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Authoritarian Resistance and Judicial Complicity: Turkey and the European Court of Human Rights

Dilek Kurban*

Abstract

International courts face growing contestations to their authority. Scholars have conceptualized the forms and grounds of such resistance as well as the response of international courts. Much empirical research has focused on regional courts with human rights mandates. Yet, in focusing on overt resistance, not differentiating between authoritarian and democratic regimes, and depicting courts at the receiving end of resistance, scholarship does not account for discrete forms of resistance tolerated and enabled by courts. In addition, studies on the European Court of Human Rights (ECtHR) base their analyses exclusively on judgments, which constitute a mere 9 per cent of this Court's jurisprudence. This methodological bias, combined with a time frame limited to the post-2010s when the ECtHR has faced public contestations to its authority, have led to inaccurate and incomplete conclusions regarding the Strasbourg Court's response to backlash and illiberalism. This article calls for a goal-orientated conceptualization of resistance and a methodology that analyses the ECtHR's non-judgment jurisprudence in its entirety to reach accurate conclusions on its response to authoritarianism. Based on an in-depth and contextual analysis of the ECtHR-Turkey case, the article puts forth empirically grounded insights on authoritarian resistance and judicial complicity. It argues that authoritarian regimes seek to lessen international courts' oversight of their policies, not to undermine the authority of these courts as such, and that international courts are not always resilient vis-à-vis *authoritarian resistance but can also be complicit with it. The forms of authoritarian*

* Visiting Researcher, Berlin Social Science Center (WZB), Germany. Email: dilek.kurban@wzb.eu.
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resistance and judicial response depend on the institutional set-up of the human rights regime in question as well as the ways in which international courts exercise their review powers. The two phenomena influence and reinforce each other, resulting in the simultaneous or consecutive occurrence of various forms of authoritarian resistance and judicial response depending on the particular political context in which they interact.

1 Introduction

Zeynep Mercan was a judge in a small town in Turkey. Her life was upended on 17 July 2016 when she was dismissed from her job and arrested on accusations of being linked to the Gülen movement,[1] which the government had accused of being behind the coup attempt on 15 July. There was no evidence to support Mercan's arrest, let alone the charges of 'violating the constitutional order'. When a lower Court upheld her pre-trial detention, Mercan went directly to Strasbourg, skipping the Constitutional Court (Anayasa Mahkemesi [AYM]). Her reason was simple; two AYM judges had also been arrested on the basis of the same charges and procedural irregularities as Mercan, and, moreover, dismissed from the AYM with the unanimous decision of the remaining judges, based solely on their subjective persuasion that their colleagues were linked to the Gülenists.[2] Clearly, thought Mercan, she could not get a fair trial at the AYM, and the European Court of Human Rights (ECtHR) would not consider the constitutional complaint mechanism to be effective under these special circumstances. She was wrong; the ECtHR dismissed her case on grounds of non-exhaustion of domestic remedies.[3] Meanwhile, Alparslan Altan, one of the dismissed AYM judges, had filed a constitutional complaint. When his former colleagues finally addressed his case, Altan had been in pre-trial detention for 18 months. The result proved Mercan's point: a unanimous inadmissibility decision.[4] Over a year later, the ECtHR found both the initial pre-trial detention and its prolonged nature to have infringed on Altan's right to liberty.[5]

The different ways in which Mercan and Altan pursued justice at the Strasbourg Court – one skipping Turkey's highest Court and the other exhausting all domestic remedies – determined the outcome of their cases. One never had her day with the ECtHR, while the other was vindicated – although this did not change his situation;

[1] An Islamic preacher, Fethullah Gülen is the leader of a transnational religious movement, the non-transparent structure, operation and goals of which have been the subject of speculation and controversy. Members of the movement have gained increasing power and influence in the areas of education, judiciary, business, police and state bureaucracy since the early 1980s and particularly after 2002 thanks to its political alliance with the Justice and Development Party (Adalet ve Kalkınma Partisi).

[2] European Commission for Democracy through Law (Venice Commission), Turkey: Emergency Decree Laws no. 667-676 Adopted Following the Failed Coup of 15 July 2016, Doc. CDL-AD(2016)037, 12 December 2016, para. 135.

[3] ECtHR, *Mercan v. Turkey*, Appl. no. 56511/16, Decision (Inadmissibility) of 8 November 2016. All ECtHR decisions are available at http://hudoc.echr.coe.int/.

[4] Anayasa Mahkemesi (AYM), *Alparslan Altan*, Appl. no. 2016/15586, Decision (Inadmissibility) of 11 January 2018.

[5] ECtHR, *Alparslan Altan v. Turkey*, Appl. no. 12778/17, Judgment of 16 April 2019.

he remains in jail, serving a sentence of over 11 years.[6] Had Mercan followed Altan's route, she would have almost certainly been rejected by the AYM and won in Strasbourg, as happened in several other cases concerning post-coup purges and arrests discussed in this article. Moreover, her case would have appeared in the ECtHR's statistics, been subject to supervision by the Committee of Ministers (CoM) and been 'seen' by ECtHR scholarship where doctrinal analyses largely remain limited to judgment jurisprudence. But one thing would have not changed: the ECtHR would still not have ruled against Turkey's constitutional complaint mechanism. Thus, despite having found Article 5 violations in prolonged pre-trial detentions of several journalists and over 400 judges and prosecutors, the ECtHR has not declared that Turkey's legal system does not offer any real remedies for victims of post-coup purges. This was so even when the ECtHR passed judgment in cases that the AYM had dismissed,[7] such as Altan's, or found no violations.[8] Strasbourg remained silent on the violation of a right to remedy even after the AYM, in dismissing the complaint of yet another imprisoned judge in June 2020, openly defied the ECtHR on the grounds that 'Turkish courts are much better placed than the ECtHR' in interpreting domestic law and that the latter's performance of that task was 'inappropriate'.[9]

Such restraint is not necessarily evident in the ECtHR's rule-of-law jurisprudence. In a series of recent rulings, the ECtHR found that Poland's high courts and judicial bodies packed by government loyalists did not constitute 'courts established by law' within the meaning of the European Convention on Human Rights (ECHR).[10] Court packing in Poland had reached such gravity, concluded the ECtHR, that it eliminated the possibility of a right to a fair trial, including at the Constitutional Tribunal (CT). The ECtHR went as far as exempting an applicant from exhausting domestic remedies in light of 'the general context' in which the CT operated and the absence of 'sufficiently realistic prospects of success for a constitutional complaint' in Poland.[11] Although the ECtHR has not (yet) declared this mechanism to be ineffective, it was considered likely (at least until the October 2023 elections resulting in the change of government) that it may grant a blanket exemption to all future applicants, particularly in light of the CT's recent declarations regarding the ECHR's incompatibility with the Polish Constitution.[12]

Thus, whereas the ECtHR allowed a company whose products were withdrawn from the market to skip the constitutional complaint mechanism in Poland, it required a

6 Mercan was released from pre-trial detention after more than two months and was subsequently sentenced to six years and three months' imprisonment. Her case is currently on appeal.

7 See, e.g., *Alparslan Altan*, *supra* note 5.

8 See, e.g., ECtHR, *Ahmet Hüsrev Altan v. Turkey*, Appl. no. 13252/17, Judgment of 13 April 2021.

9 AYM, *Yıldırım Turan*, Appl. no. 2017/10536, Decision of 4 June 2020.

10 ECtHR, *Xero Flor w Polsce sp. z.o.o. v. Poland*, Appl. no. 4907/18, Judgment of 7 May 2021 (concerning the Constitutional Tribunal); ECtHR, *Reczkowicz v. Poland*, Appl. no. 43447/19, Judgment of 22 July 2021 (concerning the Disciplinary Chamber of the Supreme Court); ECtHR, *Advance Pharma Sp. z.o.o. v. Poland*, Appl. no. 1469/20, Judgment of 3 February 2022 (concerning the Civil Chamber of the Supreme Court); ECtHR, *Tuleya v. Poland*, Appl. nos. 21181/19 and 51751/20, Judgment of 6 July 2023 (concerning the Disciplinary Chamber of the Supreme Court); ECtHR, *Wałęsa v. Poland*, Appl. no. 50849/21, Judgment of 23 November 2023 (concerning the Chamber of Extraordinary Review and Public Affairs of the Supreme Court).

11 *Advance Pharma Sp. z.o.o.*, *supra* note 10, para. 319.

12 Ploszka, 'It Never Rains but It Pours: The Polish Consttutional Tribunal Declares the European Convention on Human Rights Unconstitutional', 15 *Hague Journal on the Rule of Law* (2023) 51, at 69.

Turkish judge who had been arrested on serious charges and was facing imminent conviction to first petition a constitutional court that had unanimously dismissed two of its own members and remained silent to their arrests. As serious as the executive capture of courts in post-communist states is, the repression of judges is not nearly as grave as in Turkey. Unlike their Croatian,[13] Russian,[14] Ukrainian[15] and Hungarian[16] counterparts, Altan, Mercan and thousands of other judges (and prosecutors) were not only dismissed from their offices but also barred from the legal profession and charged with serious crimes without due process guarantees.[17] Turkish courts have long been complicit in systemic gross violations and the suppression of political dissent – a fact all too well known to the ECtHR since it started to exercise jurisdiction over Turkey in 1990.[18]

Why then does the ECtHR insist on attributing effectiveness to Turkey's legal system? This article begins to address this question through the lenses of resistance and resilience scholarship. However, this scholarship does not provide sufficient answers. Studies on resistance adopt a narrow conceptualization, limited to overt contestations, leaving out its discrete manifestations. For the most part, they also do not differentiate between democracies and authoritarian or illiberal regimes, the latter of which raise distinct challenges for human rights courts due to the absence of effective domestic remedies and the complicity of national courts in rule-of-law backsliding, legal repression and gross violations.[19] Resilience scholarship, in turn, depicts international

[13] ECtHR, *Olujić v. Croatia*, Appl. no. 22330/05, Judgment of 5 February 2009.

[14] ECtHR, *Kudeshkina v. Russia*, Appl. no. 29492/05, Judgment of 26 February 2009.

[15] ECtHR, *Oleksandr Volkov v. Ukraine*, Appl. no. 21722/11, Judgment of 9 January 2013.

[16] ECtHR (GC), *Baka v. Hungary*, Appl. no. 20261/12, Judgment of 23 June 2016.

[17] Some 3,000 judges and prosecutors were arrested immediately after the failed coup. *Alparslan Altan*, *supra* note 5, para. 14. A further 1,393 were dismissed in the following months. ECtHR, *Turan and Others v. Turkey*, Appl. nos. 75805/16 and 426 others, Judgment of 23 November 2021, para. 18. Scores of journalists, civil society activists and opposition politicians were also arrested. Commissioner for Human Rights of the Council of Europe, Third Party Intervention under Article 36, paragraph 3, of the European Convention on Human Rights, Doc. CommDH(2017)29, 10 October 2017.

[18] On state violence see, e.g., ECtHR (GC), *Aydın v. Turkey*, Appl. no. 57/1996/676/866, Judgment of 25 September 1997; ECtHR, *Kaya v. Turkey*, Appl. no. 158/1996/777/978, Judgment of 19 February 1998; ECtHR, *Kurt v. Turkey*, Appl. no. 15/1997/799/1002, Judgment of 25 May 1998; ECtHR, *İpek v. Turkey* Appl. nos. 25760/94 and 25760/94, Judgment of 17 February 2004; ECtHR, *Ahmet Özkan and Others v. Turkey*, Appl. no. 21689/93, Judgment of 6 April 2004; ECtHR, *Süheyla Aydın v. Turkey*, Appl. no. 25660/94, Judgment of 24 May 2005; ECtHR, *Osmanoğlu v. Turkey*, Appl. no. 48804/99, Judgment of 24 January 2008; ECtHR, *Gasyak and Others v. Turkey*, Appl. no. 27872/03, Judgment of 13 October 2009. On the dissolution of pro-Kurdish political parties, see ECtHR, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Appl. no. 23885/94, Judgment of 12 August 1999; ECtHR, *Yazar and Others v. Turkey*, Appl. nos. 22723/93, 22724/93 and 22725/93, Judgment of April 2002; ECtHR, *Dicle for the Democracy Party (DEP) of Turkey v. Turkey*, Appl. no. 25141/94, Judgment of 10 December 2002; ECtHR, *HADEP and Demir v. Turkey*, Appl. no. 28003/03, Judgment of 14 December 2010; ECtHR, *Party for a Democratic Society (DTP) and Others v. Turkey*, Appl. nos. 3870/10, 3870/10, 3878/10, 15616/10, 21919/10, 39118/10 and 37272/10, Judgment of 12 January 2016. On the prosecution and imprisonment of Kurdish parliamentarians, see ECtHR, *Sadak and Others v. Turkey (no. 2)*, Appl. nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, Judgment of 11 June 2002.

[19] On the authoritarian challenge to international law broadly, see Petrov, 'When Should International Courts Intervene? How Populism, Democratic Decay and Crisis of Liberal Institutionalism Complicate Things', 32 *European Journal of International Law* (*EJIL*) (2022) 1.

courts at the receiving end of resistance, be it by democratic or authoritarian regimes, neglecting instances where courts may exercise restraint for reasons other than in response to contestations. For the ECtHR, the main reason has been its docket crisis, although the Turkish case raises questions as to the presence of less conspicuous factors as well. Finally, ECtHR studies, for the most part, restrict their case law analyses to judgments, which make up only around 9 per cent of jurisprudence, and their time frame to the post-2010 period, when the ECtHR was facing public contestations to its authority. This methodological bias leads to incomplete and inaccurate findings on authoritarian resistance and the ECtHR's response to it.

As alternative concepts, this article advances authoritarian resistance and judicial complicity to explore and explain the ECtHR's response to illiberalism. Authoritarian resistance goes beyond governments' non-execution of specific judgments and entails their non-compliance with norms underlying the mandates of human rights courts. It concerns overt defiance of authority as well as discrete resistance through strategies aiming to diminish the oversight of international courts without severing ties with them. Judicial complicity goes beyond the exercise of unwarranted restraint in the adjudication of sensitive domestic issues and extends to the accommodation of authoritarian strategies of avoidance. It entails not only finding no or few violations in the adjudication of politically sensitive cases, which do raise serious breaches, but also abdicating authority by refraining from the substantive review of justiciable cases through strike-out rulings or inadmissibility decisions.

This article takes the relationship between the ECtHR and Turkey as a case study to illustrate a broader trend in the Council of Europe (CoE) system – namely, authoritarian resistance through international human rights courts. A prototype of authoritarian resistance, Turkey has engaged in entrenched rule-of-law violations, state violence and legal repression (norm non-compliance) since it ratified the ECHR in 1954, and has made efforts to diminish the ECtHR's oversight (avoidance of supranational judicial authority) while remaining within the CoE.[20] At the same time, Turkey is hardly an outlier in Europe. Russia has long engaged in systemic gross violations against minorities, the persecution of political dissidents in ways ranging from physical violence to legal repression and the crackdown of civil society organizations. In recent years, Hungary and Poland have followed suit by restricting democratic institutions, suppressing civil society and adopting discriminatory laws and policies against sexual minorities. All three states have followed Turkey's lead in covertly resisting the ECtHR's authority, as I elaborate in this article. Thus, an in-depth study of the Turkish case will advance our understanding of how authoritarian states and backsliding democracies can avoid supranational oversight without having to engage in an overt backlash.

The article engages in mixed-methods research. The legal research component is based on an analysis of the ECtHR's judgments and the inadmissibility decisions and strike-out rulings on Turkey's systemic, gross and bad faith violations. In surveying this case law, I have not systematically analysed every single judgment and

[20] D. Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (2020).

decision. Rather, I have traced the evolution of jurisprudential doctrine by analysing the ECtHR's precedent-setting judgments, and the rulings preceding and succeeding them, and the inadmissibility decisions and strike-out rulings concerning politically sensitive cases. The empirical data deriving from socio-legal research is the product of my fieldwork over nearly two decades, where I interviewed numerous Kurdish victims, lawyers, government officials and human rights activists in Turkey (in the Kurdish region, Istanbul and Ankara). In addition, I engaged in participatory observation in internal and public gatherings of Kurdish lawyers and advocates and had conversations with them in social and professional gatherings. In conducting new fieldwork for a larger research project, I held 40 targeted interviews from 2013 to 2017 with Kurdish and British lawyers who litigated before the ECtHR, Turkish and Kurdish human rights activists, Turkish government officials, ECtHR lawyers and judges and European Union (EU) and CoE officials. In this article, I cite several of these interviews and use the rest as background research. In updating my research for this article, I re-interviewed a Kurdish lawyer and surveyed recent ECtHR case law.

The rest of the article proceeds as follows. Section 2 provides a review of scholarship on resistance and response. Section 3 zooms in on the ECtHR-Turkey case as an illustration of authoritarian resistance and judicial complicity. Section 4 revisits resistance and resilience studies in light of the article's empirical findings and discusses the broader implications of the Turkey-ECtHR case for future research.

2 Contestations and Human Rights Courts

There have been growing contestations against the international liberal order by authoritarian, populist and democratic regimes.[21] States have attempted to change international law's norms and practices or to undermine its institutions from within.[22] Subregional and regional courts, whose mandates to receive individual complaints allow them to address sensitive domestic issues, have borne the most. Governments have reacted to adverse rulings by trying to limit the powers of these courts or suspend them[23] or to not comply or selectively comply with their judgments.[24] In more extreme cases, states have partially or fully exited the regional system to which such

[21] T. Ginsburg, *Democracies and International Law* (2021); Krieger, 'Populist Governments and International Law', 30 *EJIL* (2019) 971; Alston, 'The Populist Challenge to Human Rights', 9 *Journal of Human Rights Practice* (2017) 1.

[22] Krieger, *supra* note 21; Contesse, 'Resisting the Inter-American Human Rights System', 44 *Yale Journal of International Law* (2019) 179; Soley and Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights', 14 *International Journal of Law in Context* (*IJLC*) (2018) 237; Alter, Gathii and Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', 27 *EJIL* (2016) 293.

[23] Alter, Gathii and Helfer, *supra* note 22; Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash', 79 *Law and Contemporary Problems* (2016) 141; Contesse, 'Judicial Interactions and Human Rights Contestations in Latin America', 12 *Journal of International Dispute Settlement* (*JIDS*) (2020) 271.

[24] Burkov, 'The Use of European Human Rights Law in Russian Courts', in L. Mälksoo and W. Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (2017) 59.

courts belong.[25] Scholars have tried to make analytical sense of these contestations, as well as the courts' responses thereto. What follows is a discussion of the resistance and resilience literature, with a focus on the ECtHR.

A *(Authoritarian) Resistance*

There are two main viewpoints on contestations to international courts. The holders of the first view characterize all objections as backlash, but they differ amongst themselves in conceptualizing it.[26] According to Erik Voeten, backlash targeting a court's general authority is different from that which solely aims at its authority over a particular country. The former seeks to weaken or end international courts, whereas the latter withdraws from their jurisdiction or deprives individuals of access to them.[27] Courtney Hillebrecht understands backlash as a 'sustained effort to undermine' not only the authority of international courts but also 'the principles on which they are built'.[28] Scholars holding the second view contest conceptualizing all contestations as backlash, though they vary on how best to conceptualize less radical challenges. For Wayne Sandholtz, Yining Bei and Kayla Caldwell, backlash refers to drastic attacks: efforts to shut down a court or limit its competence or accessibility; systematic non-cooperation or non-compliance with it; or withdrawal from its jurisdiction.[29] In contrast, resistance is judgment driven: non-compliance with, or criticism of, specific judgments; non-cooperation in specific cases; or criticism of overall jurisprudence.[30] Mikael Madsen, Pola Cebulak and Micha Wiebusch's alternative for resistance is push-back, which seeks to influence the future direction of a court's case law in contrast to backlash, which seeks to abolish a court or undermine its authority.[31]

Empirical scholarship has adapted these analytical frameworks to case studies, many of which have focused on human rights courts. Regarding the inter-American regime, Ximena Soley and Silvia Steininger distinguish between objection and contestation, which defy particular judgments or the norms underlying them, and resistance and backlash, which target the institution as such.[32] According to Jorge Contesse, the inter-American system has faced attempted or realized withdrawals; reform efforts to weaken its powers; and domestic courts' refusal to implement Inter-American Court of Human Rights (IACtHR) rulings.[33] Scholarship on the ECtHR has focused mostly on overt backlash by two states: Russia's blocking of Protocol no. 14's

[25] Daly and Wiebusch, 'The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court', 14 *IJLC* (2018) 294; Contesse, *supra* note 22; Soley and Steininger, *supra* note 22.

[26] Alter, Gathii and Helfer, *supra* note 22.

[27] Voeten, 'Populism and Backlashes against International Courts', 18 *Perspectives on Politics* (2020) 507.

[28] C. Hillebrecht, *Saving the International Justice Regime: Beyond Backlash against International Courts* (2021), at 22–23.

[29] Sandholtz, Bei and Caldwell, 'Backlash and International Human Rights Courts', in A. Brysk and M. Stohl (eds), *Contracting Human Rights: Crisis, Accountability, and Opportunity* (2018) 159.

[30] *Ibid.*, at 159.

[31] Madsen, Cebulak and Wiebusch, 'Backlash against International Courts: Explaining Forms and Patterns of Resistance to International Courts', 14 *IJLC* (2018) 197.

[32] Soley and Steininger, *supra* note 22, at 240–241.

[33] Contesse, *supra* note 22.

entry into force for six years,[34] the United Kingdom's (UK) efforts to weaken the ECtHR during the 2010s[35] and the Russian Constitutional Court's 2015 decision to selectively implement ECtHR rulings.[36] *Vis-à-vis* the African Court on Human and Peoples' Rights (ACtHPR), resistance has mainly targeted individual access. Tom Daly and Micha Wiebusch show how, in addition to not complying with specific rulings, states have taken advantage of the 'additional avenue for resistance' offered by the two-tier nature of access by not allowing non-governmental organizations (NGOs) and individuals to petition the ACtHPR or withdrawing the declaration that did allow NGOs such access in retaliation for adverse judgments.[37]

Recent developments have put in question the applicability of existing models to illiberal contestations. In the European context, the Polish CT rejected the ECtHR's jurisdiction in rule-of-law cases based on the ECHR's 'incompatibility' with the constitution,[38] a contestation that Madsen, Cebulak and Wiebusch's 'backlash-pushback' binary model does not capture. According to Agnieszka Kubal and Marcin Mrowicki, the CT's defiance does not fit 'the neat analytical box of a "pushback"' because it concerns core rule-of-law issues and has 'potentially … serious consequences' for the ECHR system.[39] Having surveyed all adverse ECtHR rulings ever rendered against Hungary, Ula Kos has found that, since its illiberal turn in 2010, this country has been engaging in a 'subtle backlash, … which due to its concealed nature is largely overlooked in typical backlash studies'.[40]

This emerging scholarship on illiberal contestations by Hungary and Poland aside, I see three main issues with resistance scholarship. First, in characterizing non-compliance as a form of contestation, it takes the judgments of international courts, not the norms underlying their mandates, as the unit of analysis.[41] While Soley and Steininger, and Hillebrecht, draw attention to norm contestation, they focus on norms underlying specific rulings.[42] In authoritarian contexts, states can engage in a systemic norm breach even while complying with existing judgments, particularly

[34] Bowring, 'The Russian Federation, Protocol no. 14 (and 14bis), and the Battle for the Soul of the ECHR', 2 *Göttingen Journal of International Law* (2010) 589; Protocol no. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2004, ETS 194.

[35] Madsen, *supra* note 23.

[36] Aksenova and Marchuk, 'Reinventing or Rediscovering International Law? The Russian Constitutional Court's Uneasy Dialogue with the European Court of Human Rights', 16 *International Journal of Constitutional Law* (*IJCL*) (2018) 1322; Burkov, *supra* note 24.

[37] Daly and Wiebusch, *supra* note 25. On the African Court on Human and Peoples' Rights' risk of becoming non-operational, see De Silva and Plagis, 'A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court', *Opinio Juris* (19 May 2020), available at https://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/.

[38] Decisions on 24 November 2021 and 10 March 2022. For a discussion, see Ploszka, *supra* note 12.

[39] Kubal and Mrowicki, 'Pushback or Backlash against the European Court of Human Rights? A Comparative Case Study of Russia and the Democratically Backsliding Poland', 9 *Russian Politics* (2024) 135, at 135.

[40] Kos, 'Controlling the Narrative: Hungary's Post-2010 Strategies of Non-Compliance before the European Court of Human Rights', 19 *European Constitutional Law Review* (2023) 195, at 198.

[41] Soley and Steininger, *supra* note 22; Sandholtz, Bei and Caldwell, *supra* note 29.

[42] While Madsen, Cebulak and Wiebusch do mention persistent norm breach, they characterize it as 'restricted compliance' rather than resistance. Madsen, Cebulak and Wiebusch, *supra* note 31, at 211.

in Europe where judgment compliance is fairly easy due to the ECtHR's restrictive remedial measures.[43] Second, in focusing on public contestations, research neglects less conspicuous forms of resistance seeking to restrict human rights courts' oversight without the state withdrawing from the courts' jurisdiction or depriving individuals of access to them. Finally, while some studies draw attention to the authoritarian challenge to international courts,[44] they do not draw conceptual differences between resistance by democratic and authoritarian regimes. At best, they note that pushback or backlash comes from authoritarian states as well as democracies.[45] One notable exception is Daly and Wiebusch who, while still not conceptualizing authoritarian resistance, offer insights on how it 'can differ' from resistance by democracies.[46]

In understanding authoritarian resistance, our focus should be on the purpose rather than on the forms of contestations.[47] The principal goal of authoritarian resistance is to violate human rights without accountability. Since domestic courts are subject to executive control or pressure,[48] and often complicit in violations,[49] international courts are the sole obstacle to impunity. To undermine the functioning of such courts, authoritarian regimes resort to multiple strategies, such as tampering with their budgets and bureaucracies or blocking institutional reforms.[50] Prominent examples in the European context are Russia's blocking of Protocol no. 14 reforms, and Russia's and Turkey's holding back of their financial contributions to the CoE.[51] In addition to such overt attacks, authoritarian resistance occurs less ostentatiously – for instance, by minimizing the adjudicatory function of international courts and restricting victims' access to them without advocating for system-wide reforms. The form of such resistance depends on the institutional set-up of the human rights regime. Where the right of individual petition is optional, states can resist by not accepting it or by withdrawing their consent after the fact in protest of adverse judgments, as in the African regime.[52] Where an international court's jurisdiction is not compulsory,

[43] Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights', 29 *EJIL* (2019) 1091; Antkowiak, 'Remedial Approaches to Human Rights Violations: The inter-American Court of Human Rights and Beyond', 46 *Columbia Journal of Transnational Law* (*CJTL*) (2008) 351.

[44] See, e.g., Caserta and Cebulak, 'The Limits of International Adjudication: Authority and Resistance of Regional Economic Courts in Times of Crisis', 14 *IJLC* (2018) 275, at 287.

[45] Contesse, *supra* note 22, at 203; Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?', 9 *JIDS* (2018) 199.

[46] Daly and Wiebusch, *supra* note 25, at 311.

[47] Here, I draw on Contesse's concept of 'covert resistance', though it concerns efforts to weaken international courts. Contesse, *supra* note 22, at 210.

[48] On Russia, see Provost, 'Teetering on the Edge of Legal Nihilism: Russia and the Evolving Human Rights Regime', 37 *Human Rights Quarterly* (2015) 289; Trochev, 'All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia', 17 *Demokratizatsiya* (2009) 145.

[49] On Russian and Turkish courts' complicities in state violence against the Chechen and Kurdish minorities respectively, see Hillebrecht, 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights', 13 *Human Rights Review* (2012) 279, at 289; Kurban, *supra* note 20.

[50] Hillebrecht, *supra* note 28, at 112–132.

[51] Bushuev and Ostapchuk, 'Funding Crisis for the Council of Europe?', *Deutsche Welle* (3 January 2018), available at www.dw.com/en/russia-withholds-payments-to-the-council-of-europe/a-42792673.

[52] Daly and Wiebusch, *supra* note 25.

states can display resistance by not accepting it or by denouncing the underlying convention, as in the inter-American system.[53]

In the European context, where the ECtHR's jurisdiction and the right of individual petition are compulsory, states have only two options: stay and accept the consequences or exit to escape scrutiny. Even for authoritarian regimes, the reputational costs of exiting outweigh those of adverse judgments.[54] At the same time, repetitive losses do have political costs, threatening to 'undermine the legitimacy of the national position in the eyes of domestic constituents', in the words of the former Russian President Dmitry Medvedev.[55] Thus, it is in the interests of illiberal regimes to engage in discrete resistance within the system. The ECtHR's increasing resort to subsidiarity as a solution to its docket crisis has enabled illiberal states to resort to multiple covert resistance strategies. Among strategies towards that end are forcing applicants to settle their claims and issuing unilateral declarations (UD) to win strike-out rulings and creating domestic remedies both to win inadmissibility decisions in pending cases and to prolong the path to Strasbourg for future applicants. Unlike its overt forms based on confrontation, these discrete forms of authoritarian resistance have occurred with the consent, cooperation and even, in some cases, request of the ECtHR. I elaborate on this enabling role in the next section.

B *Judicial Resilience*

Scholarship has also sought to understand how international courts do or should respond to contestations. According to Madsen, Cebulak and Wiebusch, courts adopt resilience techniques.[56] Preventively, they engage in comparative and expertise-based reasoning, defer to national authorities and adjust their scrutiny levels to the sensitivity of issues. Once resistance occurs, courts mitigate it by expansively interpreting their standing and admissibility rules to facilitate access or, conversely, overruling prior decisions. They also resort to diplomacy by lobbying states to recognize their jurisdiction or expand individual access.[57] Several studies have applied this theoretical model to regional courts. According to Jed Odermatt, another preventive strategy is avoidance of highly political or sensitive issues out of principle (holding that certain issues are best dealt with by other actors) or pragmatism (seeking not to be drawn into matters that would hurt their reputation or public image).[58] In making a normative case for resilience, Salvatore Caserta and Pola Cebulak argue that, when dealing with particularly sensitive issues, international courts should be mindful of the socio-political context in which they operate and 'carefully weigh the consequences of their judgments', even if this may come at the expense of justice.[59] Soley and Steininger show

[53] Soley and Steininger, *supra* note 22; Contesse, *supra* note 22.

[54] The military junta in Greece left the Council of Europe in 1969 only when their expulsion was imminent, and Russia remained a member until its expulsion in 2022 over its occupation of Ukraine.

[55] Quoted in Trochev, *supra* note 48, at 146.

[56] Madsen, Cebulak and Wiebusch, *supra* note 31.

[57] *Ibid.*, at 213–214.

[58] Odermatt, 'Patterns of Avoidance: Political Questions before International Courts', 14 *IJLC* (2018) 221, at 227.

[59] Caserta and Cebulak, 'Resilence Techniques of International Courts in Times of Resistance to International Law', 70 *International and Comparative Law Quarterly* (2021) 737, at 739.

that reliance on the support of progressive domestic forces is yet another mitigation technique.[60]

ECtHR scholarship provides empirical analyses differentiating between judicial responses to authoritarian and democratic regimes. According to Başak Çalı, the ECtHR's responses to rising illiberalism have been 'variable' – more deferential to democracies it could rely on for the good faith interpretation of the ECHR and more willing to identify bad faith violations by repeat offenders.[61] Øyvind Stiansen and Erik Voeten assert that public criticism directed at the ECtHR in the 2010s rendered the Court more reluctant to find violations against democracies – a 'strategic restraint' that it has not exercised towards non-democracies that were also vocal in expressing discontent.[62] Laurence Helfer and Erik Voeten argue that the ECtHR has shifted its jurisprudence 'in a regressive direction', at least in the eyes of its concurring and dissenting judges.[63] They also find some support for the assertion that the ECtHR has become more lenient towards established democracies.[64] Overall, these studies conclude that the ECtHR has developed a fragmented response to contestations – more lenient towards democracies and stricter towards others.

I have two issues with this scholarship: a conceptual and a methodological one. The first concerns the depiction of international courts at the receiving end of resistance by democratic or authoritarian regimes. In restricting backlash to public efforts to undermine the authority of courts, this scholarship excludes from analyses instances where courts may exercise restraint for reasons other than mitigating government protests of adverse judgments. In fact, the ECtHR has avoided (stricter) scrutiny of Turkey's and post-communist states' repetitive violations mainly out of self-interest – namely, to alleviate its caseload.[65] The second problem solely concerns ECtHR scholarship. The Strasbourg Court rejects around 84 per cent of cases as inadmissible and strikes out a further 7 per cent on grounds of settlements and UDs.[66] Of these, while inadmissibility decisions and strike-out rulings issued by single judges are never reported and thus do not appear in public records,[67] those adopted by a three-judge committee, a chamber or the Grand Chamber are published on the ECtHR's database.[68] Yet the scholarship

[60] Soley and Steininger, *supra* note 22.

[61] Çalı, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights', 35 *Wisconsin International Law Journal* (2018) 237.

[62] Stiansen and Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights', 64 *International Studies Quarterly* (2020) 782, at 782. In his analysis of the same question, Madsen concludes that the European Court of Human Rights (ECtHR) has afforded all governments 'more subsidiarity overall' since Interlaken. Madsen, *supra* note 45, at 221.

[63] Helfer and Voeten, 'Walking Back Rights in Europe?', 31 *EJIL* (2020) 797, at 823.

[64] *Ibid.*, at 819–820.

[65] Fikfak, 'Against Settlement before the European Court of Human Rights', 20 *IJCL* (2022) 942; H. Keller, M. Forowicz and L. Engi, *Friendly Settlements before the European Court of Human Rights* (2010).

[66] ECtHR, Analysis of Statistics 2021 (2022), at 11, available at www.echr.coe.int/Documents/Stats_analysis_2021_ENG.pdf.

[67] Article 27(1) ECHR.

[68] Inadmissibility decisions issued pursuant to Article 35, strike-out rulings issued pursuant to Article 37 and cases struck off the list due to friendly settlements reached between the parties under Article 39 of the ECHR are all available on the HUDOC database, available at https://hudoc.echr.coe.int/#{%22article%22:[%2235%22,%2237%22,%2239%22],%22documentcollectionid2%22:[%22DECISIONS%22]}.

bases its analyses and frameworks only on the 9 per cent of the cases that the ECtHR addresses on merits. This bias in research design leads to inaccurate conclusions, such as that the ECtHR rigorously oversees authoritarian regimes. In fact, not only has the ECtHR exercised restraint in its substantive review of sensitive issues in Turkey, but it has also exercised no scrutiny by dismissing at the pre-merit stage thousands of cases, at least some of which have raised justiciable claims (see section 3.B).

An exception in this regard is a recent study which broadens the scope of analysis to non-judgment jurisprudence. Madsen shows that the ECtHR's post-Interlaken 'turn to subsidiarity' has been differentiated – substantive towards democracies and procedural *vis-à-vis* others.[69] Its increasing resort to 'procedural subsidiarity', combined with a formalistic interpretation of the domestic remedies rule, has led to routine inadmissibility decisions in favour of authoritarian regimes without an assessment of the effectiveness of their legal systems.[70] In exercising a 'new form' of restraint, the ECtHR has become much less accessible for victims of systemic and serious violations in Hungary, Turkey and Ukraine.[71] While being a much-needed contribution, however, Madsen's analysis is limited to the post-Interlaken period.

In reality, the ECtHR's exercise of restraint at the pre-merit stage is not new. As Helen Keller, Magdalena Forowicz and Lorenz Engi show, the ECtHR has exponentially resorted to settlements and UDs as a 'case management tool' since the early 2000s.[72] The number of cases struck out on these two grounds grew, respectively, from seven in 1998 to 2,174 in 2021 and from only one in 2001 to 470 in 2021 (with a peak of 2,970 in 2015).[73] Due to a 'closing door policy' since the 1990s,[74] settlements and UDs have represented up to 35–45 per cent of all reported cases in 2010 in contrast to about 2–3 percent in the 1980s.[75] As Veronika Fikfak notes, these statistics are an under-estimation because they reflect the number of cases, not the number of applicants, which are on average three and five per case, respectively.[76] Furthermore, ECtHR statistics 'consistently' and significantly under-report settled cases since they only include settlements reached in judgments and exclude those reached in decisions.[77]

Research on non-judgment jurisprudence demonstrates that the main reason behind the ECtHR's restraint has been its workload, not backlash, and that it has deferred to non-democratic regimes, even in cases concerning gross violations. In analysing all 10,500 cases resolved through settlements and UDs since the 1980s, Fikfak shows

69 Madsen, 'The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court', 1 *European Convention on Human Rights Law Review* (*ECHRLR*) (2021) 6.

70 *Ibid.*, at 16.

71 *Ibid.*, at 7.

72 Keller, Forowicz and Engi, *supra* note 65, at 10.

73 For official ECtHR statistics for 2010–2021, see ECtHR, *supra* note 66, at 11. For statistics for 1998–2008, see Keller, Forowicz and Engi, *supra* note 65, at 203.

74 Keller, Forowicz and Engi, *supra* note 65, at 18.

75 In 2021, the ratio seems to have stabilized at around 27 per cent. Fikfak, *supra* note 65, at 953.

76 In extreme cases, up to 360 and 840 claims can be resolved within one friendly settlement and unilateral declaration, respectively. *Ibid.*, at 955.

77 *Ibid.*, Appendix, at 2 (pointing out that from 2004 to 2010, 'as much as 65–86 % all reported settled cases were contained in decisions, [which are struck out,] rather than judgments').

that, since 2010, when the ECtHR started to proactively encourage applicants to settle their cases, there has been a seven-fold increase in Article 3 cases resolved this way.[78] Hungary, Poland, Romania, Russia, Turkey and Ukraine settled 'on average' four times more cases than before 2010.[79] Ula Kos shows that cases resolved through settlements and UDs represent 50 per cent of Hungary's and 42 per cent of Poland's entire caseloads.[80] In the case of Hungary, the number of such settled cases is more than five times the number of cases that resulted in adverse judgments.[81] These settlements rarely contain governments' acknowledgement of violations or expression of regret,[82] which used to be the general practice.[83] In contrast to pre-2010, when settlements included undertakings of individual or general measures, governments get away merely with paying compensation in the majority of cases.[84] The absence of a requirement to change legislation in settlements and UDs 'boost[s]' states' official compliance records, which are 75 per cent for Hungary and 95 per cent for Poland.[85]

Nino Jomarjidze and Philip Leach point out that despite its claim that it would examine 'with particular care and attention' UDs concerning most serious violations,[86] the ECtHR has not only relied on this procedure to strike out Article 2 and 3 cases but also not restored cases back to the list when governments violated the terms of their undertaking.[87] In fact, it '[a]stonishingly … very rarely decides to restore cases to its list'.[88] In her analysis of all 1,285 government-proposed declarations during 2012–2017,[89] Lize Glas shows that the ECtHR approved texts even where governments admitted violations of Articles 2 or 3 and, yet, did not investigate the incidents.[90] The ECtHR struck out a series of cases concerning abuse by the police or prison authorities in Georgia – a systemic problem that it had identified earlier – based on government declarations acknowledging wrongdoing and promising to conduct investigations.[91] As a result, these cases were not classified as violations and, thus,

78 *Ibid.*, at 974.

79 *Ibid.*, at 966.

80 Kos, 'Signalling in European Rule of Law Cases: Hungary and Poland as Case Studies', 23 *Human Rights Law Review* (*HRLR*) (2023) 1, at 10.

81 *Ibid.*, at 13.

82 Fikfak, *supra* note 65, at 970.

83 Keller, Forowicz and Engi, *supra* note 65, at 46.

84 Fikfak, *supra* note 65.

85 Kos, *supra* note 80, at 10.

86 ECtHR, Unilateral Declarations: Policy and Practice (2012), available at www.echr.coe.int/Documents/Unilateral_declarations_ENG.pdf.

87 Jomarjidze and Leach, 'What Future for Settlements and Undertakings in International Human Rights Resolution?', *Strasbourg Observers* (15 April 2019), available at https://strasbourgobservers.com/2019/04/15/what-future-for-settlements-and-undertakings-in-international-human-rights-resolution/.

88 Keller, Forowicz and Engi, *supra* note 65, at 56.

89 Rule 62A of the Rules of the ECtHR, laying out the requirements for a unilateral government declaration in conformity with human rights, entered into force on 2 April 2012.

90 Glas, 'Unilateral Declarations and the European Court of Human Rights: Between Efficiency and the Interests of the Applicant', 25 *Maastricht Journal of European and Comparative Law* (2018) 607, at 620 (citing cases against Ukraine, Moldova, Poland and Croatia).

91 A group of cases led by ECtHR, *Tsintsabadze v. Georgia*, Appl. no. 35403/06, Judgment of 18 March 2011. See also ECtHR, *Fesik v. Ukraine*, Appl. no. 2704/11, Judgment of 11 December 2012.

were exempt from the CoM's monitoring. Once off the hook, Georgia did not carry out any investigations. Yet the ECtHR rejected requests for the restoration of these cases back to the list.[92]

3 Authoritarian Resistance and Judicial Complicity

Turkey has long engaged in persistent resistance to the ECtHR's authority. Overtly, it has engaged in systemic norm non-compliance, as discussed earlier in section 1 and below in section 3.A.1. Covertly, Turkey has led, in quantitative and qualitative terms, member state efforts to preclude violation judgments in cases that have passed the admissibility hurdle.[93] The ECtHR has displayed varying degrees and types of complicity towards these forms of resistance. Since the outset of its oversight of state violence towards the Kurds, it has refrained from making full use of its adjudicatory powers. As its docket crisis has worsened, the ECtHR has become increasingly less accessible for victims of serious violations. Its complicity has become more visible and less explainable with workload as it responded favourably to Turkey's covert resistance strategies.

A *Judgment Jurisprudence: Restraint in Substantive Review*

1 State Violence, Legal Repression and Disenfranchisement of a Minority

The worst episode of state violence in Turkey took place in the 1990s when security forces committed systemic extrajudicial executions, disappearances, torture and forced displacement against Kurdish civilians during the armed conflict with the Kurdistan Workers' Party (Partiya Karkerên Kurdistan [PKK]).[94] In cases that reached Strasbourg, the ECtHR held that unacknowledged detention violates the right to liberty,[95] rape under detention constitutes torture,[96] enforced disappearance is a substantive violation of the right to life[97] and the anguish suffered by close relatives may constitute inhuman treatment.[98] Yet it did not question the necessity of a 15-year-long emergency rule, although emergencies are by definition temporary.[99] It exempted applicants from exhausting domestic remedies on a case-by-case basis instead of issuing an exemption for all similar cases[100] and, despite protests from its ranks,[101] expected

92 Jomarjidze and Leach, *supra* note 87.

93 As of 2020, the number of settled cases against Turkey was 1,653, followed by 1,563 against Poland, 920 against Romania and 663 against Italy. Fikfak, *supra* note 65, at 4. Invented in 2001 by Turkey, unilateral government declarations have since become a 'routine procedure' in ECtHR practice. Keller, Forowicz and Engi, *supra* note 65, at 69.

94 Kurban, *supra* note 20.

95 ECtHR, *Cicek v. Turkey*, Appl. no. 25704/94, Judgment of 27 February 2001.

96 *Aydın*, *supra* note 18.

97 *İpek*, *supra* note 18.

98 ECtHR, *Timurtaş v. Turkey*, Appl. no. 23531/94, Judgment of 13 June 2000.

99 Macdonald, 'Derogations under Article 15 of the European Convention on Human Rights', 36 *CJTL* (1997) 225.

100 ECtHR (GC), *Akdıvar and Others v. Turkey*, Appl. no. 21893/93, Judgment of 16 September 1996.

101 Judge Bonello's concurring opinion. ECtHR (GC), *Tahsin Acar v. Turkey*, Appl. no. 26307/95, Judgment of 8 April 2004.

impoverished and often illiterate civilians to prove their claims 'beyond reasonable doubt' – a standard of proof borrowed from criminal law and impossible to meet in light of Turkey's denial and impunity policies.

Although slowly starting to draw adverse inferences from the government's non-disclosure of essential documents,[102] the ECtHR waited nine years to shift the burden of proof.[103] While belatedly accepting circumstantial evidence to establish state responsibility for disappearances,[104] it insisted on direct evidence for extrajudicial executions, though the two groups of cases raised identical legal questions.[105] It rejected repeated pleas to identify an 'administrative practice' of gross abuses in the Kurdish region, finding the conclusions of the United Nations and the CoE bodies regarding 'systematic'[106] and 'widespread'[107] torture in Turkey to be 'insufficient' to reach such a conclusion.[108] Although it repeatedly found that village guards (Kurdish civilians armed by the government to fight against the PKK) engaged in extrajudicial executions,[109] disappearances[110] and displacement,[111] and expressed its 'misgivings as regards the use of civilian volunteers… in a quasi-police function',[112] the ECtHR did not use its Article 46 powers to call for the abolishment of this force. Neither did it question the use of confessors in counterterrorism, although it was aware of the Turkish Parliament's findings that these PKK militants-turned-informants fabricated allegations to obtain amnesty, obtain financial gain or get even with their enemies.[113]

Over time, the ECtHR identified the *modus operandi* of state violence by linking individual cases to a pattern of summary executions[114] and disappearances[115] by 'contra-guerrilla groups' acting 'with the acquiescence, and possible assistance, of members of the security forces'.[116] It even noted 'the pattern of disappearances of large numbers of persons in south-east Turkey between 1992 and 1996'.[117] The ECtHR nonetheless did not conclude the existence of a state practice. What constrained it was not limitations inherent to supranational adjudication, as evident in the IACtHR's finding of a state practice of disappearances in Honduras based on one case alone,[118] but, rather,

[102] *Timurtaş*, *supra* note 98.
[103] ECtHR, *Akkum and Others v. Turkey*, Appl. no. 21894/93, Judgment of 24 March 2005.
[104] ECtHR, *Ertak v. Turkey*, Appl. no. 20764/92, Judgment of 9 May 2000.
[105] ECtHR, *Mahmut Kaya v. Turkey*, Appl. no. 22535/93, Judgment, 28 March 2000.
[106] See, e.g., UN Commission on Human Rights, Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1992/32, UN Doc. E/CN.4/1995/34, 12 January 1995, at 157.
[107] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment, Public Statement on Turkey, Doc. CPT/Inf(93)1 (15 December 1992), para. 21.
[108] *Aydın*, *supra* note 18, para. 124.
[109] ECtHR, *Avşar v. Turkey*, Appl. no. 25657/94, Judgment of 10 July 2001.
[110] *Kurt*, *supra* note 18.
[111] ECtHR, *Yoyler v. Turkey*, Appl. no. 26973/95, Judgment of 24 July 2003.
[112] ECtHR, *Seyfettin Acar v. Turkey*, Appl. no. 30742/03, Judgment of 6 October 2009, para. 34.
[113] *Ahmet Özkan and Others*, *supra* note 18.
[114] *Avşar*, *supra* note 109.
[115] *Osmanoğlu*, *supra* note 18.
[116] *Mahmut Kaya*, *supra* note 105, para. 58,
[117] ECtHR, *Er and Others v Turkey*, Appl. no. 23016/04, Judgment of 31 July 2012, para. 77.
[118] IACtHR, *Velásquez Rodríguez v. Honduras*, Serie C, no. 4, Judgment of 29 July 1988. Decision available at www.corteidh.or.cr/index.php/en/jurisprudencia.

a demonstrated lack of will to make full use of its adjudicatory powers. Over the years, the ECtHR repeatedly found Article 13 violations in Turkish courts' failure to carry out investigations[119] or to do so effectively.[120] Although these rulings unearthed all the elements of an impunity policy (prosecutors' tendency to attribute responsibility, without any evidence, to the PKK[121] or to claim the victim was a PKK fighter;[122] to rely on the information provided by security forces instead of conducting investigations;[123] and to appear to investigate on paper until the statute of limitations ran out),[124] the ECtHR did not make such a determination. It also did not hold that Turkey effectively disenfranchised the Kurds by repeatedly dissolving their parties, stripping their representatives of their elected seats and misusing counterterrorism laws to put them behind the bars.[125]

2 Post-Coup Purges and Mass Detentions: A New Beginning?

Ostensibly, in the face of growing democratic backsliding in Europe, the ECtHR opened a new chapter in its dealings with authoritarian regimes. It started to enforce the ECHR's dormant bad-faith clause, Article 18, which seeks to prohibit the misuse of government power through restricting human rights for improper motives or ulterior purposes. Since its first Article 18 violation ruling,[126] the ECtHR has found ulterior political motive in the treatment of dissidents in Azerbaijan, Bulgaria, Georgia, Moldova, Poland, Russia, Turkey and Ukraine.

Yet a close reading of Article 18 case law on Turkey illustrates the various ways in which the ECtHR has been complicit with persistent norm non-compliance. First, initially, the ECtHR refrained from fulfilling its review responsibility. For example, although it had announced its intent to prioritize the cases of journalists detained after the coup attempt,[127] the ECtHR waited for the AYM to first pass judgment. The AYM's first ruling on post-coup detentions concerned two deputies of the pro-Kurdish Peoples' Democratic Party (Halkların Demokratik Partisi [HDP]):[128] inadmissibility.[129] The second concerned two journalists, Mehmet Altan and Şahin Alpay, finding their detentions to be unconstitutional and ordering their release.[130] When the lower courts

[119] *Kurt, supra* note 18; *Gasyak and Others, supra* note 18; *Süheyla Aydın, supra* note18; *İpek, supra* note 18.
[120] *Aydın, supra* note 18.
[121] See, e.g., *Ahmet Özkan and Others, supra* note 18.
[122] See, e.g., *Süheyla Aydın, supra* note 18.
[123] See, e.g., *Kaya, supra* note 18.
[124] See, e.g., *Osmanoğlu, supra* note 18.
[125] Between 1993 and 2009, the AYM closed five Kurdish parties, imposed political bans on their senior members and lifted the constitutional immunities of several Kurdish parliamentarians, paving the way to their imprisonment. The ECtHR found violations in all such cases that reached Strasbourg. See note 18 above.
[126] ECtHR, *Gusinsky v. Russia*, Appl. no. 70276/01, Judgment of 19 May 2004.
[127] ECtHR Registrar, Recently Communicated Priority Cases on Detained Journalists in Turkey, Press Release, Doc. ECHR 346(2017), 15 November 2017.
[128] At the time of the arrests, the party was the third largest represented at the Turkish Parliament.
[129] AYM, *Gülser Yıldırım*, Appl. no. 2016/40170, Decision 16 November 2017; AYM, *Selahattin Demirtaş*, Appl. no. 2016/25189, Decision of 21 December 2017.
[130] AYM, *Mehmet Hasan Altan*, Appl. no. 2016/23672, Judgment of 11 January 2018; AYM, *Şahin Alpay*, Appl. no. 2016/16092, Judgment of 11 January 2018.

refused to abide by the AYM's judgment, in an unusual move, the ECtHR announced that it would issue its rulings regarding these two journalists in two weeks.[131] On 13 March, blurring the separation of powers, the CoE's Secretary General Thorbjørn Jagland filled in the blanks:[132] if the lower courts continued to ignore the ruling, the ECtHR would conclude that the AYM was 'no longer an effective legal body' and review pending cases without expecting applicants to exhaust domestic remedies.[133] The Turkish authorities received the message. When the AYM reiterated its first judgment in Alpay's case on 15 March, the lower court did not refuse to abide with the decision and the government did not protest the AYM – as had occurred the first time.[134] Alpay was placed in indefinite house arrest.[135] From then on, neither the ECtHR nor Jagland has made an issue of the AYM's (in)effectiveness, despite hundreds of other post-coup detention cases pending constitutional review.

Second, when the ECtHR finally started to review the post-coup detentions, its complicity took the form of selective and restrained adjudication: avoiding highly politically sensitive cases and refraining from addressing the AYM's effectiveness. With respect to journalists, instead of ruling on all 10 applications that it had grouped together, the ECtHR picked the cases of Alpay and Altan. Among the remaining applicants was the latter's brother, Ahmet. In essence, the Altan brothers' cases were one and the same; they had been charged with the same crime on the basis of similar facts in the same case, sentenced to aggravated life imprisonment in the same hearing and petitioned the AYM and the ECtHR at the same time. The reason behind the ECtHR's selection was apparent; not only was Ahmet Altan renowned for his sharp-tongued criticism of President Recep Tayyip Erdoğan and, thus, his case was politically very sensitive, but Alpay and Mehmet Altan were also the only journalists whose cases the AYM had reviewed. In other words, had the ECtHR also picked 'the cases of remaining journalists, as coherence in adjudication would require, it would have to pass judgment on the effectiveness of Turkey's constitutional complaint mechanism.

Third, the ECtHR has also been complicit through its selective and inconsistent enforcement of fundamental rights. While finding Alpay's and Mehmet Altan's detentions to infringe on their rights to liberty and security under Article 5(1) and to freedom of expression under Article 10, for example, the ECtHR found that it was not necessary to examine whether the prolonged nature of their pre-trial detention violated Article 5(3). It did not question the necessity of emergency rule 20 months

[131] ECtHR Registrar, Forthcoming Judgments and Decisions, Press Release, Doc. ECHR 091(2018), 6 March 2018.

[132] On Jagland's critical adverse role in the ECtHR's jurisprudence concerning Turkey's post-coup cases, see Demir-Gürsel, 'The Former Secretary-General of the Council of Europe Confronting Russia's Annexation of the Crimea and Turkey's State of Emergency', 2 *ECHRLR* (2021) 303.

[133] 'Avrupa Konseyi'nden Kritik AYM Uyarısı', *Hürriyet* (13 March 2018), available at www.hurriyet.com.tr/dunya/avrupa-konseyinden-kritik-aym-uyarisi-40769965.

[134] C. Letsch, 'Turkey's New Constitutional Crisis Could End the Rule of Law', *The Nation* (8 February 2018), available at www.thenation.com/article/archive/turkeys-new-constitutional-crisis-could-end-the-rule-of-law/.

[135] Before the AYM issued its second ruling, Altan had been convicted of attempting to overthrow the constitutional order and sentenced to an aggravated life sentence.

after the coup attempt or review the proportionality of emergency measures, and it responded to Article 18 claims with the usual escape strategy: 'not… necessary to examine'.[136] While the ECtHR eventually ruled in the cases of the remaining journalists,[137] it either did not examine their Article 18 claims or, where it did, found no ulterior political motive. As Judge Egidijus Kūris noted in his dissent, the ECtHR's failure to see the '*pattern* and *tendency*' in the treatment of civil society and independent media in Turkey was itself a 'pattern and tendency in [its] determination of Article 18 complaints'.[138]

With respect to members of the judiciary, in a November 2021 judgment concerning over 400 judges and prosecutors, the ECtHR only addressed the unlawfulness of the initial detentions, finding it unnecessary to examine the arbitrariness of the arrests as well as the excessive length of pre-trial detentions and the absence of effective remedies.[139] What rendered this ruling unprecedented, noted Judge Kūris, was that, in justifying its limited review, the majority blatantly cited 'judicial policy', pointing to the thousands of pending applications, which put 'a considerable strain on its limited resources'.[140]

Fourth, in the cases where it did find Article 18 violations, the ECtHR's complicity took the form of unduly delayed, incoherent and restrained review. Pursuant to the ECtHR's own priority policy, the cases of HDP deputies, as individuals deprived of their liberty, constituted 'urgent cases concerning vulnerable applicants'.[141] Yet it took the ECtHR 21 months to issue a ruling. Its response, moreover, was limited to Selahattin Demirtaş, the HDP's former co-chair, leaving out for no apparent reason the remaining 11 deputies who had been arrested and placed in pre-trial detention under the same circumstances and at around the same time.[142] The crux of Demirtaş' Article 5 claim concerned the illegality of his detention: the crackdown on the HDP intensified when it took away the Justice and Development Party's (Adalet ve Kalkınma Partisi [AKP]) qualified majority in Parliament, the number of investigations against HDP deputies almost tripled in the six months following Erdoğan's call on Parliament to lift their immunities and the prolonged nature of his detention sought to prevent his

[136] ECtHR, *Mehmet Hasan Altan*, Appl. no. 13237/17, Judgment of 20 March 2018, para. 216; ECtHR, *Şahin Alpay*, Appl. no. 16538/17, Judgment of 20 March 2018, para. 186.

[137] ECtHR, *Sabuncu and Others v. Turkey*, Appl. no. 23199/17, Judgment of 10 November 2020; ECtHR, *Şık v. Turkey (no. 2)*, Appl. no. 36493/17, Judgment of 24 November 2020; ECtHR, *Atilla Taş v. Turkey*, Appl. no. 72/17, Judgment of 19 January 2021; ECtHR, *Murat Aksoy v. Turkey*, Appl. no. 80/17, Judgment of 13 April 2021; *Ahmet Hüsrev Altan*, *supra* note 8; ECtHR, *Bulaç v. Turkey*, Appl. no. 25939/17, Judgment of 8 June 2021; ECtHR, *Ilıcak v. Turkey*, Appl. no. 1210/17, Judgment of 14 December 2021; ECtHR, *Deniz Yücel v. Turkey*, Appl. no. 27684/17, Judgment of 25 January 2022.

[138] *Ahmet Hüsrev Altan*, *supra* note 8, para. 18 (emphasis in the original). Similarly, the ECtHR found 'no need to examine' Article 18 claims of a leading human rights activist, despite the large number of applicants with similar complaints. ECtHR, *Taner Kılıç v. Turkey (no. 2)*, Appl. no. 208/18, Judgment of 31 May 2022 (Judges Kūris and Koskelo dissenting on this point).

[139] *Turan and Others*, *supra* note 17.

[140] *Ibid.*, para. 98.

[141] ECtHR, The Court's Priority Policy, as updated on 22 May 2017, available at www.echr.coe.int/documents/d/echr/Priority_policy_ENG.

[142] ECtHR, *Selahattin Demirtaş v. Turkey (no. 2)*, Appl. no. 14305/17, Judgment of 20 November 2018.

participation in two critical elections: the referendum on transition to a presidential system and the presidential elections thereafter.

While noting the temporal link between Erdoğan's speeches and the acceleration of criminal investigations against Demirtaş, the ECtHR was reluctant to conclude that Turkish courts acted as government pawns. Deferring to the AYM and disregarding the CoE's own Venice Commission, it concluded that lower courts had shown sufficient evidence to demonstrate a reasonable suspicion that Demirtaş had engaged in a criminal offence. The problem was in the continuation of the detention, which 'pursued the predominant ulterior purpose of stifling pluralism and limiting political debate'.[143] Thus, bad faith was not in Demirtaş' detention but in its prolonged nature.[144] The implications for the regime were clear; as long as Turkish courts showed some justification for arrests and kept pre-trial detention periods reasonably short, Kurdish deputies were fair game. Indeed, after receiving instructions from Erdoğan to 'finish the job'[145] and only 14 days after the ECtHR's ruling, a lower Court sentenced Demirtaş to nearly five years of imprisonment relating to a speech he had made five years earlier. By September 2019, 22 HDP deputies were convicted and received up to nearly 17 years of imprisonment.[146] The convictions of parliamentarians served two critical purposes for the regime: the change of their legal status from detainees to convicts, precluding the ECtHR's orders for their release, and the automatic revocation of their parliamentary seats. While the Grand Chamber would later hold that Demirtaş' initial detention was unlawful,[147] it was too late; Demirtaş was by then a convicted felon.

Finally, the ECtHR displayed complicity by its avoidance of addressing the systemic nature of legal repression. While Demirtaş is an important political symbol, jurisprudentially speaking there was no justifiable reason to exclude the remaining deputies whose cases the ECtHR itself had joined in June 2017. If the reason was Demirtaş' status as an opposition leader, then at the very least his co-chair Figen Yüksekdağ should have been included. If the concern was Demirtaş' inability to run in the presidential elections on equal terms with the other candidates, the Chamber should not have waited until five months after these elections.

The ECtHR's second Article 18 ruling against Turkey concerns philanthropist and civil society leader Osman Kavala. Arrested in October 2017 on allegations of his involvement in the 2013 Gezi Park protests and the 2016 coup attempt, Kavala was charged as late as February 2019 and solely in relation to the Gezi events. After deciding in August 2018 to treat the case as a matter of priority, the ECtHR issued its judgment in December 2019. In finding an Article 18 violation, it gave weight to the long

[143] *Ibid.*, para. 273.

[144] The Chamber also found a violation of Article 3 of Protocol no. 1 due to Demirtaş' inability to take part in parliamentary activities. Exceptionally, pursuant to its powers under Article 46, the Court ordered Demirtaş' immediate release. Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952, ETS 9.

[145] 'Erdoğan: AIHM'nin Kararları bizi Bağlamaz', *Deutsche Welle* (20 November 2018), available at www.dw.com/tr/erdo%C4%9Fan-ai%CC%87hmnin-kararlar%C4%B1-bizi-ba%C4%9Flamaz/a-46374963.

[146] HDP, undated and untitled document (on file with the author).

[147] ECtHR (GC), *Selahattin Demirtaş v. Turkey (no. 2)*, Appl. no. 14305/17, Judgment of 22 December 2020.

time lag between Kavala's arrest and the events with which he was charged as well as the link between Erdoğan's speeches[148] and the indictment containing similarly worded charges issued three months later. While ruling that Kavala's arrest pursued the ulterior motive of silencing not only him but also all activists and human rights defenders, the ECtHR once again did not address the AYM's effectiveness. I discuss this further in section 3.B.3.

B *Non-Judgment Jurisprudence: Enabling Authoritarian Resistance*

By the early 2000s, while the Kurds had become 'repeat players' in Strasbourg,[149] so had their adversary. The government had understood the reputational, financial and political costs of denial and non-cooperation. The authoritarian outlook had become all the more costly when, in 1999, the EU made Turkey's accession contingent on its execution of ECtHR rulings. Meanwhile, post-Cold War enlargement had left the ECtHR paralysed with an unmanageable docket and desperate for the help of member states.

The change in Turkey's ECtHR policies happened incrementally. Initially, in the early 2000s, to minimize the number of adverse judgments, the government started to make settlement offers in pending cases. When refused, in the hope of winning strike-out rulings, it submitted to the ECtHR UDs that partially acknowledged the allegations, but not wrongdoing, and did not express regret or undertake to conduct investigations. When the AKP came to power in 2002, it pursued a more proactive strategy: adopting new domestic remedies that, if found effective by the ECtHR, would bring inadmissibility decisions in pending cases and diminish the number of new applications.[150] The context became all the more ideal with the introduction of the pilot judgment mechanism in the ECHR system. As it familiarized itself with the ECtHR's growing propensity to invoke subsidiarity to alleviate its docket, the AKP perfected its counter-reform strategy by adopting the most effective means of preventing or at least delaying new applications to the ECtHR: a constitutional complaint mechanism.

1 Precluding Violation Judgments: UDs and Settlement Offers

Turkey's UD strategy worked, at least initially. The ECtHR struck out several right-to-life cases, effectively penalizing applicants for refusing to settle. In *Akman*, the applicant had claimed that the security forces raided his house and killed his son, whereas the government argued that security forces were fired at from the applicant's house and so returned fire.[151] Several days before the fact-finding hearing, the government issued a declaration regretting Akman's death due to 'excessive use of force', undertaking to

[148] Erdogan accused Kavala of being the representative of the 'famous Hungarian Jew [George Soros]' and using his financial resources to 'destroy' Turkey through the Gezi protests. ECtHR, *Kavala v. Turkey*, Appl. no. 28749/18, Judgment of 10 December 2019, para. 229.

[149] Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', 9 *Law and Society Review* (1974) 95.

[150] For evidence of strategic intent on the part of the government, see sections 3.B.2 and 3.B.3 below.

[151] ECtHR, *Akman v. Turkey*, Appl. no. 37453/97, Judgement (Striking out) of 26 June 2001.

'adopt all necessary measures to ensure that the right to life is respected in the future' and offering £85,000 in compensation.[152] The ECtHR struck this and at least three more right-to-life cases, based on nearly identical declarations, despite factual disputes and the applicants' insistence on a judgment.[153] Noting that the government did not acknowledge responsibility, Judge Loukis Loucaises expressed fear that the ECtHR may 'encourage a practice by States – especially those facing serious or numerous applications – of "buying off" complaints for violations of human rights'.[154] In 2003, the Grand Chamber intervened in *Tahsin Acar*.[155] Pointing out the substantial dispute between the parties and the government's failure to acknowledge its responsibility or to undertake an investigation, it ordered the examination of the case.

The Grand Chamber's intervention paused but did not end the strike-outs based on UDs. In the mid-2000s, the excessive use of lethal force in demonstrations in the Kurdish region resulted in a fresh wave of petitions to Strasbourg. One such case concerned Aydın Erdem, a university student killed at a peaceful demonstration in 2009. Although forensic examination identified the pistols of three police officers, who moreover admitted to the prosecutor that they had used firearms during the demonstration and threw the spent bullet cases into the toilet, domestic authorities did not open an investigation. In March 2021, nearly 10 years after the family had filed their petition and six years after the case had been communicated to the government, the ECtHR struck out the case, citing Turkey's undertaking 'to adopt all necessary measures to ensure that the right to life – including the obligation to carry out effective investigations – is respected in the future'.[156] The undertaking was of a general nature and did not concern this particular incident. Yet the three-judge committee, including Judge Kūris, found it sufficient. No criminal investigation has since been opened into Erdem's death.[157]

Turkey's settlement strategy has also been effective. Compared to four in 2000, the ECtHR accepted 81 settlements in 2001.[158] The same year, the number of recipients of friendly settlement offers in Article 2 and 3 cases rose to 290, as compared to only nine in 2000.[159] The ECtHR struck out cases concerning death in custody resulting from torture or use of excessive force,[160] torture in custody,[161] deliberate destruction of property[162] and disappearances.[163] According to Keller, Forowicz and Engi, settlement

[152] *Ibid.*, paras 23–24.

[153] ECtHR, *Haran v. Turkey*, Appl. no. 25754/94, Judgment (Striking out) of 26 March 2002; ECtHR, *T.A. v. Turkey*, Appl. no. 26307/95, Judgment (Striking out) of 9 April 2002; ECtHR, *Toğcu v. Turkey*, Appl. no. 27601/95, Judgment (Striking out) of 9 April 2002.

[154] Judge Loucaides' dissenting opinion. *Toğcu*, *supra* note 154, at 13.

[155] ECtHR (GC), *Tahsin Acar v. Turkey*, Appl. no. 26307/95, Judgment (Preliminary Issue) of 6 May 2003.

[156] ECtHR, *Melese Erdem and Mahmut Erdem v. Turkey*, Appl. no. 64727/11, Decision (Striking Out) of 30 March 2021.

[157] Information received via WhatsApp from the applicant's lawyer Reyhan Yalçındağ, 14 June 2022.

[158] Keller, Forowicz and Engi, *supra* note 65, at 51.

[159] *Ibid.*, at 257.

[160] See, e.g., ECtHR, *Erdogan v. Turkey*, Appl. no. 26337/95, Judgment (Striking out) of 20 June 2002.

[161] See, e.g., ECtHR, *Kaplan v. Turkey*, Appl. no. 38578/97, Judgment (Striking out) of 10 October 2002.

[162] See, e.g., ECtHR, *Dilek v. Turkey*, Appl. no. 31845/96, Judgment (Striking out) of 17 June 2003.

[163] See, e.g., ECtHR, *İ.İ., İ.Ş., K.E. and A.Ö. v. Turkey*, Appl. nos. 30953/96, 30954/96, 30955/96 and 30956/96, Judgment (Striking out) of 6 November 2001.

offers in Article 2 and 3 cases dropped considerably over the years, with no such offer made in 2008 – the year marking the end of the time frame of their research.[164] Fikfak's research, however, shows the exponential rise in friendly settlements after 2010, when the ECtHR's Registry was tasked with a 'proactive role' to encourage the parties to settle their disputes, especially in repetitive cases concerning systemic violations on which the ECtHR had established case law.[165] With respect to Turkey, the number of settled cases rose from around 60 in 2009 to 150 in 2010, peaking at around 210 in 2018.[166]

These statistics correspond to the experience of Kurdish lawyers who, having never 'even heard about the strike-out mechanism' before, were caught off guard in 2001. In trying to communicate to Strasbourg that nothing had changed in Turkey's impunity policies, recalls Cihan Aydın, they 'felt as if speaking to a wall'.[167] Kurdish lawyers reflect on 2001–2003 as a time when the ECtHR pursued a 'policy of forcing friendly settlements upon litigants' and penalized those who refused to settle by rejecting their cases or awarding them even lower compensation than that offered by the government.[168] Judge Giovanni Bonello also raised this latter point, criticizing the ECtHR for letting Turkey, which had offered the applicant in *Tahsin Acar* £70,000 to 'get away with giving a hand-out of 10,000 euros'.[169]

Reyhan Yalçındağ, a Kurdish lawyer litigating in Strasbourg since the early 1990s, sums up the re-emergence of settlement offers after 2010, now through the ECtHR Registry: Turkey wanted to 'pay three cents to get rid of [disparaging] statistics', and the ECtHR was 'buying into this'.[170] So preoccupied was the ECtHR with its workload, says Yalçındağ, that it deviated from its precedent by offering settlements that did not entail acknowledgements of violations or undertakings to investigate. And where applicants declined, the ECtHR struck out the cases, even those that had reached the judgment phase. In some cases, to expose Turkey's impunity policy, Kurdish lawyers, rather than rejecting the offers, submitted counter-declarations with comprehensive government assurances concerning the non-repetition of violations and the undertaking of investigations to ensure the criminal responsibility of security forces.[171] Instead of requiring Turkey to sign these, the ECtHR effectively penalized the applicants by striking off their cases for not accepting Turkey's settlement offers.

[164] Keller, Forowicz and Engi, *supra* note 65, at 257.
[165] Fikfak, *supra* note 65, at 951.
[166] I am grateful to Veronika Fikfak for authorizing me to use these unpublished results deriving from her HRNUDGE project.
[167] Interview with Cihan Aydın, Diyarbakır, 31 March 2015.
[168] Reyhan Yalçındağ, group interview with Diyarbakır Bar Association lawyers, Diyarbakır, 16 February 2008.
[169] Judge Bonello's concurring opinion, *supra* note 101, para. 14.
[170] Reyhan Yalçındağ, interview over Zoom, 11 May 2022.
[171] *Ibid.*

2 Precluding Admissibility Decisions: New Domestic Remedies

In 2004, the CoM authorized the ECtHR to issue pilot judgments to reject similar cases arising from the same structural problem in response to an effective domestic remedy. The first pilot judgment, *Broniowski v. Poland*, is well known.[172] The second one, *Doğan*, issued one week later against Turkey, less so.[173] In *Doğan*, the ECtHR drew attention to a protracted issue that it had been adjudicating since its 1996 *Akdıvar* judgment: 'the situation of the internally displaced persons'.[174] What made the ECtHR recognize the collective nature of the problem that it had been adjudicating for a decade was the new political context created by Turkey's 1999 declaration as an EU candidate, which, in turn, had enabled the UN Secretary-General's special representative for the internally displaced persons to undertake a fact-finding mission to Turkey in 2002. By virtue of his mandate, the scope of Francis Deng's mission did not extend to victims of rape, torture, extrajudicial executions and disappearances, unless they had also been displaced. As for the displaced, Deng limited his recommendations to compensation, integration and return, leaving out issues of truth and justice.[175] This framework enabled Turkey to admit the existence of internal displacement without having to commit to prosecuting the perpetrators of gross violations.

By the time *Doğan* was issued, Turkey's fulfilment of Deng's recommendations had become an EU accession criterion,[176] the government was working on a compensation law in response to these recommendations and the ECtHR was facing a docket crisis. Suddenly, the pending village destruction cases gained new prominence. The parliamentary debates show that the legislative intent behind the new law was to win an inadmissibility decision in Strasbourg;[177] if seen by the ECtHR as an effective remedy, the law could undo the *Akdıvar* exception to the domestic remedies rule, boost Turkey's reputation and score a point with the EU. With these considerations in mind, the Turkish Parliament adopted the law on 17 July 2004, only 18 days after *Doğan*.[178]

It became clear that the next ECtHR ruling on displacement would assess the effectiveness of the new remedy, which led the government to engage in concerted efforts to win an inadmissibility decision. The Ministry of Foreign Affairs (MFA) representing Turkey *vis-à-vis* the ECtHR sent a 'very urgent' note to the Ministry of the Interior,

[172] ECtHR (GC), *Broniowski v Poland*, Appl. no. 31443/96, Judgment of 22 June 2004.

[173] But see Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations', 16 *HRLR* (2016) 731.

[174] ECtHR, *Doğan and Others v. Turkey*, Appl. no. 8803-8811/02, 8813/02 and 8815-8819/02, Judgment of 29 June 2004, para. 154.

[175] UN Commission on Human Rights, Specific Groups and Individuals Mass Exoduses and Displaced Persons: Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis Deng, submitted pursuant to Commission on Human Rights Resolution 2002/56, Doc. E/CN.4/2003/86/Add.2, 27 November 2002.

[176] European Commission, 2003 Regular Report on Turkey's Progress towards Accession, 5 November 2003, at 40.

[177] D. Kurban and M. Yeğen, *Adaletin Kıyısında: 'Zorunlu' Göç Sonrasında Devlet ve Kürtler – 5233 Sayılı Tazminat Yasası'nın bir Değerlendirmesi – Van Örneği* (2012).

[178] Terör ve Terörle Mücadeleden Doğan Zararların Karşılanması Hakkında Kanun, no. 5233, 17 July 2004, reprinted in *Official Gazette*, no. 25535, 27 July 2004.

asking for the 'swift presentation of sufficient satisfactory examples' of decisions to 'prevent the possibility of an early negative decision by the ECtHR'.[179] The MFA urged commissions tasked with implementation to be 'as flexible as possible' and even reward compensation for non-pecuniary damages to prevent applicants from seeking higher compensation in Strasbourg – effectively instructing them to disregard the law's material scope, which excludes compensation for emotional pain and suffering.[180] So worried were the Turkish diplomats in Strasbourg that they contacted deputy governors in the Kurdish region directly rather than through the conventional inter-ministerial process, asking them to prioritize applications from Tunceli and Diyarbakır provinces, which had produced the highest number of pending cases.[181]

The expected ECtHR ruling came in *İçyer*.[182] As in *Doğan*, the incidents occurred in Tunceli in October 1994, where security forces displaced the applicants and destroyed their properties, and no investigations were carried out. As in *Doğan*, the applicants requested to be exempted from exhausting domestic remedies. While the ECtHR had agreed in *Doğan* and found multiple violations, it found *İçyer* to be inadmissible. Impressed with government statistics showing 170,000 nationwide applications and a 'substantial number of sample decisions' awarding up to €31,000 per applicant, the ECtHR concluded that the new remedy was accessible and provided 'reasonable prospects of success'.[183] In rejecting between 800 and 1,500 similar cases,[184] it paid no attention to the absence of government statistics on rejected applications.

In reality, the remedy carried all the faulty characteristics that the ECtHR had identified in Turkey's laws since *Akdıvar*. Based on the state's no-fault responsibility, it precluded official admission of wrongdoing and did not foresee the prosecution of perpetrators. Indeed, commissions lacking independence from the executive[185] rejected thousands of applications due to the applicants' inability to provide direct evidence on the responsibility of security forces.[186] In *İçyer*, rejecting the applicants' accurate claims that the law does not provide compensation for emotional distress, the ECtHR deferred to the government's argument that victims could seek non-pecuniary damages in Turkish courts, despite Kurdish lawyers' contestations that domestic courts would also be bound by the new law.[187] Indeed, in 2009, the AYM rejected a lower Court's

[179] Ministry of Foreign Affairs, Deputy Directorate General for the Council of Europe and Human Rights, written communication numbered AKGY-6 40 and titled '*Doğan and others* Judgment and Return to Village Applications', 7 January 2005 (on file with the author).

[180] *Ibid.*

[181] Interview with a deputy governor, Kurdish region, 10 May 2006.

[182] ECtHR, *İçyer v. Turkey*, Appl. no. 1888/02, Decision (Inadmissibility) of 12 February 2006.

[183] *Ibid.*, para. 83.

[184] ECtHR, *Doğan and Others*, Appl. no. 8803-8811/02, 8813/02 and 8815-8819/02, Judgment (Just Satisfaction) of 13 July 2006, para. 6 (citing the number as 1,500); ECtHR Registrar, Cases Concerning the Effectiveness of the Compensation Procedure for Victims of Terrorism in Turkey: Inadmissible, Press Release, 8 July 2011 (giving the number as 800).

[185] Biner, 'The Logic of Reconciliation: Between the Right to Compensation and the Right to Justice in Tukey', 4 *Humanity* (2013) 73.

[186] Kurban and Yeğen, *supra* note 178.

[187] D. Kurban *et al.*, *Coming to Terms with Forced Migration: Post-Displacement Restitution of Citizenship Rights in Turkey* (2007).

opinion that victims should be compensated for emotional pain and suffering.[188] Finally, in 2011, the ECtHR rejected 200 cases, although they were filed by individuals who had unsuccessfully exhausted the new domestic remedy before petitioning Strasbourg.[189] In prematurely approving a domestic law whose substance and implementation went against its jurisprudence, the ECtHR allowed Turkey to get away with a small amount of compensation paid to a fraction of the victims of state violence.

3 What's in a Constitutional Complaint Mechanism?

Turkey's introduction of the constitutional complaint mechanism in 2010 sought to diminish the ECtHR's oversight of its human rights policies.[190] This was evident in both the legislative intent that the measure would 'result in a considerable decrease in the number of files against Turkey'[191] and in the scope of the complaint, which was restricted to rights and liberties guaranteed under the ECHR and its additional protocols, excluding other human rights treaties to which Turkey is a party.[192] It was also evident in the intense backdoor diplomacy carried out by Jagland, who later referred to this mechanism as a 'system [that Turkey and the CoE] have built together' and 'a source of immense pride'.[193] Again, the ECtHR's response was expeditious and favourable. Only seven months after the new mechanism entered into force, it rejected a case on the grounds of the applicant's failure to have applied to the AYM without assessing whether the new remedy was effective.[194]

In fact, the AYM had made a promising start, finding violations in the pre-trial detention of (non-Kurdish) opposition deputies[195] and the bans on access to Twitter[196] and YouTube.[197] It was only when the AYM was pulled into the domain of 'megapolitics' that its effectiveness was put to a real test.[198] In July 2015, state violence had resumed in the Kurdish region with the launch of a military operation in Kurdish cities, followed by round-the-clock, open-ended curfews lasting up to years and affecting 1.6 million people.[199] Civilians trapped in curfew zones requested the AYM to

[188] AYM, Appl. nos. E. 2006/79, K. 2009/97, Judgment of 25 June 2009.

[189] ECtHR, *Akbayır and Others v. Turkey*, Appl. no. 30415/08, Decision (Inadmissibility) of 28 June 2011; ECtHR, *Fidanten and Others v Turkey*, Appl. no. 27501/06, Decision (Inadmissibility) of 28 June 2011; ECtHR, *Bingölbalı and 54 Others v. Turkey*, Appl. no. 18443/08, Decision (Inadmissibility) of 28 June 2011; ECtHR, *Boğuş and 91 Others v. Turkey*, Appl. no. 54788/091, Decision (Inadmissibility) of 28 June 2011.

[190] Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun, no. 5982, 7 May 2010, reprinted in *Official Gazette*, no. 27580, 13 May 2010.

[191] Venice Commission, Opinion on the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey, Doc. CDL-AD(2011)040, 18 October 2011, at 3.

[192] *Ibid.*, at 3–4.

[193] Demir-Gürsel, *supra* note 132, at 330, 329.

[194] ECtHR, *Uzun v. Turkey*, Appl. no. 10755/13, Decision (Inadmissibility) of 30 April 2013.

[195] AYM, *Mustafa Ali Balbay*, Appl. no. 2012/1272, Judgment of 4 December 2013; AYM, *Mehmet Haberal*, Appl. no. 2012/849, Judgment of 4 December 2013.

[196] AYM, *Yaman Akdeniz and Others*, Appl. no. 2014/3986, Judgment of 2 April 2014.

[197] AYM, *Youtube LLC Corporation Company and Others*, Appl. no. 2014/4705, Judgment of 29 May 2014.

[198] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

[199] Commissioner for Human Rights of the Council of Europe, Memorandum on the Human Rights Implications of Anti-Terrorism Operations in South-Eastern Turkey, Doc. CommDH(2016)39, 2 December 2016, para. 16.

order the government to end the curfews and to cease military operations or at least carry them out in accordance with international legal standards. One after another, they failed.[200] By the end of December, 63 civilians had been shot to death or died due to lack of access to medical care. The AYM continued to reject interim measure requests, including by a 15-year-old disabled boy, a nine-month-pregnant woman and a man whose arm had to be amputated.[201] It deferred to government arguments that the applicants could have called an emergency line for medical care, food and funeral services. In reality, the petitioners had called the emergency line, and the government was well aware of the dire humanitarian situation in the curfew zones.[202]

The petitioners were confident that the ECtHR would intervene, particularly after the CoE's commissioner for human rights had expressed concern about the curfews and 'the chronic problem of impunity' shielding security forces.[203] Yet, out of the 34 applications filed by over 160 applicants,[204] the ECtHR granted interim measures in only five.[205] In the remaining cases, it did not do so because 'the elements at its disposal were insufficient'.[206] In February 2016, it directed the petitioners to the AYM, which it found to be 'relevant and potentially capable of providing interim relief'.[207] In December, it rejected as 'manifestly ill-founded' complaints that the authorities executed the curfews so strictly that they did not allow the dispatch of the injured by ambulances or families, prevented the retrieval of the bodies from the streets and subjected the residents of entire towns to indefinite house arrest.[208] It followed the AYM's lead in glossing over the issues of legality and proportionality. In contrast, the commissioner for human rights had found that curfews lacked a legal basis and that they were disproportionate to the aims they pursued. On the latter point, the commissioner had drawn attention to the 'big contrast' between the number of affected (1.6

[200] AYM, *Mehmet Girasun and Ömer Elçi*, Appl. no. 2015/15266, Decision of 11 September 2015; AYM, *Meral Danış Beştaş*, Appl. no. 2015/19545, Decision of 22 December 2015.

[201] AYM, *İrfan Uysal and Others*, Appl. no. 2015/19907, Decision of 26 December 2015.

[202] AYM, *Ayhan Seviktek ve Mehmet Oran*, Appl. no. 2016/43, Decision of 8 January 2016; AYM, *Ekrem Şen ve Diğerleri*, Appl. no. 2015/20376, Decision of 20 January 2016.

[203] Commissioner for Human Rights of the Council of Europe, Turkey Should Ensure the Protection of Human Rıghts in the Fight against Terrorism, Statement, 18 November 2015.

[204] Interview with the applicants' co-counsel Benan Molu, Berlin, 27 April 2017.

[205] ECtHR, *Öncü v. Turkey*, Appl. no. 4817/16, Decision (Interim Measure) of 21 January 2016; ECtHR, *Zehide Paksoy and Others v. Turkey*, Appl. no. 3758/16, Decision (Interim Measure) of 18 January 2016; ECtHR, *Ahmet Tunç and Zeynep Tunç v. Turkey and Ahmet Tunç and Güler Yerbasan v. Turkey*, Appl. nos. 4133/16 and 31542/16, Decision (Interim Measure) of 19 January 2016; ECtHR, *Cemil Altun v. Turkey*, Appl. no. 4353/16, Decision (Interim Measure) of 19 January 2016; ECtHR, *Mehmet Latif Karaman v. Turkey*, Appl. no. 5237/16, Decision (Interim Measure) of 22 January 2016. Only in *Öncü* did Turkey adhere to the Court's order. In the rest, it defied the instructions for immediate hospitalization, resulting in the applicants' deaths.

[206] ECtHR Registrar, Requests for Lifting of Curfew Measures in South-Eastern Turkey: The Court Refuses to Indicate Interim Measures for Lack of Elements, but Is Pursuing Its Examination of Applications, Press Release, Doc. ECHR 016 (2016), 13 January 2016.

[207] ECtHR Registrar, Curfew Measures in South-Eastern Turkey: Court Decides to Give Priority Treatment to a Number of Complaints, Press Release, Doc. ECHR 054 (2016), 5 February 2016.

[208] See, e.g., ECtHR, *Cemil Altun v. Turkey*, Appl. no. 4353/16, Decision (Partial Inadmissibility) of 6 December 2016.

million) and displaced (355,000) civilians and the official number of killed, injured or captured terrorists (totalling under 2,000), the 'tremendous' destruction of neighbourhoods and the use of lethal force and heavy weaponry in residential areas.[209]

The ECtHR addressed the remaining substantive complaints in January 2019.[210] The applicants had asked to be exempted from exhausting domestic remedies. They pointed out that the AYM was yet to issue a ruling in curfew cases filed three years earlier and had not once found a violation of the right to life during security operations since the constitutional complaint mechanism had entered into force.[211] Moreover, the impunity regime shielding security forces was strengthened by laws adopted since March 2015.[212] The ECtHR was not convinced; the applicants would not be exempt from exhausting constitutional review on the basis of 'mere doubts' about its effectiveness.[213] When the AYM finally addressed an individual complaint filed by 17 victims in 2022, it did not find violations of any of the fundamental rights raised by the applicants, including the rights to life and liberty.[214]

As discussed in section 3.A.2, the AYM rejected the petitions of journalists, judges, prosecutors and HDP deputies arrested after the coup attempt. As a result, just when it had gotten rid of thousands of Turkish cases thanks to new domestic remedies created since the mid-2000s, the ECtHR was swamped with 8,300 new applications in 2016 alone – nearly four times as many as in 2015. The number skyrocketed to 25,978 in 2017.[215] One of these applicants was Zeynep Mercan (introduced at the beginning of this article). For the ECtHR, Mercan's 'fears' of the AYM's impartiality due to its dismissal of its own members did not relieve her of the obligation to exhaust the constitutional complaint mechanism.[216] Yet, in the post-coup phase, the AYM had made it very clear that the 'conviction' of the majority of its members was sufficient to dismiss judges from their ranks without any evidence of unlawful activity.[217] As the Venice Commission noted, once the AYM thus confirmed the validity of an emergency decree dismissing thousands of judges, there would be 'little chance of success' for challenging before Turkish courts the dismissals of judges and prosecutors.[218] There was

[209] Commissioner for Human Rights of the Council of Europe, *supra* note 200, paras 28–29.

[210] ECtHR, *Ahmet Tunç and Others v. Turkey*, Appl. nos. 4133/16 and 31542/16, Decision (Inadmissibility) of 29 January 2019.

[211] By the end of 2016, some 1,200 civilians were killed, many for lack of access to emergency health services, and others were disappeared and tortured. United Nations Human Rights Office of the High Commissioner, Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016, February 2017, at 2–4.

[212] Commissioner for Human Rights of the Council of Europe, Third Party Intervention under Article 36, paragraph 3, of the European Convention on Human Rights, Doc. CommDH(2017)13, 25 April 2017, para. 32.

[213] *Ahmet Tunç and Others*, *supra* note 211, para. 115.

[214] AYM, *Gazal Kolanç and Others*, Appl. no. 2017/37897, Judgment of 5 July 2022.

[215] While the Court received substantially fewer new applications (6,717) in 2018, this was still over three times as many as in 2015. ECtHR, Analysis of Statistics 2018 (2019), at 11, available at www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf.

[216] *Mercan*, *supra* note 3; see also ECtHR, *Zihni v. Turkey*, Appl. no. 59061/16, Decision (Inadmissibility) of 29 November 2016.

[217] AYM, Appl. nos. E. 2016/6, K. 2016/12, Judgment of 4 August 2016, para. 84.

[218] Venice Commission, *supra* note 2, para. 186.

another sticking point: dismissals commanded by emergency decrees (as opposed to by administrative bodies) could not be contested before courts.[219]

And, yet, when the ECtHR finally addressed the effectiveness of the constitutional complaint mechanism in March 2018, it did not see a reason to depart from its pre-coup finding that the AYM was an effective remedy for deprivation of the right to liberty.[220] Neither has it changed this stance since. This reluctance is even more striking in *Kavala* and *Demirtas*, where the ECtHR found Article 18 violations. In the former, the ECtHR limited its analysis to the duration of constitutional review, finding 17 months to be too long, but it did not address the issue that the AYM had not found any violation. In the latter case, while being 'struck' by the AYM's failure to 'carry out any examination' of whether the applicant's speeches were protected by his parliamentary non-liability,[221] the ECtHR did not address the effectiveness of that review. Effectively, the ECtHR gave the AYM a blank cheque.

The openness of that cheque became all the more evident in a right-to-life case concerning the aerial bombardment of Kurdish civilians smuggling goods from Iraq in 2011, resulting in the death of 34 peasants.[222] Although a Turkish military court had found that the bombardment was carried out by the military and approved by the General Staff, presumably with government consent, it dismissed the case, concluding that the killings were unavoidable because the victims were mistaken as PKK militants. The AYM was, in principle, bound by *Benzer*, a similar case where the ECtHR had found a substantive Article 2 violation in the killing of Kurdish civilians in an aerial bombardment in 1994 and, exceptionally, ordered an investigation.[223] In the current case, the lead lawyer's tardiness in submitting the requested additional information came to the AYM's rescue. Finding his medically certified illness not to be grave enough to justify a two-day delay, the AYM rejected the case.[224] A dissenting judge criticized the majority with extreme formalism, citing ECtHR precedent that formalistic procedural requirements constitute disproportionate restrictions on access to justice. He noted that the AYM could have obtained the information itself; the remoteness of the villages where the applicants lived and the security situation might have reasonably delayed the completion of the process; and rules of procedure on constitutional complaints did not give guidance as to which illnesses constitute valid excuses for delays. Yet, citing the same grounds as the AYM, the ECtHR refused to pass judgment in the most serious human rights case filed against Turkey in decades.[225]

The ECtHR has been an enabler of each of the covert forms of authoritarian resistance analysed in this section. It approved Turkey's UDs and settlement offers even where they clearly fell below ECtHR standards concerning effective individual and general measures to be adopted in cases concerning gross violations and against the

[219] *Ibid.*, paras 200–201.
[220] *Mehmet Hasan Altan*, *supra* note 136, para. 142.
[221] *Selahattin Demirtaş*, *supra* note 147, para. 262.
[222] *Cumhuriyet*, 'Jetler Sivilleri Vurdu', 30 December 2011.
[223] ECtHR, *Benzer and Others v. Turkey*, Appl. no. 23502/06, Judgment of 12 November 2013.
[224] AYM, *Mehmet Encü and Others*, Appl. no. 2014/11864, Decision of 24 February 2016.
[225] ECtHR, *Selahattin Encü v. Turkey*, Appl. no. 49976/16, Decision (Inadmissibility) of 17 May 2018.

applicants' explicit requests for a judgment. It endorsed a domestic remedy, which solely provides (some) of the victims of state violence with compensation for pecuniary losses, against established ECtHR jurisprudence that there can be no effective remedy in such cases without truth and justice. It not only prematurely endorsed Turkey's constitutional complaint mechanism as an effective domestic remedy, but it also has not reversed this assessment despite the AYM's repeated failure to uphold the ECHR in cases concerning state violence and its post-coup crackdown of civil society. In sum, in attributing credentials of democracy and the rule of law to an authoritarian regime and its captured courts, the ECtHR has been complicit in the undermining of its own norms and standards by that regime.

4 Broader Implications

My empirical findings on the ECtHR-Turkish case contribute to ongoing research on a larger phenomenon: authoritarian resistance through international human rights courts. First, they show the need to pay close attention to the goals that authoritarian states pursue in adopting what may seem to be constructive measures and policies. Just as the creation of a new international court with a similar mandate is a form of resistance,[226] so is the introduction of non-functional domestic remedies or institutions where the goal is to preclude victims' access to an international court. If 'contesting the court's jurisdiction at the admissibility stage of a particular proceeding' is pushback,[227] it is difficult to see why covert efforts to settle admitted cases to preclude adverse judgments should be different. Variably considered as backlash, pushback or resistance, the authoritarian strategies laid out in this article seek to achieve the same goal: curtailing the ECtHR's jurisdiction as it applies to the states concerned.

Second, my study illustrates the inadequacy of existing theories and concepts to fully capture the multiple and often simultaneous ways in which authoritarian resistance takes place. Some of these strategies are overt and easily detectable, others more subtle, disguised behind conciliatory gestures and mistaken for cooperation. As Alexei Trochev summed up in 2009, Russia's contestations fall across the entire spectrum: 'The Kremlin today has made it a priority to stem the flow of potential complaints to the ECtHR and to do something about the complaints that have already been received by the court.'[228] Russia has sought to minimize new petitions, win inadmissibility decisions in pending cases and delay adverse judgments in others by slowing the handling of cases in Strasbourg. It has adopted corresponding strategies for each goal: a domestic remedy for pending ECtHR cases concerning excessively lengthy proceedings and the non-implementation of domestic court rulings; financial settlement offers to applicants of admitted cases; and the non-ratification of Protocol no. 14 to the ECHR.[229] Turkey, too, has adopted targeted domestic remedies to win inadmissibility

[226] Madsen, Cebulak and Wiebusch, *supra* note 31, at 209.
[227] *Ibid.*
[228] Trochev, *supra* note 48, at 146.
[229] *Ibid.*

decisions in admitted cases and, together with Hungary and initially Poland, made concerted efforts to settle cases pending in Strasbourg. All four countries have sought to avoid adverse judgments and have done so through settlement policies in contravention of ECtHR norms – by forcing the applicants to accept compensation and not undertaking general measures to ensure the non-repetition of violations.

Third, the timing, shape and duration of authoritarian resistance depend not only on the goals that states pursue but also on the changing context in which they interact with international courts as well as the domestic ideological shift or regime change. In the 1990s, Turkey engaged in 'backlash': systematic non-cooperation. In the early 2000s, the AKP's desire to join the EU coincided with the ECtHR's interest in alleviating its caseload, leading Turkey to pursue discrete resistance through cooperation rather than an overt one through confrontation. In the late 2010s, the ECtHR's resort to Article 18 to tackle the rising illiberalism in Europe and Erdoğan's turn towards autocracy resulted in Turkey's non-compliance with the ECtHR's Article 18 judgments ordering the immediate release of arbitrarily detained applicants.[230] The AYM's open defiance of the ECtHR's authority to assess the legality of Turkish laws has been the final straw illustrating that Turkey has come full circle in its attitude towards the ECHR system. Today, Turkey simultaneously engages in old and new resistance forms: persistent norm non-compliance (overt and systemic), non-compliance with specific judgments (overt and limited), defying the authority of the ECtHR (overt and general) and hindering individuals' access to justice (discrete and systemic).

Similarly, after acquiring a qualified parliamentary majority in Hungary in 2010 and making a decisive turn towards illiberalism, the Fidesz government has pursued multiple strategies of norm non-compliance. It has avoided compliance with ECtHR judgments by embroidering its CoM reports with intended remedies but never adopting them and has settled as many admitted cases as possible to preclude further adverse judgments.[231] As for Poland, the considerable decrease in settlements after the Prawo I Sprawiedliwosc (PiS) gained an absolute parliamentarian majority in 2015 may suggest that the government might be choosing to defend national authorities who have committed the violations at issue.[232] Indeed, once the ECtHR started to address the rule-of-law crisis, the CT declared the incompatibility of the ECHR's Article 6 with the Polish Constitution and, by implication, the non-enforceability of ECtHR judgments.[233] This defiance concerns the ECtHR's overall jurisprudence on the rule of law in Poland and goes further than the Russian Constitutional Court, which 'only' declared the impossibility to enforce three ECtHR rulings.[234] In this sense, the CT's decisions 'go further than a pushback, in the sense that rights enshrined in the [ECHR] might soon become illusory to Polish citizens'.[235] In fact, the CT's contestation 'might

[230] *Yıldırım Turan*, *supra* note 9.
[231] Kos names these Hungarian strategies respectively as 'disguised non-compliance' and 'subtle pushback'. Kos, *supra* note 80, at 11, 12.
[232] *Ibid.*, at 17.
[233] Ploszka, *supra* note 12.
[234] *Ibid.*, at 52.
[235] Kubal and Mrowicki, *supra* note 39, at 1.

actually result in the country leaving the ECHR in all but a name'.[236] While the PiS's fall from government after the general elections in October 2023 may steer Poland in a different direction, the country's sudden and sharp turn towards authoritarianism presents a cautionary tale on the effectiveness of the ECHR system.

Fourth, the variations in the form of authoritarian resistance also depend on the institutional set-up of the human rights regime in question. As opposed to the inter-American regime, states cannot leave the ECtHR's jurisdiction without withdrawing from the CoE. While Venezuela withdrew from the American Convention on Human Rights to prevent individual access to the IACtHR, it remains a member of the Organization of American States.[237] In contrast, Russia's suspension from the CoE went hand in hand with its suspension from the ECHR system. Thus, the stakes of not recognizing the right of individual petition are the highest in the European system. At the same time, the combination of the ECtHR's emphasis on subsidiarity and its post-enlargement workload has given authoritarian regimes leeway to impede individual access without exiting the system. In other words, there is no need to engage in 'backlash' where resistance is tolerated and, indeed, enabled by the international court itself. This variation in the institutional design of regional systems points to the need to develop analytical models tailored to their uniqueness.

Fifth, and by corollary, the form and purpose of judicial response partly depends on the ways in which international courts adjudicate. Analyses based on judgment-jurisprudence alone might be methodologically accurate for international courts with high admissibility levels or rulings that are representative of the range of issues raised by the applicants. Where judgments make up a fraction of jurisprudence and, particularly, where the court responds to systemic violations with inadmissibility decisions, judgment-based analyses can reach inaccurate conclusions.

Sixth, international courts are not always resilient in the face of authoritarian resistance. Their responses, too, move along a spectrum – from strict scrutiny to complicity, depending on the form and degree of authoritarian resistance. On the rule-of-law crises in Poland and Hungary, the contrasting compliance strategies of these two states have affected the responses of the EU and the CoE's judicial and non-judicial organs. Hungary's 'covert defiance', disguised in conciliatory rhetoric signalling an effort to comply with the ECtHR's rulings, has succeeded in evading strict oversight, while Poland's 'overt defiance' and confrontational rhetoric have triggered remedial and punitive action by the ECtHR and condemnation from the CoM.[238] Covert defiance in the form of signalling has been so effective that illiberal states 'may in fact dictate the European law enforcement actions'.[239] With respect to Turkey, the ECtHR's response to persistent norm non-compliance has evolved from restrained oversight in the 1990s to complicity since the turn of the century. Once issuing precedent-setting violation judgments in Turkey, it has turned into a court rejecting justiciable cases

[236] *Ibid.*, at 6.
[237] American Convention on Human Rights 1969, 1144 UNTS 123.
[238] Kos, *supra* note 80, at 11–28.
[239] *Ibid.*, at 30.

without reasoning, endorsing domestic remedies without scrutiny and resorting to diplomacy to restrict its jurisdiction.[240] Here, too, signalling has mattered. Once Turkey changed its stance from confrontation and non-cooperation to dialogue and cooperation, the CoE responded favourably. The ECtHR endorsed Turkey's UDs and domestic remedies even when they were in violation of its jurisprudence and rejected thousands of cases including those concerning right-to-life violations. Taking Turkey's actual and planned reforms at face value, the CoM has ceased much of its monitoring of ECtHR judgments concerning state violence.[241]

At the same time, there is a crucial distinction. Turkey is only the second member state facing infringement proceedings in the CoE's history and the first ever to defy them.[242] Not only has the Turkish judiciary not released Kavala in overt defiance of two ECtHR judgments, but it has sentenced him to life imprisonment without parole after the CoM began infringement procedures against Turkey.[243] The AYM has ruled in favour of Erdogan's regime in all politically sensitive cases, including those concerning systemic gross violations (which do not occur in Poland and Hungary) and the politically motivated imprisonment of opposition figures, judicial officials, journalists and others (which is the case in Russia but not in Poland or Hungary). It went as far as defying the ECtHR's general authority to assess the legality of Turkey's laws (as have its Russian and Polish counterparts but not (yet) the Hungarian party). Yet, in contrast to its quick and strong response to Poland's rule-of-law crisis, seven years after Erdoğan launched a crackdown against the entire civil society with the support of his captured courts, the ECtHR insists on treating Turkey as a country worthy of its subsidiarity principle. This suggests, particularly when read in light of its recent judgments on Poland, that the ECtHR's complicity might not solely be explained by a 'managerial' concern over efficiency.[244]

What lies behind the ECtHR's differential treatment of the effectiveness of the legal systems of authoritarian regimes is worthy of exploration in future research on resistance and response. More generally, my in-depth study of the ECtHR-Turkey case shows the need for conceptual clarification and empirical verification to capture the entire spectrum of resistance and judicial response in authoritarian contexts. While Russia is no longer a part of the ECHR system, it, together with Turkey, has created a precedent on the diverse ways in which authoritarian regimes can avoid supranational oversight without formally severing their ties with regional human rights

[240] Madsen, Cebulak and Wiebusch, *supra* note 31, at 213–214.

[241] Kurban, *supra* note 20.

[242] Azerbaijan, the first member state facing the infringement procedure in 2017, responded by complying with the ECtHR judgment ordering the immediate release of an applicant held in pre-trial detention. ECtHR, *Ilgar Mammadov v. Azerbaijan*, Appl. no. 15172/13, Judgment of 22 May 2014.

[243] Committee of Ministers, Interim Resolution on the Execution of the judgment of the European Court of Human Rights Kavala against Turkey, Doc. CM/ResDH(2022)21, 2 February 2022.

[244] Clements, '"Efficiency Is Paramount in This Regard": The Managerial Role of the ICC Presidency from Kirsch to Fernández', 21 *Law and Practice of International Courts and Tribunals* (2022) 342.

regimes. Hungary and Poland have already appropriated some of these strategies, and we may see more member states choosing this path in their relations with Strasbourg. In-depth and contextualized empirical research on these and other case studies would not only advance scholarship, but it would also help future efforts to uphold liberal democratic values in Europe and beyond.