civilians had more power during the peace agreements than before, the military remained the most organized and powerful of the two sides. As a consequence, the agreement ... was very weak on the issue of demilitarization and reform of the institutions.”¹¹⁰ The negotiated accords recommended the improvement of the judicial system and a reduction of the size of military forces, and they aimed to force Guatemalan society to re-examine

105 Kauffman, *Transitional Justice in Guatemala*, 11.

106 Ibid. 13; Vicente, “Justice against Perpetrators,” 6.

107 Çelikkan, *Hakikat Komisyonları*, 98; Kauffman, *Transitional Justice in Guatemala*, 11.

108 Kauffman, *Transitional Justice in Guatemala*, 18.

109 Raúl Molina Mejía and J. Patrice McSherry, “Justice in the Gerardi Case, But Terror Continues,” *NACLA Report on the Americas*, (July 2001), §1, accessed February 22, 2017, <https://nacla.org/article/justice-gerardi-case-terror-continues>

110 Vicente, “Justice against Perpetrators,” 6.

its national character.¹¹¹ However, these recommendations were not implemented. In Guatemala, constitutional reforms needed to be ratified in a referendum, and the results of a May 1999 referendum favored conservative political parties, members of military, and business elites.¹¹² Since the failure of the referendum, governments have not endeavored to implement these accords. Moreover, Kauffman argues that restorative justice in Guatemala might “better be described as ‘nation-building’ rather than reconciliation,” because “there is no relationship to restore” within society.¹¹³ Justice remained illusory for Guatemala. For instance, “General Rios Montt, who is accused of genocide for presiding over the worst atrocities between 1982-1983, received immunity between 2000 and 2004 as President of Congress.”¹¹⁴ With reference to Bishop Gerardi’s assassination and immunity for a possible genocide plotter, the encouraging restorative efforts such as a TrC and the accords in Guatemala lacked judicial sanction, “creating impunity for the military and civilian elites that still remain in the country, and obstructing any real democratic transition.”¹¹⁵ Attempts at restorative justice and peace building were not related to reinforcing the rule of law, and the abandonment of justice in favor of peace was the main problem in Guatemala. Guatemala exemplifies the fact that a sense of justice cannot be satisfied only through the agency of restorative justice tools such as the CEH which was used to spare responsible persons from punishment and the REHMI, which was never officially accepted.

3.2.2 *South Africa: An Example of Restorative Justice*

The *Nasionale Party*, which institutionalized an apartheid regime based on racism, reigned in South African Republic from 1948 to 1994. The fight against the racist regime, led by the African National Congress (ANC), was domestically and internationally supported and strengthened during the 1980s. In circumstances when the government used violence, the ANC, which was

111 Ibid., 15.

112 Ibid., 16.

113 Ibid., 12.

114 Ibid., 17.

115 Ibid., 7.

supported by the Soviet Union, also performed acts of force.¹¹⁶ After the end of the Cold War, it no longer possible for governments to legitimate violence and pressure policies with a discourse of anticommunism. The negotiation between the ANC and the government commenced in 1990 and continued transparently for three years.¹¹⁷ Despite the development of a new constitutional frame with clear economic and political limits, there was an impasse with regard to how the apartheid regime's human rights violations would be accounted for and whether amnesty laws would be enacted. The continuity of some institutions of the state that had taken the part in the former regime, such as police forces, the military, administration, and jurisdiction, was projected in the new constitutional system; because of this continuity, uncompromising accountability was not viable.¹¹⁸ After all, the two sides agreed on the establishment of a TrC with the right to grant amnesty to perpetrators who publicly and completely testify and confess to the breaches of the past regime. The ANC and Nelson Mandela were elected in the first post-apartheid election in South Africa in 1994. In July 1995, the Truth and Reconciliation Commission (TRC) was established via the Promotion of National Unity and Reconciliation Act, with Mandela's support, and the TRC began work in December that same year.¹¹⁹ It was composed of three committees – the Amnesty, the Reparation and Rehabilitation, and the Human Right Violations Committees. The TRC was designed as “a historic bridge between the past of deeply divided society ... and a future founded on the recognition of human rights, democracy and peaceful coexistence” in the interim constitution.¹²⁰

According to Sancar, the TRC was a unique combination of restorative justice, the judicial system, religious ritual, and political spectacle.¹²¹ The main feature of the TRC that sets it apart from other TrC was its ability to directly

116 Çelikkan, *Hakikat Komisyonları*, 92.

117 Ibid.

118 Sancar, *Geçmişle Hesaplaşma*, 242.

119 Çelikkan, *Hakikat Komisyonları*, 92.

120 The Constitution of the Republic of South Africa, Act 200 of 1993, (Repealed by Constitution of the Republic of South Africa, [No. 108 of 1996], G 17678, 18 December 1996), Chapter 15, Section 251, §5.

121 Sancar, *Geçmişle Hesaplaşma*, 247.

affect the judicial process. It was unique that it had such grand power to grant amnesty to perpetrators, an example of permissible amnesty. Of course, there were some restrictions on the granting of amnesty. For instance, the crimes must have occurred between March 1960 and December 1993.¹²² Furthermore, amnesty was granted to “persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period.”¹²³ Importantly for the granting of amnesty, “remorse was not a requirement; rather only political motivation for the crime and full disclosure of the facts in a public hearing under cross-examination were required.”¹²⁴

The discourse of the TRC linked forgiveness, amnesty, and reconciliation. Advocates of the TRC argued that the word amnesty is etymologically related to *amnesia* and forgetfulness, but the South Africa case reversed this relation.¹²⁵ The confessions were prominent for uncovering the fates and whereabouts of the victims of enforced disappearances, for exhumation and reburial by their loved ones, and for offering reparation to victims’ families. Furthermore, the testimony of approximately 21 thousand victims (21.296 victims per Sancar) were taken by the TRC.¹²⁶ Instead of seeking material facts, TRC tried to use a “narrative truth” and storytelling that was cathartic for victims.¹²⁷ The work of TRC terminated in 1994. The commission was not interested in different responsible sides of crimes. President Mandela accepted the final report, but Vis President Mbeki criticized it arguing that the report equated the ANG

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- 122 The Promotion of National Unity and Reconciliation, Act 34 of 1995, July 19, 1995. [Date of Commencement: 1 December 1995], Preamble §17, accessed April 16, 2018, <http://www.justice.gov.za/legislation/acts/1995-034.pdf>
- 123 Ibid.
- 124 Vicente, “Justice against Perpetrators,” 8.
- 125 Sancar, *Geçmişle Hesaplaşma*, 250.
- 126 Ibid., 244; “Truth Commission: South Africa”, *United States Institutes of Peace (USIP)* online, accessed February 23, 2017, <https://www.usip.org/publications/1995/12/truth-commission-south-africa>
- 127 Çelikkan, *Hakikat Komisyonları*, 95; Vicente, “Justice against Perpetrators,” 8.

to the apartheid regime with respect to the degree of their involvement in crimes.¹²⁸ In the end, the final report was not approved by the government.

In the transition process, the demands of victims and their families did not entirely coincide with the official discourse of the new regime. There was a mechanism that forgave perpetrators on behalf of real victims. Generally, criminal prosecution demands of victims, which oppose to “no future without forgiveness” discourse, were equated with the vengeance in this process. For instance, “the Mxenge, Biko and Ribeiro families, which legally challenged the amnesty and attempted to prosecute the murderers of their family members, were criticized by the media and TRC as vindictive and anti-reconciliation. Chairperson Tutu accused them of attempting to prevent other victims from telling their stories.”¹²⁹ The main problem about the TRC was its right to offer amnesty. The total number of amnesty hearings was 7,112, and the Amnesty Committee refused 5,392 of them, granting amnesty in only 849 cases.¹³⁰ (According to Sancar, these numbers were 7,060 and 140, respectively.¹³¹) The TRC recommended that “[p]rosecution should be considered in cases where amnesty was not sought or was denied, if evidence existed.”¹³² The possibility of judicial prosecution of persons who failed to obtain amnesty caused an interpretation that “amnesty in South Africa was conditioned on certain requirements and did not favor impunity.”¹³³ However, the majority of perpetrators who failed to obtain amnesty were not prosecuted. Despite the lack of punishment for responsible persons, acknowledgement of the truth is beneficial in enforced disappearances cases; but in reality, only one-third of 700 disappearance cases were uncovered.¹³⁴ In 2005, the judicial system, which was not working well, was placed under scrutiny, but in 2007, in the period of

128 Çelikkan, *Hakikat Komisyonları*, 94.

129 Saunders, “Questionable Associations,” 130, supranote: 42.

130 “Summary of Amnesty Decisions, 1.11.2000 of Department of Justice and Constitutional Development of the Republic of South Africa,” *The Truth and Reconciliation* online, accessed February 23, 2017, <http://www.justice.gov.za/trc/amntrans/index.htm>

131 Sancar, *Geçmişle Hesaplaşma*, 245.

132 USIP, “Truth Commission.”

133 Vicente, “Justice against Perpetrators,” 8.

134 Sancar, *Geçmişle Hesaplaşma*, 249.

President Mbeki, new amnesties were conjoined to the TCR's amnesties.¹³⁵ The *Pretoria* Supreme Court decided that this decree implied the de facto forgiveness of perpetrators and violated the Constitution.¹³⁶ Moreover, the TRC was criticized for inadequately examining the apartheid regime's discriminatory economic and social relationships within society.¹³⁷ Because of the principle of only political motivation for the crime, clearly racist crimes in the private sphere were unpenalized.

“The Commission failed in a number of ways to meet the needs of victims, and the government failed to respond to the recommendations made by the Commission concerning reparations.”¹³⁸ The TRC was an important and mostly successful mechanism to deal with past atrocities, but practical and normative inaccuracies in the criminal judicial system constrained political reconciliation. The danger of a strict separation of restorative and retributive justice, the risk of preferring restorative justice for the sake of harmony and peace, and the danger of inconsistency between society's sense of justice and political power's acts clearly appeared once again in the South African case.

3.2.3 *Spain: An Example of Retributive Justice*

The early stages of the 1936-1939 Spanish Civil War, realized between Nationalist forces and Republicans have been defined as “ferocious cruelty.”¹³⁹ In pursuit of the Nationalist cause, a Franco-led military coup d'état was staged vis-à-vis the democratically-elected government of the Popular Front (an electoral coalition of left-wing and centrist parties – Republicans, Socialists, and the Spanish Communist Party). The Franco regime located the bodies of most Nationalist victims after the Civil War and offered reparations to the survivors

135 Çelikkan, *Hakikat Komisyonları*, 96.

136 *Ibid.*, 95.

137 *Ibid.*

138 Vicente, “Justice against Perpetrators,” 8.

139 Richard Herr, *An Historical Essay on Modern Spain*, 1970, 190- 212 in Angela M. Guarino, “Chasing Ghosts: Pursuing Retroactive Justice for Franco-Era Crimes Against Humanity,” *Boston College International and Comparative Law Review* 33, no. 1, art. 4 (2010): 64, accessed October 05, 2016, <http://lawdigitalcommons.bc.edu/iclr/vol33/iss1/4>

on the victorious side. However, Republican victims and their families did not enjoy the same treatment. New forces “would hunt not only those bearing arms against them, but also anyone believed to sympathize with the Republican cause,” all people who opposed the Nationalist regime, “even by a demonstrated passivity,” were treated as criminals under Law 1939 of Franco’s “reign of terror.”¹⁴⁰ Judge Baltazar Garzón, who is celebrated for his attempt to pursue Pinochet, classified 114 thousand executions and estimated thousands of enforced disappearances that occurred during the Civil War and under the Franco regime.¹⁴¹

In November 1975, with the death of Franco, Spain entered the post-Franco era characterized by a “culture of silence.” “[N]ew political elites of both the right and left abided by a tacit, unwritten pact known as the ‘*pacto del olvido*’ or ‘pact of forgetting;’ this pact was assumed as “a pillar of Spanish democracy” to make the transition to a peaceful democracy.¹⁴² The Amnesty Law of 1977 was just a codified version of this pact. Despite of the work of the non-profit Association for the Recovery of Historical Memory since 2000, the first plan to investigate the Franco era’s crimes against humanity was created by approximately 1200 petitions received from families and organizations seeking information about disappeared victims, and this plan was executed by Judge Garzón.¹⁴³ In 2007, the first significant step occurred: parliament’s passage of the *Ley de Memoria Histórica* (Historical Memory Law - HML), which is considered “an effort that honors victims and aims to eliminate the vestiges of Francoism in the modern Spanish state.”¹⁴⁴ The removal of symbols referring to the Franco regime from public space and the facilitation of the exhumation of mass graves were important components of the law.

140 Guarino, “Chasing Ghosts,” 64-65.

141 Ibid., 61.

142 Francisco J. Romero Salvadó, *The Spanish Civil War: Origins, Course and Outcomes* (2005), 192; Rachel Nolan, “Reviving Spain’s Ghosts: Judge Looking into Fate of Franco’s Victims,” *Spiegel Online International* (September 3, 2008) in Ibid., 66.

143 Mike Elkin, “Judge Seeks to Clarify Fate of Franco Victims,” *Guardian*, London, September 3, 2008, in Ibid., 67.

144 Ivo Tzvetanov Dimitrov, *Spain’s Historical Memory Law: A Study of Successful Historical Reconciliation* (master thesis, the University of North Carolina, 2011), 2.

On 16 October 2008, Garzón, who was the Examining Judge of the High Court, opened the case to investigate crimes – especially enforced disappearances – that happened during the Civil War period and Franco era. The judge accused the former dictator Franco and his allies – thirty-four generals and ministers in those years – of atrocities.¹⁴⁵ However, since its first day, the case has been challenged, particularly by Spanish conservatives who “admonished that scrutinizing past acts would only reopen old wounds in Spain[ish] society.”¹⁴⁶ Beyond political objections, opening the case also evoked criticism from a legal perspective because the crimes that took place in Garzón’s jurisdiction were covered by the Amnesty Law of 1977. Given the diverse jurisdictional obstacles and political challenges, Judge Garzón eventually decided to drop the case on 18 November 2008 and “ceded responsibility to regional courts for opening the nineteen mass graves he had ordered exhumed the previous month.”¹⁴⁷ However, his statement and the HML were generally unsuccessful at providing official backing to victims’ families. The establishment of a TrC was considered as an option vis-à-vis jurisdictional obstacle.

The first legal obstacle was Amnesty Law of 1977 and the definitions of crimes. It was argued that the investigation of crimes that occurred during the Civil War and Franco regime violated the principle of legality, non-retroactivity, and *nullum crimen sine lege*. Article 607 (bis) of the Spanish Criminal Code introduced the category of crimes against humanity, and was incorporated in October 2004, meeting that the Franco regime’s crimes such as enforced disappearances were not classified as crimes against humanity when they occurred.¹⁴⁸ However, in this case, the reason to prosecution is not the impedi-
 tivity of domestic laws, but context of crime. If we criticize the prosecution of crimes against humanity with an *ex post facto* argument, the Nuremberg Trials

145 Guarino, “Chasing Ghosts,” 63.

146 Victoria Burnett, “Spanish Judge Drops Inquiry into Atrocities of Franco and Allies,” *New York Time*, November 19, 2008, at A7, in *Ibid*.

147 *Ibid*.

148 Mónica Zapico Barbeito, “Investigating the Crimes of the Franco Regime: Legal Possibilities, Obligations of the Spanish State and Duties Towards the Victims,” *International Criminal Law Review* 10, (2010): 244-245, accessed October 03, 2016, doi: 10.1163/157181210X492243

themselves would be illegal institutions. This aside, although enforced disappearances were not considered crimes against humanity in the Spanish Criminal Code, illegal detentions (which are composed of nearly the same elements as enforced disappearances) were defined as crimes in the 1932 Criminal Code.¹⁴⁹ The ICCPR and the UN-HRC argued that Spain has a duty to prosecute these crimes and that the amnesty law was incompatible with the obligations of the state according to the ICPPED, the Rome Statute, the Council of Europe Parliamentary Assembly Resolution, and customary international law.¹⁵⁰ Retributive justice proponents attributed to international human rights principles in order to overcome the obstacles to criminal prosecution in domestic law. Opponents of the trials argued that the majority of victims, the alleged perpetrators, and the firsthand witnesses were probably dead given that thirty-seven years had passed since the end of the Franco regime. However, “the aim of the criminal procedure is not only and exclusively to exercise the *ius puniendi* [right to punish] of the State ... it has to guarantee the rights of the victims by clarifying the facts surrounding the disappearances and redeem their right to truth, justice and reparation [...]”¹⁵¹ Despite the death of alleged perpetrators, their crimes remain immortal until a case against them is opened.

In reality, international law is not clear about whether states are obliged to prosecute those responsible for crimes against humanity notwithstanding domestic amnesty laws. It is unclear that enforced disappearances are an ongoing crime. This inharmonious international scale is an important obstacle. Furthermore, domestic law also had difficulties. If the three obstacles in the Spanish case – Amnesty Law of 1977, *nullum crimen sine lege*, and concerns about due process – cannot be overcome, demands for retributive justice cannot be fulfilled. But “families, in spite of the time that has passed and efforts of the State to silence their demands, have never been able to forget the 114.266 people that disappeared.”¹⁵²

149 Ibid., 253.

150 Guarino, “Chasing Ghosts,” 72.

151 Barbeito, “Investigating the Crimes,” 261.

152 Writ of 16 October 2008, Javier Chinchón Álvarez, “Examen del Auto del Juzgado de Instrucción no.5 de la Audiencia Nacional,” no.7054 *Diario La Ley* (Año XXIX), 2 in Ibid., 248.

The cases in this chapter are obviously small part of transitional justice examples. Nevertheless, they are adequate to understand the general tendencies in societies that have experienced human rights crimes in their pasts. The elaboration of amnesty laws in Argentina as the violation of its international duty and loss its sovereignty in international area, and the rejection of Chilean amnesty laws by a Supreme Court deferring to the supremacy of international law and duties spelled out in international treaties simplify the fact that an insufficient domestic legal system is not a reason to ignore retributive justice for accountability. The REHMI and CEH in Guatemala and the TRC in South Africa are examples of the insufficiency of restorative justice mechanisms that did not overlap with societal demands for criminal prosecution. Finally, in the Spanish example, 1200 petitions from the relatives of the victims of enforced disappearances that triggered a suit depending on international law principles despite amnesty laws decades after the fact reflect that there is no possibility of forgetting cruel crimes such as enforced disappearances. But the most important coincidence among these cases is that the consolidation of peace in society without satisfying the sense of justice – and the achievement of this justice without legal mechanisms – are impossible in the case of enforced disappearances. The next chapter focuses on the same subjects in the case of Turkey – its domestic criminal law regarding enforced disappearances, the demands of Turkish society, and efforts to cope with the past.

Coming to Terms with Enforced Disappearances in Turkey: Power, Politics, and the Law

After a brief examination of development and limitations of punishment for enforced disappearances in the international era, the case of states have reflected the international effect on their domestic criminal prosecution, testing to the necessity of retributive justice for long-lasting peace in society. My argument is that, as with other states, there is no possibility of peace or reconciliation in Turkey without justice. In this chapter, I represent the absence of justice stemming from legal and political obstacles in Turkey. I elaborate by focusing on why and how the case of Turkey might be defined as transitional justice process in light of its historical and political context, whether bringing about justice through criminal law is possible and also urgent despite Turkey's differentness. The first section addresses the legal system and the effects of politics on it. In order to reveal the absence of justice during peace attempts, I investigate efforts to seek justice in Turkey, the attempts to prosecute enforced disappearances in domestic trials in Turkey, and the conduct of Turkey's judicial system against these retributive justice efforts. As in the Chilean example, the law is both an obstacle and a source of new possibilities in the case of Turkey. Elements of the crime of enforced disappearances in the Turkish legal system, general features of the judicial system, its negligence and deficiencies, and the possibilities of using law despite its insufficiency will be portrayed in this context. The second section of this chapter is planned as

consequences of Turkey's political and legal contexts. I answer questions such as whether "conflicted democracy" and the characteristic of ongoing conflict in Turkey are obstacles for the application of law and transitional justice mechanisms, whether peace must be consolidated before seeking justice, how Turkey deviates from traditional and current transitional justice theories, and whether this divergence prevents criminal prosecutions for past abuses.

§ 4.1 Accountability Efforts and the Turkish Legal System for Enforced Disappearances

In this section, the utilization of transitional justice mechanisms in Turkey's political atmosphere, in which there is an ongoing armed conflict and no regime change, is represented. I describe the general feature of the crime of enforced disappearances in the Turkish legal system by focusing on the criminal investigation and prosecution process as a mechanism of retributive justice. The first subsection describes accountability efforts that are specific to enforced disappearances and fulfilled by the state, victims' relatives, NGOs, and lawyers. But the general focal point will be retributive justice methods. The second subsection is about the elements of the crime of enforced disappearances and focuses on the similarities and differences between the definitions of crimes against humanity in the international sphere and in the Turkish Criminal Code (TCK). As other case states show, I argue that the insufficiency of the Turkish legal system is not an obstacle to the prosecution of enforced disappearances if the real aim is to provide justice. Third and final subsection is about the generally negative conduct of the regime's institutions in the legal area during and after the peace process. This section scrutinizes whether or not enforced disappearances trials in Turkey can bring about justice by examining the conduct of Turkish judiciary system.

4.1.1 *Efforts for Accountability and the Trials of Enforced Disappearances*

The enforced disappearances era of Turkey has been marked by impunity, but after the revelation of this crime, there were some efforts for accountability

since the 1990s. These efforts fit into three categories. The first one is the investigation of the state's role in enforced disappearances by the state's own institutions through official reports. These efforts have partially disclosed the alleged perpetrators of enforced disappearances and the systematic character of the crime, but the political context prevented to cope with past abuses ultimately. On 18 April 1995, the occurrence of human rights violations such as enforced disappearances committed by persons and organizations related to state institutions were admitted in the investigation of Report of the TBMM Commission on Unsolved Political Murders (the commission report). This crime and its widespread, systematic character were also confirmed in the reports of the Commissions of the Prime Ministry and TBMM.¹ However, the involvement of state remained ambiguous because of the definition of alleged perpetrators. In 1995, the JİTEM organization was mentioned in the commission report for the first time. “[T]he allegations presented in indictments, and the evidence in reports, statements of witnesses and complainants, and acknowledgments by ‘informant’ perpetrators” defined most of the alleged perpetrators as members of the JİTEM, believed to be an organization that originated from within the Turkish army.² The commission report suggested that this organization usurped some functions of state organizations.³ According to the report, the mission of JİTEM were not known to the Commission; furthermore, the existence of this kind of organization was contentious among state officials and military members.⁴

The 1996 Susurluk accident and investigation officially disclosed the existence of an organization established within state institutions and committed extrajudicial executions and enforced disappearances. The Susurluk Report prepared in 1997 by Kutlu Savaş, Chair of the Inspection Board of the Prime Ministry, suggest that the JİTEM arose from necessity, but in time, temporary village guards and “informants” who benefited from Repentance Law No. 3419

1 The Report of TBMM Commission on Unsolved Murders, no 897, (1995), accessed March 10, 2017, <http://www.tbmm.gov.tr/sirasayi/donem19/yilo1/ss897.pdf>

2 Alpkaya et al., *Enforced*, 94.

3 The Report of TBMM Commission on Unsolved Murders, 57-58.

4 *Ibid*, 57.

joined the JİTEM and resorted to crimes such as enforced disappearances.⁵ However, the case of Susurluk did not unveil the link between this organization's crimes and state policy, and judicial process could not punish responsible persons.

In 1998, an investigation and lawsuit were launched by the Public Prosecutor of İdil Province, İlhan Cihaner, against Colonel Arif Doğan, who was identified as a founder of the JİTEM. And through the detailed information Doğan provided about the structure of the JİTEM, its existence was rendered undeniable.⁶ But the state involvement in this structure has been debated. According to the Ministry of Interior, "JİTEM was established without the knowledge of the Interior Ministry and General Staff upon [*sic*] the initiative of the Gendarmerie General Command, yet it was abolished in 1990."⁷ However, most human rights organizations and victims' families suggest that:

It is impossible for the Gendarmerie General Command, which JİTEM operated under, and by extension the General Staff, the Interior Ministry and the National Intelligence Organization which is under the Prime Ministry, as well as then-members of the National Security Council which houses all these bodies and is tasked with the duty to 'coordinate' the national security strategy, to have no knowledge of the existence of JİTEM.⁸

In any case whether the JİTEM was founded upon the initiative of the state, there was no doubt that it committed human rights crimes and it is obvious that the JİTEM used illegitimate means proscribed by the Geneva Conventions in order to defend the unity and territorial integrity of the state.

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- 5 Kutlu Savaş, *Susurluk Raporu*, accessed April 15, 2018, <http://akgul.bilkent.edu.tr/Dava/susurluk/kutlu/p2.html>
- 6 Sevdiren, *Türkiye'nin Cezasızlık Mevzuatı*, 46; Alpkaya et al., *Enforced*, 92.
- 7 Alpkaya et al., *Enforced*, 97.
- 8 "In his testimony to the *Susurluk* Commission, Eyüp Aşık said "no mob or mafia that does not rest on the state or receive support from a state official can stand on its feet even for a single day", cited in Gökdemir, 215; Doğan, 33-38. In *Ibid*.

In the early 2000s, “[c]onfessions of ex-PKK members incorporated into JİTEM as well as some military personnel shed light on the killing of Kurdish individuals during state of emergency in the southeast.”⁹ Beginning with the capture two JİTEM members and one PKK informant after bomb attack in Şemdinli, the 2006 Şemdinli case became another opportunity to cope with past abuses and prosecute the perpetrators of those abuses. In the Şemdinli report, enforced disappearances committed by the JİTEM members during the 1990s were added to agenda. However, as with the Susurluk case, this case did not manage to reveal whether the counter guerrilla organization was tied to state policy, and this ambiguity caused the non-prosecution of these crimes as consequences of state’s policy and as enforced disappearances.

The aim of seeking truth and justice in the case of disappearances was not eliminated after these failures. Especially the 2008 Ergenekon case raised the expectation of victims’ relatives and human right organizations because it was presumed that some defendants in the case had links to the JİTEM – as partners, members, or directors who were alleged perpetrators of enforced disappearances and extrajudicial executions. “The indictment of JİTEM members in [the Ergenekon] case both corroborates the existence of JİTEM and demonstrates the general character of the crimes committed by JİTEM members. [...] The secret witness statement that it is necessary to ‘eliminate the militia organization’ demonstrates the motive of the JİTEM members.”¹⁰ However, the real reason behind the Ergenekon prosecution was the plot against the government. Despite strong expectations for the disclosure of human rights crimes of the 1990s, the Ergenekon case focused only on this plot and eliminated any possibility of prosecuting the perpetrators of enforced disappearances. The Ergenekon case was considered a turning point for human rights among liberals of Turkey and victims’ families. Nevertheless, it could not render accountability for the past due to the political context.

9 Zerrin Özlem Biner, “From Terrorist to Repentance: Who Is the Victim?” *History and Anthropology* 17, no. 4 (2006), 339-353 in Budak, “Dealing with the Past,” 236.

10 http://tr.wikisource.org/wiki/2._Ergenekon_İddianamesi (February 2013) in Alp kaya et al, *Enforced*, 95.

Implementation of amnesty laws in the transition from military rule to a civilian government does not pertain to only the Turkish case. “There is always pressure to take the threat of prosecutions off the table early in a peace process and combatants at all levels of the political and military hierarchies have a tremendous interest in securing an amnesty, or ‘to ensure that peace prevails over justice.’”¹¹ But on 12 September 2010, Provisional Article 15 of the 1982 Turkish Constitution, which offers amnesty to persons responsible for the 1980 coup and precludes their prosecution was abandoned in a referendum. After the abandonment of Provisional Article 15, it was expected that a transitional justice process had really and finally begun. The investigation into members of the National Security Council that seized power by means of the coup on 12 September 1980 began on 7 April 2011.¹² This gave new hope to families of persons who have been forcibly disappeared because of the atmosphere which seemed to allow the prosecution of formerly “untouchable” persons. The criminal prosecution of important figures for human rights abuses was deemed a hallmark for accountability for the past.

The second pillar of accountability efforts is restorative methods derived from society and partially the state. Despite the politicization of the Turkish judicial system, efforts to obtain truth and justice by victims’ relatives and human rights organizations have not ceased. There has been social pressure about human rights violations in the southeast during the 2000s. The Saturday Mothers is an impressive group among them. It is a group of relatives of enforced disappearances that gather in Galatasaray Square in Istanbul and protest silently. They demand “reliable information on what happened to their relatives, identification of [the] whereabouts of victim’s remains and the prosecution of those responsible for the disappearances.”¹³ During the same years

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- 11 Marieke Wierda et al., “Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice,” *The Prosecutions Program of the International Center for Transitional Justice* (May, 2007), 9, accessed March 03, 2017, <https://www.ictj.org/sites/default/files/ICTJ-Global-Justice-Conflict-2007-English.pdf>
- 12 European Center for Constitutional and Human Rights, Hakikat Adalet Hafıza Merkezi, Helsinki Yurttaşlar Derneği, İnsan Hakları Derneği, İnsan Hakları Araştırma Derneği, Türkiye Ekonomik ve Sosyal Etüdler Vakfı, Türkiye İnsan Hakları Vakfı, *Zorla Kaybetmeler Hakkında Amicus Curiae Raporu* (Istanbul: Hafıza Adalet Hafıza Merkezi, 2016), 23.
- 13 Budak, “Dealing with the Past,” 230-231.

– while Turkey was seeking EU membership – restorative justice practices were a means to create the impression that the armed conflict was ending and that the state was capable and willing to fulfill its international obligations regarding human rights. But actually, the state tried to obscure its own responsibility for human rights crimes through restorative tools. For instance, the government neither responded to the Saturday Mothers’ demands nor punished persons responsible for human rights violations, but it did enter a compensation law into force. The Law on Compensation for Losses Resulting from Terrorism and the Fight against Terrorism is criticized because it does not encompass damages caused by the state in the region and offers compensation only for damages made by “terrorist activities” and “activities as a result of the fight against terrorism.”¹⁴ The main problem is that the state endeavored to consolidate peace through restorative tools but without sufficiently coming to terms with past abuses via criminal law.

The third pillar of accountability efforts is composed of domestic trials for cases of enforced disappearances. Accountability efforts of the relatives of enforced disappearances victims and human rights organizations are neither limited to restorative justice tools nor confined to the state’s own attempts. They commenced to act in spite of the inadequacy of the Turkish judiciary and the absence of real peace. According to the International Center for Transitional Justice (ICTJ) “[d]ocumenting crimes to a sufficient standard is an essential first step in preserving justice options during an ongoing conflict.”¹⁵ In this context, some cases started in the 2000s as well as the 1990s. I use legal data from April 2017 compiled by the Truth Justice Memory Center (TJMC), which is a human rights NGO in Turkey that focuses on enforced disappearances. This organization prepared legal data about enforced disappearances by including case records and investigation files in trials, complaints filed,

14 The Law on Compensation for Losses Resulting from Terrorism and Fight against Terrorism, Law no. 5233, Official Gazette, July 27, 2004, accessed April 16, 2018, <http://www.mevzuat.gov.tr/MevzuatMetin/3.5.20047955.pdf>

15 Wierda, “Pursuing Justice,” 20.

judgments relating to domestic law, and the ECtHR judgments.¹⁶ The legal data covers 344 forcibly disappeared persons and five groups of allegedly responsible government officials or paramilitary forces: JİTEM, the National Intelligence Organization, the Special Forces Command, the police officers, and the informants and village guards affiliated with them.

Despite the long period of time [that has] elapsed ... [approximately 20 years], the investigations into the disappearance of 218 people have been [*sic*] protracted, the investigation concerning 24 people was closed with the decision of statute of limitations, and the decision of non-prosecution concerning 18 people led to no charges being pressed against their perpetrators. [A total of 15 criminal case] ... have been filed concerning the enforced disappearance of 84 people. [...] 8 of these cases, which pertained to the enforced disappearance of 36 people, resulted in acquittals. 5 cases concerning the enforced disappearance of 46 people are still continuing. Only 2 cases concerning 2 people resulted in decisions of conviction. [...] It has been established that 72 applications have been made to ECtHR concerning 129 of the 344 forcibly disappeared people. [...] ECtHR, contrary to the course of domestic proceedings, ruled that Turkey has violated the European Convention of Human Rights in 55 applications concerning 103 people. In 6 applications concerning 11 people the state proposed friendly settlements. Thus, the responsibility of Turkey was established in 114 of the 129 forcibly disappeared people and 61 of the 72 applications on the whole.¹⁷

16 The TJMC, “Enforced Disappearances and the Conduct of Judiciary in Turkey,” accessed March 11, 2018, http://hakikatadalethafiza.org/en/about-hafiza-merkezi/how-do-we-work/main-findings-of-the-legal-studies-program/#_ftnref4

17 The TJMC, “Zorla Kaybetmelerle İlgili Hukuki Bulgular,” accessed March 11, 2018, <http://hakikatadalethafiza.org/turkiyede-zorla-kaybetmeler-ve-cezasizliga-dair-temel-bilgiler/hukuk-calismalari-programinin-temel-bulgulari/>

The legal database of the monitoring website of the TJMC for the cases about dealing with the past and enforced disappearances is illustrated in Table 1.¹⁸ In next the subsection, to understand these criminal cases and the possibility of their prosecution through the TCK, I explain the place of the crime of enforced disappearances in the Turkish legal system by comparing it to international law.

Table 4.1

Case	Start date	Victims	Current situation
Kızıltepe Jitem	2015.03.03	22 either extrajudicially and arbitrarily killed or forcibly disappeared persons	Pending adjudication
Dargeçit JİTEM	2015.10.01	8 forcibly disappeared persons including a soldier, Specialist Sergeant Bilal Batırır, who was tortured to death	Pending adjudication
The main JİTEM and Musa Anter ¹⁹	2014.12.23	13 either extra judicially and arbitrary killed or forcibly disappeared persons	Pending adjudication
Ankara JİTEM	2014.05.16	19 either extrajudicially and arbitrary killed or forcibly disappeared persons	Pending adjudication
Naim Kurt	2014.01.15	4 forcibly disappeared persons	Acquittal on 2014.12.22
Mete Sayar	2013.11.05	6 forcibly disappeared persons	Acquittal of all defendants on 2015.07.03
Yavuz Ertürk or Kulp	2013.10.11	11 forcibly disappeared persons	Pending adjudication
Musa Çitil	2012.09.11	13 either extrajudicially and arbitrary killed or forcibly disappeared persons	Acquittal on 2014.05.21

18 “Database on Enforced Disappearances,” *TJMC* online, accessed March 11, 2018, <http://www.zorlakaybetmeler.org/interventions.php>; “Cases”, *Perpetrator Not-Unknown* online, accessed March 11, 2018, <http://failibelli.org/tum-davalar/>

19 The cases of Musa Anter and the JITEM were merged on 29 January 2016.

Case	Start date	Victims	Current situation
Nezir Tekçi	2011.11.04	Nezir Tekçi, who was forcibly disappeared	Acquittal of all defendants on 2015.09.11
Temizöz and Others	2009.09.11	20 either extra judicially and arbitrarily killed or forcibly disappeared persons	Acquittal of all defendants on 2015.10.05
Abdullah Canan	1997.06.13	Abdullah Canan, who was forcibly disappeared	Acquittal on 1999.11.12
Mikdat Özeken, Münir Sarıtaş and Şemsettin Yurtseven	1997.06.13	Mikdat Özeken, Münir Sarıtaş and Şemsettin Yurtseven, who were forcibly disappeared	Acquittal on 1999.11.12
Mehmet Şerif Aşar	1994.07.05	Mehmet Şerif Aşar, who was forcibly disappeared	Conviction ²⁰
Şeyhmus Yavuz	1994.10.19	Şeyhmus Yavuz, who was forcibly disappeared	Conviction ²¹

4.1.2 *The Crime of Enforced Disappearances in Turkish Judiciary*

The elements of enforced disappearances in international sphere have generally six features.²² The first one is that the act that consists of deprivation of liberty and placing someone outside of the protection of the law. “Involvement of governmental officials, at least indirectly by acquiescence” and “refusal to disclose the fate and whereabouts of the person concerned” are two other elements considered by the Working Group.²³ The second element is about

20 The case of Mehmet Şerif Aşar resulted in sentences of six years imprisonment for five persons for deprivation of liberty and thirty years imprisonment sentences of the others for murder. in Ibid.

21 The case of Şeyhmus Yavuz resulted in a sentence of ten years imprisonment for only confessor of murder. in Ibid.

22 Alpkaya et al., *Enforced*, 51-57.

23 UN Doc E/CN.4/1996/38 (15 January 1996), *Report of the Working Group on Enforced or Involuntary Disappearances*, § 55, accessed March 10, 2017, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G96/102/18/PDF/G9610218.pdf?OpenElement>

perpetrators. They should be agents of state or persons acting with the authorization, support or acquiescence of the state.²⁴ The third element is the definition of victims which encompasses persons who are forcibly disappeared and relatives who have the right to truth and justice.²⁵ The fourth element is the intention of act. International human rights law does not seek general or specific intention to describe an act as an enforced disappearance. With regard to the Rome Statute and the reports of the Working Group, the defining element is not the intention of perpetrators but their link to the state. The fifth element is the duration of this crime. Enforced disappearances are “prototypical continuous acts” that have not any limitation. “The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.”²⁶ The last element is criminal responsibility for “any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance” and his/her superior.²⁷ There are “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance,”²⁸ and “no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance”²⁹ by referring to the ICPPED.

In the light of these elements, it might be defined two periods when this crime was committed as state policy under the definition of the Rome Statute: in aftermath of 1980 coup d'état and in the 1990s when enforced disappearances and unsolved murders became widespread and systematic in the OHAL region. Armed conflict in the 1990s between the Turkish military and the PKK

24 OHCHR online, <http://www.ohchr.org/EN/HRBodies/CED/Pages/Elaboration.aspx>

25 UN Doc, E/CN.4/2002/79 (January 18, 2002), accessed March 7, 2017, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/101/62/PDF/G0210162.pdf?OpenElement>

26 UN Doc. A/HRC/16/48 (January 26, 2011), 11, accessed March 7, 2017, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/104/45/PDF/G1110445.pdf?OpenElement>

27 UN, *International Convention for the Protection*, Part I, Art.6(i), (ii).

28 *Ibid.*, Part I, Art. 1/2.

29 *Ibid.*, Part I, Art. 6/2.

was defined as “low intensity conflict” or “irregular warfare.” Common Article 3 of the Geneva Conventions and the Additional Protocols II of 1977 Article 1 define internal conflict.³⁰ Enforced disappearances are considered grave breaches of the laws of war when committed during an internal conflict. Turkey is party to the Geneva Conventions, but official state policy does not consider the conflict between the PKK and the military as an internal conflict. According to official discourse, the PKK is terrorist organization, and the Turkish state is opposed to the PKK gaining any judicial character by accepting Common Article 3.³¹ Admission to the existence of an internal conflict would imply that the Turkish state is not capable of providing security in own territory. That the PKK does not respect the law of war and that its acts that exceed Turkey’s borders are further reasons the Turkish state gives for ignoring Common Article 3. The Turkish state describes this conflict as “domestic counterterrorism.”³² Furthermore, the ICC redefined some forms of “armed conflict” (that before the ICC, the ICTFY had defined as “protracted armed conflict”) as “not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”³³ Enforced disappearances that occurred during the 1990s

30 “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”, in Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Art. 1, <https://ihl-databases.icrc.org/ap-plic/ihl/ihl.nsf/7c4do8d9b287a42141256739003e636b/d67c3971bcffc10c125641e0052b545>

31 Fatma Taşdemir, *Uluslararası Nitelikte Olmayan Silahlı Çatışmalar Hukuku*, Adalet, Ankara, 2009, 290-293. in Sevdiren, *Türkiye’nin Cezasızlık Mevzuatı*, 34.

32 Ibid.

33 The Rome Statute, Art.8 (f).

were committed in this context of protracted armed conflict and an exceptional regime, especially in the OHAL region. This intensity on a specific region and policy, the similarity of methods and perpetrators in commitment of this crime are considered signs that enforced disappearances were widespread, systematic state policy.

With respect to the Rome Statute Article 7 and the TCK Article 77,³⁴ crimes that occurred in this region are considered crimes against humanity. However, the TCK Article 77 ultimately differs from the Rome Statute Article 7, the latter of which defines enforced disappearances as crimes against humanity. As mentioned before, “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” is a crime against humanity according to the Rome Statute.³⁵ However, the Turkish state did not sign the 1998 Rome Statute and

34 The TCK number 5237 (26.9.2004), Part I, Ch.1, Art. 77: “The systematic commission of the following acts against a part of the population for political, philosophical, racial or religious reasons and in accordance with a plan shall constitute a crime against humanity:

- a) Voluntary manslaughter,
- b) Willful infliction of injury,
- c) Torture, inflicting severe harm, or enslavement,
- d) Deprivation of liberty,
- e) Subjection to scientific experiments,
- f) Sexual violence, sexual abuse of children,
- g) Forced pregnancy,
- h) Enforced prostitution.”

Full article: “(1) Aşağıdaki fiillerin, siyasal, felsefi, ırki veya dini saiklerle toplumun bir kesimine karşı bir plan doğrultusunda sistemli olarak işlenmesi, insanlığa karşı suç oluşturur: a) Kasten öldürme. b) Kasten yaralama. c) İşkence, eziyet veya köleleştirme. d) Kişi hürriyetinden yoksun kılma. e) Bilimsel deneylere tabi kılma. f) Cinsel saldırıda bulunma, çocukların cinsel istismarı. g) Zorla hamile bırakma. h) Zorla fuhşa sevk etme. (2) Birinci fıkranın (a) bendindeki fiilin işlenmesi halinde, fail hakkında ağırlaştırılmış müebbet hapis cezasına; diğer bentlerde tanımlanan fiillerin işlenmesi halinde ise, sekiz yıldan az olmamak üzere hapis cezasına hükmolunur. Ancak, birinci fıkranın (a) ve (b) bentleri kapsamında işlenen kasten öldürme ve kasten yaralama suçları açısından, belirlenen mağdur sayısınca gerçek içtima hükümleri uygulanır.” (3) Bu suçlardan dolayı tüzel kişiler hakkında da güvenlik tedbirine hükmolunur. (4) Bu suçlardan dolayı zamanaşımı işlemez.” Accessible November 5, 2017, <http://www.resmigazete.gov.tr/eskiler/2004/10/20041012.htm>

35 The Rome Statute, Part II, Art. 7/1.

does not recognize the judicial authority of the ICC, which was built in 2002. Due to this situation, the Turkish legal system's definition of crimes against humanity has a limited impact on the cases of enforced disappearances. For the first time in 2004, the term "crimes against humanity" was defined in the body of Turkish criminal law by the new TCK No. 5237. However, three elements of the TCK Article 77 do not overlap with the Rome Statute and customary law with respect to enforced disappearances. Instead of the "widespread and systematic" characteristic of the crime described in the Rome Statute, the TCK Article 77 uses the phrase "systematically commitment in accordance with a plan." The absence of the need for a specific intention to commit crimes against humanity in the Rome Statute was replaced by the phrase "for political, philosophical, racial, or religious reasons" in TCK Article 77. And finally, many types of crime that are defined in Article 7 of the Rome Statute, especially enforced disappearances, are not presented in the new TCK. In the TCK, the only crime that overlaps with enforced disappearances is "deprivation of liberty;" however, the definition of deprivation of liberty is obviously insufficient to understand and prosecute enforced disappearances in the Turkish context. However, the negligence and deficiencies of the elements of crime in the TCK Article 77 do not suggest that the Turkish judicial system is incapable of prosecuting the crimes of enforced disappearances. I explain how criminal prosecution is both possible and obligatory in the Turkish case despite the obstacles in the TCK:

First of all, there are strong findings that the JITEM's crimes were "systematically" committed "in accordance with a plan" as described in the TCK Article 77. Furthermore, with regard to the Rome Statute, there is no necessity that this plan be related to any official state policy. This plan can be organized by the state or by another political organization. If, as is suggested by state officials, the JITEM was an unlawful organization independent of any state institutions and committed the crime of enforced disappearances outside of the state's official policy concerning the Kurdish question, this does not transform these crimes from crimes against humanity to ordinary crimes.³⁶ Although it is nearly impossible for state officials not to have noticed an

36 Alpkaya et al., *Enforced*, 95.

organization that forcibly disappeared persons in the OHAL region for a decade, such inattentiveness by the state does not relieve it of its responsibility. “The Elements of Crimes document annexed to the Rome Statute provides that government authorities’ deliberate failure to take action, or the encouragement of a crime as such, is an element demonstrating the existence of systematic plan.”³⁷

Another sign of the existence of a plan behind enforced disappearances is the typology of victims. Alpkaya examined 136 enforced disappearances cases from the 1990s and categorized them in three groups.³⁸ The first group were members of illegal organizations. The second were well-known Kurds who did not hide their political opposition and who lived in cities. And the third group were people who lived in the OHAL provinces and assumed to have relations to any degree with the PKK. Most of the disappearances pertains to the third group, and there was frequently no proof that those persons were members, supporters, or even sympathizers of the PKK. These people were not randomly selected; all of them were considered as a part of a definite policy. They were generally civilians with regard to the definition in the Geneva Conventions. And this crime was intense in a specific area. According to a November 2015 report of the TJMC, from 1980 to the 2000s, 380 persons were forcibly disappeared in Diyarbakır, 203 persons in Şırnak, and 170 persons in Mardin.³⁹ In order by the number of disappeared people, other provinces where enforced disappearances occurred are Batman, İstanbul, Hakkari, Tunceli, Şanlıurfa, Adana, and Bitlis. The concentration in the OHAL region and the similarity of the methods of enforced disappearances are considered as proof the planned and systematic feature of crime.

The second significant obstacle to criminal prosecution in the element of specific intent in the TCK Article 77. Crimes against humanity must be committed for “political, philosophical, racial, or religious reasons.” The terms “national” or “ethnic,” which could be the reasons behind the disappearances

37 Ibid., 98.

38 Gökçen Alpkaya, “Kayıplar’ Sorunu ve Türkiye”, *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi* 50, no. 3-4 (1995): 45-46, accessed March 3, 2017, <http://dergiler.ankara.edu.tr/dergiler/42/473/5441.pdf>

39 “Türkiye’de Zorla Kaybetmeler Gerçeği,” *Hakikat Adalet Hafıza Merkezi* online.

of Kurdish people, are not present in TCK Article 77. However, this does not preclude the possibility of prosecution these crimes as crimes against humanity under the TCK, because the real reason for this crime is neither ethnic nor national, but political. Some victims were Kurds and some were from another ethnicity, some were PKK militants and some were civilians, some lived in the OHAL region and some in big cities. But all were opponents of the current regime of the Turkish state.

The third and most grave obstacle under the TCK Article 77 is the lack of mention of enforced disappearances as crimes against humanity. Because of this absence, “[a]lthough the crimes committed qualify as crimes against humanity, the few criminal cases which have been initiated in relation to [enforced disappearances] ... describe the acts as ‘ordinary crimes’ such as murder and establishing a criminal organization.”⁴⁰ Its consideration as an ordinary crime invokes the problem of the statute of limitations. The statute of limitations for ongoing crimes is described in the new TCK No. 5237.⁴¹ For ongoing crimes, the begin of the limitation period is triggered only when the crime ceases by revelation of the fate of the victim under Article 66(6) of the TCK.⁴² Furthermore, enforced disappearances are crimes against humanity in addition to being ongoing crime. A statute of limitations is not applicable to the prosecution of crimes against humanity under the TCK Article 77 (4). Briefly, if the fate of victims remains unknown – even if enforced disappearances are considered as just deprivation of liberty – a statute of limitations should not be applied to its prosecution and punishment. If the fate of victim is known, a statute of limitations cannot be applied because there is no such limitation for crimes against humanity. In fact, the interpretation of enforced disappearances in the Turkish domestic law is not only determinant. Although

40 Alpkaya et al., *Enforced*, 99.

41 Ibid.

42 The TCK number 5237 (26.9.2004). Part III, Ch. 4, Art. 66 (6): “Zamanaşımı, tamamlanmış suçlarda suçun işlendiği günden, teşebbüs halinde kalan suçlarda son hareketin yapıldığı günden, kesintisiz suçlarda kesintinin gerçekleştiği ve zincirleme suçlarda son suçun işlendiği günden, çocuklara karşı üstsoy veya bunlar üzerinde hüküm ve nüfuzu olan kişiler tarafından işlenen suçlarda çocuğun onsekiz yaşını bitirdiği günden itibaren işlemeye başlar,” accessed March 8, 2017, <http://www.resmigazete.gov.tr/eskiler/2004/10/20041012.htm>

the ICPPED and the Rome Statute were not signed by the Turkish state, the European Convention on Human Rights (ECHR) and the ICCPR were. Article 15 (2) of the ICCPR stipulates that any act, even if not defined as a crime under domestic or international law when it was committed, will be considered as crime if it was a crime with regard to general principles of law.⁴³ According to the hierarchy of norms in the Turkish judicial system described in Article 90/5 of the 1982 Constitution,⁴⁴ international treaties appropriately put into effect are *a fortiori* domestic law. Because enforced disappearances are crimes against humanity in international law, Turkey has no choice but to prosecute enforced disappearances without no statute of limitations.

By the agency of this interpretation of the domestic criminal law of Turkish state, the criminal prosecution of enforced disappearances is both possible and compulsory under international and domestic law. However, the problems in trials regarding this crime rarely stem from judicial obstacles; rather they are political obstacles. In next section, I explain those obstacles with reference to some trails regarding enforced disappearances in Turkey.

4.1.3 *The Conduct of the Turkish Judicial System vis-à-vis Cases of Enforced Disappearance*

According to analyses of judicial data and the narratives of victims' relatives recorded by NGOs, the excessive number of disappeared persons and the insufficient number of criminal prosecutions reflect obstacles and ineffectiveness in both the investigation and criminal prosecution processes beyond the

43 The ICCPR, Part III, Art. 15 (2): "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, accessed February 13, 2017, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>

44 "Usulüne göre yürürlüğe konulmuş milletlerarası andlaşmalar kanun hükmündedir. (...) Usulüne göre yürürlüğe konulmuş temel hak ve özgürlüklere ilişkin milletlerarası andlaşmalarla kanunların aynı konuda farklı hükümler içermesi nedeniyle çıkabilecek uyuşmazlıklarda milletlerarası andlaşma hükümleri esas alınır" in The Constitution of Republic of Turkey, 7.11.1982, Part III, Ch.1, Art.90 (5).

inadequacy of law. The first obstacle in the investigation process is of course the absence of a definition of enforced disappearances as a crime in the new TCK No. 5237 as mentioned before. The charges in the trials regarding enforced disappearances have been establishing an armed organization, establishing an organization to commit crimes, being a member of an armed organization and deliberately murder, instigation of murder, commission of murder, murder of a person with exceptional cruelty and torture, murder of multiple persons for the same reason, and inciting people to revolt and murder each other – instead of forcibly disappearing persons.⁴⁵ The charge of “murdering people within the scope of the activities of an armed organizations that established to commit crime”⁴⁶ does not correspond with the elements of enforced disappearances as crimes against humanity. The absence of enforced disappearances in the TCK also causes a statute of limitations problem. “Courts take the criminal provisions concerning the crime of murder as the basis in enforced disappearance cases and hold that the statute of limitations is 20 years as provided in Articles 450 and 102/1 of the former TCK No. 765 which was the criminal law in effect at the time the crime was committed.”⁴⁷ Due to the twenty years statute of limitations, protracted investigation became another problem. The long duration of current investigations creates a danger of the expiration of the statute of limitations, and some interpret this as consciousness conduct – an impunity tool to protect state officials. As Uçarlar puts it, the state continues to protect persons responsible for crimes by the agency of “covered amnesties” such as the expiration of statute of limitations.⁴⁸

The failure of the judicial process generally stems from ineffective and dependent conduct of investigations. For instance, police forces in Turkey are employed in judicial investigations in addition to their law enforcement duty. Because of the lack of an independent judicial police force, security officers who were suspects in some cases investigated and collected the evidence for crimes for which they themselves were accused. As a consequence, the evidences was manipulated or lost, or fake evidence was produced. Alleged

45 The TJMC, “Enforced disappearances.”

46 Ibid.

47 Alpkaya et al., *Enforced*, 30.

48 Uçarlar, *Hiçbir Şey Yerinde Değil*, 116.

perpetrators of crimes continue to be employed in state institutions. There is also a problematic permissions system for the criminal prosecution of law-enforcement officers. “The adjudication of civil servants and public officials for crimes they have committed in office is subject to a permission to be received from the relevant competent administrative authority. If a request for permission is rejected, the prosecutor’s investigation is blocked. ... in practice, this becomes a privilege and eliminates the accountability of public officials.”⁴⁹ Some institutions and individuals are considered untouchable. It is endeavored to psychologically and practically deny the right to truth and justice to victims’ relatives. Even if they manage to start an investigation, witnesses and relatives of victims are oppressed, threatened, or at least manipulated during the investigation process in order that they change their testimony or withdraw their applications.

Problems of criminal prosecution are other dimension of the conduct of the judiciary. First of all, the nature of the crime of enforced disappearances is ignored in the criminal prosecution process. All cases are considered as “a stand-alone case.”⁵⁰ The limited extent of prosecution causes the widespread and systematic features of crimes be ignored. Generally, low-level members of security forces are held responsible and charged for enforced disappearances. The possible involvement of high-ranking officials and the chain of command is not yet explored.⁵¹ According to human rights activists, the transfer of cases as part of impunity is an obstacle to effective criminal prosecution. Some prosecutions have been transferred from the city in which enforced disappearances were committed and where victims’ relatives and their lawyers live to another city by the Ministry of Justice because of the security problem in former region. The long distance between cities causes transportation and housing problems, and the participation in trials decrease. Moreover, “most of the trials have been transferred to the cities where a strong Turkish nationalism is hegemonic and thus, it raises the question whether such transfers were politically motivated and intentional.”⁵² There is also a problem of the absence of

49 The TJMC, “Enforced disappearances.”

50 Ibid.

51 Budak, “Dealing with the Past,” 237.

52 The TJMC, “Enforced disappearances.”

impartiality and independence in the prosecution process. For instance, in those cases prosecuted for the crime of murder,

[a] comparison of the average trial time, or the rate at which trials are brought to conclusion, in cases where defendants are civilians with those cases where defendants are members of the military, the police, or government employees, implies that individuals in the latter category are being protected, because cases involving those individuals are generally delayed past the expiration of the statute of limitations.⁵³

The extreme duration of the trials causes forfeiture in many cases.

[O]ne of the most formidable obstacles resulting in unlawful non-competence decisions or obstructions with respect to investigations into the crimes perpetrated in Cizre is that Cemal Temizöz has himself led, in his capacity as the head of the gendarmerie command, the investigations into the many crimes that he is actually accused, based on relevant strong evidence, of having instigated.⁵⁴

Or bones supposedly belonging to persons who may have been forcibly disappeared in Lice in 1994 were shipped to the Forensic Medicine Institution in Istanbul in 2003 but were “lost in the mail.”⁵⁵ In my opinion, these two evidences are the most tragic examples of the fact that the problem of the Turkish judicial system extend beyond legal insufficiency; rather, “it is evident that one of the obstacles to initiating real transitional justice is the political reluctance of the government.”⁵⁶ The ongoing nature of the armed conflict in Turkey precludes the political will from punishing persons responsible for crimes of the 1990s; state policy has not really changed. Political and social intention toward accountability for past abuses do not clearly comprise. Depending on this absence of will, defendants in those trials (for instance, the defendants of in the case of Temizöz and others) have argued that they were fighting terrorists and subversives and that they cannot accept being prosecuted by the state in which

53 Alpkaya, “Kayıplar’ Sorunu,” 30.

54 Ibid., 98.

55 Ibid., 99.

56 Budak, “Dealing with the Past,” 238.

interest they were fighting. I argue that this absence of truth and justice derived from state policy for past abuses endangered peace attempts of the 2000s. Furthermore, can the ongoing conflict and lack of regime change in Turkey be real obstacle to bringing about justice? Can judicial efforts in this period be described as transitional justice means? In the next section I examine the place of peace and justice in Turkey's sui generis transitional justice process.

§ 4.2 The Case of Turkey: An Example of Transitional Justice or Not?

I described the efforts for retributive justice in Turkey before, during, and after the peace process, the attempts to prosecute enforced disappearances in domestic trials, and the attitude of Turkey's judicial system. But, in fact, it is debatable whether these legal attempts can be defined as mechanisms of transitional justice. Turkey's political reality that there is an ongoing armed conflict and that there has been no regime change does not correspond to traditional definitions of transitional justice. In this circumstance, how is it possible to use retributive justice tools without a regime change? Is it possible to bring about justice before or during the consolidation of peace? The "conflicted democracy" of Turkey and the possibility of using transitional justice mechanisms in this context are examined in this section.

Criminal prosecution of past abuses as a mechanism of transitional justice is usually utilized in a post-conflict context or as a part of a transition. According to the original assumption, transitional justice is described as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."⁵⁷ With regard to the traditional understanding of transitional justice, the existence of a transition is a substantial point. Furthermore, a shift

57 Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16, (Spring 2003): 69, accessed March 8, 2017, <http://www.nyls.edu/faculty/wp-content/uploads/sites/148/2013/09/Harvard-Human-Rights-Journal.pdf>

from violent to non-violent circumstances is not adequate in itself; there must be a political transition (also called a “paradigmatic” or “liberal” transition⁵⁸) in which “an authoritarian, repressive regime is ousted by a democratic one that is committed to human rights, the rule of law and democracy.”⁵⁹ Briefly, it must be a regime change towards democracy and peace. However, during a decade, especially with the emergence of international jurisdiction mechanisms, the pursuit of justice has been used in ongoing armed conflicts in countries such as Afghanistan, Colombia, the Democratic Republic of Congo, Liberia, Sierra Leone, Sudan, Uganda, and the former Yugoslavia.⁶⁰ The most significant development is that political transition is no longer *sine qua non* for using transitional justice mechanisms. The context of “ongoing conflict under non-democratic regimes” or “conflicted democracies” became new contexts where transitional justice mechanisms could be utilized.⁶¹ And transitional justice began to address ongoing human rights violations rather than just past violations.

“With the development of transitional justice in the absence of a profound regime change, the starting and finishing point of transition has become ambiguous.”⁶² Transitional justice practices have been utilized in post-conflict situations; however, counts as “post” in current armed conflicts remains ambiguous. Transitional justice mechanisms have been used in the aftermath of armed conflict or political transition, but now there is a shift “to attempts to achieve accountability for atrocities even before a political settlement of armed conflict has been reached.”⁶³ It is elaborated as transitional justice in non-

58 Thomas Obel Hansen, “Transitional Justice: Toward a Differentiated Theory,” *Oregon Review of International Law* 13, no. 1 (2011): 8, accessed March 8, 2017, <http://www.law.uoregon.edu/org/oril/docs/13-1/Hansen.pdf>

59 Budak, “Dealing with the Past,” 220-221.

60 Wierda et al., “Pursuing Justice,” 1-26.

61 Budak, “Dealing with the Past,” 220.

62 *Ibid.*, 224.

63 Par Engstrom, “Transitional Justice and Ongoing Conflict,” in *Transitional Justice and Peacebuilding on the Ground Victims and Ex-Combatants*, ed. Chandra Lekha Sriram, Jemima García-Godos, Johanna Herman, Olga Martín-Ortega (Routledge, 2013), 42, accessed March 02, 2017, <http://dx.doi.org/10.2139/ssrn.2004313>

transition.⁶⁴ This assumption describes the absence of transition from dictatorship to democracy as a situation of non-transition. In fact, “transitional justice in non-transition” is not altogether accurate because there is in fact a transition from a less-democratic system to more democratic one or from violence to non-violence in society. By the agency of this shift from “bad” to “good,” transitional justice engages with the domains of peacebuilding, peacemaking, and conflict resolution. There is a shift from a “conflicted democracy” – a term used to describe states that have “experienced prolonged, structured, communal, political violence even where the political structure could broadly be considered ‘democratic’” – toward a substantive democracy – that is, “a deepening, rather than an introduction of democratic standards.”⁶⁵

Because of the ongoing conflict and the absence of fundamental regime change, contrary to the original understanding of transitional justice, there was a “proto-transition” in Turkey.⁶⁶ There was neither a political turning point nor a shift from repressive regime to democratic one. Furthermore, armed conflict between the Turkish military and the PKK is not completely concluded. There are two elements to identify conflicted democracy: “There must be a deep seated and sharp division in the body politics, whether on ethnic, racial, religious, class, or ideological grounds” and “this division must be so acute, and the political circumstances such as to have resulted in or threaten significant political violence.”⁶⁷ When a conflicted democracies resorts to the declaration of a state of emergency, it is a sign of the existence of “significant political violence.” The armed conflict between the Turkish military and the PKK exhibits these two elements for defining Turkey as conflicted democracy. There is a “deep seated and sharp division” between the conflicting sides, and intensity of political violence in Turkey was sufficient to declare a state of emergency. The transitional justice of Turkey from conflicted democracy to a more democratic regime began in earnest with its desire to join the EU in the

64 Hansen, “Transitional Justice,” 22.

65 Budak, “Dealing with the Past,” 225-226.

66 *Ibid.*, 219-220.

67 Fionnuala Ní Aoláin, and Colm Campbell, “The paradox of transition in conflicted democracies,” *Human Rights Quarterly* 27, no. 1 (February, 2005): 175-179, accessed March 9, 2017, doi: 10.1353/hrq.2005.0001

early 2000s. Legal and political reforms were enacted during this period, and the trials of enforced disappearances were able to be pursued by victims' relatives in this relatively liberal atmosphere. In the current context, the cases of enforced disappearances in Turkey are not examples of traditional transitional justice mechanisms. While at first glance they seem to fit the definition of transitional justice in ongoing conflict exactly, the reality of Turkey is different.

The case of Turkey has unique features with regard to both traditional transitional justice theory and transitional justice in ongoing conflict theory. First, the political transition element of original transitional justice is absent in Turkey. The practices of enforced disappearances in Turkey did not intensify when a military junta was in power; rather, they intensified after the transition to a civilian government, especially from 1993 to 1996. For most part, in the cases of other states that committed enforced disappearances in the Cold War era and experienced transitional justice, military juntas were mainly responsible for these crimes. The development of international human rights principles after the Cold War were important for their transition process. On the other hand, enforced disappearances in Turkey were beyond the military regime and intensified after the Cold War. Because the responsible agencies for this crime have been both civilian governments and military organizations, the transition from a military regime to a civilian democracy did not trigger the accountability for the past abuses. There were some democratization efforts in the 2000s even though the conflict between the Turkish army and the PKK had not totally concluded, which might be considered a transition from less-democratic regime to more democratic one in ongoing conflict.

Nonetheless, the Turkish case also does not fully correspond to the theory of transitional justice in ongoing conflict. The transition from a conflicted democracy to substantive one remained superficial or just an intention. The policies vis-à-vis the Kurdish question of the military Junta in the 1980s and of civilian governments in the 1990s and 2000s have actually had same tendency. There is disengagement between the Justice and Development Party (AKP) governments and the former regime of Turkey, but this detachment is not evident in their approach to the Kurdish issue. Transitional justice mechanisms did not become an integral part of peacebuilding strategies. The failure of either transitional justice or peacemaking strategies jeopardizes the viability of

the other. During the 2000s, there was no durable cessation of armed conflict between the Turkish military and the PKK, no real solution beyond the political interest of the governments, no trust between the two sides of the conflict, and no political and social consensus in favor of a peace process among Turks, Kurds, and opposition parties. Not merely the armed conflict but also state policy has an ongoing nature. Scrutiny of the judicial attitude of the state regarding human rights crimes committed in the violent years of armed conflict in Southeast Turkey represents that there is no possibility of a peace process because there has been no justice.

For critical views, transitional justice works as a “definitional project, explaining who has been silenced by delineating who may now speak, describing past violence by deciding what and who will be punished and radically differentiating a new regime in relation to what actions were taken by its predecessor.”⁶⁸ Some scholars ask whether justice is the real concern of these practices. After examining the peace process and conduct of the Turkish judiciary, this question is appropriate. There is a high risk of the political manipulation of transitional justice practices during an armed conflict, and “justice seeking in the absence of peace” remains “overly ambiguous”⁶⁹ in Turkey. However, although the politicization of justice is a real risk, the solution to this problem is not to abandon endeavors to bring about justice before the ultimate end of armed conflict. The complementary position of the transitional justice in ongoing conflict between traditional transitional justice and peacemaking is considered a paradox for critical scholars. But its reason is the creation of sterile dichotomies between peace and justice. As I explained in the chapter 1, a choice between making peace and doing justice is not a real dichotomy. Generally, governments opt to offer amnesty in order to protect peace, but this precludes the possibility of sustainable peace due to the dissatisfaction of a sense of justice. The real aim should not to be sacrifice justice to achieve peace but to make peace without impunity. In my opinion, what should be

68 Adriana Rincon Villegas, “Transitional Justice in the Ongoing Armed Conflict in Colombia,” (Master thesis, the University of Georgia Athens, 2015), 14.

69 Maria A. van Nievelt, “Transitional Justice in Ongoing Conflict: Colombia’s Integrative Approach to Peace and Justice,” *Cornell International Affairs Review* 11, no. 2 (2016): 1, accessed March 3, 2017, <http://www.inquiriesjournal.com/a?id=1416>

confronted is not the seeking of justice before or during peace but the politicization of justice.

Transitional justice and the resolution of armed conflicts are not mutually exclusive; rather, there is overlap between them by particularly depending on deterrence effect of prosecution. For instance, the UN's approach to transitional justice "supports accountability, justice and reconciliation at all times. Peace and justice should be promoted as mutually reinforcing imperatives and the perception that they are at odds should be countered."⁷⁰ It says that "we are trying to repair the boat at high seas, with high winds and furious waves"⁷¹ with reference to the Colombian example of transitional justice in an ongoing conflict. "There is ... not sufficient empirical evidence to conclude either that accountability strategies increase the risk of conflict (or prolongs it) or that it increases the likelihood of continuing conflict."⁷² Turkey's legal proceedings for enforced disappearances are examples of attempting to "repair the boat at high seas," but politics has generally undermined justice during this process. There are really important challenges to doing justice during an armed conflict, but in order to repair the boat, there is not always time to wait for the storm to calm before the boat sinks.

I insist that peace and justice are two indispensable parts of a transition process. I also argue that legal mechanisms for coping with past are indispensable part of the justice process. Moreover, justice is itself the eminent issue for coming to terms with enforced disappearances in Turkey because of the negative conduct of the Turkish judiciary. Criticism of transitional justice mechanisms used during ongoing conflicts, such as the politicization of the judicial process, is valid for the cases of Turkey. I find it appropriate to consider Villegas' question regarding the Colombian example for the case of Turkey: "What kind of justice can be achieved through transitional justice; who are the beneficiaries of transitional justice and who becomes ignored and excluded?"⁷³

70 Guidance Note Of The Secretary-General United Nations Approach To Transitional Justice, March 2010, accessed April 6, 2017, https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf

71 Villegas, "Transitional Justice," 1.

72 Engstrom, "Transitional Justice," 8-9.

73 Villegas, "Transitional Justice," 56.

Justice is vital for sustainable peace in society, but should criminal law be part of the attempts for justice despite its insufficiency and the politicization of the legal system? What does law signify for a sense of justice for enforced disappearances in Turkey? To understand the function of retributive justice and, more generally, the sense of justice in Turkey's conflicted democracy, I examine the perception of cause lawyers besides this conduct of judiciary in the next chapter.

A Sense of Justice in the Case of Turkey

As presented in the chapter 3, achieving peace is not possible with the absence of justice in deeply divided societies such as Turkey, and the demand for justice is not being sufficiently met by the domestic judicial system. This discrepancy between demands for retributive justice and its deficiency obviously causes the anticipations from retributive justice mechanisms to change. Due the obstacles to criminal prosecution and the atmosphere of ongoing conflict in Turkey, some parts of civil society – who advocate the necessity of justice for peace – suggest using restorative justice mechanisms rather than retributive justice tools. However, the main argument of this work is that the methods of retributive justice are required for attempts to seek justice. There can be no abandonment of legal routes for accountability for past abuses in Turkey. Human rights lawyers especially support the use of criminal prosecution as a transitional justice mechanism to bring about justice for the cases of enforced disappearances in the ongoing conflict. I argue that an examination of these lawyers' positions explains the role of retributive justice (and more specifically criminal law) in generating a sense of justice with respect to enforced disappearances. What are their expectations from the criminal prosecution of enforced disappearances, the politicization of the judicial system notwithstanding? What were these expectations and how have they changed? What are their current expectations of the means of retributive justice? Is there still any expectation that these mechanisms will lead to accountability? What

is their sense of justice? And what is the place of criminal law in the sense of justice according to them? I find answers to these and other questions by focusing on the opinions of human rights lawyers in this chapter.

§ 5.1 The Cause Lawyers of Turkey: Justice and Criminal Prosecution

In this work, for two reasons, I focus on the cause lawyers who work on the cases of enforced disappearances in Turkey to depict the sense of justice related to criminal justice. I could, of course, focus on victims to analyze the correlation between criminal justice and the sense of justice, but their expectations do not always overlap with criminal justice, especially given the negative conduct of the Turkish judiciary. In *Hiçbir Şey Yerinde Değil: Çatışma Sonrası Süreçte Adalet ve Geçmişle Yüzleşme Talepleri*, Uçarlar asks what victims of enforced disappearances actually mean by justice given that twenty years have passed.¹ She argues that they have a sense of justice that exceeds criminal justice. According to the aforementioned NGO's reports and Uçarlar's oeuvre, most of victims' relatives describe the perpetrator of enforced disappearances as the state. It is natural that there are various assumptions about justice among survivors, victims, and other parts of society. Some persons want the execution of perpetrators, others find life sentences for perpetrators to be adequate, and some among the victims have no interest in criminal justice – they only want to know why the perpetrators committed the crimes and the fates of their disappeared relatives. For instance, one man, Ekrem Bey from Muş, said, "I want their [perpetrators'] children decide to what should be their punishment instead of me ... s/he goes home after the trial ... [.] I am ready to accept that his/her child imposes a penalty on him/her."² Yıldız Hanım from Batman indicated to no demand by saying "we stay in our homes, they stay theirs."³ The different demands among victims' relatives are understandable; however, a functioning retributive justice system might mitigate victims'

1 Uçarlar, *Hiçbir Şey Yerinde Değil*, 118.

2 Ibid., 202.

3 Ibid., 230.

vengeance that is considered a legitimate sense for them. Furthermore, I am agreeing with that justice for the present and future of society as a whole is not independent of the sense of justice among victims' relatives, but it should be different on some points. The cycle of violence should be broken in order to build and protect social justice. This detachment is not possible by merely deferring to victims' demands for justice – which are as varied as killing the perpetrator for the murder of their loved-ones to forgiving them without any atonement. Moreover, it should be noted that only four of thirty-one persons lean toward offering amnesty to perpetrators when they confess their responsibility for the crimes and tell the truth.⁴ This means that there is no strict division between the senses of justice of victims and lawyers, although generally the former are related to restorative justice and latter retributive justice in the literature.

Another reason of my choice to favor the cause lawyers is the role of retributive justice in the legal arena. For enforced disappearances, the investigation and criminal prosecution of state crimes via the state's own institutions is a hallmark of coping with the past. The problem is not the insufficiency of retributive justice mechanisms to bring about justice; it is the political manipulation of these mechanisms in states such as Turkey. In this context, some part of society defends the utilization of restorative justice tools, completely ignoring retributive justice or considering it to be a secondary mechanism. Especially, it might be expected that lawyers of the state as Turkey where human rights crimes were committed in past, will not abandon to support retributive justice mechanism for seeking justice in favor of restorative justice although existence of ongoing conflict and disrupted judicial system. In this section, I focus on human rights lawyers' justice aspects. In the fact, advocating to retributive justice is not a choice for these lawyers. It is their profession, and they do not work in the field for money. At least, they must believe that retributive justice should take place in the process of transitional justice. But in reality, what is justice according to human rights lawyers who are presupposed to be absolute advocates of retributive justice?

4 Ibid., 205.

In enforced disappearances cases, it is difficult strictly distinguish between who is a lawyer and who is a victim. Most regional lawyers (who live in the region where the crimes took place or who were born there) personally experienced human rights crimes. There are lawyers whose family members were forcibly disappeared when they were children or teenagers, and others were at least growing as first-hand witnesses of the crimes. Furthermore, these are not the only lawyers working on these cases; there are also ones born in big cities who are generally highly-educated and have not experienced any human rights crimes in their communities, but who are nonetheless human rights activists and lawyers. I made personal and in-depth group interviews with eight human rights lawyers belonged to these two groups. Six of the lawyers (A, B, C, D, E, and F) are well-educated and live in big cities outside of the former OHAL region. Four of these six are currently lawyers in enforced disappearances cases in Turkey, and all work in the enforced disappearances field. Three of these big-city lawyers (A, D, and E) are young and did not experience the beginning of these cases first-hand. The other two lawyers with who I conducted interviews (G and H) are young persons who were born, raised, studied at the university, and now work under the bar associations in the former OHAL regions as cause lawyers in the cases of enforced disappearances.

I explained their positions in transitional justice by asking questions such as the following: Why is criminal law a necessary mechanism for accountability in enforced disappearances cases? What were their expectations from criminal prosecution at the beginning of the investigations, how did they change during process? After the ends of trials with acquittal, what did their expectations transform to? What are their general expectations from the criminal justice process? According to them which is more fair in the case of Turkey: punishment of the individuals who forcibly disappeared persons or those who ordered the crime? Does the Turkish criminal law and the judicial system allow for fair prosecution of enforced disappearances? Is the judicial system inadequate in Turkey or are other factors the real obstacles? Is it be possible to obtain effective results though the TCK if all legal actors (judges, public prosecutors, lawyers) aim to punish these crimes? How does the transfer of cases affect the judicial process? What is the relationship between victims' families and lawyers? Is the relationship between victims and lawyers who are working

in the region different from that between victims and lawyers who are not in the region? How is the relationship between these two different categories of lawyers? Are domestic law and criminal prosecution assumed to be just steps toward the ECtHR? What are their expectations from the ECtHR? By the agency of these and other questions, I describe the relation between law and the sense of justice which has vital role in the reconciliation and peace process.

5.1.1 *What Is the Place of and Expectations From the Criminal Law in Transitional Justice?*

The general perspective of these lawyers considers criminal prosecution as a necessary part of seeking justice. However, their central point goes beyond the arguments of retributive justice proponents in the literature; these lawyers situate their argument – which prioritizes criminal justice – not with reference to the rule of law but to victims’ demands for justice. According to these lawyers, truth commissions are an important part of seeking justice, but it is only a complement to retributive justice mechanisms because truth commissions cannot satisfy victims’ demands for justice. Lawyer A argued that society takes criminal justice and accountability seriously: “Truth commissions remain incapable; the courtroom has importance in the eyes of society in Turkey.” Beyond the demands of victims’ relatives, criminal prosecution is also important for perpetrators. Lawyer B said that truth commissions have the capacity to uncover the truth but not to prevent future crimes because of the absence of punishment. Truth commissions only create social shame for the perpetrators; however, social shame does not make sense for perpetrators in the case of Turkey. Lawyer B says that in Turkey, the perpetrators of enforced disappearances, the victims who were forcibly disappeared, and the victims’ relatives “are different individuals of same family; they are in same *aşiret*; they are living in same province. If they had had a sense of shame they would not have committed this crime.” Because of this situation, it is neither possible to abandon restorative justice nor retributive justice in favor of the other. And punishment has importance for both victims and perpetrators.

I use three categories suggested by lawyer B and supported by middle-aged interviewees who had taken part in the process since the 1990s, to explain their expectations from criminal justice. The first category is the capacity of

criminal justice to uncover truth. The crimes of enforced disappearances have origin of state; and if fair investigations and prosecutions are conducted in the judicial system, the documentation of the systematic feature of these crimes is possible. The background of state crimes will be uncovered by criminal prosecution, according to lawyer B, and this is a major step toward truth. B said that which practices used while the crime was committed, who committed this crime, and “how these crimes poisoned the society” can uncover the truth behind the crimes by the agency of criminal justice. Lawyer C assumed that criminal prosecution is necessary and beneficial in all circumstances. Lawyer B supported this idea with the example of the case of Hrant Dink, an unsolved political murder in Turkey. B argued that the documentation and acknowledgment of the crimes’ elements, even if they remain limited with regard to possibilities of conjuncture, cause discussions in society and raise the question of whether the state was involved in the crime. According to her, these discussions are as significant as the judicial process itself in Turkey. The second category concerns the obligations of the state under international law. Criminal prosecution is considered as a field that corresponds state’s duties. Actually, there is no choice for the state except to prosecute in line with its international obligations. I think that the third category is the most reasonable. As lawyer B puts it, we do not have the right to replace victims’ relatives and decide what justice is instead of them. “Victims’ relatives want to see the alleged perpetrators in courtrooms, to see their accounting; this condition creates a sense of settlement and relief for them.”

Documentation and acknowledgement of the crime, international obligations, and the demands of victims’ relatives are generally considered important features of criminal justice among the interviewees. However, there is no consensus about the real function of criminal justice in the Turkish context among them. There can be observed, not a tension but a distinction between the function of criminal prosecution to prevent future crimes and its function to uncover truth. Lawyer C assumed that the existential aim of criminal prosecution is not to seek truth but to define “material fact,” to punish responsible persons in accordance with a body of rules, and to prevent repetition of crimes in future. Although lawyer B argued that truth seeking is part of the current Turkish judicial system due to its context, she agrees with the function of

criminal justice to determine material fact. However, younger lawyers who did not witness the initial attempts at transitional justice in Turkey first hand have a different point of view about the relation of truth and criminal justice relation given the current condition of trials which generally conclude with an acquittal. Referring to trials in which she participated after 2013, Lawyer D argued that victims' relatives actually know that the perpetrators will not be punished by the state. They are hopeless and think that the judges do not consider their demands. However, criminal justice is still a momentous part of seeking justice in Turkey. Lawyer D explained this situation as a fusion of the functions of a truth commissions with those of criminal prosecution. D said that "after 2013, following acquittals, criminal prosecutions transformed into *de facto* truth commissions." Lawyers for victims and victims' relatives make defenses aimed not at the fair punishment of perpetrators, but aimed at telling the truth and publicly archiving crimes committed under state institutions. I asked lawyer D why this documentation is so important to lawyers and victims' relatives and whether they anticipate that this archive will be useful for future criminal prosecutions of enforced disappearances. She said that they (including herself) have no expectation of punishment given the recent context of Turkey; however, meeting face to face with perpetrators and questioning them are more important than punishment. D added that after acquittal decisions were handed down in some cases, the functions of truth commission and those of criminal prosecution are merged for the need in Turkey. This was beneficial because Turkey has no experience of truth commissions in the past and does not know how they function.

Young, big-city lawyers such as lawyers A, D, and E have an different opinions of lawyers B, C, and F and regional lawyers such as G and H. Younger big-city lawyers are more desperate about criminal justice and its capacity; they tend to merge the functions of truth commissions and those of criminal prosecution. But middle-age lawyers are less flexible and more hopeful about the functions of criminal prosecutions. The latter advocate that the expectation of victims' relatives is to see the perpetrators and to tell their stories while those perpetrators stand in the dock in the courtroom. But in theory, this demand would be satisfied by truth commissions instead of criminal prosecutions. Lawyer B, who has participated in the proceedings since the 1990s,

argued that it is not possible to replace the functions of a truth commission with criminal prosecution. First of all, the victim has the opportunity to speak at length and tell his/her story in a truth commissions; however, this is not viable in a courtroom. “Even if judicial system is well-organized, there is and must be a limit. It is not feasible for one person to talk for three days in a trial.” She also argued that criminal prosecution should “put an end” on case. If a criminal prosecution does not limit the subject of a case and concretely specify the responsible individual – briefly, not put an end on a case – society will not accept the existence of the crime of enforced disappearances. The second aspect of non-overlap between truth commissions and criminal prosecutions is that perpetrators do not participate in trials on their initiative and do not accept their responsibility for enforced disappearances. Rather, the state defines and punishes crimes committed by the state’s own officials. Lawyer B assumed that this situation is itself an example of acceptance and apology.

When I asked about their previous expectations and their sense of justice before acquittals were handed down, especially before 2013, all described almost the same picture with respect to trials. Alleged perpetrators in the cases defended themselves, arguing that they were not guilty, that they were fighting terrorism in Southeast Turkey, that they broke the blockade of the PKK in the region, that they saved the people from the PKK’s cruelty, and that they reestablished the laws of the Republic of Turkey in the region. They did not accept individual responsibility for the crimes but argued that they acted upon the state’s order to save the region. At first glance, their defenses were right. However, when victims’ relatives commenced to tell their version of the story, to tell the details of a story composed of human rights violations, the whole picture came into focus. Lawyer B said that “it might be true that state commanded you [perpetrators] to fight against terrorism, but did it command you to rout out persons by butt stroke at midnight? Did it tell you to disappear persons in tunnels?” At the corridors of the courtroom, the defendants have threatened victims’ relatives and lawyers to pay them back despite of their defendant position in trial. However, through the agency of telling the different sides of the same story, victims’ relatives felt a sense of social consolidation. After the Ergenekon case, lawyer A said that “the sense of fear among victims’ relatives began to dissolve” and “Şırnak Bar had recuse to prosecution with

the collective application of society of the region". Lawyer G a regional lawyer said that "these initial trials were a ray of hope." However, as lawyer D put it, the political will changed after the failure of the peace process and expectations from the prosecution process began to disappear.

In my opinion, middle-ages interviewees elaborate the criminal justice perspective by referring to theory and do not generally talk about the current situation. Because of that, I asked what they think of the acquittals in recent trials in Turkey. Lawyer C said that the acquittals intensified the grief of victims' relatives, but she offered no solution to this problem in the context of Turkey. However, lawyer B's argument included reasoned support for criminal justice in Turkey in spite of its corruption. She stated that if there is acquittal despite strong evidence of the crime, this decision would be discussed in society and labelled a political decision. For instance, "in the case of Temizöz and others, in spite of the acquittal of Cemal Temizöz, nobody says that Temizöz was not involved in these crimes." Lawyer F, like lawyer B, affirmed that the acquittal in the defendants in the Temizöz and others case despite the abundance of evidences as well as the non-investigation of enforced disappearances in the Ergenekon case showed that punishment not be possible in many cases. However, the discussion of cases is itself significant for society and cannot occur without a criminal prosecution process. Lawyer B and F argued that official truth commissions might create a similar effect in the society but not as much as trials in the context of Turkey. B said that "even a hard-hearted person who reads the news about the bones of children found in Dargeçit and that the alleged perpetrators of this crime were acquitted ... will ask who perpetrator is and demand that the state find and punish those perpetrators." Lawyer B, who experienced the 1980 coup d'état and the 1990s, elaborated on criminal justice as a process beyond concrete consequences. She said that "it is not simple to punish enforced disappearances under this state formation and this judicial system; however, if I did not believe in the efficiency of law and justice, I would not be lawyer now. Beyond punishment, it is important that the courtroom and judicial process be used as a platform."

According to lawyer E, the expectations of victims' relatives are similar to those of lawyer B: the process rather than punishment is important. However, lawyers A, D and G argued that the expectations of victims' relatives and their

lawyers from trials decline because of the denial of crime by defendants and the state, the absence of political will to punish them, and the acquittal decisions. Their main purpose was transformed into seeing perpetrators standing in the dock. Furthermore, according to A and D, this is not the real demand of these victims' relatives. It is just acceptance of the current situation because the possibility of punishment is absent. However, acceptance has various consequences. Lawyer A said that a man whose father was forcibly disappeared endeavored to collect evidence in the Mete Sayar case, but his expectation was not for punishment, only to meet the alleged perpetrator face-to-face. Moreover, lawyer D tells different story. The psychological condition of victims' relatives and lawyers causes a decline in effort for the cases. However, regional lawyer H represents the fact that there is no correlation between lawyers' expectations from criminal prosecution and their identities. Unlike the despair of lawyer G who is another regional lawyer, H concedes that it is true that political context dominates the judiciary, but after a referendum or an election, a new political context might turn judiciary in a different direction. Earlier trials that did not satisfy victims' justice demands can be brought to light in this new direction of jurisdiction.

5.1.2 *Are Obstacles to Fair Criminal Prosecution Produced by the Political or Judicial Systems in Turkey?*

I asked the eight lawyers whether the problems of prosecuting the cases of enforced disappearances is the consequence of legislation in Turkey or of the performance of judicial actors as well as whether the criminal prosecution would be fairly managed if judges were replaced with human rights lawyer without any change to Turkish laws. All interviewees asserted that there is both a lack in the legislation and corruption in the actions of legal actors. Lawyer E affirmed that there are problems as a result of the fact that ICPPED was not signed by Turkey, such as the absence of a definition of enforced disappearances in the TCK; however, the real problem is the mentality of the state. Lawyer F considered that reforms made after 2005 as part of the EU adaptation process positively altered the legal profile of Turkey. Lawyers F, G, and H affirmed that the statute of limitations and the absence of a definition of this crime in TCK can be overcome by the agency of judicial opinion; however, the

main obstacle is the inertia of judicial actors and pressure on them. Lawyer G complained that the crimes of the 1990s are crimes against humanity, but the jurisprudence does not prefer to use this term. With reference to the “systematic commission” element of crimes against humanity in the TCK Article 77, he said “if there is a murder, whether or not it was systematically committed has no importance because this crime has a perpetrator. Nevertheless, there is political intervention in the judicial system and also pressure on attorneys and public prosecutors. No prosecutor can properly present the cases due to fear and restraint.” Lawyer H argues that deficiencies in the Turkish legal system cause a mistrust of justice, but the origin of this problem is impunity rather than the inadequacy of legislation. He said that “if the state wants to prosecute some people without political interest, hundreds of them will get life sentences.”

Five of these lawyers, before being asked, referred to the transfer of cases as a tool of impunity and proof of a political mentality that is the real cause of the ineffectiveness of the criminal process. Lawyer A said that “the transfer of cases has a place in laws. But I think nobody thought that this law would be used to prevent the participation of one side’s relatives and lawyers in a trial. This usage, which conduces to impunity originates from state’s mentality.” I asked how and why the state transferred cases from one city to another and how such transfers foreclosed the expectation of justice. Lawyer D affirmed that cases such as the Dargeçit case is not merely concerned with a few defendants and two victims; they are concerned with all the people of the region, and all of them want to participate in the trials. Lawyer F narrated that “although many people have participated in the trials, there has been no security problem in Mardin or in Şırnak. But Musa Çitil [the defendant] is a person who is wellprotected, and the case was transferred to Çorum where there is no airport, it is remote, and there is a conservative population. The transfer of cases is a method of the state to protect itself.” Owing to the transfers, the link between the court and the crime scene is cut off, the gathering of evidence becomes more difficult, and the participation of both victims’ relatives and their lawyers becomes challenging due to reasons such as transportation costs. Lawyer A says that cases in which almost the whole society of the region participate, such as that of Temizöz and others case in Diyarbakır, have been

transferred to “strange cities” which are conservative, such as Çorum and Adiyaman. Furthermore, she noted that she, some families of victims, and other lawyers continue to go these “strange” locations – long distances are not barrier for them. For instance, a family that had migrated to Switzerland in the 1990s came from there to all the trials in the Mete Sayar case in Ankara.

The transfer of cases is decided by a hierarchical plan. The actors and institutions of this decision are the court, police department or gendarmerie, the governor, the Ministry of Justice, and the Supreme Court. When police officers of a region where trials are taking place affirm they cannot maintain security at the trials, higher institutions do not risk disapproving of a demand for transfer. Lawyer F tells the story that Tahir Elçi (a famous human rights lawyer murdered in 2015 in Diyarbakır, a prominent figure in enforced disappearances cases in Turkey) blamed someone high within this hierarchy by asking who is responsible for the transfers and whether one police officer’s request causes this atmosphere of impunity. According to all interviewees, the motivation to transfer cases is obviously neither police officers’ requests nor the security problem, it is a product of the political system. Lawyer G explained the situation by saying that “the transfer of cases is an attempt to politically intervene in the cases. Otherwise, it is not possible that the state cannot provide security for only one trial.”

5.1.3 *Which Type of Criminal Prosecution Affects a Sense of Justice: Symbolic or Legal?*

Lawyer B’s argument in the initial cases that “it might be true that State commanded you [perpetrators] to fight against terrorism, but did it command you to rout out persons by butt stroke at midnight? Did it say you disappear persons in tunnels?” creates the circumstance that the perpetrators of these crimes have individual responsibility. The abuses are the consequences of the personal corruption of state officers. If this is true, it is expected that lawyers demand the punishment of perpetrators who personally committed the crime. However, according to all interviewees, there is obviously a political will beyond personal responsibility. If this scenario is true, they consider prosecuting the “commander” in the background instead of just the gunman. I asked them whose criminal prosecution is hypothetically fairer for them: the criminal

prosecution of fifty soldiers who forcibly disappeared persons or the prosecution of one commander responsible for just ordering the disappearances. Lawyer G and H assert that the commander must be prosecuted in order for it to have a deterrence effect. H said, “there are investigations into tens of civilians who were alleged perpetrators, but there is not a single investigation into a police officer or a political actor (...) though the ‘commander’ should stand trial first.” I did not receive an answer to my hypothetical question from big-city lawyers; they merely describe current situation of criminal justice in enforced disappearances cases according to them. Nevertheless, that they have a sense of justice that prioritizes the prosecution of commanders, just like regional lawyers.

Lawyer A expressed that the judicial system does not consider the subject of these cases to be a part of state policy. But during the 1990s, there were some groups commanded by one leader and those groups were aware of each other. Defendants have said that they knew nothing about the crimes, they were just doing their work, and they did not remember. Lawyer D affirmed that “because of the fact that those people committed terrible crimes, their memory denies these crimes. Their defenses were such as said automatically without changing in all trials. They change their memory by changing victims’ statute or by forgetting the crimes.” In addition to the absence of confessions, some people are protected by the state according to these lawyers. Lawyer E gave the example of Musa Çitil who was prosecuted for enforced disappearances, acquitted, and then appointed as gendarmerie regional commander after the case. Interviewees noted that there are certainly examples of officers misusing their power without a concrete command toward human rights crime. However, the real problem is the judicial system focus on lower ranking officials and soldiers involved in the crime and ignoring chain of command. According to them, the political will in Turkey protects those high in the chain of command rather than those at lower levels.

5.1.4 *Is International Human Rights Law an Effective Legal Mechanism for Enforced Disappearances in Turkey?*

International human rights law is not deemed an effective tool in domestic criminal prosecution process. Lawyer D narrated “in the case of Ankara

JITEM, a lawyer wanted to use Chile as an example, but the chief judge said, ‘This is not Chile’. Or in the case of Kulp, the chief judge did not know about the ECtHR decision in the case. Even if you have full knowledge of international law, there is nobody to whom you can express your ideas.” Lawyer B admitted that “we have no expectation from domestic law to punish enforced disappearances, but we do expect it from the ECtHR.” Lawyer H affirms that they intend to appeal to the ECtHR as soon as possible. He tells his story justifying his preference for international legal mechanisms: “Yesterday I went to the prosecutor to take some dossiers. I wanted to photocopy the dossiers of twenty or so murdered persons. He made pretexts for not giving the photocopies. After that, he distributed these dossiers to different prosecutors. They try to prevent us from accessing the dossiers. In this circumstance, getting results is impossible. It should be appealed to the Constitutional Court and then the ECtHR as soon as possible.” Because of answers like this, I focused to the ECtHR rather than the more general aspects of international human rights.

Lawyer A remembered that the ECtHR have used as an escape during the 1990s. From the 1990s onwards, this mechanism has been important for the documentation of crimes. But all interviewees similarly argued that the contemporary decisions of the ECtHR and their practices in Turkey were disappointing for them. Lawyer A assumed that Turkish legislation is adequate for implementing the ECtHR decisions on enforced disappearances. However, she continued that “in the 4th jurisdiction pact [in Turkey], there is an article that if the ECtHR decides that there was a violation you have the right to execute this decision by applying to the public prosecution office within three months. Although there are lawyers who demand the execution of decisions by referring to this article, it is not practiced.” As we discussed above, the problem is political will rather than the limitations of the legislation. Lawyers C and D recalled the responses of government members to negative decisions of the ECtHR or in the Reports of Council of Europe: “We are not a banana republic” and “I repay it”. Lawyer F affirmed that this situation does not pertain to the case of Turkey, it is problem of the ECtHR system that has no executive or oppressive mechanism to compel states to implement its decisions. There is just a compensation punishment for the states, and the governments think they can escape their responsibilities by paying the compensation.

Lawyer A noted that the ECtHR is not just a judicial mechanism immune from politics, and because of that, sanctions are not obliged to have a judicial character. They can be international relational and political sanctions. Moreover, lawyer H reported that after the beginning of new OHAL in Turkey (after 15 July coup attempt), the ECtHR has passed the responsibility on to Turkey and does not want to get involved in the process.

Despite the insufficiency of the ECtHR to bring about justice in enforced disappearances cases, these lawyers attend to its decisions in order to create awareness in society. Lawyer B said that the decisions of the ECtHR indicate the responsibilities of the state, differentiating them from domestic prosecutions. Lawyer C noted that while the Turkish judicial system has returned acquittals, the ECtHR convicted the state of the same crime, a dilemma that renders the Turkish judicial system's decisions questionable in society. Lawyer A also said that "violation decisions of the ECtHR became an alternative to the official Turkish narrative of history." Lawyer B thought that the ECtHR is one of the most effective mechanisms under these circumstances in the international plan. After these conversations about despondency about the possibility of the punishment of perpetrators in the Turkish context and about the significance of international prosecution mechanisms, I wondered whether if the decision in enforced disappearances cases were almost sure to be acquittals, are the efforts to prosecute crimes domestically just a procedure to exhaust internal judicial authorities in order to take the case to the ECtHR? Lawyer B said "the aim is not just to exhaust internal law, but to correctly exhaust it. If we enumerate the legal steps one to ten, ten is the ECtHR. Each step in this schema renders the next step possible. Every step should be exhausted with regard to the judicial opinion. If we disregard the domestic judicial process – those nine steps before ECtHR – we damage the final step." Lawyer F argued that law is a field of struggle, and that the whole process in the legal field has same importance. Lawyer A noted that lawyers do not act as if they will absolutely win even an ordinary divorce suit; the final decision is less important than the process itself. Lawyer C says that "law is a method for saying our words by grounding them in law which is powerful in international and internal arenas."

5.1.5 *What Are Lawyers' Relationships with Victims' Relatives and with Society in the Region? What are the Relationships of Big-city Lawyers and Regional Lawyers with Each Other?*

Enforced disappearances trials are fragmented in Turkey. First, the group of regional lawyers is different from the group of big-city lawyers. The former is also fragmented within itself with regard to their experiences. Second, there is a separation between victims' relatives and their (generally regional) lawyers. Lawyers B, C, and F did not criticize the current relationships in the prosecution process that is aimed to be harmonious. But the opinions of lawyers A, D, and E (who are younger) reflected the different situation. They narrated that they do not have direct relations with victims' relatives. Regional lawyers are in contact with victims, and other lawyers are in contact with those regional lawyers mostly via the law associations. However, this relationship between the two lawyer groups did not exist from the beginning of the trials. Creating cooperation was not easy for the interviewees; it took a long time. Lawyer D said "they thought our purpose is to prepare projects by instrumentalizing the cases; they think that we are never understand their situation." Lawyer F explained that they try to remain secondary, leaving primary decisions to regional lawyers. Some regional lawyers who suffered terribly in their past are introverts. They are not open to both groups of lawyers. For instance, as lawyer A puts it, a lawyer in Şırnak can be closed to the ideas of a lawyer in Mardin, they can closely cooperate with both Turkish and Kurdish lawyers, and they can make decisions by themselves. However, other lawyers complain about these behaviors. Lawyer A said this situation varies from person to person. A lawyer whose family member was murdered is open to cooperation with all other lawyers. The only variable in the fragmentation of lawyers is obviously not whether they are victims of the crimes in the current cases. Ethnicity and social class differences are other important variables. Lawyer D said that young regional lawyers are more open to cooperation but that there is tension between them due to socio-economic differences. Lawyer H, who works in the region, agreed with lawyer D about the subject of cooperation and tension, but he argued that the tension had a different root. He asserted that

If there are well-known cases that remain on the agenda, lawyers come here from the west [his term for big-city lawyers], and they follow the cases. Their arrival depends on whether the cases can be appealed. There are only a few who say, ‘grave human rights violations have occurred in this region, I should go here and taken interest in the cases’ – despite the fact that nearly everybody experiences the violation of rights nowadays.

Briefly, regional lawyers also assert that the tension between the two groups is not based on socioeconomic differences but is derived from differing identities, birthplaces, and workplaces, which are meaningful in the Turkish context. I think both of the two lawyer groups tend to cooperate with each other and are content with this cooperation, but they persistently emphasize the distinction between them, and each group creates roles for the other.

Lawyer A and D assumed that there are also egocentric problems among regional lawyers. They blamed other lawyers for not sufficiently preparing defenses. They argued that the belief that there will be an acquittal in the case causes inertia and creates a political atmosphere in courtroom. Regional lawyers began to act like victims’ relatives, merely telling a story. Lawyer D said that “it is true that there is a political side to crimes and trials; moreover, this is a criminal prosecution. Perpetrators should be defined and punished. Somebody should gather evidence, call witnesses, etc. But a strategic plan remains secondary.” Lawyer A said, “some lawyers want to revolutionize in courtroom.” Lawyer D referred to those lawyers’ “humanity,” saying that “they are also humans, they have human and egocentric struggles. It is remarked because the cases are human rights cases, but they are not necessarily the best persons in the world to work on human rights.” Lawyer E noted that this hierarchical, egocentric struggle among lawyers occurs in all cases. Lawyer A clearly stated that “I was disappointed when I observed that these egocentric relations harm our human rights struggle.” There is neither harmony within regional lawyer group nor acceptance of other lawyers. In fact, a very small group of persons works on these cases; one lawyer may have five or six different cases as broadly different as those of Musa Anter or Ankara JİTEM. I asked if regional lawyers demand their help because of the low number of lawyers. They mentioned some attempts of young lawyers, such as “strategic

case commission” in Diyarbakır, to organize their strategy in cases. However, hierarchical order in the region is still powerful among other age groups. I want to note that five interviewees mentioned that Tahir Elçi was a lawyer in most of the cases that people of the region liked, respected, and trusted. After his murder, his absence was felt in cooperation attempts and prosecution processes.

Of course, it is not possible to generalize about the sense of justice of human rights lawyers who work on enforced disappearance cases by examining only eight lawyers. However, there are few lawyers working in this field despite the importance of subject. In my opinion, their senses of justice are different with regard to their experiences. Lawyers who never experienced hope about coping with past tend to merge various functions of restorative and retributive justice. Truth and justice have the same importance for them, and they lean toward changing the elements of criminal prosecution. However, lawyers who witnessed the beginning of the cases separate truth seeking from justice. Although they think both are indispensable, main purpose and duty of criminal prosecution is not and cannot be to uncover truth but to punish perpetrators and bring about justice. Some lawyers consider criminal prosecution to be a step that should be exhausted before resorting to the ECtHR. Some lawyers believe that despite the insufficiencies of current criminal prosecution processes, these cases can be used as evidence if the political atmosphere in Turkey someday changes with reference to the role of trials in documentation. Other lawyers regard trials as a result of victims’ demands for justice; because of that, retributive justice tools cannot be abandoned. Some see trials as *mélange* of the means of retributive and restorative justice, while others describe criminal prosecution as a consequence of the rule of law. Briefly, there are various significations for criminal prosecution, and some are the opposite of others. Furthermore, none of their senses of justice does not exclude or not take the criminal prosecution of enforced disappearances as secondary; merely they endeavor to change or expand its functions with regard to Turkey’s context. Their approach to criminal prosecution is as a process when the punishment of responsible persons seems to be the main purpose of criminal prosecution. I suppose that they still prioritize punishment, but due to the context of the Turkish judiciary, they must to (rather than choose to) prioritize the

prosecution process. The victim-centered arguments of lawyers in support of retributive justice is different from the discussion in the transitional justice literature. And finally, neither the limitations of the Turkish criminal law nor the ongoing conflict in Turkey cause them to give up criminal prosecution of enforced disappearances. Although the understanding of retributive justice, the causes and consequences of this preference, and expectation from criminal prosecution distinguish them from proponents of retributive justice in the literature, the sense of justice of Turkey's cause lawyers and criminal law cannot be separated from each other.

6

Conclusion

For me human rights simply endorse a view of life and a set of moral values that are perfectly clear to an eight-year-old child. A child knows what is fair and isn't fair, and justice derives from that knowledge.

– Tom Stoppard, *The Guardian*

The prohibition of burial and the obfuscation of the fates of adversaries of a regime, long been among political power's cruelest methods. However, since the classification of these practices as enforced disappearances, which are crimes against humanity with regard to international human rights principles, they have been differentiated from the crimes of homicide and abduction committed by the state. Enforced disappearance goes beyond punishment of the opponents of regime. This practice of the state places such persons outside the protection of the law; and also it is practiced to terrorize, intimidate, suppress, and dominate the community to which victims belong. "The feeling of insecurity generated by this practice is not limited to the close relatives of the disappeared, but also affects their communities and society as a whole."¹ Due to the fact that this gruesome feature of enforced disappearances causes

1 "International Day", *UN* online.

lifelong suffering for the victims' relatives and intense fear among opponents of the regime, I agree with the tendency that the accountability for this crimes against humanity should a part of any reconciliation and peace attempts in society, which has experienced this abuse in their past.

Arendt suggests that for any wrongdoer, the most powerful armor to escape punishment is to forget the crime.² However, accountability for past abuses reflects a choice to settle accounts instead of forgetting or repressing the violent past. Furthermore, remembering cannot be only purpose of accountability. Justice for past abuses should be on the agenda if the ultimate aim is reconciliation and peace in society; the lack of justice creates impunity, and the “tentacles of impunity” affect both the present and future of society. Restorative justice theory asserts that the utilization of retributive justice mechanisms before the consolidation of peace in a sharply divided society can endanger the transition process. Some states preferred to not cope with their violent pasts, or to use restorative justice tools, and to ignore retributive justice, which is considered an obstacle to peace and reconciliation in society. In this work, I argue that the abandonment of justice in favor of peace is the main problem. The absence of retributive justice tools generally leads to impunity. Examples of states in this work as Argentina, Chile, Guatemala, South Africa, and Spain show that the consolidation of peace in society without satisfying the sense of justice – and the achievement of this justice without legal mechanisms – is impossible for the crime of enforced disappearances. Although regimes seek to escape from holding persons accountable for their crimes owing to their political interests or their assumptions about peace, the societies of these states have not generally agreed with offers of amnesty to perpetrators by depending on their right to truth and justice and by demanding the criminal punishment of perpetrators.

In this work, I examined the role of retributive justice mechanisms in generating a sense of justice concerning past human rights abuses, specifically in the cases of enforced disappearances in Turkey during the late 1980s and 1990s. The number of individuals forcibly disappeared is estimated at 1.352

2 Arendt, *Responsibility*, 95.

persons,³ and enforced disappearances in the history of Turkey have generally been marked by impunity. However, accountability efforts observed in this process and in the peace process include the investigation of state's role in this crime by the state's own institutions and in official reports, restorative justice methods derived from society and in part from the state, and domestic trials of enforced disappearances cases. The crimes that are the subjects of 15 criminal cases are actually considered crimes against humanity under the Rome Statute Article 7 and TCK Article 77. However, TCK Article 77 ultimately differs from the Rome Statute Article 7, the latter of which defines enforced disappearances as crimes against humanity. The negligence and deficiencies of elements of crime in TCK Article 77 are important obstacles for criminal prosecution, but these obstacles can be overcome by different interpretation of law and the real obstacle is the conduct of the Turkish judicial system rather than law's itself.

The political and judicial insufficiency to seek justice shattered the possibility of peace in Turkey during the transition process. Actually, Turkey is no ordinary case of traditional transitional justice theory; it is an example of "proto-transition," "transition in ongoing conflict," and "conflicted democracy." However, the transition feature itself is questionable in Turkey. Because the policies vis-à-vis the Kurdish question of the military Junta the 1980s and of civilian governments the 1990s and 2000s have actually had same tendency. There is disengagement between AKP's governments and the former regime of Turkey, but this detachment is not evident in the approach to the Kurdish issue. Mechanisms of transitional justice did not become an essential part of peacebuilding strategies. The failure of either justice or peacemaking strategies jeopardizes the viability of other. The examination of judicial attitude of the Turkish state about human rights crimes committed in the violent years of armed conflict reveals that there was no possibility of a peace process because there was no justice. I do not ignore the risk of the political manipulation of justice practices during an ongoing armed conflict. It is true that seeking of justice in the absence of peace is complicated. But I suggest that the solution to this problem is not to abandon endeavors to bring about justice before the

3 Göral et al., *Executive*, 4.

accurate end of conflict. Offering amnesty for the consolidation of peace precludes the possibility of sustainable peace due to the dissatisfaction of a sense of justice. I should not be to sacrifice justice to achieve peace but should be to make peace without impunity. In my opinion, what should be confronted is not the seeking of justice before or during peace but the politicization of justice.

When I assert that the peace and justice are indispensable components of each other in any society that has experienced enforced disappearances, I am making a correlation between the sense of justice and law, specifically criminal law. I attribute this correlation to example of states that show the prominent role of retributive justice in real reconciliation in society, to Turkey's failure to make peace without justice, and to legal actors who are part of the cases of accountability. For depicting the sense of justice related to law and criminal justice, I focused on the sense of justice of cause lawyers who work on enforced disappearances cases in Turkey. I realize that it is not possible to deduce the sense of justice of cause lawyers who work on enforced disappearances by analyzing the assumptions of only eight lawyers; however, if we consider that there are few lawyers working in this field, and that this sample – which is also composed of lawyers from different socioeconomic and sociopolitical strata of society – can make a sense. There are different approaches to criminal law among them. These lawyers do not have the same tendencies on subjects such as the prioritization of truth or justice, the belief in the possibility of prosecution in domestic or international courts, the perspective about victims' demands, the approach to the utilization of trials as a *mélange* of retributive and restorative justice tools, the hope for change in the conduct of the Turkish judiciary, and change in the functions of criminal prosecution. However, none of their senses of justice exclude or take the criminal prosecution of enforced disappearances as secondary. And I suppose that they still prioritize punishment, but due to the context of the Turkish judiciary, they must (rather than choose to) prioritize criminal prosecution as a process. Neither the limitations of Turkish criminal law nor the ongoing conflict in Turkey convince them to abandon criminal prosecution of enforced disappearances. Although their comprehension of criminal justice distinguishes them from proponents of

retributive justice in the literature, the sense of justice of Turkey's cause lawyers and criminal law cannot be separated from each other.

The research in this thesis focused on transitional justice theory, international human rights principles, the reactions of states vis-à-vis the crimes of enforced disappearances in their pasts and their consequences, the important role of retributive justice in these states' societies, the history of Turkey's enforced disappearances, its accountability efforts and its peace process which lacked justice, and the role of retributive justice in specific to enforced disappearances in Turkey. In answer to my inquiry about the role of retributive justice in generating a sense of justice with respect to cases of enforced disappearances in Turkey, I argue that to consolidate peace in society, the sense of justice of this society must be satisfied. And retributive justice means are still prominent instruments – despite their inadequacy – to achieve justice in the case of Turkey. Furthermore, the sense of justice specific to this kind of atrocity is a complicated subject. During the preparation of this thesis, I asked two questions beyond the problematic of this work. First, criminal justice is a requirement during a transition process, but how can the legal system be protected against political manipulation? What measures would realize this aim? My second question concerns the variety of the senses of justice related to human rights abuses in society. My impression is that criminal justice is prominently positioned against impunity, these are the reconciliation in a society with sharp divisions in its past. Transitional justice mechanisms cannot be shaped according to the demands of only one part of this society, be they victims or politicians. Society should be considered as whole and the sense of justice should be satisfied beyond personal demands because, as mentioned before, people might claim to kill perpetrators or to forgive them without any punishment. However, I inquire the different justice assumptions in Turkey about same crimes. Especially, what is the sense of justice of those parts of a society that neither political stakes on neither the side of victims nor perpetrators – of ordinary citizens? I think that these and more questions about the sense of justice for human rights crimes can be the subject of other works.

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