Hasankeyf at the European Court of Human Rights:
A Human Rights Based Approach to the Protection of Cultural Heritage

By

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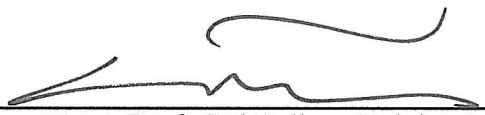

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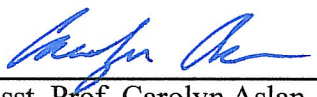

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ABSTRACT

Today the protection of cultural heritage is one of the major concerns of the states as well as the international community as a whole. Institutions such as UNESCO, the Council of Europe and the European Union are increasingly focusing their activities on the safeguarding of cultural heritage. Many international legal instruments have been elaborated in this regard and the protection of cultural heritage is now being discussed within the framework of broader concepts such as human rights. The present study concentrates on this latter aspect. Can cultural heritage be protected as a part of human rights? In this context, this study aims to examine the implications of the on-going case brought against the construction of the Ilısu Dam and Hydroelectric Power Plant before the European Court of Human Rights. The long-criticized Ilısu Dam project poses a threat to nearly two hundred archaeological sites in the south east of Turkey, including the site of Hasankeyf, which is of significant importance. First, the study examines the development of the international law regarding cultural heritage and the evolving literature on the connection of cultural heritage to human rights. Then, it explores the background of the Ilısu Dam project and its impacts on the site of Hasankeyf. Finally, it discusses the legal issues raised in the Hasankeyf case at the European Court of Human Rights. The study concludes that while the human rights law may play an important role in the protection of cultural heritage, the recognition of cultural heritage as a human right challenges the current practice of the Court.

Keywords: cultural heritage, international law, human rights, European Court of Human Rights, Hasankeyf, Ilısu Dam

ÖZET

Günümüzde, kültürel mirasın korunması devletler kadar uluslararası toplumu da ilgilendiren bir meseledir. UNESCO, Avrupa Konseyi ve Avrupa Birliği gibi uluslararası kurumlar çalışmalarını gittikçe artarak kültürel mirasın korunması üzerinde yoğunlaştırmaktadır. Bu bağlamda birçok uluslararası sözleşme geliştirilmiş, ayrıca kültürel mirasın korunması, insan hakları gibi daha kapsamlı konular çerçevesinde tartışılmaya başlanmıştır. Bu çalışma, sözü geçen bu son noktaya değinmektedir. Kültürel miras, insan hakları kapsamında korunabilir mi? Bu çerçevede, çalışma, Ilısu Barajı ve Hidroelektik Santrali yapımına karşı Avrupa İnsan Hakları Mahkemesi'nde açılmış ve halen sürmekte olan davanın sonuçlarını incelemeyi amaçlamaktadır. Uzun bir süredir eleştirilmekte olan Ilısu Barajı projesi aralarında Hasankeyf'in de bulunduğu yaklaşık iki yüz arkeolojik sit alanı için bir tehdit oluşturmaktadır. Bu çalışma öncelikle, uluslararası hukukun kültürel miras konusunda gelişimi ve kültürel mirasın insan hakları ile olan bağlantısı üzerine gelişen literatürü inceleyecektir. Daha sonra, Ilısu Barajı projesi ve projenin Hasankeyf sit alanına olan etkisi araştırılacaktır. Son olarak, Avrupa İnsan Hakları Mahkemesi'nde görülmekte olan Hasankeyf davasına ilişkin hukuki meseleler tartışılacaktır. Bu çalışma kültürel mirasın daha etkin bir şekilde korunmasında insan hakları hukukunun önemli bir rol oynayabileceğini, ancak kültürel mirasın bir insan hakkı olarak tanınmasının pratikte – özellikle Avrupa İnsan Hakları Mahkemesi çerçevesinde – bir takım zorluklar yaratabileceğini ortaya koymaktadır.

Anahtar kelimeler: kültürel miras, uluslararası hukuk, insan hakları, Avrupa İnsan Hakları Mahkemesi, Hasankeyf, Ilısu Barajı

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CHAPTER 1

INTRODUCTION

Major urban and industrial projects undertaken by the public authorities pose a threat to the cultural heritage in Turkey like in many other countries in the world. The construction of dams, in particular, has caused the loss of a considerable part of Turkey's cultural heritage since the 1960s. Today, the threat continues despite the adoption of conservation policies. Two recent controversial dam projects, the Yortanlı Dam and the Ilısu Dam, the former in the west and the latter in the south east of Turkey, are highly discussed not only in Turkey, but also in Europe. Sadly, the efforts to stop the Yortanlı Dam from flooding the Roman site of Allianoi failed in August 2010, when the authorities have decided to fill the site with sand and leave it under the dam's water reservoir. The situation in the southeast is still critical. If the Ilısu Dam is completed as it is projected, an area containing more than nearly two hundred archaeological sites, including Hasankeyf –a site of great importance– will be inundated. The gravity of the impacts of the dam on the cultural heritage and the environment already caused the majority of the foreign companies that were initially supporting the project, to withdraw. However, despite the withdrawal of the foreign financial support, the construction of the Ilısu Dam started in 2008. In the website of

the State Hydraulic Works (Devlet Su İşleri), it is announced that the dam will be completed in 2015. The legal action pending before the Diyarbakır Administrative Court against the construction of the Ilısu Dam did not have an effect on the commencement of the construction works either.

While the fate of Hasankeyf is still unknown, the preservation efforts of the site have engendered very important discussions regarding the protection of cultural heritage in international law. In 2006, a group of experts from Turkey have applied to the European Court of Human Rights claiming that the construction of the Ilısu Dam was violating certain rights and freedoms guaranteed under the European Convention of Human Rights, since the dam would cause an extensive damage to the cultural heritage, in particular the site of Hasankeyf. What is the link between cultural heritage and human rights? Can human rights law play a role in the protection of cultural heritage? If yes, how can the concept of cultural heritage be integrated into the concept of human rights? To what extent can cultural heritage be protected as a part of the human rights system? These are some of the questions, issues and concerns underlying the debate of "protecting cultural heritage as a human right," which constitutes the subject of this thesis. Recently, the scholars have increasingly focused their attention on the human dimension of cultural heritage. This thesis aims to contribute to this debate by analyzing the implications of the court case on Hasankeyf pending before the European Court of Human Rights.

Today, the protection of cultural heritage is considered as a common concern of the international community. Therefore, states have a shared responsibility for identification, conservation and management of the world's heritage as established by the international standards. However, the last decades witnessed several cases where the principles laid down in these international instruments were violated. Now

scholars, legal experts and cultural heritage practitioners are reflecting on the gaps and weaknesses of the current system and on how cultural heritage can be more effectively protected. The role of the human rights law is very important in this respect.

Conducting research on the protection of cultural heritage as a part of human rights raised certain challenges. First, cultural heritage law is a newly developed legal field. The research done so far in the field and the related case-law are limited. In addition, despite the increase in the amount of scholarship on cultural heritage, very few of these studies have examined the linkage between cultural heritage and human rights. Besides, the sources in the field of human rights law devote very little attention to cultural heritage.

The connection with cultural heritage and human rights can be studied in different contexts: wartime protection of cultural heritage, exercise of religious freedoms, protection of minorities and indigenous groups, illicit trade etc. Although the thesis refers to these subjects frequently, it does not intend to study each aspect in detail. Rather, it will consider how cultural heritage can be protected as a form of human rights, in particular within the context of the European Court of Human Rights.

The political and social context in Hasankeyf should be noted as well. The site of Hasankeyf is situated in the south east of Turkey where the majority of the population is from Kurdish origin. The "Kurdish Question", which involves both the peoples' claims related to social and cultural rights and the fight against the PKK, the Kurdish terrorist organization, is one of the most important domestic issues in Turkey since the 1980s. It was against this background that the safeguarding campaign of

Hasankeyf was used by certain groups for political propaganda. This raised, in some people's minds a wrongful association of Hasankeyf with the Kurdish Question. It is of great importance to emphasis that Hasankeyf is considered as any other site in Turkey within the scope of this thesis. All cultural heritage situated in Turkey are a part of Turkey's national cultural heritage, whether they belong or not to any group or minority, and also of the shared heritage of humanity. This guiding principle rejects any discriminatory interpretation of cultural heritage; on the contrary it attributes a universal value to cultural heritage.

The thesis is composed of five chapters. The second chapter focuses on the protection of cultural heritage in international law and provides a literature review on the subject. The first section of the chapter examines the development of the international law that expanded its scope to cover the field of cultural heritage, with references to the conventions, recommendations and principles formulated during a span of over fifty years. The second section concentrates on the evolving literature on the human right dimension of cultural heritage. While it discusses the place of cultural heritage in the classification of human rights on one hand, it refers to past experiences that have shown the interaction between cultural heritage and human rights on the other. Throughout the chapter, key concepts such as intangible heritage, cultural pluralism, cultural diversity and integrity are addressed as well.

The third chapter introduces the background of the construction project of the Ilısu Dam (the "Ilısu Dam Project") and the problems associated with the preservation and protection of Hasankeyf. First, it provides a brief history on past dam projects that have caused significant damage to cultural heritage both in the world and in Turkey. It also explains the management policies adopted by states to safeguard cultural heritage threatened by dams and also other infrastructure projects.

Then, it gives an overview of the Ilısu Dam Project: past, present and challenges. The measures foreseen to preserve Hasankeyf are discussed as well.

The fourth chapter deals exclusively with the court cases related to the construction of the Ilısu Dam project pending before the Turkish courts and the European Court of Human Rights. The first section of the chapter provides information on the national legal framework for the protection of cultural heritage in Turkey and on the cases brought to the Turkish courts to save Hasankeyf. The second section of the chapter analyzes the legal implications of the Hasankeyf case at the European Court of Human Rights. The claims of the applicants and the objections of Turkey are examined and commented on with reference to the Court's case-law. Finally, the chapter argues that the recognition of cultural heritage as a human right raises challenges in the implementation, in particular within the context of the European Court of Human Rights.

The fifth chapter offers a conclusion to the analysis on the Hasankeyf case and provides a general assessment of Turkey's current approach to the preservation and the protection of the cultural heritage situated on its territory.

CHAPTER 2

CULTURAL HERITAGE AND INTERNATIONAL LAW

The protection of cultural heritage is ensured by numerous legal instruments and mechanisms at both national and international levels throughout the world. However, the rapid development of the international law with regards to cultural heritage over the last decades had a significant influence on the evolution of cultural heritage. Mainly owing to the instruments developed by institutions like UNESCO, the concept of cultural heritage has changed content. It used to cover the tangible heritage such as monuments, sites and objects, but now it extends to the living heritage of the peoples and societies such as traditions and folklore (referred to as "intangible heritage"). The inclusion of the intangible heritage within the scope of the legal protection of cultural heritage moved the current emphasis on "property" toward peoples and cultural identity. This approach stimulated new discussions on the human dimension of cultural heritage and on its status as a human right. In fact, human rights norms have been referenced in the most recent international instruments for the protection of cultural heritage. In particular, the Framework

Convention on the Value of Cultural Heritage for Society (Faro Convention)[1] recognizes the rights related to cultural heritage among universal human rights.[2]

This chapter seeks to understand how the protection of cultural heritage has become a subject of international law and to examine the recent developments in international law and human rights law with regard to cultural heritage. The first section deals with the concepts of "cultural property" and "cultural heritage" and analyses the development of the international legal instruments for the protection of cultural heritage. The second section focuses on the field of human rights and considers the place of cultural heritage in the general context of human rights. It then argues for the relevance of the protection of cultural heritage as a part of the human rights system.

2.1 History and Evolution of International Law for the Protection of Cultural Heritage

2.1.1 Emergence of the Concept of Cultural Property

The idea of protecting the heritage of the past existed long before the establishment of legal norms. As early as 70 BC, Gauis Verres, the governor of Sicily at the time was accused of, among other charges, plundering art work of special importance for Sicily as narrated in Cicero's speeches called the "Verrines" (Miles,

[1] The Convention was adopted in 2005 by the Council of Europe. The text of the Convention is available at <www.coe.int> (date of access: 15 May 2011).
[2] See Article 1§ 1 (a) of the Faro Convention.

2002, p. 28). Cicero himself acted as a prosecutor in the trial against the Roman governor who had to leave Sicily before the end of the trial (Miles, 2002, p. 29) [3].

The concept of cultural property flourished during the age of Enlightenment. Our current understanding of cultural property is based on the legal theory developed during this period and the last two centuries (Miles, 2002, p. 28).

The Swiss jurist Emmerich de Vattel introduced for the first time the idea of a separate category for cultural property, subject to different conditions and treatment in wartime, in his treatise "Le droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains" (The law of nations; or, Principles of natural law as applied to the conduct and affairs of States and Sovereignties) of 1758 (Miller, 2008, p.300). According to Miller, de Vattel was original in his perception of cultural property "as something separate from land, ships, bullion, commodities, arms, or other portable possessions" (2008, p 301). Another important thinker from the Enlightenment Age is Abbé Grégoire who played a key role in stopping the destruction of monuments and art from the Ancien Régime in France. Abbé Grégoire believed that preserving historical monuments and objects was a public duty, because they form together the patrimony of the people (Francioni, 2007, p. 223). Although these ideas did not have any force of law immediately, they provided an important theoretical basis for later developments.

[3] The "Verrines" are considered to be the earliest text dealing with how art should be used (Miles, 2002, p.30). Miles explains that Cicero not only accuses Verres of abusing his authority as a governor to collect art, but also puts forward the idea that conquering generals should respect the art of the defeated (2002, p. 31). In this respect, Cicero distinguishes art works (especially religious objects and images) from ordinary spoils of war and builds the theoretical bases for the perception of art as cultural property.

In Europe, during the nineteenth century, two important events raised public awareness about cultural property. First, the sculptures of the Parthenon[4] in Athens, Greece, were removed to England by Lord Elgin.[5] The public reaction against this event at the time was so strong that the British Museum (where the sculptures are displayed today) almost renounced to purchase the sculptures from Lord Elgin (Miles, 2002, p. 41). The debate over the ownership of the Parthenon sculptures (known as the Elgin Marbles) has been one of the most famous international cases related to cultural property. The claims of the Greeks for the return of the marbles still continue today. The second event is the systematic looting that Napoleon conducted in Italy during his first Italian Campaign in 1796-1799. His idea was to establish a national museum, Le Musée Français (today, the Louvre Museum) (Merryman, 2006, p. 5). Although spoiling the war victim's art was not prohibited by the international law at that time, such action attracted much reaction. A prominent figure of the time was Quatremère de Quincy, an important artist and architectural theorist. He played an important role in the development of the principles on the looting and the destruction of cultural property through the letters he wrote to General Miranda (one of Napoleon's generals) to stop the looting in Italy (Prott, 2009, p. 19). Napoleon, after his defeat at Waterloo in 1815, had to return some of the looted art works, including the famous bronze horses of San Marco in Venice, to Italy. The Napoleon case is a typical example for the use of cultural property as an ideological tool by the political powers (Francioni, 2007, p. 224). Yet he is neither the first nor the last one.[6] Merryman shows the parallelism between Napoleon'

[4] The Parthenon was built nearly 2,500 years ago on the Acropolis of Athens as a temple dedicated to the Greek Goddess Athena. The building was highly damaged during the Venetian siege of the city in 1687 (Prott, 2009, p. 214).

[5] The question on whether Lord Elgin obtained a legitimate approval from the Ottoman authorities to remove the marbles is still debated (Prott, 2009, p. 215).

[6] Merryman identifies "aggression" as one -and the most common - of the four different forms of art imperialism (Merryman, 2006, p. 3). The other forms are opportunism, partage and accretion.

confiscations and the Roman looting of cultural property (Merryman, 2006, p. 5). He uses the same example of the bronze horses of San Marco. Interestingly in the first place, they were taken by the Venetians from Constantinople following the conquest of the city in 1204 during the Fourth Crusade and brought to Venice to decorate the Cathedral of San Marco as a sign of power and pride (Merryman, 2006, p. 5).

With the exception of thinkers like Quatremère, the linkage between cultural objects and heritage was considered in a different way during this period when compared to the Age of Enlightenment (Francioni, 2007, p. 224). Napoleon's idea of establishing a national museum in France shows the national character attributed to the cultural property at the time. Cultural property was seen as a part of the national heritage rather than the "patrimony of people."[7] Nationalism is an important principle in the field of cultural property and is still debated today especially concerning restitution issues.[8] One should bear in mind that "the concept of cultural property itself is inherently nationalistic," as Miles remarks, to understand the evolution of the concept (2002, p. 40).

From a wider perspective, nationalism played an important role as a political principle during the nineteenth century. The idea of "nation-state," born after the Treaty of Westphalia (1648) that ended the Thirty Years War in Europe, was used in the nation building of nineteenth century Europe. A nation-state is defined as "a *sovereign state* of which most of the citizens or subjects are united also by *factors which define a nation*, such as language or common descent" (Oxford Reference Online[9]). When states are sovereign, it means that they do not recognize a higher authority within their territories (Donnelly, 1993, p.28). During the formation of

[7] See page 8.
[8] See the article "Two Ways of Thinking About Cultural Property" by John Henry Merryman in *The American Journal of International Law* 80.4 (1986): 831-853.
[9] Koç University library, E-reference sources (date of access: 15 May 2011).

nation-states in Europe, language together with other forms of culture (religion, literary and artistic traditions) were the legitimate basis for the nation-states to support their independency claims and to become sovereign (Francioni, 2004, p. 2). It is not surprising that in the international relations between the states, "culture" (an important factor that defines a nation) was considered as an internal matter of the states for a long time. Accordingly, the issues related to culture, such as cultural heritage, were traditionally treated within the domestic jurisdiction of the states where international law could not interfere.

The principle of sovereignty dominated the international relations of states during and post Second World War, despite the establishment of the international organizations such as the United Nations, the International Monetary Fund, the World Bank and the GATT[10] (Keyman, 2006, p. 4-5). Nevertheless, international law aimed to protect the cultural properties, especially during armed conflicts.

In 1893, a legal document called the Lieber Code, prepared for the use of American soldiers, brought attention to the protection of cultural objects in war. The Lieber Code is the first legal document to represent cultural property as a special category to be protected in war (Miles, 2002, p. 44). This approach has not been internationally recognized until the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflicts concluded in The Hague (the 1954 Hague Convention).

Prior to the adoption of the 1954 Hague Convention, special rules on the protection of cultural properties were included in the 1907 Hague conventions on the laws and customs of war.

[10] GATT is the abbreviation of the General Agreement on Tariffs and Trade, which was replaced by the World Trade Organization in 1995.

Article 27 and 56 of the Regulations annexed to the Convention IV of 1907 are cited below:[11]

Article 27

> In sieges and bombardments all necessary steps must be taken to spare, as far as possible, *buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected*, provided they are not being used at the time for military purposes.
>
> It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy be forehand.

Article 56

> The property of municipalities, that of *institutions dedicated to religion, charity and education, the arts and sciences*, even when State property, shall be treated as private property.
>
> All seizure of, destruction or willful damage done to institutions of this character, *historic monuments, works of art and science*, is forbidden, and should be made the subject of legal proceedings.

Thus, cultural property was not treated as a separate category to be protected, and rather was regrouped with the buildings dedicated to religion, education and charity. Francioni says that "[this] implies both a fragmented approach to the objects in question and a 'humanitarian' criterion for protection, i.e. one stemming from the undefended character of the buildings, rather than a 'cultural' one" (2007, p.224). As a result, such provisions were insufficient to ensure an efficient international protection of cultural property. Besides, the Hague conventions on the laws and customs of war had a procedural limitation since they required that all the belligerent states should be a party to the conventions (Francioni and Lenzerini, 2003, p.632).

[11] See the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague, 1907) available at <www.icrc.org> (date of access: 15 May 2011).

The next sub section concentrates on the evolution of the concept of cultural property after the Second World War.

2.1.2 Transition from "Cultural Property" to "Cultural Heritage"

A new world order began to settle by the end of the Second World War. The principle of the sovereignty of the states that had been dominating the modern international relations so far was challenged by the rise of the international law. This period covers also the adoption of very important documents, the Charter of the United Nations, the Universal Declaration of Human Rights (the UDHR), the Geneva Conventions of 1949[12] regarding international humanitarian law and the 1954 Hague Convention.

Cultural properties in particular, were treated horrendously during the Second World War. The consequences of the carpet bombing in the cities and of the looting of cultural objects in the occupied territories were devastating. Therefore, one of the first tasks of the newly founded agency of the United Nations, UNESCO, was to adopt a convention to safeguard the material heritage in time of war. The 1954 Hague Convention and its two Additional Protocols[13] still remain as the main legal tools on for wartime protection of cultural heritage.

The 1954 Hague Convention introduced and defined, for the first time, cultural property as a separate category to protect at an international level. Francioni

[12] The Geneva Conventions and their Additional Protocols are at the core of international humanitarian law, the body of international law that regulates the conduct of armed conflict and seeks to limit its effects. They specifically protect people who are not taking part in the hostilities (civilians, health workers and aid workers) and those who are no longer participating in the hostilities, such as wounded, sick and shipwrecked soldiers and prisoners of war. In particular, Article 53 of the Protocol I and Article 16 of the Protocol II prohibit any acts of hostility directed against cultural properties. For further information, visit <www. icrc.org> (date of access: 15 May 2011).

[13] The Second Protocol of 1999 creates a higher level of protection called "enhanced protection" and provides specific sanctions for serious violations and set the conditions in which individual criminal responsibility is applied.

notes that the Convention presents cultural property as "a comprehensive and homogenous category of objects worth protecting because of their cultural value, rather than simply because of their generic undefended or civilian character"[14] (2007, p. 225). The 1954 Hague Convention regroups movable and immovable properties of great importance, buildings such as museums and libraries and centers containing a large amount of cultural properties under the category of cultural property.[15]

In addition, the 1954 Hague Convention introduced the principle according to which cultural heritage of any nation belongs to the "cultural heritage of all mankind" and therefore it should be protected for the general interest. The Preamble of the Convention, in its well-known statement, sets forth that:

> damage to cultural property belonging to any people whatsoever means damage to the *cultural heritage of all mankind*, since each people makes its contribution to the culture of the world,

and that:

> the preservation of the cultural heritage is *of great importance for all peoples of the world* and that it is important that this heritage should receive international protection.

The expression of "heritage of mankind" became a key element of UNESCO's cultural heritage policies and was pointed out in several non binding documents[16]. However, it was with the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (the 1972 World Heritage Convention) that UNESCO established a system of protection based on this concept. The Preamble of the Convention states that:

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[14] By "generic undefended or civilian character", the author refers to the approach adopted by the Hague conventions of 1907 conventions on the laws and customs of war.
[15] See Article 1 of the Convention.
[16] See for instance the 1956 Recommendation on International Principles Applicable to Archaeological Excavations, the 1966 UNESCO Declaration on the Principles of International Cultural Cooperation, the 1976 Recommendation Concerning the International Exchange of Cultural Objects, all available at <www.unesco.org> (date of access: 15 May 2011).

> deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful *impoverishment of the heritage of all the nations of the world*,

thus,

> parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved *as part of the world heritage of mankind as a whole.* [17]

It is important to mention that the big crisis that the states had to face such as the safeguarding of the Nubian monuments during the construction of the Aswan High Dam in Egypt and the inundations of 1966 in Florence played an important role in the adoption of the Convention (Francioni, 2008b, p.12). These events showed that the national resources could be insufficient in some cases. A coordinated action at an international level and a harmonized legal and institutional framework that would support the public and private efforts were needed to respond to such emergencies (Francioni, 2008b, p.13). That is why the Convention calls the "international community as a whole" to participate in the protection of the cultural (and natural heritage) of the world.[18]

In the meantime, the rise of criminal activities related to the illicit importation and exportation of cultural properties and the growth of the black market aroused particular international concern (Akipek, 1999, p.4). As a result of increased awareness of the need to protect cultural heritage from illicit trade, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was adopted in Paris in 1970 (the 1970 UNESCO Convention). [19] Article 2 of the Convention indicates the seriousness of the

[17] See 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, available at <www.unesco.org> (date of access: 15 May 2011).
[18] See the Preamble of the Convention.
[19] As far as the illicit trafficking of cultural objects and their restitution are concerned, the main treaties are the 1970 UNESCO Convention and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995). These two conventions complement each other in the sense that the

problem and the necessity of an international cooperation to fight illicit trafficking as follows:

> the illicit import, export and transfer of ownership of cultural property is one *of the main causes of the impoverishment of the cultural heritage* of the countries of origin of such property and that *international cooperation* constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from.[20]

In brief, the gravity of the emergencies that the states had to confront both during war and peace time and the need for international cooperation to fight serious crimes transcended national boundaries and made cultural property a subject of international concern. At this point, UNESCO developed further the concept of "heritage of mankind" (at least for the tangible heritage) and established the "world heritage" system based on the recognition that the protection of cultural heritage is for the general interest of humanity. Francioni explains that:

> The concept of world heritage goes beyond that of cultural property, as it requires a radical shift in perspective from the national interest of the State to which the property belongs, to *the general interest of humanity* in identifying and preserving a cultural or natural site so exceptional as to be of universal value. (2007, p. 229)

This implies that the protection of cultural heritage was no longer at the sole discretion of the individual states. By becoming party to the 1954 Hague Convention, the 1972 World Heritage Convention and the 1970 UNESCO Convention, states recognized that issues related to cultural heritage should also be regulated by international norms that constituted a higher authority.

Since the protection system was based on the material element of the cultural heritage, the term "property" was used to cover the tangible heritage especially the

UNIDROIT Convention deals with the private law issues that are not regulated under the UNESCO Convention (UNIDROIT Convention is available at <www.unidroit.org>, date of access: 15 May 2011). At regional level, the European Council Directive 93/7 secures the return of cultural objects unlawfully removed from the territory of a member State. (The directive is available at <http://eur-lex.europa.eu/>, date of access: 15 May 2011)

[20] The text of the Convention is available at <www.unesco.org> (date of access: 15 May 2011).

immovable cultural properties such as monuments, groups of buildings and sites.[21]With the emergence of new concepts and approaches in the field, the need for policies aiming at developing the content of the concept of "heritage" was strongly felt. Already in 1968, the Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works remarks that cultural properties are more than simple objects or monuments:

> cultural property is the product and witness of the different traditions and of the spiritual achievements of the past and thus is an essential element in the personality of the peoples of the world, (...)
>
> it is indispensable to preserve it as much as possible, according to its historical and artistic importance, so that the significance and message of cultural property become a part of the spirit of peoples who thereby may gain consciousness of their own dignity.[22]

The UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore adopted in 1989 (the 1989 Recommendation) was entirely oriented towards the safeguarding of intangible cultural heritage. The Recommendation recognized folklore as an integral part of cultural heritage and living culture[23].This approach served as the basis for the further development of the cultural heritage concept.

Ten years after the adoption of the 1989 Recommendation, UNESCO jointly organized an international conference with the Smithsonian Institution[24] to assess the relevance of the 1989 Recommendation and reviewing the protection of intangible heritage. The conference marked the need to develop a legally binding document in

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[21] Like the 1954 Hague Convention (See Articles 1 and 2), the 1972 World Heritage Convention focuses on the immovable cultural properties (of outstanding value) as well (See Article 1).
[22] See the Preamble of the Recommendation. The text of the Recommendation is available at <www.unesco.org> (date of access: 15 May 2011).
[23] See the Preamble of the Recommendation. The text of the Recommendation is available at <www.unesco.org> (date of access: 15 May 2011).
[24] The International Conference "A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore" was held in Washington in 1999 (Retrieved from <www.unesco.org> on 15 May 2011).

the field of safeguarding of intangible cultural heritage ("2000 onwards and the drafting of the Convention"). Francioni explains that it also highlighted:

> the need to put at the center of the system of protection *the peoples, groups and communities that are the creators and bearers of intangible cultural heritage*. This represented an important shift as compared in the past of giving overriding priority to the interest of scientific research thus relating cultural communities to mere objects of study and investigation. (2004, p. 16)

This approach was reflected later in the definition of the intangible cultural heritage developed in the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (the 2003 Intangible Heritage Convention).[25] The first paragraph of Article 2 defines "intangible cultural heritage" as:

> the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.

The importance of this definition lies on the fact that it does not cover only the artistic products, but also the knowledge, skills and creativity that enable the production of such products (in other words, the process itself). Article 2 continues as follows:

> This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of *identity and continuity*, thus promoting respect for *cultural diversity and human creativity*.

In other words, the subject of protection is the process of making culture as well as the cultural diversity and creativity of humanity. Cultural diversity emerges as a value to safeguard beyond the value of a single cultural object.

[25] Available at <www.unesco.org> (date of access: 15 May 2011).

The Universal Declaration on Cultural Diversity adopted by UNESCO in 2001 served as a basis for the development of the 2003 Intangible Heritage Convention. Article 7 of the Declaration presents cultural heritage as "the wellspring of creativity:"

> Creation draws on the roots of cultural tradition, but flourishes in contact with other cultures. For this reason, heritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures.

The same year, a very important normative instrument was also adopted: the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (the 2001 Underwater Cultural Heritage Convention).[26] This Convention established a standard of protection for safeguarding the cultural heritage situated in the seabed beyond the limits of national jurisdictions.[27] The Preamble of the Convention recognizes underwater cultural heritage as "an integral part of the cultural heritage of humanity", expanding further the content of the heritage concept. Article 1 of the Convention defines "underwater cultural heritage" as "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years." The expression "all traces of human existence" (including also the human remains) marks clearly the break away from the traditional approach of "property."

The 2001 Underwater Cultural Heritage Convention deals also with the exploitation of the sea beds and contains detailed provisions concerning the prevention of the illicit trafficking of cultural property recovered from the sea. In this

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[26] Available at <www.unesco.org> (date of access: 15 May 2011).

[27] "States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea" (Article 7 §1).

sense, the Convention represents an important recognition of the international interest in the preservation of cultural heritage (Francioni, 2007, p. 233).

Finally in 2003, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (the 2003 Intangible Heritage Convention) was adopted.[28] This Convention constituted a step further in the development of the concept of cultural heritage and extended the legal protection to the traditions or living expressions transmitted from generation to generation such as oral traditions, performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts[29]. More importantly, Francioni explains that:

> the protection of the intangible cultural heritage has not only the purpose of safeguarding national interests belonging to each sovereign state, but, particularly, *the value of such heritage* "as a mainspring of cultural diversity" corresponding to a "common concern" of the international community as a whole. (2004, p. 17)

The safeguarding of the intangible cultural heritage is closely linked to the preservation of cultural diversity and the promotion of intercultural dialogue. To complement the set of instruments, UNESCO adopted the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[30] This Convention differs from the 2003 Intangible Heritage Convention:

> While the 2003 Convention deals primarily with the processes of transmission of knowledge within the communities and groups that bear this heritage, the 2005 Convention is devoted to the production of cultural expressions, as circulated and shared through cultural activities, goods and services. ("2000 onwards and the drafting of the Convention")

[28] Available at <www.unesco.org> (date of access: 15 May 2011).
[29] See the second paragraph of Article 2 of the Convention.
[30] Available at <www.unesco.org> (date of access: 15 May 2011).

To sum up, the transition from the concept of "property" to the concept of "heritage" is represented below:

	What is preserved?	For whose interest?	What kind of interest?	Qualification	Legislation
Property	Monuments and material objects	Individual states (national interest)	Economical	Private good	National laws
Heritage	Cultural values	International community (general interest)	Public	International public good (a common value)	National laws and international law

Through the instruments, principles and concepts it has elaborated over the years, UNESCO contributed to the recognition of cultural heritage as a common value for humanity in international law. This had two important consequences. First, the traditional principle of state sovereignty governing the protection of cultural heritage has been challenged (Francioni, 2004, p. 12). Second, cultural heritage – as the common patrimony of humankind – has been elevated to the same rank as the other common values such as the protection of natural environment and human rights (Francioni, 2007, p. 236).

Turkey's participation in the international conventions on cultural heritage:

Convention	Status	Notes
UNESCO		
1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and First Protocol	Accession[31] in 1965	Not a party to the Second Protocol adopted in 1999
1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property	Ratification in 1981	Not a party to the 1995 UNIDROIT Convention which is a complementary to the 1970 Convention.
1972 World Heritage Convention	Ratification in 1983	Nine sites inscribed on the World Heritage list
2001 Convention on the Protection of the Underwater Cultural Heritage	Not a party	37 countries are party to the Convention as of May 2011
2003 Convention for the Safeguarding of the Intangible Cultural Heritage	Ratification in 2006	8 elements inscribed on the Intangible Heritage lists
2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions	Not a party	116 countries are party to the Convention as of May 2011
Council of Europe		
1954 European Cultural Convention	Ratification in 1954	
1985 Convention for the Protection of the Architectural Heritage of Europe (Granada, Convention)	Ratification in 1989	
1992 Convention for the Protection of the Archaeological Heritage of Europe (revised) (Valletta, Convention)	Ratification in 1999	
2001 European Convention for the protection of the Audiovisual Heritage	Signature in 2005 (not a party)	7 countries are party to the Convention as of May 2011
2005 Convention on the Value of Cultural Heritage for Society (Faro Convention)	Not a party	10 countries are party to the Convention as of May 2011

[31] In general, there are two ways for a state to become a party to the international conventions: by signature and ratification or by accession. Ratification and accession both signifiy that the States Parties are legally bound by the terms of the conventions. But the procedures differ. In case of ratification, the state first signs, then ratifies the treaty. In case of accession, there is only one step. Both ratification and accession require that the legislative organ of the state (for Turkey the parliament) follow domestic constitutional procedures and makes a formal decision to be a party to the conventions (Donnelly, 1993, p.10).

2.2 Protection of Cultural heritage in Human Rights Law

2.2.1 Universal Human Rights and Cultural Rights

While international law produced a large number of legal texts dealing with culture and cultural rights, international human rights law devoted less attention to the subject. Cultural rights form a rather under-developed and problematic category of human rights compared to other categories such as the civil-political and social-economic rights (Francioni, 2008a, p. 1; Logan, 2007, p. 38; Vrdoljak, 2008, p. 41).

In general terms, human rights constitute a legal standard of minimum protection necessary for human dignity. Human rights emerged as a subject of international law following the end of the Second World War, particularly within the framework of the United Nations. The Charter of the United Nations, signed at the 1945 San Francisco Conference, cites "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" as one of the organization's principal purposes.[32]

The first instrument elaborated by the United Nations in the field of human rights was a declaration. The Universal Declaration of Human Rights (the UDHR), adopted by the General Assembly resolution 217 A (III) of 10 December 1948, recognized for the first time at an international level that all human beings have equal and inalienable rights.[33] These are rights that one has simply because one is human (Donnelly, 1993, p.19). The Preamble of the UDHR proclaims the Declaration as:

> *a common standard of achievement for all peoples and all nations*, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect

[32] See the third paragraph of Article 1.
[33] Available at <www.un.org> (date of access: 15 May 2011).

> for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

The UDHR continues to be "a common standard of achievement for all peoples and all nations." In 2008, the United Nations launched a year-long campaign to celebrate its sixtieth anniversary and promoted further commitment to the principles set forth by the Declaration.

At the same time as the adoption of the UDHR, the United Nations began to work on a covenant or a treaty that would be legally binding for the states (Donnelly, 1993, p.10). The preparation was only completed in 1966 and two covenants[34] were adopted: the International Covenant on Civil and Political Rights (the "ICCPR") and; the International Covenant on Economic, Social and Cultural Rights (the "ICESCR") (together the "Covenants"). The Covenants entered in force in 1976. As of May 2011, one hundred sixty seven (167) states ratified or acceded to the ICCPR, and one hundred sixty (160) states to the ICESCR.[35] The UDHR, the Covenants and their additional protocols[36] form together the International Bill of Human Rights.

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[34] The reason for the adoption of two separate covenants instead of a single document lies in the political conditions of the Cold War. The ideological differences between the Soviet Union and the USA, especially the concerns of the USA regarding the social interests, resulted in the splitting of the fundamental rights (Anderson, 2005, p 22; Donnelly, 1993, p. 10). The situation has created from the very beginning a hierarchy in the perception of the two categories of rights. The economic, social and cultural rights embodied in the ICESCR have been traditionally considered "less important" than the civil and political rights (Donnelly, 1993, p. 25). The texts of the Covenants are available at <http://www2.ohchr.org/english/> (date of access: 15 May 2011).

[35] To see the status of the major multilateral instruments deposited with the Secretary-General of the United Nations, please visit the database available at <http://treaties.un.org> (date of access: 15 May 2011).

[36] The ICCPR has two additional protocols. The First Optional Protocol to the ICCPR enables the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any right provided by the ICCPR. It entered in force simultaneously with the ICCPR. The Second Optional Protocol adopted in 1989 deals with the abolition of the death penalty. It entered in force in 1991. Recently in 2008 an Optional Protocol to the ICESCR related to the individual complaints was adopted by the General Assembly. It aims to strengthen the legal enforcement of economic, social and cultural rights.

The UDHR recognizes a wide spectrum of human rights for all peoples. Article 1 of the UDHR sets forth the right to liberty and equality on which the philosophy of the Declaration is based. Article 2 introduces the principle of non discrimination in the enjoyment of the rights and freedoms. Article 3 proclaims that the right to life, liberty and security of person are essential for the enjoyment of all other rights. Articles 4 to 21 contain the civil and political rights and Articles 23 to 27 deal with the economic, social and cultural rights.

Economic, social and cultural rights form a broad category of human rights that are embodied in a legally binding form in the ICECSR. They include the right to social security, the right to work, the right to equal payment for equal work, the right to rest and leisure, the right to a standard of living adequate for health and well-being (including the right to adequate housing, right to food and right to water), the right to education and the right to participate in the cultural life of the community.

The UDHR affirms clearly the importance of the economic, social and cultural rights for the protection and promotion of human dignity in Article 22: "Everyone, as a member of society, (...) is entitled to realization (...) of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." However, the Declaration recognizes that the states have widely differing resources and that this fact may limit the realization of such rights. In this respect, the ICESCR obliges the States Parties to:

> take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[37]

[37] See the first paragraph of Article 2.

It implies that the economic, social and cultural rights cannot be immediately realized in full and thus the States Parties have to take active measures to guarantee them (Anderson, 2005, p. 22).

The provisions of the ICESCR are generally criticized for not being enforceable because they do not pose clear and precise obligations (Francioni, 2008a, p. 4). Although it is partly correct, in case of cultural rights, there are other important motives related to their very nature that create difficulties in the enforcement of cultural rights.

Cultural rights may be held and exercised individually and collectively unlike other human rights. When cultural rights are considered as group rights – as generally assumed – they may conflict with the rights of the individuals in the group. For instance in a case where a member of the group would like to marry an outsider, the group interests (to safeguard the uniqueness of the group) may prevail over the individual interests (to marry a person of her/his choice). In the opposite case, if cultural rights are considered as individual rights like the other human rights, the members' right to marry outside the group will be respected, however this time, the group's own existence may be at danger (Francioni, 2008a, p. 4).

Cultural rights may be in conflict with other individual rights. A well-known example is related to property rights. When a state claims the return of a stolen or illegally exported cultural object, it may be the case that it fails because the property right of the purchaser is protected over the cultural rights of the real owner in certain legal systems. Another relevant example is free speech. In 2006, a Danish newspaper published cartoons of the Prophet Muhammed that attracted the reaction of the

Muslim groups. However, the Danish court rejected the Muslim groups' claims in favor of the cartoonist's free speech (Francioni, 2008a, p. 4-5).

Cultural rights may justify certain violations of the internationally accepted human rights standards such as the prohibition of discrimination against women, the protection of children and the pursuit of scientific research.[38] Ayton-Shenker affirms that "any attempts to justify such violations on the basis of culture have no validity under international law" (1995). This conflict underlies a historical debate between human rights and culture which will be discussed below.

Challenge of human rights and culture

Our contemporary world is characterized by the pluralism and diversity of cultures. UNESCO has already established the protection and the promotion of cultural diversity, "the common heritage of humanity," as one of its specific mandates.[39]

Cultural identity has been an important source for peoples' self-definition, expression and sense of group belonging. Cultural identities may change as different cultures are constantly interacting with one another. While this process is enriching, it challenges the interpretation and the application of certain cross-cultural concepts such as human rights. How can universal human rights exist in a culturally diverse world? In other words, how can the universal character of human rights be reconciled with the dynamic, group oriented and relative nature of the culture?

[38] Logan notes that controversial cultural practices continue today such as the burning of female children in Northern India or female and male genital mutilation practiced by certain religious groups (2007,.p 37).
[39] See the Preamble and the first Article of the 2001 UNESCO Declaration on Cultural Diversity.

The debate over universal human rights and cultural relativism is a long-standing one. The cultural relativist theory opposes the application of the international human rights standards to culturally diverse societies. This view asserts that human values vary according to different cultural perspectives, so they cannot be universal (Donnelly, 1993, p.34). One of the most well-known statements supporting this view was adopted in 1947 by the American Anthropological Association in opposition to the draft UDHR (Goodale, 2006, p.1).

Certainly, such assertion poses a serious threat to the effectiveness of the international system of human rights. If the protection of human rights is considered a culturally relative matter, it will be at the sole discretion of the individual states. In this case, the states may rely on cultural relativism to disregard their obligations regarding human rights under international law. It is no coincidence that throughout history, this idea of uniqueness and exclusivity of cultures served as a legitimate basis for empire building and territorial conquests (Francioni, 2008a, p.3).

Nevertheless, through the work of the United Nations, the universality of human rights was established in international law and reinforced continuously. The Vienna Declaration and Programme of Action[40] adopted by the United Nations World Conference on Human Rights in 1993, states clearly that the universal nature of human rights is beyond question. It also adds that:

> All human rights are *universal, indivisible and interdependent and interrelated*. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. *While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind*, it is the duty of States, *regardless of their political, economic and cultural systems*, to promote and protect all human rights and fundamental freedoms.[41]

[40] The text of the Declaration is available at <www.ohchr.org> (date of access: 15 May 2011).
[41] See the Part I § 5.

The states therefore have a legal obligation to promote and protect human rights, regardless of particular cultural perspectives, under international law. They cannot claim cultural relativism as an excuse to violate or deny human rights.

In 1999, the American Anthropological Association revised its earlier statement of 1947 and affirmed its commitment to both human rights and the UDHR, and the respect for human differences.[42]

The 2001 UNESCO Declaration on Cultural Diversity represents human rights as a guarantor of cultural diversity:

> The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a *commitment to human rights and fundamental freedoms*, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.[43]

A similar provision is adopted in UNESCO's most recent conventions related to culture and cultural heritage as well.[44] The Preamble of the 2003 Intangible Heritage Convention refers specifically to the UDHR and the ICESPR.

Cultural rights

The UDHR contains a single provision dealing with cultural rights in Article 27 (the right to participate in the cultural life). Such provision is embodied in a binding form in Article 15 of the ICESCR as follows:

> The States Parties to the present Covenant recognize the right of everyone:
> (a) *To take part in cultural life*;

[42] The 1999 Statement is available at <www.aaanet.org/> (date of access: 15 May 2011).
[43] See Article 4 of the Declaration.
[44] Article 2 § 1 of the 2003 Intangible Heritage Convention limits the application of the Convention to the intangible cultural heritage that is compatible with existing international human rights instruments. Article 2 § 1 of the 2005 Convention says that no one can invoke the provisions of the Convention to infringe human rights.

(b) To enjoy the benefits of scientific progress and its applications;
(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

In the context of Article 15, the first question one should ask is what does "cultural life" or simply "culture" mean. O'Keefe interprets the term "culture" from three different but interrelated perspectives:

> (1) "culture" in the classic highbrow sense, meaning the traditional canon of art, literature, music, theatre, architecture, and so on;
>
> (2) "culture" in a more pluralist sense, meaning all those products and manifestations of creative and expressive drives, a definition which encompasses *not* only "high" culture but also more mass phenomena such as commercial television and radio, the popular press, contemporary and folk music, handicrafts and organized sports; and
>
> (3) "culture" in the *anthropological sense*, meaning not simply the products or artifacts of creativity and expression (as envisaged by the first two definitions) but, rather, *a society's underlying and characteristic pattern of thought-its "way of life"*-from which these and all social manifestations spring. (2008, p. 905)[45]

The experience with cultural rights has shown that they were mostly claimed to safeguard the language, religion, traditions and the distinct "way of life" of groups and communities as defined in the third point of O'Keefe's classification. Everyone has the right to culture, including the right to enjoy and develop cultural life and identity.[46] This aspect is closely linked to the right to self-determination set out in Article 1 of both Covenants: "All peoples have the *right to self-determination*. By virtue of that right they freely determine their political status and freely pursue their economic, social and *cultural development*". Together with the right to self

[45] See also the 1976 UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, available at <www.unesco.org> (date of access: 15 May 2011).
[46] Article 1 of the Declaration of the Principles of International Cultural Co-operation (adopted in 1966 like the Covenants) states that: (1) Each culture has a dignity and value which must be respected and preserved. (2) Every people has the right and the duty to develop its culture. (3) In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.

determination, Article 15 of the ICESCR and Article 27 of the ICCPR on minorities[47] served as a basis to guarantee minority and indigenous groups the freedom to practice and develop their cultures (O'Keefe, p.918; Vrdoljak, 2008, p.58). During 1990s, new instruments of human rights reinforced the protection, for instance the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,[48] the 1994 Council of Europe Framework Convention for the Protection of National Minorities[49] and the ILO (International Labor Organization) Convention No.169 on Indigenous and Tribal Peoples.[50]

Vrdoljak explains the interplay between cultural rights and right to self-determination as follows:

> It is no coincidence that, in international law, *cultural rights have been primarily developed in respect of the most vulnerable groups, including colonized peoples, minorities and indigenous peoples. This is because cultural rights have been elaborated and applied by the international community to groups whose right to self-determination (including secession) they have suppressed or denied.* These groups have tested the boundaries of international law and challenged established state practice on self-determination and cultural rights. Colonized peoples, who had the exercise of their right to self-determination perpetually deferred, ensured that the division between self-determination and development was formally put asunder following decolonization. Minorities within states denied the right to self-determination, have been afforded cultural and other rights as an alternative mode of ensuring the protection and preservation of their identities. Indigenous peoples draw on both these traditions and maintain that the right to self-determination and cultural rights can only be enjoyed and exercised effectively in unison. (2008, p. 42)

[47] Article says that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". Even if such article is present in the ICCPR, it certainly includes the cultural rights of the minorities (Vrdoljak, 2008, p. 60).
[48] Available at <www.un.org> (date of access: 15 May 2011).
[49] Available at <www.coe.int> (date of access: 15 May 2011).
[50] Available at <www.ilo.org> (date of access: 15 May 2011).

The extent of the states' responsibility is also an important issue in terms of the exercise of cultural rights. Article 15 poses a positive obligation upon the States that are party to the ICESCR (O'Keefe, 1998, p. 905) as is usually the case for other economic, social and cultural rights. A State Party under a positive obligation should take active measures to ensure that the right in question is satisfied. Therefore, within the context of Article 15, it implies that a State Party shall not only create an environment in which its citizens can "enjoy and create cultural works and values" (in other words participate in cultural life), but shall also make sure that such enjoyment is sustainable by taking appropriate measures, improving it and by encouraging further participation (O'Keefe, 1998, p. 906). In case of minorities and indigenous groups, the States Parties will first abstain from interfering with their cultural freedoms, then take active measures to protect them and promote their cultures (Francioni, 2004, p.5; O'Keefe, 1998, p.918).

2.2.2 Cultural Heritage as a Universal Human Right

How can one relate cultural heritage to cultural rights or to the general context of human rights? Since cultural heritage was traditionally regarded as the movable and immovable cultural assets, Article 15 of the ICESCR provided a limited interpretation for cultural heritage. Within the scope of Article 15, a State Party had the duty to safeguard the archaeological and architectural heritage situated on its territory to promote the cultural life of its citizens (O'Keefe, 1998, p. 909). However, the concept of cultural heritage expanded to include the intangible values of the peoples and communities that have become themselves the center of the protection, as studied in the first section of this chapter. Such evolution strengthened the relationship between cultural heritage and human rights. Francioni explains that:

> So far as *cultural heritage represents the sum of practices, knowledge and representations that a community or group recognizes as part of their history and dignity, it is axiomatic that members of the group, individually or collectively, must be entitles to access, perform and enjoy such heritage as a matter of right.* Furthermore, the dynamic evolution of the concept of cultural heritage from a mere historical-artistic object to intangible heritage entails that even *cultural objects or places must be understood in the function and role they perform in a given society as indispensable tools for the exercise of certain fundamental rights and freedoms*, such as right of association or religious freedom. (2008a, p.7)

The second sentence of the paragraph underlines in particular that cultural heritage does not only connect to cultural rights but also the other human rights and more importantly to the respect for human dignity. Confiscation of art under the Nazi Regime in Europe[51] and the destruction of mosques, churches and libraries during the Balkan Wars in 1990s[52] are sad examples that demonstrated the link between people and cultural heritage. When discriminatory regimes or radical groups aim to eliminate people because of their race, religion, nationality or ideology, they first target their cultural heritage. Francioni believes that the concept of human dignity *per se* is closely linked to the protection of cultural heritage:

> The concept of human dignity (...) includes people's entitlement to the respect of the cultural heritage that forms an integral part of their identity, history and civilization. *Destruction or desecration of symbolic objects and sites that are essential to the enactment of a people's culture (be it a library, a place of worship, a sacred site for indigenous peoples) is a violation of their collective dignity no less than a violation of their personal dignity*. (2004, p.4)

Therefore the States Parties have both a negative obligation to abstain from any act that may cause damage to cultural objects and sites and a positive obligation to take the necessary measures to protect such heritage so that groups and communities can

[51] See the book "The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War" by Lynn H. Nicholas (New York: Knopf, 1994).
[52] See the master thesis "Cultural heritage as a human right : wartime destruction and post-war reconstruction of cultural heritage in Bosnia and Herzegovina" by Senem Kınalıbaş (thesis advisor Gül Pulhan) (İstanbul: Koç University, 2008).

continue their cultural practices under Article 15 of the ICESPR (Article 27 of the ICCPR, in case of minorities) (Francioni, 2008a, p.9).

The return of cultural objects presents another framework that illustrates the connection of cultural heritage to the human rights. States should protect cultural and religious objects of peoples that are indispensable for the cultural practices as well as for their cultural development. It is not a coincidence that the Preamble of the draft 1970 UNESCO Convention (related to the illicit trade and restitution) included a reference to Article 27 of the UDHR (right to freely participate in the cultural life of the community), which was removed later on (Vrdoljak, 2008, p.55). Vrdoljak draws attention to the late twentieth-century developments such as the restitution claims of indigenous people against former colonial powers and the re-emergence of the Holocaust survivors' and their heirs' claims: "These claims have strengthened (...) the link between restitution and the right of a group to determine how its culture is preserved and developed; and the importance of ensuring such right, for the benefit of the cultural heritage of all humankind" (2006, p.5). The restitution of cultural objects guarantees the contribution of peoples and societies to the cultural heritage of mankind.

The recognition of the linkage between cultural heritage and human rights is also important in terms of reinforcing the protection mechanisms for cultural heritage in international law. It became apparent over the years that in time of crisis, international law was weak in preventing the damage done to cultural heritage (Gerstenblith, 2006, p.79). The most striking examples are the destruction of Dubrovnik and the Mostar Bridge during the 1990s conflict, the destruction of great

rock sculptures of Buddhas of Bamiyan in Afghanistan in 2001[53] and the recent looting of the Iraq Museum.[54] Widespread non-compliance to the international norms, the lack of enforcement and punishment mechanisms[55] urged the assertion of cultural heritage as a dimension of human rights. The human rights law may play an important role in providing efficient legal protection for the world's cultural heritage.

[53] Following the destruction of the great rock sculptures of Buddhas of Bamiyan by the Taliban Government in Afghanistan, UNESCO adopted the 2003 Declaration on Intentional Destruction of Cultural Heritage. For a detailed analysis of the case, see the article "The destruction of the Buddhas of Bamiyan and International Law by Francioni and Lenzerini in *European Journal of International Law* 14 (2003): 620-653.

[54] See the article "Art Loss in Iraq. Protection of Cultural Heritage in Time of War and its Aftermath" by James A. R. Nafziger in *IFAR Journal Iraq Double Issue* 6. 1/2 (2003).

[55] Among the international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia has the most prominent case law on cultural heritage. In 2005, the Court has sentenced the former Yugoslav General Strugar for the destruction of the old city of Dubrovnik, among other charges, thus applied the individual criminal responsibility – under article 3(d) of the Tribunal's Statute – for the attacks against cultural heritage. See the Judgment of 31 January 2005 of the Tribunal on the *Strugar Case* available at <www.icty.org> (date of access: 15 May 2011).

CHAPTER 3

ILISU DAM AND THE PRESERVATION OF HASANKEYF

This chapter explores the background of the Ilısu Dam Project and the preservation of the site of Hasankeyf. First, it introduces the policies and approaches adopted in the planning of development projects – in particular dams – to prevent or minimize the negative impacts of the projects on cultural heritage. It examines the practices of these policies in Turkey as well. Then the chapter focuses on the construction of the Ilısu Dam, its historical background, the facts about the project and the long-discussed issue of Hasankeyf. The chapter outlines the measures foreseen for the preservation of Hasankeyf and addresses the discussions about the feasibility of these measures.

3.1 Dams and Cultural Heritage Management

3.1.1 Emergence of International Conservation Policies

Throughout time, an important part of the world's cultural heritage got damaged and destroyed not only from natural reasons but also from human interventions. Wars, religious and ethnic conflicts, illicit trade and site looting continue to be the major factors for the loss of cultural heritage. However, new dangers are also threatening cultural heritage such as large scale industrial projects and urban planning. Pickard points out that "For the archaeological heritage it has become increasingly necessary in recent years to combat the increasing scale of development activity, which can impact both known and perceived remains" (2001, p. 8).

The 1968 UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public and Private Works provides a list of projects that are likely to damage and destroy cultural heritage.[56] Among these development activities, dams are one of the most serious threats towards cultural heritage. Dams are built to supply water, irrigate lands, control floods and produce hydroelectric energy. They also represent a very important investment for the states. However, since they are constructed on rivers, they primarily affect the river valleys which

[56] Such projects are: (a) Urban expansion and renewal projects, although they may retain scheduled monuments while sometimes removing less important structures, with the result that historical relations and the setting of historic quarters are destroyed; (b) Similar projects in areas where groups of traditional structures having cultural value as a whole risk being destroyed for the lack of a scheduled individual monument; (c) Injudicious modifications and repair of individual historic buildings; (d) The construction or alteration of highways which, are a particular danger to sites or to historically important structures or groups of structures; (e) The construction of *dams* for irrigation, hydro-electric power or flood control; (f) The construction of pipelines and of power and transmission lines of electricity; (g) Farming operations including deep ploughing, drainage and irrigation operations, the clearing and levelling of land and afforestation; and (h) Works required by the growth of industry and the technological progress of industrialized societies such as airfields, mining and quarrying operations and dredging and reclamation of channels and harbours. See Article 8 of the Recommendation available at <www.unesco.org> (date of access: 15 May 2011).

have been important centers for ancient human civilizations and which offer valuable archaeological information. Moreover, they do not only destroy monuments and sites, but the whole valley. So, as far as cultural heritage is concerned, the damage rate of dams is very high compared to other development works.

Until the second half of the twentieth century, the states tended to neglect the adverse effects of dam building on cultural heritage. Nevertheless in the 1960s, an international crisis broke out when the government in Egypt decided to build the Aswan High Dam in the Upper Nile valley. The valley contained important historical monuments and archaeological sites that belonged to the Nubians, one of the earliest African civilizations. Following the international safeguarding campaign launched and conducted by UNESCO, a majority of the great monuments, including the Abu Simbel Temple, were dismantled and removed to a dry site.[57] This event was the first international systematic safeguarding campaign that aimed to save cultural heritage at risk because of dam constructions.[58] The Nubia campaign also showed the importance and the necessity of international co-operation in safeguarding cultural heritage and served as a catalysis for the development of the concept of world heritage (Francioni, 2008b, p. 12).[59] The Preamble of the World Heritage Convention, in its first paragraph, draws attention to new dangers threatening cultural heritage that result from "*changing social and economic conditions* which aggravate the situation with even more formidable phenomena of damage or destruction" and adds that "deterioration or disappearance of any item of the cultural or natural heritage

[57] For the list of the monuments, see the article "The Rescue of Nubian Monuments and Sites" at <www.unesco.org> (date of access: 15 May 2011).

[58] For further information on the Nubia Campaign, see the article "The Aswan High Dam and the International Rescue Nubia Campaign" by Fekri A. Hassan in *African Archaeological Review* 24 (2007): 73-97.

[59] The Nubia campaign set an example for other rescue campaigns, such as saving Venice and its Lagoon in Italy and the Archaeological Ruins at Moenjodaro in Pakistan, and restoring the Borobodur Temple Compounds in Indonesia.

constitutes a *harmful impoverishment of the heritage of all the nations of the world*".

Then it concludes that:

> parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole…in view of the *magnitude and gravity of the new dangers* threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value.[60]

In the meantime, UNESCO developed policies to guide States in combining the requirements of development projects with the preservation of cultural heritage. The 1968 Recommendation Concerning the Preservation of Cultural Property Endangered by Public and Private Works stated clearly that States had the duty to "ensure the protection and the preservation of the cultural heritage as much as to promote social and economic development".[61] A similar approach was also adopted in a legally binding document, the revised European Convention on the Protection of Archaeological Heritage in 1992 (the Valetta Convention) under the title "integrated conservation of the archaeological heritage."[62] Integrated policies require for instance the participation of archaeologists in the planning process of conservation strategies, the possibility for the modification of development plans if necessary from a conservation perspective and the conservation of archaeological heritage found during the development work preferably in situ.[63] As of May 2011, forty (40) states are party to the Valetta Convention, including Turkey.[64] Many European countries have already been applying integrated conservation policies in their development

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[60] See 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, available at <www.unesco.org> (date of access: 15 May 2011).
[61] See the Preamble of the Recommendation.
[62] See Article 5 of the Valetta Convention available at <www.coe.int>. The concept of integrated heritage conservation was previously expressed in the 1975 Declaration of Amsterdam and the 1985 Convention for the Protection of the Architectural Heritage of Europe (the Granada Convention), both adopted by the Council of Europe like the Valetta Convention.
[63] See Article 5 of the Valetta Convention available at <www.coe.int> (date of access: 15 May 2011).
[64] For the approval of the Convention by Turkey (Law no. 4434), see the official journal dated 8.8.1999 and numbered 23780, available at <www.resmigazete.gov.tr> (date of access: 15 May 2011).

projects, as the Convention recommends (Pickard, 2001, p. 8). Many others are in the process of reforming their legislations accordingly.

3.1.2 Dam Projects in Turkey

In Turkey, over the years, many important archaeological sites have been partially or completely affected by dam constructions. The first systematic salvage excavation took place during the construction of the Keban Dam on the Euphrates River and started in the mid 1960s.[65] The Keban Dam project was a part of the large scale development project in southeastern Turkey (Güneydoğu Anadolu Projesi, known as GAP) and followed by Atatürk, Karakaya, Birecik and Karkamış Dams, all built on the Euphrates River. In 2000, the flooding of the sites Zeugma, a Roman garrison city near Gaziantep well-known for its mosaics, and Halfeti, containing beautiful examples of civil architecture, by the Birecik Dam raised a lot of public and academic reaction.

Today many other sites are similarly being threatened. The site of Hasankeyf in southeastern Anatolia and the site of Allianoi in the West became symbols of the preservation efforts in recent years. Allianoi, the Roman spa town, is located near Bergama, İzmir. In August 2010, the İzmir Regional Conservation Board n. 2 decided to fill the site with sand before it would flood by the Yortanlı Dam's reservoir.[66] Despite the long standing national and international campaigns[67] supported by legal recourse, the workers had already begun to fill the site in preparation for the release

[65] The Middle East Technical University (METU) led the excavations from 1964 to 1975. For further information, visit the website of METU TAÇDAM (Center for Research and Assessment of Historical Environment), available at <www.tacdam.metu.edu.tr> (date of access: 15 May 2011).
[66] See the online newspaper article "Allianoi için son karar: Gömün" (Last call for Allianoi: Bury it) dated 28 August 2010 available in Turkish at <www.radikal.com.tr> (date of access: 15 May 2011).
[67] See the online newspaper article "Why the Roman spa town of Allianoi must be saved" dated 30 September 2010 available at <www.theartnewspaper.com> (date of access: 15 May 2011).

of water. On the other hand, another dam is planned to be constructed in the Munzur Valley National Park near Tunceli, one of the largest national parks in Turkey, although the national park laws prohibit any construction activities.[68]

Turkey's neighbors, Syria and Iraq have been confronting similar problems, since the Euphrates and Tigris Rivers, which begin in Turkey, pass through these countries before they flow into the Persian Gulf. For instance, in Iraq the site of Ashur, the capital of the Assyrian Empire, is under the threat of the construction of Makhul Dam on the Tigris River (Pulhan, 2010, p.125). Although the dam project is suspended at the moment, UNESCO did not remove the site from the List of World Heritage in Danger (first inscription in 2003) due to possible future construction.[69]

The problem associated with dams and cultural heritage in Turkey has also been pointed out several times by the European Parliament in its most recent resolutions on Turkey's progress reports. In the resolution on the 2007 Turkey Progress Report,[70] the Turkish government is called to:

> apply European standards to projects with far-reaching effects, such as the construction of *dams in the Munzur valley, the Allianoi dam, the construction of the Ilısu dam* and gold-mining in Bergama and other regions, which threaten both the historical heritage and unique, valuable landscapes; (...) take EU law as a guideline when planning regional development projects. (§ 37)

In the resolution on the 2009 Turkey Progress Report,[71] the issue is presented under the section "human rights and respect for, and protection of, minorities." The European Parliament:

> encourages the Turkish Government to intensify its efforts to overcome social and economic deficiencies in the south-east; reiterates its call on the Commission to present a study on the consequences of the Southeast Anatolia

[68] See the online newspaper article "Munzur'da HES sondajina izin yok" (No permission to drilling for hydroelectric plant) dated 23 August 2010 available in Turkish at <www.radikal.com.tr> (date of access: 15 May 2011).
[69] For further information, visit the website <http://whc.unesco.org/> (date of access: 15 May 2011).
[70] The resolution is available at <www.europarl.europa.eu> (date of access: 15 May 2011).
[71] The resolution is available at <www.europarl.europa.eu> (date of access: 15 May 2011).

> Project (GAP); calls on the Turkish authorities to *preserve the cultural and environmental heritage concerned in this context, with particular reference to the archaeological sites of Hasankeyf and Allianoi*; is concerned about the displacement of thousands of people resulting from the construction of the dams; urges the Government to cease work on the Ilısu Dam Project until the above-mentioned Commission study is presented. (§ 16)

In contrast to what the European Parliament claims, the relevant authorities in Turkey such as the Ministry of Environment and Forestry and DSI (State Hydraulic Works) affirm that the dam projects are in compliance with the international standards, in particular with the principle of integrated conservation expressed in the Valetta Convention.[72]

One fact is certain: Turkey's cultural heritage has suffered considerable damage through development works for a long time. Despite the salvage excavations and preservation efforts, the heritage saved is much less compared to the heritage that is lost. Is the integrated conservation applied in a correct manner by the authorities? The answer to this question needs to be taken more seriously now as the protection of cultural heritage has become an international concern.

3.2 Ilısu Dam Project and its Impact on Cultural Heritage

3.2.1 Overview of the Project

The Ilısu Dam is planned to be constructed in the southeastern region of Turkey on the Tigris River as part of the Southeast Anatolia Project (Güneydoğu Anadolu Projesi - GAP). This is a large, regional development project covering the construction of twenty dams and nineteen power plants in total both on Euphrates

[72] See the interviews published in the "Arkeoloji ve Barajlar Gerçeği" special issue of the *Aktüel Arkeoloji Dergisi* 17 (2010).

and Tigris Rivers, some of which are already finished. The Ilısu Dam will singularly provide a significant portion of the project's total energy production (see table 1).

Location of the dam	Within the boundaries of Mardin and Şırnak provinces
River	Tigris
Purpose	Energy production
Estimated period of construction	2008 – 2015
Dam body	23,31 hm^3
Height	130 m
Dam reservoir (volume)	10.410 hm^3
Dam reservoir (area)	313 km^2
Power	1200 MW
Estimated production (annual)	3883 GWh

Table 1: Technical information related to the Ilısu Dam and Hydroelectric Power Plant
Source: DSI (State Hydraulic Works)[73]

The body of the Ilısu Dam is situated 45 km from the Turkish – Syrian border, 65 km from Midyat, 35 km from Cizre and 15 km from Dargeçit (see figure 1). The reservoir of the dam will flood nearly 300 square kilometers of land that covers the areas governed by the provinces of Batman, Siirt, Diyarbakır, Mardin and Şırnak (see figure 1).[74]

[73] See the section "Regions – Mardin" in the website <www.dsi.gov.tr> (date of access: 15 Mayl 2011).
[74] For further information on the project, visit <www.dsi.gov.tr/ili-su> (date of access: 15 April 2011).

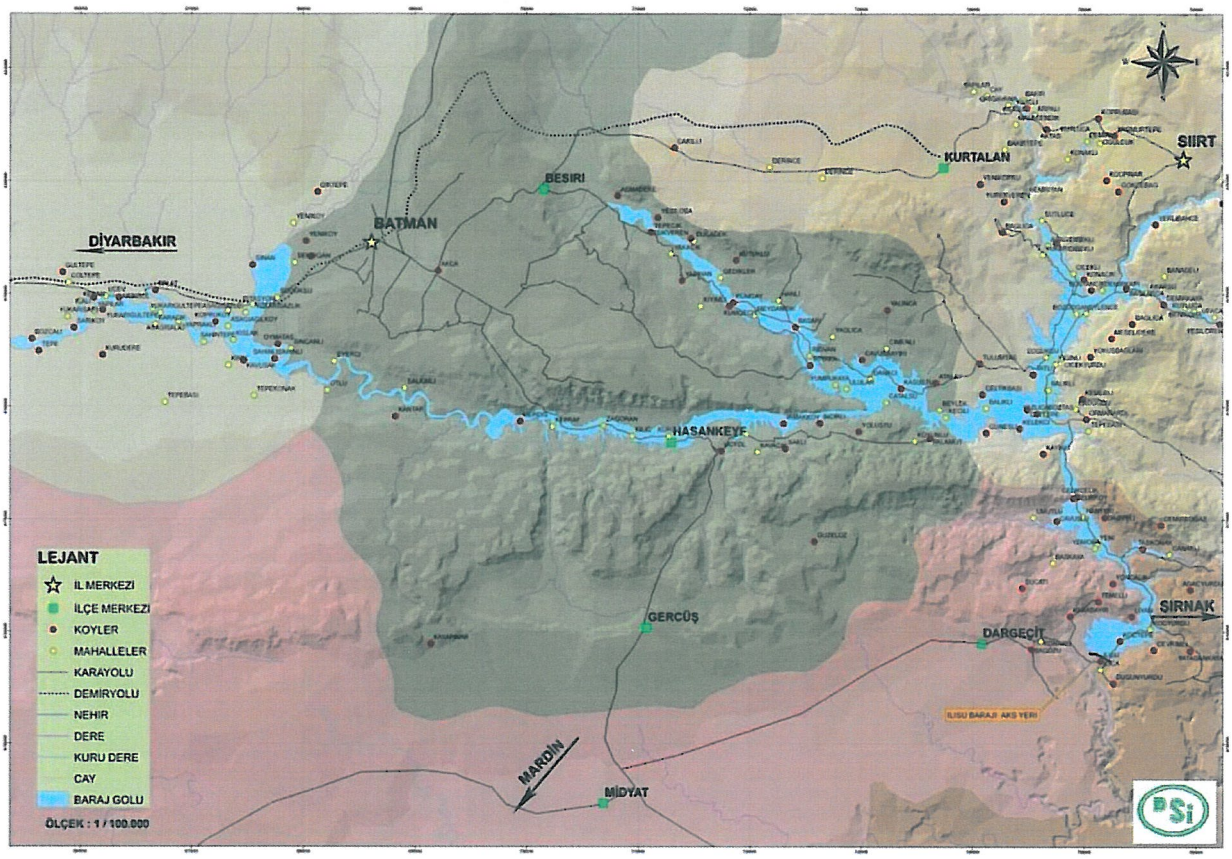

Figure 1: Map of potential flooding due to the Ilısu Dam
Source: DSI (State Hydraulic Works)[75]

Projects of this kind and scale are problematic in terms of the environmental impacts, social implications related to displacement of people and the cultural heritage issues. These three aspects represent the major challenges related to the implementation of the Ilısu Dam Project. Due to the project, nearly 50,000 people are going to be displaced and resettled.[76] On the other hand, according to the environment assessment report prepared by Doğa Derneği (Nature Association), the biodiversity in the area – especially the bird life– will be seriously affected by the project.[77] Moreover, Ilısu Dam when completed, will submerge the area that covers the Tigris Valley, Hasankeyf and nearly two hundred archaeological sites -most of

[75] Visit <www.dsi.gov.tr> (date of access: 15 May 2011).
[76] For the reports on the settlement issues prepared by the Ilısu Consortium, visit <wwww.dsi.gov.tr/ili-su> (date of access: 15 April 2011). For the reports prepared by the Council of Europe Committee of Experts, visit <www.dsi.gov.tr/ili-su> (date of access: 15 April 2011).
[77] For the report, visit <www.dogadernegi.org> (date of access: 15 May 2011).

which have not been investigated yet. These sites are likely to yield rich archeological data since the Tigris Valley is situated in the northern part of Mesopotamia where Near Eastern civilizations have developed. In short, the dam project will irreversibly affect the natural and cultural formation of this area of significant historical importance.

The plan to construct a dam at Ilısu was initially conceived in 1954 by the State Hydraulic Works (Devlet Su İşleri - DSI) for the development of water and land resources in the Tigris River (DSI). In 1989, when the GAP Regional Development Administration was established, the Turkish government at the time included the dam project in the investment program (Stepova, 2001). However, financial difficulties and the socio - cultural challenges delayed the implementation of the project. In 1997, the Council of the Ministers at the time adopted a decision to make the necessary arrangements for the procurement of the loan (Decision no. 1997/9532). The first international consortium that was set up to build the dam was dissolved in 2002, because a sufficient loan had not been provided by the export credit agencies.[78] The concerns of the foreign governments and institutions – initially willing to support to project – concerning the environment and cultural heritage played an important role in this failure (Pulhan, 2010, p.125). As a result, the Ilısu Dam Project was abandoned for several years. In 2004, the Council of the Ministers issued another decision amending the decision of 1997 and decided to pursue to project again with foreign loans – including export credits guaranteed by governments – with the leadership of Austrian VA Tech Finance GmbH (DSI). A new international

[78] "There were two consortia and one joint venture initially taking part in the Ilısu project. Electromechanical: Sulzer Hydro (Switzerland – sold to Austrian VA Tech in 1999) and ABB Alstom Power (Switzerland – sold to Alstom France in March 2000). Engineering and consultancy services: Binnie Black and Veatch (UK) Dolsar (TR). Civil works joint venture: Balfour Beatty (UK – withdrew Nov 2001) Impregilo (Italy - also withdrew Nov 2001) Skanska (Sweden - withdrew Sept 2000) Kiska (TR) Nurol (TR) Tekfen (TR)." (Stepova, 2001)

consortium was established accordingly. In August 2007, the Turkish government signed a loan agreement with German, Austrian and Swiss export credit agencies (DSI, 2009, p.4). In the meantime, the new Ilısu consortium developed a master plan for the rescue of the site of Hasankeyf. The rescue project envisaged the establishment of a new settlement area, Hasankeyf Cultural Park, where certain historical monuments would be removed (see figure 2). However, the Turkish government failed to fulfill the terms required by the export credit agencies funding the project related to the protection of the environment and the cultural heritage – also known as World Bank criteria. [79]Following this, the foreign governments already under the pressure of the NGOs announced their withdrawal from the project. Finally in July 2009, the export credit agencies working terminated the loan agreement (Aktüel Arkeologi Dergisi, 2010, p. 15). Nevertheless, the Ilısu Dam Project is not cancelled and by now it has been known publicly that Turkish banks are willing to support the project. The construction works that started in 2008 are continuing today with recently increased speed.[80]

The long-run and the uncertainty of the process influenced the course of the rescue excavations. In 1998, the Ministry of Culture, DSI and Middle Eastern Technical University (METU) signed a protocol (the 1998 Protocol) according to which the rescue excavations at the Ilısu and Karkamış Dams reservoir area would be conducted by METU Center for Research and Assessment of Historical Environment (METU TAÇDAM) (Tuna, 2010, p.39). METU TAÇDAM set up a flexible management model for the project: the field work and documentation activities were managed by the board of METU TAÇDAM while the funds were provided by DSI

[79] See the online newspaper article "Avrupa Ilısu'dan desteğini çekti, çevreciler mutlu" (Europe withdrew its support from the Ilısu project, environmentalists are happy) dated 7 July 2009 available in Turkish at <www.radikal.com.tr> (date of access: 15 May 2011).
[80] See the online newspaper article "Court Case Could Slow Turkish Dam Project" dated 30 March 2011 available in Turkish at <www.nytimes.com> (date of access: 15 May 2011).

(Tuna, 2010, p.40).[81] The decisions taken by the board of METU TAÇDAM were reviewed couple of times a year by a higher board composed by members of the Ministry of Culture, DSI GAP Administration and METU TAÇDAM (Tuna, 2010, p.40). METU TAÇDAM carried out the rescue excavations under the model envisaged by the 1998 Protocol until 2003 when the Ministry of Culture and DSI began to look for a different model for the management of the rescue projects. Meanwhile, the first consortium had been dissolved due to international pressure and protests. After METU TAÇDAM was excluded from the project, the rescue excavations came to a halt for two years. In 2004, the 1998 Protocol was dissolved and a new protocol was signed between the Ministry of Culture, DSI and the Ministry of Energy and Natural Resources this time concerning only the Ilısu Dam reservoir area (Tuna, 2010, p.45). This corresponds to the time when the second international consortium was formed for the construction of the Ilısu Dam. Today, the rescue excavations in the Ilısu Dam reservoir area are conducted by the General Directorate of Cultural Properties and Museums and the Diyarbakır and Mardin Museums under the framework established in 2004 (Pulhan, 2009a, p.10). They are financed by the Ministry of Culture and Tourism through the funds accorded by DSI (Pulhan, 2010, p. 125) without any foreign support since the withdrawal of the second consortium in 2009.

3.2.2 Preservation of Hasankeyf

Among the archaeological sites threatened by the construction of the Ilısu Dam, the site of Hasankeyf comes in the first place due to its unique cultural and

[81] The management model based on the semi financial and administrative autonomy of the METU TAÇDAM was previously applied in the Keban Project which, at the time, was internationally recognised as a successfull project (Özdoğan, 2010, p. 27).

natural significance and its historical importance. Hasankeyf is situated in the south east of Turkey, on the south bank of the Tigris River, about halfway between Midyat and Batman.

Why should Hasankeyf be preserved? Oluş Arık, the archaeologist who conducted the excavations in Hasankeyf between 1986 and 2003, describes the site as a settlement that was influenced by three major social and cultural worlds: Mesopotamia, Roman Empire and Central Asia – Iran (Arık, 2003, p.7). This mixture of cultures is reflected in each monument that contributes to the architectural pattern of the ancient town. The nature that Hasankeyf was built into is also a part of this fabric. The Tigris River, the great rocks, canyons, caves and grottoes shaped the social and cultural life from very early times on and gave Hasankeyf its unique identity. Thus, Hasankeyf is a very important site that preserves in harmony the cultural remains of major ancient civilizations that lived in south eastern Anatolia within a unique natural landscape of the Tigris Valley. Arık divides the site into three parts: the upper town, known as "Kale" (castle in Turkish), the lower town and the north side of the Tigris.

The Islamic sources refer to Hasankeyf as "Hisn kayfa". "Hisn" is a commonly used word for place names, meaning "fortress" in Arabic (Encyclopedia of Islam[82]). The word "kayfa" though has an Aramaic origin. In various languages belonging to the Aramaic language family (such as Assyrian, Hebrew, Syriac and Arabic), the words "kepa, kipas, kefa, kaifa" mean "rock" (Arık, 2003, p.13). Thus Hisn kayfa, which was later transformed into Hasankeyf, means "Rock fort". Romans used the Assyrian root as well and named Hasankeyf "Castrum Cepha"

[82] Koç University library, E-reference sources (date of access: 15 May 2011).

(Castle of the Rock) (Arık, 2003, p.13). This information shows that the place was associated with its natural rock formations in every period of its history.

During the Middle Ages, Hasankeyf was situated within the area called "Al-Jazira" (meaning "island" in Arabic) covering the lands in northern Syria, northern Iraq and south eastern Anatolia that stand between the Tigris and Euphrates Rivers (Arık, 2003, p .14). The area is also referred as Upper Mesopotamia. Hasankeyf had a favorable geographical position. Arık believes that the Silk Road was once passing through the majestic bridge of Hasankeyf of which only three pedestals survive today (Arık, 2003, p .25). There are similar remains of bridges (at least two, Memikhan and Şeyh Musel) on Garzan, one of the tributaries of the Tigris River in the north that links the area to Siirt and vice versa.[83]

A brief history of Hasankeyf is provided below (Arık, 2003, 13-21).

[83] Personal interview with Gül Pulhan who is conducting a rescue excavation in Gre Amer, one of the sites threatened by the Ilısu Dam.

	7th c. BC	0	7th c.	1102	1232	1461	Mid 16th c.
	Assyrian Influence	**Roman Period**	**Islamic Rule**	**Artukid Period**	**Ayyubid Period**	**Akkoyunlu Period**	**Ottoman Period**
Sharp canyons and thousands of caves formed by the movement of the waters (Tigris River) offered a safe settlement for the inhabitants of Hasankeyf for a very long time. Arık suggests that there is archaeological evidence proving the existence of a prehistoric settlement in the lower town.	It is assumed that Assyrians came to southeastern Anatolia (where Hasankeyf was also located) passing though the Euphrates River basin. Etymological evidence: "kefa" meaning rock in Assyrian (kefa > keyf) + Reference to Hasankeyf as "Kipani" in ancient Assyrian sources Possibly dominated by Urartians, Persians, Alexander the Great and the Seleucid dynasty	Hasankeyf was a frontier between Roman and Persian territories: strategic importance. In the 5th century Hasankeyf (Cepha) was the seat of a Syrian bishopric: considerable Christian population.	Conquest of El cezire (upper Mesopotamia) Hasankeyf was controlled by the Ummayads, Abbasids, Hamdanids and later by Marwanids who were driven out by Seljuks (Turcoman invasion) Battle with the Byzantine Empire in the west.	Artukids are of Turcoman origin. Even if they ruled Hasankeyf as a vassal of the Seljuk Sultanate, they were independent in practice. Flourishing time for Hasankeyf. (golden age) Famous bridge: Arık states that it connects Diyarbakır and Cizre.	Ayyubids took control of Hasankeyf. Ayyubids of Hasankeyf survived for more than two centuries, occasionally under the Mongols and their successors. Most of the surviving monuments in Hasankeyf now were built during this period: Ulu mosque in Kale, El rızk Mosque, Sultan Süleyman Mosque, İmam Abdullah Mosque, Kale kapıları, Küçük Saray	Akkoyunlus ruled until 1482 Tomb of Zeynel (son of Uzun Hasan) Ayyubids regain control but in the early 16th century the town was captured by the Safavid Sah İsmail.	Yavuz Sultan Selim defeats the Safavids and Hasankeyf became an Ottoman town. During this time, Hasankeyf was a populated town controlling a vast area within the boundaries of Diyarbakır. However once it has lost its strategic significance, the town regressed economically and began to lose its inhabitants.

Today Hasankeyf is one of the six provinces of Batman. Archaeological excavations were suspended during the 1990s because of the increasing clashes between the PKK and the military in the area. The insecurity at the region and the uncertainty relating to the construction of the Ilısu Dam had a very bad impact on the economic and social development of Hasankeyf. Therefore, it is not surprising that Hasankeyf is among the poorest districts in Turkey.

How will Hasankeyf be preserved? The preservation of the ancient city is a very complex issue. The government planned to dismantle and remove some parts of the standing monuments to another site (see figure 2) and to leave other parts under water. The Council of Europe Sub-Committee on Cultural Heritage pointed out in their report on the Ilısu Dam Project of June 2009[84] that:

> The preservation of the cultural heritage of Hasankeyf remains one of the most demanding tasks of the Ilısu Hydropower Project. It is not only the *outstanding location and historical situation* of Hasankeyf ("authenticity in setting") which should be preserved as far as possible, but a large number of *fragile architectural monuments* as well. (p. B)

These two points are in fact the main focus and concern of the architects and cultural heritage experts regarding the feasibility of the removal plan. First, the major concern is whether the material of the historical monuments is suitable for removal. Ahunbay explains that to transfer the historical monuments to another site, there are several methods: (1) cutting off the monument from its foundations and mounting it on a wheeled trolley – only applicable to Zeynel Bey Tomb in Hasankeyf – and (2) dismantling and reassembling – not suitable for rubble masonry (irregularly shaped stones) which is used in the construction of most of the buildings in Hasankeyf – (2006). She argues that non of these methods are suitable for the transfer of the monuments in Hasankeyf and further notes that in case of implementation, they

[84] The report is available at <www.dsi.gov.tr/ili-su> (date of access: 15 May 2011).

require a considerable budget and a perfect planning. Moreover, the monuments that would remain under the water risk being damaged in the long run because their material, mainly limestone, is very sensitive to water (Ahunbay, 2006; Pulhan, 2006). The second controversial issue is the planning of a new location for some of the selected monuments of Hasankeyf (see figure 2). The idea of establishing a cultural park is criticized from both a conceptual and a managerial perspective. Pulhan expressed her concerns related to the archaeological park by comparing the envisioned Hasankeyf cultural park to Miniaturk, a theme park in Istanbul containing the miniature models of iconic and historical buildings from all around Turkey regardless of their location or chronology (2006). Similarly, Ahunbay emphasized the impossibility of creating the same landscape and context once the monuments are relocated. She adds that:

> It is impossible to transfer and "save" Hasankeyf at the same time. Hasankeyf consists of a spectacular landscape incorporating major natural features closely connected to a complex fabric of monuments. Hasankeyf can only be saved by being preserved in situ, developing conservation projects for its extensive buildings and ruins and continuing research and excavations to reveal its hidden parts. (2006)

Despite the Turkish government's persistency in the envisaged project and the rescue plan; professional bodies, architects, archaeologists, engineers and several NGO's believe that Hasankeyf should be preserved *in situ*, in its original setting and the authorities should take into consideration alternative projects for the location or the extent of the Ilısu Dam.

The preservation *in situ* is also required by the legal norms. Article 20 of the Law on the Protection of Cultural and Natural Assets (Law no. 2863) sets forth the principle according to which the immovable cultural properties should be preserved exactly where they are situated. The Valetta Convention confirms the same principle

referring to "the conservation and maintenance of the archaeological heritage, preferably *in situ"* in Article 4.

On the other hand, NGOs – in particular the Nature Association (Doğa Derneği) and cultural heritage experts have been campaigning for the inscription of the site of Hasankeyf to the World Heritage list due to "its outstanding universal value."[85] As is known, the List was established by the 1972 UNESCO Convention to which Turkey is a party since 1983.[86] Only the cultural and natural properties of "outstanding universal value" [87] are inscribed on the List.[88] Once they are inscribed, the States Parties must ensure "the identification, protection, conservation, presentation and transmission to future generations" of these properties.[89] Otherwise, UNESCO may recall the States Parties to undertake their obligations arising from the inscription of the properties on the List.[90] However, the Convention requires the consent of the territorial state for the inscription of a property or site to the World Heritage list.[91] In other words, the states are responsible for the nomination of a site

[85] See the paper "Outstanding Universal Value of Hasankeyf and the Tigris Valley" prepared by Professor for Doğa Derneği (the Nature Association), available at <www.dogadernegi.org> (date of access: 15 May 2011).
[86] For the approval of the Convention by Turkey (Law no. 2657), see the official journal dated 20.04.1982 and numbered 17670 available at <www.resmigazete.gov.tr> (date of access: 15 May 2011).
[87] The definition for the term "outstanding universal value" absent in the Convention is provided by the Operational Guidelines for the Implementation of the World Heritage Convention developed and revised by UNESCO. The paragraph 49 of the Operational Guidelines defines outstanding universal value as "cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of humanity". In addition, a set of criteria are elaborated for the assessment of the outstanding universal value in paragraph 77 of the same document.
[88] So far, Turkey inscribed nine sites on the World Heritage list and submitted twenty three sites on the Tentative list. See the website <www.whc.unesco.org>, (date of access: 15 May 2011).
[89] See Article 4 of the Convention. Certain scholars argue that in theory, such duty is applied to the the non-inscribed properties having an outstanding universal value as well (Carducci, 2008, p. 109; Francioni, 2003, 631). But in practice, UNESCO has remained inefficient in the protection of the non-inscribed sites (See footnote 92).
[90] However, Francioni and Lenzerini remark that "only in a very few cases (if compared to the enormous number of sites inscribed on the List), such as those of the Kakadu National Park, Machu Picchu, the Whale Sanctuary of El Vizcaino, and more recently Cologne Cathedral, states have come under great pressure, and sometimes have been forced, to abandon their plans of economic development involving or affecting World Heritage properties" (2008, p.403).
[91] See Article 11 § 3.

for the World Heritage list. Therefore, it would not be realistic, at this stage, to expect that Turkey will take action and that Hasankeyf will become a world heritage site. It is also unlikely that UNESCO would step in for a non-listed site like Hasankeyf despite its potentially outstanding universal value.[92]

While the discussions continued, the site of Hasankeyf was placed on the World Monuments Watch List in 2008, because of the decaying state of the monuments.[93] In 2010, the conduct of the excavations, research and conservation activities at the site of Hasankeyf was assigned to the University of Batman (Uluçam, 2010, p.132). The archaeological team headed by Uluçam who had been excavating in Hasankeyf for some time, began to work on the maintenance and the improvement of the monuments. Unfortunately, last summer a massive rock fell down from the Castle and killed a person within the Hasankeyf site area. The authorities immediately closed the site to the public because of the rock fall risk.[94] As a result, the touristic visits to Hasankeyf became impossible cutting the major source of income for the locals though selling souvenirs, providing guidance, restaurants etc. Another consequence was the temporary suspension of the excavations (Uluçam, 2010, p.132). The local inhabitants expressed their discontent to the archaeologists

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[92] Regarding the practice of UNESCO related to the non-inscribed sites, Lenzerini explains that "UNESCO has called upon States Parties to respect their responsibilities arising from the Convention, with regard to properties not inscribed on the lists (…) only in blatant cases of deliberate acts of hostility against items of obviously great importance, such as the Buddhas of Bamiyan destroyed by the Taliban regime in Afghanistan in 2001. Apart from this kind of sensational situation, the *Convention has had no influence with regard to the very frequent cases of not-blatantly-improper actions performed by governments party to the Convention within their own territory (for whatever reason, including public works, urbanistic planning, and promotion of tourism),* which threaten or actually prejudice the integrity of cultural or natural properties objectively being of outstanding universal value but not inscribed on any of the two lists contemplated by Article 11". (2008, p. 208)

[93] See the website <www.wmf.org>, (date of access: 15 May 2011). Hasankeyf was previously listed in the ICOMOS World Report 2000 as a heritage at risk (see the website <www.international.icomos.org/home.htm>. date of access: 15 May 2011).

[94] See the online newspaper article "Re-open Hasankeyf Castle!" dated 23 July 2010 available at <www.ntvmsnbc.com>, (date of access: 15 May 2011).

after this event (Uluçam, 2010, p.132), which was already an overdue reaction of the economic and social pressures created by the Ilısu Dam Project.[95]

[95] For the social background of the excavations, see "Gre Amer" by Gül Pulhan and "Dicle'nin Kalesi" (Castle of the Tigris) by Abdülsselam Uluçam in *Arkeoloji ve Barajlar Gerçeği,* the special issue of Aktüel Arkeoloji Dergisi 17 (2010) and "Dicle ve kolları Hasankeyf'in ötesinde" (Tigris and its tributaries are beyond Hasankeyf) by Gül Pulhan in *NTV Tarih* 7 (August 2009).

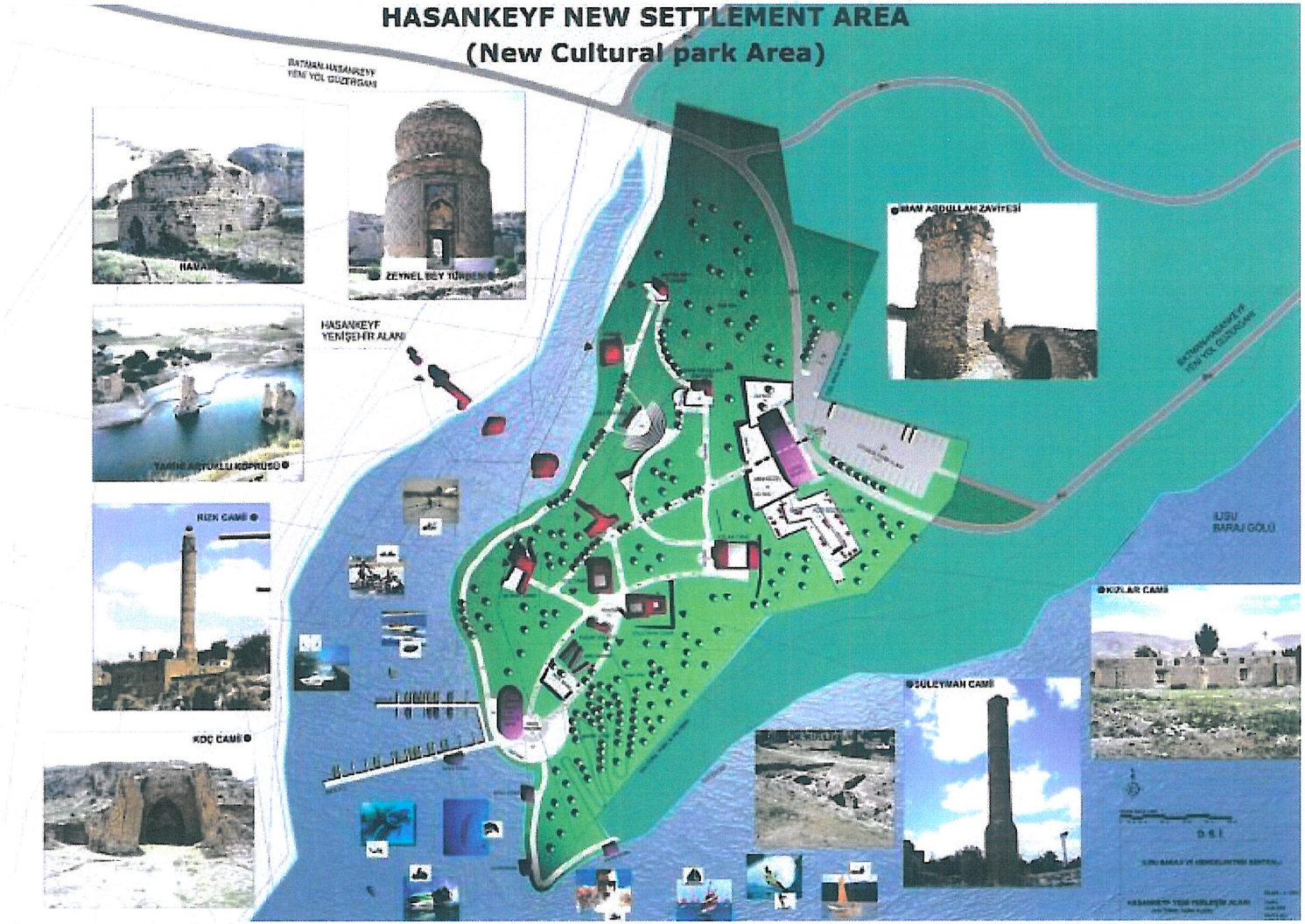

Figure 2: Hasankeyf Cultural Park Area. This rescue plan was envisioned by the second international consortium dissolved in 2009. Source: DSI (State Hydraulic Works) <www.dsi.gov.tr> (date of access: 15 May 2011)

CHAPTER 4

LEGAL PROTECTION OF HASANKEYF

To protect the site of Hasankeyf *in situ,* legal action has been started against the construction of the Ilısu Dam in Turkish courts at the end of the 1990s. This chapter first explores Turkey's legal and institutional framework for the protection of cultural heritage and the court cases pending before domestic courts against the Ilısu Dam Project. Then the chapter analyzes the application lodged with the European Court of Human Rights regarding the Ilısu Dam Project (Hasankeyf case) and discusses the claims of the applicants and the objections of Turkey. Finally, it concludes that the implications of the Hasankeyf case are significant for the assertion of cultural heritage as a human right.

4.1 Court Cases against Ilısu Dam before Turkish Courts

4.1.1 National Legal Framework

Turkey has a firm legal framework for the protection of cultural heritage. Like most of the source countries with a rich archaeological heritage,[96] Turkey

[96] Greece adopted its first protection law in 1834 and Italy in 1872 (Watson and Todeschini, 2006, p. 28).

adopted national protection norms from early times onwards. Interestingly, the first antiquities laws ("asarı atika mevzuatı") were developed since the 1860s as a result of the reaction against the increasing European looting of antiquities from the Ottoman lands (Madran, 2002, p. 19). Among these laws, the Decrees ("nizamname") of 1869 and 1874 dealt primarily with the regulation of archaeological excavations and included limited provisions on the protection (Madran, 2002, p. 28; Pulhan, 2009b, p.130-131). The Decree of 1869 allowed the free trade of antiquities within the Ottoman lands, however prohibited the export of antiquities out of the country (Özel, 1998, p. 70). As for the Decree of 1874, it declared, for the first time, the state ownership over the newly found antiquities (Özel, 1998, p. 70). Nevertheless, the antiquities found during authorized excavations were divided among the state, the land owner and the finder (Özel, 1998, p. 71). The finder could export such antiquities with the permission of the state (Özel, 1998, p. 71). In 1881, Osman Hamdi Bey, artist and a very important figure for Turkish art and museology, was appointed as the director of the Archaeological Museum in Istanbul (Madran, 2002, p. 41). His efforts led to the adoption of a new decree in 1884 that introduced the principle of state ownership: all the antiquities found in the Ottoman lands or to be found through excavations belonged to the state only and the export of such antiquities were absolutely prohibited (Özel, 1998, p. 71). The Decree of 1894 served as a basis for the Decree of 1906, which remained in force during the Republican period – from 1923 onwards – as well (Madran, 2002, p. 43). The first Turkish Law on Antiquities was adopted in 1973 (Law no. 1710) and replaced by the Law on the Protection of Cultural and Natural Assets (Law no. 2863) in 1983 (the 1983 Protection Law). Today, the 1983 Protection Law (as amended respectively in 1987 and 2004) together with the related regulations constitute the main legislation

in domestic law regarding the preservation and the protection of the cultural and natural heritage.[97]

The Constitution of the Turkish Republic[98] recognized the State's duty to conserve the historical, cultural and natural assets and wealth, and to take supportive and promotive measures towards that end.[99] The 1983 Protection Law determined the Ministry of Culture and Tourism, the High Council for Conservation ("Kültür ve Tabiat Varlıklarını Koruma Yüksek Kurulu", formerly "Anıtlar Yüksek Kurulu") and the Regional Conservation Boards ("Kültür ve Tabiat Varlıklarını Koruma Kurulları") as the responsible public authorities for the protection of the country's cultural heritage.[100]

In this context, Hasankeyf was declared in 1978 as a archaeological site of first grade ("birinci derece arkeolojik sit alanı") to be protected by the High Council for Conservation.[101] According to the decree of 1978, the monuments within the borders of the archeological site were identified as historic monuments that should be protected and were registered in the Turkish cultural inventory list in 1981. The decree of 1981 states that:

> It has been decided that within the archaeological sites, registered by the decree dated 14.04.1978 with reference number A-1105 of our Commission, no construction is permitted, no planning change is allowed. The sites should be protected exactly as they are.

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[97] For the commentary on the 1983 Protection Law, see "Kültür ve tabiat varlıklarını koruma hukuku : açıklamalar, yargıtay-danıştay kararları mevzuat" by Sabih Kanadoğlu (Ankara: Seçkin Yayıncılık, 2003). For a general critique of the legislation with regard to the movable cultural properties, see "The Protection of Cultural Properties in Turkey" by Sibel Özel in *Cultural Property Protection* ed. by Eric Schneider and Roseann Schneider (Berlin: BWV, 2005. p. 23-41).

[98] The text of the Constitution is available at <http://www.tbmm.gov.tr/anayasa.htm> (date of access: 15 May 2011).

[99] See Article 63.

[100] See Articles 10 and 51.

[101] The information on the legal status of the site Hasankeyf is retrieved from the response of the Turkey Dams and Cultural Heritage Watch Committee to the report prepared by the General Rapporteur Stepova in 2001 on the possible impacts of the Ilısu Dam on the cultural heritage of the area (Letter dated 24 May 2002 adressed to the General Secretariat of the Council of Europe, not published).

In 1991, the boundaries of the archaeological site were extended further and other monuments were registered and placed under the legal protection. The related decisions are still in force today.

Article 20 of the 1983 Protection Law clearly states that the immovable cultural properties shall be preserved exactly where they are situated and shall be removed only with the consent of the related board. Therefore, the Diyarbakır Conservation Board should have examined and approved the master plan related to the transfer of the monuments and the establishment of the Hasankeyf Cultural Park before it is to be implemented. The applicants to the European Court of Human Rights claimed that the master plan was approved on July 2005 by an inter-ministerial decision, without having been discussed in the Diyarbakır Conservation Board as requested by the law.[102]

During the last years, the High Council for Conservation adopted several resolutions ("ilke kararı") dealing especially with the protection of cultural properties affected by dams, which were highly criticized.[103] The Resolution no. 717 adopted in 2006, envisaged that DSI and the Ministry of Culture and Tourism would form a scientific committee of experts which would determine how the immovable cultural properties located within the dam reservoir shall be protected – for instance whether they should be preserved *in situ*, transferred to another site or remained under water – in Article 2. With regard to the dam projects that were already started but not finished at the time of the adoption of the Resolution, Article 3 stated that DSI would prepare a project according Article 2 and submit it to the Regional Conservation Boards. However, in November 2008, the Council of State cancelled Articles 2 and 3 of the

[102] Replies of the applicants to the objections of Turkey (not published).
[103] All the resolutions adopted by the High Council for Conservation are available at <www.kultur.gov.tr> (date of access: 15 May 2011).

Resolution no. 717 on the grounds that the duties accorded by the 1983 Protection Law to the Regional Conservation Boards were unlawfully assigned to DSI.[104] Thus, such articles were cancelled and replaced by another resolution (Resolution no. 749) in March 2009. This second resolution named again the scientific committee (this time, including the representatives of the investment companies) as the responsible body for the development of protection measures in Article 2 and transferred DSI's duties under Article 3 to certain "relevant authorities" ("ilgili kuruluşlar"). For this reason, the Council of State found the Resolution no. 749 unlawful as well.[105] The High Council for Conservation cancelled Resolution no. 749 and adopted a third one (Resolution no. 765) in April 2010. Article 2 of the Resolution says that in case the dam in question can not be relocated for necessary reasons, a scientific committee (this time composed of experts, academicians and representatives from the Ministry of Culture and Tourism) shall be formed to determine the protection measures. However, it did not specify what these "necessary reasons" are and who will decide on the existence of such reasons. Moreover, the scientific committee shall advise the Regional Conservation Boards on the dam projects started before the adoption of the Resolution, such as Ilısu Dam Project, as foreseen under Article 3. In brief, it is clear in all these resolutions that the authority of the Regional Conservation Boards accorded by law is transferred to ad hoc committees and their role is reduced to the evaluation of such projects prepared by these committees. The Resolution no. 765 is in force today.[106]

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[104] See the decision of the 6th Chamber dated 26.11.2008 and numbered E. 2006/8266 and K. 2008/8268, available at <www.danistay.gov.tr> (date of access: 15 May 2011).

[105] Resolution no. 765 states that: "Following the cancellation of the Resolution no. 749 adopted by the High Council for Conservation in 20.03.2009 by the decisions of the 6th Chamber of the Council of State dated 26.10.2009 and numbered E: 2009/7251, dated 09.11.2009 and numbered E:2009/7215, and dated 07.12.2009 and numbered E:2009/7466 ..." Retrieved from the website <www.kultur.gov.tr> on 15 May 2011.

[106] The "Initative to Keep Hasankeyf Alive" announced in their website in July 2010 that three associations applied to the court for the cancellation of this last Principle. Visit <http://www.hasankeyfgirisimi.com> (date of access: 15 May 2011).

4.1.2 Court Cases

Two different court cases are pending before the Council of State ("Danıştay") and the Diyarbakır Administrative Court ("Diyarbakır İdare Mahkemesi") relating to the Ilısu Dam Project.

In 2000, Turkish attorney Murat Cano applied to the Ankara Administrative Court for the cancellation of the Ilısu Dam Project and the related agreement concluded with the foreign investors.[107] He claimed that the Ilısu Dam Project violated the 1983 Protection Law and the international agreements to which Turkey was a party. At first, the Ankara Administrative Court determined that it had no jurisdiction to examine the case and sent the case to the Diyarbakır Administrative Court. The Diyarbakır Administrative Court decided that it had no jurisdiction either. The Council of State resolved the conflict of competence and decided that the competent court was the Diyarbakır Administrative Court.[108] In November 2001, the Diyarbakır Administrative Court rejected the case on the grounds that attorney Murat Cano had no standing to sue because his interests had not been affected. Cano appealed against this decision. In June 2003, the Council of State overruled the decision of the Diyarbakır Administrative Court and affirmed that Cano, as any other citizen, held the right to claim the cancellation of such a project threatening cultural heritage, the protection of which was secured under the Constitution and the 1983 Protection Law.[109] After that the decision of the Council of State became definite, the Diyarbakır Administrative Court finally began to investigate the case.

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[107] The project and the agreement concluded for its implementation are considered as administrative acts. By Turkish law, the court cases related to the cancellation of administrative acts are examined by the Administrative Courts (See Article 125 of the Constitution and Article 2 of the Law on Administrative Procedure no. 2577).

[108] From the "Statement of Facts" prepared by the European Court of Human Rights following the submission of the Application No. 6080/06 related to Hasankeyf and sent to the applicants in a letter dated 21 July 2006 (not published).

[109] See footnote 108.

In the meantime, Turkish attorney Kemal Vuraldoğan and the Union of Chambers of Turkish Engineers and Architects (TMMOB) applied to the Council of the State and requested, this time, the cancellation of the Council of the Ministers' decision on the implementation of the Ilısu Dam Project (Decision of 20.03.1997 numbered 1997/9532) [110]. In April 2003, the 10th Chamber of the Council of State rejected the case and the plaintiffs appealed against this decision. In December 2006, the General Committee of the Administrative Chambers of the Council of State overruled the decision of the 10th Chamber and decided that the 10th Chamber should have waited until the Diyarbakır Administrative Court had delivered its decision on the Ilısu Dam Project:

> (...) since the judgment of the Diyarbakır Administrative Court regarding the cancellation of the Ilısu Dam Project will have an effect on this present case where the cancellation of the Council of the Ministers' decision on the implementation of the Ilısu Dam Project (Decision of 20.03.1997 numbered 1997/9532) is requested, it is necessary that the case pending before the Diyarbakır Administrative Court is considered as a preliminary issue[111] ["bekletici mesele"] (...). [112]

Today, the case before the Diyarbakır Administrative Court is still pending. Recently, an expert team conducted a survey ("keşif") in Hasankeyf site area, upon the Court's order, to question in particular how the monuments will be transferred to another site and how the remaining monuments would be protected under water[113].

The excessive delay in the conduct of proceedings before the domestic courts urged a group of experts, including Cano, to search for efficient mechanisms for the

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[110] The court cases related to the cancellation of the Council of Ministers' decisions are examined by the Council of State (See Article 24 of the Law on the Council of State no. 2575).
[111] A preliminary issue is an issue (which may be a question of law) which is decisive in the case. Thus, a court may decide that this issue should be discussed before the main trial of the case.
[112] See the decision of the General Committee of the Administrative Chambers of the Council of State dated 7 December 2006 and numbered E. 2003/1063 and K. 2006/2104 (English translation provided by Ece Velioglu).
[113] See the online newspaper article "Hasankeyf'te keşif yapıldı" (A survey was made in Hasankeyf) dated 26 March 2011 available in Turkish at <www.batmanexpress.com> (date of access: 15 May 2011).

protection of Hasankeyf under international law. In March 2006, Cano together with three professors who previously conducted archaeological research in Hasankeyf and the chief editor of an influential journal, applied to the European Court of Human Rights (ECHR) bringing the preservation efforts to the international legal platform.

4.2 Hasankeyf Case at the European Court of Human Rights

4.2.1 General Information on the Procedure before the Court

The European Court of Human Rights is an international court set up in 1959 following the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the "European Convention on Human Rights"[114] (the "Convention"), by the members of the Council of Europe. The Convention gave effect to certain of the rights stated in the Universal Declaration of Human Rights and established an international judicial organ with jurisdiction (the ECHR) to find against States that do not fulfill their undertakings. The ECHR is based in Strasbourg, France.[115]

The ECHR examines complaints from persons claiming that their rights under the European Convention on Human Rights have been infringed by the States Parties. The rights guaranteed are set out in the Convention itself, and also in Protocols Nos. 1, 4, 6, 7, 12 and 13,[116] which only some of the States have accepted.

[114] The European Convention on Human Rights was opened for signature in Rome on 4 November 1950; it entered into force on 3 September 1953. Today, all the forty-seven members of the Council of Europe are party to the Convention, including Turkey.

[115] It is important not to confuse the ECHR with the Court of Justice of the European Union based in Luxembourg whose duty is to control the States' compliance with the European Union law, and with the International Court of Justice, the judicial organ of the United Nations, based in The Hague.

[116] These protocols extended the scope of the Convention. For instance Protocol No. 1 introduced the protection of property, the right to education and the right to free elections. In particular, Protocol No. 6 concerns the abolition of death penalty. The other protocols deal with the procedure and the control system of the Court. Protocol No. 11 has a significant importance. Since its entry in force in 1998, the

The ECHR is not a court of appeal vis-à-vis national courts, therefore, it can not annul or alter their decisions. Nor can it intervene directly on behalf of the victim with the authority that he or she is complaining about. The Court deals with matters which are the responsibility of the public authority (legislature, administrative authority, court of law, etc.) of the States Parties, thus, the complaints against private individuals or organizations are out of the Court's mandate.[117]

Who can apply to the ECHR? Any person (or legal entity) who considers to have been personally and directly the victim of a breach of one or more of these fundamental rights by the States Parties (which have ratified the Convention or the Protocol in question) can apply to the Court.

What happens after such person has lodged an application to the Court? Applications which are not declared inadmissible immediately after a preliminary examination of the case are referred to a Chamber. Chambers decide on both the admissibility and the merits of the case (whether there has been a breach of the Convention), separately or together where appropriate. When a Chamber has decided to admit the case, it may conduct further examination by inviting the parties to submit further evidence and written observations including any claim for compensation (just satisfaction) by the applicant. The Chamber may also decide to hold a hearing on the merits of the case if no hearing has taken place at the admissibility stage. Finally, the Chamber delivers its judgment related to the case.[118]

Court functions as a full-time court and individuals can apply to it directly. Recently, Protocol No. 14 entered in force (June 2010). It aims for a more effective operation of the ECHR.

[117] See the basic information on procedures, available at <www.echr.coe.int> (date of access: 15 May 2011).

[118] See the basic information on procedures, available at <www.echr.coe.int> (date of access: 15 May 2011).

What are the effects of the ECHR's judgments? Judgments finding violations are binding on the States concerned and they are obliged to execute them. The judgments may include the payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained (just satisfaction), the adoption of general measures (amendment to the legislation to bring it into line with the Convention) or the adoption of individual measures (restitution, reopening of the proceedings, etc.). In either case, the State concerned must be careful to ensure that no such violations occur again in the future, otherwise the Court may deliver new judgments against them. [119]

The admissibility criteria are set forth in Article 34 and 35 of the Convention. Article 34 guarantees the right of individual application, one of the key components of the system, and the victim status of the applicant. The criteria under Article 35 can be regrouped as the procedural grounds for admissibility (I), the grounds relating to the Court's jurisdiction (II) and those relating to the merits of the case (III). The admissibility criteria are analyzed below in detail. [120]

[119] See the basic information on procedures, available at <www.echr.coe.int> (date of access: 15 May 2011).
[120] For further information, see the Practical Guide on Admissibility Criteria availaible at <www.echr.coe.int> (date of access: 15 May 2011).

Article 34
Individual applications

Principle of individual application

Victim status

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Article 35
Admissibility criteria

(I-A) The Court should intervene only where States have failed in their obligations (principle of subsidiarity).

(I-B) The six-month time-limit

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2. The Court shall not deal with any application submitted under Article 34 that

(I-C)

(a) is anonymous; or

(I-D) Where the parties, the complaints and the facts are identical

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

(I-E)

(I-F) Examples for the abuse: misleading information; use of offensive language; violation of the obligation to keep friendly-settlement proceedings confidential; etc.

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

(III-A)

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

(III-B) New admissibility criterion introduced by the Protocol No. 14 on 1st June 2010.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

(II-A) Incompatibility ratione personae: The violation should have been committed by a Contracting State or be in some way attributable to it. **(II-B)** Incompatibility ratione loci: The violation should have taken place within the jurisdiction of the respondent State or or in territory effectively controlled by it. **(II-C)** Incompatibility ratione temporis: The provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention in respect of that Party. **(II-D)** Incompatibility ratione materiae: The right relied on by the applicant must be protected by the Convention and the Protocols.

See also Article 32 §§ 1 and 2 regarding the jurisdiction of the Court.

4.2.2 Analysis of the Hasankeyf Case

Zeynep Ahunbay (Conservation architect and professor), Metin Ahunbay (Architect and professor), Oluş Arık (Archaeologist and professor), Özcan Yüksek (Journalist) and Murat Cano (Attorney) lodged an application before the European Court of Human rights in March 2006 to stop the construction of the Ilısu Dam. The applicants claimed that if the Turkish State would implement the Ilısu Dam Project, it would cause the destruction of irreplaceable heritage and by doing so, it would violate certain rights and freedoms guaranteed in the European Convention on Human Rights. This idea was originally argued by the attorney Cano in his paper "Kültürel Varlıkların Uluslararası Alanda Korunması İçin Normatif Öneriler" (Normative Suggestions Concerning the International Protection of Cultural Properties) submitted in the symposium "Kültürel Miras Kavramının Yeniden Tanımlanması ve Korunması İçin Uluslararası Sempozyum: Geçmişimiz İçin Bir Gelecek" (A Future for Our Past: International Symposium for Redefining the Concept of Cultural Heritage) organized by the Istanbul Initiative at Bilgi University in İstanbul, Dolapdere Campus in 24-26 June 2004. [121] The text of the application is provided below.

[121] This idea was also mentioned by the members of the Turkey Dams and Cultural Heritage Watch Committee (including Cano) in their response to the report prepared by the General Rapporteur Stepova in 2001 on the possible impacts of the Ilısu Dam on the cultural heritage of the area (Letter dated 24 May 2002 adressed to the General Secretariat of the Council of Europe, not published): "As in case with the other international documents, (...) and especially according to the Agreement for the Preservation of Archaeological Heritage, revised and signed in Valetta in 1992, "archaeological sites" are a basic source of "information" and "common memory" belonging to the "past" of all humanity. Owing to this fact, preventing or making it impossible to access an archaeological site is a violation of the "right for information". In fact, the destruction of archaeological data of the "former" and of the "other" means the deliberate destruction of some of the basic documents contributing to our awareness of past cultures. We believe that these violations stand against the goal of the European Human Rights Act and the basic principles of the European Human Rights Court." The report is available at <http://assembly.coe.int> (date of access: 15 May 2011).

EUROPEAN HUMAN RIGHTS COURT

Council of Europe

Strasbourg, France

APPLICATION

Submitted upon the Article 34 of the European Convention of Human Rights and articles 39,40,41,42,45 and 47 of the Court Regulation

I – PARTIES

A – PLAINTIFFS

1. **Surname:** AHUNBAY 2. **Name:** Zeynep

   Sex: Female

3. **Nationality:** Turkish 4. **Profession:** Conservation architect, Professor of Conservation at Istanbul Technical University, Faculty of Architecture , Istanbul,Turkey

5. **Date of birth and place :** 20.06.1946 , Ünye/ Turkey

6. **Place of residence:** Ağa Çırağı Sok. 8/6 Taksim/Beyoğlu/Istanbul/ Turkey

7. **Phone number :** 00 90 0212 293 77 79

8. **Current address:** Ağa Çırağı Sok. 8/6 Taksim/Beyoğlu/Istanbul/Turkey

Positions held and activities related to the site:

- Participation in excavation and conservation works at Hasankeyf : 1998-2000
- Presentation of Hasankeyf as a Heritage at Risk site to ICOMOS Europe
- Organization of seminarsfor the salvage of Hasankeyf during the years 1999-2005, as president of ICOMOS Turkey

1. **Surname:** ARIK 2. **Name:** Oluş

   Sex: Male

3. **Nationality:** Turkish 4. **Profession:** Professor of Art History and Archaelogy

5. **Date of birth and place :** 28.07.1934 , Ankara / Turkey

6. **Place of residence :** Yeni Kordon 1. Sok. Soydan 5/A-11 Çanakkale/ Turkey

7. **Phone number :** 00 900286 213 13 04

8. **Current address:** Yeni Kordon 1. Sok. Soydan 5/A-11 Çanakkale/ Turkey

Positions held and activities related to the site:

- Preliminary surveys and archaeological investigations at Hasankeyf : 1985
- Director of archaeological excavations at Hasankeyf : 1986 – 2003 (mandate ended in 2003 by administrative decision)
- Author of the book "Hasankeyf, Üç Dünyanın Buluştuğu Kent/ **Hasankeyf, The City Where The Three Worlds Meet**", Istanbul 2004, Türkiye İş Bank Publication

1. **Surname:** AHUNBAY 2. **Name:** Metin

Sex: Male

3. **Nationality:** Turkish 4. **Profession:** Architect, archaeologist, Professor of architectural history

5. **Date of birth and place :** 19.05.1935 – Istanbul /Turkey

6. **Place of residence :** Ağa Çırağı Sok. 8/6 Taksim/Beyoğlu/Istanbul/ Turkey

7. **Phone number :** 00 90 0212 293 77 79

8. **Current address :** Ağa Çırağı Sok. 8/6 Taksim/Beyoğlu/Istanbul/ Turkey

Positions held and activities related to the site:

- Architectural research and documentation at Hasankeyf : 1986-1991, 1998-2001

1. **Surname:** YÜKSEK 2. **Name:** Özcan

Sex: Male

3. **Nationality:** Turkish 4. **Profession:** Journalist

5. **Date of birth and place :** 10.05.1963 , Rize / Turkey

6. **Place of residence :** Kılıç Ali Paşa Mah. Akarsu Yokuşu No: 4/4 Cihangir/Beyoğlu/İstanbul/ Turkey

7. **Phone number :** 00 90 212 410 35 48

8. **Current address :** Kılıç Ali Paşa Mah. Akarsu Yokuşu No: 4/4 Cihangir/Beyoğlu/İstanbul/ Turkey

Positions held and activities related to the site:

- Publication of several articles about Hasankeyf and organizer of a campaign for the salvage of Hasankeyf as editor of ATLAS monthly, a popular journal on environmental, geographical and cultural topics

1. **Surname:** CANO 2. **Name:** Murat

Sex: Male

3. **Nationality:** Turkish 4. **Profession:** Attorney at law

5. **Date of birth and place :** 01.01.1953 , Erzincan /Turkey

6. **Place of residence :** Taksim İstiklal Caddesi Meşelik Sokak No:36 K:3 D:8 34433 Beyoğlu-Istanbul/TURKEY

7. **Phone number :** 00 90 212 252 92 32 pbx

8. **Current address :** Taksim İstiklal Caddesi Meşelik Sokak No:36 K:3 D:8 34433 Beyoğlu-Istanbul/TURKEY

Positions held and activities related to the site:

- Attorney at law specialized in minority rights and protection of cultural heritage

B – HIGH CONTRACTUAL PARTIES

1 - Republic of Turkey
2 - Federal Republic of Germany
3 - Republic of Austria

II – STATEMENT OF FACTS

14.1 The Republic of Turkey has started a project : Ilısu Dam, which consists of a dam and a hydroelectric power plant over the river Tigris . The region in which this project will be realized is located within the cultural sphere of ancient Mesopotamia.
The dam and the hydro-electric power plant in question are intended to be commissioned to an international consortium lead by a Swiss firm, accompanied by firms from the Federal Republic of Germany, Republic of Austria and Turkey.

14.2 According to information gathered from national press, the construction of the dam will start in March of 2006. There are plans to move some of the historic monuments from the ancient city to another location at a higher position in the landscape, in order to save them from being inundated by the dam.
The projected Ilısu dam aims to generate a 170 km long lake which will stretch from Hasankeyf in Batman province to Cizre county in Şırnak province. The capacity of the dam reservoir is 11.400 billion cubic meters. It is intended to hold 7.4 billion cubic meters of water constantly (the yearly flow of the Tigris is 16 billion cubic meters).
According to the survey conducted by Prof. Algaze, about 200 sites dating from prehistory up to the Middle Ages will be affected by the construction of the dam. No serious excavation has been conducted in most of the archaeological sites in the threatened area. Excavations in Hasankeyf have been going on about twenty years now, but the archaeological potential of the site is far from being fully exploited. The researches so far have revealed important finds relating to the history and archaeological significance of the site. These can be summarized as follows:

a) **HASANKEYF is a significant representative of man's creative genius**
Monuments and groups of buildings within Hasankeyf testify to highest level of design and ingenuity. The tomb of Zeynel Bey, the Mosque of Sultan Suleyman, the bridge over the river Tigris and the Castle can be mentioned as outstanding examples of their time and architectural types. The excavations revealed presence of Chalcholithic settlement in the lower city and Assyrian presence (8th century B.C) in the cave dwellings. The foundation of the Castle goes back to the rule of the Roman Emperor Constantinos.

b) **HASANKEYF is a witness to an important interchange of human values, of developments in architecture, and in monumental arts**
Hasankeyf, is located within Mesopotamia, one of the cradles of humankind. Archaeological remains from Roman to Seljuks are visible in the settlement. Its collection of architectural remains from Artukid, Ayyubid and Akkoyunlu periods reflects that this is a point where different cultures met and merged . Craftsmen coming from the east, like the architect of Zeynel Bey Mausoleum, have introduced glazed

tile architecture to this land of stone building tradition . The glazed tile architecture was fashionable in central Asia, especially in Semerkand, capital of Tamerlane's Kingdom. Thus, an architectural taste within a geographical region which stretched from Semerkand to Istanbul, found its expression also in Hasankeyf. To identify and understand these relationships is important for the cultural history of the world. The wide spanning arches of the famous bridge of Hasankeyf was a structural wonder to its spectators when it linked not only the two sides of the town in the Middle Ages but also provided passage from the south to the north. The Ottoman Bridge in Mostar built in the middle of the sixteenth century incorporates the knowledge and technology inherited from this bridge. Being on the Silk Road, Hasankeyf was a stopping point for many travellers who brought interesting ideas to this place and took their valuable experiences from this wonderful town to far away cities, inspiring new ideas.

c) **HASANKEYF bears testimony to cultural traditions which have disappeared**

Hasankeyf is a settlement with many layers: it has remains from prehistoric/ Chalcholithic, up to the late Ottoman period. It is almost unique in being preserved with all its medieval features because the site has been deserted long time ago. Roman, Byzantine, Artukid, Ayyubid and Akkoyunlu cultural layers provide information about the way of living of the people who occupied this territory at different periods in history.

d) **HASANKEYF is a significant cultural landscape with its outstanding examples of cave dwellings, religious and funerary monuments**

The monument which is called Kızlar Camii is an interesting funerary building which has no matching example in the Islamic world. The mausoleum of Zeynel Bey is the only surviving example of a central Asian styled tomb in the region, built with glazed tiles and preserving its double shelled dome. The cave dwellings and monuments carved into the rock are also interesting features of this settlement . The importance of providing living spaces within the soft rock has lead to unique solutions. There are also religious buildings, a church and a mosque are carved into the solid rock. The landscape is spectacular; the relationship of the river Tigris with the city on top of the high rising cliffs creates a unique landscape. The impressive gateways to the castle and the integration of one of the main towers of the castle with the main rock make an unmatched compostion.

e) **HASANKEYF is an outstanding example of a natural and archaeological site which has become vulnerable under the impact of irreversible change**

Hasankeyf preserves its cave dwellings and the Medieval urban structure, yet the bedrock is sensitive to the penetration of water through the fissures . The interesting water conveyance system, religious and military architecture, dwellings and shops cut into the

rock are vulnerable to the action of men and nature. At the moment, the Ilısu Dam Project is the most serious danger for the site. It is essential to preserve this exceptional cultural landscape from all potential risks for the benefit and enjoyment of all mankind .

f) **HASANKEYF is directly associated with living traditions, ideas and beliefs – (intangible heritage)**
According to local legends, Hasankeyf is associated with some Biblical myths . It is believed that the cave of the famous "seven sleepers" is in the vicinity of Hasankeyf. Several of the mosques, graveyards, mausolea in Hasankeyf are considered as holy places of worship and are greatly venerated by the local people as they have great respect for their ancestors and monuments with religious significance.

III – STATEMENT CONCERNING THE CLAIMS OF CONTRACT AND PROTOCOL VIOLATIONS

15.1 **The following articles of the Convention for the Protection of Human Rights and Fundamental Freedoms are being violated: Article 1, entitled "Obligation to respect human rights"; Article 2, entitled "Right to Life"; Article 5, entitled "Right to Liberty and Security"; Article 9 on "Freedom of Thought"; Article 10 on "Freedom of Expression" and Article 14 on "the Prohibition of Discrimination" and Article 2 of the Protocol no. 1 to the Convention, entitled "Right to Education".**

15.2 **According to the first sentence of the Article 2 of "the Convention for the Protection of Human Rights and Fundamental Freedoms", adopted on 4.10.1950 in Rome, and henceforth called the Convention, "*Everyone's right to life shall be protected by law*" .**
"The right to life", no doubt, covers not merely the physical sustenance of the biological existence of the individual. Apart from the biological and physical existence, human beings acquire intellectual, artistic and spiritual values and pass these on to future generations. Human beings need to have the rights and the freedom to make use of their rights in order to benefit fully from the right to life. Therefore Article 1 of the Convention obliges the state parties to "*secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.*"

15.3 **One of the rights secured by the Convention is the "Right to Education". This right should not be understood solely as the education provided by standard schools at different levels. Every human being has the right to visit, get in contact , understand, learn about different cultures and their cultural heritage, thus know about the past and the other cultures. Direct contact with the "previous" and "the other" cultures are primary and ideal means of learning and being educated.**

It is only possible to learn more about "the previous" and "the other" cultures by studying the artifacts or remnants of the past eras or peoples. For this reason, the cultural heritage should be accessible to everyone and at all times. Accessibilty is only possible if the cultural heritage is protected. Expressed in legal terms, the right of access to information includes the right of access to the valuable remains of past civilizations: the chance to see, study and make historic and scientific deductions from these objects or works of art.

15.4 **No discrimination should be made among cultures and cultural heritage belonging to people.**

15.5 **The right of access to information is possible and meaningful if there is freedom to share information. If information is not shared, it will not be possible to convey values of one culture to other people. In such cases, "common human values" and "shared values" can not be established globally. This may deprive humanity from developing a mutual understanding which can contribute to the development of a conscious effort for living together in peace. In fact, the works of art and culture unite people and provide a common basis for appreciation of human achievements. The invisible bridges which cultural heritages of mankind build among peoples of the world are the foundations on which world peace can flourish.**

15.6 **Hasankeyf is a significant site which meets more than one of UNESCO's criteria for the asssessment of outstanding universal value; at national level Hasankeyf site is scheduled as an archaeological site of major importance by the Turkish authorities. It is well known that the ancient cultures which have developed along the Nile and in Mesopotamia are the precursors of Mediterranean civilization, also the beginning of the world civilization. To destroy the vestiges of the past cultures means to erase some part of man's collective memory. Hasankeyf is not only a unique Medieval site with a spectacular landscape, its archaeological treasures include prehistoric times, there are significant contributions from the Roman culture; the remains of the military stronghold at the eastern border of the Eastern Roman Empire were revealed during recent excavations. In view of its significance and in accordance with the European Convention on the Protection of the Archaeological Heritage (revised in Valetta in 1992), the responsibility of protecting the archaeological heritage in Hasankeyf should be shared by Turkey and all the other European countries.**

15.7 **The preliminary project, proposed by the high contractual states for the transfer of some of the major monuments in Hasankeyf is not acceptable; it should not be put into action. The medieval monuments in Hasankeyf are mostly constructed using rubble masonry, which means that the building material is not blocks of regular geometry but consists of roughly shaped stones joined together with strong mortar. When one tries to dismantle monuments built with this technique, the architectural members will disintegrate into rubble. The authenticity of the site will be**

lost if only some parts of the monuments (like minarets or gateways) which are built with regular blocks are selected for transfer to the site which will be the " New Hasankeyf". It is very complicated to cut and transfer cave dwellings and shops carved into the bedrock. Moreover, it is impossible to recreate the spectacular natural landscape which is very important for the appreciation of the ancient site. The high cliffs which have been formed by the action of the Tigris river in the course of millions of years, the river itself and the citadel are the major elements which are not transferrable. Since the archaeological excavations at Hasankeyf are far from being complete, the site will suffer seriously from inundation by the loss of archaeological information the unresearched areas would provide .

15.8 **We, the applicants, believe that the inundation of Hasankeyf wil result in the loss of historic, scientific and landscape values which are important for all mankind. The execution of the dam project will affect us in a negative way , depriving our access to cultural heritage- a human right which is very important for aesthetic and scientific reasons; since cultural heritage is a source of inspiration and information for all human beings. Therefore, we will be relieved and benefit greatly from the removal of potential dangers and related losses which will be caused by the construction of the Ilısu dam and the transfer of monuments.**

IV – STATEMENT ON PARAGRAPH 1 OF ARTICLE 35 OF THE CONVENTION

We, the applicants, as Turkish citizens, do not have the right to intervene to the transactions related to the Ilısu Dam carried out in the Federal Republic of Germany and the Republic of Germany. Therefore, it seems out of question to "exhaust" the courses of domestic law in those countries. The lawsuit by lawyer M. Cano in the year 2000 against the administrative processes by the Republic of Turkey has not been concluded yet. Since the decisions and administrative processes made by the governments and the respective public organizations of the other high contractual parties were not disclosed, we do not know what these are. Moreover, the "administrative practices" of the high contractual states show that applying to the domestic law does not promise to be fruitful. In fact, although the UK, Sweden and Italy withdrew from the international consortium, previously established on the initiative of the Swiss firm, the implementation of the project came up again , due to the political and administrative public institutions in Turkey and the guaranteed credit by the governments of the Federal Republic of Germany and the Republic of Austria.

V – STATEMENTS ON THE PURPOSE OF THE APPLICATION AND DEMANDS IN ACCORDANCE WITH EQUITY

19. **The purpose of the application is ;**
(1) To stop the construction of the Ilısu Dam before some monuments in Hasankeyf are damaged by dismantling/ transfer projects and the region

is flooded . In order to gain time to consider the case fully, but not permitting any destruction to the cultural heritage in the reservoir basin, temporary injunction measures are necessary (according to the Article 39 of the Court Regulation); urgent serving method should be applied to notify the consortium of the intervention (according to Article 40) ; in view of its importance, the case should be considered in priority (according to Article 41) ; evidence should be gathered (according to Article 42),
(2) To establish the fact that the articles 1., 2., 5., 9., 10. and 14. of the Convention and the article 2 of the Protocol no. 1 to the Convention are being violated.

VI – STATEMENT ON THE COURSE OF ACTIONS IN OTHER INTERNATIONAL OFFICES

20. **Lawyer M. Cano applied to the EU, Council of Europe, UNESCO and to all the member countries which took part in the previous composition of the consortium. UNESCO and the Council of Europe did not respond. England, Italy and Sweden authorities withdrew from the project. The EU, the Federal Republic of Germany and the Federal Government of Austria responded negatively.**
Afterwards, an application was sent to the General Office of the Council of Europe by Lawyer M. Cano and, along with the 20 members of the Dams and Cultural Heritage Watch Committee of which Prof. Dr. M. Ahunbay and Prof.Dr. Z. Ahunbay are also members.

VII – LIST OF ATTACHED DOCUMENTS

21. 1. Decision number 2000/36-274, dated 6.4.2000 of Ankara 4th Administrative Affairs Court, refusing to review the case; referring it to the Administrative Court in Diyarbakır
2. Decision number 2000/5169-5217 dated 16.10.2000 of Supreme Court, Division 10, referring the case to Diyarbakır Administrative Affairs Court.
3. Decision nubler 2001/205-99, dated 22.2.2001 of Diyarbakır Administrative Court refusing to discuss the case, referring it to the Supreme Court in Ankara
4. Decision number 2001/1243-1006 dated 20.11.2001 of Diyarbakır Administrative Affairs Court refusing to discuss the case.
5. Decision number 2002/1880 dated 4.6.2002 of Supreme Court, Division 10 related to negating the decision of Diyarbakır Administrative Affairs Court
6. Decision of Supreme Court, related to file number 2002/1880 , 2003/2458 on 16.3.2003 negating the decision of the Diyarbakır Administrative Affairs Court (decision taken with majority of votes)
7. Letter dated 18.4.2005 sent in response to the application of one of the applicants, Attorney M. Cano to the Administrative Affairs Court in Diyarbakır on 21.03.2005
8. Copy of letters sent by Attorney M. Cano to UNESCO, EU, Council of Europe and the letter sent in response by the Permanent Commission of EU

9. Petition presented to EU General Secretariat by the Turkish Dams and Cultural Heritage Watch Committee and the related report by MS Stepova
10. Clip from the Turkish daily "Referans" dated 4.2.2006
11. A copy of the book Hasankeyf Üç Dünyanın Buluştuğu Kent / **Hasankeyf, The City Where The Three Worlds Meet**", Istanbul 2004, Türkiye İş Bank Publication by applicant Prof.Dr. Oluş Arık

VIII – SIGNATURE AND RATIFICATION

22. We certify that the information provided here is correct .

With best regards, 23.2.2006 Istanbul /Turkey.

Legal process of the case

The purpose of the application is to stop the construction of the Ilısu Dam and to claim the violation of Article 1 (Obligation to respect human rights), Article 2 (Right to life), Article 5 (Right to liberty and security), Article 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of expression), Article 14 (Prohibition of discrimination)of the Convention and Article 2 of the Protocol No. 1 (Right to education). To ensure that the case is resolved before the dam begins to operate (estimated date 2015), the applicants have posed additional requests related to the legal procedure such as request for interim measures,[122] urgent notification of the application[123] and for priority.[124] In July 2006, the Court informed the applicants that the request for interim measures and priority were refused, however, the application would be notified to Turkey pursuant to Rule 40 (urgent notification).[125] The Court asked the Turkish Government to urgently brief the Court about what stage the construction of Ilısu Dam was as well as the measures foreseen or taken for the preservation of the cultural heritage of Hasankeyf. In the Court's terminology, the case was "communicated" to the State concerned. In December 2006, the Turkish Government submitted their response composed of four files to the Court. The observations of Turkey include the State's preliminary objections to the applicants' claims as well as the technical information related to the Ilısu Dam Project and the measures foreseen to protect environment and cultural heritage in the area. The applicants replied to the Government's observations in January 2007. The progress of the case is summarized below:

[122] See Rule 39 of the Rules of Court ("İç Tüzük"), available at <www.echr.coe.int> (date of access: 15 May 2011).
[123] See Rule 40 of the Rules of Court, available at <www.echr.coe.int> (date of access: 15 May 2011).
[124] See Rule 41 of the Rules of Court, available at <www.echr.coe.int> (date of access: 15 May 2011).
[125] Letter of the Court dated 21 July 2006 (not published).

Case title: Zeynep Ahunbay and others versus Turkey

Applicants: Zeynep Ahunbay (Conservation architect and professor), Metin Ahunbay (Architect and professor), Oluş Arık (Archaeologist and professor), Özcan Yüksek (Journalist), Murat Cano (Attorney)

Respondent State: Turkey[126]

Application number and date: 6080/06 and 3 March 2006

Related chamber: Second chamber

Status: Communicated

Alleged Violations: Article 1 (Obligation to respect human rights), Article 2 (Right to life), Article 5 (Right to liberty and security), Article 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of expression), Article 14 (Prohibition of discrimination) and Article 2 of the Protocol No. 1 (Right to education) + Article 8 (Right to respect for private and family life)[127]

Admissibility and the merits

Following the exchange of written representations, the Court will consider if the application meets the admissibility requirements before it decides on whether there has been a breach of the Convention or not. In this context, there are three questions to be discussed:

1. Have the applicants exhausted the domestic remedies as required by Article 35 §1?
2. Can the applicants be considered as victims under Article 34?

[126] Initially, the application was directed against Germany and Austria as well which were guarantor States for the Ilısu Dam Project. Following their withdrawal from the project in 2009, they are not concerned with the case anymore.
[127] Article 8 was later added by the Court.

3. Can the case be treated under any of the rights guaranteed by the Convention?

The exhaustion of domestic remedies is a requirement that is related to the legal procedure. However, the issue of the victim status and the consideration of the right violated under the Convention are closely linked to the subject of the case.

In the first place, the obligation to exhaust domestic remedies is a generally recognized rule of international law (Guide § 42). It implies that the applicant, before bringing its claim to the ECHR, should have used all the procedures available in its country to protect its rights or to claim compensation in respect of a past violation. These procedures usually involve taking a case before national courts. The rationale behind this criterion is the principle of subsidiarity, another key component of the protection system established by the Convention:

> The European Court of Human Rights is intended to be subsidiary to the national systems safeguarding human rights and it is appropriate that the national courts should initially have the opportunity to determine questions regarding the compatibility of domestic law with the Convention (Guide § 43).

Turkey refers to the court case pending before the Diyarbakır Administrative Court related to the construction of the Ilısu Dam and argues that the domestic remedies have not been exhausted by the applicants. It is correct that the Diyarbakır Administrative Court has not delivered its final judgment yet. Should the Court automatically admit that the domestic remedies were not exhausted?

The Court indicates that this criterion must be applied with some degree of flexibility and without excessive formalism (Guide § 46). It takes into consideration the availability and effectiveness of the remedies as well as the general legal and political context in which they operate and the particular circumstances of the

individual case (Guide § 52). The excessive delay in the conduct of legal proceedings,[128] the start of the construction works in 2006 despite the ongoing court case, the controversial inauguration ceremony, the persistence of the Government to continue with the current project despite the withdrawal of foreign guarantors due to environmental and heritage problems and the "burial" of Allianoi may show that the available remedy is in fact inadequate and ineffective in the particular circumstances of the Hasankeyf case. Some of these facts are also put forward by the applicants in their replies to the preliminary objections of Turkey.[129]

In the second place, Article 34 requires that the applicants are victims: they must be directly and personally affected by the measures they are complaining about – in our case the dam project (Guide § 23). If the applicants are unable to show that they are the victims of the alleged violation, the Court may rely on the *ratione personae* criterion to reject the case (Guide§ 151).

In this respect, Turkey claims that the applicants can not be regarded as victims within the meaning of Article 34 as interpreted by the Court's case law because they are not directly affected by the dam project.

As with the principle of the non-exhaustion of domestic remedies, the Court sustains that this criterion can not be applied in a mechanical and inflexible way:

> The interpretation of the term "victim" is liable to evolve in the light of conditions in contemporary society and it must be applied without excessive formalism. (Guide, § 22)

Accordingly, the Court has accepted applications from "potential" victims or indirect victims on a case-by-case basis (Guide § 24-29). Yet how will, in our case, a lawyer

[128] See the case-law of the Court (Selmouni c. France [GC], § 76 – excessive delay in conduct of inquiry – Radio France and Others v. France (dec.), § 34; Scordino v. Italy (dec.); Pressos Compania Naviera S.A. and Others v. Belgium, §§ 26 and 27).
[129] Replies of the applicants to the objections of Turkey (not published).

based in Istanbul, explain to the Court that he is directly affected by the construction of a dam in Hasankeyf? From the application and the replies of the applicants to the preliminary objections of Turkey, one can deduce that the applicants rely on the concept of public interest to explain their victim status.[130] However, when the applicants evoke that everyone has a general interest in the protection of cultural heritage, there is a risk that the Court interprets the case as *actio popularis*[131]. The Court has a well-established case-law on *action popularis* (Klass and Others v. Germany, § 33; The Georgian Labour Party v. Georgia (dec.); and Burden v. the United Kingdom [GC], § 33). According to the practice of the Court, the applicants who claim the protection of a collective interest, are not regarded as victims within the meaning of Article 34. In the Hasankeyf case, the applicants have brought in effect an *action popularis* to prevent the construction of a dam which they consider to be unlawful and against the public interest. Turkey argues that the claims presented by the applicants constitute an *actio popularis* as well.

Nevertheless, the contribution of the local inhabitants, local authorities or NGOs involved in the protection of the environment and cultural heritage as a third party to the case may strengthen the victim status of the applicants. So why were the locals not involved in the case at the first place? The answer to this question lies in the political and social context of Hasankeyf. When one pays attention to the identity

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[130] Quotations from the replies of the applicants to the preliminary objections (not published): "Cultural values are public values" (p. 2), "all the applicants are persons doing public service" (p. 3), "the destruction of cultural heritage, the damage done to it, its modification and temporary or permanent inaccessibility of the cultural heritage prejudices the applicants as it prejudices all the humans and the humanity" (p. 3), "The value that is to be protected by the use of this right is a public value on national level and is an exceptional value universally" (p. 4) and " …project of this kind could damage humans and the humanity in the mid-term" (p.4).

[131] The Latin expression "actio popularis" means "action at law of the people". It can be interpreted as "(1) A public or universal right to initiate a lawsuit or prosecution. In domestic law, this term is often used to refer to a right of private citizens to bring a legal action on behalf of the state. (2) A right of action belonging to the international community as a whole or to any person, usually arising from a violation of a duty *erga omnes*" (Oxford Reference Online. Koç University library, E-reference sources. Date of access: 15 May 2011).

of the five applicants, he or she will notice that they are all notable professors or professionals who have a connection to Hasankeyf. Professor Zeynep Ahunbay and Metin Ahunbay participated in the excavation, conservation and documentation activities of Hasankeyf in the late 1990s. Professor Oluş Arık directed the archeological excavations in Hasankeyf from 1986 to 2003. They all support the preservation efforts of Hasankeyf through the articles or books they publish or the seminars they organize. Özcan Yüksek is the chief editor of the Atlas magazine which runs several large and prominent campaigns to save Hasankeyf. Murat Cano continue its legal battle against the Ilısu Dam since 2000. The choice of these applicants is not a coincidence. Their professional connection to Hasankeyf reinforce the purpose of the case, that is to stop the construction of the dam and strengthens the claim on the universal value of Hasankeyf. The universal value of Hasankeyf is explained and emphasized in the application. The applicants based their arguments on the World Heritage list criteria, a well-known and respected method of assessment.[132] Therefore, the involvement of the local people or authorities in the case could have politicized the purpose of the case due to the delicate political situation in the south-east of Turkey and the Kurdish tension.

In the third place, the *ratione materiae* criterion requires that the right claimed to have been violated by the applicant must be included in the Convention and the Protocols (Article 35 § 3):

> For a complaint to be compatible *ratione materiae* with the Convention, the right relied on by the applicant must be protected by the Convention and the Protocols thereto that have entered into force. For example, applications are inadmissible where they concern the right to be issued with a driving licence (X v. Federal Republic of Germany (dec.)), the right to self-determination (X v. the Netherlands (dec.)), and the right of foreign nationals to enter and reside in a Contracting State (Peñafiel Salgado v. Spain (dec.)), since those

[132]Zeynep Ahunbay also prepared a separate paper arguing the outstanding universal value of Hasankeyf and the Tigris Valley. See footnote 85.

> rights do not, as such, feature among the rights and freedoms guaranteed by the Convention (Guide, § 202).

Turkey argues that the protection of cultural heritage is not guaranteed by the Convention, nor can it be interpreted within the scope of any provision. Moreover it claims that such a wide interpretation of the articles will raise a problem under Article 32 of the Convention, which limits the jurisdiction of the Court to "all matters concerning the interpretation and application of the Convention and the Protocols thereto.":

> The court has neither jurisdiction nor any procedure to examine whether the construction of a dam would destroy cultural heritage ... On the basis of the European Convention on Human Rights, the Court has no competence to intervene in such a matter; the protection of cultural heritage is the exclusive responsibility of the competent Turkish authorities who have the discretion of deciding on the balance between what may be lost and what may be gained by the construction of the Ilısu Dam ... The convention, *per se*, does not protect the right to cultural heritage ... and interpreting any of its articles as such would be to exceed the court's jurisdiction beyond its mandate entrusted by the High Contracting Parties (Preliminary Objections, p. 2).

It is correct that the Convention secures fundamental civil and political rights, not cultural rights (Francioni, 2008, p.1; Vrdoljak, 2008, p. 70). The application itself and the replies of the applicants show that the applicants are aware of this fact. However, they are testing the boundaries of the human rights law and question why the concept of cultural heritage is absent from the case-law of the Court.

> If the cultural heritage and the values embedded in it are not considered as fundamental rights, the European Civilization, its institutions and European "thinking individuals" should question themselves. Regarding the issue at hand, such a questioning needs to be done considering the "obligation to respect human rights", the "right to life", the "right to liberty", the "freedom of thought, conscience and religion", the "freedom of expression", the "prohibition of discrimination", the "right to education" and the role of "transfer of values" between civilizations and generations and the limits of states/ governments' authority and their duties.[133]

[133] Replies of the applicants to the objections of Turkey (not published).

This paragraph indicates that the application is based on a philosophical basis rather than a legal one. The connection of cultural heritage with certain fundamental rights as presented by the applicants is confirmed by the developments in international law. However, such claim has so far has no legal basis (neither the case law nor the provisions) under the system established by the European Human Rights Convention.

First, the applicants suggest that the human life does not only depend on people's physical existence but also on intellectual, artistic and spiritual values that people acquire. Therefore, they should freely acquire and transfer such values, including the values attributed to cultural heritage, to be able to enjoy from the right to life (Article 2 of the Convention). In this context, the applicants argue that the destruction of Hasankeyf will cause the loss of such values that form a part of the people's "life". However, from the text of the Convention and the Court's implementation of Article 2 (Korff, 2006), one can conclude that the extent of the right to life is in fact limited to the people's physical integrity. Acts like killing people and causing their death or harm to their physical health constitute violations of Article 2.

Then, the applicants claim that cultural heritage is closely linked with the right to education (Article 2 of the Protocol No. 1). They draw attention to the fact that education does not consist of the formal education at schools but comprehends also the lifelong learning. Peoples acquire attitudes, values, skills and knowledge from daily experience and resources in their environment such as cultural heritage. Therefore, the applicants suggest that the destruction of Hasankeyf will deprive people from this source of inspiration and information. Nevertheless, the case-law of the Court show that the Court do not enjoy such a broad margin of appreciation with

respect to this right. Under Article 2 of the Protocol No. 1, the Court usually found a violation of this article when the students' right to education are restricted,[134] when they are refused to exempt from mandatory lessons on religion[135] or when the parents' religious and philosophical convictions are not respected.[136]

As far as the prohibition of discrimination (Article 14 of the Convention) is concerned, the applicants advocate that cultural heritage, to whatsoever culture it may belong, should be protected. Article 14 states that "The enjoyment of the rights and freedoms *set forth in this Convention* shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." This article guarantees an equal enjoyment of the rights and freedoms set forth in the Convention. Therefore, it should be interpreted in conjunction with another article, which is already a subject of discussion in the case of Hasankeyf. In addition, the applicants should prove that through the destruction of Hasankeyf, they become victims of a practice of discrimination on one of the grounds cited in the Article 14. This could be contradictory to the purpose of the case and the universal value attached to Hasankeyf.

The application does not provide any explanations related to the connection of cultural heritage to the right to liberty and security (Article 5), the freedom of thought, conscience and religion (Article 9) and the freedom of expression (Article 10). Nevertheless, taking the whole application in consideration, one can say that the applicants consider these rights and freedoms as guarantees of the access to and the

[134] See the case *Temel and others v. Turkey*, judgment of 03.03.2009, no. 36458/02, available at <www.echr.coe.int> (date of access: 15 May 2011).
[135] See the case *Folgerø and others v. Norway*, Grand Chamber judgment of 29.06.2007, no. 15472/02, available at <www.echr.coe.int> (date of access: 15 May 2011).
[136] See the case *Lautsi v. Italy*, judgment of 03.11.2009, no. 30814/06, available at <www.echr.coe.int> (date of access: 15 May 2011).

enjoyment of cultural heritage. They also affirm that cultural heritage is a form of expression for people and constitute a source of common memory as referred in the Valetta Convention. Again, it will not be easy for the Court to include cultural heritage in the scope of these articles. Regarding the implementation of the right to liberty and security, the Court deals primarily with the acts that constitute a deprivation of liberty, such as unlawful detention or arrest (Macovei, 2002). In scope of Article 9 (the freedom of thought, conscience and religion), the Court affirmed that the term "conscience" does not cover the cultural identity of a group (Murdoch, 2007, p. 11).[137] Finally, the first paragraph of Article 10 (freedom of expression) define the freedoms protected under this article as "the freedom to hold opinions and to receive and impart information and ideas." It implies in practice the free criticism of the government (in particular during elections), the freedom to impart information and ideas on economic matters, the artistic creation and performance (includings radio boadcasts, paintings and films) and the freedom of press (Macovei, 2001). In brief, none of these articles is interested directly with cultural heritage, nor can be interpreted within their scope.

Besides the provisions of the Convention, the applicants suggest that the Court should also take into account the international legal instruments regarding the protection of cultural heritage.[138] The Court recognizes that "when defining the meaning of terms and notions in the text of the Convention it can and must take into account elements of international law other than the Convention", however it is not competent to examine alleged violations of rights protected by another international instrument (Guide § 85).

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[137] See the case *Sidiropoulos and others v. Greece,* judgment of 10.07.1998, no. 26695/95, available at <www.echr.coe.int> (date of access: 15 May 2011).
[138] Replies of the applicants to the objections of Turkey (not published).

Can any Article other than those evoked by the applicants be applicable to the Hasankeyf case? Interestingly, the Court has added Article 8 among the allegations following the preliminary examination of the case (before it was referred to the Second Chamber).

Article 8 defines the right to respect for private and family life. The first paragraph affirms that "Everyone has the right to respect for his private and family life, his home and his correspondence". The term "private life" is a broad term therefore its content was developed in the case-law of the Court. In several cases, the Court recognized the potential effects of environmental changes (e.g. pollution) on the well-being of peoples and on their private and family life (López Ostra v. Spain, § 51; Tătar v. Romania, § 97). Likewise, the effects of the construction of a dam may possibly be treated within the framework of respect for private life. However, in such case, it is indispensable that the victims are actual residents of the area affected by the dam (such as the villagers in Hasankeyf or people that have lost their home and were resettled because of the dam). Otherwise, the notion of "private life" or "family life" will not be relevant.

The second paragraph of Article 8 allows certain interference by the public authority with the right to respect for private and family life:

> There shall be no interference by a public authority with the exercise of this right *except* such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Therefore when the Court examines whether there has been a violation of Article 8, it should consider if the State in question has come to a fair balance between public interests (in case of Hasankeyf, the interest of the area's economic well-being - that

of having a dam and hydroelectric power plant) and the applicant's effective enjoyment of his/her right to respect for his/her home and his/her private and family life (López Ostra v. Spain, § 51; Powell and Rayner v. the United Kingdom, § 40). Interestingly, Turkey has cited these two case-law in their preliminary objections to support the wide margin of appreciation afforded to States in this kind of matters (environmental problems) while in both cases, the Court has decided against the States. Furthermore, it is important to note that in the context of Article 8, the interest of the applicant is still a private interest and not a public one. The applicants can not evoke the public interest of all the peoples in the protection of cultural heritage under Article 8 of the Convention.

It is apparent that the questions on the exhaustion of the remedies, the victim status of the applicants and on the alleged violations of the articles are not easy to solve in the particular circumstances of the Hasankeyf case. The major challenge is, however, the conflict between the established concept of the general interest in the protection of cultural heritage and the human rights system designed to protect the individual interests.

CHAPTER 5

CONCLUSION

Five years have passed since the applicants brought the Hasankeyf case before the European Court of Human Rights. It is not certain that the process will come to an end in the near future. Nevertheless, it might be interesting at this point to think about the possible ways in which the case could go. The Court has two options: it can either decide that the Hasankeyf case is inadmissible on the grounds that are discussed in the fourth chapter (the exhaustion of the remedies, the victim status of the applicants and the alleged violations of the article) and reject the case, or decide that the case is admissible and take the case.

When the Court takes the case, it accepts that the domestic remedies are exhausted by the applicants (at least for Cano), that the applicants are personally affected by the state's act (construction of the dam) which accord them the victim status and that their claim falls within the scope of an article of the Convention or the protocols. In case of Hasankeyf, this article is likely to be Article 8 of the Convention on the right to respect for private and family life. At this stage, the Court will examine if there is a violation of such article or not. Therefore, the applicants will try to show that the construction of the dam interferes with their private and family life,

in particular with the ecological system and cultural heritage of the area. The involvement of the locals will no doubt help to strengthen this claim. If the Court accepts that the damage done to cultural heritage presents also an interference to the private life of the applicants, it will be a first. However, it will not be easy. The Court accepts that the impacts of the environmental changes on the well-being of the people in the area constitute an interference to their private life in cases such as pollution where the impacts on people is very clear. The Court will need to interpret very broadly the concept of private life to include the effects of the cultural heritage (interference with people's cultural development) which are difficult to show. To decide that there is a violation, the Court will also assess if such interference is legitime or not. The second paragraph of the article allow the state to interfere with the private life of the people when it is necessary for economical reasons. Therefore, the Court will examine if there is a fair balance between the interests of the state regarding the construction of the dam and the enjoyment of people's right to private life (living in a healty environment, access to cultural heritage). If the Court conclude that this interference is necessary for the interests of the state, there will be no violation. However if the interference is not justified, the Court will decide that there is a violation.

The Court may submit its opinion on the admissibility and the merits of the case (whether there is a violation or not) together as well.

Bearing in mind that the Court faces for the first time a claim related to the protection of cultural heritage in the way presented by the applicants, its evaluation of the facts is very important, whether it finds a violation or not. The question of whether the ECHR will recognize and protect the right to cultural heritage may not be solved in the Hasankeyf case, however it is sure that it will engender discussions

on the linkage between cultural heritage and human rights in the practice of the Court and set the path for a future framework for the protection of cultural heritage in international law.

It is important to note that even if the Court finds a violation and condemn Turkey, it does not have the authority to stop the execution of the Ilısu Dam Project. It may request the compensation of the damages of the applicants, if any. However, such a judgment will have a political pressure that may cause Turkey to step back. It will be also incumbent on Turkey to prevent that future claims are brought before the Court on the protection of cultural heritage.

However, the internal developments in Turkey concerning cultural heritage are not promising at all. For the last ten years, Turkey has been undergoing a rapid development in economy, industry and urban planning. Massive roads, tunnels, bridges, dams and other types of infrastructure are constructed one after another. During this process, the protection of cultural heritage did not seem to be a major concern to the authorities. Although a large number of archaeological sites were destroyed or damaged, the authorities continue to underestimate the gravity of the loss. "The pieces here are a pillar and a fountain. They can be found anywhere" said the Minister of the Environment following the flooding of Allianoi[139]. In April 2011, the Prime Minister accused the archaeologists of causing the delay of the Marmaray project (a railway passing under the Bosphorus that will connect both sides), describing the discoveries at Yenikapı –among them a precious collection of ancient ships– as "archeological thing" and just potteries. Is not it the duty of the governments to protect and preserve the cultural heritage as much as to promote economic development?

[139] See the "International news in brief – November 2010" in *The Art Newspaper* available at < http://www.theartnewspaper.com>.

Therefore, the judgments of the ECHR alone can not guarantee an efficient protection of the cultural heritage. One should bear in mind that the protection begins at home.

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APPENDIX I

Topographic map of Hasankeyf (Arık, 2003, p.23)

A. Upper Town (CASTLE)

1. First gate of the Castle facing the Rızk Mosque
2. Remains of a small mosque on the side of the road heading to the Castle
3. Second gate (with lions) of the Castle (it doesn't exist today)
4. Entrance of the Castle provided with a zigzag ramp + cave houses and shops
5. Third gate of the Castle
6. Forth gate of the ramp
7. Control tower (burç) called "Small Palace"
8. District office and police station (from late Ottoman – early Republican period) on the north side of the Castle
9. Large Palace
10. Tower on the north side of the Large Palace
11. Large tomb (in ruins) built on the remains of the Large Palace
12. Cemetery built on the remains of the Large Palace
13. Small mosque built on the remains of the Large Palace
14. Entrance remains on the east side of the Large Palace
15. Ulu Mosque
16. Complex of houses
17. Training area
18. Decorated houses
19. Mosque
20. Mosque
21. Water storage
22. Aslan Baba Tomb and burials
23. The back door (north west) of the Castle
24. Flushing system and water storage

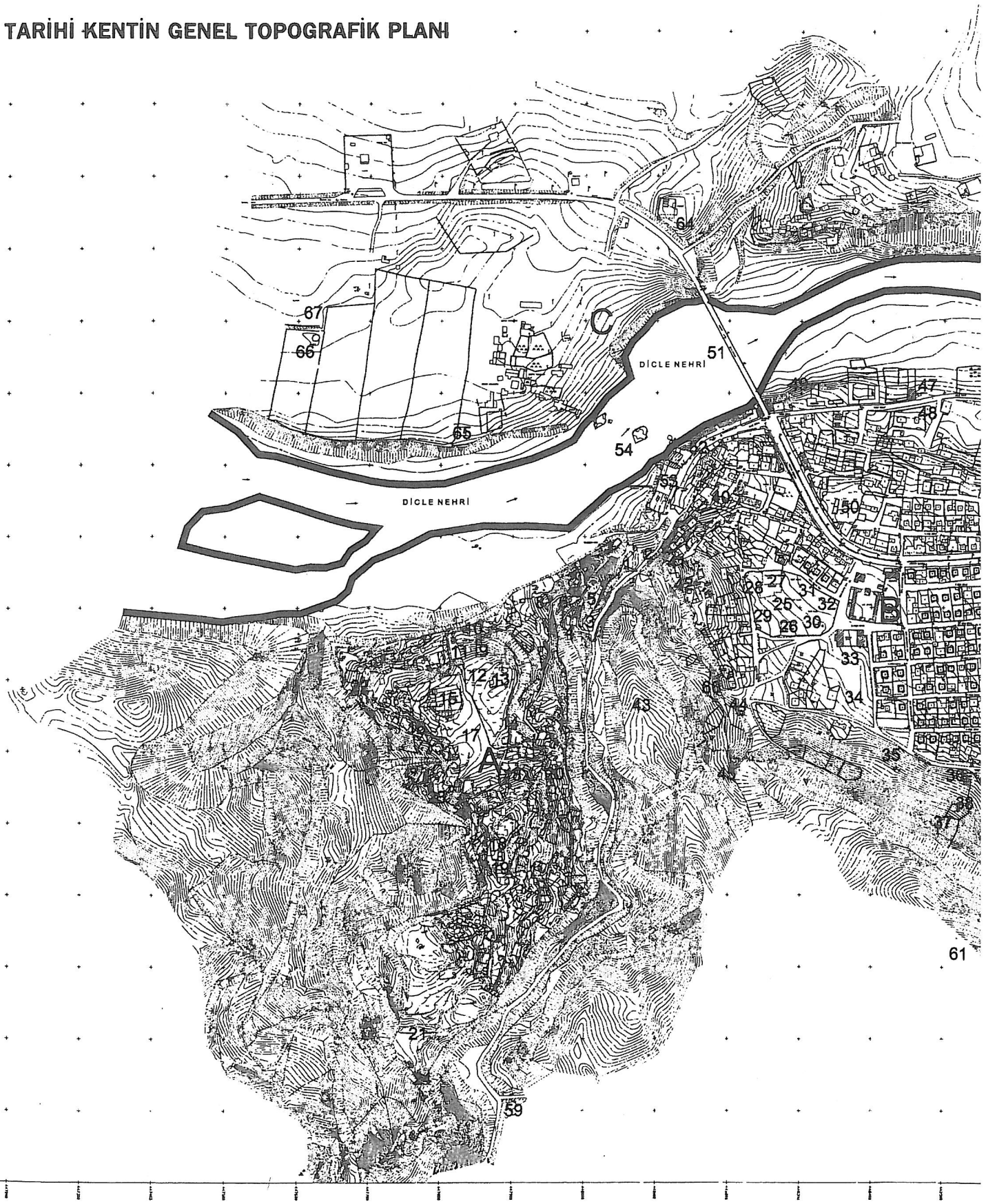
B. Lower Town

25. Central excavation area
26. Koç Mosque
27. Sultan Süleyman Mosque
28. Building with courtyard on the west side of the Sultan Süleyman Mosque
29. Building units and streets (excavated in the first place) on the south east of the central excavation area
30. Public house and market
31. Small mosque
32. Vaulted structure
33. Mausoleum complex known as "Kızlar Mosque"
34. "Small Külliye"
35. "Anonymous Külliye"
36. "Mevlana Mosque"
37. "Yamaç Külliyesi"
38. Internal wall
39. Hearts for ceramic
40. Remains of a church
41. Kiosk
42. House of the chief (ağa)
43. Mint (darphane)
44. Cave – church in the narrow canyon between the rocky hills in the south
45. Wall in the narrow canyon between the rocky hills in the south
46. Remains of the palace on the waterside/bank called "Cami'u Mardinike"
47. Excavation House
48. Remains of the Wall Tower (entrance of the town) facing the excavation house
49. Remains of the Coastal Wall (on the west of the excavation house)
50. Administrative office and adjacent cemetery and tomb
51. Modern Bridge
52. Old market street
53. Rızk Mosque
54. Remains of the old bridge
55. Salahiye garden
56. Remains of a pillar in the garden
57. External wall
58. Kasımiye (old name of the modern military area)
59. Church behind the Castle and cave-monastery
60. Structure with three vaults
61. Small cave – mosque called "Mosque with 12 mihrab" or "Mescid-i Ali" on the south east of the Castle, on the Uzundere road
62. Cascade on the south of Kasımiye
63. Cave on the east of Kasımiye

C. Opposite Side of the Tigris River

64. Tomb and convent of İmam Abdullah
65. Building of an early Ottoman mosque style with single dome called "Hamam"
66. Zeynel Tomb
67. Remains of buildings with courtyards surrounding the Zeynep Tomb and street units from 1991 excavations

TARİHİ KENTİN GENEL TOPOGRAFİK PLANI




DİCLE NEHRİ
DİCLE NEHRİ
46
58
39
55
56
57
63
0
50
100
200
300m

APPENDIX II

Photographs from Hasankeyf (Personal archive of Gül Pulhan)

Photograph 1 Remains of the old bridge and the modern bridge.

Photograph 2 Town of Hasankeyf. View from the Castle.

Photograph 3 Town of Hasankeyf and the Rızk Mosque (on the right). View from the opposite side of the Tigris.

Photograph 4 Town of Hasankeyf, the Rızk Mosque and the Castle. View from the opposite side of the Tigris.

Photograph 5 Town of Hasankeyf, the caves and the Tigris.