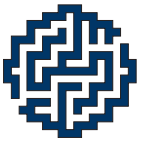
ENFORCED DISAPPEARANCES
AND
THE CONDUCT OF THE JUDICIARY



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ENFORCED DISAPPEARANCES AND THE CONDUCT OF THE JUDICIARY

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TRUTH JUSTICE MEMORY CENTER
HAFIZA MERKEZİ

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PREFACE

Truth Justice Memory Center (Hakikat Adalet Hafıza Merkezi) was established to contribute to the exposure of systematic and widespread human rights violations that took place in the past, the reinforcement of collective memory about these violations, and the improvement of access to justice for those who were subjected to violations.

Unlike many civil society organizations involved in work on democratization, social peace and transitional justice, Truth Justice Memory Center set its most fundamental aim as the documentation of human rights violations and started to work on documenting incidents of 'enforced disappearances'.

By getting in touch with relatives of victims of enforced disappearances, the lawyers representing the victims and families, civil society organizations, and other legal resources, the Documentation, Legal, and Outreach groups of Truth Justice Memory Center seek first to factually determine the timeline of, means and methods employed in, and parties responsible for enforced disappearances; and second, to track the course of due process, as well as whether the judicial mechanisms operated in the service of justice.

Enforced disappearance is a practice employed by the state as a tool of the 'fight against terrorism', and it relies on oppression and intimidation. Truth Justice Memory Center analyzes this practice in two complementary reports offering a sociological and legal study of the data gathered in the research conducted during the Center's first year.

This report aims to examine judicial practices relating to enforced disappearance based on the legal data obtained, analyze the relevant rights violations from the perspective of European Court of Human Rights (ECtHR) judgments, and contribute to debates about the issue in terms of national and international criminal law, human rights law and the laws of war. It is our hope that the report is successful in attaining these goals.

METHODOLOGY

PRELIMINARY STUDY

Initially, we conducted a comparative review of available resources and lists on forcibly disappeared people previously published by individuals and organizations working in the field of human rights.

During this process, we found inconsistencies with respect to the names of disappeared individuals in the said lists and supporting evidence was lacking/weak. This brought about the need to re-gather the existing data from their original sources by way of fieldwork.

We then decided to conduct the study along two main axes. The documentation team launched fieldwork in search of sociological truth regarding forcibly disappeared individuals, and the legal team set out to pursue the data held by lawyers representing the disappeared, other institutions of law and non-governmental organizations.

OBJECTIVE

We firstly aimed to discover the sociological and legal facts in the field of enforced disappearance, and along with that, to create a database with reliable content and in which data are stored in a researchable format. Eventually we will seek to collaborate with individuals and organizations conducting relevant work, and to thereby accelerate the struggle for justice so that responsible persons are held accountable.

Toward these goals, the legal team of Truth Justice Memory Center conducted analyses and interviews in a total of seven central locations including Diyarbakır, Mardin, Cizre, İdil, Silopi, İstanbul and Bursa in the six-month period between June 2012 and January 2013 to access information and documentation pertaining to the forcibly disappeared.

Our legal team held interviews in Diyarbakır, Mardin and Şırnak Bar Associations, with lawyers whose names are given at the beginning of this report, and at the İstanbul, Diyarbakır, Mardin branches of Human Rights Association (İnsan Hakları Derneği - İHD).

Data obtained as a result of interviews in excess of one hundred and eighty hours and the four-month period of study and evaluation were analyzed and assessed in accordance with the criteria set by the legal team and legal interns of Truth Justice Memory Center.

According to the data gathered and research conducted as part of the preliminary study, we substantively verified that 262 individuals whose names were found in the abovementioned tentative list were forcibly disappeared. As we continue our work, we aim to verify in stages all incidences of disappearance.

To offer a fact-based discussion of whether litigation will pave the way for reaching justice and to have a deep understanding of operational/problematic aspects, instead of focusing on the entire data collected, we decided to focus on 55 cases of disappearance whose sociological dimensions we have information on through interviews with relatives.

The materials studied include, in sum, interviews, case records/investigation files in trials on enforced disappearances, complaints filed, judgments relating to domestic law, and European Court of Human Rights (ECtHR) judgments.

Based on the data acquired, the goal was to understand the practical dimensions of trials in the context of enforced disappearance cases, i.e. to ascertain whether trials were efficient, expeditious and effective. The contents of legal files were compared with the factual narrations by relatives of the disappeared/case lawyers.

Where narratives of the relatives of the disappeared were consulted, no editing took place except in the form of abridgments, and statements were quoted verbatim.

The research team included Emel Ataktürk Sevimli, Eser Poyraz and İlkem Altıntaş; Ceren Tanya Aslan, Melis Öner, Zeynep Ekmekçi, Hazal Tanrıkulu, Ekin Tanrıkulu, Aslı Bilge and Irmak Erdoğan provided support.

SUMMARY

The last half century in Turkey was marked by widespread and grave human rights violations in the aftermath of military coups and rights violations centered on the Kurdish question. Individuals in charge in the military, government and politics of the era have not been tried, punished, or held accountable –to the satisfaction of the public- for the offenses they committed in that era.

In the coup atmosphere, where politics became detached from the citizens and limited to the professional activity of politicians, liberty was replaced with security concerns and state-backed violence came to be ignored. In addition, the public was not free to express the reaction that widespread human rights violations called for.

Official sources put the death toll in the armed conflict between Turkish Armed Forces (TSK) and Kurdistan Workers Party (PKK) going on for thirty years at 44,000 people, while unofficial data suggest a figure of 55,000, including civilians, army members and members of the PKK.

Following the 1980 coup, the many changes in political and social arenas were accompanied by a shift in methods exercised in the fight against regime opponents. There was an addition to the killing methods implemented throughout our political history. That is, a method emerged known as “missing in custody” in Turkish literature and referred to as “enforced disappearance” in international law.

This method became a matter of daily life with military’s takeover of the government in 1980. After 1990, there was a rampant increase in its use. Thousands of individuals were abducted, forcibly disappeared or fell victim to unsolved murders for political reasons.

The investigation reports drawn up by the Grand National Assembly of Turkey (Türkiye Büyük Millet Meclisi - TBMM) and the Turkish Prime Ministry verified the widely held public sentiment that the abductions, enforced disappearances and unsolved murders in that period were perpetrated by individuals and organizations connected with the state.[1]

In a parliamentary system, governments should have had political responsibility for these disappearances and murders via the legislative branch, and the parliamentary investigative commissions should have had the ability to access any information and documents, and hear any witnesses relating to issues they inquire into. However, this is not how the process unfolded in the investigations conducted by the abovementioned commissions. Even the TBMM declared that it was prevented from accessing information that would bring out this chaotic period into the open and it was not able to hear the most important witnesses.[2]

The prime minister’s office had six different occupants between 1991 and 2001 in Turkey. Four large political parties - Motherland Party (Anavatan Partisi – AP), True Path Party (Doğru Yol Partisi – DYP), Welfare Party (Refah Partisi – RP) and Democratic Left Party (Demokratik Sol Parti – DSP) - each had their turn in government. Yet nothing changed with respect to enforced disappearances and political murders. Offenses were not investigated, and the background of the incidents was altogether ignored.

The governments of the era in question covered up this dirty war to ensure that “state secrets” were not spilled out. The judiciary was complicit in the process by remaining silent and protracting lawsuits.

The Susurluk accident on 3 November 1996 offered an excellent opportunity to lay bare the politician-underground world-army/police network organized at the state level and feeding

1 Report of TBMM Commission Investigating Unsolved Political Murders -18 April 1995. http://tr.wikisource.org/wiki/Susurluk_Raporu_(Kutlu_Savaş), last accessed 27 April 2013.

2 Report of TBMM Commission Investigating Unsolved Political Murders – http://www.tbmm.gov.tr/sirasayi/donem19/yil01/ss897.pdf, last accessed 27 April 2013.

off of terror and violence. Yet, the judiciary failed to take advantage of this opportunity.
In addition, the recently initiated Ergenekon, Temizöz, and Çitil lawsuits seem to have adopted a course that is quite far from exposing the actual dimensions of the organization at the state level.[3]

There is still a cloud of uncertainty over how domestic issues were balanced with one another in Turkish politics after 1990 and how the violence practiced under the anti-terror banner in 1993 and 1994, as well as the politics behind that violence, should be understood. What is certain, however, is that the number of individuals forcibly disappeared for political reasons was 13 between 1980 and 1991, but it surged after 1991, peaked in 1993 and 1994, and began dropping afterwards.

It appears that a previous suggestion Alpaslan Türkeş, then Chairman of the Nationalist Action Party (Milli Hareket Partisi - MHP), made to legitimize units under his control to the effect that 'the army, the police and the National Intelligence Organization are not enough in the struggle against anarchy, special forces composed of elite individuals equipped with high firepower need to be set up' took shape after 1990, leading to the emergence of Gendarmerie Intelligence and Counter Terrorism Unit (Jandarma İstihbarat ve Terörle Mücadele Birimi - JİTEM).[4]

Concurrently, 'death squads' were formed as one of the 'instruments' referred to in 'Counter-guerrila's statement 'the homeland must be defended against the enemy by resorting to all instruments'. Government employees who distanced themselves from the use of illegal operational methods in the struggle against PKK were purged one by one and unsolved murders and enforced disappearances were on the rise.

In the years JİTEM was fighting against PKK through the use of what JİTEM Commander Cem Ersever called 'unconventional warfare', several important military and political figures, including Ersever himself, lost their lives one after another in suspicious ways, which cleared the way completely for the implementation of the planned strategy.

In a series of suspicious deaths, General Commander of Gendarmerie Eşref Bitlis passed away on 17 January 1993, Finance Minister Adnan Kahveci died on 5 February 1993, President Turgut Özal on 17 April 1993, and Gendarmerie Diyarbakır Regional Commander Bahtiyar Aydın on 22 October 1993. While the public was discussing that JİTEM was involved in the murders, this time it was Cem Ersever, the JİTEM Commander, who was killed on 4 November of the same year.

At the time this report was drafted, the investigations meant to dispel suspicions about the deaths of the abovementioned officials had not yet yielded any results.

In Turkey, it is no small feat to confront the incidents/facts that left a mark on collective memory and their public, political and judicial dimensions. The first order of business to render truths visible and ensure their recognition is to make them unavoidably obvious.

One of the primary reasons for the establishment of the Truth Justice Memory Center and the centrality of its 'documentation/recording' effort is the opportunity of documenting the truth, exposing it in its rawest form, and being able to state, 'this is what happened in this country and here's the evidence' before a Truth Commission which may come into being some day.

At a time when we are hopeful that a social peace process is emerging, we need mutual understanding, truth and justice more than ever

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3 Ergenekon Case No. 2009/209 E. at the 13th High Criminal Court of İstanbul, Cemal Temizöz et al. Case No. 2009/470 E. at the 6th High Criminal Court of Diyarbakır, Brigadier General Musa Çitil Case No. 2013/ 50 E. being heard at the High Criminal Court of Çorum.

4 O.Gökdemir, Faili Meçhul Cinayetler Tarihi (A History of Unsolved Murders), p.204, Çiviyazıları Publishing House.

to resolve all kinds of conflicts.
It will not be easy to quickly and rapidly leave behind such a traumatizing period that still looms over the entire society in some way. But we will build our future based on how we reckon with our past.

To satisfy the sense of justice and heal the wounds, it is necessary to bring impunity to an end on the one hand and, on the other, to create a process in which those who suffered violations and injustice in this dark period will receive redress or feel vindicated.

In this regard, confrontation is a fine line and its fundamental creed is 'acknowledgment'.

Reducing social tension firstly requires the party that caused the grievance, that is the state, to acknowledge the facts regarding rights violations and restore the honor of the victims.

The public's need for justice has now reached a point of no return, and in order to complete the work of confronting this dark era, there must be faith that compliance with principles of law has been observed, violations have been established, and a line has been drawn between the fair and the unfair.

For societies - just like for individuals -, reckoning with the past is more important in terms of confronting today and the future than for the sake of the past alone. Rendering violations visible/acknowledged, holding responsible parties accountable and the eventual establishment of justice with the associated legal guarantees will foster collective rehabilitation on the one side and nourish the sense of trust and the desire for coexistence, on the other.

State terror is not, and cannot be, a 'normal' political method in any country in the world. It is not, and cannot be, so in Turkey, either.

The concepts of 'state terror' and 'state crime' have long been discussed in the laws of countries that confront their respective histories of military coups. In some of those countries, these concepts have become part of legal definitions.[5]

We live in a country where the word 'terror' remains at the center of our lives, and it is high time we reckoned with the fact of the matter. The main reason democracy cannot be institutionalized in Turkey is that 'state terror' has not been analyzed adequately and 'state crimes' have been covered up. These are practices that have far-reaching historical roots and came to be relied on in the past, and they continue in their role as habitual commitments of the state.

The present study by Truth Justice Memory Center aims to expose 'enforced disappearance' (a method historically called an anti-terror strategy), provide documentary verification of disappearances, discuss the problem in terms of political science and jurisprudence, and analyze the state policy of impunity on the basis of the study results.

It is our hope that rendering the problem visible through evidence will contribute to an acknowledgment on the part of the state and to its resolution.

If the failure to investigate and try all official/unofficial government authorities, military/paramilitary/civilian forces involved in acts of enforced disappearance represents a deliberate choice, it is then necessary to think sincerely about the meaning of that choice, the challenges it poses to democracy and ways in which those challenges could be overcome.

An approach that relegates human life to the status of 'minor detail' when "the supreme interests of the state" are at stake should have drawn the ire of the members of the legal profession first of all. The silence, negligent attitude and occasional actual support of the

5 http://www.cels.org.ar/home, last accessed 4 May 2013, http://en.wikipedia.org/wiki/State_terrorism, last accessed 4 May 2013.

judiciary toward the aforementioned process of impunity should now come to an end.

The political power should have opposed any incidence of enforced disappearance without regard to the identities of the parties involved, the timing of the incident, the manner in which it took place, and the way it was directed. Trying a few high ranking members of the military is a certainly meaningful but insufficient step, and we are not sure whether it will be possible to take the further step and initiate litigation that will actually serve society's need for justice and make room for shedding light on a dark era.

Our tentative list suggests that 1,353 persons were forcibly disappeared between 1980 and 2001 by forces alleged to be connected with the state. In the same period of time, thousands of murders were committed which remain unsolved.

The political, military and administrative individuals in charge in that period were never investigated, tried, or held accountable in a meaningful sense.

People who were disappeared forcibly do not simply represent numbers or contents of a legal file. They are individuals who, while going about their daily lives amongst us as mothers, fathers, daughters, spouses or children, were taken away from homes, the street, and their workplaces coercively and then destroyed. Their relatives are now destined to suffer an endless wait.

The state has an obligation to identify the suspects in that intense process of brutality, bring them to justice, punish the responsible parties and pay reparations to the victims.

Bringing an end to impunity, creating necessary legislation and taking any precautions required to prevent this practice are not acts of courtesy toward the public. They are not optional, either.

Ending impunity is a constitutional duty of the Republic of Turkey and it is her legal obligation according to international agreements to which she is a signatory.

We hope that this study will contribute to the solution of the problem.

THE CONDUCT OF THE JUDICIARY IN ENFORCED DISAPPEARANCES:

No effective, expeditious and independent investigations; failing to undertake timely investigations, and protracting investigations beyond the statute of limitations

EMEL ATAKTÜRK SEVİMLİ

THE VIOLATIONS

In light of the data gathered, this section analyzes the judicial practices of the state in cases where the subject matter is 'enforced disappearances' and to question whether or not the state satisfies its 'positive' and 'negative' obligations in investigations/prosecutions.

Conceptually, the interventions that the state is 'obligated to avoid' indicate the negative obligations, while the affirmative steps it is 'required to take' mark the positive obligations in terms of the exercise of fundamental rights and freedoms.

The right to life is the essence of fundamental rights and freedoms, and a prerequisite of the exercise of all rights and freedoms. Given its importance, it is the primary issue in both constitutional regulations and international human rights instruments. The right to be free from torture and ill-treatment, the right to have a free and safe life, and other rights concerning the recognition of effective remedies can come into existence only on the basis of the right to life.

With respect to the exercise of the right to life and other rights dependent on it, international documents and jurisprudence hold indisputably that in addition to its negative obligation to avoid disappearing, killing, and torturing, the state is also positively obligated to control/plan the operations of security forces, to take preventive security measures, to provide medical services, to investigate disappearances and murders, to make all effective remedies available, and ultimately to take all necessary judicial and administrative measures.

Before we share the results of the analysis through the perspective described above, we would like to provide the following information to shed light on the investigation/prosecution data concerning crimes of enforced disappearance: According to the tentative list generated by Truth Justice Memory Center by gleaning data from over thirty institutions, individuals and sources working in the field of human rights, records indicate that 1,353 have thus far been disappeared by forces directly or indirectly connected with the state, and several sources claim that the actual number might exceed that.

An analysis based on the places, names and cases in the list mentioned above shows that provinces where acts of enforced disappearances took place most frequently are Diyarbakır with 28.1% of the total, Şırnak with 14.8%, Mardin with 13.7%, İstanbul with 6.05%, Batman with 5.75%, Hakkari with 5%, and Tunceli with 3.3%.

As stated in the methodology section, analyses and interviews were conducted in the initial six-month period in seven locales including Diyarbakır, Mardin, Cizre, İdil, Silopi, İstanbul and Bursa in order to access legal information on forcibly disappeared persons, so that the names in the tentative list can be validated, the facts of enforced disappearance can be verified, and the data can be entered in the database. As a result, 262 of the persons named in the said list, were conclusively confirmed to have been forcibly disappeared. In the forthcoming phases of our work, the goal is to verify all facts of enforced disappearance gradually.

The legal data obtained as such were analyzed in detail under the following headings by the legal team of Truth Justice Memory Center in accordance with the criteria specified in the methodology section:

- A. Failure to follow legal detention procedure / Inaccurate records;
- B. The use of cruel killing methods to intimidate;
- C. Unidentifiable graves, failure to return bodies to families;
- D. Failure to conduct effective, expeditious and independent investigations;
- E. Losing hope that there will be justice;
- F. Obstructing the 'claiming of rights' with psychological and physical barriers;
- G. The perception of 'Tyrant state/Dependent judiciary' / The expectation for reparations and apology.

A. Failure to Follow Legal Detention Procedure / Inaccurate Records

The state has the positive obligation to minimize the risk of arbitrary detention, disappearance and murder, to provide for judicial review, and to ensure the keeping of appropriate detention records so that parties responsible for rights violations can be identified and punished. That is why the law stipulates the keeping of diligent detention records that include information on a suspect's identity, dates and times of detention/ release, the place of detention, the reason for detention, and the identity of the official who detained the suspect.

In the context of the crimes of disappearance and murder, a major risk arises of unrecorded detention, arbitrary detention, and placement of individuals outside judicial review; thus it is crucial for the state to monitor whether detention records accurately represent the facts.

As stated in the judgments of European Court of Human Rights, if an individual who was healthy when detained is later disappeared, suffers bodily harm or is found dead, the state is obligated to provide a reasonable explanation of how these circumstances came into being.[1]

The analysis of the cases and the narratives of the relatives of the disappeared discussed in this study lead to the following findings:

■ The forcibly disappeared persons were detained in their homes, workplaces or on the street, but nevertheless generally in public. Following the detention, they were either not heard from or they were eventually found dead,

■ No official detention records were available, or they did not provide information on who detained the forcibly disappeared persons, the place and the time of and the reason for the detention, or on the length of detention as well as where detainees were held,[2][3]

■ Contrary to the requirements of their duties, Chief Public Prosecutors' Offices failed to inspect detention centers, custody suites and deposition rooms.[4]

Considering, in sum, the failure to keep meticulous and accurate detention records or the concealment of records from prosecutors and judicial authorities, together with the lengthy time period and the geographic area in which enforced disappearance was wide-spread, it is apparent that "detention" was planned as a phase of enforced disappearance from the beginning. These deliberate measures additionally evince a specific official scheme to prevent the identification of state agents who took part in the crime.

1 Altıntaş, İ. "Enforced Disappearance Cases From the Perspective of the European Court of Human Rights", p. 108

2 http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{„fulltext":[„Aydin"],"itemid":[„001-58371"]}Judgment of ECtHR in Aydın v. Turkey, 57/1996/676/866- on inaccurate detention records

3 Committee Against Torture, 45th Session, 1-19 November 2010

4 Code of Criminal Procedure (CMUK) No. 1412, Articles 104, 128 and other related provisions, and Criminal Procedures Act (CMK) No. 5271, Articles 91, 92 and other related provisions.

AHMET BULMUŞ
Date of Disappearance: April 1994
Place of Disappearance: Şırnak, Cizre

According to statements by eye witnesses and family members, Ahmet Bulmuş was detained in April 1994 in downtown Cizre by armed individuals carrying walkie-talkies who put him in a white Renault Toros. Two days after the incident, a team led by Cizre District Gendarmerie Commander Cemal Temizöz arrived in his family's house, searched the house, threatened the family and said Ahmet Bulmuş was in their hands and the family should not look for him in any manner. Because of the climate of fear prevailing in Cizre at that time, the family could not file any petitions for investigation concerning the notification of detention.

Nothing was heard of Ahmet Bulmuş for two years following his detention. Upon receiving news that bodies were found in excavations in the vicinity of Sinan Lokantası in the Silopi district, the slain Ahmet Bulmuş's wife went to the area and identified a decapitated body found in the excavation as wearing the clothing of her husband, Ahmet Bulmuş. Because of the ongoing climate of fear, the family was again not to able to file any petitions. After skull remains were found in another excavation in 2009, Ahmet Bulmuş's son, thinking that the remains might be those of his father, filed a petition with the Prosecutor's Office on 24 March 2009. On 11 October 2009, fifteen years after the incident, the Prosecutor's Office heard, for the first time, some individuals who witnessed the abduction of the slain man.

Even after nineteen years after the detention and enforced disappearance of Ahmet Bulmuş, allegations relating to the disappearance do not appear to have been duly investigated. No action was taken in the investigation other than those summarized above.

According to his relatives, those who witnessed Ahmet Bulmuş being tortured while in detention described the incident to his family with the following words: "*We were detained along with him, we were blindfolded, we recognized each other through our voices, I asked him his name, he was there… Yes, they were torturing, he never passed out… They were telling him to 'swear by the nation', 'confess that so and so did this, and so and so did that.' He never gave up anybody. That's what I saw there.*" Yet, the file analyzed included no record of Ahmet Bulmuş's detention, nor were the testimonies of the said witnesses taken.

Witnesses state that the condition of Ahmet Bulmuş deteriorated due to the torture inflicted on him, and he died in a panzer en route to the Cizre Public Hospital, where soldiers were transporting him while he was bleeding. Yet, neither the physician on duty nor the hospital employees have been asked to testify to date. The family's narratives about the enforced disappearance of Ahmet Bulmuş and how he was subsequently found dead include the following excerpts:

"There was a public hospital in service. They bring him there in a panzer, they show him to the physician, and the physician responds 'you killed this guy, why did you bring him here?'… My step-mother recognized my father by the sweater he had on… The body my mother saw and identified as my father was decapitated, the body that was found there and identified by my mother was later buried by Silopi Municipality in the potter's field in the Silopi district. I don't know where his grave is…"

"… According to what I heard from the television and the people around, a skull piece was found in the well here, I think that piece is my father's…"

"When my father's dead body was found and buried in 1996, we did not go to any authorities and file a complaint, I was scared and that's why I didn't go anywhere to complain."

Based on the data Truth Justice Memory Center

had access to and analyzed as of the date this report was drafted, it was found in regards to Ahmet Bulmuş that:

- **He was detained and forcibly disappeared,**
- **Heavy and deadly torture was inflicted on him,**
- **He was killed using inhuman and cruel methods,**
- **His body was decapitated after he was killed,**
- **No effective, expeditious and comprehensive investigation was conducted to identify and punish those responsible,**
- **His detention was unlawful,**
- **The detention procedure was not overseen by the Prosecutor,**
- **No record of the detention was kept,**
- **Testimonies of witnesses and hospital employees who could have had information on the incident were not taken,**
- **Several individuals and institutions with knowledge of the incident remained silent and did not notify the judicial authorities of it,**
- **Even though the identities of the disappeared person and his family were known, the forcibly disappeared individual was buried as an unidentified person in a potter's field,**
- **No record of his grave was kept,**
- **His family was intimidated and threatened,**
- **The evidence was not duly collected,**
- **The investigation was not conducted effectively, expeditiously and in a comprehensive manner.**

The statute of limitations on this matter is set to expire in April 2014.

B. The Use of Cruel Killing Methods to Intimidate

According to the definition provided in the United Nations International Convention for the Protection of All Persons from Enforced Disappearance, even if a forcibly disappeared person is later found dead, his status as a 'forcibly disappeared person' remains unchanged after the body is located. In this context, we inquired whether there were commonalities in the way the disappeared persons who were found dead following detention were killed.

On the basis of the case files and the corresponding narratives of the relatives of the disappeared, we identified widespread use of the following cruel methods of killing:

- Heavy and deadly torture,
- Bullets, sharp objects,
- Severing organs, body parts, decapitation,
- Burning in furnace,
- Strangulation with wires and ropes,
- Immolation by use of inflammable material

SEYHAN DOĞAN, DAVUT ALTUNKAYNAK, NEDİM AKYOL, MEHMET EMİN ASLAN, ABDURRAHMAN COŞKUN, ABDULLAH OLCAY, SÜLEYMAN SEYHAN
Date of Disappearance: November 1995
Place of Disappearance: Mardin, Dargeçit

On the night of the incident, soldiers from the District Gendarmerie Command in Mardin Dargeçit detained eight persons, including four children, after raiding multiple homes. One of the detainees, Hazni Doğan, was later released. The rest were not heard from again.

One of the juvenile detainees, the twelve-year old Hazni Doğan, was subjected to heavy psychological and physical torture while in detention. He was put before a firing squad whose weapons were aimed at him and intimidated by being told 'either you talk or we will kill you', and shots were fired at the sides of his feet and into the air. He was also forced to witness the torture inflicted upon his elder brother Seyhan Doğan and to listen to the sounds of others being tortured.

Following all this torture, Hazni Doğan was released. The others were forcibly disappeared.

The families filed a petition with the Prosecutor's Office on 8 November 1995. Thanks to persistent efforts by the relatives of the disappeared and Human Rights Association, Dargeçit Public Prosecutor's Office initiated an investigation into the incident. No progress was made in the investigation until 2009.

Due to intense efforts by the lawyers, investigations were resumed and based on information received, on 17 February 2012, excavations were made in Bağözü, a village in the Dargeçit district which had been completely evacuated for security reasons. No remains were found in the location that was indicated. There were no further excavations. The Prosecutor and forensic medical officials left the village.

After public authorities left, the people in the neighboring community told the relatives of the disappeared that there were several mass graves in the village, that the soldiers did not allow anyone to approach the graves, and they would be able to show the relatives the location of the graves.

The relatives of the disappeared went to the wells in the location pointed out to them. No excavation tools were available, so they removed the rocks and debris that stuffed one of the wells with their bare hands. Later, construction machinery arrived from the municipality and continued the digs.

On the night of 21 February 2012, the families found burnt human remains, fractured skulls and pieces of clothing in the excavated well. Remains were delivered to the Forensic Medicine Institution for identification by way of the Prosecutor's Office.

One year after remains were sent to the Forensic Medicine Institution, the medical report was finally released. Some of the remains belonged to 19-year old Mehmet Emin Aslan, who was detained in Mardin Dargeçit and then forcibly disappeared.

■ The investigation of the case is in progress as of the date of this report and the Prosecutor has yet to file a case.

■ After October 2015, any lawsuit or prosecution will be barred by the statute of limitations.

BİLAL BATIRIR, Specialist Gendarmerie Sergeant
Date of Disappearance: 8 March 1996
Place of Disappearance: Mardin, Dargeçit

The Prosecutor's Report in the investigation file pertains to seven people, including three children, who were forcibly disappeared after being detained in the raid conducted by the Gendarmerie District Command in Mardin Dargeçit. According to anonymous witness testimony, Specialist Sergeant Bilal Batırır, who was a member of the Gendarmerie interrogation center at the time of the disappearance, had informed the family of one 57-year-old disappearance victim –Süleyman Seyhan– of his burial location. The witnesses further testified that after providing the family with this information, Specialist Sergeant Bilal Batırır was punished by being burned in the furnace used for heating the battalion.

In 1996, Sergeant Batırır's wife filed a criminal complaint against the individuals responsible and demanded that they be punished.

■ As of the date of this report, a case is yet to be filed against the responsible parties.

■ The investigation risks becoming barred by the statute of limitations as of 2016.

■ Hurşit İmren of the Dargeçit Gendarmerie Command, Battalion Commander at the time, who ordered the burning according to anonymous witnesses, is currently the mayor (affiliated with the Republican People's Party) of the town of Çepni in Sivas province. Mehmet Tire, Dargeçit Division Commander of the time, is the mayor (affiliated with the Democrat Party) of Bodrum Gümüşlük.

C. Unidentifiable Graves and Failure to Return the Bodies to Families

On reviewing the petitions, interviews and the case files, the following patterns emerged:

■ Most of the forcibly disappeared persons were buried as 'unidentified persons', without any 'records and reference numbers', and families were prevented from accessing the bodies,
■ Relatives of the disappeared suffered great anguish because the disappeared persons were buried in a way that would not even allow the identification of the location of their graves,
■ State agents did not attempt to identify the forcibly disappeared and find out their fates,
■ State agents acted in ways to obstruct families looking for their relatives,
■ The failure to find out the fate of the forcibly disappeared, to return their bodies to their relatives, and to locate their graves amounts to torture and ill-treatment of the relatives of the disappeared,
■ The families continue to feel the traumatic effects and the fear despite the long period of time since the enforced disappearances.

HASAN ESENBOĞA
Date of Disappearance: 25 December 1994
Place of Disappearance: Şırnak, Cizre

Hasan Esenboğa was found dead on the İdil-Cizre highway on 25 December 1994. The crime scene report in the investigation file numbered 1994/287 with the İdil Chief Public Prosecutor's Office found that the body was blindfolded and resting against a rock, there were marks of beating on the body, and there was one fired shell casing next to the body. External examination showed the person had been strangulated with a wire, therefore no autopsy was conducted.

According to the statements of Hasan Esenboğa's wife and mother-in-law in the investigation file, he went on a business trip to Cizre four days before he was found dead, he did not return and was missing during those four days.

On the day following Hasan Esenboğa's disappearance, his family went to Cizre and made some inquiries in order to find out his fate. Someone who recognized his photograph said he got in a white Toros together with 3-4 others after he exited the Dörtyol Mosque in downtown Cizre.

The Prosecutor's Office heard the testimonies of the persons Hasan Esenboğa had business relations with and requested that the police conduct an investigation to find those who last saw the slain man. The inquiries bore no fruit and the Public Prosecutor ordered an indefinite search on 19 April 1996. Throughout the indefinite search, routine correspondence with the İdil District Gendarmerie Command went back and forth quarterly as required by the law, yet the correspondence led to no information on the perpetrators until 1 January 2010.

In 2010, K. Esenboğa filed a criminal complaint with the Cizre Public Prosecutor's Office again, which initiated an investigation under reference number 2010/1267. In this complaint, the complainant specified many details that she did (could) not in 1994. She emphasized that when she first saw her husband's dead body, there were two bullet marks on his head, while the Prosecutor's report on the death said there was a shell casing by the side of the body and included no reference to the bullet marks.

Yet another important issue explained by the complainant was that she named the individuals who saw her husband being taken into a white Toros. She said they were code-named Yavuz, Ramazan Hoca, Bedran and Selim.

Cizre Chief Public Prosecutor's Office declared noncompetence based on jurisdiction regarding the investigation and forwarded the case, along with the names of suspects, to İdil Chief Public Prosecutor's Office (İdil Chief Public Prosecutor's Office, Investigation No. 1994/287).

After receiving information on the above code-named suspects, the Prosecutor's Office heard the complainant's uncle as a witness. In his testimony, the witness stated that when they went to file the petition to notify that Hasan Esenboğa was forcibly disappeared, he saw the suspects in the Prosecutor's Office building, but he said he did not recognize them because he was in fear.

The complainants' attorneys notified the Prosecutor's Office that the person code-named Bedran is Adem Yakin and the one code-named Yavuz is Burhanettin Kıyak, and that they are on trial in the case publicly known as the "Temizöz Case" on charges of disappearing and killing 20 people and are under arrest.

In the investigation, suspect Adem Yakin was heard not as a suspect, and instead as a "witness". Testimony from one of the other suspects, Burhanettin Kıyak, had not been taken as of the writing of this report.

The complainants' attorneys requested a

noncompetence decision from the İdil Public Prosecutor's Office on 16 October 2012 and asked that the case be forwarded to Diyarbakır Chief Public Prosecutor's Office commissioned as per Article 10 of the anti-Terror Law.

The investigation into the crime is in progress as of the writing of this report. Even after nineteen years after the incident, no charges have been filed.

FAHRİYE MORDENİZ, MAHMUT MORDENİZ
Date of Disappearance: 28 November 1996
Place of Disappearance: Diyarbakır

F.M. and A.M, who are sons of Fahriye and Mahmut Mordeniz, joined the Kurdistan Workers Party (Partiya Karkerên Kurdistan - PKK) in 1993. Approximately two years later, on 28 November 1996, plain-clothes police officers first detained Mahmut Mordeniz, the father, when he was in the market selling cattle, and later Fahriye Mordeniz, the mother, when she was home.

Upon learning that his parents were detained, M.E.M. filed ten petitions with the Diyarbakır State Security Court after the incident, namely on 8, 10, 11, 12, 13, 16, 18, 23, 24 and 25 December 1996. He stated that his parents were detained, he was concerned about their fate, and requested that testimony be taken from witnesses S.K. and Ş.M. who were present at the time of the detention.

Before his parents were detained, complainant M.E.M. himself was also detained together with R.A. in Diyarbakır Ofis. At the police station, he was pressured with 'Either your whole family will work as agents or you will all die. Either you join the PKK or you leave Diyarbakır'.

During the investigation, S.K., an eye witness who was with Mahmut Mordeniz when he was detained, stated that he later went to the police station to inquire about Mahmut's fate, at which point a police officer in charge of the custody suite told him that Fahriye and Mahmut Mordeniz were not in custody and added 'sir, between you and I, this is the work of the intelligence, use whatever means you have to save your man'.

After this incident, the family filed a petition with the Human Rights Commission of the Grand National Assembly of Turkey (Türkiye Büyük Millet Meclisi - TBMM).

On 3 December 1996, two dead bodies, one of them a female, were found bellies down by

the side along the Cizre-Silopi highway, with their hands tied with a piece of cloth and their mouths taped.

The records inside the investigation file indicate that two fired shell casings were found at the scene. The records show that finger swabs of the bodies were taken, a crime scene diagram was made and the bodies were photographed.

The bodies were delivered to the morgue, the standard autopsy was not performed, but the Diyarbakır Prosecutor's Office requested that the bodies be buried in a way that would allow the identification of the graves.

According to the record signed by two police officers and a municipal employee, the burial took place in the Cizre Asri Cemetery on 10 December 1996.

The Cizre Prosecutor's Office sent a request to Cizre Police Headquarters and Gendarmerie for an investigation as to whether the deaths of the two persons 'were related to PKK or any other terrorist organization'.

The Cizre Prosecutor's Office also sent correspondence to Prosecutors' Offices in Şırnak, Silopi, İdil, Beytüşşebap, Uludere and Diyarbakır, and inquired whether there were any persons who were concerned that their relatives were disappeared.

There were several pieces of correspondence which did not contribute to the resolution of the case.

After the Mordeniz couple was buried by the municipal employee in the care of the police officers on 10 December 1996, Cizre Police Headquarters delivered a response to the Prosecutor's Office dated 27 December 1996 which stated that the fate of the persons in question could not be ascertained and the investigation was in progress.

Cizre Public Prosecutor's Office decided to consolidate pre-trial procedures and to forward the file to İdil Public Prosecutor's Office on 11 March 1998. The İdil Prosecutor's Office decided that for purposes of identification, it would request information from the Diyarbakır Branch of the Human Rights Association, in addition to all other relevant institutions.

Considering that the enforced disappearance and murder of the Mordeniz couple might have commonalities with many unlawful executions between 1993 and 1996 in terms of the way in which the crimes were committed, the type of weapons used and other pieces of evidence, İdil Prosecutor's Office sent letters to Prosecutors' Offices in Şırnak, Cizre, Beytüşşebap, Uludere, Şirvan, Derik Kızıltepe, Nusaybin, Ömerli, Kozluk, Bismil, Çınar, Hani, Kulp and Lice, requesting that information in the preliminary investigation files be delivered in a format that explained the place and time of the murders, as well as weapons and methods used to commit them and the expert opinions on the murders.

The İdil Prosecutor's Office applied with the Diyarbakır Prosecutor's Office and Police Headquarters to seek approval for the identification of the bodies with the help of the Mordeniz family members, who had recourse to the Diyarbakır Branch of Human Rights Association, on 31 August 1998.

The children of the Mordeniz couple identified the slain persons depicted in the photographs in the investigation file as their parents in November 1998.

In his testimony taken by the İdil Prosecutor's Office, complainant M.K.M. said he resided in Diyarbakır until 1997, he received anonymous phone calls and letters that threatened him, he was requested to leave Diyarbakır and withdraw the complaint he lodged in regards to the death of his parents, and added that he moved to Bingöl out of fear.

The record dated 10 November 1998 and contained in the investigation documents

shows that Cizre Municipality indicated that no information could be provided on the location of the graves of complainant's parents because no record was generated at the time of the burial.

The European Court of Human Rights held in its judgment issued on the application submitted on the incident, dated 10 January 2006 and numbered 49160/99 that a violation of Article 2 of the European Convention on Human Rights, which protects the right to life, could not be proven on the merits, yet it was violated on procedural grounds, and violations of Articles 3 and 5 of the Convention could not be proven, but Article 13 was violated because of the failure to conduct an effective and proper investigation.[5]

D. Failure to Conduct Effective, Expeditious and Independent Investigations

a) Analysis of Compliance with Investigation Procedures and the Scope of Investigation

As established in domestic law/international laws and in ECtHR judgments, the right to life is not a theoretical right; it is a 'tangible' right that comes into being by way of our existence. The state has an obligation to respect this right, to refrain from disappearing or killing the individual, to take necessary precautions to secure the life of the individual from attacks with fatal consequences, and, if it cannot provide such security, to conduct effective, expeditious and independent investigations to inquire diligently into the circumstances of disappearance or death, and to identify and punish the responsible parties.

As soon as the Prosecutor, acting on behalf of the state, becomes aware that an individual was deprived of his or her liberty, detained, abducted, held in custody without a duly issued warrant for detention or arrest, or that an individual's life is at risk, the Prosecutor becomes charged with certain official duties. In accordance with procedural rules on criminal prosecution, the Prosecutor is required to promptly intervene in the situation, investigate the crime, identify, find and interrogate the suspects, and ensure the security of the victim.[6]

The Prosecutor is also required to conduct a reasonably expeditious inquiry into all issues necessitated by the investigation, ensure that inquests/autopsies/expert examinations/identifications are conducted, to find, hear and take testimony from witnesses, and to strive to

5 For definitions of violations in terms of merits and procedures, see Altıntaş İ. "Enforced Disappearance Cases From the Perspective of the European Court of Human Rights", p. 108

6 Mahmut Kaya v. Turkey, see Altıntaş İ. "Enforced Disappearance Cases From the Perspective of the European Court of Human Rights", p. 108

gather all evidence at risk of loss.[7]

When there is an allegation that state agents are responsible for the disappearance/killing, the investigation must be directed at identifying and punishing the responsible parties. Active participation of families of the disappeared in the investigation is necessary.

The analysis of our data has led to the following conclusions:

■ The investigating prosecutors' offices implemented very few or none of the procedures/mechanisms, some of which are summarized above, that are provided in criminal procedures,
■ Even though a long period of time has elapsed since the acts of enforced disappearance, the investigations still remain ongoing and are generally protracted,
■ Necessary inquiries and identifications were not completed, and evidence was not collected at the 'crime scenes',
■ Information/documents given by suspect law-enforcement officers on the detentions were taken at face value and necessary inquiries were not made,
■ Reasonable measures were not taken to protect the evidence which might emerge over time,
■ No photographs of the 'crime scene' were taken,
■ In situations where the disappeared persons were killed as a result of torture, records were kept as if they were killed in clashes,
■ Fake evidence was generated through falsified records,
■ Testimony was generally not taken from suspects, and in cases where it was taken, suspect statements were considered adequate,
■ There was no investigation of the organizational links among suspects,
■ The chain of command of which suspects were a part was not taken into consideration,
■ Law-enforcement officers, government employees and administrative employees who could potentially provide information about the crime were not interrogated as required,
■ State agents who opposed the use of illegal methods and gave information on crimes could not be protected,
■ Even in cases including witnesses who saw the disappeared in police stations/gendarmerie/illegal interrogation rooms and in fact provided names, no testimony was taken from them, and where their testimonies were actually heard, they were not deemed credible,
■ Relatives of the disappeared were not asked for information during investigations,
■ Inquests were rarely performed,
■ There were doubts that autopsy procedures were carried out completely and in keeping with legal standards,
■ Investigations were generally limited in scope.

7 CMK No. 5271, Article 43 et seq., Article 79 et seq, and CMUK No. 1412, Article 45 et seq.

ABDULLAH CANAN
Date of Disappearance: 17 January 1996
Place of Disappearance: Hakkari, Yüksekova – Van Highway

On 27 October and 23 November 1995, the Alpine Commando Battalion Command undertook two operations in Ağaçlı and Karlı villages in Yüksekova. After the first operation, three persons were disappeared. Abdullah Canan and seven members of the Canan family, who resided in the Karlı village, lodged a complaint with the Yüksekova Prosecutor's Office about the operation undertaken in the village of Karlı on 23 November 1995. Complainants alleged that their homes and belongings were damaged deliberately during the operation. They identified Battalion Commander Mehmet Emin Yurdakul as chiefly responsible for the incident. Shortly thereafter, members of the Canan family were pressured to withdraw their complaints.

On 17 January 1996, Abdullah Canan was put in a military vehicle on the Van-Yüksekova highway and detained. His family applied to military authorities, but they were not given any information. On 21 February, Canan was found dead in the same location, with his mouth gagged and his hands and arms tied up.

The autopsy determined that Canan had been shot at close range. Seven bullets hit him in vital areas including his chest, shoulders and head.

In November 1999, the local court concluded that Canan's murder was committed in a terrorist or intertribal conflict and acquitted the three defendants. The court ordered that an investigation be iniated on Battalion Commander Mehmet Emin Yurdakul for misuse of authority and resticting individual freedom. The investigation could not be completed within the time frames stipulated in Articles 102 and 104 of Turkish Criminal Code. The case became barred by the statute of limitations and then closed.

Examining the family's several applications, the European Court of Human Rights found the Turkish state responsible for the violation of a series of rights including the right to life and right to freedom from torture. The court also concluded that effective investigation was not carried out and ordered Turkey to pay damages to compensate for the pecuniary and non-pecuniary losses they suffered.[8]

Esat Canan, a current Member of Parliament representing the BDP (Peace and Democracy Party) and formerly representing the CHP (Republican People's Party), provided the following information in the testimony he gave on 5 December 1997 to the TBMM Commission to Investigate Susurluk on the enforced disappearances and unsolved murders involving his relative Abdullah Canan and others in the Hakkari region (the section excerpted from the report is quoted verbatim);[9]

'In his testimony taken in relation to certain unsolved murders, Esat Canan stated that;... After the incident, an unsigned threatening letter was sent to the elder brother of Savaş Buldan. On 17 January 1996, Abdullah Canan got in his car in front of his home in Yüksekova district of Hakkari and left the district after telling his wife that "they would be renewing the gun license."

10 kilometers into Hakkari, at the place known as Yeniköprü, they ran into a checkpoint, Abdullah Canan was transported to a vehicle like a panzer. All the authorities they inquired with told them he was not in their custody. On the third day after he disappeared, his (Canan's) car was found at Güzeldere on the Van-Hakkari

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8 25 December 2007 – bianet.org AİHM: Abdullah Canan'ın Yaşam Hakkı Korunmadı, Etkili Soruşturma Olmadı (*ECtHR: Abdullah Canan's Right to Life Was Not Protected, There Was No Effective Investigation*), Bianet, http://bianet.org/bianet/siyaset/103780-aihm-abdullah-canan-in-yasam-hakki-korunmadi-etkili-sorusturma-olmadı

9 Report of the TBBM Commission to Investigate Susurluk, testimony dated 5 December 1997, http://tr.wikisource.org/wiki/TBMM_Susurluk_Ara%C5%9Ft%C4%B1rma_Komisyonu_Raporu/Bilgisine_ba%C5%9Fvurulanlar#7-_Esat_CANAN_5.12.1997_tarihli_ifadesinde.3B, accessed 27 April 2013

Highway. An official named Kahraman Bilgiç took 20 thousand German marks from Abdullah Canan's elder brother by telling him "I will let you get in touch with Abdullah Canan in no time." As a relative of Abdullah Canan, he met with Kahraman Bilgiç; Kahraman Bilgiç told him "Abdullah Canan is in our hands, he is in a cell, the Yüksekova Battalion Commander Major Mehmet Emin sent him to us for execution''

Major Mehmet Emin Yurdakul pushed Abdullah Canan's car into the riverbed, Kahraman Bilgiç told him, "don't do anything at all, this is our duty. We did what we did in the cases of Eşref Bitlis, Bahtiyar Aydın''. Kahraman Bilgiç traveled around with the code name Havar, Kahraman Bilgiç told the Battalion Commander "he only took 5 thousand German marks'', he denied the abduction, and later Abdullah Canan's body was found on the second day of the religious feast by the gendarmerie.

The prosecutor's office is still at the stage of preliminary investigation with respect to the issue, no progress has been made since then, the incident was within the jurisdiction of Diyarbakır State Security Court.

Again in 1993, Sabri Çardak killed Mahir Karabağ and Eyüp Karabağ in the village of Beşbulak, Hacı Teknik was murdered in Çukurca by this team, also Mikdat Özeken, Şemsettin Yurtseven, Münir Sarıtaş, Mehmet Yaşar, Nezir Tekçi were killed by the same team in 1994-95, and none of these persons were heard from again.

Kahraman Bilgiç, under the code name of Havar, was caught after the ransom case involving the man named Necip Baskın. He was arrested in Yüksekova and transported to the Midyat Prison. Four files were forwarded to the prosecutor's office regarding Mehmet Emin Yurdakul, In the interrogation, Kahraman Bilgiç said they killed Abdullah Canan. At this stage the interrogation was stopped, and the petty officer named Hüseyin Oğuz said 'I worked in the first three days of the interrogation, there is a tape recording of that interrogation, once there was a reference to the major, they took me off the interrogation'. The Yüksekova evidence was concealed.
Major Mehmet Emin Yurdakul said he had a connection to Colonel Hamdi Poyraz who was serving in the brigade in Hakkari.

As of the date of this report, the incidences and relations referred to above have not been prosecuted or investigated in detail.

The investigation on the battalion commander referred to in the testimony is now barred by the statute of limitations because it was not completed within the time frame stipulated in Articles 102 and 104 of the Turkish Criminal Code.

Under procedural laws concerning criminal justice, all notices may be served orally or in writing to the Public Prosecutor's Office or to other local authorities, the municipal police office/officers, justices of peace, governors, district governors and subdistrict administrators when there is a crime, and the crime of enforced disappearance is no exception in this regard.

In addition, in the event of a suspicious death, the municipal police, employees of the municipality or heads of villages, upon becoming aware of the situation, are obligated to notify it to the Public Prosecutor's Office or the justice of peace without burying the body.

The analyzed data show that procedure has been followed in regards to the said notification requirement. However, even though the forcibly disappeared were buried based on the permit obtained from municipalities and with the involvement of municipal employees, during the burial procedures the Prosecutor's Office did not contact the individuals and entities (district governor, mayor, the municipal employee in charge of the burial etc.) who could have had information on the crime and the slain person, nor did these individuals and entities share the information they had on the crime with public authorities.

b) The Collection of the Evidence by Law-Enforcement Officers Suspected of Committing Crimes

Under the law, the Public Prosecutor may conduct the investigation through his or her own office, or through the police. In either case, the Prosecutor must take measures to prevent the destruction of evidence.

Establishing this essential investigation rule in a judgment, the ECtHR held that when evidence on a crime is gathered by state agents who themselves are suspected of having committed crimes, the result will be an inadequate investigation, and the state has an obligation to take measures in that regard.[10]

The analyzed data has led to the following conclusions:

- Law-enforcement officers who had a chance to destroy the evidence were allowed to serve as officers 'who collected the evidence', a circumstance which made it impossible to actually gather the evidence and shed light on the facts,
- The evidence was manipulated,
- Fake evidence was generated,
- Prosecutors' Offices did not take any measures with respect to the issue explained above.

To give examples from the case files examined:

- On 6 June 1994, Abdullah Özdemir and İzzet Padır were detained by Cizre District Gendarmerie Division Command. While others detained along with them were released the next day, they were kept in custody,
- Unlike in the case of several other enforced disappearances, the families of the disappeared acted promptly, lodged a criminal complaint with the Prosecutor's Office and said that they were concerned about the well-being of their relatives,
- Although it was clear in the investigation file that the persons in question were detained by the Cizre District Gendarmerie Command, the Prosecutor's Office inquired with the same Command about the fate of the persons. District Gendarmerie Commander Cemal Temizöz fabricated records to the effect that these detainees had been released and these records were submitted to the file.
- The records in question did not include dates, or the names, badge numbers, or ranks of officers who carried out the detention. They only bore signatures under the word 'officer' and there was no identification accompanying the signatures. The Prosecutor's Office conducting the investigation at the time considered these documents provided by the Gendarmerie adequate and did not make any further inquiries. After a while, an indefinite search order was issued for the disappeared who 'could not be found'. Aside from routine correspondence, no action took place in the investigation file for many years.

In 2009, a suit was brought against Major Cemal Temizöz and other defendants before the Diyarbakır 6th High Criminal Court with case number 2009/470. The indictment in the case, referring to the documents mentioned above, stated "...the testimony records delivered were undated, two testimonies were printed, it was not clear which officer created the records, the signatures on the release and arrest records whose photocopies were delivered initially did not match the signatures on the original records sent subsequently, leading to a suspicion that the photocopied documents were not generated out of original documents", and these statements confirm our findings above.[11]

c) Failure to Initiate Legal Proceedings against Law-enforcement Officers who did not Comply with the Requests and Orders of the Prosecutor's Office

Prosecutors are authorized under the law to conduct investigations directly on government

10 Orhan v.Turkey judgment, 18 June 2002, http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"docname":["orhan"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-60509"]}, accessed 2 May 2013

11 The case in which Colonel Cemal Temizöz and six other defendants are being tried by the Diyarbakır 6th Criminal Court, File No 2009/470 E. – the indictment is available at http://tr.wikisource.org/wiki/Cizre_davas%C4%B1_iddianamesi, accessed19 March 2013

employees who act abusively or negligently in the performance of their judicial duties and tasks, as well as on law-enforcement superiors or officers who act abusively or negligently in the performance of the requests and orders issued by the prosecutor's office.

In the case files examined, there was no evidence that this authority was exercised. Thus we observe the following:[12]

- Prosecutors did not take initiative over the course of the investigations,
- The gendarmerie/police generally remained negligent toward orders/warrants concerning the investigation of crimes and suspects, either no response was furnished to them or boilerplate responses were given to ignore them,
- The files were full of binders that included inconclusive correspondence, and no meaningful progress was made.

d) Statute of Limitations/Impunity/The Problem of Judicial Impartiality

1. As known, neither the former Criminal Code No. 765 nor the current Turkish Criminal Code No. 5237 defines enforced disappearance as a crime.

For that reason, courts take the criminal provisions concerning the crime of murder as the basis in enforced disappearance cases and hold that the statute of limitations is 20 years as provided in Articles 450 and 102/1 of the former Turkish Criminal Code No. 765 which was the criminal law in effect at the time the crime was committed.

Considering that acts of enforced disappearance took place predominantly in the 1990s and that courts have not been able to conduct trials effectively and expeditiously, impunity has usually been the result. The findings of the study confirm this, and show the following:

- Investigations mostly result in decisions of lack of jurisdiction, noncompetence, non-prosecution, or preclusion by the statute of limitations,
- There were two trials which concluded with a punishment of the responsible parties,
- The average duration of trials is unreasonably long.

The results of the analysis both confirm that Turkey's 'lengthy trials' and 'impunity' problems are real and show that the problems arising from the statute of limitations are very important and need to be addressed.

2. Judicial independence and impartiality are must-haves for an effective investigation.

When the continuity of the state is at stake, the judiciary displays a silent or biased attitude toward disappearances, abductions and murders with political origins, which places a major obstacle in the way of effective and expeditious investigations.

The state is obligated to ensure the independence of individuals who will investigate unlawful acts such as enforced disappearance and murders committed by state agents. It is additionally necessary to ensure that the independence in question is exercised not only in appearance but also in actuality.[13]

There are concrete reasons why there is so much controversy in Turkey over the independence and impartiality of the judiciary. A comparison of the average trial time, or the rate at which trials are brought to conclusion, in cases where defendants are civilians with those cases where defendants are members of the military, the police, or government employees, implies that individuals in the latter category are being protected, because cases involving those individuals are generally delayed past the expiration of the statute of limitations.

12 Turkish Criminal Code (TCK) No. 765, Articles 230 and 235, TCK No. 5237, Article 257

13 Ergi v. Turkey judgment - 28 July 1998, http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{„docname“:[„ergi“],“documentcollectionid2“:[„GRANDCHAMBER“,“CHAMBER“],“itemid“:[„001-58200“]}, accessed 2 May 2013

Cases in which defendants are soldiers, police officers, or paramilitary forces very often result in impunity or decisions based on the statute of limitations, which constitutes a violation of the obligation to conduct effective investigations.

3. The observations resulting from our analyses are substantiated in a report of the TBMM Commission to Investigate Unsolved Murders dated 18 April 1995; however, no lasting and sustainable solution came into being despite the length of time elapsed since then.

The TBMM Commission report noted that the prosecutors were content with obtaining their news on the violations of the right to life from the media, just like ordinary citizens, who had no duties and responsibilities in that regard. The report continued, *"Although newspapers and books featured news stories on unsolved political murders and other allegations, Public Prosecutors' Offices took no action, and like regular citizens, Public Prosecutors simply read the stories".*[14]

Upon concluding that the Prosecutors failed to fulfill their duties, the Commission resolved that *a copy of the report be delivered to the Ministry of Justice, so that Public Prosecutors could be ensured to act more sensitively in respect of the publicly available news.*[15]

The Commission also noted that *"For reasons we were not able to comprehend, Ankara State Security Court Chief Prosecutor Nusret Demiral and Ülkü Coşkun obstructed the work of our Commission and did not, in contravention of the law, deliver information and documents on..... unsolved political murders to our Commission, and the Plenary Session of the Grand National Assembly should be asked whether their acts and actions should be notified to the High Council of Judges and Prosecutors for an evaluation". With this observation,* the report also revealed that the abovementioned attitude of the judiciary acquired a biased character from time to time.[16]

If even the TBMM is unable to enjoy support from the judiciary when it attempts to investigate unlawful conduct, and the reflex that safeguards and protects the state and whitewashes its actions kicks in, the primary problem becomes the need to ensure the independence and impartiality of judicial authorities who will investigate the crimes of the state.

e) The Fact That Certain Institutions and Individuals are Treated as Untouchable or Impossible to Investigate

The results of the study confirm once more the fact that when it comes to enforced disappearance and unsolved murders, there are individuals and institutions that cannot be touched or investigated.

The entire body of data derived from the cases analyzed in the study and the narratives of the relatives of the disappeared and their attorneys lead to the following impressions:

- Investigations are not conducted with due thoroughness; there are individuals/organizations that are shielded,
- There is no investigation into organizational connections and commonalities in criminal methods,
- Investigations into members of the military, the police or government employees are kept on hold, and their length and scope are kept limited,
- In many cases, suspects are promoted and rewarded,
- Complaints are specifically about five groups, three of which are organizations of the state, including police officers affiliated with the Gendarmerie Intelligence and Counter-Terrorism Unit (Jandarma İstihbarat ve Terörle Mücadele Birimi – JİTEM), National Intelligence

14 Report of the TBMM Commission to Investigate Unsolved Murders, p.160, http://www.tbmm.gov.tr/sirasayi/donem19/yil01/ss897.pdf, accessed 27 April 2013

15 Report of the TBMM Commission to Investigate Unsolved Murders, p.160, http://www.tbmm.gov.tr/sirasayi/donem19/yil01/ss897.pdf, accessed 27 April 2013

16 Report of the TBMM Commission to Investigate Unsolved Murders, p. 158 http://www.tbmm.gov.tr/sirasayi/donem19/yil01/ss897.pdf, accessed 27 April 2013

Organization (Milli İstihbarat Teşkilatı - MİT), the Special Forces Command, and the village guards and informants,

■ Even though relatives of the disappeared lodged complaints with the Prosecutor's Office, in many cases (including the 'JİTEM' case and the 'Temizöz' case), not all soldiers, police officers or village guards who are suspected of having connections to the crime were investigated, and the scope of the investigation was limited to those individuals who were very visibly at the forefront.

1. The Susurluk Report[17] drafted by the Chair of the Inspection Board of the Prime Ministry Kutlu Savaş, the MİT Susurluk Report[18] drafted in part by Sönmez Köksal, and the Report of the TBMM Commission to Investigate Unsolved Murders all officially established in detail that village guards, informants, and JİTEM members took part in many unlawful activities. Even though the TBMM lodged a criminal complaint with the Ministry of Justice for the necessary investigation to be conducted, there has been no comprehensive investigation to date which inquires into all extensions of the JİTEM organization.[19]

2. The most serious trial on enforced disappearances and political murders is the one known as the Temizöz case, and in that case, too, the inquiry into organized activity was kept limited. It was considered adequate to try a total of seven persons, including Colonel Cemal Temizöz, village guard Kamil Atağ who is a former Cizre Mayor, and other village guards and informants.

3. The Temizöz case is highly crucial for the investigation of the rights violations in the Şırnak/Cizre region between 1990 and 2000 and the implementation, to some extent, of the accountability mechanisms.

Yet, it is necessary to keep in mind that for years and in quite a wide area, the systematically executed abductions, enforced disappearances and murders could not have been sustained without the support of official political will backing them.

The defendants in the Temizöz case argue that they 'saved' Cizre from the PKK and they 'brought an end' to PKK's domination over the town, and their purpose was to ensure the continuity of the Turkish state in this territory, and stated they could not come to terms with the fact that they were brought before the Court and reproached those who abandoned them.

4. In a sense, their reproach points to an important reality that all of these practices could only take place by means of a systematic organization including the persons who executed and supported the practices and the decision-makers, as well as those who stood behind them, and that these practices could not have been accomplished but for this support.

Worthwhile proceedings vis-à-vis the grave breaches of human rights committed between 1990 and 2000 could only have taken place through a courageous investigation aiming to inquire whether or not all of the suspects in political, administrative and military positions during that time had decisions and practices connected with these crimes, and to lay bare all persons and structures, both legal and illegal, involved in the practices of that dark era. It is not possible to say that the suits brought so far have been moving in that direction.

5. As explained above, the analysis of the data shows that abductions, detentions and enforced disappearances usually took place out in the open, in the busiest spots of the town and during daytime, and, in some cases, they began with a detention of people in their homes and while everyone was watching.

17 Vikikaynak, Kutlu Savaş Susurluk Report, http://tr.wikisource.org/wiki/Susurluk_Raporu_(Kutlu_Sava%C5%9F), accessed 19 March 2013

18 Vikikaynak, Köksal Sönmez Susurluk Report, http://tr.wikisource.org/wiki/Susurluk_Raporu_(S%C3%B6nmez_K%C3%B6ksal), accessed 19 March 2013

19 Report of the TBMM Commission to Investigate Unsolved Murders p.159, http://www.tbmm.gov.tr/sirasayi/donem19/yil01/ss897.pdf, accessed 27 April 2013

That the criminals acted so comfortably, and the failure of the state to find those responsible for the acts of abduction, disappearance and murder, leads to the impression on the part of the families and the public that the criminals were being shielded, and contributed to the survival of a climate of fear and horror in the entire region. As established in the Report of the TBMM Commission to Investigate Unsolved Murders, although security forces "caught the perpetrators in murders committed in ordinary cases rather quickly", they are unable to do so in the case of political murders, which the people of the region *"perceive as the state turning a blind eye to these latter murders".*[20]

The TBMM Commission to Investigate Unsolved Murders stated in its Report dated 18 April 1995 that urgent amendments to the law are necessary to ensure that when there is an allegation of political murders committed by public officers, in particular law-enforcement officers, independent judicial organs prosecute such officers, rather than an 'administrative investigation' taking place. It has been more than eighteen years since this report came out. Yet, no noticeable progress has been made in legal or practical terms in this regard.[21]

6. As stated above, some positive steps have been made in regards to enforced disappearances and unsolved political murders. The 'Ergenekon case' has been initiated, and the trials of Colonel Cemal Temizöz and his team (who are being held responsible for the enforced disappearances in the Cizre region), and Brigadier General Musa Çitil (implicated in the incidents that took place in the vicinity of Mardin), have begun.

While the initiation of these lawsuits was originally met with a lot of enthusiasm and hope that they would help shed light on a dark era, this has given way to serious concerns.

There is widespread public sentiment that enforced disappearances/unsolved murders were put on the agenda as an anti-terror strategy in the 1990s by way of decisions made at the governmental level and that they were executed through a chain of command with the involvement of JİTEM, MİT and the police force. The investigative reports drawn up at the level of the Grand National Assembly reiterated concerns along the same lines. Yet the investigations have not been deep enough to be effective, and the confidence that the counter-guerrilla organization would be exposed and all responsible parties would be brought before justice has been waning.

The deficient investigations and manipulative steps throughout the proceedings, coupled with the problems arising from the failure to follow criminal procedure during trials, have led to a widening sentiment that these trials would not yield full disclosure of the truth, either, and efforts to hold the criminals accountable would be blocked.

20 Report of the TBMM Commission to Investigate Unsolved Murders, pp.159-160, http://www.tbmm.gov.tr/sirasayi/donem19/yil01/ss897.pdf, accessed 27 April 2013

21 Report of the TBMM Commission to Investigate Unsolved Murders, p.160, http://www.tbmm.gov.tr/sirasayi/donem19/yil01/ss897.pdf, accessed 27 April 2013

EŞREF BİTLİS- General Eşref Bitlis, Chief of the Gendarmerie
Date of Death: 17 February 1993

General Eşref Bitlis, Chief of the Turkish Gendamerie, died on 17 February 1993 after his plane crashed for undetermined reasons. Press reports in the 1990s stated that Gendarmerie Chief Eşref Bitlis opposed the activities of JİTEM, the abductions, summary executions, and the involvement, together with informants, in arms and drugs smuggling. After the death of Gendarmerie Chief Eşref Bitlis, some other high ranking members of the military who were in Bitlis' team also lost their lives in suspicious clashes, such as Colonel Rıdvan Özden who was the Gendarmerie Field Officer in Mardin and Brigadier General Bahtiyar Aydın who was the Gendarmerie Regional Commander in Diyarbakır.[22]

After the statute of limitations expired on the case concerning the death of Eşref Bitlis in a plane crash, on 17 February 2013, his son Tarık Bitlis spoke to various media outlets.

In his remarks on the website of the Cumhuriyet Daily, Tarık Bitlis said, *"the deficiencies in the system kept the facts in the dark. The investigations on the incidents in 1993 must inquire into the mechanisms responsible, there are several facts yet to be clarified or shared with the public, and in that sense everything stays the same. Reopening the case file is not the same thing as shedding light on the subject, and the deficiencies of the current system cause the facts to always remain in the dark."*

Tarık Bitlis noted that it is necessary to analyze the attitude and the behaviors of the Police Department, Turkish Armed Forces and the MİT throughout this process and added, *"15 minutes or half an hour after the incident, the Chief of General Staff of the time says 'icing is the cause'. And then today the MİT and the police say 'we had no correspondence on that issue, we do not know anything about it'. But the same MİT, the very same tools of the system, can occupy the next-to-most important seat in the Ergenekon case right off the bat. There is no questioning about that even today. Who did this? Who is responsible for that occupation? Why was it even facilitated? And quo vadis? What I want to emphasize is that the most important thing to be investigated about this case is this: the individuals who were in charge of these organizational structures in the system need to be contacted, and when they respond by saying 'we don't know anything', this response must be made public. If the then-Undersecretary of the MİT does not know anything, that must be made public. If the Chief of General Staff of the time did not initiate any action in regards to the incident in which the aircraft carrying the General Commander of the Gendarmerie was harassed, this must be shared with the public. This is because similar incidents are going on as part of our lives today. In my opinion, this is the most important and anticipated aspect of this case that needs to be shared with the public."*[23]

■ As of the date of this report, no suit has been brought in regards to the allegations concerning the death of Gendarmerie Chief Eşref Bitlis.

22 Vikipedi – Eşref Bitlis, http://tr.wikipedia.org/wiki/E%C5%9Fref_Bitlis, accessed 27 April 2013

23 Cumhuriyet Daily dated 25 February 2013

RIDVAN ÖZDEN – Gendarmerie Field Officer in Mardin
Date of Death: 12 August 1995

Colonel Rıdvan Özden escaped an ambush that targeted his official vehicle in 1994. He lost his life in a clash of arms with the PKK on 12 August 1995.

His wife Tomris Özden has been suggesting since 1995 that there are clouds over the circumstances surrounding his death.

According to his certificate of death, there is a bullet hole 6 centimeters above Özden's left eyebrow.

When Tomris Özden looked at his husband's dead body before the funeral, she said, she did not notice any bullet wounds on his forehead, and because the back of his head was covered in blood, she thought he could have been shot in the back of his neck.

Tomris Özden claims that when her husband was working in Mardin, he was pressured by Veli Küçük and his team to join JİTEM.

After a PKK informant said Özden did not die in the clash and one of the soldiers under his command said, "our commander was killed by the soldier accompanying him", the Rıdvan Özden assassination case was reopened by the civilian Prosecutor's Office in 2009.

The General Staff, on the other hand, denies the allegations about JİTEM and argues that Özden was killed by the PKK.[24]

BAHTİYAR AYDIN - Brigadier General Bahtiyar Aydın, Gendarmerie Regional Commander in Diyarbakır, Date of Death: 22 October 1993

Brigadier General Aydın was the Gendarmerie Regional Commander in Diyarbakır in 1993. He was known in the region as a military man who did not approve of the unlawful methods of violence implemented against the public in the region.

Aydın was shot dead in front of the premises of the Division Command in Lice on 22 October 1993, and the PKK was declared responsible for his death.

A member of the Hakkari Yüksekova Gang, when questioned in the investigation on that gang, alleged in his testimony that Aydın was killed by informants doing the bidding of JİTEM. The General Staff, on the other hand, denied the allegations about JİTEM and argued Aydın was killed by the PKK.

An anonymous witness code-named "Deniz" who once had a senior executive role within the PKK (who was later revealed to be Şemdin Sakık) alleged in his testimony during the Ergenekon investigation that Aydın was killed by a soldier, and the soldier committing the murder was himself later killed by another soldier.[25]

■ As of the date of this report, no suit has been brought in regards to the allegations concerning the death of Bahtiyar Aydın, Gendarmerie Regional Commander in Diyarbakır.

■ According to the official interpretation, the statute of limitations will expire on 22 October 2013.

24 Vikipedi - Rıdvan Özden, http://tr.wikipedia.org/wiki/R%C4%B1dvan_%C3%96zden, accessed 27 April 2013

25 Vikipedi – Bahtiyar Aydın http://tr.wikipedia.org/wiki/Bahtiyar_ayd%C4%B1n, accessed 27 April 2013

KAZIM ÇİLLİOĞLU – Colonel, Field Officer in Tunceli
Date of Death: 3 February 1994

Kazım Çillioğlu, Gendarmerie Field Officer in Tunceli and a close colleague of General Eşref Bitlis, was found dead in his apartment on 3 February 1994, one year after the suspicious death of Bitlis in the plane crash.
The cause of his death was declared as suicide. However, 16 years after his death, his son Gökhan Çillioğlu had recourse to the Düzce Chief Public Prosecutor's Office, bringing the documents at his disposal. He said they thought it was not death by suicide and requested an investigation.

Çillioğlu remarked as follows: *"My dad had said his goodbyes to us, he knew that they would be killing him also after the death of General Eşref. He told us his would not be a natural death, he was going to be killed before he could see his grandchildren and before he could get old. He was killed because he knew too much."*

Gökhan Çillioğlu stated that the autopsy report on his father included contradictions. Instead of a full-fledged hospital, the autopsy was conducted in an infirmary by general practitioners and janitors. The individuals who found his body were not included as witnesses in the autopsy report. The prosecutor identified a bullet hole on the back left, while the doctors identified a bullet hole above the left ear. No swab was taken from the right hand. There was a mismatch between the marks the family saw when the casket was opened at the time of the funeral service and the statements in the report, and the family's requests to delay the funeral so that a comprehensive autopsy could be conducted were prevented by the Tunceli Governor and the military officials.
Çillioğlu asked, *"There is the problem of two different bullet holes, they covered it up. Why was a private soldier present in the autopsy of a field officer?"* and added, "*They attempted to kill my father so many times. That's why he taught us not to use the same path twice, to look oncomers straight in the eye. The documents at his disposal are gone with him."* In his remarks to various outlets in the press, he said he thought Mahmut Yıldırım, code-named Yeşil, killed his father.[26]

■ As of the date this report, no suit has been brought in regards to the death of Colonel Kazım Çillioğlu.

■ According to the official interpretation, the statute of limitations will expire on 3 February 2014.

26 milliyet.com.tr/ Babam Yeşil ve Bozo ile sürtüşüyordu (*My Father Was In Strife With Yeşil and Bozo*), www.milliyet.com.tr http://gundem.milliyet.com.tr/babam-yesil-ve-bozo-ile-surtusuyordu/gundem/gundemdetay/09.04.2012/1525632/default.htm, accessed 19 March 2013

THE SUSURLUK CASE AND THE RELATIONS AMONG THE STATE, THE MAFIA AND THE POLITICIANS

Politically-motivated Enforced Disappearances and Unsolved Murders

On 3 November 1996, Sedat Edip Bucak, a member of the parliament from the True Path Party (Doğru Yol Partisi – DYP) representing the province of Şanlıurfa; Hüseyin Kocadağ, former Deputy Chief of İstanbul Police Headquarters and the Principal of the İstanbul K. Eröge Police Academy; Abdullah Çatlı who carried a fake ID as "Mehmet Özbay", and Gonca Us were involved in a suspicious traffic accident in the Mercedes sedan, license plate 06 AC 600, owned by Bucak in the Çatalceviz area that is part of the Susurluk district.

The accident led to deaths of Hüseyin Kocadağ, who was in the driver's seat of the vehicle with the license plate 06 AC 600, Abdullah Çatlı who had a fake ID as "Mehmet Özbay", and Gonca Us. Member of Parliament Sedat Bucak survived with injuries.

In the aftermath of the accident, it was discovered that the vehicle's trunk contained a small cache of weapons. Recovered from the trunk were machine guns, pistols and cartridges, silencers, hundreds of bullets for various brands of guns, cell phones, ID cards from various hospitals, the TBMM vehicle pass card belonging to Sedat Bucak, portable computing devices, credit cards, 19 different types of cleaning supplies, searchlights, fake license plates and other items that could be used in an assassination.

It was discovered that Abdullah Çatlı, who died in the accident, used a fake ID showing him to be an expert employed with the Security General Directorate and bearing the name Mehmet Özbay. This card was signed by Chief of Police Mehmet Ağar. In addition, high amounts of foreign currency and Turkish lira, credit cards issued by various national and international banks, an İstanbul Chamber of Commerce Member Card, and a fake driver's license bearing the name Mehmet Özbay were found on the person of Çatlı.

Following the accident, Kutlu Savaş, Chair of the Inspection Board of the Prime Ministry, the National Intelligence Agency, and the TBMM Commission to Investigate Susurluk all drafted reports on the relations among the state, the mafia and politics as disclosed by the accident. The reports were debated by the public for years.

A decision was made to keep confidential a portion of the report drawn up by Kutlu Savaş, Chair of the Inspection Board of the Prime Ministry, on the grounds that it discussed state secrets. Yet, the information in that section was later published in various outlets in the press and some of the information was included in the annexes to the Ergenekon case.

In the Report in question, MİT was accused of using Yeşil and hiding Çatlı. The report included the phrase, *"It would be understable for a reputable organization such as MİT to use disreputable individuals; however, being close with them to the point of friendliness and cooperation is something that warrants an explanation."*[27]

The sections of the Report which were not published on grounds of state secrecy, but which were later reported in the press, discussed the political murders committed by the state, unlawful acts, and the relations among bureaucrats, military officials, police officers, and informants. These sections included statements such as *"Behçet Cantürk was killed by the police, several individuals of Kurdish origin were executed, it was right for them to be punished but the effect of certain killings was miscalculated", "Abdullah Çatlı was commissioned against the ASALA by Hiram Abas on behalf of the MİT and with permission from Kenan Evren, upon his return*

27 Milliyet daily website, story titled "Kutlu Savaş Devlet Sırrını Ele Verdi" (*"Kutlu Savaş Discloses State Secret"*), http://www.milliyet.com.tr/2008/01/26/guncel/axgun01.html, accessed 27 April 2013

he enjoyed protection by the Security General Directorate", "Together with Veli Küçük, he used JİTEM informants and promoted him to group commander. There were executions based on orders from superiors. These men later committed murders for personal reasons."[28]

The report drawn by MİT stated that, while as an organization MİT did not receive any information, the consideration of the news stories reported in the press shows that important relationships existed among the individuals mentioned as part of the allegations, namely Tansu Çiller, Özer Çiller, Mehmet Ağar, Haluk Kırcı, Sedat Bucak, İbrahim Şahin, Korkut Eken, Hüseyin Baybaşin and the deceased Abdullah Çatlı, Ahmet Cem Ersever and Tarık Ümit. These relationships were important and they need to be examined.[29]

According to the allegations which deserve examination based on the reports , *"True Path Party Chairwoman Tansu Çiller set up a 'Special Criminal Organization' comprised of certain officers of MİT and the police as well as nationalists. The Çiller Special Organization, known as the 'special bureau' by its members, has links to the CIA and MOSSAD."*

The report offers the following with respect to allegations concerning the structure and membership of the organization: "Comprised of 700 individuals, the Special Bureau includes True Path Chairwoman Tansu Çiller, Özer Çiller, Mehmet Ağar, MİT Deputy Undersecretary and anti-Terror Department Head Mehmet Eymür, Retired Colonel Korkut Eken, Special Operations Department Head İbrahim Şahin, nationalist mafia chief Alaattin Çakıcı, and Abdullah Çatlı."[30]

f) Manipulating/Threatening Witnessses

The analysis of the data shows the following:

Relatives of the disappeared were subjected to psychological pressure. Witnesses were both kept under pressure and manipulated.

One of the most remarkable examples in this regard includes the testimony given by former Cizre District Governor Emir Osman Bulgurlu, who was called as a witness in the case where seven defendants, including Colonel Cemal Temizöz, former commander of Kayseri Gendarmerie Command and former Cizre Mayor Kamil Atağ, were being tried.

Bulgurlu served as District Governor in Cizre between 1993 and 1994. In the testimony he gave in the case, with case number 2009/470 E., tried before the Diyarbakır 6th High Criminal Court, he stated that he had no information on the abductions in "White Renault Toros vehicles", enforced disappearances, tortures or political murders of people during the years he served in Cizre. In his responses to the questions posed to him during cross-examination by the case lawyers, he was observed to be distressed. While he hesitated in his responses to questions by complainants' lawyers, Bulgurlu appeared at ease when responding to the lawyers representing the defendants. The reason for this became clear later.

Witness Osman Bulgurlu told the Presiding Judge that he was sent an anonymous letter which provided information and direction on how he should give testimony in the hearing. Bulgurlu's statements were seen to be almost exactly in line with the letter.

The letter opened with the line,*'Esteemed Governor, thinking that your knowledge will be sought, we considered it appropriate to remind you of certain matters describing the general situation in Cizre at the time you served there between 1993 and 1994, since you might have forgotten them.'* It continued, *'This information*

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28 Taraf daily website, http://www.taraf.com.tr/haber/12-yasak-sayfa.htm, accessed 27 April 2013

29 The Prime Ministry – National Intelligence Organization Investigation Report, http://akgul.bilkent.edu.tr/Dava/susurluk/mit/, accessed 27 April 2013

30 Vikipedi – Susurluk Kazası (The Susurluk Accident), http://tr.wikipedia.org/wiki/Susurluk_kazas%C4%B1, accessed 19 March 2013

includes the issues Colonel Cemal indicated during the discussions held with him.' In the letter, witness Bulgurlu is instructed, if questioned at the hearing, to say *'the District Gendarmerie Command did not have any civilian vehicles", "he did not hear or know of informants being used by the gendarmerie', 'he did not know any individuals named Yavuz, Selim Hoca and Cabbar'*, and to mention *'the PKK attack against the Office of the District Governor'.* The letter further instructed him to testify by saying *'he was very sad to see that individuals whom the state should be grateful to were being tried, as a district governor he thought this was a conspiracy, if peace was brought to Cizre step by step at that time, this was only thanks to the work of Captain Cemal'.* The Court resolved to lodge a criminal complaint with the Diyarbakır Chief Public Prosecutor's Office in regards to the said letter.[31]

The Report of the TBMM Commission to Investigate Unsolved Murders pays special attention to the condition of witnesses, and establishes the following in this regard: *"Although there are allegations that the unsolved murders in the region were frequently committed by the state, interviewees were not able to provide concrete evidence and information on the issue. When asked why they thought it is the counter-guerrilla that committed these acts, they claimed that the acts were always committed in the same manner, the behaviors were as if they were being coordinated centrally and given the way in which the slain were killed, it is an authority within the state that committed the acts."*[32]

The TBMM Commission report suggests as follows on page 34:

"Because there is intense propaganda in support of the allegation that the unsolved political murders were committed by the state, and given that citizens who initially served as witnesses to shed light on these murders were themselves killed in unsolved murders, people are not testifying.

Individuals offering witness testimony to the state are quickly disclosed and they, as stated above, quickly become victims of unsolved murders. Killings occur in the busiest areas of town, and in the case of murders committed in a coffee-house with 20-30 people in attendance, people are scared to testify even when their next-of-kin and relatives are killed."[33]

31 Milliyet daily website, story titled "Temizöz davasının tanığı vali: Bana ifade mektubu geldi" (*Governor, a witness in the Temizöz case: I received a letter about how I should testify"*) http://gundem.milliyet.com.tr/temizoz-davasinin-tanigi-vali-bana-ifademektubu-geldi/gundem/gundemdetay/20.02.2011/1354570/default.htm, accessed 27 April 2013

32 Report of the TBMM Commission to Investigate Unsolved Murders pp. 33-34, http://www.tbmm.gov.tr/sirasayi/donem19/yil01/ss897.pdf, accessed 27 April 2013

33 Report of the TBMM Commission to Investigate Unsolved Murders p.33, http://www.tbmm.gov.tr/sirasayi/donem19/yil01/ss897.pdf, accessed 27 April 2013

E. Losing Hope That There Will Be Justice

The legal data analyzed establish the fact that there were 'individuals/institutions that could not be touched and are impossible to investigate'. The relatives of the disappeared agreed with this fact in its entirety, did not have any trust in the state, the judiciary, or the judicial bodies.

After Ayhan Çarkın, a former police officer at the İstanbul Police Department, confessed that a certain person was killed by torture, buried and disappeared as such, the Prosecutor's Office claimed it was unable to prosecute due to the expiration of the statute of limitations, rather than adding further depth to the investigation. The brother of the disappeared person expresses his feelings about this as follows:

"Now, this is quite a paradox we're facing; The murderer says he did it, we say, yes we know the murderer, and we're the victims. So, for the first time both the criminal and the victim say the same thing, yet the mechanism does not operate, the system does not move. This in my opinion is a tragicomic situation... If the state wanted to solve the issue, I think it could do so very easily. But when you look at it as a sign that some organizations within the state are still surviving, then the situation becomes clear. That is, there are untouchable places, and they have a policy to not let their men go.

... I don't think anything concrete will happen, because, as in the last move by the Prosecutor's Office, it is as if they say, let things run their natural course. Letting it run its own course, that's what happened. They could have moved differently against Ayhan Çarkın, and if the state wanted, it could have obtained a lot of leads and made great strides as a result. Because there are others who make you feel that they too are in a position to provide information. But then, looking at the sentence Mehmet Ağar received recently, this all shows that the policies of the state will lose their value. It'll be a fait accompli, they will hush up the matter eventually."

Another relative of a disappeared person expresses her feelings as follows:

"... At that time, it was Tansu Çiller who was in charge of all this. That is, Tansu Çiller and Mesut Yılmaz, it was them. All of this Ergenekon organization was at their disposal, that is they were inside the state...

... They ate at the same police station which they would leave to disappear people, and then they came to back to sleep there. They were disappearing people like Nezir ... These are the people responsible for these disappeared persons. At that time Tansu Çiller was the Prime Minister, for example, she was in government. We want the state to bring those who treated our brother like that before justice, we want the state to investigate them ... If the state wishes, it can find our brother, that is, the bodies in twenty-four hours. But it doesn't. If it did, like if we were talking about the son of the Prime Minister or the President, or a member of parliament, they would then find the body in twenty-four hours. The case of our brother is clear, but they say 'he was killed in the mountains, we don't know where his body is'. There are witnesses, there are people caught together with him and then taken to the police station. Who was in charge there in the fourth month of 1992? The identity of the senior military people, the battalion commander are all well-known! It's all quite clear, but because we're Kurds, the state does not want to solve any of our issues."

F. Obstructing the 'Claiming of Rights' with Psychological and Physical Barriers

The data analyzed and the recorded narratives lead to the following idea:

To prevent relatives of the disappeared from having recourse to judicial authorities, the police and the gendarmerie implemented various methods of oppression, and the search for justice was precluded in a psychological, physical and economic sense.

In a recording on file with Truth Justice Memory Center, a relative of a disappeared person describes his experience in that period as follows:

"... There were these teams in Dargeçit, they knew his name (referring to the forcibly disappeared person)... That is, M.K. and K.S. are responsible for his detention. Those two detained our brother out in the open... M.K. and M.Ş. know the location of our brother's body... They were on watch that night, those two disappeared him that night ... We know he was tortured for three days, because it was reported that 'they heard his voice'. They were torturing him and they disappeared him after three days... The houses in the vicinity –the village of Xelia-... they are in central Dargeçit... In fact, some houses adjoin the yard of the battalion... People from those houses said 'until three days ago, there were sounds', 'there were screams, meaning they were torturing him by electrifying him'.

Later, one of my uncles went to Germany some 9 or 10 years ago. He met a young guy there, we don't know that guy yet. He told our uncle, 'Back in 1992, I was responsible for making tea there'. He added, 'I was serving tea to the soldiers inside the battalion' and 'one of the soldiers told me that they threw Nezir Acer in the furnace'. Remember, they had central heating at that time. The guy said 'they told me they threw Nezir Acer in the furnace and burned him in there'.

We trust in God, some villagers say, 'this is what they did at that time, when the soldiers killed a guerrilla, they would cut up the body into pieces, they used to do extremely disgusting things to them... They were not giving the bodies back to the people, they were throwing them in wells... So my dad went to the Fındıklı village and told them 'I want to see my son's grave' (referring to forcibly disappeared person's brother who joined the PKK). At that time the roads were not safe, people were scared... They took the body to the station... The head of the village tells my dad... The chief of the station told the story to the head of the village and said 'we brought his body back to the station, undressed him and set the dog on the body'... They swore that 'the dog did not go to the body'... They were setting the dogs on them, so that the bodies could be defiled... They said 'they set a dog on his body, too'... My brother was young, he was seven or eight years old, he used to take the sheep to the pastures, but he would always have his water pitcher with him, so he could perform his ritual ablution for prayer... He used to recite the Koran... When he left, he was actually 12 or 13 years old... He was too young when he went to the mountains, he did not look mature... his index finger was raised even when he died... The battalion commander then called the headman and told him 'go call the imam, take his body and clean it carefully, and then bury him in the cemetery'. And the villagers said, 'this is how we buried your brother'...

... After these incidents (referring to Nezir and his brother who was killed), we were then thought of as criminals, the soldiers were always on us... Many times, they would be at our door in two or three a.m... They were just knocking on the door and not saying anything...They were coming for no reason and opening the door... Once, they came and kept knocking on the door for quite a while, I didn't answer it right away and my uncle was asleep. 'It must be the soldiers', I thought. I was scared, and I didn't want to wake him up... They knocked on the door again, my uncle was still in

bed, all of a sudden a few men showed through the door and came inside... They were in and my uncle was still asleep, they told him, 'why do you say they took my son forcibly, see your door is open, I knocked it a little bit and it fell right here, but you didn't bother waking up and you didn't come here to see what was going on... If it were the PKK, you would be by their side quickly... They beat up my uncle so badly that I don't know for how many days he couldn't stand up... So, after the incidents we were never at ease... And then we moved to Dargeçit... thinking that we can't go on like that in the village...

... We've been in dire poverty and terrible circumstances... I would go cotton-picking with my baby with me... There was no one to take care of us, the baby would be with me all day... I don't know that if anybody else had it worse and more difficult than we did."

Yet another interview excerpted below shows quite clearly the grave consequences of the unlawful conduct toward the families of the disappeared as they were pursuing their rights.

On 29 October 1995, a mother's two boys, one thirteen and the other fourteen years of age, were detained, and one of them was released later, while the other was never heard from again. The mother of the disappeared experienced the following, as was narrated by the son who had been released:[34]

"... So my mother went to the battalion and said 'give me my son'... They responded, 'we let him go and he went to the mountains'... My mom said, 'you're lying, he just came (referring to her son who was released), you beat him up, give me my other son, too (now referring to her forcibly disappeared son)... She then went to the Dargeçit Prosecutor right away and lodged a complaint. The Prosecutor first told my mother that 'they are in the battalion', and later he said 'they took them to Mardin', and finally he said 'I don't know anything, they are not giving me any information'... My mother then went to Midyat, lodged a complaint, came back, and then they detained her. They said, 'why do you lodge a complaint, don't look for your son, we let him go and he went to the mountains'... They released my mother, she went to Mardin without coming home... She just kept searching all the time... Honestly, at that time she bribed a lot of people connected with the state, just so she could get some news and get a lead. My mother then went to Diyarbakır. There was the Özgür Gündem daily at that time, she spoke to that daily and then gave an interview on Med TV...and said 'I want my rights from the state'. After she said that, it was her turn to disappear. Twenty-three days later, she came out of the torture chamber in Mardin... At that time, the mayor was also in custody in Mardin. So they brought my mother from Mardin together with the mayor... They kept her in cold all the time, kept her in cold rooms... Later, my mother had surgery, the physicians said, 'her lungs were in terrible condition, they are not functional'. They operated on her... She was last hospitalized in Çapa in 2000, she stayed there for ninety days, they didn't give her anything to eat or drink for seventy-five days, just the IV... She then passed away".

The analysis of case data and the narratives of the relatives of the disappeared show that the judicial authorities, namely the prosecutors and the judges, did not facilitate or encourage the families' pursuit of justice throughout the proceedings.

When asked how judges and prosecutors treated them and what their attitudes were like, a relative of a disappeared person responded as follows:

"Their treatment was very harsh, it is as if they make you feel you're criminal... They always act in a discriminating manner, the police acted that way, they are acting together, they are acting like a gang, and they keep referring to special forces...

... I had the same experience there, too. I brought suit there, as well. For that, I went to the Public

34 For the specifics of the incident, see the case of Seyhan Doğan and others in Mardin, Dargeçit

Prosecutor's Office and gave testimony... Each time, I said they were acting in concert, I wanted to sue for organizational conduct, I did not want to sue for monetary or property loss. The Chief Public Prosecutor's Office took my testimony three times. Supposedly, some sort of mistake was made in one of them, they gave an excuse like 'that guy shouldn't have signed it, we have to take testimony again'. And then the courthouse moved to a different place, and they said, 'we have to take it again'. I see a pattern in all of this. I stressed that I wanted a lawsuit for organizational conduct... You see the same thing all over, the state has the policy of 'I'm not letting my men go down', the state is shielding them greatly...

... It is as if the Prosecutor's Office, the police, special forces, the law enforcement are members of the same team, they have this attitude that is protective of their own kind and they act in solidarity with one another.

That feeling is what demoralizes you... You became even more concerned about both the state and democracy, and you lose faith...

... That is, I should not be the one pursuing the rights of my brother, it's the law that should do it. The prosecutors, judges, judicial authorities of this country, it's they who should pursue those rights. The government bureaucracy should do so... This is their public responsibility... If this is a task we continue to take care of, then that means something is wrong and things are going badly here.

Why should the Saturday Mothers still have to bear burden of bringing proof that their relatives disappeared or finding the perpetrators of unsolved murders? These people have been here for thirty years. If we are trying to say that the state and the society are now beyond a threshold, there should be concrete indicators of that. Making the steps toward that is really not a problem."

G. The Perception of a 'Tyrant State / Dependent Judiciary'/ The Expectation of Reparations and Apology

The main demand of the relatives of the forcibly disappeared is the determination of the fates of the disappeared, the finding of their bones and the identification of their graves.

When asked about their feelings and opinions on the compensation of their losses and the prospect of apology, the relatives' expectations are different within these two categories. For families in the larger category, the payment of damages is not a matter of primary importance. What is essential is the issuance of an apology and admission of the grievance. One of the relatives of a disappeared person expressed these feelings in the following words:

"In my opinion, what matters most is an apology. It will be a sign showing that the state, which we once called the tyrant state, has now moved beyond tyranny and acquired a modern character, and the mechanisms of justice and the law operate independently. All that is required for the Saturday Mothers and with respect to all unsolved murders and other crimes of the state is only an apology.

If they say 'we acknowledge that wrongs were done as part of that structure and we are now reckoning with that and admitting our guilt', and if the state –the current government or whatever lawful authority- says we are apologizing on behalf of the state, that will be a moment when we have moved beyond a threshold in my opinion.

Other than that, we do not have a further expectation, compensation or whatever, that's not what we are expecting."

For families in the second, smaller category, there is an expectation for both an apology and the payment of damages to compensate for their suffering.

The analysis of the data suggests that the individuals who were forcibly disappeared usually had a leading role in their respective communities, were trustworthy, well-liked, of adult age and responsible for the subsistence of their families.

After enforced disappearances, relatives of the disappeared not only suffer pain due to losing a loved one, but in addition, they are deprived of the material and moral support of the disappeared person. They also have to assume additional burdens in the form of inquiring about the fate of the disappeared person, seeking a legal remedy, and retaining counsel. Because of the threats and the fear, they change their place of residence and abandon their homes, workplaces and means of subsistence. Considering all these factors along with the conditions of poverty which families of the disappeared experience, major additional difficulties arise, which then leads to an expectation of compensation for the damage.

RECOMMENDATIONS

■ The Grand National Assembly of Turkey (Türkiye Büyük Millet Meclisi – TBMM) should establish an independent truth commission to identify the individuals responsible for human rights violations, political murders, and enforced disappearances since the period following the 12 September military coup, and to ensure that those individuals are held accountable.

■ To bring an end to the de facto 'impunity' that has emerged, the government should take necessary legal and administrative measures to remove all legal barriers that prevent responsible parties from being held accountable. These barriers include the problem of statutes of limitation, the law on state secrets, and the laws predicating the trial of government employees on official permission. The state must effect the necessary regulations.

Investigations are incomplete and inadequate rarely lead to a lawsuit. Trials are not concluded in a reasonable time frame and are obstructed by the statute of limitations. Punishments are awarded on the basis of articles concerning 'misconduct in office' or 'excessive use of force' and they are deferred, and punishments are ultimately not executed. Thus, necessary legal and administrative mechanisms must be created to ensure fair and expeditious investigations and the execution of punishments, and political measures are required to ensure a judicial practice in which the tradition of protracting trials involving suspected criminal conduct by government employees is brought to an end and citizens are encouraged to seek justice.

■ Because law enforcement is 'the state institution granted the monopoly of using violence under the law', legislation must specify in detail how law enforcement agencies with this monopoly will exercise their powers and how they will be held accountable when they go beyond their powers. This legislation must be enforceable.

■ To halt the mentality characterized by 'I'll pay the damages, and then I'll torture, I'll practice enforced disappearance or I'll kill', government employees responsible for rights violations should additionally be held personally responsible at all levels for all of their actions, negligence, and the orders they give, and there must be oversight to ensure that they are held accountable.

On-the-job trainings for law enforcement must be developed, in which independent human rights organizations will also participate. These trainings must emphasize a perspective of acting lawfully and they must be aimed at bringing about a functioning system. The following are particularly important in this regard:

■ Effective mechanisms should be created for an independent and strong judiciary, trials should be expeditious and efficient, and the judgments rendered must be executed.

■ In order for investigations to bear fruit in the case of acts connected with state such as politically-motivated murders, abductions and enforced disappearances, prosecutors and judges in charge of these investigations should be exempted from hearing ordinary cases.

Facilities should be provided and legal measures should be taken to allow prosecutors and judges to conduct judicial practice that is free from political, administrative or military pressure, and which is independent and impartial.

■ The High Council of Judges and Prosecutors must conduct periodic on-the-job trainings to ensure that judges and prosecutors master the legislation and jurisprudence derived from international conventions and that the quality of judicial practice is enhanced,

■ The Witness Protection Program and anonymous witness service must be rearranged by taking international experience and the problems in local practice into consideration,

■ Steps must be taken to ensure 1) the prevention of deterrent counter-complaints after relatives of the disappeared lodge complaints against law-enforcement officers and 2) the avoidance of suits brought on the basis of such articles relating to 'using force and violence against a public official to prevent him from performing his duties' or 'attempting to manipulate the proceedings' and similar articles, and 3) the right to impartial and fair trials must be guaranteed,

■ Government employees implicated in rights violations should be removed from office or assigned to another office, and they should not be promoted or rewarded, while the investigation is pending,

■ Although the investigations concerning law-enforcement officers must be conducted directly by the Prosecutors, they are in practice conducted by the law enforcement instead of the prosecutor, which creates the obvious risk that the evidence might be destroyed; thus, the power and independence of prosecutors must be reinforced, and the problem of judicial police must be addressed,

■ As the Ministry of the Interior planned and declared previously, an independent police complaint mechanism must be set up and rendered functional,

■ The state must share its archival information with judicial authorities and the relevant nongovernmental organizations in the case of investigations on political murders and enforced disappearances, and these investigations should not be obstructed on grounds of state secrecy,

■ The state must involve the relatives of the forcibly disappeared in the investigation process and inform them about the conclusions of trials,

■ **Relatives of victims must be provided rehabilitation and compensation facilities, and steps must be made toward payment of damages,**

■ **Official detention records must be kept in a reasonably timely and accurate manner. The law must explicitly specify the relevant time frames and establish sanctions for non-compliance,**

■ **In consideration of the obligations under domestic and international treaties, regulations must be effected and implemented to allow for the monitoring of detention locations by independent monitoring bodies,**

■ **The United Nations International Convention for the Protection of All Persons From Enforced Disappearance must be signed and implemented.**

ENFORCED DISAPPEARANCES IN INTERNATIONAL LAW

PROF. GÖKÇEN ALPKAYA

Costa Gavras' film *Missing*, which shared the Golden Palm award with Yılmaz Güney/Şerif Gören's *Yol* in the 1982 Cannes Film Festival, uses dramatic language to depict, for a popular audience, a common practice in Latin American states from the late 1960s through the 1970s. The 1980s represented an era in which this particular practice spread to different parts of the world and an opinion emerged that international cooperation was required to combat it. International instruments began banning the practice in 1990s, while in Turkey it became one of most favored tools in the "fight against terrorism". While international awareness and will with respect to this practice made it possible to introduce an absolute prohibition in the 2000s, Turkey was only then learning, for the first time, from the judgments rendered by the European Court of Human Rights (ECtHR), the details of her own implementation of the practice. Finally, around the year 2010, while some countries in the world were coming to terms with it and others were getting newly introduced, political and social conditions for a reckoning with the practice appeared to be coming out in Turkey.

We are still, however, far from a full-fledged reckoning. Only when the entire society, including perpetrators, recognizes this practice can such a reckoning be possible. For that, knowledge of the concept must be provided; in other words, one needs to know what constitutes the phenomenon elusively referred to as the "practice" above.

Let us start with the nomenclature. While the Nazis are generally considered to be the first to have implemented this practice, it is the organizations in Latin America that initially identified it and put it into concrete terms; therefore, the original name given to this practice is a Spanish word: *desaparición*. The English equivalent of that term is *disappearance*, and it is known as *disparition* in the French language. Its lexical meanings include to become lost, vanish, go out of sight -- as in an object becoming lost, someone getting lost, or someone no longer being seen in places and environments where he/she would habitually be seen, or someone or something going out of sight. Yet, because this word is too general to describe the practice in question, a special term is needed to qualify it. The practice is known as *desaparición forzada* in Spanish, *forced* or *enforced disappearance* in English, and *disparitions forcees* in French.

As in many other fields, concepts in the field of human rights have come into being only through translation in Turkish; in other words, they are not original to the language but instead transferred to it. In Turkish, the practice is referred to with different wordings such as *"kayıplar"* (missing), *"kayıp kişiler"* (missing persons), *"gözaltında kayıplar"* (missing in detention), *"zorla kaybetmeler"* (forced disappearances), or *"zorla kaybedilmeler"* (enforced disappearances). However, the practice in question is not one that relates to a domain of a freedom; rather, it concerns a prohibition. Thus, it is necessary to understand that the variation in the wording is no cause for celebration, as it does not present a richness but on the contrary, it is an obstacle before the comprehension of the concept. As noted above, if a reckoning with this practice is what is desired, then more light needs to be shed on the nomenclature applying to the concept. To do that, it will be useful to first refer to an agreed-upon definition of it:

"...is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law..."

This definition alone is enough to lay bare that the practice in question is not a simple matter of "disappearance", "missing", "missing in detention" or "enforced disappearance". This is because we have before us an act in which the subject is not an individual, but a state. One should not confuse this with a situation where the "disappeared" individual walks away voluntarily, is held by another

individual or individuals for personal reasons, went out of sight because of an accident or natural disaster or even, for instance, participated in a "witness protection program", leading to a consideration that the individual "disappeared" at his own will. While in such situations the "state" can only be indirectly responsible, in the practice we mentioned above it bears direct responsibility. Therefore, it is neither accurate nor proper to employ vocabulary that would mitigate or ambiguate this responsibility. Similarly, phrases that relate the practice only to detention have an element missing, and are thus inaccurate. In sum, it is an obligatory first step to name this practice as "enforced disappearance" or "enforced disappearance of persons" and individuals subjected to this practice as "forcibly disappeared persons" to be able to comprehend the concept.

Second, if we are to employ legal instruments in this reckoning, we need to know what those instruments are. In that regard, it is first necessary to show clearly the domains of international law that legislate the ban on enforced disappearance. In fact, the ban on enforced disappearance is within the purview of three separate domains in international law and the rules that apply to it vary significantly as regards both the definition of the practice and the establishment of responsibility. Furthermore, because international law is essentially based on "international" treaties, the governing rules do not automatically give rise to legal consequences with respect to states that are not party to the treaties in question. It is not easy to enforce rules that are rooted in precedents, either. Nevertheless, knowledge of these rules is required both for ensuring efficient implementation of existing national legislation and creating an effective pressure to cause the state to become a party to the relevant international treaties.

This article seeks to offer a contribution in this regard by discussing enforced disappearances in the context of the three domains referred to above, namely international human rights law, international humanitarian law, and international criminal law.

I. Enforced Disappearances in International Human Rights Law

As noted in the introduction, there was no normative basis other than the norms of general human rights and humanitarian law for the struggle against the practice of enforced disappearance, which began emerging and spreading in the 1970s. Nor were most of the general international protection mechanisms available today operational then. Still, concerns that arose as a result of the violent and widespread character of enforced disappearances led to the creation of the *Working Group on Enforced or Involuntary Disappearances* by the United Nations Commission on Human Rights as early as 1980.

As the first and longest-standing unit of the 36 "thematic mandate" procedures categorized as "special procedures" by the Commission on Human Rights (replaced by the United Nations Human Rights Council as of 2006), the *Working Group on Enforced or Involuntary Disappearances* (hereafter, the *Working Group*) is still surviving. The *Working Group* is not an organ receiving individual petitions in the conventional sense – instead, its main tasks are to provide a channel of communication between the relatives of forcibly disappeared individuals and governments, and to reveal the fate of the forcibly disappeared through methods such as urgent appeals and country visits.[1] With the adoption of the 1992 Declaration, the mandate of the *Working Group*

1 It is reported that between its inception and 2013, the Working Group was notified of approximately 54,000 cases, and within that frame it transmitted 182 cases of enforced disappearances in Turkey to the government, 60 of which still remain as open cases, with the total number of open cases from 84 countries standing at about 43,000: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.45_English.pdf For information on the Working Group's visit to Turkey in 1998, see: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/053/03/PDF/G9805303.pdf?OpenElement

was expanded to monitor the implementation of the Declaration.

The *Declaration on the Protection of All Persons from Enforced Disappearance* (hereafter, the *Declaration*), another milestone in the international fight against enforced disappearances, was adopted by the UN General Assembly on 18 December 1992.[2] Like the *Universal Declaration of Human Rights*, the *Declaration* is not a legally binding instrument, and also like the *Universal Declaration*, it left its imprint on subsequent eras: The definition in the preamble of the *Declaration*, provided as if in passing (but in fact reflecting the experience of the *Working Group*), as well as its other articles, established the basis for binding documents –that is the treaties– that came later. The first of those treaties is the *Inter-American Convention on Forced Disappearance of Persons* (hereafter, the *Inter-American Convention*), which was drawn up within the framework of the Organization of American States (OAS) and took effect in 1996.[3] Both organized political/social action and the fact that the organs of the Inter-American Convention on Human Rights developed a far more advanced jurisprudence than comparable organs (for instance, organs of the European Convention on Human Rights) probably had a role in the making and adoption of the first treaty on this subject in a geographical region where enforced disappearances were fairly wide and frequent.

The *Inter-American Convention* was followed by the *Statute of the International Criminal Court* (hereafter, the *ICC Statute*) which rendered enforced disappearance more than a violation of human rights for which states are liable and made it an international crime resulting in individual criminal liability. Adopted in 1998, the *ICC Statute* went into effect in 2002, and as a result enforced disappearances became the subject matter of international criminal law in addition to human rights law and humanitarian law.[4]

The most comprehensive step regarding enforced disappearances, however, was the *International Convention for the Protection of All Persons From Enforced Disappearance* (hereafter, the *International Convention*) which was opened for signature in 2006 by the United Nations and entered into force in 2010.[5] The definition quoted above in the Introduction is the one provided in this convention. In addition to offering a normative framework regarding enforced disappearance, the Convention also contemplated the establishment of a Committee with a mandate to monitor the enforcement of the articles of the Convention. The *Committee on Enforced Disappearances* took office in 2011.[6] In light of the bird's eye-view discussion above, we can now proceed to the specific details of enforced disappearance, noting that "no

2 For a general assessment of the Declaration, see Gökçen Alpkaya, "Kayıp'lar Sorunu ve Türkiye" (*"The Question of the Disappeared and Turkey"*), AÜ SBF Dergisi (*Journal of the Ankara University School of Political Sciences*), Prof. Dr. Turan Güneş'e Armağan (Tribute to Prof. Turan Güneş), Vol. 50, Issue 3-4, 1995, p. 31-63.

3 For the text of and parties to the Convention, see http://www.oas.org/juridico/english/treaties/a-60.html. For a Turkish translation of the Convention, see Mehmet Semih Gemalmaz, Ulusalüstü İnsan Hakları Hukuku Belgeleri (*Supranational Human Rights Documents*) Vol. 1: Bölgesel Sistemler (*Regional Systems*), İstanbul, Legal Yayıncılık, 2011. Also see Mehmet Semih Gemalmaz, Ulusalüstü İnsan Hakları Hukukunun Genel Teorisine Giriş (*Introduction to the General Theory of Supranational Human Rights Law*), Vol. 2: Expanded and Updated 8th Edition, İstanbul, Legal, 2012, p. 418-425.

4 About the ICC, see R. Murat Önok, Tarihî Perspektifiyle Uluslararası Ceza Divanı (*The International Criminal Court in Historical Perspective*), Ankara, Turhan Kitabevi, 2003; Durmuş Tezcan, Mustafa Ruhan Erdem and R. Murat Önok, Uluslararası Ceza Hukuku (*International Criminal Law*), Ankara, Seçkin Yayıncılık, 2009.

5 For the text of the Convention, see http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx For parties to the Convention, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en For a Turkish translation of the Declaration and the Convention, see Mehmet Semih Gemalmaz, Ulusalüstü İnsan Hakları Hukuku Belgeleri (*Supranational Human Rights Documents*) Vol. 2: Uluslararası Sistemler (*International Systems*), İstanbul, Legal Yayıncılık, 2011. This study relied on the Gemalmaz translation. While an unoffical Turkish translation is available from İnsan Hakları Ortak Platformu/İHOP (*Human Rights Joint Platform*), it includes serious mistakes, see http://www.ihop.org.tr/index.php?option=com_content&task=view&id=490

6 About the Committee, see: http://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx

exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance"[7] and similarly "no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance."[8]

1. THE ACT

Based on the definition in Article 2 of the *International Convention*, we can say the act of enforced disappearance involves two main elements: Depriving a person of liberty and placing the person outside the protection of the law.[9] Therefore, these two elements are both necessary conditions for there to be a mention of an enforced disappearance.

a. Deprivation of liberty

The *Convention* identifies deprivation of liberty as the main element of the act of enforced disappearance and lists the methods by which the act is realized:

- Detention;
- Arrest;
- Abduction;
- Any other form of deprivation of liberty.

As can be seen, this is not an exhaustive listing; in other words, the act of enforced disappearance comes into being when a person is deprived of his/her liberty in any form in addition to detention, arrest or abduction, as long as the other element of the act is also present. In fact, the *Inter-American Convention* directly provides "the act of depriving a person or persons of his/her or their freedom, in whatever way" for the definition of enforced disappearance, without referring to detention or arrest.

This makes it quite obvious that there is more to enforced disappearance than, for example, "disappearance in detention". At risk of repetition,

7 ***International Convention*****, Article 1.2.**

8 ***International Convention*****, Article 6.2.**

9 In fact, the Working Group provides a definition of enforced disappearances that has three elements: deprivation of liberty; the involvement of state officials and the refusal to give information on the fate and whereabouts of the disappeared person, see Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc E/CN.4/1996/38 (15 January 1996), par. 55, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/102/18/PDF/G9610218.pdf?OpenElement. There is debate in the literature as to whether or not "placement outside the protection of the law" constitutes a fourth element. While the elements of the definition are undoubtedly important in respect of the legal consequences it will give rise to, these and similar issues will not be discussed for the purposes of this article.

this is not a mere difference in phrasing; it is necessary to emphasize that this is a critically important difference, for it shows the nature of the practice we face: When this practice is not named in a way that also includes "deprivation of liberty in whatever way", there arises a serious obstacle before both perpetrators (and responsible parties) and victims, and in fact the entire society, coming to terms with it.

Yet another issue concerning this particular element is that whether the act of deprivation of liberty is a lawful one does not matter by itself. In other words, enforced disappearance may begin with a completely lawful detention or arrest, but it may also start, at the outset, with a detention or arrest that is unlawful in terms of merits or procedure. Neither possibility alone plays a determining role in regards to an act constituting enforced disappearance, because the distinguishing mark of the act of enforced disappearance –as noted above– is the availability of the two different elements. That is, in addition to deprivation of liberty, it is necessary for the act to include placement outside the protection of the law.

b. Placement outside the protection of the law

"Placing outside the protection of the law" is a concept emphasized in the *Declaration* almost to a persistent extent: It is referenced not only in the definition but Article 1 also specifies that any act of enforced disappearance places the persons subjected to that act outside the protection of the law. The concept is also mentioned in both the *International Convention* and the *ICC Statute*. Therefore, it is important to shed light on this critical concept which involves the violation of more than one right.

In the General Comment it adopted in 2011, the *Working Group* states that "placement outside the protection of the law" not only contemplates an official denial of detention and/or concealment of the fate or whereabouts of the person, but also, while the person remains deprived of liberty, she or he is (additionally) denied any right under the law, putting him or her in legal limbo and in a situation of complete defenselessness.[10] Recognizing that this leads to the denial of the disappeared person's legal existence and as a result prevents the person from enjoying human rights and freedoms, the *Working Group* characterizes "placement outside the protection of the law" as a "paradigmatic violation" of the "right to be recognized as a person before the law" directly, and stresses that the rights of the disappeared person's next-of-kin are also impacted in addition to the rights of the disappeared person.

However, a more comprehensive analysis of "placement outside the protection of the law" is necessary, and yet another important aspect of enforced disappearance as well as the relevant jurisprudence should not be ignored: Enforced disappearance of a person and the resulting placement of the person outside the protection of the law leads to the violation of the legal remedies available not just to the person in question, but to his or her relatives following this practice, and therefore to a violation of the "right to seek rights". Thus, it is necessary to consider that "placement outside the protection of the law" provides a broader protection than is available by way of the following phrase in the *Inter-American Convention*:

"...thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees..."

As a matter of fact, under the *International Convention*, "placement outside the protection of the law" comes into being "...by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person...", which extends to individuals in addition to the disappeared person, perpetrators and responsible parties. Finally, in support of this interpretation, Article 18 of the *International Convention* contemplates a

10 For the text, see http://www.ohchr.org/Documents/Issues/Disappearances/GCRecognition.pdf

guarantee that any person with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel shall at least have access to certain pieces of information.

In sum, we can say that "placement outside the protection of the law", as the main element constitutive of enforced disappearance, means the impediment of access to all remedies both the disappeared person and his or her relatives may resort to against deprivation of liberty.

2. PERPETRATORS

In fact, before even reaching the question of perpetrators, the two elements above suffice to demonstrate how enforced disappearance is not a simple offense, for instance, an ordinary abduction. No system of law would bother calling the abduction of a person or the murder of a person and the concealment of the body an act of "placement outside the protection of the law". Thus, in the case of enforced disappearances, there must be a power capable of keeping a person inside or outside the protection of the law. And that power is the state itself.[11] As a matter of fact, the *International Convention* lists the perpetrators of enforced disappearance as follows:

- Agents of the state;
- Persons or groups of persons acting with the authorization of the state;
- Persons or groups of persons acting with the support of the state;
- Persons or groups of person acting with the acquiescence of the state.[12]

When enforced disappearances become real, the distinctions above as well as the language used to express them remain ambiguous. Thus, the categories above need to be elucidated.

a. Agents of the state

Persons in this category are in fact "government employees", as they are commonly known in the Turkish language. Yet, the reference is not to all government employees, but only to those who have the authority to deprive a person of his liberty lawfully. It could be said that what is essentially referred to in this context are members of the general and special law enforcement forces.

However, it is necessary to consider the particular aspects of enforced disappearance. As noted above, enforced disappearance might originate not only from an unlawful deprivation of liberty but also a lawful detention or arrest. Thus, reducing "perpetrator" to law enforcement alone could be misleading in identifying enforced disappearance as a state practice. It is important to keep in mind that if an act of enforced disappearance began with a lawful detention or arrest order, as will be discussed below, not only the persons issuing the order but also those who implemented it could be held liable.

b. Others

The *Convention* offers an exhaustive and comprehensive list of persons who may take part in the implementation of this "state practice" even though they are not government employees directly. In fact, it does not seem possible for the state to be connected to enforced disappearance except through authorization, support and acquiescence. Yet, the contents of these concepts are not clear. For instance, what kind of transaction constitutes *authorization* and what is authorized; which acts and transactions constitute *support*; and at what stage *acquiescence*[13] begins and how long and until when it continues are questions to which

11 The difference in the ICC Statute in this regard will be discussed later below.

12 The Convention sets forth an obligation to take appropriate measures to investigate acts committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice (Article 3).

13 The word *acquiescence* also mentioned in the ICC Statute is sometimes translated as "bilgi" (*awareness*) (see Önok, op.cit. p. 161) or "onay" (*consent*) (see Mehmet Semih Gemalmaz, Ulusalüstü İnsan Hakları Hukuku Belgeleri (*Supranational Human Rights Law Documents*) Vol. 2: Uluslararası Sistemler (*International Systems*), İstanbul, Legal Yayıncılık, 2011, p.754) in Turkish.

answers are found in neither the *Convention* nor in its elaboration.[14] It is nevertheless possible to see why the *Convention* is silent on these sensitive questions because, unlike the *ICC Statute* which refers to identical concepts, the *Convention* is geared toward the determination of state responsibility and not individual criminal liability: as a matter of fact, ECHR jurisprudence on enforced disappearance cases holds, without reaching these intricate questions, that failure to conduct an effective investigation alone is reason enough to determine state responsibility.[15]

3. VICTIMS

The primary victims of enforced disappearance are the persons disappeared forcibly. However, because this is a practice that differs from comparable ones in that it impacts not only the forcibly disappeared but also their relatives, it is necessary to discuss forcibly disappeared and their relatives separately.

a. The forcibly disappeared

Without adding anything new to the norms referred to above, we can offer the following definition of forcibly disappeared:

... "The forcibly disappeared are considered to be the individuals who are placed outside the protection of the law as a result of deprivation of their liberty directly by agents of the state or by a person or group of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of such individuals.

There is no doubt that neither this definition nor any other international norm offers an answer to "who are the forcibly disappeared, then?" International human rights law provides very little guidance in this regard. In addition, any attempt to give a definition risks excluding existing or potential victims -- therefore one can understand why such an attempt might be avoided. In any case, based on the definition in the Convention, it is possible to suggest that enforced disappearances are essentially associated with "raison d'État".

Finally, yet another issue, obvious but nevertheless worth mentioning, is this: The forcibly disappeared need not be the citizens of the state that forcibly disappeared them. In other words, while "raison d'État" operates mainly in regards to its own citizens, it may target foreigners, as well.

b. Relatives of the forcibly disappeared

It was established above that enforced disappearances place the forcibly disappeared outside the protection of the law and make it impossible for them and their relatives to use effective remedies.

However, enforced disappearances violate more of the rights of the relatives of the forcibly disappeared: the relatives of forcibly disappeared persons are considered to be subjected to inhuman and degrading treatment, if not torture. Furthermore, while the "right to truth" or the "right to know the truth" explicitly referred to in the Preamble to the *International Convention* is not yet guaranteed as a specific right in human rights law, enforced disappearances also violate this right.[16]

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14 For the elaboration of the Convention, see http://www.ohchr.org/EN/HRBodies/CED/Pages/Elaboration.aspx

15 See the section in this report titled "Enforced Disappearance Cases from the Perspective of the European Court of Human Rights". Also see Faruk Turhan, "Avrupa İnsan Hakları Mahkemesi Kararları Işığında Kişi Özgürlüğü ve Türkiye/Gözaltında Kayıplar, Hakim Önüne Çıkarma ve Gözaltı Süreleri" (*The Issue of Individual Liberty in light of European Court of Human Rights Judgments and Turkey/Disappearances in Detention, Bringing Before Court and Detention Periods*) , Gazi Üniversitesi Hukuk Fakültesi Dergisi (*Journal of the Gazi University School of Law*), June-December 2000, Vol. IV, Issue 1-2, p. 204-258.

16 Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, E/CN.4/2002/71, 8 January 2002, par. 77-80. http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3e140ed64e7c6a83c1256b9700513970?Opendocument

There are, of course, legal problems that relatives of the forcibly disappeared persons have in common with relatives of individuals who disappear for completely different reasons: Because the fate and whereabouts of forcibly disappeared persons are not known, the rights and obligations of their relatives in such domains as marriage, guardianship, and proprietorship become blurred.

4. INTENTION

Leaving a discussion of the *ICC Statute* to the pages below, it is first of all necessary to emphasize in this regard that current human rights norms concerning enforced disappearances do not include any specific or general element of intention with respect to placement outside the protection of the law. In other words, any act fitting the definition of enforced disappearance may be accepted as such without regard to its cause, purpose or target.

In fact, in the *General Comment on the Definition of Enforced Disappearance, the Working Group* states that placement outside the protection of the law is a consequence of the act of enforced disappearance, and therefore, it admits cases without requiring a demonstration, or even presumption, of the intention of the perpetrator to place the victim outside the protection of the law.[17]

In addition, no specific intention is sought under human rights law with respect to enforced disappearances. Enforced disappearance, unlike in the definition[18] of torture, need not have been committed against an individual "for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind".

Thus, enforced disappearances might be motivated by completely personal reasons such as "revenge" or confiscating money,[19] or be based on objectives such as keeping a person from his unwanted activities or forcing the person's relatives into any action. Accordingly, the distinctive criterion in the case of enforced disappearances is not the intention of the perpetrator, but the perpetrator's connection with the state.

5. DURATION

Enforced disappearances are considered a prime example of "continuous acts" under international human rights law: The act begins at the moment when the individual is deprived of liberty and continues until the state acknowledges the deprivation or provides information about the fate and whereabouts of the individual. This is because even though an enforced disappearance violates several rights, it is considered a consolidated act, and the state remains responsible as long as the act continues, without regard to the number of years that has elapsed since the beginning of the act.[20]

In fact, the *International Convention* emphasizes the continuing nature of the offense of enforced disappearance and states that a state party which applies a statute of limitations shall take measures to ensure that the limitations period is of long duration and is proportionate to the seriousness of the offense, and that the period commences from the moment the offense of enforced disappearance ceases (Article 8.1). This

17 Report of the Working Group on Enforced or Involuntary Disappearances 2007, A/HRC/7/2, par. 5.

18 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1.

19 See, for example, Ayhan Işık, "Cizre Görüşmelerinin Ardından" ("*After the Cizre Talks*"): "Bazı kişilerin ise korucuların ekonomik çıkarları için kaybedildiği belirtiliyor." (*There are reports that some persons were disappeared in the economic interests of the village guards"*) http://www.hakikatadalethafiza.org/duyuru.aspx?NewsId=65&LngId=1

20 Report of the Working Group on Enforced or Involuntary Disappearances, 2010. DocumentA/HRC/16/48 http://www.ohchr.org/Documents/Issues/Disappearances/GC-EDCC.pdf

means, for example, that the limitations period governing the persons who forcibly disappeared Mehmet Emin Aslan, who was detained by the Dargeçit Gendarmerie Command in 1995 and whose burned skull and remains were found[21] in a well 18 years after the detention, should commence from February 2013.

Nevertheless, the *International Convention* grants competence to the *Committee on Enforced Disappearances* only with respect to enforced disappearances which commenced after the entry into force of the *Convention* (Article 35). This points to a weakness of human rights treaties arising from their basis in, and deference to, international law.

6. CRIMINAL RESPONSIBILITY

As in the case of other human rights violations, states carry the responsibility in the case of enforced disappearances under international human rights law. This responsibility involves an obligation to both avoid enforced disappearances and to prevent and punish enforced disappearances. The *International Convention* requires states parties to criminalize enforced disappearances in their respective national legislations (Article 4) and introduces rules concerning criminal responsibility. In this regard, Article 6 thereof stipulates that at least the following persons should be held criminally responsible:

i. Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;

ii. A superior who: (i) knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance; (ii) exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution [...].

In addition, the following will also be punishable:

i. Delaying or obstructing, in the case of a suspected enforced disappearance, the taking of proceedings before a court by any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel in all circumstances, since the person deprived of liberty is not able to exercise this right (Article 22.a);

ii. Delaying or obstructing the right of any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel to a prompt and effective judicial remedy as a means of obtaining without delay at least the information on the authority that ordered the deprivation of liberty; the authority responsible for supervising the deprivation of liberty; the date and time the person was deprived of liberty; the destination in the event of a transfer; the date, time and place of release; the state of health of the person; and in the event of death, the circumstances and the cause of death and the destination of the remains (Article 22.a);

iii. Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate (Article 22.b);

iv. Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.

Thus, the *International Convention* does not limit criminal responsibility to the perpetrator and sheds light on what is in fact the "collective" nature of enforced disappearances.

21 Mesut Hasan Benli, "Kemikler, Gözaltında Kayıpların Çıktı" (*Remains determined to be of those disappeared in detention*), Radikal, 24 February 2013.

With respect to the monitoring of the prohibition on enforced disappearance within the frame of international human rights law:

1. The fact that enforced disappearances are not specifically prohibited in human rights treaties of a general nature such as the European Convention on Human Rights, American Convention on Human Rights, and International Covenant on Civil and Political Rights does not mean that these instruments do not carry competence with respect to enforced disappearances. On the contrary, the jurisprudence of the conventions' respective enforcement organs, taking care to refer to one another as necessary, demonstrates that the practice of enforced disappearance violates a number of rights including the right to liberty and security, the right to be recognized as a person before the law, freedom from torture or inhuman or degrading treatment, the right to have recourse to effective domestic remedies, the right to protect family life, and the right to life. The conventions' enforcement organs continue to play a very important role in the definition of enforced disappearances as a specific human rights violation.

2. In terms of States Parties to the *International Convention*, the established procedures in the United Nations human rights conventions are applicable. That is to say, States Parties can recognize Committee's competency to review applications from states and/or individuals by notifying the Committee, in addition to reporting to it. However, in addition to these established procedures, three important supervisory competencies are granted to the Committee. First, in the event of an enforced disappearance, a request for urgent action may be submitted by relatives of the disappeared person, their representatives, their counsel or any person authorized by them, or more importantly, by any other person with a legitimate interest. Second, if the Committee receives reliable information indicating that a State Party is seriously violating the provisions of the *Convention*, it may visit the state in question. Third, if the Committee receives information containing well-founded indications that enforced disappearance is being practiced on a widespread or systematic basis in the territory under the jurisdiction of a State Party, it may, after seeking all relevant information on the situation from the State Party concerned, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General of the United Nations. It is now too soon to foresee how the Committee will be exercising these competencies granted under the Convention.

3. In terms of Turkey (which is not a party to the *International Convention*), even though the only remedy available at this time is the submission of individual applications to the Human Rights Committee and the European Court of Human Rights in the event of an enforced disappearance, that is enough to have this practice condemned. In addition, it will also be possible to submit applications to these bodies after Turkey becomes a party to the *International Convention* and recognizes the competency of the *Committee on Enforced Disappearances* to admit applications from individuals.

II. Enforced Disappearances in terms of International Humanitarian Law

In the most general of terms, international humanitarian law can be defined as the set of rules aiming to protect civilians and prisoners of war, the sick, the shipwrecked, and the wounded who are not actively participating in the conflict during international armed conflicts as well as non-international armed conflicts. As a sub-branch of the law known as the law of war or law of armed conflicts (sometimes as the Law of The Hague), international humanitarian law is at times also referred to as the Law of Geneva because it is mainly composed of the Geneva Conventions of 1949 and the 1977 Additional Protocols. This law is rooted not in "humanist" (widely mistranslated into Turkish as "insancıl") but "humanitarian" ("insani" in Turkish) concerns, and, focusing on armed combat, it establishes the rules to be followed in time of conflict.[22]

International humanitarian law is essentially a body of law among states. In other words, in the event of violations of international humanitarian law, there is no international protection mechanism to which victims can have recourse, nor is there an international supervisory mechanism that states can activate. This is a domain in which treaties authorize only the International Committee of the Red Cross, which played a determining role in the emergence and growth of the Law of Geneva, to advance "humanitarian" and "diplomatic" initiatives. There is, nevertheless, a strong opinion arguing that humanitarian law norms can be, and in fact should be, enforceable by human rights organs such as the European Court of Human Rights.[23]

It will be useful to discuss two important points about the Geneva Conventions before considering their provisions relating to enforced disappearances.

First, the Conventions recognize universal jurisdiction in respect of "grave breaches" to be discussed below. The concept of jurisdiction might be confusing, because a State Party is in fact obligated under the Conventions to prosecute persons who commit or order the commitment of offenses that are considered to fall within the scope of serious violations, regardless of such persons' nationalities, and to try these persons in the State's domestic courts. However, the State Party can, if it so chooses, also extradite the offending persons to another State Party under certain conditions.

Second, in the case of non-international armed conflicts that take place within the borders of a State Party, not just the State Party in question but also the other party (or parties) to the conflict are obligated to honor, at a minimum, the rules stipulated in the common Article 3 (to be discussed below), without prejudice to their legal status.

When it comes to where enforced disappearances stand in this quite broad framework, it is necessary first of all to note that the Geneva Conventions and their additional protocols do not include a specific prohibition on enforced disappearance. However, we can note that this practice is treated differently also in international humanitarian law from "disappearances" in general and constitutes a violation of a number of core principles of

22 About international humanitarian law, see Ayşe Nur Tütüncü, İnsancıl Hukuka Giriş (*Introduction to Humanitarian Law*), İstanbul, Beta, 2006.

23 For examples and a critique of this view, see Bill Bowring, "Avrupa İnsan Hakları Mahkemesi İçtihadında Parçalanma, lex specialis ve Gerilimler" (*"Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights"*), 50. Yılında Avrupa İnsan Hakları Mahkemesi, Başarı mı, Hayal Kırıklığı mı? (*The 50th Anniversary of the European Court of Human Rights: Success or Disappointment?*), prepared for publication by Kerem Altıparmak, Ankara, Ankara Barosu Yayınları, 2009, p. 206-221.

humanitarian law. In this regard, there is a major overlap between the norms relating to international armed conflicts and regulating "grave breaches of the Geneva Conventions" and common Article 3 of the same Geneva Conventions including the essential rules to be followed in armed conflicts that are not of an international character. In addition, customary humanitarian law rules explicitly prohibit enforced disappearances. Let us now discuss each of these in turn.

A. IN THE CONTEXT OF "GRAVE BREACHES"

Grave breaches of the Geneva Conventions concern the prohibitions stipulated in various provisions[24] of the four different conventions[25] adopted on 12 August 1949. Depending on the persons each convention protects, there is some variation as to the scope of the "grave breaches" against individuals who are sought to be protected in international armed conflicts. We may classify grave breaches associated with enforced disappearances as follows:

1. Willful killing;
2. Torture or inhuman treatment, including biological experiments;
3. Willfully causing great suffering or serious injury to body or health;
4. Willful deprivation of the rights of fair and regular trial.

The first three prohibitions seek to protect all protected persons, namely both the persons recognized as *hors de combat* and civilians. As an element of enforced disappearances, "willful deprivation of the rights of fair and regular trial" is within the scope of grave breaches as an offense against prisoners of war and civilians.

In addition, there are other rules that are important in the context of enforced disappearances, even though they are not part of "grave breaches". These include regulations relating to giving news to family members and receiving news from them[26] and the facilitation of inquiries made by members of families dispersed because of the war.[27]

B. IN THE CONTEXT OF COMMON ARTICLE 3

It could be argued that common Article 3 of the Geneva Conventions, while setting forth the essential rules to be followed in armed conflicts of a non-international nature, also prohibits the practice of enforced disappearance. This article stipulates as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

***1.** Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.*

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
***a.** violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
***b.** taking of hostages;*
***c.** outrages upon personal dignity, in particular*

24 GC I, Article 50; GC II, Article 51; GC III, Article 130; GC IV, Article 147.

25 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) relative to the Treatment of Prisoners of War, and Geneva Convention (VI) relative to the Protection of Civilian Persons in Time of War. Turkish versions of the Convention articles mentioned in the original version of this study rely on the translations and explanations offered in Durmuş Tezcan, Mustafa Ruhan Erdem and R. Murat Önok, Uluslararası Ceza Hukuku (*International Criminal Law*), Ankara, Seçkin Yayıncılık, 2009.

26 GC IV, Article 25.

27 GC IV, Article 26.

humiliating and degrading treatment;
d. *the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples* [...].

C. IN THE CONTEXT OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

While humanitarian law has at its core the 1949 Conventions that all the states in the world today are party to, this law also encompasses a series of other instruments. These instruments include, first of all, the 1977 Additional Protocols and, essentially, customary law that is considered to be binding upon all states, without regard to whether a state is party to these instruments. With respect to customary rules on enforced disappearances, we have the opportunity to consult a highly comprehensive study put together at the request and with the support of the International Committee of the Red Cross.[28] This study offers an exhaustive analysis of states' practices in this area and provides a catalog comprising 161 rules. One of them, Rule 98, concerns enforced disappearances. Rule 98 is found in Part V, which discusses the rules regulating the treatment of civilians and persons *hors de combat* in both international and non-international armed conflicts, and here is what it stipulates: *"Enforced disappearance is prohibited."* Thus, enforced disappearances are not specifically referred to in any humanitarian law instrument, yet there is a specific and absolute prohibition on enforced disappearance in customary law. Furthermore, this is a prohibition that does not even offer a definition of enforced disappearance.

In fact, it could very well be argued that there is a fundamental contradiction due to the fact that the concept of customary law concerns rules stemming from the conduct of the states and that enforced disappearances emerge as a state conduct. If the source of customary law is the actions of states and several states implement enforced disappearance as a state practice, then how is it that customary law prohibits enforced disappearance?

This is a legitimate question which could have been asked in the context of human rights law as well, and there is a simple and equally legitimate answer to it: If, even in a time of war, no state openly declares that it has the right to forcibly disappear persons,[29] then the "raison d'État" that causes individuals to be forcibly disappeared is at best a criminal reason which is also aware of the crime it commits. In other words, states practicing enforced disappearance are actually very well aware that their practice violates both human rights and humanitarian law.

With respect to the already-weak monitoring of the prohibition on enforced disappearance within international humanitarian law, there is variation according to whether the armed conflict in question is of an international nature or a non-international armed conflict:
1. In the case of international armed conflicts, persons directly perpetrating acts that constitute enforced disappearance and/or ordering such actions have individual criminal responsibility under the Geneva Conventions. These persons can be tried before a national court of any state party to the Conventions under the principle of universal jurisdiction.
2. The principle of universal jurisdiction is not explicitly recognized in regards to acts of enforced disappearance taking place during non-international armed conflicts; such acts are essentially subject to the national jurisdiction of the state in question.
3. Nevertheless, thanks to improvements in international criminal law, enforced disappearances practiced in time of both international and non-international armed conflicts are becoming the subject matter of international criminal justice within the scope of "war crimes".

28 Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, ICRC, Cambridge University Press, 2005.

29 Henckaerts and Doswald-Beck, op.cit, p.341.

III. Enforced Disappearances in International Criminal Law

Enforced disappearances emerged as a state practice and efforts to seek ways to legally combat the practice initially took root in the 1970s. At that time, none of the various bodies of law governing the practice had the meaning and significance they have today. When *Mothers of the Plaza de Mayo*, who became synonymous with the "disappeared", gathered in front of Videla's presidential palace on 30 April 1977 to form a group of only 14, the Inter-American Convention on Human Rights was not in effect, and the International Covenant on Civil and Political Rights had entered into force only a year before. While the Geneva Conventions were in force, the 1977 Protocol had not yet been opened to signature. Finally, "international criminal law" in its current sense was only a mere fantasy. Considering the developments in the 36-year span since then –let us remember that span largely coincides with, and is roughly equal to the length of time Berfo Ana in Turkey looked for her son– we can see that the process involved the normative/institutional/procedural development of human rights on the one hand, and a parallel process that might be called the "criminalization of human rights violations", on the other. In other words, the rules on human rights, the international bodies to safeguard human rights and ultimately the international procedures related to that safeguarding task developed over the course of this period, accompanied by a strong tendency to go beyond deeming certain grave violations of human rights and humanitarian law as traditional breaches of international treaties and considering them offenses within the budding "public international law". In turn, this means that individuals will now be held criminally responsible in addition to the responsibility of states.

Leaving aside the political/ideological dimensions of this process, which absolutely warrant discussion (albeit separately), we can note that the rules that were initially meant to apply to armed conflicts between states were gradually expanded to encompass non-international armed conflicts also, and certain acts were ultimately stripped from the context of non-international conflicts and conceptualized as "human rights crimes". That is to say, a number of human rights violations including enforced disappearances can be the subject matter of international criminal justice without seeking the condition of whether or not an armed conflict is the case, in particular after the entry into force of the ICC Statute.[30]

This is undoubtedly a significant development, because it goes beyond holding states responsible (even in cases before the European Court of Human Rights, the most effective organ in this context, this responsibility is essentially limited to the payment of monetary compensation) with respect to human rights and opens up the path to trying and penalizing individuals who perpetrate these crimes.

Yet, this same development should not cloud the fact that enforced disappearance is a crime which may be committed in the context of armed conflicts as well. The codification of enforced disappearance as a "crime against humanity" in the frame of an attack against a civilian population is so advanced a step that it comes with a risk that crimes of enforced disappearance perpetrated in time of armed conflict could be ignored. As noted above, however, in both international and non-international armed conflicts, persons who remain *hors de combat* due to laying down of arms, sickness, wounds, detention or for a different reason can be, and in fact are, forcibly disappeared.

Thus, it is necessary to treat enforced

30 About this process, see: Joseph William Davids [2012], "From Crimes against Humanity to Human Rights Crimes", 18 New Eng. J. Int'l & Comp. L., p.225-242.

disappearances within the context of international criminal law separately, namely as war crimes and as crimes against humanity.

a. As war crimes

War crimes are regulated in Article 8 of the ICC Statute. In line with the Geneva Conventions, the Statute breaks down war crimes into two categories, namely crimes committed in international armed conflicts and those committed in non-international armed conflicts. Again in line with the Geneva Conventions, the ICC Statute does not provide a specific prohibition on enforced disappearances in the context of either type of armed conflicts. Still, there are two reasons why Article 8, entitled 'War Crimes', applies to enforced disappearances.

First, enforced disappearances constitute a war crime as a peculiar composition of acts deemed as crimes in both types of armed conflicts. Acts which may be considered related to the practice of enforced disappearance are regulated as follows in paragraph 2 of Article 8:

1. For the purpose of this Statute, "war crimes" means:
a. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
i. Willful killing;
ii. Torture or inhuman treatment, including biological experiments;
iii. Willfully causing great suffering, or serious injury to body or health; (...)
vi. Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
vii. Unlawful deportation or transfer or unlawful confinement;
viii. Taking of hostages.

b. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
(...)
vi. Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;
x. Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
xxi. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

c. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat *by sickness, wounds, detention or any other cause:*
i. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
ii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
iii. Taking of hostages;
iv. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

d. (...)

e. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law [...]

And second, the use of the phrase "other serious violations of the laws and customs applicable in armed conflicts, namely..." with respect to both international and non-international armed

conflicts weakens the opinion that Article 8 provides an exhaustive list of war crimes.[31] In other words, the specific reference in ICC jurisprudence to enforced disappearances within the scope of other serious violations of laws and customs applicable in armed conflicts seems to be an inevitable one, especially given the customary rule discussed above.[32]

b. As crimes against humanity

The *International Convention* provides that widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall carry the consequences provided for under such applicable international law.[33] The applicable provision demonstrates that the mutual interaction between these two domains is in fact quite strong and international criminal law progresses at a rapid pace. The first judgment along these lines is the one rendered by the International Criminal Tribunal for the Former Yugoslavia in 2000 in the Kupreškić case.[34] Even though its governing statute did not refer to the crime of enforced disappearance, the Tribunal (also taking the 1992 *Declaration* into consideration), decided that enforced disappearances are within the scope of "other inhuman acts" in the statute. That the *ICC Statute*, which explicitly lists enforced disappearances among acts constituting crimes against humanity, had at that time been opened to signature was probably a factor in that decision. Crimes against humanity are regulated in Article 7 of the *ICC Statute*. These involve crimes committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Enforced disappearances are referred to in Article 7.1.i. as "enforced disappearance of persons" and defined in Article 7.2.i. as follows:

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

Thus, the enforced disappearance definition which the ICC jurisdiction rests upon differs from the one in the *International Convention* in important ways:
1. First of all, the *ICC Statute* requires that the crime has been committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack;
2. In addition to the State, there is reference to a connection with a political organization;
3. It requires an "intention of removing them from the protection of the law for a prolonged period of time".

The "Elements of Crimes" document[35] adopted by the assembly of states parties to the *ICC Statute* on 9 September 2002 additionally provides as follows in regards to the elements of this particular crime: Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose (footnote 23); this crime falls under the jurisdiction of the Court only if the attack occurs after the entry into force of the Statute (footnote 24); the word "detained" would include a perpetrator who maintained an existing detention (footnote 25) and in the case of a perpetrator who maintained an existing detention, it shall suffice if the perpetrator was aware that a refusal to

31 About this view, see Tezcan, Erdem and Önok, op.cit, p. 573.

32 In this context, there is an important judgment rendered in 2003 by the Appeals Chamber of International Criminal Tribunal for the Former Yugoslavia in the Krnojelac case, see http://www.icty.org/x/cases/krnojelac/acjug/en/krn-aj030917e.pdf

33 Article 5.

34 Henckaerts and Doswald-Beck, op.cit. p. 342.

35 http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf

acknowledge deprivation of freedom or a refusal to give information on the fate or whereabouts of the disappeared person had already taken place (footnote 28); under certain circumstances an arrest or detention may have been lawful (footnote 26). Additionally, it is necessary for the perpetrator to be aware that such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of the disappeared person or such refusal was preceded or accompanied by the deprivation of freedom (Article 7.1.i. (3)). The "awareness" element was inserted especially because of the complexity of the crime (footnote 27).

Discussed only roughly here, these developments suggest that the crime of enforced disappearance in the context of international criminal law warrants a separate and comprehensive analysis.

CONCLUSION

In one of his fascinating columns in the daily Radikal, Ali Topuz remarks as follows:

"The law always comes in two types: There is the law full of jiggery-pokery, an apparatus used by the states and the sovereigns for their machinations. This is a type of law with a simple motto: "Gotcha". And then there is the law that is an instrument to fight, to corner, to push back that former law. This one also has a simple motto: "Back off." [36]

This applies to international human rights law, international humanitarian law, and international criminal law, and ultimately, international law: Although international law is also the law of states, it can simultaneously create a zone of resistance due to the nature of interstate relations as well as the impact of political and social struggles. Nevertheless, it should be kept in mind that resistance, by definition, means resisting something one has been subjected to, and in that sense, opens the path to "freedom from something", and yet it is not sufficient for "freedom for something". In fact, the concept of *extraordinary rendition*[37] emerged at the same time as the transformation of enforced disappearances into a prohibition under international law, which demonstrates the said insufficiency, does it not?

In any case, one must not give up responding with a "back off!"

36 Ali Topuz, "Şu İşkencecinin İşine Bak" (*"Look What That Torturer Has Done"*). Radikal, 19 February 2013. http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=1121916&CategoryID=99

37 Nikolas Kyriakou [2012], "The International Convention for the Protection of All Persons from Enforced Disappearance and its Contributions to International Human Rights Law, with Specific Reference to Extraordinary Rendition", 13 Melb. J. Int'l L., 1-38; Patricio Galella and Carlos Espósito [2012], "Extraordinary Renditions in the Fight against Terrorism. Forced Disappearances?", 16 SUR - Int'l J. on Hum Rts., p.7-31.

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THE RECOGNITION OF ENFORCED DISAPPEARANCE AS A CRIME UNDER DOMESTIC LAW AND THE STATUTE OF LIMITATIONS: A PROBLEMATIC OF INTERNATIONAL CRIMINAL LAW

ASST. PROF. ÖZNUR SEVDİREN

Introduction

The history of the state, or sources of power preceding the state, committing grave and systematic violations of the human rights of their own citizens/subjects can undoubtedly be dated back to ancient times. Yet, it is only in the aftermath of the wars and extraordinary periods in recent history that these violations became the subject matter of international law and those who perpetrated them could be brought before court. Not only were these acts exempted from investigation and prosecution during the times of conflict and extraordinary circumstances in which they were perpetrated, but some criminal acts even enjoyed a legal basis, as was the case in Nazi Germany,[1] and regime changes and democratic transitions led to criminal impunity[2] for perpetrators by way of statutory limitations. As a result, these acts eventually had to be defined in international law. The recognition of the crime of enforced disappearance as a crime committed against international public order could only come about after it was perpetrated widely or systematically in Latin American countries,[3] including mainly Argentina, Chile, Brazil and Uruguay, as well as in countries such as Turkey, Sri Lanka and Chechnya.[4] As such, the act of enforced disappearance was first condemned as a violation of international law[5] and then gradually came to be characterized as an international crime whose elements were defined in international treaties and customary law. All of these declarations and conventions underscored that enforced disappearance constitutes *a crime against humanity.* The fact that the act has been defined as a crime against humanity in such a way as would go beyond the legal definition of various crime types in domestic law leads to various consequences in terms of the definition and scope of the crime, as well as the statute of limitations which will be discussed particularly in this section.

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1 Frommel, Monika, '*Verbrechensbekämpfung im Nationalsozialismus*', in Stolleis, Michael et al. (ed.) *Die Bedeutung der Wörter – Studien zur europäischen Rechtsgeschichte, Festschrift für den Sten Gagner zum 70. Geburtstag*, Beck, München, 1991, pp. 47-64, Kubink, Michal, *Strafen und ihre Alternativen im zeitlichen Wandel*, Duncker & Humblot, Berlin, pp. 285-287, See also, Schmidt, Eberhardt, *Einführung in die Geschichte der deutschen Strafrechtspflege*, 3rd Ed., Vandenhoeck & Ruprecht, Göttingen, 1965, pp. 449-452, Wolf, Jörg, *Jugendliche vor Gericht im Dritten Reich – Nationalsozialistische Jugendstrafrechtspolitik und Justizalltag*, Beck, München, 1992, pp. 118-167.

2 Ambos, Kai, 'Impunity and International Criminal Law' (A Case Study on Colombia, Peru, Bolivia, Chile and Argentina)', *Human Rights Quarterly*, 1997, vol. 18, Issue 1-4, pp. 1-13, Auaya Quezada, Sergio/Rangel Trevino, Javier, 'Neither Truth Nor Justice, Mexico's De Facto Amnesty', *Latin American Perspectives*, 2006, vol. 33, Issue 2, pp. 56-68, Guarino, Angela, M. 'Chasing Ghosts: Pursuing Retroactive Justice for Franco-Era Crimes Against Humanity', *British Journal of International and Comparative Law*, 2010, vol. 33, pp. 61-85.

3 See, for instance, Ambos, Kai, *Straflosigkeit von Menschenrechtsverletzungen : Zur "Impunidad" in südamerikanischen Landern aus völkerstrafrechtlicher Sicht*, Edition Iuscrim, Freiburg, 1997, Ott, Lisa, Enforced Disappearance in International Law, Insertia, Cambridge, 2011.

4 It is estimated that 90,000 people suffered from the crime of enforced disappearance in Argentina, Bolivia, Brazil, Chile, Colombia, El Salvador, Haiti, Honduras, Mexico, Peru and Uruguay between 1966 and 1986. Molina Theissen cited in Ott, p. 4. The reports of the UN Working Group on Enforced or Involuntary Disappearances also provide important data in this regard. For example, in its report referenced A/HRC/4/41/Add.1 and dated 20 February 2007 (p. 6), the Working Group informs that 45,000 persons were disappeared according to the data provided by the Truth Commission in Guatemala between 1979 and 1986. The report notes that the Working Group has received information on 3,152 of those disappearances. According to the Working Group, 8,000 persons were forcibly disappeared in El Salvador. (A/HRC/7/2/Add.2, 2007, p.9). The Working Group's 1999 report on Sri Lanka (E/CN.4/2000/64/Add.1, 21 December 1999), states that there has been 12,258 instances of enforced disappearance in the country since 1980. The reports are accessible at www.ohrc.org/EN/HRBodies/CED (February 2013).

5 See, for instance, United Nations General Assembly Resolution 33/173, 20 December 1978, The document (E-CN.4-RES_1980-20(XXXVI)) that is the basis for the Working Group on Enforced or Involuntary Disappearances within the UN Human Rights Council, 'Question of Missing and Disappeared Persons', 29 February 1980, UN Declaration, UN Human Rights Council Resolution 2004/40 dated 19 April 2004 (http://www.unhcr.org/refworld/docid/43f3136f0.html , accessed February 2013), 19 April 2004. In 1984, the Parliamentary Assembly of the Council of Europe stressed the consequences of the crime of enforced disappearance to member states, emphasized the inadequacy of existing legislation on this crime type, and made a resolution asking member states to recognize enforced disappearance as a crime against humanity (Article 12) http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta84/ERES828.htm. In 2005, the Assembly reiterated these principles in its Resolution No. 1463. The text of the resolution is accessible at: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1463.htm (February 2013).

This discussion is particularly important in terms of the acts of enforced disappearance perpetrated during the state of emergency in Turkey in the 1990s, because assessing this crime within the scope of the crime of voluntary manslaughter in domestic law translates into the dismissal of criminal proceedings in progress due to the application of the statute of limitations.[6] Human rights organizations, bar associations and various non-governmental organizations frequently point to the risk of impunity which arises with respect to the perpetrators.[7] In addition, the planned and systematic nature of the acts of disappearance and the motives of perpetrators are exposed by the violation judgments of the European Court of Human Rights concerning the crime of enforced disappearance[8] (as well as compensation judgments relating to Turkey); documents relating to crimes of enforced disappearance in the annexes to indictments in cases of public interest; witness statements, admissions by defendants, statements by persons known as "informants" who enjoyed relief under the Repentance Law; and the revelation,[9] in light of all the available information, of the sites where the bodies of disappeared persons were buried or disposed of. This section argues that crimes of enforced disappearance, whose elements have emerged as described above, need to be considered within the scope of 'crimes against humanity' regulated in Article 77 in Section One of Chapter Two of the Turkish Criminal Code. The discussions on statute of limitations can move forward along the axis of international criminal law only within that scope. Through that perspective, the legal meaning and consequences of defining an act as an "international crime" will be emphasized first, and in that framework, the crime of enforced disappearance will be analyzed in its proper context, namely along with the development and general characteristics of crimes against humanity in international law. The last part covers the elements of the crime of enforced disappearance committed in Turkey and considers the problematic of statutory limitations regarding these crimes.

INTERNATIONAL CRIMES AND THE SOURCES OF INTERNATIONAL CRIMINAL LAW

Under international law, certain acts that constitute serious and large-scale violations[10] of (international) obligations fundamental to the protection of human life, such as the obligations concerning prohibitions put in place by the international community over time as regards racial discrimination, genocide, enslavement, torture and ill-treatment, are considered crimes

6 Also, under Article 68 of the Turkish Criminal Code concerning convicted persons, there is a risk of application of statutory limitations to punishments for convicts whose sentences have not been executed yet.

7 The works of the Human Rights Association on disappearances and ECtHR judgments are accessible at http://ihd.kardaizler.org/index.php/kayiplar/2294-aihm-dosyalari.html, Özbudun, Sibel/Demirer, Temel's assessment of disappearances in custody is available at the website of Progressive Lawyers Association, http://www.chd.org.tr/haber_detay.asp?haberID=607, 2011, The TESEV report authored by Uçum, Mehmet et al., 'Confronting the Past: Impunity and High Profile Cases', is accessible at http://www.tesev.org.tr/ (report date unavailable). A brief piece penned by relatives of the disappeared is accessible here: http://www.bianet.org/bianet/bianet/52998-turkiyede-gozaltinda-kayiplar, also, the relevant 2010 report of the Human Rights Joint Platform is available here: e-kutuphane.ihop.org.tr/pdf/kutuphane/25_3_2010-10-04.doc (February 2013).

8 See, for instance, Altıparmak, Kerem, 'Kayıplar, Zaman ve Hukuk' (*The Missing Persons, Time and the Law*), Diyalog, pp. 82-87, 2009, http://e-kutuphane.ihop.org.tr/pdf/kutuphane/22_81_0000-00-00.pdf, Turhan, Faruk, 'Avrupa İnsan Hakları Mahkemesi (AİHM) Kararları Işığında Kişi Özgürlüğü ve Türkiye', (*Turkey and The Issue of Individual Liberty in Light of ECtHR Judgments*) Gazi Üniversitesi Hukuk Fakültesi Dergisi (*Journal of the Gazi University School of Law*), Vol. 4, Issue 1-2, 2000, pp. 204-258.

9 See, for instance, the story 'Ölüm Kuyuları Açılacak' (Wells of Death to be Excavated) in the Sabah newspaper dated 16 December 2008 on the 'acid wells' in Silopi BOTAŞ facilities, accessible at arsiv.sabah.com.tr. Also, the story 'Tunceli'de İnsan Kemikleri' (Human Remains in Tunceli), dated 13 August 2011, can be accessed at www.cnnturk.com (February 2013).

10 Wright, Quincy, 'The Scope of International Criminal Law: A Conceptual Framework', *Virginia Journal of International Law*, Vol. 15, Issue 3, 1975, pp. 561-578, Cryer, Robert, 'The Doctrinal Foundations of International Criminalisation', in Bassiouni, Cherif, M (ed.), *International Criminal Law*, 3rd ed., Brill, Leiden, Vol. 1, 2008, pp. 107-128. See also Schabas, William, *The UN International Criminal Tribunals*, Cambridge University Press, Cambridge, 2006.

(*criminis iuris gentium*). Because these acts are aimed at disrupting the order, peace, and security of the international community and constitute violations of the fundamental rules of international law, the regulations to punish them are characterized as peremptory norms (*zwingendes Recht*, *jus cogens*) in international law.[11] As noted above, international crimes do not necessarily have to be transnational in nature; given the injustice involved in them, the commission and the prevention of these crimes are of great concern to members of the international community, without regard to where the crimes may have been committed. Because the international community as a whole has an interest in punishing the violation of such a norm, it is understood that all states have the right to prosecute perpetrators of international crimes, which has led to the birth of 'universal jurisdiction'. Accordingly, when certain international crimes are committed, states will have jurisdiction to prosecute the perpetrators even if the crime has been committed in the territory of a foreign country, against a foreigner or by a foreigner.

While the rule in international law is to exercise universal jurisdiction with respect to certain types of crimes, it is important to note that this jurisdiction is invoked only in exceptional circumstances, for it amounts to intervention into "domestic affairs" of sovereign states and requires judicial cooperation and the enforcement of extradition regulations.[12] Cases within this scope include international crimes committed in Chile during the Pinochet era which were investigated in Belgium and Spain, and those committed during the Guatemalan Civil War which were also investigated in Spain.[13]

Thus, aside from the general crime types defined in domestic law, impunity in the case of international crimes arises as a serious risk when no effective investigation is conducted or investigation is led in a manner that aims to clear away criminal responsibility of perpetrators who are usually public officials.

By their very nature, international crimes occur in a context that usually creates and grants immunity from punishment to their perpetrators, and this phenomenon is the *raison d'être* of a permanent International Criminal Court established to prosecute these crimes. In this regard, the International Military Tribunal at Nuremberg, set up in the aftermath of the Second World War on the basis of the London Charter to try German war criminals (and, in a different context, the Tokyo War Crimes Tribunal [International Military Tribunal for the Far East]), constitutes a major step toward the establishment of international criminal justice. In the 1990s, these developments were followed by the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), based on the powers of United Nations Security Council enshrined in Chapter VII of the Charter of the United Nations. The Special Court for Sierra Leone and the Ad-Hoc Court for East Timor are also worth recalling in this context.[14] Finally, the International Criminal Court,[15] which was established on the basis of the Rome Statute in 1998 and has had jurisdiction since the Statute entered into force on 1 July 2002, defined four types of crimes "disrupting international peace and well-being"[16] in situations listed in the Statute. With respect to these four crimes, namely genocide, crimes against humanity,

11 Bassiouni, Cherif, M., 'International Crimes: Jus Cogens and Obligatio Erga Omnes', *Law and Contemporary Problems*, Vol. 59, Issue 4, 1996, pp. 63-74.

12 Cassese, Antonio, 'The Rationale for International Criminal Justice', in Cassese, Antonio (ed.) *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, Charney, Jonathan, 'International Criminal Law and the Role of Domestic Courts', *American Journal of International Law*, Vol. 95, Issue 1, 2001, pp. 120-124.

13 Guarino, pp. 63-85.

14 On this topic, see, Linton, Suzannah, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', *Criminal Law Forum*, Vol. 12, Issue 2, 2001, pp. 185-246.

15 Bkz. Schabas, William, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2007.

16 The Preamble to the Statute of the International Criminal Court, the Court's Statute is accessible at http://www.icc-cpi.int/Pages/default.aspx (March 2013).

war crimes, and crimes of aggression, so long as they are committed within the territory of a state party to the Statute[17] the Court has jurisdiction regardless of where they may have been committed. The current caseload of the International Criminal Court shows that the investigations in progress almost always concern crimes committed within the territory of a state, and perpetrators and victims are usually citizens of the same state.[18]

The second aspect of international crimes that is particularly important for this study is that, because these acts prejudice the interests of the international community, they are considered crimes without regard to whether they were defined as such in the domestic laws of the states at the time they were perpetrated. If a given state is not party, for instance, to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide or does not have regulations in its legislation on genocide,[19] that will not absolve genocide perpetrators of criminal responsibility within the frame of the prohibition of genocide which is a peremptory norm of international law.

This aspect of international crimes is directly related to the sources that introduce these crimes into international law. It is basic knowledge that laws are the sources of regulations that establish crimes and punishments in domestic law. No provision on crime and punishment may be introduced by way of instruments other than law, such as decrees or general regulatory transactions of the administration including regulations and by-laws. In Continental European law, this principle is referred to as the 'legality principle' in legal texts and it aims to restrict government authority over the individual.[20] An analysis of the Rome Statute of the International Criminal Court shows instantly the effect of the legality principle on international criminal law.

The Rome Statute came into being as a text of 'compromise' and 'consensus' between various legal systems, and in fact, Article 22 of the Statute is titled with the Latin expression corresponding to the principle of legality, "*nullum crimen sine lege*". This article provides in paragraph 1 "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." Considered together with paragraph 3 of the same Article, it becomes more evident that this article, rather than reflecting the legality principle in international law, establishes the jurisdiction of the International Criminal Court, for paragraph 3 provides, "This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute". This exception sets forth that the definition of legality under international law may not be the same as it is under domestic law and, as will be emphasized once more below, provides that treaties constitute only one of the sources of international law. Understanding the practical consequences of this distinction and the peculiar character of the concept of international crime requires comparing the legality principle in the two contexts of international law and domestic law.

In criminal law literature and jurisprudence, four consequences usually follow from the

17 The Statute provides that the Court may have jurisdiction by way of a United Nations Security Council resolution or a non-party state's acceptance of the Court's jurisdiction temporarily (Article 12(3)). The Court will have jurisdiction on the crime of aggression one year after 30 states parties accept or ratify the resolution to be made, on a 2/3 majority, after 1 January 2017 by the Assembly of States Parties as per Article 121 of the Statute in regards to the amendments adopted (Articles 15 bis and 15 ter) in the 2010 Review Conference in Kampala. For the relevant decisions of the Kampala Conference, see http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (February 2013).

18 See, for instance, Cryer, Robert, 'The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision', *Journal of International Criminal Justice*, Vol. 7, Issue 2, 2009, pp. 283-296.

19 For example, even though Rwanda was a party to the 1948 Genocide Convention before the genocide in the country, it did not have any domestic legislating designating genocide as a crime. Schabas, 2006, p. 156.

20 On the intellectual roots of the legality principle, see Beccaria, Cesare, *On Crimes and Punishments*.

principle of legality.[21] These are provision through law (codified provisions), the principle of certainty, the interdiction of analogy, and non-retroactivity. Legality is a principle that rather reflects Continental European legal mentality, and as such, it is difficult to argue that it is as a whole legislated and interpreted in the same way in other major legal systems of comparative law. As a matter of fact, the legality principle is not fully established in common law systems, including England first of all, where the criminal judge is allowed to make law by way of creative precedent and the codification of criminal law is still in progress.[22] In addition, it is noted that in countries which adhere to Islamic *shariah*, the legality principle has not been adopted strictly in respect of the crimes of *hudud, quesas* as well as *ta'azir*, in parallel with Islamic criminal law.[23] As these explanations suggest, the major systems of comparative law have not embraced the legality principle completely. As will be discussed below, this leads to important, if indirect, consequences under international law.

Following from the legality principle, the provision of domestic law that introduces a given crime and the associated punishment has a statutory reference, which means that the provision in question comes into being in the discretion of the legislative body authorized to set down law. This maintains the separation of powers that must exist among the legislative, executive and judicial branches, and facilitates the objective of authorizing only the legislature to act in the domain of criminal justice, which is home to the most serious restrictions on and interventions into individual rights and liberties. In this regard, no direct comparison appears possible between the legality principle under international law and that under domestic law. This is because international law, unlike domestic law, lacks a 'centralized legislature'.[24] While a legislative quality might be attributed to the post-Second World War United Nations General Assembly, it is necessary to note that United Nations resolutions do not have the binding capacity that laws do. Similarly, it is rather difficult to consider the United Nations Security Council an executive body comparable to those found in domestic law systems.

In domestic law, the closely related principles of certainty and the interdiction of analogy ensure that the citizens of a state can be aware what conduct is "incriminating" and thereby foresee the consequences of their actions. This allows a sanction to realize its positive objective of general prevention. Because no comparable criminal law or code exists in international law, adopting this strict interpretation of the legality principle in the criminal context will lead to unfair consequences under international law. In fact, the widespread rape of Tutsi women in Rwanda, which in a narrow interpretation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide cannot be considered a crime of genocide, was found, by analogy, to be "causing serious bodily and mental harm to members of the group" by the International

21 Kreß, Claus, 'Nulla Poena, Nullum Crimen Sine Lege' in *Max Planck Encyclopaedia of Public International Law*, 2010, http://www.uni-koeln.de/jur-fak/kress/NullumCrimen24082010.pdf (February 2013), Özbek, Veli Özer et al., *Türk Ceza Hukuku Genel Hükümler (Turkish Criminal Law: General Provisions)*, 3rd Ed., Seçkin, Ankara, 2012, pp. 67-72, Özgenç, İzzet, *Türk Ceza Hukuku Genel Hükümler (Turkish Criminal Law: General Provisions)*, 7th Ed., Seçkin, Ankara, 2012, pp. 103-136, Hakeri, Hakan, *Ceza Hukuku Genel Hükümler (General Provisions of Criminal Law)*, Adalet, Ankara, 2012, pp. 11-24, Koca, Mahmut/Üzülmez, İlhan, Türk *Ceza Hukuku Genel Hükümler (Turkish Criminal Law: General Provisions)*, Seçkin, Ankara, 2012, pp. 43-55.

22 See Bassiouni, Cherif, M. 'Principles of Legality in International and Comparative Law', in Bassiouni, 2008, pp. 73-106, For a detailed study on the topic, see Alacakaptan, Uğur, *İngiliz Ceza Hukukunda Suç ve Cezaların Kanuniliği Prensibi (The Principle of the Legality of Crimes and Punishments in English Criminal Law)*, Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara, 1958.

23 See Haleem, Abdel et al., *Criminal Justice in Islam: Judicial Procedure in Sharia*, Tauris, London, 2003, pp. 37, Bohlander, Michael/Hedayati-Kakhki, Mohammad, 'Criminal Justice under Shari'ah in the 21st Century-An Inter-Cultural View', *Arab Law Quarterly*, Vol. 23, Issue 4, 2009, pp. 417-36, also see Kreß 2010, p. 3.

24 This opinion is also emphasized in the letter from the prosecutor's office in the *Simon* judgment in Argentina, Parenti, Pablo F., 'The Prosecution of International Crimes in Argentina', *International Criminal Law Review*, Vol. 10 Issue 4, 2010, pp. 491-507.

Criminal Tribunal for Rwanda.[25] Likewise, the Special Court for Sierra Leone found the use of "child soldiers" in the civil conflict to be a war crime in accordance with Article 4(c) of its Statute.[26] Furthermore, the Rome Statute of the International Criminal Court, one of the most agreed-upon texts of international criminal law as noted above, uses the phrase "other inhumane acts" with respect to crimes against humanity and employs similar phrases when defining war crimes. These formulations are outright contradictions of the principle of certainty and the interdiction of analogy.[27]

Finally, the principle of non-retroactivity provides that an act which, at the time of its commission, was not defined as a crime will not lead to criminal responsibility on the part of the perpetrator if it is criminalized subsequently. In Continental European civil legal systems, this principle is applied strictly as a rule, yet in England, where the common law system is in effect, the prohibition on retroactivity was not enforced when there ought to have been a reasonable belief that a given conduct would have been incriminating. For instance, the European Court of Human Rights has found, in regards to sexual violence against the spouse, that the prohibition on retroactivity was not violated even though there was no provision concerning that act in UK law at the time the crime was committed.[28] In international law, many trials to date could be said to have violated the prohibition on retroactivity in its narrow sense. This issue will be discussed in detail below in the context of the statute of limitations.

In sum, there are significant differences between national criminal law and international criminal law. The former legislates, at least ideally, that provisions which establish crimes and punishments must be codified and criminal conduct must be defined in a way that is explicit and does not leave room for analogy. This is in essence a manifestation of the difference between the respective sources of national criminal law and international criminal law.

Article 38 of the Statute of the International Court of Justice, generally acknowledged as setting forth the sources of international law,[29] lists the following sources:

1. International conventions,
2. International custom,
3. The general principles of law,
4. Judicial decisions and international legal teachings

Thus, customary international law, as a branch of international law, is an obvious source of international criminal law. In fact, to address the objection that the crime came into being only after the commission of the act, i.e. the *ex post facto law* objection, the *ad hoc* international criminal tribunals (Nuremberg, Tokyo, former Yugoslavia and Rwanda) that have included international crimes within the scope of their jurisdiction have relied on the establishment that these crimes were previously and fundamentally defined in customary law.

Accepted as the foundation of customary law with respect to international crimes, the Nuremberg Tribunal provided two main grounds for addressing the objections based on non-retroactivity and the legality principle with respect to the crimes within the jurisdiction of the Tribunal (crimes against peace, crimes against humanity, and the crime of aggression). First, it relied on various conventions and declarations to explain that the crimes within

25 Akayesu (ICTR-996-4-T) 2 September 1998, § 688.

26 Norman (SCSL-04-14-AR72), 31 May 2004, § 17-24.

27 Schabas 2007, p. 109, Cryer, Robert et al., *International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2010, p., 265, Bassiouni, 2011, p. 203, pp. 410-11.

28 SW v. the United Kingdom, ECtHR, § 34, 36 cited in Kreß 2010, p. 6.

29 Bassiouni, Cherif, M. 'The Discipline of International Criminal Law', in Bassiouni 2008, pp. 3-40, Bantekas, Ilias/Nash, Susan, *International Criminal Law*, Cavendish, London, 2003, p. 2, Cassese, Antonio/Acquaviva, Guido/Whiting, Alex, *International Criminal Law: Cases and Commentary*, Oxford, Oxford University Press, 2011, pp. 5-26.

its jurisdiction were defined in customary law. At a time when customary law in regards to international crimes, in particular war crimes, was just taking shape, the Nuremberg Tribunal, proceeding on the natural law tradition, stated that allowing crimes that are serious violations of moral values to go unpunished would be unfair.[30] The *ad hoc* international tribunals for the former Yugoslavia and Rwanda, and other joint or hybrid international tribunals that follow their precedents (such as the Special Court for Sierra Leone), held the fact that crimes within their respective jurisdictions were defined in customary law was sufficient grounds for individual criminal responsibility to arise. This will be discussed again below in the context of crimes against humanity.

This aspect of international crimes should be taken into account not only by international criminal justice bodies alone, but also in the context of the applicable law in trials heard by domestic courts prosecuting international crimes. Two provisions, namely Article 7 of the European Convention on Human Rights and Article 15 of the International Covenant on Civil and Political Rights, are highly significant in this context. These provisions define the legality principle under international human rights law and criminal law and as such demonstrate the specific character of international law that is being discussed here. Article 7 of the European Convention on Human Rights provides as follows:
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.[31]

In addition, Article 15 of the International Covenant on Civil and Political Rights provides as follows:
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

The textual, teleological and systematic interpretation of both articles makes it plainly obvious that domestic legislation does not constitute the only source of punishment for acts that are considered crimes under international law; it is obligatory to take international law into account, as well. To stress that international law must be interpreted as the basis for the legality principle, paragraph 2 of the same article additionally refers to both international law, by emphasizing "general principles of law", and the Kelsenian natural law tradition, by defining moral values as superior norms. Leaving aside the implications of both provisions for criminal doctrine and legal philosophy, the provisions in question became the fundamental norms over time in terms of the prosecution of international crimes, as will be seen below. This has resulted, as noted above, from the fact that domestic legal systems lacked the provisions concerning international crimes that mostly take place under the responsibility of the state apparatus

30 Kelsen, Hans, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law', *International Law Quarterly*, Vol. 1, Issue 2, 1947, pp. 153-171 and 'The Rule Against Ex Post Facto Laws and the Prosecution of the Axis War Criminals', *Judge Advocate Journal*, Vol. 2, Issue 3, 1945, pp. 8-12.

31 On the origin of this Article in Nuremberg trials, see Kreß, Claus, *International Lawyer,* 'Versailles-Nuremberg-The Hague: Germany and International Criminal Law', Vol. 6, Issue 4, 2006, pp. 15- 39, p. 31.

and government agents or from the failure to have recourse at least to the provisions usually available in general criminal law. The fact that statutory limitations do not apply to international crimes has its roots in these two provisions that establish the unique character of international law in terms of its sources. Before discussing the meaning of these provisions in respect of acts of enforced disappearance in Turkey below, it is necessary to consider the literature on statutory limitations concerning international crimes.

STATUTE OF LIMITATIONS IN TERMS OF INTERNATIONAL CRIMES IN INTERNATIONAL LAW

In domestic law, statute of limitations can be defined as the prohibition on initiating legal proceedings against a criminal act or imposing punishment if proceedings have been initiated, following the lapse of the period of time set by law.[32] The application of the statute of limitations does not alter the criminal character of the act at issue. This is because the periods of limitation should be understood as a waiver of the prosecution of the criminal act in accordance with the preferred criminal policy or a waiver of the execution of the punishment awarded for the crime. In other words, the limitations mean the state relinquishing its right to penalize. It is necessary to emphasize the critical importance of the concept of criminal policy here. As observed in several decisions of the Constitutional Court, criminal policy manifests itself through the actions of the legislative branch in a given country, subject to compliance with the constitutional framework.[33] Undoubtedly, the duration of the statutory limitation and the reasons for the suspension[34] and vacatur thereof take concrete shape on the basis of the specific imagination of the individual prevailing in a given country, as German legal scholars emphasize.[35] Therefore, while periods of limitation and crimes subject to the statute of limitations vary in different legal systems, they may also be the subject of different provisions within the same legal system in different eras. As a matter of fact, the provisions in the current Turkish Criminal Code No. 5237, when compared with the periods of limitation in the former Turkish Criminal Code, can be said to include regulations that are more disadvantageous to perpetrators.

It is nonetheless necessary to note that in domestic law, as in comparative law, a general approach has come into being with regard to statute of limitations in the context of certain types of crimes. In particular, regulations which provide that crimes against the state and acts of murder, if committed abroad, will not be subject to the statute of limitations are generally accepted in Turkish law, as they are in comparative law.[36] Similarly, the Turkish Military Penal Code contemplates that statutory limitations shall not apply to certain military offenses.[37]

A more general state practice in domestic law involves the norms which stipulate that statute of limitations shall not apply to international crimes under international criminal law. As will be discussed below, this practice was the case in the domestic statutory schemes of a number of countries and substantiated by way of court decisions which found that there was an available peremptory norm requiring that the statute of limitations not apply to international crimes. The topic of statutory limitations has been discussed in three different contexts in

32 Özgenç, pp. 794-805, Hakeri, pp. 619-630, Özbek et al., pp. 694-731, Koca/Üzülmez, pp. 611-633.

33 See, for instance, E. 1970/7, K. 1970/23, 12.5.1970 and E. 1999/39, K. 2000/23, 19.9.2000. These decisions are accessible at the portal of the Constitutional Court at www.anayasa.gov.tr (February 2013).

34 For instance, a suspect or accused testifying before the prosecutor, the drafting of an indictment, the issuance of arrest warrant, see Turkish Criminal Code, Article 67.

35 See, for instance, Gropp, Walter, *Strafrecht Allgemeiner Teil*, Springer, Berlin, 2005, p. 36.

36 Turkish Criminal Code, Article 66(7).

37 For instance, crimes such as draft evasion and absence without leave provided for in the Military Penal Code are not subject to the statute of limitations under Article 49/A thereof.

international criminal law jurisprudence and literature, namely the crimes committed before and during the Second World War, crimes committed in real-socialist regimes, and in particular the crimes perpetrated in the military regimes in Latin America. In this part, this study will discuss the major regulations relating to statutory limitations in international criminal law and domestic court decisions, which have reverberated through teachings of international law. Because a significant number of the crimes committed in Latin America are specifically related to the crime of enforced disappearance, major examples illustrating that topic will be considered later.

The Charter of the Nuremberg Tribunal, where key German war criminals in the Second World War were tried, did not include any provisions on statute of limitations, for it assumed that the judgments against the persons on trial would be executed right away. Following the Second World War, the question of statute of limitations arose with respect to the war criminals at lower levels who were able to find asylum and hide in fascist regimes in Latin America, particularly in Argentina.[38]

After the Second World War, it was the French legislature that made the first step with respect to the acts that constituted war crimes and crimes against humanity.[39] A law enacted in France in 1964 provided that "Crimes against humanity, as defined in the United Nations Resolution of 13 February 1946 which takes note of the definition of crimes against humanity contained in the Charter of International Military Tribunal at Nuremberg of 8 August 1945, are by their nature not subject to statutory limitation of prosecution." The reason of the draft law stated that it is a general principle of international law that crimes against humanity are, by their nature, not subject to the statute of limitations and the law in question only has a *declaratory* function with respect to that principle. The elaboration of this law gave primacy to such ethical and moral reasons as the punishment of the crimes committed during the Second World War and solidarity with victims and their relatives.

With the revelation of the role of certain French officials during the Second World War through archival data, public support for the draft law increased. Despite its opponents' objections that evidence had been destroyed and witness statements could not be held credible because of the length of time since then, the draft became law in 1964.[40] In the frame of this law, French courts made three important decisions that impacted the development of international criminal law: the *Barbie, Touvier* and *Papon* decisions.[41]

In its 1984 decision in the *Barbie* case, the French Court of Cassation held that the crimes against humanity committed against Jews and members of the French Resistance by German citizen Klaus Barbie, the head of the Gestapo at Lyon whose extradition had been requested from Bolivia, would not be subject to the provisions on statute of limitations given the nature of those crimes.[42] In its decision in the case of Paul Touvier, a French citizen tried on charges of complicity in the murders of seven Jews during the Second World War, the

38 In this context, the decision on Adolf Eichmann, who was extradited to Israel after an extended process, is highly significant. See Lasok, D., 'The Eichmann Trial', *International and Comparative Law Quarterly,* Vol. 11, Issue 2, 1962, pp. 355-374.

39 See Kok, Ruth, *Statutory Limitations in International Criminal Law*, Asser Press, Hague, 2007, pp. 160, Sadat, Leila Nadya, 'The Nuremberg Paradox', Washington University in St. Louis Faculty Working Papers in http://ssrn.com/abstracr=1408153, 2009, (February 2013), pp. 30-32.

40 In its final form, the provision in question stipulates that the statute of limitations shall not apply to crimes against humanity under Article 213-5 of the French Criminal Law adopted in 1994.

41 Cassese/ Acquaviva/ Whiting 2011, p. 170, p.174, pp. 488-499.

42 Kok, pp. 160-162, Forrest Martin, Francisco, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis,* Cambridge, University Press, Cambridge, 2006, pp. 482-483. Lelieur-Fischer, Juliette, 'Prosecuting the Crimes Against Humanity Committed during the Algerian War. An Impossible Endeavour (the 2003 Decision of the French Court of Cassation in Aussaresses)', *Journal of International Criminal Justice,* Vol. 2, 2004, Issue 1, pp. 231-244, p. 233.

French Court of Cassation reversed the acquittal decision awarded by the Paris Court of Appeals for lack of evidence and held once more that provisions on statute of limitations shall not apply in matters of crimes against humanity.[43] The conviction of Maurice Papon,[44] who was held responsible for the deportation of 1,500 Jews to concentration camps in Germany, built on previous decisions and substantiated once more the approach advocating the imprescriptibility of crimes against humanity. Yet, it is necessary to note that the French High Court's 2003 decision in the *Aussaresses* case, involving acts of torture and "summary executions" resulting in murder in the Algerian War between 1955 and 1957, largely contradicted the Court's consistent approach on this matter; the Court held in *Aussaresses* that only those provisions of customary international law which were not at variance with domestic law could be applicable. The divergent perspectives the High Court adopted with respect to crimes against humanity committed at the time of the Second World War and the Algerian War received fair criticism, and the appropriateness of these perspectives was the subject of debate in the context of Article 7(2) of the European Court of Human Rights and Article 15(2) of the International Covenant on Civil and Political Rights.[45] Developments concerning France's admission of responsibility for the Algerian War are of course likely to have an impact in the near future on the French High Court's jurisprudence on crimes committed against humanity during the Algerian War.

Post-Second World War arguments on statute of limitations in the Federal Republic of Germany began in the 1960s with the prescription, under the German Criminal Code, of several types of crimes committed during the war. In Germany, the first half of 1960s marked a period in which no clear approach had yet been established as regards the punishment of Second World War criminals.[46] Although the German Social Democratic Party (SPD) in particular proposed to consider the limitation periods to have been suspended between 1945 and 1949, when an effective investigation system was clearly not in place, the act which took its final shape and was adopted in 1965 extended the limitation periods until 1969 only in respect of manslaughter. It is important to emphasize, however, that the act provided that voluntary manslaughters that had been prescribed at the time the act entered into force in 1965 would be excluded from the scope of that extension and based the exclusion on Article 103(2) of the Constitution of the Federal Republic of Germany which established the prohibition on retroactivity.

Interestingly, this provision set forth by the German legislature – extending the limitation periods only with respect to the perpetrators of war crimes and crimes against humanity committed during the Second World War – was brought before the Federal Constitutional Court of Germany on charges of constitutional violation. Observing that the extended limitation periods did not violate the constitution and did not alter the substance of criminal responsibility (merely involving a procedural regulation), the Court found that rules on the statute of limitations did not entitle perpetrators to a right which could not be abrogated by the legislature. Therefore the act did not violate the prohibition on retroactivity stipulated in Article 103(2) of the German Constitution.[47] In fact, a new act in 1969 extended limitations periods for another twenty years (until 31 December 1979) with respect to murder and other acts punishable by a life sentence, and provided that under

43 Kok, p. 162, Cassese, Antonio, *The Oxford Companion to International Criminal Justice,* Oxford University Press, Oxford, 2009, pp. 957-958, Bassiouni, Cherif, M., *Crimes Against Humanity: Historical Evolution and Contemporary Application,* Cambridge University Press, Cambridge, 2011, p. 675.

44 Cassese/Acquaviva/Whiting, p. 170, Bassiouni, 2011, p. 676.

45 Lelieur-Fischer, p. 234.

46 Kreß, pp. 27-30, Freudiger, Kerstin, *Die juristische Aufarbeitung von NS-Verbrechen,* Tübingen, Mohr Siebeck, 2002, pp. 12-33, Kok, pp. 145-149, Weiss, Friedl, 'Time Limits for the Prosecution of Crimes Against International Law', *British Yearbook of International Law,* Vol. 53, Issue 1, 1982, pp. 165-195.

47 Bundesverfassungsgericht, BVerfG 25, 269, 26 February 1969, the original text of the decision is accessible at: http://www.servat.unibe.ch/dfr/bv025269.html#Rn013195 (February 2013).

no circumstances shall statute of limitations apply to the crime of genocide.[48] In 1979, there was renewed debate about limitations, and the provision stipulating imprescriptibility of manslaughter was ultimately incorporated into German Criminal Code (Article 78/2).

A similar provision of law was on the agenda in the United Kingdom at a relatively later date, namely in the 1990s. The War Crimes Act enacted in 1991 conferred jurisdiction on United Kingdom courts over murders that took place, in violation of the laws of war (humanitarian law), in a territory that was part of Germany or under German occupation between 1 September 1939 and 5 June 1945.[49] For the UK courts to have jurisdiction, it sufficed if the alleged offenders were, or subsequently became, British citizens or residents in the United Kingdom, the Isle of Man or any of the Channel Islands on 8 March 1990.

This act was adopted after a highly contentious process. There were arguments that investigations to be launched on the basis of this act, after so many years had passed since the Second World War, would amount to an abuse of the criminal investigative process (*the abuse of process doctrine*). It was further likely that evidence would have been lost since then, and because most witnesses were residing abroad, proceedings would not have room for the exercise of the right to question witnesses, which would mean an inevitable violation of the right to a fair trial, guaranteed under Article 6 of the European Convention on Human Rights.[50] Theses to the contrary maintained that UK law had established standards on the reliability, competence and objectivity of evidence, proceedings would move forward within the frame of the circumstances of the specific cases and in accordance with those evidentiary standards, and testimony from witnesses residing abroad could be taken through rogatory means in keeping with the rules on international judicial assistance and cooperation.[51] The first conviction based on this act was rendered against Anthony Sawoniuk who was accused of murdering two Jewish civilians in Belarus.[52]

The most important decision concerning post-war crimes in Italy involves the investigation of the murder of 335 Italian civilians by German and Italian soldiers in 1944 and the verdict on Erich Priebke in particular.[53] Initially, the Military Court of Rome dismissed the case on statute of limitations grounds, holding that under the facts of the case, Priebke could not be punished with the imprescriptible life sentence due to mitigating circumstances arising from the execution of the law and orders of superiors and compliance with the law under duress. The decision of the Military Court was quashed by the Italian Military Court of Cassation. The *Priebke* case was tried again before the Military Court of Rome, which made a conviction decision that rested on a different definition of the crime than was given in the indictment and held that statute of limitations would not apply to the contemplated life sentence. More importantly, though, the Military Court of Rome also cited international law. With reference to Article 10(1) of the Constitution of the Italian Republic, which provides that "The Italian legal system conforms to the generally recognized principles of international law", the Military Court stated that statutory limitations would not apply to war crimes and crimes against humanity, for the non-applicability principle had a peremptory *(jus cogens)* character generally recognized under international law.

In its decision concerning the extradition of Austrian war criminal Josef Franz Leo

48 Freudiger, p. 32, Kok, p. 148.

49 The text of the Act is accessible at: http://www.legislation.gov.uk/ukpga/1991/13 (February 2013). See Richardson, 'War Crimes Act 1991', Modern Law Review, Vol. 55, Issue 1, 1992, pp. 73-87, Kok, pp. 180-184. Also see Ganz, Gabrielle, 'The War Crimes Act 1991: Why No Constitutional Crisis?', *Modern Law Journal*, Vol. 55, Issue 1, pp. 87-95, 1992.

50 Kok, pp. 183-184.

51 Ibid.

52 Bassiouni, 2011, p. 326.

53 Ibid., p, 680.

Schwammberger, the Federal Court of La Plata (*Cámara Federal de La Plata*) in Argentina held that general statutory limitations would not apply to crimes against humanity.[54] Even though, at the time of the commission of the crimes in question, Argentina was not party to the conventions (discussed below) on the non-applicability of statutory limitations to war crimes and crimes against humanity, the Court reiterated that the non-applicability principle had become a peremptory norm of customary international law. The Court reasoned its decision with reference to the opinions of Hugo Grotius and Cesare Beccaria as well as international conventions and declarations. The High Court considered the lack of provisions on statutory limitations in conventions on international crimes (for instance, the genocide convention) strongly supportive of its approach. The Court further emphasized that international law is one of the sources of criminal law as per Article 102 of the Constitution of Argentina and observed that the legality principle could therefore not be applied strictly; it was necessary to recognize the provisions aimed at guaranteeing that limitation rules would not apply to international crimes before the courts in Argentina.[55]

Two main international conventions concern the topic of international crimes and statutory limitations discussed above. These instruments – the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[56] and the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes[57] – reflect the influence of the abovementioned developments as well as play an exemplary role for the statutory limitation regulations of domestic legal systems as regards international crimes.

Article 1 of the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provides as follows:

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

1) War crimes as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3 (1) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

2) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nurnberg [*sic*], of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

Article 4 of the Convention imposes upon states parties the obligation to adopt any legislative

54 Kok, p. 177, in addition, for a brief general evaluation of the national court decisions in Argentina by the International Committee of the Red Cross, see http://www.icrc.org/customary-ihl/eng/docs/v2_cou_ar_rule160 (March 2013).

55 Kok, p. 178.

56 The Convention on the Non-Applicability of Statutory Limitations to War Crimes Against Humanity is accessible at treaties.un.org. See United Nations Economic and Social Council Commission of Human Rights, 'Question of War Criminals and of Persons Who Have Committed Crimes Against Humanity', E/CN.4/1966, http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/906 (February 2013), in particular, pp. 49-50, Miller, Robert, H., 'The Convention on the Non-Applicability of Statutory Limitations to War Crimes Against Humanity', *American Journal of International Law,* Vol. 65, Issue 3, 1971, pp. 476-501.

57 The text of the European Convention on the Non-Applicability of Statutory Limitations to War Crimes Against Humanity is accessible at http://conventions.coe.int/ (February 2013). Also see Bassiouni, 2011, p. 276.

or other measures necessary to ensure that statutory limitations shall not apply to said crimes.

The European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes significantly narrowed the scope of the rule on the non-applicability of provisions concerning statutory limitations. It provides in Article 1 that the following shall not be subject to statutory limitations, insofar as they are defined as crimes in the domestic law of a contracting state: war crimes (in the form of violations specified in those provisions of the 1949 Geneva Conventions that limit the scope of Article 1); any comparable violations of humanitarian law as defined in customary law (which are not already provided for in the Geneva Conventions, when the specific violation under consideration is of a particularly grave character by reason either of its factual and intentional elements or of the extent of its foreseeable consequences); crimes against humanity (as specified in the Genocide Convention[58]); and any other acts which the contracting states shall declare, in accordance with the procedure in the Convention, to be a violation of international law.

Following these important steps in the prosecution of crimes against humanity and war crimes committed during the Second World War, there was renewed debate on statutory limitations in the context of international crimes around the time of the collapse of real-socialism in the 1990s. Although legislative efforts and proceedings concerning crimes committed or allegedly committed under real-socialist regimes in times of regime change were generally marked by prejudiced political and ideological score-settling with and rupture from past regimes, these efforts also led to important considerations regarding international crimes and limitation periods.

Of the countries in transition, the Czech Republic made "the most radical moves" in this context. Discussions on statutory limitations in international criminal law in the Czech Republic began with the collapse of real-socialism in Czechoslovakia in 1989.[59] After the country split into two as the Czech Republic and Slovakia in 1990, legislation was required to punish the perpetrators of the crimes committed in Prague at the time of the military intervention, to crush what is known as the 1968 'Prague Spring'.[60] These acts were sponsored by Warsaw Pact countries including mainly the Union of Soviet Socialist Republics. An act adopted in 1993, which included in its reason important ideological declarations about the socialist regime and the Communist Party of Czechoslovakia,[61] established as follows: "the period of time from 25 February until 29 December 1989 shall not be counted as part of the limitation period for criminal acts if, due to political reasons incompatible with the basic principles of the legal order of a democratic state, said acts were not finally and validly convicted or the charges against them were dismissed" (Article 5).

Before the 1993 Draft Bill was passed into law, it arrived before the Czech Constitutional Court for a preliminary review. The Court's conclusion

58 While it could be thought at this point that the Convention stipulates non-applicability of statutory limitations only with respect to the crime of genocide, the phrase *"the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations"* therein leads to the conclusion that genocide is considered as a specific example of a crime against humanity.

59 Priban, Jiri, 'Retroactivity and Constitutional Justice in Central Europe', Priban, Jiri/Roberts, Pauline/Young, James (ed.) *Systems of Justice in Transition: Central European Experiences Since 1989.* Ashgate, Aldershot, pp. 29-42, pp. 37-38. Robertson, David, A, 'Problem of Their Own, Solution of Their Own: CEE. Jurisdiction and the Problems of Lustration and Retroactivity', in Sadurski, Wojciech/Czarnota, Adam/Kyrgier, Martin (ed.) *Spreading Democracy and the Rule of Law*, Springer, Berlin, 2010, pp. 73-96.

60 On the Prague Spring, see Williams, Kieran, *The Prague Spring and Its Aftermath: Czechoslovak Politics,* 1968-1970, Cambridge University Press, Cambridge, 1997.

61 Wilke, Christiane, 'Politics of Transitional Justice: German, Hungarian and Czech Decisions on Ex Post Facto Punishment' in *The Contours of Legitimacy in Central Europe: New Approaches in Graduate Studies*, Oxford, European Studies Centre, 2003, pp. 4-5, accessible at: http://users.ox.ac.uk/~oaces/conference/papers/Christiane_Wilke.pdf (February 2013).

established significant principles responsive to objections concerning the legality and equality principles in the context of the debate about statutory limitations. The Czech Constitutional Court held that limitations periods shall be given effect only if investigative bodies perform their duties effectively. The Court observed that an effective investigation into crimes committed during the former regime was not functional with respect to political crimes perpetrated against regime opponents, and on this basis the Court established that the rulers of the regime did not initiate any investigations into the crimes committed on behalf of the regime. Arguing that the real-socialist regime had no legitimacy, the Court concluded that statutory limitations should not apply to crimes perpetrated during that time period. Any interpretation to the contrary, the Court held, would mean the new regime, resting on the rule of law, would ignore or implicitly condone the crimes committed on behalf of the state under the previous regime.

The debate in the Czech Republic had a counterpart in Hungary with regard to crimes perpetrated in 1956, during the uprising against government forces which was quelled through the intervention by the Union of Soviet Socialist Republics.[62] An act issued in 1991 stipulated that "statutory limitations shall commence as of 2 May 1990 with respect to the prosecution of the crimes of treason (Article 144/2), voluntary manslaughter (Article 166/1 and 2), and infliction of bodily harm resulting in death (Article 170/5) as defined in the 1978 Law that were committed between 21 December 1944 and 2 May 1990, if the decisions concerning the state's punitive power were made for political reasons".[63] The Constitutional Court of Hungary, when the act in question was before it, emphasized the prohibition of retroactivity in the context of the legality principle as well as the principle of certainty and predictability of law, and held that the act would violate the constitution. Afterwards, the Hungarian legislature, in a new act in 1993 (Act Concerning the Procedures in the matter of Certain Criminal Offences during the 1956 October Revolution and Freedom Struggle), defined the crimes committed during the 1956 uprising as war crimes and crimes against humanity.[64] In its preliminary review of the new act, drafted in the same context, which provided that statutory limitations shall not apply to certain types of crimes committed during the 1956 occupation, the Constitutional Court reached some conclusions that are highly important for the purpose of this study.[65] The Court observed that the prohibition of war crimes and crimes against humanity was, at the time said crimes were committed, recognized under customary international law. Based on this observation, and because international crimes concerned the international community as a whole, it stressed that rules of international law generally accepted under Article 7/1 of the European Convention on Human Rights constituted, without need for any additional regulation, a direct source of Hungarian domestic law. The Court then considered that the non-applicability of statutory limitations to war crimes and crimes against humanity is a *general principle of law,* and did not find the challenged legislation unconstitutional. The Hungarian Supreme Court declined to apply this law in its decision in the *Sagotarjan* case on the grounds that a (non-international) armed conflict –a concept which must exist for a war crime to materialize under international law and will be

62 On this topic, see Report of the Special Committee of the United Nations on the Problem of Hungary, UN General Assembly 11th Session, New York, 1957, accessible at: mek.oszk.hu/01200/01274/01274.pdf (February 2013).

63 Kok, pp. 205-209, Priban, p. 35. Also see Boulenger, Christian, 'Europeanisation through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and Hungary's Return to Europe', in *The Contours of Legitimacy in Central Europe, New Approaches in Graduate Studies,* European Studies Centre, Oxford, 2003, http://users.ox.ac.uk/~oaces/conference/papers/Christian_Boulanger.pdf (February 2013).

64 Kok, p. 34. Also see Stan, Lavinia, 'Hungary', in Stan, Lavinia (ed.)*Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past,* Routledge, Oxon, 2009, pp. 72-127, pp. 120-122.

65 The Constitutional Court of Hungary, No. 53/1993 (X.13.) AB. The English version can be found at the following link of the International Committee of the Red Cross on national court decisions: http://www.icrc.org/ihl-nat.

discussed below in the context of Turkey– did not exist in Hungarian territory.[66] This act was put before the Constitutional Court once again in 1996, and this time the Court struck it down on the grounds that it did not include the required rules of reason concerning its execution. Yet, the Court underscored in the same decision that war crimes and crimes against humanity were subject to a different regime with respect to statutory limitations and the need to investigate and punish war crimes under the 1949 Geneva Conventions[67] contracted by Hungary.

In Germany, discussions on statutory limitations gained new traction in the context of certain types of crimes committed in East German Democratic Republic.[68] The issues that were most controversial and carried the broadest implications had to do with the definition of and prescription of crimes involving persons who lost their lives due to anti-personnel mines and automatic firing systems or because of shooting by East German border guards when people attempted to pass through the Berlin Wall constructed in 1961.[69] After the unification of East Germany and West Germany, the Federal German legislature enacted two pieces of legislation with a view to ensuring that crimes perpetrated in East Germany did not go unpunished. The legislation known as the First Act on the Statute of Limitations included the following provision:

"In calculating the period of limitation for the prosecution of acts which were committed during the unlawful rule of the Socialist Unity Party of East Germany but, due to the explicit or presumed wishes of the State or Party leadership, were not prosecuted on political or other grounds incompatible with the free order of a law-based State, the period from 11 October 1949 until 2 October 1990 shall not be counted. The period of limitation shall be considered to have been suspended in that period." Another act issued in the same year[70] further extended the limitation periods in regards to crimes committed in the era of the East German Republic. In 1994, the German Federal Court[71] held that the abovementioned approach toward crimes committed during the Second World War could also be implemented in relation to crimes perpetrated during the era of the East German Republic. Observing that "the regime incompatible with the general principles of a free state based on the rule of law" was a major obstacle before the prosecution of certain types of crimes in East German Republic, the Court determined that the unification of Germany could not result in the statute of limitations having run in regards to crimes that could not be prosecuted in East German Republic because of "the culpability of the state". The German Constitutional Court also followed the approach of the German Federal Court.[72] Eventually, a third act extended the period of limitations one more time, until 2 October 2000.[73]

While it can be granted that the crimes committed in former socialist regimes had a

66 Hoffmann, Tamas, 'Individual Criminal Responsibility for Crimes Committed in Non-International Armed Conflicts – the Hungarian Jurisprudence on the 1956 Volley Cases', in Adan, Nieto, Martin, (ed.) *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions: Proceedings of the XVth International Congress on Social Defence*, Ministerio de Justicia, Catilla- La Mancha Universidad, pp. 735-757, pp. 740-742, Kok, p. 207, Stan, 120-122.

67 The Conventions will be discussed below under Crimes of Enforced Disappearance in Turkey.

68 Gesetz über das Ruhen der Verjährung bei SED-Unrechstaten, 3.4.1993, p. 392. Bundesanzeiger, www.bgbl.de (February 2013), Marxen, Klaus/ Werle, Gerhard/Böhm, Frank, *Die Strafrechtliche Aufarbeitung von DDR-Unrecht*, de Gruyter, Berlin, 1999, pp. 5-7.

69 Wilke, p. 2. Kok, pp. 193-197. The investigation led to the trials of persons including Erich Honecker, the former Head of State of East Germany.

70 Bundesanzeiger, Gesetz zur Verlängerung strafrechtlicher Verjährungsfristen (2. Verjährungsgesetz), 29 September 1993, p. 1657, www.bgbl.de (February 2013).

71 Bundesgerichtshof für Strafsachen, 18 January 1994. http://www.hrr-strafrecht.de/hrr/1/93/1-740-93.php?referer=db (February 2013), see in addition, Kok, p. 196.

72 Bundesverfassungsgericht BVerfG 25, 269, the text of the decision is accessible at: http://www.servat.unibe.ch/dfr/bv025269.html (February 2013).

73 Gesetz zur weiteren Verlängerung strafrechtlicher Verjährungsfristen und zur Änderung des Gesetzes zur Entlastung der Rechtspflege (3. Verjährungsgesetz), 30 December 1997, p. 3223, www.bgbl.de (February 2013).

distinct character in this regard, the pieces of legislation, court decisions and international conventions referred to above indicate that the rule on the non-applicability of statutory limitations to international crimes has been evolving toward becoming a peremptory norm of international law. As a matter of fact, Article 29 of the Rome Statute of the International Criminal Court,[74] contracted by 121 states as of March 2013, affirms this norm. What follows is a discussion of the crime of enforced disappearance as an international crime and the question of statutory limitations in that specific regard.

ENFORCED DISAPPEARANCE AS AN INTERNATIONAL CRIME

The crime of enforced disappearance emerged as a widespread practice after a decree issued in Nazi Germany during the Second World War.[75] The first time it was treated as an international crime was the trial of Wilhelm Keitel[76] and the trial of *Josef Altstoetter et al.* (aslo known as the *Justice* case, in which all defendants held positions in the justice system of the Nazi regime)[77] before the Nuremberg Tribunal under the Control Council Law. As Alpkaya discusses in detail, enforced disappearance became increasingly widespread not only in times of war but also in times of peace when states practiced it against their own citizens, leading to grave and large-scale violations of the fundamental rights and liberties recognized under international human rights instruments. As a result, it was necessary to define the crime of enforced disappearance in various declarations and conventions. These conventions and United Nations declarations show that the international community and domestic law systems are sensitive about prosecuting the perpetrators of the crime of enforced disappearance and illustrate the progress of international law in that context. In fact, the approach, which suggests that the prevention of enforced disappearance and the prosecution and punishment of perpetrators is on its way to becoming a peremptory norm of international law (*jus cogens*), is reflected in the jurisprudence of international judicial bodies including, mainly, the judgments rendered on Latin American countries by the Inter-American Court of Human Rights.[78]

Adopted on 20 December 2006 and having entered into force on 23 December 2010, the International Convention for the Protection of All Persons from Enforced Disappearance has consolidated the partially differing sections of the Declaration on the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on Forced Disappearance of Persons, and has provided in its Article 2 that enforced disappearance "is considered to be the arrest, detention (*Entzug der Freiheit*), abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".[79]

As this definition indicates, enforced disappearance is a crime consisting of several acts. It usually involves deprivation

74 On the International Criminal Court, visit www.icc-cpi.int (March 2013).

75 See Werle, Gerhard/Jeßberger, Florian, *Völkerstrafrecht*, Mohr Siebeck, Tübingen, 2007, p. 362.

76 Wilhelm Keitel's testimony is available at: http://avalon.law.yale.edu/imt/04-03-46.asp#keitel1 (February 2013).

77 Justice Case, accessible at: http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf (February 2013).

78 See, for instance, the *Goiburu v. Paraguay* judgment where the Inter-American Court states that the prohibition of the crime of enforced disappearance has a peremptory *(jus cogens)* character in international law, § 84, http://www.univie.ac.at/bimtor/dateien/iachr_2006_Goiburu_vs_paraguay.pdf Radilla-Pacheco v. Mexico, para. 139, http://www.corteidh.or.cr/docs/casos/articulos/seriec_209_ing.pdf, p. 203, Casyto v. Peru, http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf (March 2013).

79 For the debates on the definition, see Andreu-Guzmán, Federico, 'The Draft International Convention on the Protection of All Persons from Forced Disappearance', *The Review of the International Commission of Jurists,* Vol. 62-63, 2001, pp. 73-106.

of liberty, abduction, torture, injury, murder, and misconduct in office. Thus, the complex composition of the crime and the specific unlawfulness inherent in it are frequently emphasized.[80] Speaking very broadly, three conclusions arise from the Convention definition.

The first is that enforced disappearance involves depriving a person of his liberty by any means. In this regard, how the act of enforced disappearance was initiated does not matter. Therefore, not only unlawfully detained persons but also those who are in custody or the subject of an arrest warrant can be the victims of a crime of enforced disappearance.

Second, in a crime of enforced disappearance, the perpetrators may be agents of the state or persons acting on behalf of the state in ways specified in the Convention. In the Declaration, the perpetrators of the crime are identified as government officials, organized groups, or private individuals acting with the direct or indirect support of, or on behalf of, the government. Enforced disappearance may be perpetrated by special security units or paramilitary forces. Article 1(2) of the International Convention for the Protection of All Persons from Enforced Disappearance emphasizes that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance. Articles I(a) and X of the Inter-American Convention on Forced Disappearance of Persons also include the same provision.

The third conclusion is that the crime of enforced disappearance places the victim outside the protection of the law. The right of the disappeared person to appear before a judge (*habeas corpus*) is denied, and the person's other rights face serious risks of violation, including the right to physical integrity, life, dignity, sexual immunity, and property. Because enforced disappearance entails the denial of the disappeared person's fundamental rights, the disappeared person and his or her relatives are left without a remedy, as emphasized in relevant conventions. The fate and whereabouts of the person are unknown, which precludes the exercise of the right to a remedy granted under domestic law. Although the Inter-American Convention established (in Article II thereunder) that impediment of the recourse to legal remedies and procedural guarantees is an objective element of the crime of enforced disappearance, the crime may nevertheless be perpetrated even when relatives of the victim can potentially lodge an objection to the detention or arrest; therefore, it could be argued that the definition given in the UN Convention better reflects the specific character of the crime.

Opposition groups, intellectuals, political party representatives, members of illegal organizations, and representatives of non-governmental organizations may be among victims of enforced disappearance. In addition to the disappeared person, victims of the crime of enforced disappearance involve the disappeared person's family members and relatives who are not given any truthful information about his or her fate for months, sometimes for years.[81] The anguish and distress relatives of the disappeared feel as a result of their inability

80 Grammer, Christoph, *Der Tatbestand des Verschwindenlassens einer Person,* Duncker & Humblot, Berlin, 2005, pp. 95-137, Ambos, Kai, "Verbrechenselemente" sowie Verfahrens- und Beweisregeln des Internationalen Strafgerichtshof, *Neue Juristische Wochenschrift,* Vol. 54, Issue 6, pp. 405-410, 2001, p. 406, also see von Braun, Leonie/Diehl, David, Die Umsetzung gegen das Verschwindenlassen in Deutschland: Zur Erforderlichkeit eines eigenen Straftatbestandes, *Zeitschrift für international Strafrechtsdogmatik,* Vol. 4, 2011, http://www.zis-online.com/dat/artikel/2011_4_547.pdf (February 2013).

81 UN General Assembly Resolution 33/173 on "Missing Persons" dated 20 December 1978, Resolutions No. 43/159 (1988), 44/160 (1990,) 46/125 (1991) and 47/132 (1992). In the same context, see annual reports of the Inter-American Commission on Human Rights for the years 1978 and 1980-1981. Annual Report of the Inter-American Commission on Human Rights 1978, OEA/Ser.L/II.47, doc., 1979, Annual Report of the Inter-American Commission on Human Rights, 1980-1981, OEA/Ser.G, CP/doc.1201/1981, 1981, the reports are accessible at http://www.wcl.american.edu/humright/digest/database3.cfm (February 2013).

to know the truth about the victim of the act of enforced disappearance are considered torture or cruel, inhuman and degrading treatment in the jurisprudence of Human Rights Courts.[82] Furthermore, the United Nations Working Group on Enforced or Involuntary Disappearances has received substantial information suggesting that the act of enforced disappearance aims to intimidate the group or collective of which the victim is a part and therefore has destructive effect on the entire society.[83] This is particularly well exemplified in Latin American countries where enforced disappearance was widely practiced. In fact, the crime of enforced disappearance has been defined in many of these countries in a manner that mirrors international conventions.[84] Although trials relating to the disappeared, or on *desaparecidos* as they are known in Latin American countries, mainly proceeded in the frame of the crime of deprivation of liberty,[85] currently proceedings are in progress concerning the crime of enforced disappearance in a *lex specialis* framework, rather than the general regulation relating to deprivation of liberty.

While the particular importance of the topic for Latin American countries cannot be ignored, in several other countries including Turkey, the practice of enforced disappearance came to be defined as an international crime within the jurisdiction of international courts.[86] Enforced disappearance constitutes a violation under international law, and although it is not, as will be analyzed below, included in the respective statutes of the Tribunals for the former Yugoslavia and Rwanda, the ICTY observed that enforced disappearances practiced in the territory of the former Yugoslavia should be defined as crimes against humanity within the frame of "other inhumane acts".[87]

The last definition of enforced disappearance comes from Article 7/2(i) of the Rome Statute of International Criminal Court, which defines enforced disappearance as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." The identification of removal from the protection of the law as an intention demonstrates the specific character of the crime and establishes the typical mental element that is necessary.

The Statute defined the act as a crime involving multiple acts. These acts, according to the Statute, are the arrest, abduction or detention (*Entzug der Freiheit*) of one or more persons and the refusal to acknowledge the abduction or to provide information about the whereabouts or fate of the person or persons. In the Elements of Crimes document annexed to the Statute, it is noted that given the complex nature of the crime, its commission will normally involve more than one perpetrator.[88] With this definition,

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82 Scovazzi, Tulio/Citroni, Gabriella, *Struggle Against Enforced Disappearance and the 2007 United Nations Convention,* Martinus Nijhoff, Leiden, 2007, p. 30.

83 See, for instance, United Nations document E/CN.4/1985/15, § 291, accessible at http://www.ohchr.org (February 2013). Also see XXIV International Conference of the Red Cross and Red Crescent, Manila, 1981, Resolution II "Forced or involuntary disappearances", www.icrc.org (February 2013).

84 See Working Group on Enforced or Involuntary Disappearances, 'Civil and Political Rights, Including the Questions of Disappearances and Summary Executions', E/CN.4/2006/56, 2006. Accessible at: http://www.ohchr.org (February 2013).

85 Bkz. Lafontaine, Fannie, 'Limitation for Enforced Disappearances: The Sandoval Case before the Supreme Court of Chile', *Journal of International Criminal Justice,* Vol. 3, Issue 2, 2005, p. 469-484.

86 Anderson, Kirsten, 'How Effective is the International Convention for the Protection of all Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?', *Melbourne Journal of International Law,* Vol. 7, Issue 2, 2006, pp. 245-277.

87 *Kupreskic* (IT-95-16-T) 14 January 2000, § 566, *Kvocka* et al. (IT-98-30/1-T), 2 November 2001, § 208.

88 Footnote 23 elaborating Article 7 in Elements of Crimes.

it is first of all established that members of a 'political organization', in addition to state agents or persons acting on behalf of the state in any form, could also be perpetrators of this crime. The second innovation in the text of the Article is the use of the expression "for a prolonged period of time" to qualify disappearance in order for the act to materialize. While the Rome Statute does not provide any clarity on that expression, it is obvious that it will need to be interpreted narrowly given the obligation – guaranteed under international conventions – to bring the person before a judge.

The Rome Statute establishes that in order for the crime of enforced disappearance to be considered a crime against humanity, it must have been committed as part of a widespread or systematic attack. Undoubtedly, the commission of the crime of enforced disappearance as such, that is as a crime against humanity, is highly significant in terms of the discussions on statutory limitations. Thus, it is necessary to first highlight the elements of the crime against humanity.

CRIMES AGAINST HUMANITY AS A TYPE OF INTERNATIONAL CRIME

The notion of crime against humanity is the first example of the legal importance attributed to the concepts of human dignity and humanity that have progressed with the Enlightenment philosophy. The history of that notion can be traced back to the 1907 Hague Convention, which established that international obligations arising from the law of humanity[89] and public conscience shall also be applicable in times of war.[90] A declaration issued by Great Britain, France and Russia in the aftermath of the First World War included the first reference to crimes against humanity which, in the context of the 1915 deportation of Armenians and the violations of humanitarian law resulting from the deportation, was intended to express the grave crimes committed against the civilian population during the war.[91] The 1919 Paris Peace Conference also included a request to punish perpetrators of crimes against laws and customs of war, as well as humanitarian law, and to establish a tribunal equipped with the jurisdiction to do so.[92] Finally, while there were no doubts at the Paris Peace Conference as to the violations of the laws of war, the American delegation objected that crimes against humanity could be an ambiguous and uncertain notion and it would therefore be difficult to enforce it under criminal law. Because that delegation's approach was adopted, crimes against humanity were ultimately omitted from the final text. Accordingly, following the First World War, both the Treaty of Versailles and Treaty of Sèvres only contemplated trials relating to violations of the laws of war, and there was refrain from the expression "crime against humanity" and no definition of this crime type was provided.

"Crime against humanity" was first defined, along with "war crimes" and "crimes against the peace" (now known as crime of aggression)[93], in Article 6/c of the London Charter of the International Military Tribunal at Nuremberg.[94] The Charter defined crime against humanity as follows:

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89 Known as humanitarian law in contemporary terminology, on the meaning of the concept of humanity in this regard, see Luban, David, 'A Theory of Crimes Against Humanity', *Yale Journal of International Law,* Vol. 29, Issue 1, pp. 85-167, 2004, pp. 86-90.

90 See, for instance, Schwelb, Egon, 'Crimes Against Humanity', *British Yearbook of International Law,* Vol. 23, Issue 8, 1946, pp. 178-190.

91 For the Treaty of Sèvres article on crime against humanity, see Matas, David, 'Prosecuting Crimes Against Humanity: The Lessons of World War', *Fordham International Law Journal,* Vol. 13, Issue 1, 1989, pp. 86-104, pp. 88-92.

92 Ibid., For the text of the report, see Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, *American Journal of International Law,* Vol. 14, 1920, Issue.1/2, pp. 95-154.

93 Tezcan, Durmuş, 'Saldırgan Savaş' (Aggressive War), *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi (Journal of the Ankara University School of Political Sciences),* Vol. 49, Issue 1-2, 1994, pp. 349-363.

94 The Nuremberg Charter and the trial documents are accessible at the following Yale University link: http://avalon.law.yale.edu/imt/imtconst.asp (February 2013).

"murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal."

Article 6 of the Charter of the Nuremberg International Military Tribunal further provided that it is irrelevant whether these acts were defined as crimes under the domestic law of country where the crime against humanity was perpetrated. In addition, the Charter and the Tribunal's jurisprudence required that a crime against humanity can only be committed in the context of the existence of war. The Charter's definition of the elements of the crime against humanity was also adopted in the Charter of Tokyo International Military Tribunal established to try Second World War criminals.[95]

At the Nuremberg and Tokyo trials, objections were put forth that the legality principle was violated with respect to the crimes that fell under the jurisdiction of the two Tribunals. As noted above, the Tribunals relied natural law to emphasize that the legality principle is a principle of justice, and perpetrators could not have been unaware that their actions were criminal and it would be unacceptable to leave unpunished those persons who gravely violated the rules of international law. Critically, the Nuremberg Tribunal observed that international law cannot be violated by abstract entities but only by individuals, and international law can only be enforced if such violations are punished.[96] The definition of crime against humanity as established with the Nuremberg Tribunal was affirmed with UN General Assembly Resolution 95 and dated 11 December 1946.[97]

Although UN General Assembly Resolution 95 recognized the definition of crimes against humanity, unlike in the case of the crime of genocide and war crimes, no treaty exclusive to this crime type has yet been adopted (excepting the conventions on the two methods by which the crime against humanity is committed, namely racial discrimination[98] and enforced disappearance). Accordingly, crimes against humanity were treated in customary law as they were originally defined in the Nuremberg Charter, and the enforcement of that definition by international criminal justice bodies has resulted in a significant body of precedent in regards to the elements of the crime. This precedent has informed discussions when elements of the crime were being established in the Statute of the International Criminal Court and eventually found their way into the Statute definitions. Before considering the elements of crimes against humanity under the Statute of the International Criminal Court, it is necessary to review the statutes of the relevant courts and the approach developed as to whether crimes against humanity must be defined in connection with a state of war/armed conflict.

The first major step in this regard is the definition of crimes against humanity provided in the Statute of the International Criminal Tribunal for the former Yugoslavia[99] ("ICTY Statute") established in 1993 pursuant to Resolutions 808 and 827 by the United Nations Security Council based on its powers under Chapter 7 of the United Nations Charter. According to the

95 The only difference between the Nuremberg Tribunal and the Tokyo Tribunal is that the Statute of the Tokyo Tribunal does not include the religious reason when defining the crime of perpetration.

96 Robert H. Miller, 'The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity', *American Journal of International Law,* Vol. 65, Issue 3, pp. 476-501, 1971.

97 http://untreaty.un.org/cod/avl/ha/ga_95-i/ga_95-i.html (February 2013).

98 UN Convention on the Elimination of All Forms of Racial Discrimination, official Turkish translation is accessible at http://www.uhdigm.adalet.gov.tr/sozlesmeler/coktaraflisoz/bm/bm_09.pdf (February 2013).

99 *International Criminal Tribunal for former Yugoslavia, ICTY,* see Schabas, 2006, on the debates over the establishment of the Court, see Rubin, Alfred 'An International Criminal Tribunal for former Yugoslavia', *Pace International Law Review,* Vol. 6, Issue 1, 1994, pp.7-17.

Statute, when committed in armed conflict, whether international or internal in character, and directed against any civilian population "in a widespread or systematic manner", the following acts shall be considered crimes against humanity:

a) Murder,
b) Extermination,
c) Enslavement,
d) Deportation,
e) Imprisonment,
f) Torture,
g) Rape,
h) Persecutions on political, racial and religious grounds,
i) Other inhumane acts.[100]

Unlike the Nuremberg Charter, the ICTY Statute acknowledges torture and rape. In addition, Nuremberg Charter's definition which identified the existence of an "armed conflict" as an objective element of the crime against humanity was incorporated into the ICTY Statute. While this contradicted the opinion in the international law literature that crimes against humanity can be committed not only during armed conflict but also in time of peace,[101] it is understood that the approach taken in the Tribunal's Statute substantially restricts the definition of the crime against humanity. In fact, in its 1995 *Tadić* judgment,[102] the ICTY held that "it is by now a settled rule of customary international law that crimes against humanity do not require a connection to international *armed* conflict, indeed may not require a connection to any conflict at all", and indicated that the definition in the Statute of the Tribunal was provided to mark the boundaries of the Tribunal's jurisdiction, rather than to establish the elements of the crime against humanity.[103] The ICTY established the contextual elements of crimes against humanity as follows:[104]

a. The existence of an 'attack',
b. The crime must be perpetrated as part of the attack,
c. The attack must be directed against any part of the civilian population,
d. The attack must be widespread and systematic,
e. The perpetrator must commit the crime with awareness of the attack.

The most important development concerning the condition of armed conflict in regards to crimes against humanity is undoubtedly the approach taken in the Statute of the International Criminal Tribunal for Rwanda ("ICTR Statute") with respect to genocide, crimes against humanity and war crimes. No such condition is required in the ICTR Statute,[105] which was promulgated by the UN Security Council on the basis of Chapter 7 of the United Nations Charter after the 1994 genocide in Rwanda which began with the killing of more than 500,000 people in a short span of time. In addition, and unlike the ICTY, the ICTR established that the elements required for a crime against humanity will be satisfied if the crime is perpetrated against a civilian population in a *"widespread and systematic"* manner with national, political, ethnic, racial and religious motives. Although it was argued that the phrasing in the ICTR's Statute was appropriate given that crimes against humanity are generally committed with national, political, ethnic, racial and religious motives,[106] the ICTR Appeals Chamber indicated that in customary law, the mental element of the crime against humanity did not necessarily have to be a discriminatory

100 The Statute of the Court is available at: http://www.icty.org/ (February 2013). See Alpkaya, Gökçen, *Eski Yugoslavya için Uluslararası Ceza Mahkemesi (International Criminal Tribunal for former Yugoslavia),* Turhan, Ankara, 2002.

101 For the debates, see Van Schaak, Beth, 'The Definition of Crimes Against Humanity: Resolving the Incoherence', *Columbian Journal of Transnational Law,* Vol. 37, Issue 3, 1999, pp. 787-850.

102 The Tadić judgment will be discussed in the context of armed conflict under the section dealing with enforced disappearances in Turkey.

103 Van Schaak, pp. 827-828.

104 See, for instance, Kunarac et al. (IT-96-23/1-A), 12 June 2002, § 85.

105 International Criminal Tribunal for Rwanda, ICTR, was established in the capital of Tanzania, Arusha.

106 Akayesu (ICTR-96-4-A), 1 June 2001, § 464.

intent.[107] The judgments of the ICTY also speak to the same effect.[108] It has been suggested that this definition is not representative of customary international law, and the legal professionals who authored the ICTR Statute erred by assuming that discriminatory intent was a mental element of the crime against humanity.[109]

As will discussed below, the ICTR Statute, like the Turkish Criminal Code, considers discriminatory intent in the perpetration of the crime as a typical mental element. Both statutes also require the element that the crime was perpetrated as part of a widespread and systematic attack. This is with a view to eliminating the risk that crimes committed in an isolated manner without a connection to an "armed conflict" could easily be considered under that definition.[110]

The most contentious issues that arose during negotiations over the definition of crimes against humanity in the Statute of the International Criminal Court ("ICC Statute") involved whether the existence of an armed conflict was required; whether discriminatory intent would be required only when the crime takes place by means of persecution or would it be required with respect to all crimes against humanity; and finally whether both a "widespread nature" and "systematic nature" would be required as criteria or one of them would be sufficient and necessary.[111]

The Rome Statute of ICC was adopted in 1998 and entered into force on 1 July 2002. Article 7 of the Statute provides that any of following acts when committed as part of a widespread or systematic attack directed against any civilian population will satisfy the definition of the crime against humanity:

1) Murder,
2) Extermination,
3) Enslavement,
4) Deportation or forcible transfer of a population,
5) Torture,
6) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,
7) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act constituting a crime against humanity or any acts within the jurisdiction of the Court,
8) Enforced disappearance of persons,
9) Racial discrimination (apartheid),
10) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Following the establishment of the elements of the crime against humanity and acts constituting that crime as above, Article 7/2(a) of the Statute provides that the acts that constitute the crime against humanity must be committed in a widespread manner as part of an attack, pursuant to or in furtherance of a State or organizational policy to commit such attack.[112]

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107 Akayesu (ICTR-96-4-A), 1 June 2001, § 464.

108 Tadić (IT-94-1-A) 15 July 1999, § 283, 292i Kordić et al. (IT -9514/2-T), 26 February 2001, § 186, Blaskić (IT-95-14-T), 3 March 2000, § 244, 260.

109 Schabas 2006, p. 197.

110 Ibid., 238-241

111 Van Schaak, 843-844, see Hwang, Phylilis, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court', *Fordham Journal of International Law,* Vol. 22, Issue 2, 1998, pp. 457-503.

112 This criterion has been reinterpreted in various decisions of the Pre-Trial Chamber of the International Criminal Court on the humanitarian crisis in Kenya. In the majority opinion of the Pre-Trial Chamber this refers to "any organization that is capable of perpetrating a widespread or systematic attack against a civilian population", while the minority opinion was that "the organization must be state-like". See Werle, Gerhard/Burghardt, Boris, 'Do Crimes Against Humanity Require the Participation of a State or 'State-Like' Organisation', *Journal of International Criminal Justice,* Vol. 10, Issue 5, 2012, pp. 1151-1170.

Under the Rome Statute, a crime against humanity will materialize if it is perpetrated in either a widespread or systematic manner. The definition in Statute does not require the satisfaction of both a "widespread" and "systematic" nature together. In addition, "attack" refers to a context in which there are multiple commissions of the acts identified in the definition of the crime in Article 7/2(a); as such, it has been noted that the word "attack" is limited to armed conflict or violent acts.[113] Even non-violent racial discrimination (apartheid) or non-violent persecution is considered to be part of the definition of attack. Before discussing the element of commission of the crime in furtherance of a state policy, required as another condition under the Statute, it is necessary to consider how international criminal law jurisprudence and literature interpret the expressions "widespread" or "systematic".

While the word "widespread" is defined variously in the context of crime against humanity, it is generally used to indicate the scale of the attack and the number of victims.[114] International criminal justice bodies have not established a relevant quantitative criterion in this regard. In its *Akayesu* judgment, the Tribunal for Rwanda defined widespread as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims".[115] In its judgment in the Kordić case, the Tribunal for the Former Yugoslavia held that "a crime may be widespread by the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude".[116] In this context, "inhumane act" is used to refer to the acts that constitute the crime against humanity.

In addition, the concept of "systematic" has been defined differently in the jurisprudence of the respective Tribunals for the former Yugoslavia and Rwanda. It has been interpreted as non-coincidental emergence of similar acts, and the pattern/course/route followed by acts taking place in the same context in an organized manner.[117] In the *Akayesu* judgment, the ICTR took a different approach in its definition of "systematic" and held that "The concept of 'systematic' may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources".[118]

Although in the Rome Statute the concepts of widespread and systematic have been joined with the conjunction "or" and the crime against humanity would thus materialize if the attack is either widespread or systematic, the two concepts frequently overlap as part of the same criteria.[119] In this regard, when establishing whether or not elements of the crime against humanity have materialized, the Tribunals for the former Yugoslavia and Rwanda considered the number of victims; the nature of the acts committed; the purposes of the acts; whether or not there was a plan; whether or not there was a political purpose or ideology behind the acts to exterminate, inflict difficult conditions upon or persecute a specific group; the role, if any, of high ranking military officers or important political figures played in the commission of the acts in question; and whether public or private resources were substantially used.[120]

The Elements of Crimes document[121] annexed to

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113 Schabas, 2006, p. 194.

114 Kayishema et al. (ICTR-95-1-T), 21 May 1999, § 123, Kordic et al. (IT-95-14/2-A), 17 December 2004, § 94, Blaskic (IT-95-14-T), 3 March 2000, § 206, Bagilishema (ICTR-95-1A-T) 7 June 2000, § 77.

115 Akayesu (ICTR-996-4-T), 2 September 1998, § 580, also see Rutaganda (ICTR-96-13-T), 6 December 1999, § 69.

116 Kordic et al. (IT-95-14/2-T), 26 February 2001, § 179.

117 Kunarac et al. (IT-96-23/1-A), 12 June 2002, § 98-101.

118 Akayesu (ICTR-996-4-T), 2 September 1998, § 580.

119 Schabas, 2006, p. 193.

120 Kunarac et al. (IT-96-23/1-A), 12 June 2002, § 95, Jelisic (IT-95-10-T), 14 December 1999, § 53, Blaskic (UT-95-14-T), 3 March 2000, § 203. Also see ICC, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar al-Bashir, Al Bashir (ICC-02/05-01/09), 1, 4 March 2009, § 81.

121 Elements of Crimes, accessible at: http://www.icc-cpi.int.

the Statute defines another condition required thereunder, namely the commission of the crime in furtherance of a state or organizational policy. With respect to the commission of crimes against humanity, the document defines "policy" as "the active promotion or encouragement by the state or organization of the attack which constitutes an element of the crimes against humanity". However, the footnote (fn. 6) to the Article which defines the concept of policy explains that in exceptional circumstances such a policy may be implemented by a *deliberate*[122] failure to take action, which is consciously aimed at encouraging an "attack" that constitutes a crime against humanity. The third sentence of the footnote, which offers a further explanation, states that the existence of such a policy cannot be inferred *solely* from the absence of governmental or organizational action. Under this particular Article, which the literature considers highly problematic in terms of its internal consistency, absence of action is generally understood to mean acquiescence or consent.[123]

Under the Rome Statute, the perpetrator must be aware of the context (*chapeau*) of the 'attack'. Or, the fact that the crime, "by its nature and consequences",[124] is part of the attack involving the elements required under the Rome Statute must be known by the perpetrator.[125] As to the element of knowledge, the Statute provides that "'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events" (Article 30(3)). Therefore, the Rome Statute, an instrument that codifies customary international law to a substantial degree, indicates that it shall suffice if the perpetrator knows the connection between the crime and the attack, and unlike with the crime of genocide, specific intent will not be required.

As a subject of controversy in the criminal justice literature, the concept of specific intent has to do with defining the purpose or motive of the perpetrator along with defining elements of the crime.[126] For instance, it is generally agreed that specific intent is required for the crime of genocide to be perpetrated; genocide is a crime that involves a certain number of acts which must be committed with a purpose/motive to destroy, in whole or in part, a national, ethnic, racial or religious group. Yet, customary international law, substantiated by the Nuremberg Charter, and the Rome Statute did not refer to the intent of the perpetrator in the context of crimes against humanity. The elaboration of the Rome Statute suggests that such a requirement would lead a burden to prove a perpetrator's subjective motive and was thus left out of the definition of the crime against humanity. In fact, in its judgment in the *Tadić* case, the ICTY held that discriminatory intent is required only with respect to the crime of "persecution" and it did not constitute the mental element of other crimes against humanity.[127] Therefore, regulations that require a discriminatory intent for a crime against humanity to crystallize contradict the explicit provision of the Rome Statute as well as customary international law. It is generally accepted in customary international law that the intent of the perpetrator, whether personal or discriminatory, is of no importance.[128]

Finally, the element of crimes against humanity which requires the perpetration of a widespread

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122 Undoubtedly, deliberation is used here to refer to individuals acting on behalf of the state, not to the state which is a legal personality and does not carry criminal responsibility under international criminal law.

123 Ambos, Kai, 'Crimes Against Humanity and the International Criminal Court', in Sadat, Leila, *Forging Convention for Crimes Against Humanity,* Cambridge University Press, Cambridge, 2011, pp. 279-304, p. 286.

124 Kunarac (IT-96-23/1-A), 12 June 2002, p. 99, See also DeGuzmann, Margaret, 'Crimes Against Humanity', in *Research Handbook on International Criminal Law* in Brown, Bartram, Edward Elgar Publishing, Northampton, 2011, p.17, pp. 62-113.

125 Blaskić (IT-95-14-T), 3 March 2000, § 244-247, Kunarac et al. (IT-96-23/1-A), 12 June 2002, § 102, Tadić (IT-94-1-A), 15 June 1999, § 271.

126 See Özgenç, under the heading 'amaç veya saik' ('intent or reason'), pp. 274-275.

127 Tadić (IT- 94-1-A), § 284-288.

128 Ambos, 2011, p. 292.

or systematic attack against a civilian population indicates, through the use of the concept of 'civilian population', that the number of victims also matters with respect to the commission of this crime. The use of that concept establishes that the commission of these crimes against randomly selected individual victims will not constitute a crime against humanity.[129] In addition, it is generally accepted that "civilian population" does not include military personnel. Civilian population refers to individuals who are not actively part of combat, according to Article 50 of the 1997 Additional Protocol I of the 1949 Geneva Conventions which are considered to have codified customary international law.[130] However, the existence in a civilian group of individuals who are members of the parties to the conflict will not rule out the status of the crimes committed as crimes against humanity.[131]

The current Turkish Criminal Code No. 5237 provided, for the first time, a definition of crimes against humanity. The definition differs in important ways from the definition of such crimes in the Rome Statute and in customary law. Article 77 of the Turkish Criminal Code stipulates as follows:

The systematic commission of the following acts against a part of the population for political, philosophical, racial or religious reasons and in accordance with a plan shall constitute a crime against humanity:
a) Voluntary manslaughter,
b) Willful infliction of injury,
c) Torture, inflicting severe harm, or enslavement,
d) Deprivation of liberty,
e) Subjection to scientific experiments,
f) Sexual violence, sexual abuse of children,
g) Forced pregnancy,
h) Enforced prostitution.

The first issue that stands out in this definition is that the phrase "widespread or systematic attack" in the Rome Statute has been replaced with "systematic commission in accordance with a plan". Thus, in Turkish criminal law, the acts identified in the Article need not have been committed as part of a "widespread or systematic attack". Their "systematic commission in accordance with a plan" shall suffice.

In addition, while crimes against humanity may be committed with a general intent under the Rome Statute, the use in Turkish Criminal Code of the phrase "for political, philosophical, racial or religious reasons", defines them as crimes that must be committed with specific intent.

The reason of the Article notes that the inspiration for the definition of the crime against humanity is Article 6/c of the Nuremberg Charter. Yet, as discussed above, discriminatory intent is required only in regards to the act of persecution under the Nuremberg Charter. Except in relation to that act, it is not provided as a characteristic mental element of crimes against humanity. Accordingly, the conclusion that the definition has missed this particular point is probably warranted.

Also, the text of the Article states the source of the Article is French criminal law. Strangely, although the source law provides for the crime of "abduction resulting in enforced disappearance" (article 212-2) under the heading crimes against humanity, and although acts of enforced disappearance were perpetrated in a "widespread and systematic manner" in Turkey, the Turkish Criminal Code does not regulate the same crime. The fact that there is a lack of specific regulation in the text of the code on enforced disappearance will be discussed below, together with the effect of the lack on criminal responsibility and the question of statutory limitations in that regard.

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129 Kunarac vd. (IT-96-23/1-A), 12 June 1990, § 90, Semanza (ICTR-97-20-T), 15 May 2003, § 330, Naletilic et al. (IT-98-34-T), 31 March 2003, § 235.

130 Rutaganda (ICTR-96-3), Tadic (IT-94-1-A), 7 May 1997, § 643, Kordic (IT-95-14/2-T), 26 February 2001, § 180, See Cryer et al., p. 193.

131 Tadic (IT-94-1-A) 7 May 1997, § 638, Kordic (IT-95-14/2-T), § 180, Kayishema et al. (ICTR-95-1-T), 21 May 1999, § 128.

THE CRIME OF ENFORCED DISAPPEARANCE IN TURKEY

Aside from important and tragic cases such as that of Sabahattin Ali a few decades earlier, it is mainly in the 1980s that enforced disappearance, as a Cold War concept, crept onto the public agenda in Turkey. History suggests two eras in which the crime of enforced disappearance was probably committed in Turkey in a way that would satisfy the elements of a crime against humanity, e.g. as part of a widespread or systematic attack and within the frame of a "state policy" as defined under the Rome Statute. The first era is the martial law regime declared immediately after the military coup on 12 September 1980, when acts such as murder, torture, and persecution were perpetrated as part of the attack against the civilian population.[132] This era was widely condemned by the international community[133] and led to the suspension of relations between Turkey and the Council of Europe. (It should be noted that, following the abrogation of temporary Article 15 of the 1982 Constitution which granted immunity from criminal prosecution[134] to members of the Nationality Security Council,[135] some of these crimes are now being adjudicated in the trials of former NSC members Kenan Evren and Tahsin Şahinkaya.) The second era was the 1990s when enforced disappearances and unsolved murders were practiced during the state of emergency, and acquired a widespread and systematic character. Building on the discussion about the requirement concerning context (*chapeau*), this section of the article will cover the elements of the act of enforced disappearance in the latter era and the conditions of investigation and prosecution of perpetrators of the act. Thus, it is first necessary to identify the broad contours of the context from which enforced disappearances sprang up in the 1990s.

Enforced disappearances surged dramatically in the 1990s, an era marked by ongoing armed conflict. Some commentators referred to the conflict as "low-intensity warfare" in some places where the state of emergency was in effect, and as "irregular warfare"[136] as far as parties actively involved in the conflict were concerned.

The concept of "armed conflict" was first used in place of "war" in the 1949 Geneva Conventions.[137] Common Article 2 of the four Conventions, to which Turkey is a party, defined "international armed conflict" and specified the types of conflicts that are considered to fall under the scope of that definition. Common Article 3 established that any violations defined in the Conventions, when committed in case of armed conflict not of an international character, will be considered grave breaches of the laws of

132 Gökdemir, Orhan, *Faili Meçhul Cinayetler Tarihi (A History of Unsolved Murders),* 3rd Ed., Destek Yayınevi, 2011, Mavioğlu, Ertuğrul/Şık, Ahmet, *Kırk Katır Kırk Satır, Kontrgerilla ve Ergenekon'u Anlama Kılavuzu (Between a Rock and a Hard Place: A Guide to Understanding the Counterguerrilla and Ergenekon),* Vol. 1, İthaki, İstanbul, 2011, Yalçın, Soner, *Binbaşı Ersever'in İtirafları (The Confessions of Major Cem Ersever),* Doğan Kitap, İstanbul, 2011.

133 On the applications of Denmark, France, the Netherlands, Norway and Sweden, see European Commission of Human Rights: Report on the Applications of Denmark, France, Netherlands, Norway and Sweden Against Turkey and the Conclusion of A Friendly Settlement, *International Legal Materials,* Vol. 25, Issue 2, 1986, pp. 308-318. See Tanör, Bülent, *Türkiye'nin İnsan Hakları Sorunu (Turkey's Human Rights Problem),* 3rd Ed., BDS Yayınları, İstanbul, 1994, Mavioğlu, Ertuğrul, *Bir 12 Eylül Hesaplaşması-I (A Reckoning With 12 September-I),* 4th Ed., İthaki Yayınları, İstanbul, 2006 and *Bir 12 Eylül Hesaplaşması II (A Reckoning With 12 September-II),* İthaki Yayınları, İstanbul, 2006, by the same author.

134 Immunity from criminal prosecution covered the period between the first general election after 12 September 1980 until the establishment of the Office of the Speaker of the TBMM.

135 See, for instance, the story '12 Eylül duruşması başladı' (`12 September trial begins`) in Milliyet newspaper dated 20 November 2012, accessible at www.milliyet.com.tr (February 2013).

136 Major Cem Ersever, who was among the important names in the organization widely known as the 'deep state' in Turkey and was himself killed in an unsolved murder, used the phrase "irregular warfare", Yalçın, p. 53.

137 The original texts of the 1949 Geneval Conventions, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, are available at http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp. (March 2013).

war. Common Article 3 does not define "conflicts not of an international character", but the 1977 Protocol II additional to the 1949 Geneva Conventions defines non-international armed conflict as follows in Article 1 thereunder:

"armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

In addition, Protocol II, Article 3 provides that the provisions of the Protocol on non-international armed conflicts may not "be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State".

While official bodies and persons offer conflicting assessments as to whether there is an armed conflict not of an international character in Turkey in the framework established in Additional Protocol II, the definition of non-international armed conflict has evolved significantly in international law beyond this Additional Protocol. In the *Tadić* judgment, the International Criminal Tribunal for the former Yugoslavia reinterpreted the concept of "armed conflict" and adopted the definition of "*protracted armed violence* between governmental authorities and organized armed groups or between such groups" .[138] This definition was included verbatim in Article 8(f) of the Statute of the International Criminal Court, which additionally provided that situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, shall not be considered non-international armed conflicts.

Based on the definition of "protracted armed conflict" under customary international law and the law of treaties, it could be argued that a conflict of an internal character existed in the state of emergency region in Turkey. In fact, this has been indirectly acknowledged by members of the government at the time. Tansu Çiller, who was Turkey's Prime Minister in 1993, observed that "Turkey faces a terrorist movement that has transformed into a militia and become widespread"; this statement lays bare the approach of the then-government toward the character of the conflict through the words of its spokesperson authorized at the highest level.[139]

As discussed in reports and studies of human rights organizations and other non-governmental organizations, enforced disappearances took place in the context of an exceptional regime that implemented "special warfare methods"[140] against the civilian population in the state of emergency region in the name of anti-terror struggle, and did so at a time when the State of Emergency Law[141] was in effect. In the 1990s, enforced disappearances were also perpetrated against members of illegal organizations outside the state of emergency region, or in connection with the conflict, or as another part of the anti-terror struggle.[142] Even though there are serious indications that enforced disappearances were committed as part of a similar organization and plan in both the state of emergency region and other regions of the country, the focus here will remain on the enforced disappearances

138 Tadić (IT- 94-1-A), § 70 *"protracted armed violence"*.

139 For a relevant news story, see Vatan, 7 July 2009: http://haber.gazetevatan.com/Devleti_ciplak_gormustum/242283/1/Haber (February 2013).

140 For the remarks of Coşkun Üsterci, İzmir representative of the Human Rights Foundation of Turkey, see *Evrensel,* 15 December 2011, http://www.evrensel.net/news.php?id=19408

141 State of Emergency Law No. 2935, 25 October 1983, Official Gazette, Issue: 18204, 27 October 1983.

142 Alpkaya, Gökçen, '"Kayıp"lar Sorunu ve Türkiye' *(Turkey and the Problem of "Missing Persons"), Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi (Journal of the Ankara University School of Political Sciences),* Vol. 50, Issue 3-4, 1995, pp. 31-63, Elçi, Tahir, 'Türkiye'de Gözaltında Kayıplar' *(Disappearances in Detention in Turkey),* Diyalog, 2009, http://e-kutuphane.ihop.org.tr/pdf/kutuphane/22_81_0000-00-00.pdf, pp. 91-97 (February 2013).

perpetrated in the state of emergency region given their "widespread" and "systematic" nature.

As noted above, the most obvious and relevant sign that enforced disappearance was perpetrated in a widespread or systematic manner and as part of a state policy is the similar course followed by the disappearances in custody in the state of emergency region, and the available strong evidence that perpetrators were the same throughout the region. As reported by human rights organizations, discussed in the reports of the commissions of the Prime Ministry and the TBMM (Grand National Assembly of Turkey),[143] disclosed by the perpetrators themselves, and reflected in the indictments of various recent trials, in nearly all cases of enforced disappearance, the victim was previously apprehended and taken into custody in broad daylight by persons known to the local public, and either no information or false information was given on the fate of the victim, and relatives of the victims who attempted to instigate the prosecution of those responsible were openly or implicitly threatened. Furthermore, based on a visit to Turkey in 1998, a United Nations Working Group reported that acts of enforced disappearance followed a pattern.[144] The present report by the Truth Justice Memory Center also sheds light on how enforced disappearances took place in the region.[145]

Considering the allegations presented in indictments, and the evidence in reports, statements of witnesses and complainants, and acknowledgments by "informant" perpetrators[146] as a whole, it is apparent that a large number of the acts of enforced disappearance in the 1990s were committed by members of JİTEM (Gendarmerie Intelligence and Anti-Terror Unit),[147] an organization that came into being inside the army. The denial, or only partial admission, of its existence and position within the Turkish Armed Forces since the 1990s and its eventual connections with other security and intelligence units of the state explains why effective investigations cannot be conducted in Turkey with regard to the crime of enforced disappearance, as will be reiterated below.

The first mention of the JİTEM organization is in the Susurluk Report drawn up by Kutlu Savaş, Chair of the Inspection Board of the Prime Ministry (the "Commission Report").[148] In the Report, JİTEM is said to have arisen out of necessity. Over time, however, temporary village guards and "informants" who later enjoyed relief under Repentance Law No. 3419 joined the organization, and thereafter JİTEM members resorted to criminal activity.

The following statements in the Susurluk report are particularly noteworthy, given how they are taken to represent the operational approach of JİTEM:

143 Report of TBMM Commission on Unsolved Murders, 1995, http://www.tbmm.gov.tr/sirasayi/donem19/yil01/ss897.pdf (February 2013).

144 Report of the UN Working Group on Turkey, E/CN.4/1999/62/Add.2, p. 4.

145 On behalf of the Legal Team of The Truth Justice Memory Center, Ataktürk Sevimli, Emel, present study, "The Conduct of the Judiciary in Enforced Disappearances"

146 For detailed information on the testimonies and acknowledgments of informants, see Mavioğlu/Şık, pp. 83-100.

147 Ibid., pp. 81-140.

148 The report by Kutlu Savaş offers the following observations on JİTEM: "Although the Gendarmerie General Command denies its existence, the fact of JİTEM cannot be forgotten. JİTEM might indeed have been disbanded, liquidated, its staff might be employed in other units, and its records might have been sent off to archives. Yet, several individuals who worked for JİTEM are alive. In fact, the existence of JİTEM is actually not a problem. JİTEM came into being due to a need. Village guards and informants worked effectively and facilitated the job of the security forces greatly in the initial period of the fight against the PKK. This has led to further sympathy toward the security forces. The Special Teams that were authorized to move around in the rural areas did so effectively and freely, yet over time they resorted to steps beyond their official mandate and became more tolerant toward the criminals among them. To coordinate the supervision and administration of the special teams, the group known as JİTEM within the Gendarmerie was put into effect. JİTEM conducted effective work in the region. Local gendarmerie units were not even aware of much of that work. Over time, civilian and military officers of JİTEM began attracting attention in the region. Because it included so many village guards and informants, the number of individual crimes moved up." http://tr.wikisource.org/wiki/Susurluk_Raporu_%28Kutlu_Sava%C5%9F%29 (February 2013).

In the state of emergency region, even sergeant majors, deputy police chiefs, and more significantly, the informants who were the terrorists of yesterday and the potential criminals of tomorrow had the capacity to implement decisions (execution decisions). The initiative by the Corps Commander in 1996 to bring all the irregularity to an end prevented the arbitrary executions to some extent. *It is quite obvious that there can be no mention of unsolved murders when individuals who were being delivered from one hand to another while they were in official custody due to matters that went to court are later found dead under a bridge.*[149]

Multiple individuals who were consulted in the report of the Grand National Assembly of Turkey (Türkiye Büyük Millet Meclisi – TBMM) Susurluk Commission attested to the existence of JİTEM. In reference to the 'rivalry' and lack of coordination between the intelligence organizations of the state, the general evaluation section of the Commission Report noted that "it could not be ascertained what function JİTEM serves. While its existence was in dispute, its actions were definitely not".[150]

Both the statements in reports and acknowledgments by former "informants" brought to the fore the unsolved murders, killings, enforced disappearances, torture, and smuggling of drugs and arms perpetrated by JİTEM members in the late 1990s.[151] In 1998, then- Public Prosecutor of İdil province, İlhan Cihaner, launched an investigation into Colonel Arif Doğan, who was alleged and subsequently admitted to having founded JİTEM. The investigation centered around the murders of three villagers, and the investigation file was eventually transmitted, on grounds of jurisdictional non-competence, to the Prosecutor's Office at the Diyarbakır State Security Court.[152] In line with the Report of the Inspection Board of the Prime Ministry, the Diyarbakır Prosecutor's Office expanded the investigation and a lawsuit was brought against certain suspects who were JİTEM members. According to the data provided by the Truth Justice Memory Center, the trial is still in progress before the Third High Criminal Court of Diyarbakır.

The indictment of JİTEM members in another case both corroborates the existence of JİTEM and demonstrates the general character of the crimes committed by JİTEM members.[153] Statements of secret witnesses in the case point to the crimes of enforced disappearance that the defendants, given the contents of case file, very likely committed. The secret witness statement that it is necessary to "*eliminate* the militia organization" demonstrates the motive of the JİTEM members. In the trial, publicly known as the 2nd Ergenekon case, retired Colonel Arif Doğan testified as follows:[154]

"JİTEM is an organization set up experimentally in the awareness of and in accordance with the decisions of senior level commanders, he is the founder of the organization, its area of activity encompasses the state of emergency region, it does not have any permanent staff members, and they set aside time after regular work hours and fought against terrorism as part of the organization."

Later, in a book which published an interview[155]

149 *Ibid.*

150 Report of the TBMM Investigative Commission, http://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss1153.pdf (February 2013).

151 For the interview with former "informant" Abdulkadir Aygan, see *Evrensel,* 4 October 2008, For Abdulkadir Aygan's interview with journalist Neşe Düzel, where he disclosed important information, see *Taraf,* 27 January 2009, http://www.taraf.com.tr/nese-duzel/makale-abdulkadir-aygan-olmedi-hastaneden-alip-yine.htm http://www.evrensel.net/v2/haber.php?haber_id=38255.

152 Mavioğlu/Şık, p. 98.

153 See http://tr.wikisource.org/wiki/2._Ergenekon_İddianamesi (February 2013).

154 *Ibid,* under the subheading titled defenses.

155 Doğan, Arif, *'JİTEM'i Ben Kurdum' (I Established JİTEM)*, (prepared for publication by Cüneyt Dalgakıran) Timaş Yayınları, İstanbul, 2011.

with him, Colonel Arif Doğan offered highly detailed information on how JİTEM was structured. In fact, the indictment relied on the documents retrieved as a result of the investigation and searches conducted in relation to the colonel to describe in detail how JİTEM, the organization whose activities the Report of the TBMM Commission had no doubt about, came into being. Documents annexed to the indictment which were marked "highly classified" or "classified" describe the cancelled plan to set up Gendarmerie Intelligence Group Commands and 24 affiliated Gendarmerie Intelligence teams within the Gendarmerie General Command in the provinces of Ankara, İzmir, Diyarbakır, Van, Adana, Erzurum, İstanbul and Samsun. The affiliated teams were to report to the Gendarmerie Intelligence Groups Command "for the purpose of neutralizing the terrorist activities in the rural areas". Also to be established were two "group commands" based in the provinces of Ankara and Diyarbakır. The documents which form the basis for the indictment lead to the conclusion that over time, these group commands evolved into the Gendarmerie Intelligence and Anti-Terror Groups Command. The resulting organization was set up at the initiative of a number of ranking officers including Colonel Arif Doğan "who knew the region well and conducted intelligence activities". Its "initial purpose" was "making up for the deficiencies in intelligence", but it was later given the nod by superior authorities and provided with permanent staff.

Several of the JİTEM-related documents which were seized reveal that many pieces of information relating to "internal security operations going on the Southeast region" were included in operational reports. These reports provide information on the existence of JİTEM and the importance of rendering it more effective in matters of intelligence, interrogation and operations so that the problems of coordination and the rivalry between domestic security and intelligence bodies in the region can be addressed.[156] The seized JİTEM documents reveal both the operational logic and targeted operations of the organization. The indictment emphasizes in various ways the importance attributed to the creation of "psychological panic" among the local public, and even though it does not overtly express it, the emphasis on cooperation with organizations such as Hizbullah in sections of the report is remarkable.[157] The following comments by JİTEM members represent the character of the organization:

"Let us not forget that the people of the region favor just and authoritarian attitudes, which brings up the issue of giving a fair trial to the criminal and *immediate execution*. If this is carried out in a way that does not create state terror, one of the advantages the terrorist organization PKK has in the region will be counter-balanced." (Emphasis added.)

In addition, the indictment cited "immediate execution" as exemplary with reference to the crime of voluntary manslaughter and stressed that the arms used in JİTEM operations were not registered. It also emphasized that some individuals named in the indictment who are alleged to be part of the JİTEM organization stayed in touch on an ongoing basis. It added that the successor to Arif Doğan is Brigadier General Veli Küçük. In fact, JİTEM also occupies a large space in that part of the first Ergenekon indictment which lists the crimes Veli Küçük is charged with.[158]

The most recent development concerning the acknowledgment of JİTEM's existence by relevant entities is the letter attesting to the fact of JİTEM,

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156 Informing the TBMM Commission on Susurluk formed after the Susurluk scandal, former Gendarmerie General Commander Teoman Koman said, "no organization, whether legal or illegal, called JİTEM was established within the gendarmerie, it does not exist. Yet, outside the gendarmerie, there is a group of people doing unlawful things using that name". See *Hürriyet*, 20 November 2005, http://www.hurriyet.com.tr/pazar/3542856.asp

157 pp. 29-30 under 'Secret Activities' in folder (9) in pouch (1), also see Mavioğlu/Şık, pp. 90-91.

158 http://tr.wikisource.org/wiki/Ergenekon_iddianamesi/ (February 2013).

transmitted by the Interior Ministry as part of the investigation led by the Ankara Specially Authorized Prosecutor's Office. As reported by Anadolu Ajansı and other print and visual media outlets,[159] this letter states that JİTEM was established without the knowledge of the Interior Ministry and the General Staff and at the initiative of the Gendarmerie General Command, yet it was abolished in 1990. The evidence gathered in the ongoing trials would obviously not, by itself, support such an acknowledgment, and the fact that there was no such admission of JİTEM's existence during the years when its members committed crimes most frequently raises serious suspicions that the acknowledgment is offered to create immunity from punishment for those responsible. The files of defendants with connections to JİTEM include multiple documents demonstrating official correspondence with JİTEM and the badges and payrolls of its members show JİTEM to be the unit where they were employed. It is impossible for the Gendarmerie General Command, which JİTEM operated under, and by extension the General Staff, the Interior Ministry and the National Intelligence Organization which is under the Prime Ministry, as well as then-members of the National Security Council which houses all these bodies and is tasked with the duty to 'coordinate' the national security strategy, to have no knowledge of the existence of JİTEM.[160] Furthermore, as noted above, commentators frequently note that in the 1990s, the then-prime minister made statements supportive of such an organization.

It is understood that the JİTEM organization or the 'deep' powers behind it had a multidimensional strategy toward the Kurdish question which they assessed to be a problem of "terrorism". In any case, it is apparent that JİTEM did not employ legitimate means, as contemplated in the 1949 Geneva Conventions, to ensure the political unity and territorial integrity of the state. The confessions by former JİTEM members and witness statements had an important role in exposing this organization and made it possible to find the bodies of individuals buried in different places.[161]

In light of the explanations above, there are strong indications that the JİTEM organization acted in accordance with a plan, or "systematically" as defined in the Rome Statute of the International Criminal Court and as regulated under Article 77 of the Turkish Criminal Code. It should first be noted that under the Rome Statute the plan need not be connected with an official state policy; it may be preconceived by an organization that is acting on behalf of the state, or one that is acting completely independently of the state as an opponent of the regime. Thus, it is possible that acts constituting crimes against humanity might have been planned independently outside a central government policy. Even if JİTEM has, as alleged, built an organization that runs parallel to the state's anti-terror structure, that will not render the crimes committed by JİTEM ordinary crimes. It must be granted that JİTEM acted systematically as defined under the Rome Statute, given that it operated on a motive that anyone somehow suspected of having connections to the PKK or anyone who opposes the perspective JİTEM adopted, including some soldiers and army officers, must be eliminated, and given that it created "execution squads",[162]

159 See, for instance, *Radikal* 'Malumun İlanı: JİTEM var' ('A Public Secret: JİTEM Exists'), 10 July 2011, accessible at http://www.radikal.com.tr, also see *Birgün* daily's 'JİTEM ölmedi, kılık değiştirdi' ('JİTEM not gone, remains in disguise'), 13 July 2011, accessible at http://www.birgun.net/ (February 2013).

160 In his testimony to the Susurluk Commission, Eyüp Aşık said "no mob or mafia that does not rest on the state or receive support from a state official can stand on its feet even for a single day", cited in, Gökdemir, p. 215, Doğan, pp. 33-38.

161 http://www.radikal.com.tr/haber.php?haberno=148387, story reported by Ahmet Şık/Özgür Cebe "Susurluk Hortladı" ("Susurluk Rises from the Grave"), 2 April 2005, story reported by Ertuğrul Mavioğlu, 22 July 2009, *Radikal*, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=946147&CategoryID=77 (February 2013).

162 Petty Officer Ahmet Öznalbant, an accused in the Temizöz case, said the following about the "execution squads": "A death squad was formed. Along with the squad, some 6-7 people, in plain clothes, used to work in the interrogation room of our station and take testimony. At the time I worked there, there were several unsolved murders. It was that squad that handled the detention procedures, they would not give us any information" See *Radikal*, 22 February 2013 story 'JİTEM'in infaz mangasının amiri 'Yavuz' ortaya çıktı' ('Head of JİTEM's execution squad, 'Yavuz', revealed'), accessible at www.radikal.com.tr (February 2013).

as was frequently the case in Latin America. Even the existing indictments consider JİTEM an organization[163] and observe that it followed military discipline and had a continuing character. In other words, its actions fit the definition under the Turkish Criminal Code of the crime of setting up an organization with criminal intent.

Even assuming, hypothetically, that JİTEM perpetrated the unsolved murders and enforced disappearances as an unlawful organization acting independently of other units of the state and outside the approach taken by the state in regards to the Kurdish question at the time, such an assumption shall not preclude the commission of crimes against humanity. In point of fact, this assumption (which runs highly contrary to the ordinary course of events) can go no further than being purely hypothetical idea. It is impossible to grant that such an organization could have acted independently in an entity such as the army where the hierarchy, duties and responsibilities are clearly established, or that it could have acted autonomously or as a parallel structure for such a long period of time in an area centrally administered by the governor of the state of emergency region under the State of Emergency Law. Accordingly, as discussed in the Susurluk Report of the TBMM and Report of the Prime Ministry (drawn up by Kutlu Savaş), the entities comprising the National Security Council of the time cannot be considered to have had no information on the existence and activities of JİTEM. There is thus no doubt that the crimes committed by JİTEM were perpetrated as part of a policy and in a systematic manner. The Rome Statute in fact explicitly refers to a state or organizational policy. The Elements of Crimes document annexed to the Rome Statute provides that government authorities' deliberate failure to take action, or the encouragement of a crime as such, is an element demonstrating the existence of systematic plan.

The contents of the files referenced above as well as statements by witnesses and "informants" lead to the conclusions that JİTEM members created false records to destroy evidence relating to crimes they committed, complaints lodged by the local public were not taken into consideration, and witnesses were not heard in investigations. Allegations against Field Officer Cemal Temizöz, former head of the Cizre Gendarmerie Command, are particularly noteworthy in this context. According to the indictment which constitutes the ground for the ongoing trial before Diyarbakır 6th High Criminal Court (file no: 2009/470 E.), one of the most formidable obstacles resulting in unlawful non-competence decisions or obstructions with respect to investigations into the crimes perpetrated in Cizre is that Cemal Temizöz has himself led, in his capacity as the head of the gendarmerie command, the investigations into the many crimes that he is actually accused, based on relevant strong evidence, of having instigated. In fact, there is a strong likelihood that the evidence was tampered with – in investigations on disappeared individuals, signatures on written records do not match, it is not clear who drafted the records, and there are differences of content between photocopies and original documents. One of most tragic examples of evidence tampering concerns the remains thought to be of the persons who could not be

163 The indictment includes the following statements: "The Court of Appeals for the 8th Criminal Circuit observed as follows: "Aside from constituting a crime under Article 313 of the Turkish Criminal Code, the organization and the powers exercised violate Article 6 of the Constitution which stipulates "No one or agency shall exercise any state authority which does not emanate from the Constitution; such an exercise may find no defense in a state governed by the rule of law; setting up an unlawful organization, exercising authority like the legitimate forces of the state, and creating so-called laws based on their own power and rules are practices that undo the concept of a state governed by the rule of law; under such conditions a system will form in which might makes right and a level of unlawfulness that has no bounds will prevail, resulting in a citizen-state relationship characterized by fear and insecurity, rather than by rules of law; such would amount to an absolute violation of the law that goes beyond violating the Constitution and the laws, as well as lead to the total elimination of the state governed by rule of law; considering all of the foregoing, the Court found that the accuseds' actions fit the provisions of Article 313 of the Turkish Criminal Code", these observations of the Court of Appeals for the 8th Criminal Circuit as well as the observations above indicate that the organization set up by the suspects in the present case is substantially similar in terms of both the entire organizational approach and the methods used" See http://tr.wikisource.org/wiki/2._Ergenekon_İddianamesi (February 2013).

heard from after they were taken into custody in the Lice district of Diyarbakır in 1994. Shipped from the district of Kulp to the Forensic Medicine Institution in İstanbul in 2003, the remains were "lost in the mail".[164]

The victim typology targeted by the JİTEM organization is also noteworthy. According to Alpkaya, the "first generation" of victims involved members of illegal organizations. Victims in the second group, in Alpkaya's words, were "well-known Kurds residing in urban areas who express their dissent openly".[165] Among them were provincial and district-level administrators of HEP, ÖZDEP, DEP and HADEP, employees of the Özgür Gündem and Özgür Ülke newspapers, members of trade unions, and members of the İHD (Human Rights Association). Alpkaya includes Kurdish businessmen in this group, as well. The third group of victims includes individuals residing in the state of emergency region and who were somehow connected to the PKK. As is apparent, the victims are not a coincidentally or randomly selected group of unconnected people; instead, the places where victims were disappeared concentrate in a specific geographic area. According to the data provided by the Truth Justice Memory Center in this study, 28% of the disappearances took place in Diyarbakır, 14% in Şırnak, 13% in Mardin, 5% in Batman, 5% in Hakkari, and 3% in Tunceli.

Under Article 77 of the Turkish Criminal Code, a characteristic objective element of crimes against humanity is that they must be committed systematically as part of a plan. The indictments include documents which offer detailed discussions of the planned and coordinated manner in which JİTEM members acted and of the plans and methods they followed. Witness statements and defendants' acknowledgments confirm the content of these documents. The fact that acts of enforced disappearance did not come into being independently and randomly, the methods identified to hide the bodies of the victims, the systematic concealment of information on the fate of victims from their families, and the repeated prevention of efforts by victims' relatives to obtain information all point to the deliberate and systematic character of the crime of enforced disappearance. Moreover, the documents that are attached to the indictment demonstrate that the crime of enforced disappearance was committed systematically as part of a plan, given that public resources were transferred to JİTEM operations and various persons were employed by JİTEM, including mainly the "informants" (as revealed by way of payrolls).

Accordingly, it is virtually indisputable that the crimes of enforced disappearance, perpetrated in Turkey within the relevant period of time and whose objective elements were laid out as above, constitute a crime against humanity. As noted above, it is highly likely that enforced disappearances were perpetrated by JİTEM members, with the government and National Security Council then in power having knowledge thereof, largely consistent – at least in the beginning – with a national security policy whose principles and practices were laid down by representatives of political parties from time to time. It is clear that an overwhelming majority of the victims were not directly connected with armed conflict as provided in the definition under the 1949 Geneva Conventions. Although the crimes committed qualify as crimes against humanity, the few criminal cases which have been initiated in relation to these crimes (referred to above) described the acts as 'ordinary crimes' such as murder and establishing a criminal organization.

A rather more controversial issue in this regard is whether or not the crime against humanity materializes under the Turkish Criminal Code, which differs in its definition of the objective elements of the crime as well as the crime's characteristic mental element. As mentioned above, unlike the international law of treaties and customary international law, the Turkish

164 Mavioğlu/Şık, p. 122.

165 Alpkaya, p. 45.

Criminal Code defines crime against humanity as a crime that must be committed with a specific intent. Under Article 77 of the Code, the crime must be committed for "political, philosophical, racial or religious reasons". There is little room for doubt that enforced disappearances were perpetrated in Turkey in connection with the national security policy of the era. The lack of reference in Article 77 to the terms "ethnic" or "national" does not make a difference, since victims were subjected to acts of enforced disappearance not because of their ethnic or religious identities, but because they were members and supporters of successive political parties with a focus on ethnic identity which for the most part are not represented in the TBMM.

Yet another issue that must be discussed in regards to Article 77 of Turkish Criminal Code is that despite the widespread nature of the crime of enforced disappearance in Turkey, the Article does not offer a definition of enforced disappearance consistent with that provided in international law. As stated above, under the Rome Statute of the International Criminal Court, enforced disappearance involves the arrest, detention (*Entzug der Freiheit*) or abduction of the person and the refusal to provide information on the whereabouts or fate of the person. With respect to persons whose fates are not known yet, the applicable paragraph of Article 77 is 1(d) which discusses the crime of depriving a person of his or her liberty. A similar interpretation is also the case in comparative law systems that do not explicitly define the crime of enforced disappearance as a crime against humanity. For instance, the Belgian Act Concerning the Punishment of Grave Violations of International Humanitarian Law does not provide for the crime of enforced disappearance, yet one of the acts involved in the crime, namely deprivation of liberty, is regulated under Article 2(5) thereof, which relates to the method by which the crime against humanity is perpetrated and specifically addresses "grave violation in the form of imprisonment or deprivation of liberty in contravention of the fundamental principles of international law".[166] Thus, the crime of enforced disappearance is considered in the jurisprudence within the framework of the deprivation of liberty.[167]

THE CRIME OF ENFORCED DISAPPEARANCE AND THE PROBLEM OF STATUTE OF LIMITATIONS

Again, as discussed above, declarations and conventions on enforced disappearance emphasize the continuing nature of the crime. In this context, Article 17 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance provides that enforced disappearance shall be considered to continue as long as the victim's fate is concealed or the facts about the victim remain unclarified. The same article further provides, in reference to Article 2 of the International Covenant on Civil and Political Rights which regulates the right to an 'effective remedy', that when the remedies provided in the ICCPR are not available, the statute of limitations shall be suspended.

(It is important to note that, in contrast, Article 17 of the Declaration does provide rules on statutory limitations in regards to enforced disappearances that are not considered crimes against humanity. This is confirmed in the third paragraph of the Article, which provides "Statutes of limitations, where they exist, relating to acts of enforced disappearance shall be substantial and commensurate with the extreme seriousness of the offence".)

This principle is also adopted in the International Convention for the Protection of All Persons from Enforced Disappearance. The Convention provides that statutory limitations shall not apply to enforced disappearances which constitute crimes against humanity (Article 5), and statutory limitations concerning enforced

166 Smis, Stefaan/Van der Borght, 'Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law', *International Legal Materials*, Vol. 38, Issue 4, 1999, pp. 918-925.

167 Andreu-Guzmán, p. 73.

disappearances which are not of that character should be of long duration and proportionate to the extreme seriousness of the crime (Article 8). This Convention also establishes that statutory limitations, if applied in domestic law, shall commence from the moment when the crime of enforced disappearance ceases. In addition, Article VII of the Inter-American Convention provides that statutory limitations shall not apply to the prosecution of and the punishment for the crime of enforced disappearances. The Inter-American Convention establishes further that if the domestic law includes a norm preventing application of the stipulation that statutory limitations shall not apply, and the limitation period shall be equal to that which applies to the gravest crimes in the relevant state. Both Conventions additionally provide that expeditious and effective remedies must be put in place to determine which official has given or continues to give the orders to refuse information about the whereabouts and state of health of the person and/or orders to deprive the person of his or her liberty. Finally, in its Resolution No. 1463, the Parliamentary Assembly of the Council of Europe noted statutory limitations shall not apply to the crime of enforced disappearance until the fate and other related truths about the victim are clarified (Article 10.3.3).[168]

In parallel with international law of treaties, the jurisprudence on enforced disappearance has been emphasizing the continuing/ongoing character of the crime. In the *Sandoval* case,[169] the Supreme Court of Chile appropriately held that the amnesty law shall not apply in respect of acts of enforced disappearance. The crime has not ceased yet, therefore one of the minimum requirements of the amnesty law has not been met because it has not been determined when the crime will be considered to have ceased, and therefore enforced disappearance –a crime that has not ceased– may not enjoy amnesty.[170]

It is further indicated in international law scholarship that the crime of enforced disappearance has a continuing character so long as public officials fail to take action as regards the fate of the victim.[171]

Given that the crime of enforced disappearance is a continuing or ongoing crime that ceases only when the fate of the victim is known, in accordance with international law, the issue of statutory limitations must be decided on the basis of the current Turkish Criminal Code No. 5237. The defunct Turkish Criminal Code No. 765 is inapplicable because the act of depriving a person of his liberty, referred to in Article 77(d) of the current Code, is ongoing and has not ceased yet. Article 66(6) of the current Code provides that in the case of continuing crimes, the period of limitation shall commence only when the crime ceases. Article 77(4) thereof establishes additionally that statute of limitations shall not apply to crimes against humanity. Accordingly, statute of limitations may not apply to the prosecution of or the punishment for the crime in cases involving victims whose fates remain unknown.

At this point, an issue may arise as to applicability of more favorable provisions, since Article 7(2) of the Turkish Criminal Code stipulates as follows: "Where the provisions of law in effect at the time of the commission of the crime differ from those of the laws that took effect subsequently, the law that is more favorable to the perpetrator shall be applied and executed." With respect to statutory limitations, this principle has been established more clearly in Articles 38(1) and (2) of the Constitution as follows:

"No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other

168 The entire text is available at http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1463.htm (February 2013).

169 Lafontaine, pp. 469-484.

170 *Ibid*, s. 472.

171 Scovazzi/Citron, p., 310, Grammer, 195-197, on the concept of "continuing violation" in terms of human rights, see Dijkstra, Petra et al., *Enforced Disappearance as Continuing Violations*, Amsterdam International Law Clinics, Amsterdam, 2002.

than the penalty applicable at the time when the offence was committed.

The provisions of the above paragraph shall also apply to *the statute of limitations on offences and penalties* and on the results of conviction."

Yet, as emphasized above, in the case of the continuing crime of depriving a person of his liberty, the crime will cease only when its continuity ends. Thus, the more favorable provisions of law may not apply in the case of enforced disappearances which constitute crimes against humanity.

It is important to stress that the act of enforced disappearance will not cease to be a crime against humanity once the fate of the victim is known. The UN Convention and Resolution No. 1468 of the Parliamentary Assembly of the Council of Europe, which were discussed above, establish that statutory limitations shall not apply to crimes against humanity. These instruments have also been adopted in customary law and incorporated into the Rome Statute of International Criminal Court (Article 29). Even though there were no domestic law provisions on the definition of crimes against humanity or upon statutory limitations as regards those crimes at the time they were committed in Turkey, these crimes have been defined under customary international law, general principles of law and case law. This will be binding upon not only international criminal courts and human rights courts, but also the national courts. As expressed above, under Article 7/1 of the European Convention on Human Rights and Article 15/1 of the International Covenant on Civil and Political Rights, international law is one of the sources of positive criminal law.

The situation is quite clear when it comes to Turkish criminal law. Turkey is a party to both the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Referring to the legality principle in regards to crimes and punishments, both instruments state that international law, in addition to criminal law, is a source of criminal legislation. Article 15(2) of the International Covenant on Civil and Political Rights stipulates that any act which did not constitute a crime, under national or international law, at the time it was committed will be considered criminal if it is was criminal according to the general principles of law. Crimes against humanity, like war crimes, are recognized and defined under international law. A lack of definition of the crime against humanity in general principles of law does not bear upon the nature of the act as a criminal one. As a matter of fact, Article 27 of the 1969 Vienna Convention on the Law of Treaties provides that a state may not invoke the provisions of its internal law as justification for its failure to perform its obligations under a treaty.

After setting forth that treaties duly put into effect in accordance with the hierarchy of norms shall bear the force of law, Article 90/5 of the 1982 Constitution of the Republic of Turkey provides as follows in its last sentence:[172]

"In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

Article 7 of the European Convention on Human Rights and Article 15 of the International Covenant on Civil and Political Rights first identify international law as a basis of the legality principle in their respective first paragraphs, and then set forth, in their respective second paragraphs, the exception and the criterion regarding general principles of law in the context of the legality principle. These two Articles are binding *a fortiori* upon Turkish law.

In addition, Article 18 of the 1992 UN Declaration provides that special amnesty provisions or

172 For a critical perspective on this topic, see Gözler, Kemal, *Türk Anayasa Hukuku Dersleri (Lectures on Turkish Consitutional Law)*, Ekin Kitabevi, Bursa, 2012, pp. 279-281.

similar legislation should not apply to the crime of enforced disappearance. Even though it is argued that UN resolutions do not have binding power, their role in the interpretation of positive law is obvious. In its various reports, the UN Human Rights Council cautioned the Member States that amnesty laws or comparable regulations should not lead to impunity for perpetrators or reductions in penalties.[173] The UN Working Group reminded Member States of the conventions on statutory limitations concerning international crimes and Article 15(2) of the International Convention on Civil and Political Rights. The 2006 report of the UN Working Group made an effort to provide clarity on what the comparable regulations referred to in Article 18 might be and considered periods of limitation within that scope.[174] The report indicated that any interpretation to the contrary shall mean a violation of Articles 4 and 17 of the UN Declaration which emphasizes the continuing character of the crime. It further stressed that statutory limitations shall not apply if enforced disappearance is perpetrated as a crime against humanity.

As a result, the perpetrators of crimes of enforced disappearance in which the fate of the victims is known should also be considered perpetrators of crimes against humanity. They must accordingly be punished for manslaughter under Article 77(1)(a) and deprivation of liberty under Article 77(1)(d) in accordance with the rules governing consecutive sentences. Thus, it is not possible to agree with the claim that crimes against humanity should be considered outside the scope of exception on consecutive sentences provided with respect to voluntary manslaughter and causing injury with malicious intent and the claim that these crimes should be treated as a single act in accordance with the regulation on compound crime (Article 42 of Turkish Criminal Code).[175] Any interpretation to the contrary will have to neglect the specific (*sui generis*) character of crimes against humanity, their development in international law, and the fact that they are not essentially defined as crimes that may be constituted by alternative acts because the crimes listed in the Article pertain to different subject matter and they violate different legal norms. For the same reasons(as will be discussed in detail in another study), the provision of Turkish Criminal Code Article 43, on successive crimes is not be applicable, because there is no doubt that more than one crime is the case as understood from the phrase “crimes against humanity” in the title of the Article.

IN PLACE OF A CONCLUSION

The United Nations Declaration on the Protection of All Persons From Enforced Disappearance establishes in Article 2 that no state shall practice, permit or tolerate the act of enforced disappearance, and it imposes upon the state the “positive” obligation to employ “all means” to prevent and eradicate enforced disappearance. The Parliamentary Assembly of the Council Europe substantiated these obligations by way of its 1984 Resolution No. 828 and 2005 Resolution No. 1463. Both declarations, the Inter-American Convention and the UN Convention[176] mandate that threat of war, declaration of war, internal political instability or other extraordinary circumstances may not be invoked as legal justifications for enforced disappearance. The essential texts on human rights stipulate that no regulations may be enacted which contradict the right to life, the right to liberty and security and the prohibition of torture, as well as the framework identified in the relevant conventions.

Given the importance of the issue, a substantial

173 1994 Report of the UN Working Group (E/CN.4/1994/26), 2006 Report of the UN Working Group E/CN.4/2006/56, p. 16, accessible at www.ohrc.org/EN/HRBodies/CED (February 2013).

174 2006 Report of the UN Working Group E/CN.4/2006/56, p. 18, accessible at www.ohrc.org/EN/HRBodies/CED (February 2013).

175 Tezcan, Durmuş/ Erdem, Mustafa Ruhan/ Önok, Rıfat, Murat, *Uluslararası Ceza Hukuku (International Criminal Law)*, Seçkin, Ankara, 2009, p. 559.

176 Inter-American Convention, Article I(a) and UN Convention (1(2)).

jurisprudence, based on human rights legislation, has developed on enforced disappearances. As discussed in a different part of this study, a significant portion of the European Court of Human Rights jurisprudence on enforced disappearance concerns the violations that came into being in Turkey with respect to these crimes. Although the gravity of the topic in terms of human rights law is reflected in the ECtHR judgments, it is rather difficult to say that the domestic legal mechanisms have acted equally sensitively. Although the crime was perpetrated in a widespread and systematic manner, it is observed that ongoing trials in Turkish courts have neglected that element.

The acts of enforced disappearance which took place in Turkey in a widespread and systematic manner during the 1990s, especially in the state of emergency region, must be considered international crimes leading to individual criminal responsibility and to compensatory obligations on the part of the state under international human rights law, given their status as violations of international public order. The specific unlawfulness found in these crimes, due to the multiple violations of human rights which they encompass, results in a requirement on the part of the domestic courts to consider them a form of crime against humanity, regulated in Section One of Chapter Two of the Turkish Criminal Code. What necessarily follows from that consideration is that statutory limitations should not apply to these crimes. As discussed above, that the perpetrators must be subject to statutory limitations applicable to international crimes is not only a demand for material justice based on natural law, but also a requirement imposed by the peremptory regulations of positive law under Article 7 of the European Convention on Human Rights, Article 15 of the United Nations International Covenant on Civil and Political Rights, and Article 77 of Turkish Criminal Code.

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ENFORCED DISAPPEARANCE CASES FROM THE PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS

İLKEM ALTINTAŞ

This section mainly reviews the judgments rendered by the European Court of Human Rights (hereafter, the Court) in relation to enforced disappearance claims, and offers a guide showing the steps to be taken by the relatives of the disappeared, lawyers and nongovernmental organizations before the Court when an enforced disappearance takes place.

This study first analyzes the admissibility criteria for an application concerning an enforced disappearance claim. It then offers an explanation of the process by which the Court's jurisprudence with respect to enforced disappearance cases has been shaped by closely reviewing each of the relevant articles of the European Convention on Human Rights (hereafter, the Convention).

Finally, the study describes the mandate and operational procedure of the Committee of Ministers of the Council of Europe, the body responsible for executing the Court judgments, and presents arguments as to what opportunities might be available with respect to the execution of the violation judgments on enforced disappearance rendered against Turkey.

1. Admissibility Criteria

The Court first needs to decide whether an application it received is admissible or not. Accordingly, a relative of a disappeared person or a lawyer planning to lodge an application with the Court in respect of an enforced disappearance claim should first of all check whether the file satisfies the admissibility criteria.

The admissibility criteria of the Court are divided into three categories:[1] Procedural criteria, criteria concerning the jurisdiction of the Court, and substantive criteria. In this study, the analysis focuses on admissibility criteria regarding procedure, as they are considered particularly important in enforced disappearance cases.

VICTIM STATUS

Under Article 34 of the Convention, applications to the Court can be submitted only by individuals who claim that they have been aggrieved due to a violation of the Convention by a Contracting State. The act or negligence in question must have had a direct impact upon the applicant. Where there is a personal and special relationship between the applicant and the victim directly, the Court may admit the application from the individual application lodged by the applicant who is considered an indirect victim.[2] In enforced disappearance cases, next-of-kin may lodge applications on behalf of the disappeared person. In enforced disappearance cases so far, the Court admitted individual applications lodged by a victim's mother, father, sibling, child, spouse as recognized under civil law, spouse as recognized before a religious authority,[3] and uncle. In the *Nesibe Haran v. Turkey* case, the

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1 ***Practical Guide on Admissibility Criteria,*** **Council of Europe, 2011, http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf**

2 ***Ibid.*****, § 30**

3 ***Üçak and others v. Turkey*****, judgment dated 26 April 2007, Application no: 75527/01, 11837/02.**

Turkish government argued that Nesibe Haran did not have a civil-law marriage to the person alleged to have been forcibly disappeared, İhsan Haran, and therefore she could not be considered a victim. The Court, however, emphasized that Nesibe Haran had three children with İhsan Haran and decided that she was a victim in her capacity as İhsan Haran's partner, even though she as the applicant was not married to him under civil law.[4]

RULE ON THE EXHAUSTION OF DOMESTIC REMEDIES

Paragraph 1 of Article 35 of the Convention stipulates that an application may be lodged with the Court only after the exhaustion of domestic remedies and within six months from the date on which a final decision was issued under domestic law.

As a general rule, all domestic remedies in Turkey must have been exhausted before applying to the Court. The reason there is a rule stipulating the exhaustion of domestic remedies is to allow the domestic authorities and primarily the courts to prevent or correct the alleged violations of the Convention.[5] In its jurisprudence, the Court stressed that this rule must be implemented in a flexible way.[6]

Domestic remedies need to be sufficiently available not only in theory but also in practice.[7] For instance, a domestic remedy that is contemplated under the law but has never been implemented is not in fact a remedy that needs to be exhausted, because it has no practical use.[8]

Applicants are required to exhaust only those domestic remedies that were available at the time the events took place, can provide a resolution of their complaints, and offer a reasonable chance of success.[9]

A respondent state alleging that domestic remedies have not been exhausted has the burden to prove that the applicant has not used a remedy that is both available and effective.[10]

Once the respondent state satisfies the burden to prove that the applicant has access to an available and effective remedy, the applicant will have to demonstrate the following:

- The remedy has in fact already been exhausted;
- Or it is inadequate or ineffective for the specific circumstances of the incident for a certain reason, such as an excessive delay in an investigation;
- Or there are special circumstances releasing the applicant from the obligation to exhaust the domestic remedy.[11]

The special circumstances mentioned above might arise when domestic authorities remain completely passive, as in when they do not launch an investigation vis-à-vis a serious allegation brought against state officials on grounds of misconduct in office or causing damage. In these circumstances, it can be argued that the burden of proof transfers one more time, and therefore, it would now be the respondent state that has the burden to prove the course of action taken toward the gravity and seriousness of the complained incidents.[12] For example, in *Kurt v. Turkey*, which is the first enforced disappearance case against Turkey, the Court held that the reluctance of the competent authorities in regards to the complaints the applicant filed qualifies

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4 ***Nesibe Haran v. Turkey*****, judgment dated 6 January 2005, Application no: 28299/95, §§ 58-59**

5 ***Practical Guide on Admissibility Criteria*****, § 47**

6 Simmons, Alan, *European Human Rights: Taking a Case Under the Convention,* p. 26

7 ***Practical Guide on Admissibility Criteria*****, § 54**

8 See *Tanrıkulu v. Turkey*, Grand Chamber judgment dated 8 July 1999, Application no: 23763/94, § 79

9 Ibid., § 50. For an illustrative judgment, see *Moreira Barbosa v. Portugal,* judgment dated 29 April 2004, Application no: 23763/94

10 Ibid., § 56. For an illustrative judgment, see *Akdivar v. Turkey,* judgment dated 16 September 1996, Application no: 21893/93, § 68

11 Ibid., § 59, Also see *Akdivar v. Turkey,* § 68

12 ***Akdivar v. Turkey*****, § 68**

as the special circumstance that exempts the applicant from the obligation to exhaust domestic remedies.[13] The applicant notified the Bismil Public Prosecutor that her son was taken into custody by security forces and he had not been heard from since then. She petitioned the Diyarbakır State Security Court in that regard, yet the authorities did not consider the applicant's allegations seriously, and gave credit to the baseless idea that her son was kidnapped by the PKK. The Court held this to be reluctance on the part of the authorities in regards to the complaints filed by the applicant.

It is important to keep in mind with regard to the rule on the exhaustion of domestic remedies that because of its heavy case load, the Court examines diligently whether the application satisfies the admissibility criteria before considering its merits. In addition, the Court has recently adopted a stricter attitude toward compliance with admissibility criteria in cases concerning Turkey.[14] Thus, when bringing an application to the Court, it is necessary to indicate in the application form the steps taken to exhaust domestic remedies and provide relevant documentary evidence. If a remedy is not exhausted because it is assumed to be ineffective, a persuasive explanation must be given, accompanied where necessary by documentation establishing why the remedy in question is ineffective.

SIX-MONTH RULE

An application may be submitted to the Court only within the six months following the date on which a decision is issued under domestic law.

The purpose of the six-month rule is to promote security of the law, ensure that cases raising issues under the Convention are examined within a reasonable time, and protect the authorities and other persons concerned from being in a situation of uncertainty for a long period of time.[15]

As a rule, the six-month period runs from the final decision in the process of exhaustion of domestic remedies.[16] Where it is clear from the outset that the applicant has no effective remedy, the six-month period runs from the date on which the act complained of took place or the date on which the applicant was directly affected by or became aware of such an act or had knowledge of its negative consequences. Where an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances.[17]

The concept of continuing violation

In its 2009 judgment in the case of *Varnava and others v. Turkey*, the Court clarified whether the six-month rule applies to situations of enforced disappearance since these are situations that constitute continuing violations. Accordingly, in enforced disappearance cases, applications can be dismissed for failure to comply with the six-month rule where there has been excessive or unexplained delay on the part of applicants to apply to the Court after they became aware or should have become aware, that no investigation has been commenced or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future.[18]

Thus, once they realize that state authorities will

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13 *Kurt v. Turkey*, judgment dated 25 May 1998, Application no: 15/1997/799/1002, § 83

14 http://www.echr.coe.int/Documents/Stats_analysis_2012_FRA.pdf, p. 59

15 *Practical Guide on Admissibility Criteria*, § 66

16 Ibid., § 71

17 *Varnava and others v. Turkey*, Grand Chamber judgment dated 18 September 2009, Application no: 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 157

18 Ibid., § 165

not initiate an investigation in relation to a claim of enforced disappearance or that the investigation initiated has been ineffective; applicants should lodge their applications with the Court promptly. For example, the Court dismissed the *Akdoğan and others v. Turkey* and *Suphi Polat v. Turkey* applications including claims of enforced disappearance without discussing the merits or serving notice to the Turkish government, on the grounds the applicants ought to have become aware of the inefficiency of the domestic law investigation before seven years had elapsed since the date on which the events took place.[19] However, in the *Er and others v. Turkey* case, applicants lodged their application with the Court 10 years after Ahmet Er was forcibly disappeared. The Court dismissed the Turkish Government's initial objection that applicants failed to comply with the six-month rule. On 14 July 1995, Ahmet Er was detained by soldiers near the town of Çukurca in the province of Hakkari and he was not heard from again. After his relatives informed the Çukurca Public Prosecutor of the incident, an investigation was initiated promptly and continued actively until 16 February 1996. The Çukurca Public Prosecutor decided on 10 December 2003 that he lacked jurisdiction and forwarded the file to the military prosecutor. The military prosecutor began a new investigation into the incident on 14 January 2004. The applicants lodged their application with the Court on 16 May 2004. In its 2012 judgment, the Court considered that an investigation, albeit a sporadic one, was being conducted and applicants followed up with the investigation by submitting information as expected of them. In addition, the delivery by the Çukurca Public Prosecutor of the file to the military prosecutor in 2003 and the subsequent initiation of an investigation by the military prosecutor could have been properly regarded as promising new developments by the applicants. For these reasons, the Court found that the applicants' wait for results from the two investigations did not amount to a failure to show the requisite diligence in complying with the six-month rule and dismissed the Turkish Government's initial objection.[20]

In addition, in the *Bozkır and others v. Turkey* case, applicants lodged an application with the Court eight years after their relatives were disappeared on 26 August 1996. In its judgment dated 26 February 2013, the Court observed that the domestic law investigation continued actively for the period of eight years and applicants followed up with the investigation, and dismissed the Turkish Government's initial objection that the applicants had not complied with the six-month rule.[21]

When long periods of time have elapsed after the enforced disappearance, for purposes of the six-month rule, the defense before the Court must emphasize that the domestic law investigation remained in progress and applicants followed up with it, and that they lodged their application promptly once they became aware of the inefficiency of the investigation, providing supporting information and documents to that effect.

19 ***Aydoğan and others v. Turkey*** **application, ECtHR letter of 4 July 2006, Application no: 987/02;** ***Polat v. Turkey*** **application, ECtHR letter of 28 November 2005, Application no: 32389/03**

20 ***Er and others v. Turkey,*** **judgment dated 31 July 2012, Application no: 23016/04, §§ 45-61**

21 ***Bozkır and others v. Turkey,*** **26 February 2013, Application no: 24589/04, § 49. This judgment will become final on 26 May 2013, unless one of the parties brings it before the Grand Chamber.**

The Court's Holdings with Respect to Convention Violations in Enforced Disappearance Cases

RIGHT TO LIFE – ARTICLE 2 OF THE CONVENTION

Article 2 of the Convention protects the right to life and provides as follows:

*'**1.** Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

***2.** Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
***a)** in defence of any person from unlawful violence;*
***b)** in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
***c)** in action lawfully taken for the purpose of quelling a riot or insurrection'*

In *Kurt v. Turkey*, which included the first claim of enforced disappearance decided by the Court, the Court dismissed the applicant's enforced disappearance claim under Article 2 and decided to assess it instead under Article 5 which regulates the right to liberty and security. [22] In its judgment, the Court determined that the victim was held in unacknowledged detention in the complete absence of the safeguards contained in Article 5 of the Convention, and found that there was a particularly grave violation of the right to liberty and security.[23] In subsequent cases, the Court also examined enforced disappearance claims under Article 2 of the Convention and, based on the facts of a given case, found Article 2 to have been violated either because the state was affirmatively responsible for the death of the victim or the failure to conduct an effective investigation into the claim of enforced disappearance, or the state failed to fulfill its obligation to protect the right to life.[24]

Below is a discussion of violations found under Article 2 and their respective reasons:

State responsibility for the death of the victim (Substantive violation of Article 2 on merits)

In finding a violation of Article 2 based on the death of the victim, the Court reasoned as follows:

'Where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue arises under Article 3 of the Convention. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies. Whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention depends on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody.

In this respect, the period of time which has

22 Simmons, p. 94

23 *Kurt v. Turkey*, §§ 128-129

24 For an example of a judgment concerning violation of Article 2 on grounds of state responsibility for the death of the applicant and for the failure to conduct an effective investigation, see, *inter alia, Tanış and others v. Turkey,* judgment dated 2 August 2005, Application no: 65899/01; For an example of a judgment concerning violation of Article 2 on grounds of state responsibility for failing to fulfill the obligation to protect the life of the individual, see, *inter alia*, *Osmanoğlu v. Turkey*, judgment dated 24 January 2008, Application no: 48804/99

elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died. The passage of time may therefore to some extent affect the weight to be attached to other elements of circumstantial evidence before it can be concluded that the person concerned is to be presumed dead. Issues may therefore arise which go beyond a mere irregular detention in violation of Article 5. Such an interpretation is in keeping with the effective protection of the right to life as afforded by Article 2, which ranks as one of the most fundamental provisions in the Convention.'[25]

In light of this jurisprudence, the Court pays attention to the following matters before deciding whether the state is responsible for the death of the victim alleged to be forcibly disappeared:

- The period of time in which the victim was not heard from after being detained;
- The availability of credible evidence that the victim was taken to a detention center which the state is in charge of; for instance, the availability of eye witnesses;
- The unavailability of credible records showing where the victim was held and of custody records;
- State authorities' suspicion that the victim was involved in activities necessitating criminal prosecution; for instance, authorities suspecting that the victim had connections to the PKK;[26]
- The state's failure to provide a satisfactory and plausible explanation of the victim's fate.

In the enforced disappearance judgments it rendered against Turkey, the Court observed that in the general context of the situation in south-east Turkey in 1993, it cannot be ruled out that an unacknowledged detention of a disappeared person would be life-threatening. The Court also held that defects undermining the effectiveness of criminal law protection in the south-east region during this period permitted members of the security forces to escape accountability for their actions.[27]

In consideration of the foregoing, in cases where it has been established beyond a reasonable doubt that the forcibly disappeared person can be presumed to have died (presumption of death) after being detained by security forces, the Court held that the state was responsible for the death.

State's obligation to effectively investigate a claim of enforced disappearance (Procedural Violation of Article 2 in procedural terms)

The first sentence of Article 2 of the Convention holds states responsible for the protection of everyone's right to life. The conduct of an effective investigation, in other words, the procedural protection of the right to life is an obligation the Court established through its jurisprudence on the basis of this sentence. The Court has held that states have an obligation to investigate claims of enforced disappearance effectively under Article 2.

The Court's jurisprudence on this matter is as follows:

'The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. However, the procedural obligation to conduct an effective investigation is not confined to cases that concern intentional killings resulting from the use of force by agents of the State. This procedural obligation also applies to cases where a person has disappeared in circumstances which may be regarded as life-threatening.'[28]

25 See, *inter alia*, *Taş v. Turkey*, judgment dated 14 November 2000, Application no: 24396/94, §§ 63-65

26 Simmons, p. 95

27 *Taş v. Turkey*, § 66

28 *Acar v. Turkey*, Grand Chamber judgment dated 8 April 2004, Application no: 26307/95, § 226

a) Effective Investigation Criteria

An effective investigation under Article 2 of the Convention involves a comprehensive, impartial and diligent examination of the circumstances surrounding an incident of death or enforced disappearance.

The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible. Even if no absolute result is achieved in terms of identifying and punishing the responsible parties, the investigation, to be considered effective, must be capable of achieving such a result.[29]

The investigation must be conducted by an independent body in a process accessible to the next-of-kin of the victim and complainants. For instance, the Court deemed that investigations on security forces conducted by provincial administrative councils as per Law No. 4483 were ineffective. As we know, Law No. 4483 (Concerning the Prosecution of Government Employees and Other Public Officials) provides that the prosecution of security forces who are alleged to have committed crimes over the course of their administrative policing duties is subject to permission for the investigation by the highest ranking civilian authority in the organization in which the forces are serving.[30] The provincial or district-level administrative councils that conduct a preliminary inquiry to establish whether the investigation will be permitted are chaired by the governor of the province or the district governor of the district. The Court found that the councils may not be considered independent investigative bodies because applicants do not have access to the administrative councils and the councils are composed of officials under the authority of the civilian administrator who is in charge of the public official under investigation.[31]

b) Responsibilities of the prosecutor

- When an applicant makes a claim of enforced disappearance, or upon becoming aware of such a claim, the prosecutor must promptly initiate an investigation.
- The prosecutor must act timely with respect to searching and gathering evidence and taking testimony from witnesses or complainants.
- The prosecutor must personally examine the locations where the person is alleged to have been kept in custody and the custody records.
- In addition to the location where the disappeared person is alleged to have been detained, the Prosecutor must also personally examine other locations where he or she suspects the victim might have been held or locations he or she deems necessary as part of the investigation, as well as other custody records.
- The Prosecutor needs to conduct an investigation if he or she has suspicions about the accuracy of custody records or other official documents.
- The Prosecutor must interrogate security forces or, where necessary, their supervisors who are or may be connected with the incident.
- The Prosecutor must establish whether security forces conducted any operations at the time of the claimed disappearance or at the location where the disappeared person is alleged to have been detained.
- If there are witnesses who claim to have seen the forcibly disappeared person when he or she was being detained or at the location where the person was being held, the Prosecutor must take testimony from such witnesses or other potential witnesses.
- Witnesses or potential witnesses must be asked whether or not they are aware of a detention even if they may not know the names involved, rather than simply asking whether they knew the person alleged to have been detained.
- Investigation records must be kept in a complete manner.
- The Prosecutor must not neglect the available evidence, and may not withhold a decision to initiate an investigation based on neglect of the evidence.

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29 *Osmanoğlu v. Turkey*, § 88

30 See *Law No. 4483 Concerning the Prosecution of Government Employees and Other Public Officials*, Article 3

31 See, *inter alia*, *Taş v. Turkey*, § 71

c) The responsibilities of security forces

■ Custody records must be kept diligently.
■ Custody records must include information on the identity of the suspect, date/hour/minute of the detention and the release, the location where detention took place, the reason for the detention, and the identity and office of the person who detained the suspect.[32]
■ Capture and crime scene records must bear the signatures (no code names should be used) of the security forces who apprehended the suspect and who were on duty in the place of the incident.
■ If the location of the detained suspect needs to be changed for any reason (hospitalization, conducting an inquest, etc.), the time of each change as well as the names and offices of the security forces accompanying the suspect must be recorded.

State's obligation to protect the life of the individual (Violation of the positive obligation under Article 2)

The abovementioned obligation to protect the right to life encompasses not only the obligation to conduct an effective investigation but also the state's obligation to use preventive measures to protect individuals facing a risk of unlawful violence.

In the judgment of *Osman v. United Kingdom*, the Court introduced a criterion to establish whether a state obligation arises in this regard. A state's obligation to protect the right to life arises when the authorities knew, or ought to have known at the time, of the existence of a real and immediate risk to the life of an identified individual and failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[33] It is the applicant's burden to prove such failure.

The first enforced disappearance case where the Court implemented the criterion in the judgment on *Osman v. United Kingdom* is the case of *Mahmut Kaya v. Turkey*.[34] The case concerns the abduction, disappearance and murder of a physician residing in Elazığ who was suspected of aiding and abetting the PKK in 1993. Observing that state authorities considered him suspect because the victim treated wounded members of the PKK, and that he had previously received threats, and considering the general situation of Turkey's south-east region in that period, the Court concluded that there has been a violation of Article 2 because the Turkish Government failed to take reasonable measures to prevent a real and immediate risk to the life of the victim.[35] In *Mahmut Kaya v. Turkey*, the Court was unable to establish beyond a reasonable doubt that state officials carried out the killing of the victim. There was dispute between the respondent state and the applicants as to the circumstances of the case, and the European Commission of Human Rights in office at the time heard witnesses in two hearings. Due to the inconsistencies in the statements of eye witnesses and the inadequacy of the domestic law investigation, the Commission concluded that there was insufficient evidence to support a finding that the state was responsible for the killing. While the Court accepted the facts as established by the Commission,[36] it noted that strong inferences could be drawn on the facts of this case that the perpetrators of the murder were known to the authorities,[37] and found that the state violated its obligation to protect the right to life.

In its 2008 judgment in the case of *Osmanoğlu v. Turkey*, the Court was not able to determine that the state was responsible for the disappearance of the victim who went missing after he was taken from his grocery store by two individuals

32 Vermeulen, Marthe Lot, *Enforced Disappearance Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, Intersentia, 2012, p. 292

33 *Osman v. United Kingdom*, judgment dated 28 October 1998, Application no: 87/1997/871/1083, § 116

34 Vermeulen, p. 404

35 *Mahmut Kaya v. Turkey*, judgment dated 28 March 2000, Application no: 22535/93, § 101

36 Ibid., § 76

37 Ibid., § 87

who identified themselves as police officers. In this particular case, however, the Court found, unlike it did in other enforced disappearance cases, that the presumption of death had been established even though it could not be ascertained that the victim was detained. In rendering this judgment, the Court opined that a finding of state involvement in the disappearance of a person is not a condition *sine qua non* for the purposes of establishing whether that person can be presumed dead.[38] The Court concluded that there has been a violation of Article 2 in its substantive aspect because the state failed to take the reasonable measures to prevent a real and immediate risk to the life of the victim.[39]

As a judgment which may be considered a change in jurisprudence in enforced disappearance cases, what are the legal consequences of the *Osmanoğlu v. Turkey* judgment?

Prior to the *Osmanoğlu* judgment, the Court jurisprudence provided that a forcibly disappeared person could be presumed to be dead by considering whether there was credible evidence that the victim was taken to a detention center which the state was in charge of. After the *Osmanoğlu* judgment, it may now be possible to assert a substantive violation of Article 2 on grounds of a presumption of death even in situations where it cannot be established beyond a reasonable doubt that the victim was detained by state authorities, assuming that the other conditions have materialized. This can be considered an advance in the jurisprudence of the Court with respect to enforced disappearance.

38 ***Osmanoğlu v. Turkey*, § 57**

39 **Ibid., § 84**

TANIŞ AND OTHERS v. TURKEY, APPLICATION NO: 65899/01

The case concerns the disappearance of Serdar Tanış and Ebubekir Deniz, respectively the president and secretary of the Silopi branch of the People's Democracy Party.

The applicants alleged that Tanış and Deniz received death threats from state authorities on account of their political activities.

On 25 January 2001, plain-clothes people attempted to force Serdar Tanış to get into a car, but Tanış refused to get in. On receiving a call on his mobile phone from the gendarmerie commanding officer, he went to the station accompanied by Ebubekir Deniz.

Tanış and Deniz have not been heard from since then.

After complaints were filed by the applicants, Silopi Public Prosecutor launched an investigation on 26 January 2001.

Silopi Public Prosecutor heard testimony from the applicants and eye witnesses. He found that Serdar Tanış received a call on his mobile phone at 1:44 p.m. on 25 January 2001.

On 28 January 2001, the Commanding Officer of the Şırnak Gendarmerie sent notes to the Şırnak and Silopi Public Prosecutors and the Governor of Şırnak indicating that Tanış and Deniz went to the gendarmerie command of their own free will and left the building at 2:20 p.m., and that Tanış was a gendarmerie informant.

The applicants lodged their application with the European Court of Human Rights on 9 February 2001.

Government authorities informed the ECtHR that they seized a letter on 3 March 2001 which indicated that Tanış and Deniz joined a PKK camp in Doloki, Iraq.

On 22 April 2003, the Silopi Public Prosecutor sent the case file to the public prosecutor at the Diyarbakır State Security Court.

A delegation composed of three judges from the ECtHR arrived in Ankara to hear evidence from witnesses between 28 and 30 April 2003.

On 9 February 2004, the prosecutor at the Diyarbakır State Security Court decided that there was no case to answer for lack of evidence.

On 3 May 2004, applicant's objection to the decision that there was no case to answer was dismissed by the Malatya State Security Court.

In its judgment, the Court held that the state was responsible for the enforced disappearance of Tanış and Deniz and for the fact that no news of them was heard since then, and found a substantive violation of the right to life. The Court held that that has been a violation of the right to life on account of the failure to conduct an effective and thorough investigation which would ensure prosecution of perpetrators. The Court also found that an unacknowledged detention of Tanış and Deniz led to a particularly grave violation of the right to liberty and security. Finding that the applicants suffered anguish and distress because of the disappearance of their relatives, the Court held that the prohibition on torture was violated. The Court further found that the right to an effective remedy was violated due to the failure to conduct an effective investigation into the disappearance of their relatives.

PROHIBITION OF TORTURE – ARTICLE 3 OF THE CONVENTION

Article 3 of the Convention provides:
"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

In an enforced disappearance case, state responsibility under Article 3 is examined in two respects;
1) With respect to the forcibly disappeared person, and
2) With respect to the applicant.

The distinction is discussed in detail below.

Violation of Article 3 with respect to the forcibly disappeared person

A violation of Article 3 of the Convention may arise if it can be proven by way of a witness or witnesses that the forcibly disappeared person suffered ill-treatment while being detained or throughout the detention.

Observing that it is hardly possible to present independent and objective medical evidence or eye witness testimony in unacknowledged cases of detention and enforced disappearance, the Court held that requiring either prior to any finding of a violation of Article 3 could undermine the protection provided by this article.[40]

In the case of *Çakıcı v. Turkey*, the applicant alleged a violation of Article 3 because his brother was beaten and given electric shock treatment while in detention. Yet, the only evidence presented in regards to that treatment was the eye witness who shared the same cell with his brother and saw the injury that the brother suffered as a result of the ill-treatment inflicted upon him. The Court decided that the evidence was credible.[41]

In the case of *Akdeniz and others v. Turkey*, the

40 ***Çakıcı v. Turkey***, **§ 91**

41 **Simmons, p. 101**

Court considered the eye witness statements sufficient to establish a finding that actions including keeping the forcibly disappeared persons in the open in cold weather, keeping them bound, and causing anguish and fear that they may be killed violated Article 3 and constituted inhuman and degrading treatment.[42]

In situations where the bodies of the disappeared persons have been identified, the Court has found a violation of Article 3 of the Convention if autopsy reports include findings that the victim might have been subjected to ill-treatment and respondent state cannot provide an explanation as to how those findings came into being.[43]

Violation of Article 3 with respect to the applicant as the relative of the disappeared person

Applicants may claim that they too have suffered violations of Article 3 because of the uncertainty and anguish they experienced due to the enforced disappearance of their relatives. The Court's jurisprudence in this context holds as follows:

'Whether a family member of a forcibly disappeared person is a victim under Article 3 depends on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitable for the relatives of a person who has suffered a grave human rights violation. These factors include the proximity of the family ties - special preference will be given to the parent-child relationship in this context - the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the effort spent by the family member to obtain information about the disappeared person, and how authorities responded to those inquiries.

The Court notes that the essence of such a violation does not lie in the fact of the 'enforced disappearance' of family members, but in the reactions and behavior of the authorities to the situation brought to their attention. Resting in particular on the latter element, a relative may claim victim status due to the behavior of the authorities.'[44]

In light of this jurisprudence, the Court pays attention to the following factors to establish whether the relative of the forcibly disappeared person is a victim under Article 3:

- The degree of proximity between the applicant and the forcibly disappeared person
- The particular circumstances of their relationship
- Whether the applicant witnessed the detention of the forcibly disappeared person
- Efforts spent by the applicant before public authorities to obtain information about the forcibly disappeared person
- How the authorities reacted to those efforts[45]

If applicants will claim a violation of their own rights under Article 3, they will need to inform the Court in regards to the factors above. The Court's criterion on the particular circumstances of the relationship between the forcibly disappeared person and the applicant is not sufficiently clear-cut and the Court has not clarified the issue with its jurisprudence. That the applicant must have witnessed the detention of the forcibly disappeared person is not a condition *sine qua non* for a finding of the violation of Article 3. The Court has rendered judgments in which applicants who did not satisfy that criterion were also considered victims under Article 3.[46] Applicants must also provide the Court with detailed information on the efforts they expended to obtain information about the forcibly disappeared person and on the reaction of the authorities to those efforts. The Court emphasized particularly that the essence

42 *Akdeniz and others v. Turkey*, judgment dated 31 May 2001, Application no: 23954/94, § 98

43 For illustrative cases, see *Mahmut Kaya v. Turkey*, §§ 110-118; *Hayriye Kişmir v. Turkey*, 31 May 2005, Application no: 27306/95, §§ 122-132

44 *Çakıcı v. Turkey*, § 98

45 Simmons, pp. 104-105

46 See, *inter alia*, *Tanış and others v. Turkey*

of an Article 3 violation does not lie in the fact of the 'enforced disappearance' of family members, but in the reactions and behavior of the authorities to the situation brought to their attention. Yet, in its judgment on *Sangariyeva v. Russia*, the Court found a violation of Article 3 in respect of the experiences of applicants who were, respectively, one year old and three years old at the time of the incident and therefore did not expend any effort to obtain information.[47]

Applicants' inability to bury their relatives in a proper manner

In its 2008 judgment in the case of *Khadzhialiyev and others v. Russia*, the Court observed that the relatives of the victims whose corpses were found dismembered and decapitated four days after they were disappeared, did not suffer continuous anguish and distress due to the enforced disappearance itself. The Court noted that for 6 years after the incident, the missing parts of the bodies of the victims have not been found and the applicants have been unable to bury their loved ones in a proper manner, must have caused profound and continuous anguish and distress, resulting in a breach of Article 3.[48] In light of this judgment of the Court, in situations where bodies or body parts are missing, applicants may claim a violation of Article 3 not only with respect to the enforced disappearance of their relatives but also the continuous anguish and distress resulting from the applicants' inability to bury their relatives in a proper manner.

ULUMASKAN AND OTHERS, APPLICATION NO: 9785/02, 17309/04 and 22010/04

The case concerns the disappearance of Sadık and Seyithan Ulumaskan around Diyarbakır.

On 4 December 1997, Sadık and Seyithan drove to Diyarbakır to meet with their relative Aziz Büyükmaskan in a café.

In the evening on that day, Aziz called İsmail, one of the applicants, and told him that Sadık and Seyithan did not show up for their meeting. Afterwards, İsmail promptly set on the road toward Diyarbakır to meet with Aziz, but Aziz did not show up for the meeting.

On 5 December 1997, İsmail informed the police that his brother and father went missing the previous day.

On 10 December 1997, the victims' vehicle was found on the road from Şanlıurfa to Diyarbakır, with its doorlock forced, side windows rolled down and license plates removed.

In the testimony he gave on the same day, Aziz told the authorities that he and Seyithan agreed to meet in a café in Diyarbakır after the two had a phone conversation on 2 December 1997, but Seyithan and Sadık did not show up for their rendezvous. Later, Aziz told that he did not go to his meeting with İsmail after learning the he was being sought by the police and he did not want to get caught.

On 12 December 1997, Mustafa, one of the applicants, lodged a complaint with the Şanlıurfa and Viranşehir Public Prosecutors' Offices, indicating that Aziz was responsible for the disappearance of his relatives.

According to the record dated 23 December 1997, the police showed pictures of the disappeared to the owner and employees of the café and took their testimony. They said they did not see the disappeared persons in the café.

47 Vermeulen, p. 85

48 Ibid., p. 186

On 28 January 1998, Aziz was put in Diyarbakır Prison. He was released on 3 November 1999 under the amnesty provided by the Repentance Law.

On 28 March 2001, the applicants' lawyer requested a copy of the investigation file from the prosecutor who led the investigation. This request was denied on grounds of the confidentiality.

Throughout the investigation, applicants lodged complaints, submitted information and appealed to several authorities in regards to the disappearance of their relatives. Authorities took testimony from the individuals named in the statements of applicants.

In its inadmissibility decision, the Court observed that the prosecutor launched an investigation as soon as he became aware of the disappearance; testimony was taken from the suspect Aziz on 10 December; the lost vehicle was found on the same day and inquiries were made about the matter; testimony was taken from the owner and employees of the café on 23 December; the gendarmerie and the prosecutor also heard Aziz; all individuals named in applicants' testimony to the authorities were heard, yet none of them supported the applicants' claims; and the applicants were kept informed of the progress of the investigation. The Court held that the investigation conducted by the authorities was effective even though it did not bring to light the circumstances regarding the disappearance of Sadık and Seyithan. The Court also noted that authorities did not act complacently toward the claims of the applicants.

THE RIGHT TO LIBERTY AND SECURITY– ARTICLE 5 OF THE CONVENTION

Article 5 of the Convention is as follows:

'***1.*** *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
a*) the lawful detention of a person after conviction by a competent court;*
b*) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;*
c*) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
d*) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
e*) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
f*) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition;*

2. *Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*

3. *Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'

For a detention to be lawful, it must rest on one of the grounds listed in paragraph 1 of Article 5. A detention that takes place without resting on one of those grounds is a violation of 'a procedure prescribed by law'. Furthermore, a violation of paragraph 3 of Article 5 will also arise if, following such an unlawful detention, the detainee is neither released nor brought before a judicial authority.[49]

In incidents of enforced disappearance, authorities usually deny that the victim was detained. Therefore, there is no judicial facility to monitor the lawfulness of the detention under Article 5, paragraph 4 of the Convention.[50] Similarly, it is not possible to claim damages due to unlawful detention under Article 5, paragraph 5 of the Convention, because authorities do not acknowledge that the victim was detained, let alone debating the lawfulness of the detention.[51]

Even if applicants allege that each provision of Article 5 is separately violated in enforced disappearance cases as explained above, the Court has opted to decide that Article 5 has been violated as a whole.[52]

The Court's jurisdiction in respect of this issue is as follows:

'Any deprivation of liberty must not only satisfy the substantive and procedural requirements of the domestic law but also comply with Article 5 whose sole purpose is to protect individuals from arbitrary detentions. To minimize the risk of arbitrary detention, Article 5 seeks to ensure that the act of deprivation of liberty is subject to independent judicial control and to provide safeguards aiming to hold authorities accountable for that act. Unacknowledged detention of an individual amounts to a complete negation of these safeguards and as such constitutes a most serious violation of Article 5. Considering that authorities are responsible for the individuals under their supervision, Article 5 requires authorities to take preventive measures to eliminate the risk of enforced disappearance through effective precautions and to conduct an effective and expeditious investigation into an arguable claim involving a claim that an individual has been detained and has not been heard from since the detention'.[53]

One point worth recalling here is that in enforced disappearance cases where the Court determines beyond a reasonable doubt that the individual has been detained by state authorities, a violation of Article 5 is found. Where such detention cannot be proven, no violation of Article 5 will be found.[54]

RIGHT TO AN EFFECTIVE REMEDY – ARTICLE 13 OF THE CONVENTION

Article 13 of the Convention provides:

'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

The concept of 'arguable claim'

It is necessary to emphasize first of all that Article 13 is not individually enforceable. Applicants

49 Simmons, p. 110

50 Ibid., p.110

51 Ibid., p. 110

52 Ibid., p. 111

53 See, *inter alia*, *Akdeniz v. Turkey*, 31 May 2005, Application no: 25165/94, § 130

54 See, *inter alia*, *Tekdağ v. Turkey*, 15 January 2004, Application no: 27699/95, § 90

may assert a claim in respect of Article 13 only in conjunction with another right or liberty protected under the Convention. However, there is no requirement to prove an actual violation of another right under the Convention to be able to advance a claim within the scope of Article 13; the availability of an 'arguable claim' concerning such a violation shall suffice.[55] For instance, in establishing whether the applicant had an 'arguable claim' under Article 13 relating to the detention of his son in the case of *Timurtaş v. Turkey*, the Court deemed it sufficient that the applicant provided information to the authorities on when, where and with whom his son was detained and the names of witnesses who saw his son being detained.[56] Accordingly, for the purposes of demonstrating their 'arguable claim' before the Court in the future, in the context of domestic law it is important for the applicants to share with relevant authorities the information they have in regards to the disappearance of their relative.

The Court's Article 13 jurisprudence as it relates to enforced disappearances is as follows:

'Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Article 13 thus requires the provision of a domestic remedy to deal with the substance of an "arguable claim" under the Convention and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 also varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of authorities.

In addition, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, or where a right with as fundamental an importance as the right to life is at stake, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure.'[57]

The difference between the violation of the obligation to carry out an effective investigation under Article 2 and the violation of Article 13

Confusion may arise when the Court, observing a failure to carry out an effective investigation in a given enforced disappearance case, finds a procedural violation under Article 2 of the Convention and, at the same time, concludes that Article 13 which concerns the right to an effective remedy has been violated due to the same failure. The important point here is that the procedural protection under Article 2 imposes upon the state a **duty** to conduct an effective investigation vis-à-vis an alleged death or disappearance, whereas Article 13 affords the applicant the **right** to an effective remedy. Where the investigation into an alleged death or disappearance that is the subject of an applicant's complaint is ineffective or partial, a violation of this right will arise.

55 Simmons, p. 135

56 *Timurtaş v. Turkey*, judgment dated 13 June 2000, Application no: 23531/94, § 112

57 See, *inter alia*, *Timurtaş v. Turkey*, § 111

TAHSİN ACAR V. TURKEY, APPLICATION NO: 26307/95

The case concerns the disappearance of a farmer named Mehmet Salim Acar in the Ambar village in the district of Bismil.

The applicant alleged that two unidentified plain-clothes police officers abducted Salim on 29 August 1994 when he was working in a field.

Mehmet Salim's family lodged several complaints and petitions with the authorities relating to his disappearance and to find out where and why he was detained.

On 29 August 1994, Bismil Public Prosecutor launched an investigation.

In July 1995, the applicant gave Bismil Public Prosecutor the names of two gendarmerie officers and a village guard who might be responsible for the abduction of his brother.

On 17 June 1996, the prosecutor issued a decision of non-jurisdiction as per the Law on the Prosecution of Civil Servants in effect at the time and transmitted the investigation file to the Diyarbakır Provincial Administrative Council.

In January 1997, the Provincial Administrative Council decided not to take proceedings against the officers in question on the basis that there was insufficient evidence. This decision was confirmed by the Council of State on 14 January 2000.

In its judgment, the Court considered that there was no proof that gendarmerie officers were connected with the disappearance of Salim, and the claim that the applicant's brother was abducted and detained by state agents is based on hypothesis and speculation rather than on reliable evidence. The Court therefore found no violation of Article 2 of the Convention on the grounds that it was not established beyond a reasonable doubt that the state authorities were responsible for the disappearance of Salim.

The Court has found that the initial investigation led by Bismil Public Prosecutor in relation to the applicant's claims disregarded the claims of victim's relatives and proceeded slowly, and the subsequent investigation by the Provincial Administrative Council was not complete and satisfactory because it was not accessible to the relatives of the victim. The Court thus found a breach of Article 2 of the Convention in these respects.

Because it was not established beyond a reasonable doubt that state authorities were responsible for the disappearance of Salim, the Court dismissed applicant's claims that Article 3 (the prohibition on torture), Article 5 (the right to liberty and security), Article 6 (the right to a fair trial), Article 13 (the right to an effective remedy), and Article 14 (prohibition of discrimination) were violated.

ASLAKHANOVA AND OTHERS V. RUSSIA, APPLICATION NO: 2944/06, 8300/07, 50184/07

The case concerns the enforced disappearance of eight persons apprehended in operations conducted in Chechnya between March 2002 and July 2004.

In each incident of enforced disappearance, an investigation was launched by the competent prosecutor's office, yet the investigations did not produce any results as to the whereabouts of the forcibly disappeared persons or the identity of perpetrators.

Applicants lodged their applications with the Court between January 2006 and November 2007. Applicants claimed a violation of Article 2 (the right to life) of the Convention because of the enforced disappearance of their relatives and the failure to conduct an effective investigation into the matter, a violation of Article 5 (the right to liberty and security) because of the unacknowledged detention of their relatives, a violation of Article 3 (the prohibition of torture) because of the anguish they suffered due to the disappearance of their relatives, and a violation of Article 13 because of the unavailability of an effective domestic remedy concerning their claims. Finally, with reference to Article 26 of the Convention, they claimed that the deficiency of investigations into enforced disappearance in Russia constitutes a systemic problem.

In its judgment, the Court held that the victims should be presumed dead, the state was responsible for the deaths, and therefore the defendant state violated Article 2 of the Convention. In addition, the Court found that the deficiencies found in previous investigations on enforced disappearance were also found in this case. The Court summarized the deficiencies as follows: Delays in the opening of the proceedings, lengthy periods of inactivity, failure to take vital steps - especially those aimed at the identification and questioning of the military and security officers who are responsible for or witnessed the detention - and failure to keep relatives of the victims informed of the important investigative steps and to grant the relatives access to the results of the investigation. The Court therefore found a further breach of Article 2 in respect of the obligation to conduct an effective investigation. The Court also granted the claims of the applicants and held that Articles 3, 5 and 13 of the Convention were also violated.

In the Aslakhanova judgment, the Court noted that the failure to investigate enforced disappearance cases in Russia was a systemic problem and domestic law did not provide an effective remedy in this regard. The Court asked the Russian Government to take measures to ensure the execution of the judgment before the Committee of Ministers, so that the problem could be eliminated.

The Court categorized the measures under two main groups, 'those aimed at mitigating the continued suffering of the relatives of the forcibly disappeared persons' and 'those concerning the efficiency of investigations'.

What Non-Governmental Organizations Can Do Over the Course of Applications to the Court

Article 36, Paragraph 2 of the Convention provides that any person concerned who is not an applicant may submit written comments and take part in hearings in exceptional circumstances, subject to permission of the president of the Court.

Requests from non-governmental organizations interested in the subject matter of a case are usually approved by the Court. Amnesty International took part in *Kurt v. Turkey* and CEJIL participated in *Timurtaş v. Turkey*, exemplifying non-governmental organizations taking part in enforced disappearances cases filed and concluded against Turkey. The organizations in attendance made presentations on the concept of enforced disappearance and its place in international law.

Concerned individuals or NGOs wishing to take part in a case before the Court must submit a petition in English or French including an explanation of the reason they seek participation within twelve weeks following transmission of the application to the respondent Contracting Party.[58]

Execution of the Judgments of the European Court of Human Rights

The Court's final judgments are forwarded to the Committee of Ministers, the executive body of the Council of Europe, for execution as per Article 46 of the Convention. The Contracting States are obligated to remedy the violations the Court has found; however, they will have discretion as to the manner in which they provide relief. As a rule, the state concerned will determine the measures that will remedy the violation, subject to the supervision of the Committee of Ministers.

When the Court renders a judgment of violation, the measures which the state concerned must take regarding the execution of the judgment are of two types, individual measures and general measures.

Individual measures: The execution of a judgment of violation must first of all put an end to the violation and remedy the negative consequences for the applicant. The first issue that comes to mind in this regard is the timely payment of the compensation awarded by the Court. In cases where the mere payment of compensation does not remedy the consequences of the violation for the applicant, the Committee of Ministers may request that authorities of the state concerned take additional individual measures.

General measures: During the process of execution of judgments, the Committee of Ministers, with a view to preventing similar violations, may request that the state concerned take measures applicable beyond the particular case. These measures may involve changes to the legislation or case law that led to the violation or the creation of new domestic remedies that will prevent similar violations. General measures usually also include the dissemination and

58 See Rules of Court, Article 44, subparagraphs a and b of paragraph 3

publication by the state concerned of the violation judgment in question in the national language.

THE OPERATIONAL PROCEDURE OF THE COMMITTEE OF MINISTERS

Once a judgment rendered by the Court becomes final, the Committee of Ministers will ask the state concerned to indicate in the frame of an 'action plan' the individual and general measures it plans to take for the execution of the judgment. Once all necessary individual and general measures are taken, the state concerned submits an 'action report' to the Committee of Ministers. Since January 2011, the Committee of Ministers has followed a twin-track procedure in the adoption and implementation of action plans. While the 'standard supervision' procedure is followed for most judgments, an 'enhanced supervision' procedure is followed for judgments/pilot judgments requiring urgent individual measures or revealing an important structural problem.[59]

In the 'enhanced supervision' procedure, the stages of the execution of the judgment are periodically discussed in the human rights conferences of the Committee of Ministers. The Committee may take appropriate actions in the form of specific decisions or interim resolutions expressing satisfaction, encouragement or concern, or providing suggestions and recommendations as to the execution of the judgment. In addition, the Committee may decide to have its Chair issue declarations and press releases and to hold high-level meetings with regard to the execution of the judgment. In this procedure, it is important that the texts adopted by the Committee are translated into the language of the state concerned and disseminated.[60]

If the Committee of Ministers concludes, after the process explained above, that the necessary individual and general measures for the execution of the judgment have been taken, it adopts a final resolution that the violation judgment has been executed by the state concerned and then takes the judgment off its agenda.

Under Article 9 of the Rules of the Committee of Ministers, applicants, applicants' lawyers, and non-governmental organizations may submit written communication to the Committee of Ministers with regard to the payment of compensation and the execution of individual measures. For instance, lawyers in the cases of *Osman Murat Ülke* and *Dink*, which concluded with violation judgments against Turkey, submit communications to the Committee of Ministers in this framework.[61] In addition, the Open Society Institute, a non-governmental organization, requested an examination under the 'enhanced supervision' procedure with respect to the judgment in the case of *Salduz v. Turkey* concerning the right to a fair trial and whose execution was reviewed through the 'standard supervision' procedure, because the case discloses complex and structural problems relating to Turkish criminal justice system.[62]

THE SITUATION BEFORE THE COMMITTEE OF MINISTERS WITH RESPECT TO ENFORCED DISAPPEARANCE JUDGMENTS RENDERED AGAINST TURKEY

The Committee of Ministers has been reviewing the execution of violation judgments of a final nature rendered against Turkey thus far under the title "Action of the Security Forces in Turkey" as a whole. This is a category that includes not only the execution of enforced disappearance judgments but also violation judgments rendered against Turkey due to the action of security forces thus far, as well as friendly settlements. The Committee of Ministers has not yet resolved that these judgments have been executed, but

59 See http://www.coe.int/t/dghl/monitoring/execution/Presentation/Pres_Exec_en.asp

60 See http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2011_en.pdf

61 See http://www.coe.int/t/dghl/monitoring/execution/Themes/Add_info/TUR-ai_en.asp

62 For the request submitted to the Committee and the response of the Turkish Government, see https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2063044&SecMode=1&DocId=1871042&Usage=2

has adopted interim resolutions listing the general measures taken so far and identifying the measures necessary for the execution of judgments.[63]

OPPORTUNITIES THAT COME TO MIND IN LIGHT OF THE ASLAKHANOVA AND OTHERS V. RUSSIA

The Court rendered a highly significant judgment on enforced disappearances against Russia on 18 December 2012. The judgment in the case of *Aslakhanova and others v. Russia* is quite remarkable in terms of the Court's observations with respect to Article 46 of the Convention.[64]

In the judgment, the Court noted that 120 judgments have been adopted since 1999 against Russia with respect to enforced disappearances in the Northern Caucasus region and observed that there exists systemic problem in the country in that regard. The Court indicated that Russia will need to take a series of measures toward the execution of this judgment before the Committee of Ministers. The Court listed the measures in two principal groups:

■ The Court highlighted that the most pressing need concerns taking measures in regards to the continuing suffering of the relatives of the disappeared. In this regard, the Court supported the proposal to create a body that would be in charge of solving the enforced disappearances in the region, which would enjoy unrestricted access to all relevant information. This body needs to be provided with the financial resources that will allow it to carry out large-scale forensic work, including the location and exhumation of mass graves and the payment of compensation to the families of the victims.

■ The second group of measures should relate to effective investigations. In this context, the Court required that Russian Government take general measures to shed light on unacknowledged detentions by state authorities; to afford investigators unrestricted access to all relevant information held by military and security forces; to provide victims with access to the case files; and to ensure that investigations do not become barred by statute.

In this context, applicants, their lawyers or non-governmental organizations can take the following steps in regards to enforced disappearance judgments rendered against Turkey that are awaiting execution before the Committee of Ministers:

■ Requesting that the enforced disappearance judgments reviewed under the category 'The Action of Security Forces' and through the 'standard supervision' procedure before the Committee of Ministers be separated from that category and that they be examined through the aforementioned 'enhanced supervision' procedure because they disclose complex and structural problems;

■ Once the *Aslakhanova and others v. Russia* judgment becomes final and arrives before the Committee of Ministers for execution, requesting, in light of this novel jurisprudence of the Court, that the same general measures be taken in enforced disappearance cases concerning Turkey.

Whether these steps might yield results before the Committee of Ministers can only be guessed at this time. Yet, there is a chance that they can contribute to a separated review of enforced disappearance judgments against Turkey and to the taking of general measures specific to this issue, which makes these steps worthwhile.

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63 DH(99)434 resolution dated 9 June 1999, DH(2002)98 resolution dated 10 July 2002, ResDH (2005)43 resolution dated 7 June 2005, and ResDH (2008)69 resolution dated 18 September 2005

64 *Aslakhanova and others v. Russia*, judgment dated 18 December 2012, Application no: 2944/06, 8300/07, 50184/07, 332/08, 42509/10, § 210-239

OPPORTUNITIES AVAILABLE TO THE COURT AND THE COMMITTEE OF MINISTERS IN ENFORCED DISAPPEARANCE CASES

■ In situations where a victim could not be heard from for a long time and yet it could not be proven that he was detained by state authorities, the plaintiff may argue to the Court, in light of the *Osmanoğlu v. Turkey* judgment, that the victim should be presumed dead and the state failed to satisfy its obligation to protect the life of the victim, and therefore a claim of substantive violation of Article 2 of the Convention may be advanced.

■ In light of the *Aslakhanova and others v. Russia* judgment, applicants bringing claims of enforced disappearance before the Court may, in addition to making submissions on the articles of the Convention alleged to have been violated, submit claims under Article 46 of the Convention which concerns the execution and binding nature of the judgments. Applicants may also communicate to the Court the measures they request to be taken to redress their grievances, in addition to payment of compensation, under the said article.

■ NGOs may take advantage of the option afforded by paragraph 2 of Article 36 of the Convention and take part in enforced disappearance hearings before the Court.

■ It may be requested that the enforced disappearance judgments reviewed under the category 'The Action of Security Forces' and through the 'standard supervision' procedure before the Committee of Ministers be separated from that category and that they be examined through the aforementioned 'enhanced supervision' procedure because they disclose complex and structural problems.

■ Once the *Aslakhanova and others v. Russia* judgment becomes final and arrives before the Committee of Ministers for execution, it may be requested, in light of this novel jurisprudence of the Court, that the same general measures be taken in enforced disappearance cases concerning Turkey.

■ NGOs may also take advantage of the procedure provided under Rule 9 of the Rules of the Committee of Ministers and submit written communications to the Committee in regards to the execution of finalized enforced disappearance cases.

ENFORCED DISAPPEARANCE JUDGMENTS OF THE ECtHR IN REGARDS TO TURKEY

1) Kurt v. Turkey, Application no: 15/1997/799/1002, judgment dated 25 May 1998

2) *Çakıcı v. Turkey*, Application no: 23657/94, judgment dated 8 July 1999

3) *Mahmut Kaya v. Turkey*, Application no: 22535/93, judgment dated 28 March 2000

4) *Ertak v. Turkey*, Application no: 20764/92, judgment dated 9 May 2000

5) *Timurtaş v. Turkey*, Application no: 23531/94, judgment dated 13 June 2000

6) *Taş v. Turkey*, Application no: 24396/94, judgment dated 14 November 2000

7) Çiçek v. Turkey, Application no: 25704/94, judgment dated 27 February 2001

8) Şarlı v. Turkey, Application no: 24490/94, judgment dated 22 May 2001

9) Akdeniz and others v. Turkey, Application no: 23954/94, judgment dated 31 May 2001

10) İrfan Bilgin v. Turkey, Application no: 25659/94, judgment dated 17 July 2001

11) İ.İ., İ.Ş., K.E. and A.Ö . v. Turkey, Application no: 30953/96, 30954/96, 30955/96, 30956/96, friendly settlement dated 6 November 2001

12) Yakar v. Turkey, Application no: 36189/97, friendly settlement dated 16 April 2002

13) Orhan v. Turkey, Application no: 25656/94, judgment dated 18 June 2002

14) Tepe v. Turkey, Application no: 27244/95, judgment dated 9 May 2003

15) Sevdet Efe v. Turkey, Application no: 39235/98, inadmissibility decision dated 9 October 2003

16) Eren and others v. Turkey, Application no: 42428/98, friendly settlement dated 2 October 2003

17) Hanım Tosun v. Turkey, Application no: 31731/96, friendly settlement dated 6 November 2003

18) Nergiz ve Karaaslan v. Turkey, Application no: 39979/98, inadmissibility decision dated 6 November 2003

19) Yurtseven and others v. Turkey, Application no: 31730/96, friendly settlement dated 18 December 2003

20) İpek v. Turkey, Application no: 25760/94, judgment dated 17 February 2004

21) Tahsin Acar v. Turkey, Application no: 26307/95, judgment dated 8 April 2004

22) Tekdağ v. Turkey, Application no: 27699/95, judgment dated 14 June 2004

23) Erkek v. Turkey, Application no: 28637/95, judgment dated 13 July 2004

24) O. v. Turkey, Application no: 28497/95, judgment dated 15 July 2004

25) Seyhan v. Turkey, Application no: 33384/96, judgment dated 2 November 2004

26) Evin Yavuz and others v. Turkey, Application no: 48064/99, inadmissibility decision dated 1 February 2005

27) *Türkoğlu v. Turkey,* Application no: 34506/97, judgment dated 17 March 2005

28) Akdeniz v. Turkey, Application no: 25165/94, judgment dated 31 May 2005

29) Koku v. Turkey, Application no: 27305/95, judgment dated 31 May 2005

30) Kişmir v. Turkey, Application no: 27306/95, judgment dated 31 May 2005

31) Toğcu v. Turkey, Application no: 27601/95, judgment dated 31 May 2005

32) Tanış and others v. Turkey, Application no: 65899/01, judgment dated 2 August 2005

33) Özgen and others v. Turkey, Application no: 38607/97, judgment dated 20 September 2005

34) Sıddık Aslan and others v. Turkey, Application no: 75307/01, judgment dated 18 October 2005

35) Nesibe Haran v. Turkey, Application no: 28299/95, judgment dated 6 October 2005

36) *Mordeniz v. Turkey*, Application no: 49160/99, judgment dated 10 January 2006

37) Şeker v. Turkey, Application no: 52390/99, judgment dated 21 February 2006

38) Aydın Eren and others v. Turkey, Application no: 57778/00, judgment dated 21 February 2006

39) Ulumaskan and others v. Turkey, Application no: 9785/02, inadmissibility decision dated 13 June 2006

40) Kavak v. Turkey, Application no: 53489/99,

judgment dated 6 July 2006

41) Diril v. Turkey, Application no: 68188/02, judgment dated 19 October 2006

42) Kaya and others v. Turkey, Application no: 4451/02, judgment dated 24 October 2006
43) *Yazıcı v. Turkey*, Application no: 48884/99, judgment dated 5 December 2006

44) Üçak and others v. Turkey, Application no: 75527/01 and 11837/02, judgment dated 27 April 2007

45) Canan v. Turkey, Application no: 39436/98, judgment dated 26 June 2007

46) Enzile Özdemir v. Turkey, Application no: 54169/00, judgment dated 8 January 2008

47) Osmanoğlu v. Turkey, Application no: 48804/99, judgment dated 24 January 2008

48) Cesim Yıldırım v. Turkey, Application no: 29109/03, judgment dated 17 June 2008

49) Nehyet Günay and others v. Turkey, Application no: 51210/99, judgment dated 21 October 2008

50) Yetişen v. Turkey, Application no: 21099/06, inadmissibility decision dated 10 July 2012

51) Fındık and Kartal v. Turkey, Application no: 33898/11 and 35798/11, inadmissibility decision dated 9 October 2012

52) Taşçı and Duman v. Turkey, Application no: 40787/10, inadmissibility decision dated 9 October 2012

53) Er and others v. Turkey, Application no: 23016/04, judgment dated 31 October 2012

54) Bozkır and others v. Turkey, Application no: 24589/04, judgment dated 26 February 2013

55)Meryem Çelik and others v. Turkey, Application no: 3598/03, judgment dated 16 April 2013

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Law No. 4483 Concerning The Prosecution of Government Employees and Other Public Officials

BIOGRAPHIES

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Gökçen Alpkaya is a full professor in the Department of International Law at the School of Political Sciences at Ankara University. Prof. Alpkaya teaches undergraduate and graduate courses on international law, international human rights law, and international humanitarian law. Her books include AGİK Sürecinden AGİT'e İnsan Hakları *(Human Rights from the Conference on Security and Cooperation in Europe to the Organization for Security and Cooperation in Europe)*, Kavram Publications, İstanbul, 1996; (with Dr. Filiz Zabcı) İlköğretim Vatandaşlık ve İnsan Hakları Eğitimi *(Citizenship and Human Rights Education at the Elementary School Level)*, Doğan Publications, Ankara, 1998; Eski Yugoslavya için Uluslararası Ceza Mahkemesi *(International Criminal Tribunal for the Former Yugoslavia)*, Turhan Publications, Ankara, 2002; (with Dr. Faruk Alpkaya) 20. Yüzyıl Dünya ve Türkiye Tarihi *World and Turkish History in the 20th Century)*, Tarih Vakfı *(History Foundation)*, İstanbul, 2005.

İLKEM ALTINTAŞ

After graduating from TED Ankara High School, İlkem Altıntaş completed an undergraduate degree at the School of Law at Ankara University in 1998. She held a law internship at the Ankara Bar Association in 1999 and began a career with the Turkish Foreign Ministry as an expert specializing in human rights in 2000. After spending eight years at that position in Ankara and Strasbourg, she worked as a rapporteur at the European Court of Human Rights in Strasbourg between 2008 and 2011. Since 2012, she has been teaching international human rights law at Yeditepe University on a part-time basis. Altıntaş has also been working at the Truth Justice Memory Center since December 2012. In addition, she has a position as a tutor in the Human Rights Education Program for Legal Professionals at the Council of Europe. Altıntaş holds two master's degrees, one from the School of Law at the University of Essex and the other from the Department of Political Science and Public Administration at Bilkent University, both focused on the European Convention on Human Rights and the European Court of Human Rights.

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Dr. Sevdiren graduated from İstanbul Haydarpaşa High School and went on to complete an undergraduate degree at the School of Law at İstanbul University in 1998. Following her law internship at the İstanbul Bar Association in 1999, she participated in various short-term programs at Birkbeck, University of London and at the University of Westminster. In 2003, she earned a postgraduate degree from the School of Law at the University of Sheffield with a comparative thesis on juvenile courts in Turkey, England and Wales. After postgraduate studies, Dr. Sevdiren worked as a research assistant at the Institute of International and Comparative Criminal Law at the School of Law at the University of Cologne, where she drew up a report on the general provisions of the new Turkish Criminal Code. She began her doctoral studies in 2005, and her dissertation comparing alternatives to imprisonment in Germany, England, Wales and Turkey was supported by the German Academic Exchange Service, University of Cologne, and Friedrich-Ebert-Stiftung. From January to April 2011, she was a member of the Founding Curriculum Committee of the School of Law at the Turkish-German University. Dr. Sevdiren taught part-time in the Department of Political Science and International Relations at Boğaziçi University in the fall and spring semesters in the 2011-2012 academic year, offering courses on international criminal law. She has been a faculty member in the Department of Criminal Law and Criminal Procedure Law at the School of Law at Uludağ University since September 2011.

EMEL ATAKTÜRK SEVİMLİ

Emel Ataktürk graduated from the School of Law at Marmara University in 1988. She has been a member of the İstanbul Bar Association since 1989. She has held memberships and administrative positions at non-governmental organizations including İnsan Hakları Derneği *(Human Rights Association)*, Türkiye İnsan Hakları Vakfı *(Human Rights Foundation of Turkey)*, and Helsinki Yurttaşlar Derneği *(Helsinki Citizens' Assembly)*. Ataktürk both studied and trained students at the İstanbul Bar Association Women's Rights Center, Center for European Studies at Boğaziçi University, and the Office of the United Nations High Commissioner for Refugees. She contributed to a number of the studies published by these various centers. Ataktürk is currently a Program Manager at the Truth Justice Memory Center.

LIST OF THE DISAPPEARED VERIFIED BY TRUTH JUSTICE MEMORY CENTER

The Truth Justice Memory Center has confirmed that the 262 people on this list were forcibly disappeared. Our sources include the interviews we carried out with the relatives of the disappeared, applications made to the European Court of Human Rights, and data we have gathered from lawyers and bar associations who have represented enforced disappearance cases especially in Cizre, Silopi, İdil and Diyarbakır.
In order to verify this list, we took into account the following data:

- Testimonies of the relatives of the forcibly disappeared;
- Reports of the Human Rights Investigation Commission of the Grand National Assembly of Turkey;
- Case files of enforced disappearances that have been referred to local courts;
- Investigation files of enforced disappearance cases that continue to be investigated by Prosecution Offices;
- Petitions of complaint as procedure of legal application;
- Applications to and decisions of the European Court of Human Rights;
- Official statements that have been signed in the presence of lawyers and are valid as declarations.

When sources contradicted each other, we relied on legal data. The reason for this is the fact that legal data is the basis to overcome the impunity in enforced disappearance cases. Legal data is used as a reference when statute of limitations periods are calculated, or perpetrators are determined. However, if there was a contradiction between the accounts of the relatives of the forcibly disappeared and legal data, we added the narrative data as a footnote. We prioritized data in the final decisions of the European Court of Human Rights. We allowed the same priority for ECtHR applications.

The respect we felt for the forcibly disappeared necessitated a considerable effort on our part to ensure the accuracy of the data of the list we formed. However, despite all such effort, the list may still contain deficiencies or mistakes. It is highly important that these are reported to our center to eliminate the deficiencies of this study. To report such deficiencies, or to provide new information please call us at (+90) 212 243 32 27 or mail us at info@hakikatadalethafiza.org.

The most up to date version of the list can be found at www.zorlakaybetmeler.org.

	NAME-SURNAME	DATE	PROVINCE	LOCATION	SOURCE
1	**Abbas Çiğden**	01/01/1988 (1) Month and day unknown	Şırnak	Silopi / Derebaşı Village	Official minutes dated 29 January 2009 signed in the presence of lawyers affiliated with the Şırnak Bar Association
2	**Abdo Yamuk**	01/10/1993 (2) Day unknown	Diyarbakır	Kulp / Alaca Vlg.	ECtHR Application No: 23954/94
3	**Abdulaziz Gasyak**	06/03/1994	Şırnak	Cizre - Silopi Highway	Interviews with relatives of Süleyman Gasyak and Ömer Candoruk who were forcibly disappeared together -Süleyman Gasyak's wife Leyla Gasyak and Ömer Candoruk's wife Hanım Candoruk and son Mesut Candoruk / ECtHR Application No : 27872/03 / Diyarbakır 6. Criminal Court File No:2009/470
4	**Abdulhakim Tanrıverdi**	01/04/1993 (3) Day unknown	Şırnak	Cizre / Kuştepe Vlg.	Interview with Atike Tanrıverdi and İdris Tanrıverdi / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
5	**Abdulhamit Düdük**	16/07/1994	Şırnak	Silopi	Diyarbakır 6. Criminal Court File No: 2009/470
6	**Abdulkerim Kalkan**	01/05/1992 (4) Day unknown	Şırnak	Cizre / İnci Vlg.	Interview with Zekiye Kalkan
7	**Abdullah Canan**	17/01/1996	Hakkari	Yüksekova - Van Hwy.	ECtHR Application No: 39436/98
8	**Abdullah Düşkün**	16/04/1994	Şırnak	Cizre	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
9	**Abdullah Efelti**	01/02/1995 Day unknown	Şırnak	Cizre	Interview with Mesut Efelti and Besna Efelti / Diyarbakır 6. Criminal Court File No: 2009/470
10	**Abdullah İnan**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hamlet	ECtHR Application No: 3598/03
11	**Abdullah Kert**	01/09/1990 Gün bilinmiyor	Hakkari	Yüksekova / Tılur Vlg.	Interview with Salih Kert / Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
12	**Abdullah Özdemir**	06/06/1994	Şırnak	Silopi / Zıristan Hamlet / Üçağaç Vlg.	Interview with Tahir Özdemir / Diyarbakır 6. Criminal Court File No: 2009/470
13	**Abdullah Turğut**	01/11/1995 Day unknown	Şırnak	Silopi	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
14	**Abdulvahap Timurtaş**	14/08/1993	Şırnakz	Silopi / Yeniköy	ECtHR Application No: 23531/94
15	**Abdurrahman Afşar**	01/03/1994 Day unknown	Şırnak	Cizre	Diyarbakır 6. Criminal Court File No: 2009/470
16	**Abdurrahman Coşkun**	03/11/1995 (5)	Mardin	Dargeçit	Dargeçit Office of the Chief Public Prosecutor Inquiry No: 1995/2
17	**Abdurrahman Hoca Şuho**	30/11/1995	Şırnak	Silopi	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
18	**Abdurrahman Olcay**	01/11/1995 (5) Day unknown	Mardin	Dargeçit	Dargeçit Office of the Chief Public Prosecutor Inquiry No: 1995/2
19	**Abdurrahman Yılmaz**	01/02/1994 (6) Day unknown	Şırnak	Cizre	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
20	**Abdurrezzak Binzet**	16/07/1997	Şırnak	Silopi	Diyarbakır 6. Criminal Court File No: 2009/470

21	**Abidin Pulat (Polat) (7)**	01/10/1995 Day unknown	Şırnak	Silopi / Buğdaylı Vlg.	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
22	**Adil Ölmez**	01/01/1995 Month and day unknown	Şırnak	Cizre	Interview with Mustafa Ölmez / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
23	**Agit Akipa**	11/12/1991	Şırnak	İdil	ECtHR Application No: 56291/12
24	**Ahmet Berek**	01/01/1993 Month and day unknown	Şırnak	Cizre	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
25	**Ahmet Bulmuş**	01/04/1994 (8) Day unknown	Şırnak	Cizre	Interview with Vedat Bulmuş / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
26	**Ahmet Bozkır**	26/08/1996	Hakkari	Otluca Vlg.	ECtHR Application No: 24589/04
27	**Ahmet Çakıcı**	08/11/1993	Diyarbakır	Hazro / Çitlibahçe Vlg.	ECtHR Application No: 23657/94
28	**Ahmet Dansık**	22/02/1995	Şırnak	Silopi	Interview with Abdullah Dansık / Official minutes dated 26 January 2009 signed in the presence of lawyers affiliated with the Şırnak Bar Association
29	**Ahmet Er**	14/07/1995	Hakkari	Çukurca / Kurudere Vlg.	ECtHR Application No: 23016/04
30	**Ahmet Kalpar**	05/12/1993	Şanlıurfa	Siverek	Petition presented to Istanbul Office of the Chief Public Prosecutor Inquiry No: 2007/1536
31	**Ahmet Özdemir**	13/08/1994	Şırnak	Güçlükonak / Fındık Vlg.	Interview with Taybet Özdemir / ECtHR Application No: 30953/96, 30954/96, 30955/96, 30956/96
32	**Ahmet Özer**	13/08/1994	Şırnak	Güçlükonak / Fındık Vlg.	Interview with Fatım Özer / ECtHR Application No: 30953/96, 30954/96, 30955/96, 30956/96
33	**Ahmet Sanır**	01/03/1994 Day unknown	Şırnak	Merkez / Ara Vlg.	Official minutes dated 27 January 2009 signed in the presence of lawyers affiliated with the Şırnak Bar Association
34	**Ahmet Şayık**	07/01/1994	Şırnak	Silopi	Interview with Şeyhmus Şayık / Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
35	**Ahmet Şen**	01/01/1994 Month and day unknown	Şırnak	Güçlükonak	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
36	**Ahmet Ürün**	14/04/1996	Şırnak	Center / Gazipaşa District	Şırnak Office of the Chief Public Prosecutor Inquiry No: 1996/158
37	**Ahmet Üstün**	01/04/1994 Day unknown	Şırnak	Cizre	Interview with Fadile Üstün and Ali Üstün / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
38	**Ahmet Yetişen**	14/11/1994	Batman		ECtHR Application No: 21099/06
39	**Ali Efeoğlu**	05/01/1994	İstanbul	Pendik	Istanbul Office of the Chief Public Prosecutor Inquiry No: 1994/4970
40	**Ali İhsan Çiçek**	10/05/1994	Diyarbakır	Lice / Dernek Vlg.	ECtHR Application No: 25704/04
41	**Ali İhsan Dağlı**	14/04/1995	Diyarbakır	Silvan / Eşme Vlg.	ECtHR Application No: 75527/01,11837/02

42	**Ali Karagöz**	27/12/1993	Şırnak	Cizre	Interview with Ayşe Karagöz / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/435
43	**Ali Müldür**	Date unknown	Şırnak	Silopi (**9**)	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
44	**Ali Osman Heyecan**	01/01/1995 Month and day unknown	Şırnak	Silopi	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/423
45	**Ali Tekdağ**	13/11/1994	Diyarbakır	Dağkapı	ECtHR Application No: 27699/95
46	**Aşur Seçkin**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hamlet	ECtHR Application No: 3598/03
47	**Atilla Osmanoğlu**	25/03/1996	Diyarbakır		ECtHR Application No: 48804/99
48	**Aydın Kişmir**	06/10/1994	Diyarbakır		ECtHR Application No: 27306/95
49	**Ayhan Efeoğlu**	06/10/1992	İstanbul		Istanbul Office of the Chief Public Prosecutor Inquiry No: 2012/535
50	**Ayşenur Şimşek**	24/01/1995	Ankara		Petition presented to Istanbul Office of the Chief Public Prosecutor Inquiry No: 2007/1536
51	**Ayten Öztürk**	27/07/1992	Dersim		Malatya Office of the Chief Public Prosecutor Inquiry No: 2012/169
52	**Bahri Arslan**	01/04/1985 Day unknown	Şırnak	Merkez / Kırkkuyu Vlg.	Petition of complaint dated 25 March 2009 presented to the Cizre Office of the Chief Public Prosecutor
53	**Bahri Esenboğa**	13/08/1994	Şırnak	Güçlükonak / Fındık Vlg.	Interview with Hatice Özdemir / ECtHR Application No: 30953/96, 30954/96, 30955/96, 30956/96
54	**Bahri Şimşek**	01/10/1993 (**2**) Day unknown	Diyarbakır	Kulp / Alaca Vlg.	ECtHR Application No: 23954/94
55	**Bedri Berek**	01/01/1994 Month and day unknown	Şırnak	Cizre	Interview with Cevher Berek
56	**Behçet Tutuş**	01/10/1993 (**2**) Day unknown	Diyarbakır	Kulp / Alaca Vlg.	ECtHR Application No: 23954/94
57	**Bilal Batırır**	08/03/1996	Mardin	Dargeçit	Dargeçit Office of the Chief Public Prosecutor Inquiry No: 1995/2
58	**Casım Çelik**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hamlet	ECtHR Application No: 3598/03
59	**Celil Aydoğdu**	01/10/1993 (**2**) Day unknown	Diyarbakır	Kulp / Alaca Vlg.	ECtHR Application No: 23954/94
60	**Cemal Geren**	10/02/1991	Şırnak	Cizre	Interview with Hizni Geren
61	**Cemal Kavak**	24/04/1996	Diyarbakır	Kuruçeşme	ECtHR Application No: 53489/99
62	**Cemal Sevli**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hamlet	ECtHR Application No: 3598/03

63	**Cemil Kırbayır**	13/09/1980	Kars	Göle	Interview with Mikail Kırbayır / Kars Office of the Chief Public Prosecutor Inquiry No: 2011/899 / The Grand National Assembly of Turkey, Human Rights Investigation Committee's Subcommittee for the Investigation of the Fate of People Allegedly Disappeared Whilst In Custody on the Basis of the Disappearance Case of Tolga Baykal Ceylan, the "Cemil Kırbayır" Report
64	**Cemile Şarlı**	24/12/1993	Bitlis	Tatvan / Ulusoy Vlg.	ECtHR Application No: 24490/94
65	**Cezayir Orhan**	24/05/1994	Diyarbakır	Kulp / Çağlayan Vlg. / Deveboyu Hamlet	ECtHR Application No: 25656/94
66	**Davut Altınkaynak**	03/11/1995 (**5**)	Mardin	Dargeçit	Dargeçit Office of the Chief Public Prosecutor Inquiry No: 1995/2
67	**Deham Günay**	11/07/1997	Şırnak	Silopi	ECtHR Application No: 51210/99
68	**Derviş Özalp**	10/02/1994	Şırnak	Cizre	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
69	**Ebubekir Aras**	01/07/1992 Day unknown	Şırnak	Cizre	Interview with Hediye Aras
70	**Ebubekir Dayan**	17/01/1994	Şırnak	Cizre	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
71	**Ebubekir Deniz**	25/01/2001	Şırnak	Silopi	Interview with Mehmet Ata Deniz / ECtHR Application No: 65899/01
72	**Ebuzeyt Aslan**	07/09/2001	Van		ECtHR Application No: 75307/01
73	**Emin Altan**	07/04/1996	Diyarbakır	Center / Bağlar	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
74	**Emin Karatay**	01/06/1991 Day unknown	Şırnak	Cizre / Bozalan Vlg.	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
75	**Emin Kaya**	Date unknown	Şırnak	Güçlükonak	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/546
76	**Emin Savgat**	01/02/1993 Day unknown	Şırnak	Cizre / Dirsekli Vlg. / Kurtuluş Hamlet	Petition of complaint dated 25 March 2009 presented to the Cizre Office of the Chief Public Prosecutor / Official minutes dated 26 January 2009 signed in the presence of lawyers affiliated with the Şırnak Bar Association
77	**Enver Akan**	15/10/1998	Mardin	Dargeçit (**10**)	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
78	**Fahriye Mordeniz**	28/11/1996	Diyarbakır		ECtHR Application No: 49160/99
79	**Fehmi Tosun**	19/10/1995	İstanbul	Avcılar	Interview with Hanım Tosun / ECtHR Application No: 31731/96
80	**Ferhat Tepe**	28/07/1993	Bitlis		ECtHR Application No: 27244/95
81	**Fethi Ildır**	01/09/1993 Day unknown	Şırnak	Cizre / Kuştepe Vlg.	Cizre Office of the Chief Public Prosecutor Inquiry No: 1993/492
82	**Fethi Yıldırım**	05/01/1994	Şanlıurfa	Viranşehir	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151

83	**Fettah Erden**	01/01/1994 (**11**) Month and day unknown	Şırnak	Güçlükonak / Boyuncuk Vlg.	Cizre Civil Court of First Instance File Number: 2005/236 File - 2007/22 Decision
84	**Feyzi Bayan**	29/09/1989 (**1**)	Şırnak	Silopi / Derebaşı Vlg.	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
85	**Fikri Özgen**	27/02/1997	Diyarbakır		ECtHR Application No: 38607/97
86	**Fikri Şen**	13/08/1994	Şırnak	Güçlükonak / Fındık Vlg.	Interview with Adile Şen / ECtHR Application No: 30953/96, 30954/96, 30955/96, 30956/96
87	**Hakkı Kaya**	16/11/1996	Diyarbakır		ECtHR Application No: 4451/02
88	**Halil Alpsoy**	01/01/1994 Month and day unknown	İstanbul	Küçükçekmece / Kanarya District	Interview with Fikriye Alpsoy
89	**Halil Birlik**	07/11/1996 (**12**)	Şırnak	Silopi / Habur Border Gate	Interview with Çetin Birlik / Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
90	**Halit Aslan**	07/09/2001	Van		ECtHR Application No: 75307/01
91	**Halit Ertuş**	26/08/1996	Hakkari	Otluca Vlg.	ECtHR Application No: 24589/04
92	**Halit Özdemir**	01/01/1993 (**21**) Month and day unknown	Şırnak	Silopi / Görümlü Vlg.	ECtHR Application No: 7524/06
93	**Hamdo Şimşek**	01/01/1993 (**21**) Month and day unknown	Şırnak	Silopi / Görümlü Vlg.	ECtHR Application No: 39046/10
94	**Hasan Avar**	01/10/1993 (**2**) Day unknown	Diyarbakır	Kulp / Alaca Vlg.	ECtHR Application No: 23954/94
95	**Hasan Aydoğan**	31/03/1998	İzmir	Çeşme / Alaçatı	Petition presented to Istanbul Office of the Chief Public Prosecutor Inquiry No: 2007/1536
96	**Hasan Baykura**	01/12/1993 (**23**) Day unknown	Şırnak	Cizre	Interview with Suphiye Baykura / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
97	**Hasan Bayram**	01/05/1994 Day unknown	Diyarbakır	Lice	Lice Office of the Chief Public Prosecutor Inquiry No: 1994/57 / ECtHR Application No: 987/02 (Decision of inadmissibility)
98	**Hasan Ergül**	23/05/1995	Şırnak	Silopi	Interview with Hizni Ergül / Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
99	**Hasan Esenboğa**	25/12/1994	Şırnak	Cizre	Interview with Hatice Özdemir / İdil Office of the Chief Public Prosecutor Inquiry No: 1994/287
100	**Hasan Gülünay**	20/07/1992	İstanbul		Interview with Birsen Gülünay / İstanbul Office of the Chief Public Prosecutor Inquiry No: 2009/61296
101	**Hasan Kaya**	21/02/1993	Elazığ		ECtHR Application No: 22535/93
102	**Hasan Ocak**	21/03/1995	İstanbul		ECtHR Application No: 28497/95
103	**Hasan Orhan**	24/05/1994	Diyarbakır	Kulp / Çağlayan Vlg. / Deveboyu Hamlet	ECtHR Application No: 25656/94
104	**Hayrullah Öztürk**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hamlet	ECtHR Application No: 3598/03

105	**Hazım Ünver**	01/10/1996 Day unknown	Şırnak	Silopi (**13**)	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
106	**Hikmet Kaya**	04/11/1994 (**5**)	Mardin	Dargeçit	Dargeçit Office of the Chief Public Prosecutor Inquiry No: 1995/2
107	**Hükmet Şimşek**	01/01/1993 (**21**) Month and day unknown	Şırnak	Silopi / Görümlü Vlg.	ECtHR Application No: 39046/10
108	**Hurşit Taşkın**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hamlet	ECtHR Application No: 3598/03
109	**Hüsamettin Yaman**	01/01/1992 (**22**) Month and day unknown	İstanbul	Merter	Interview with Feyyaz Yaman / Istanbul Office of the Chief Public Prosecutor Inquiry No: 2011/71615
110	**Hüseyin Demir**	26/09/1994	Şırnak	İdil	İdil Office of the Chief Public Prosecutor Inquiry No: 1994/211
111	**Hüseyin Koku**	20/10/1994	Kahraman-maraş	Elbistan	ECtHR Application No: 27305/95
112	**Hüseyin Morsümbül**	18/09/1980	Bingöl	-	Petition of complaint sent via official correspondence to the Bingöl Office of the Chief Public Prosecutor. Istanbul Office of the Public Prosecutor Correspondence No: 2011/2536
113	**Hüseyin Taşkaya**	05/12/1993	Şanlıurfa	Siverek	Interview with Sultan Taşkaya / Petition presented to Istanbul Office of the Chief Public Prosecutor Inquiry No: 2007/1536
114	**Hüseyin Yeşilmen**	01/01/1993 Day unknown	Şırnak	Cizre	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
115	**İbrahim Adak**	01/02/1994 Day unknown	Şırnak	Cizre	Diyarbakır 6. Criminal Court File No: 2009/470
116	**İbrahim Akıl**	01/01/1993 (**21**) Month and day unknown	Şırnak	Silopi / Görümlü Vlg.	ECtHR Application No: 7524/06
117	**İbrahim Demir**	11/12/1991	Şırnak	İdil	ECtHR Application No: 56291/12
118	**İhsan Arslan**	27/12/1993	Şırnak	Cizre	Interview with Şevkiye Arslan / Diyarbakır 6. Criminal Court File No: 2009/470
119	**İhsan Haran**	24/12/1994	Diyarbakır		ECtHR Application No: 28299/95
120	**İkram İpek**	18/05/1994	Diyarbakır	Lice / Türeli Vlg. / Çaylarbaşı Hamlet	ECtHR Application No: 25760/94
121	**İlhan Bilir**	01/01/1992 Month and day unknown	Şırnak	Center	Interview with Güllü Bilir
122	**İlhan İbak**	13/08/1994	Şırnak	Güçlükonak / Fındık Vlg.	Interview with İsmet İbak and Şerif İbak / ECtHR Application No: 30953/96, 30954/96, 30955/96, 30956/96
123	**İlyas Diril**	13/05/1994	Şırnak	Beytüşşebap	ECtHR Application No: 68188/01

124	**İlyas Eren**	11/03/1997	Diyarbakır		ECtHR Application No: 42428/98
125	**İsa Efe**	09/07/1996	Mardin	Derik / Tepebağ Vlg.	ECtHR Application No: 39235/98 (Decision of inadmissibility)
126	**İsa Soysal**	01/01/1988 (14) Month and day unknown	Şırnak	Silopi / Bozalan Vlg.	Interview with Musa Soysal / Silopi Office of the Chief Public Prosecutor Inquiry No. 2008/3151
127	**İsmail Bahçeci**	24/12/1994	İstanbul	Levent	Interview with Umut Bahçeci
128	**İzzet Padır**	06/06/1994	Şırnak	Silopi / Zıristan Hamlet / Üçağaç Vlg.	Interview with Harun Padır and Musa Padır / Diyarbakır 6. Criminal Court File No: 2009/470
129	**İzzettin Acet**	28/10/1994	Şırnak	Cizre	Interview with Taybet Acet and Mesut Acet / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
130	**İzzettin Yıldırım**	29/12/1999	İstanbul		ECtHR Application No: 29109/03
131	**Kamil Bilgeç**	27/11/1995	Şırnak	Silopi	Interview with Yusuf Kerimoğlu / Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
132	**Kasım Alpsoy**	19/05/1995	Adana		Interview with Halil Alpsoy's wife Fikriye Alpsoy / Petition presented to Istanbul Office of the Chief Public Prosecutor Inquiry No: 2007/1536
133	**Kemal İzci**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hamlet	ECtHR Application No: 3598/03
134	**Kemal Mubariz**	02/01/1994	Mardin	Nusaybin	Interview with Ömer Mubariz / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
135	**Kenan Bilgin**	12/09/1994	Ankara		ECtHR Application No: 25659/94
136	**Kerevan İrmez**	19/10/1995	Şırnak	Cizre	Official minutes dated 26 January 2009 signed in the presence of lawyers affiliated with the Şırnak Bar Association
137	**Kuddusi Adıgüzel**	15/03/1994	Diyarbakır	Kulp / Konuklu Vlg. / Arık Hamlet	ECtHR Application No: 23550/02 / Kulp Office of the Chief Public Prosecutor Inquiry No: 2001/189
138	**Lokman Akay**	06/11/1995	Şırnak	Cizre	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
139	**Lokman Kaya**	26/08/1996	Hakkari	Otluca Vlg.	ECtHR Application No: 24589/04
140	**M. Ali Mandal**	31/03/1998	İzmir	Çeşme / Alaçatı	Petition presented to Istanbul Office of the Chief Public Prosecutor Inquiry No: 2007/1536
141	**Mahmut Mordeniz**	28/11/1996	Diyarbakır		ECtHR Application No: 49160/99
142	**Mahrem Tanrıverdi**	06/05/1994	Diyarbakır	Lice	7. Army Corps Office of the Military Prosecutor File No: 2005/833
143	**Makbule Ökden**	Date unknown	Şırnak	Cizre	Interview with Sitti Tanrıverdi / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
144	**Mehdi Akdeniz**	20/02/1994	Diyarbakır	Kulp / Karaorman Vlg. / Sesveren Hamlet	ECtHR Application No: 25165/94

145	**Mehmet Abdulillah Heyecan**	01/01/1995 Month and day unknown	Şırnak	Silopi	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/423
146	**Mehmet Acar**	01/02/1994 Day unknown	Şırnak	Cizre / Dirsekli Vlg. / Züra Area	Interview with Necat Acar / Diyarbakır Office of the Chief Public Prosecutor Inquiry No: 2009/906 and Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
147	**Mehmet Bilgeç**	07/11/1996	Şırnak	Silopi / Habur Border Gate	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
148	**Mehmet Dansık**	22/02/1995	Şırnak	Silopi	Interview with Abdullah Dansık / Official minutes dated 26 January 2009 signed in the presence of lawyers affiliated with the Şırnak Bar Association
149	**Mehmet Elçi**	05/02/1994	Şırnak	Cizre	Petition of complaint dated 27 March 2009 presented to the Cizre Office of the Chief Public Prosecutor
150	**Mehmet Emin Aslan**	02/11/1995 (5)	Mardin	Dargeçit	Dargeçit Office of the Chief Public Prosecutor Inquiry No: 1995/2
151	**Mehmet Emin Kaynar**	28/10/1994	Şırnak	Cizre	Interview with Abdurrahman Kaynar / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
152	**Mehmet Emin Özalp**	25/09/1994	Şırnak	İdil / Bereketli Vlg.	Interview with Emine Özalp / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
153	**Mehmet Ertak**	21/08/1992	Şırnak		ECtHR Application No: 20764/92
154	**Mehmet Faysal Ötün**	02/10/1994	Mardin	Derik	Çorum 2. Criminal Court File No: 2013/50
155	**Mehmet Fındık**	31/12/1995	Şırnak	Silopi / Doruklu Vlg.	Interview with Sait Fındık / ECtHR Application No: 33898/11 and 35798/11 (Decision of inadmissibility)
156	**Mehmet Gürri Özer**	01/02/1994 Day unknown	Şırnak	Cizre	Diyarbakır 6. Criminal Court File No: 2009/470
157	**Mehmet İlbasan**	01/01/1994 (15) Month and day unknown	Şırnak	Cizre	Diyarbakır 6. Criminal Court File No: 2009/470
158	**Mehmet Kanlıbıçak**	27/12/1999	İstanbul		Name mentioned in the event account cited in the ECtHR decision on İzzettin Yıldırım with Application number 29109/03.
159	**Mehmet Mungan**	18/03/1998 (16)	Şırnak	Silopi / Yeniköy / Ceylan Hamlet	Interview with Mustafa Mungan / Official minutes dated 26 January 2009 signed in the presence of lawyers affiliated with the Şırnak Bar Association
160	**Mehmet Nezir Duman**	13/02/1993	Şırnak	İdil	Interview with Ali Duman, Yusuf Duman, Azime Duman and Veysel Vesek / İdil Office of the Chief Public Prosecutor Inquiry No: 2009/168
161	**Mehmet Ömeroğlu**	07/01/1994	Şırnak	Silopi	Interview with İsa Ömeroğlu / Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
162	**Mehmet Özdemir**	26/12/1997	Diyarbakır		ECtHR Application No: 54169/00

163	**Mehmet Salih Demirhan**	01/01/1993 (**21**) Month and day unknown	Şırnak	Silopi / Görümlü Vlg.	Interview with Yusuf Demirhan / ECtHR Application No: 7524/06
164	**Mehmet Salih Akdeniz**	01/10/1993 (**2**) Day unknown	Diyarbakır	Kulp / Alaca Vlg.	ECtHR Application No: 23954/94
165	**Mehmet Salim Acar**	20/08/1994	Diyarbakır	Bismil / Ambar Vlg.	ECtHR Application No: 26307/95
166	**Mehmet Şerif Avar**	01/10/1993 (**2**) Day unknown	Diyarbakır	Kulp / Alaca Vlg.	ECtHR Application No: 23954/94
167	**Mehmet Şah Atala**	01/10/1993 (**2**) Day unknown	Diyarbakır	Kulp / Alaca Vlg.	ECtHR Application No: 23954/94
168	**Mehmet Şah Şeker**	09/10/1999	Diyarbakır	Bismil	ECtHR Application No: 52390/99
169	**Mehmet Şehit Avcı**	28/12/1999	İstanbul		Name mentioned in the event account cited in the ECtHR decision on İzzettin Yıldırım with Application number 29109/03.
170	**Mehmet Şerif Avşar**	22/04/1994	Diyarbakır		Diyarbakır 3. Criminal Court File Number: 2007/439 File - 2008/79 Decision
171	**Mehmet Tan**	15/12/1992	Irak	Zaho	Interview with Ahmet Tan / Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
172	**Mehmet Tanrıverdi**	06/05/1994	Diyarbakır	Lice	7. Army Corps Office of the Military Prosecutor File No: 2005/833
173	**Mehmet Toru**	23/04/1994	Şırnak	Güçlükonak / Koçyurdu Vlg.	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/546
174	**Mehmet Turay**	05/02/1994	Şırnak	Cizre	Petition of complaint dated 27 March 2009 presented to the Cizre Office of the Chief Public Prosecutor
175	**Metin Andaç**	31/03/1998	İzmir	Çeşme / Alaçatı	Petition presented to Istanbul Office of the Chief Public Prosecutor Inquiry No: 2007/1536
176	**Metin Can**	21/02/1993	Elazığ		Name mentioned in the event account cited in the ECtHR decision on Hasan Kaya with Application number 22535/93.
177	**Mikdat Özeken**	27/10/1995	Hakkari	Yüksekova / Ağaçlı Vlg.	ECtHR Application No: 31730/96
178	**Mirhaç Çelik**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hamlet	ECtHR Application No: 3598/03
179	**Mirze Ateş**	15/03/1994	Diyarbakır	Kulp / Konuklu Vlg. / Arık Hamlet	Diyarbakır State Security Court Office of the Chief Public Prosecutor Inquiry No: 1996/1621
180	**Muhsin Taş**	14/10/1993	Şırnak	Cizre	ECtHR Application No: 24396/94
181	**Mursal Zeyrek**	01/05/1994 (**17**) Day unknown	Şırnak	Silopi / Aktepe Vlg.	Interview with İslam Zeyrek / ECtHR Application No: 33100/04
182	**Mustafa Aydın**	01/01/1994 (**15**) Month and day unknown	Şırnak	Cizre	Diyarbakır 6. Criminal Court File No: 2009/470
183	**Münür (Münir) Aydın**	01/01/1988 (**1**) Month and day unknown	Şırnak	Silopi / Derebaşı Vlg.	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151

184	**Münür Sarıtaş**	27/10/1995	Hakkari	Yüksekova / Ağaçlı Vlg.	ECtHR Application No: 31730/96
185	**Naci Şengül**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hamlet	ECtHR Application No: 3598/03
186	**Nadir Nayci**	01/01/1993 Month and day unknown	Şırnak	Cizre / Kuştepe Vlg.	Interview with Ramazan Nayci / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/432
187	**Namık Erkek**	20/12/1992	Mersin		ECtHR Application No: 28637/95
188	**Nazım Babaoğlu**	12/03/1994	Şanlıurfa	Siverek	Interviews with Bayram Balcı and İrfan Babaoğlu
189	**Nedim Akyön**	02/11/1995 (5)	Mardin	Dargeçit	Dargeçit Office of the Chief Public Prosecutor Inquiry No: 1995/2
190	**Neslihan Uslu**	31/03/1998	İzmir	Çeşme / Alaçatı	Petition presented to Istanbul Office of the Chief Public Prosecutor Inquiry No: 2007/1536
191	**Nezir Acar**	08/04/1992	Mardin	Dargeçit	Interview with Mehmet Ali Acar, Cemile Acar and Halil Acar / Dargeçit Office of the Chief Public Prosecutor Inquiry No: 2006/5
192	**Nezir Tekçi**	01/04/1995 Day unknown	Hakkari	Yüksekova	Eskişehir 1. Criminal Court File No: 2011/299
193	**Nihat Aydoğan**	01/11/1994 Day unknown	Mardin	Midyat / Doğançay Vlg.	Interviews with Halime Aydoğan and Leyla Aydoğan
194	**Nurettin Erşek**	25/09/1994	Şırnak	İdil / Bereketli Vlg.	Interviews with Selamet Balica, Emine Balica and Kader Balica / İdil Office of the Chief Public Prosecutor Inquiry No: 2009/185
195	**Nurettin Yedigöl**	10/04/1981	İstanbul	-	Interview with Muzaffer Yedigöl / Istanbul Office of the Chief Public Prosecutor Inquiry No: 2012/43993
196	**Nusreddin Yerlikaya**	01/10/1993 (2) Day unknown	Diyarbakır	Kulp / Alaca Vlg.	ECtHR Application No: 23954/94
197	**Orhan Eren**	26/09/1997	Diyarbakır		ECtHR Application No: 57778/00
198	**Orhan Yakar**	17/11/1996	Bingöl		ECtHR Application No: 36189/97
199	**Osman Kayar**	01/11/1993 Day unknown	Şırnak	Silopi	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
200	**Osman Nuri Taşçı**	04/07/1987	Erzurum	Oltu	ECtHR Application No: 40787/10
201	**Ömer Candoruk**	06/03/1994	Şırnak	Cizre - Silopi Hwy.	Interviews with Hanım Candoruk and Mesut Candoruk / ECtHR Application No: 27872/03 / Diyarbakır 6. Criminal Court File No: 2009/470
202	**Ömer Fındık**	31/12/1995	Şırnak	Silopi / Doruklu Vlg.	Interviews with Sait Fındık and Bedia Fındık / ECtHR Application No: 33898/11 ve 35798/11 (Decision of inadmissibility)
203	**Ömer Kartal**	31/12/1995	Şırnak	Silopi / Doruklu Vlg.	Interview with Mehmet Kartal / ECtHR Application No: 33898/11 ve 35798/11 (Decision of inadmissibility)
204	**Ömer Savun**	07/05/1989	Şırnak	Güçlükonak	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/441

205	**Ömer Sulmaz**	01/01/1993 Day unknown	Şırnak	Cizre	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
206	**Önder (Ender) Toğcu (18)**	29/11/1994	Diyarbakır		ECtHR Application No: 27601/95
207	**Piro Ay**	17/05/1994	Mardin	Derik	Çorum 2. Criminal Court File No: 2013/50
208	**Ramazan Bilir**	01/01/1995 Month and day unknown	Şırnak		Interview with Güllü Bilir
209	**Ramazan Elçi**	01/02/1994 Day unknown	Şırnak	Cizre	Diyarbakır 6. Criminal Court File No: 2009/470
210	**Ramazan Özalp**	01/01/1993 Month and day unknown	Şırnak	Cizre	Official minutes dated 26 January 2009 signed in the presence of lawyers affiliated with the Şırnak Bar Association
211	**Ramazan Şarlı**	24/12/1993	Bitlis	Tatvan / Ulusoy Vlg.	ECtHR Application No: 24490/94
212	**Ramazan Yazıcı**	22/11/1996	Diyarbakır		ECtHR Application No: 48884/99
213	**Raşit Demirhan**	01/05/1994 Day unknown	Diyarbakır	Lice	Lice Office of the Chief Public Prosecutor Inquiry No: 1994/57 / ECtHR Application No: 987/02 (Decision of inadmissibility)
214	**Recai Aydın**	02/07/1994	Diyarbakır		Petition presented to Istanbul Office of the Chief Public Prosecutor Inquiry No: 2007/1536
215	**Resul Erdoğan**	23/04/1994	Şırnak	Güçlükonak / Koçyurdu Vlg.	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/546
216	**Reşit Eren**	01/01/1988 (1) Month and day unknown	Şırnak	Silopi / Derebaşı Vlg.	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
217	**Reşit Sevli**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hamlet	ECtHR Application No: 3598/03
218	**Rıdvan Karakoç**	01/03/1995 (19) Day unknown	İstanbul		Interview with Hasan Karakoç / Petition presented to Istanbul Office of the Chief Public Prosecutor Inquiry No: 2007/1536
219	**Sabri Akdoğan**	01/05/1994 Day unknown	Diyarbakır	Lice	Lice Office of the Chief Public Prosecutor Inquiry No: 1994/57 / ECtHR Application No: 987/02 (Decision of inadmissibility)
220	**Sabri Pulat (Polat) (7)**	01/10/1995 Day unknown	Şırnak	Silopi / Buğdaylı Vlg.	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
221	**Sadık Ulumaskan**	04/12/1997	Şanlıurfa		ECtHR Application No: 9785/02,17309/04, 22010/04 (Decision of inadmissibility)
222	**Sadun Bayan**	01/09/1988 (1) Day unknown	Şırnak	Silopi / Derebaşı Vlg.	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
223	**Salih Şengül**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hamlet	ECtHR Application No: 3598/03
224	**Salih Yusuf Tahir**	30/11/1995	Şırnak	Silopi	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
225	**Seddık Şengül**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hamlet	ECtHR Application No: 3598/03

226	**Selahattin Aşkan**	26/08/1996	Hakkari	Otluca Vlg.	ECtHR Application No: 24589/04
227	**Selahattin Bilen**	01/01/1995 Month and day unknown	Şırnak	Silopi	Interview with Hamit Bilen / Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
228	**Selami Çiçek**	10/06/1994 (**20**)	Şırnak	Cizre	Interview with Turan Çiçek / Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
229	**Selim Orhan**	24/05/1994	Diyarbakır	Kulp / Çağlayan Vlg. / Deveboyu Hamlet	ECtHR Application No: 25656/94
230	**Serdar Tanış**	25/01/2001	Şırnak	Silopi	Interviews with Şuayip Tanış and Mehdi Tanış / ECtHR Application No: 65899/01
231	**Servet İpek**	18/05/1994	Diyarbakır	Lice / Türeli Vlg. / Çaylarbaşı Hamlet	ECtHR Application No: 25760/94
232	**Seyhan Doğan**	02/11/1995 (**5**)	Mardin	Dargeçit	Interview with Hazni Doğan / Dargeçit Office of the Chief Public Prosecutor Inquiry No: 1995/2
233	**Seyithan Ulumaskan**	04/12/1997	Şanlıurfa		ECtHR Application No: 9785/02,17309/04, 22010/04 (Decision of inadmissibility)
234	**Seyithan Yolur**	18/05/1994	Diyarbakır	Lice / Türeli Vlg. / Çaylarbaşı Hamlet	Name mentioned in the event account cited in the ECtHR decision with Application number 25760/94 on İkram İpek and Servet İpek who were forcibly disappeared at the same time.
235	**Soner Gül**	01/01/1992 Month and day unknown	İstanbul		Interview with Feyyaz Yaman, brother of Hüsamettin Yaman who was forcibly disappeared at the same time / Istanbul Office of the Chief Public Prosecutor Inquiry No: 2011/71615
236	**Süleyman Durgut**	14/07/1994	Şırnak	Cizre	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
237	**Süleyman Halil Teli**	30/11/1995	Şırnak	Silopi	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
238	**Süleyman Gasyak**	06/03/1994	Şırnak	Cizre - Silopi Hwy.	Interview with Leyla Gasyak / ECtHR Application No: 27872/03 / Diyarbakır 6. Criminal Court File No: 2009/470
239	**Süleyman Seyhan**	30/10/1995 (**5**)	Mardin	Dargeçit	ECtHR Application No: 33384/96
240	**Süleyman Soysal**	29/11/1995	Şırnak	Silopi	Interview with Emin Soysal and Kamuran Soysal / Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
241	**Süleyman Şık**	01/01/1994 Month and day unknown	Şırnak	Silopi	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
242	**Süleyman Tekin**	26/08/1996	Hakkari	Otluca Vlg.	ECtHR Application No: 24589/04
243	**Şemdin Cülaz**	01/01/1993 (**21**) Month and day unknown	Şırnak	Silopi / Görümlü Vlg.	Interview with Kazım Cülaz and Haşim Cülaz / ECtHR Application No: 7524/06
244	**Şemsettin Yurtseven**	27/10/1995	Hakkari	Yüksekova / Ağaçlı Vlg.	ECtHR Application No: 31730/96
245	**Şeyhmuz Yavuz**	11/03/1994	Diyarbakır		ECtHR Application No: 48064/99 (Decision of inadmissibility)

246	**Tahir Koçu**	01/02/1993 Day unknown	Şırnak	Cizre / Dirsekli Vlg. / Kurtuluş Hamlet	Petition of complaint dated 25 March 2009 presented to the Cizre Office of the Chief Public Prosecutor / Official minutes dated 26 January 2009 signed in the presence of lawyers affiliated with the Şırnak Bar Association
247	**Tahir Macartay**	22/07/1993	Şırnak	İdil-Midyat Hwy.	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
248	**Tahsin Çiçek**	10/05/1994	Diyarbakır	Lice / Dernek Vlg.	ECtHR Application No: 25704/04
249	**Talat Türkoğlu**	01/04/1996	Edirne		ECtHR Application No: 34506/97
250	**Tevfik Timurtaş**	29/12/1990	Şırnak	Cizre	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
251	**Tolga Baykal Ceylan**	10/08/2004	Kırklareli	İğneada	The Grand National Assembly of Turkey, Human Rights Investigation Committee's Subcommittee for the Investigation of the Fate of People Allegedly Disappeared Whilst In Custody on the Basis of the Disappearance Case of Tolga Baykal Ceylan, the "Tolga Baykal Ceyhan" Report
252	**Turan Demir**	01/10/1993 (2) Day unknown	Diyarbakır	Kulp / Alaca Vlg.	ECtHR Application No: 23954/94
253	**Ümit Taş**	01/10/1993 (2) Day unknown	Diyarbakır	Kulp / Alaca Vlg.	ECtHR Application No: 23954/94
254	**Üzeyir Arzık**	01/01/1988 (1) Month and day unknown	Şırnak	Silopi / Derebaşı Vlg.	Silopi Office of the Chief Public Prosecutor Inquiry No: 2008/3151
255	**Üzeyir Kurt**	25/11/1993	Diyarbakır	Bismil / Ağıllı Vlg.	ECtHR Application No: 15/1997/799/1002
256	**Veysi Başar**	22/07/1993	Şırnak	İdil-Midyat Hwy.	Cizre Office of the Chief Public Prosecutor Inquiry No: 2009/430
257	**Yahya Akman**	06/03/1994	Şırnak	Cizre - Silopi Hwy.	Interviews with relatives of Süleyman Gasyak and Ömer Candoruk who were forcibly disappeared together -Süleyman Gasyak's wife Leyla Gasyak and Ömer Candoruk's wife Hanım Candoruk and son Mesut Candoruk / ECtHR Application No : 27872/03 / Diyarbakır 6. Criminal Court File No :2009/470
258	**Yusuf Çelik**	24/07/1994	Hakkari	Şemdinli / Ortaklar Vlg. / Ormancık Hmt.	ECtHR Application No: 3598/03
259	**Yusuf Kalenderoğlu**	22/02/1995	Şırnak	Silopi	Interview with Şahin Kalenderoğlu / Official minutes dated 26 January 2009 signed in the presence of lawyers affiliated with the Şırnak Bar Association
260	**Yusuf Nergiz**	03/10/1997	Diyarbakır	Kulp / Zeyrek Vlg.	ECtHR Application No: 39979/98 (Decision of inadmissibility)
261	**Zeki Diril**	13/05/1994	Şırnak	Beytüşşebap	ECtHR Application No: 68188/01
262	**Zozan Eren**	26/09/1997	Diyarbakır		ECtHR Application No: 57778/00

(1) Abbas Çiğden, Üzeyir Arzık, Feyzi Bayan, Sadun Bayan, Münür (Münir) Aydın and Reşit Eren were disappeared at the same time. Our only sources regarding this group disappearance are the petitions of complaint presented by relatives of the disappeared, and the official minutes held in the presence of lawyers. We registered the various dates presented by relatives of the disappeared in these different official minutes and petitions, and this is why there appear to be contradictory dates for this group disappearance.

(2) Abdo Yamuk, Bahri Şimşek, Behçet Tutuş, Celil Aydoğdu, Hasan Avar, Mehmet Salih Akdeniz, Mehmet Şerif Avar, Mehmet Şah Atala, Nusreddin Yerlikaya, Turan Demir and Ümit Taş were detained and disappeared in an operation carried out from 9 to 11 October 1993.

(3) The date of disappearance was not stated clearly in the interview we carried out with Atike Tanrıverdi and İdris Tanrıverdi. The date is stated in Abdurrahim Tanrıverdi's petition dated 1993 as April 10, and in the Cizre Chief Public Prosecutor's Office's Decision of Non-Jurisdiction as April 9. The body of the disappeared was found on 17 April.

(4) Zekiye Kalkan gave the date of her husband's disappearance as May 92, 93 or 94. The notes she kept stated the year as 1992, so the date of disappearance was recorded as 1992.

(5) We record here the various dates provided by the relatives of the disappeared who recounted their version of the same event in Inquiry File No: 1995/2 of the Dargeçit Chief Prosecutor's Office, this is why there appear to be contradictory dates for this group disappearance.

(6) The body of Abdurrahman Yılmaz was found on 14 February 1994. Some documents in the source legal file state that he was missing for 5-6 days, whereas another document states the date of disappearance as 6-7 February.

(7) Both surnames are given in the source legal file.

(8) The date of disappearance was given as April 1993 in the interview we carried out with Vedat Bulmuş.

(9) The location of enforced disappearance is not definite in the source legal file, but it was registered as Silopi since a demand for a DNA test was presented for bones found in the Silopi area.

(10) Enver Akan had actually set out to go to Midyat on that day, however, since he was last seen in Mardin-Dargeçit, it was recorded as thus.

(11) The source legal file registers the date of disappearance as April 1994 in one passage, and May 1994 in another.

(12) The date of disappearance was given as 6 November 1996 in the interview we carried out with Çetin Birlik. The date is provided as 7 November 1996 in the petition of Hatice Çağlı, the wife of Mehmet Bilgeç who was disappeared at the same time.

(13) Osman Ünver, who filed the petition, states that Hazım Ünver went to Iraq on the day of the disappearance, but that he later found out that an exit record in his name exists at the Iraqi customs. Therefore, the place of disappearance was recorded as Silopi.

(14) The date of disappearance was given as 1990 in the interview we carried out with Musa Soysal.

(15) In source legal files the date is given as July, August and September in different places.

(16) The date of disappearance was given as 1997 in the interview we carried out with Mustafa Mungan.

(17) The date of disappearance was given as 26 June 1994 in the interview we carried out with İslam Zeyrek, and in the petition of complaint. In our source legal file from the ECtHR the date is recorded as, 'Mursal Zeyrek received his conscription papers on 26 May, and one or two days later he was disappeared'.

(18) Since both Ender and Önder are stated as the name of the individual in the source ECtHR application, and because of the note stating 'the name Ender will be used for consistency', both names have been recorded here.

(19) In the interview we carried out with Hasan Karakoç, he stated that Rıdvan Karakoç last called them on February 20.

(20) The date of disappearance was given as 1993 in the interview we carried out with Turan Çiçek.

(21) Şemdin Cülaz, Halit Özdemir, Mehmet Salih Demirhan, İbrahim Akıl, Hükmet Şimşek and Hamdo Şimşek were disappeared at the same time. There is a different ECtHR application for Hükmet and Hamdo Şimşek dated 2010 that requests the merging of the application with the application made regarding Ş.Cülaz, H.Özdemir, M.S. Demirhan and İ.Akıl in 2006. No decision has been made in either ECtHR case as of yet. However, the ECtHR has decided to merge the applications. As for the date of disappearance, both ECtHR applications state the date as 14 May 1993 or 14 June 1993.

(22) The date of disappearance was given as 18 May 1992 in the interview we carried out with Feyyaz Yaman.

(23) The date stated in the source legal file varies, however accounts of the event recount that Hasan Baykura was disappeared one or two days after the attack on Kamil Atak's home (December 1993).

NOTES

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