TO THE PRESIDENCY OF THE CONSTITUTIONAL COURT OF THE REBUPLIC OF TURKEY

SUBJECT OF APPLICATION	**:** In the matter of submitting legal opinion in the capacity of *amicus curiae* to the ongoing individual application file number 13/2640 before the Constitutional Court of the Republic of Turkey.
INSTITUTIONS SUBMITTING LEGAL OPINION IN THE CAPACITY OF AMICUS CURIAE	**:** Truth Justice and Memory Center The Turkish Economic and Social Studies Foundation Human Rights Foundation of Turkey Human Rights Association Human Rights Agenda Association Helsinki Citizens Assembly Human Rights Research Association European Center for Constitutional and Human Rights
RIGHTS VIOLATED BY PUBLIC AUTHORITIES	**:** Articles 3, 17, 19 of the Constitution of the Republic of Turkey; Articles 2, 3, 5, 13 of the European Convention of Human Rights; Articles 2, 4, 6, 9, 10, 14, 16, 26 of the International Covenant on Civil and Political Rights; Articles 3, 5, 8 of the Universal Declaration of

Human Rights. [right to life, right to an effective remedy, right to liberty and security and prohibition of torture]

INDIVIDUAL APPLICANT **:** Birsen Gülünay

ATTORNEY OF THE APPLICANT **:** Gül Altay

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INTRODUCTION

01. The signatory organizations listed below that in the capacity of *amicus curiae* present the legal opinion herein would like to extend their thanks to the Esteemed Court for providing the opportunity to make assessments on the nature of the crime and the rights of the victim and victim's relatives in the light of international human rights law, international humanitarian law, the doctrine of penal law and related jurisprudence to the individual application file No. 13/2640 on the allegation of the enforced disappearance of Hasan Gülünay.

02. The signatory organizations, although there exists in the Internal Regulations of the Constitutional Court no procedural regulation on the presentation of an opinion by third parties, on the basis of the provision below added to Article 44/3(a) of the Rules of Court of the European Court of Human Rights which states,

"Once notice of an application has been given to the respondent Contracting Party under Rules 51 § 1 or 54 § 2 (b), the President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, ***invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing****."*

presents in the capacity of *amicus curiae*[1] its legal opinion to the Esteemed Court with the aim of contributing to the goal of the full and most effective protection of human rights and basic freedoms.

03. The Truth Justice Memory Center Turkey, is a human rights organization based in Istanbul, and is a non-governmental organization that aims to uncover and document the truth concerning gross violations human rights that have taken place in the past, strengthen collective memory about these violations, and support survivors in their pursuit of justice.[2]

04. The Turkish Economic and Social Studies Foundation (TESEV) is an independent non-governmental think-tank, analyzing social, political and economic policy issues facing Turkey. Based in Istanbul, TESEV was founded in 1994 to serve as a bridge between academic research and policy-making process in Turkey. By opening new channels for policy-oriented dialogue and research, TESEV aims to promote the role of civil society in

[1] A Latin legal term, '*amicus curiae'* literally means 'friend of the court', who is not a party to a case, who offers information that bears on the case but who has not been solicited by any of the parties to assist a court.

[2] Herein the *amicus curiae* legal opinion consisting of 58 pages is prepared by Truth Justice Memory Center Turkey with the cooperation of the signatory institutions, and its original language is Turkish.

the democratic process and seeks to share its research findings with the widest possible audience.

05. The Human Rights Foundation of Turkey (HRFT), established in 1990, is a non-governmental and non-profit organisation providing treatment and rehabilitation services for torture survivors and documenting human rights violations in Turkey. The HRFT grew out of the necessity to further promote the prevention of torture in Turkey where grave human rights violations left thousands of people tortured and traumatised. The establishment process of the HRFT was launched by the Human Rights Association together with the Turkish Medical Association and founded in accordance with the Turkish Civil Code.

06. Human Rights Association is a non-governmental and voluntary organization. IHD is not a body of any States, Governments and political parties and upholds the principle that the human rights are universal in nature and indivisible. IHD struggles against any kinds of discrimination based on language, religion, colour, gender, political thought and etc... Human Rights Association (İnsan Hakları Derneği "IHD") has been founded, on 17 July 1986, by 98 human rights defenders. IHD was founded in dark period because of the military coup that had been conducted on 12 September 1980. Human Rights Association has been subjected to incredible pressures in its struggle. Today IHD continues its struggle with 29 branches, 3 representative offices and over 10.000 members and activists. There are many activities, such as; campaigns, preparing reports and so on, during the 22 years period of IHD. IHD is the founder of HRFT (Human Rights Foundation of Turkey), one of the founders and members of IHOP (Human Rights Joint Platform) a member of FIDH (The International Federation for Human Rights) one of the founders, members and spokesperson of UCMK (Coalition for International Criminal Court-CICC)

07. The Human Rights Agenda Association, established in 2003 with the participation of human rights defenders from different regions of Turkey, aims at developing a model for the society with its approach to human rights violations which pays no attention to the identity of the author or the victims. The HRAA accepts that human rights as a value is above all political ideologies and worldviews and believes that rights can only be improved by developing an approach to get into the very sources of issues and by using appropriate tactics and strategies to translate concrete proposals into real life.

08. Helsinki Citizens' Assembly [hCa] is a non-governmental organization, working on the notions of fundamental rights and freedoms, peace, democracy and pluralism. hCa, works independently from political parties, government and states, aims to; introduce the basic rights and freedoms accepted in international agreements and outlined by universal standards into daily life, to promote peaceful processes for the resolution of problems through mutual understanding dialogue and peace, to improve pluralist democratic

bodies and civil society initiatives, to ensure the supremacy of law and to defend an economic system that promotes the well-being of human life and the environment.

09. Human Rights Research Association (İHAD) has been founded by a group including legists, academics and human rights activists in 2006 in Ankara. İHAD, as a human rights movement independent from states, governments, political and ideological groups, conducts researching, follow-up, monitoring, reporting and publication activities and projects in different areas of human rights. The vision of Human Rights Research Association is a world where law, freedom and justice is applied to all and the mission of İHAD is, to work for protecting and developing the humanitarian values through using the methods of research, monitoring, reporting and training.

10. The European Center for Constitutional and Human Rights (ECCHR) is an independent, non-profit legal organization based in Berlin, Germany that enforces human rights by holding state and non-state actors responsible for egregious abuses through innovative strategic litigation. ECCHR focuses on cases that have the greatest likelihood of creating legal precedents in order to advance human rights around the world. ECCHR has appeared as amicus or third party intervener before many national and regional courts worldwide, including the European Court of Human Rights.

11. The Presentation of The Action Plan on Prevention of ECHR Violations adopted in 2014 by the Council of Ministers of the Republic of Turkey sets forth as its primary goal the "[improvement of the present] profile which casts doubt on the ideal of protecting and improving the fundamental rights and freedoms [through] the elimination of the problems arising from both structure and practice".[3] Combating 'impunity' in past gross human rights violations plays an indispensable role in the full protection basic rights and freedoms and the rule of law. In this respect, it is highly important to assess the manifestation of the problem of impunity in the field of jurisdiction by taking into consideration the international responsibilities of states. The hereby presented legal opinion aims, to define, in the light of jurisprudence and legal doctrine formed by the Constitution, international agreements, human rights bodies and mechanisms, the obligations of the Republic of Turkey regarding gross human violations in a general sense, and specifically, the trial and punishment process of perpetrators of the crime of enforced disappearance.

The request to present a legal opinion on Application No. 13/2640 of the signatory organizations, each of which has carried out significant work in combating impunity, derives from their desire for their knowledge and experience in the related field to be taken into

[3] Official Gazette, Issue: 28928, 1 March 2014, Decree Number: 2014/5984,_Appended: The adoption of "The Action Plan on Prevention of ECHR Violations".

account by the Esteemed Court, and to make a contribution to the formation of new jurisprudence regarding legal issues inherent to the dispute subject to individual application.

12. The signatory organizations are of the opinion that any long term delay of any investigation file without carrying out an effective investigation that would unveil the truth regarding the allegation subject to application, and the verdict of non-prosecution due to the statute of limitation constitute a breach of the state's obligations arising from the Constitution and international agreements.

For this reason, the signatory organizations have aimed to present to the attention of the Esteemed Court background information on the crime of enforced appearance and its nature, the positive/negative obligations of the state regarding the issue and administrative practices, the stance of judicial bodies, and the related verdicts of the European Court of Human Rights and the Inter-American Court of Human Rights, and to shed light on the debate on the statute of limitation in the context of crimes against humanity and the right to the truth. In terms of securing citizens' rights and freedoms defined in domestic and international agreements in addition to the Constitution, it is highly important for the Esteemed Court to take into consideration the doctrines and jurisprudence on the crime of enforced disappearance presented in this opinion when reaching a verdict on the merits of the application.

THE FACTS

13. The subject of this application is to submit legal opinion acting in the capacity of *amicus curiae* to the ongoing individual application file number 2013/2640 before your Highest Court.

14. The applicant Birsen Gülünay alleges that her husband Hasan Gülünay was detained by policemen in plain clothes on 20 July 1992, she could not obtain any news from him after that date, her husband had been forcibly disappeared and murdered in custody and the truth about his fate has been concealed from her.

15. The applicant states that there is a witness (Erol Çam) who saw her husband Hasan Gülünay while he was in custody at the Istanbul Police Headquarters, and that the statements of Ayhan Çarkın, who had been working as a police officer at the Special Operations Team of the Istanbul Police Headquarters, that contain information about the incident, were published in the press and released to the public, that she has made repeated applications to a number of authorities, including prosecution offices and the Human Rights Investigation Commission of the Grand National Assembly of Turkey, that state officials have rejected that the detention of Hasan Gülünay ever took place, and that judicial authorities ruled on a verdict of non-prosecution without collecting evidence, hearing witnesses and carrying out

an effective investigation, whereas in truth that her husband was murdered and forcibly disappeared whilst in custody and that the truth is being concealed.

16. It has emerged that regarding the latest complaint on the incident, the Istanbul Public Prosecutor's Office decided not to prosecute (decision dated 31 October 2012 in investigation file number 2012/56232) pursuant to articles 449 and 210/1 of the former Turkish Penal Code numbered 765, which sets forth a 20-year statute of limitation, and that the appeal by the aggrieved applicant to a higher court against this decision was also rejected and an individual application was made to the Constitutional Court of the Republic of Turkey to reveal the truth.

THE CRIME OF ENFORCED DISAPPEARANCE

17. The crime, which is generally referred to in Turkey's political literature as "missing in custody", is referred to as "enforced disappearance" in international law.[4]

18. The first known implementation of the use of the strategy of enforced disappearance was put into force by the Nazi Regime, later it was also implemented systematically in Latin American countries by dictatorships and military regimes in order to pacify dissidents, resulting in the deaths of tens of thousands of people.[5]

19. The implementation of the use of the strategy of enforced disappearance in a widespread manner and as a common practice urged the international community to take action. In 1980, the Working Group on Enforced or Involuntary Disappearances[6] was created by the United Nations Commission on Human Rights, and in 2006, the International Convention for the Protection of All Persons from Enforced Disappearance7 was adopted by the United Nations General Assembly, as a result of the impact of the Working Group and the long struggle of Latin American civil society organizations.

[4] Gökçen Alpkaya, "The Issue of the Disappearances and Turkey [Kayıplar Sorunu ve Türkiye]", Journal of Ankara University Faculty of Political Sciences, Vol. 50, 1995, No. 3 – 4, p. 40 – 41.
[5] Ibid 1995: 34 – 35.
[6] 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. Gökçen Alpkaya, "Enforced Disappearances in International Law" in *Enforced Disappearances and the Conduct of the Judiciary*, Truth Justice Memory Center Publications, Istanbul, 2011, p. 46.
[7] 20.12.2006, E/CN.4/2005/WG.22/WP.1/Rev.4. As of September 2014, 93 states have signed the convention and 43 have ratified it. However, Turkey has not signed the Convention yet.

20.1. The *International Convention for the Protection of All Persons from Enforced Disappearance* defines the crime of enforced disappearance as follows:

" […] 'enforced disappearance' 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."[8]

20.2. Considering the definition of the crime selectively, the elements of the process appear as follows:

(i) Act: is the deprivation of liberty of persons and placing such persons outside the protection of the law; followed by a refusal.

(ii) Perpetrators: are agents of the state or persons or groups of persons acting with the authorization, support or acquiescence of the state.

(iii) Victims: are forcibly disappeared persons and relatives of them.

(iv) Duration: is a period that begins at the time of deprivation of liberty and ends when the state accepts the deprivation of liberty or gives information on the whereabouts of the forcibly disappeared person.

DUTIES OF THE STATE[9]

21. 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.

22. The right to life is not a right in theory; it is a 'tangible' right that comes into being by way of our existence as defined in national and international law and as stated in the decisions of the European Court of Human Rights. The state has an obligation to respect this right, to

[8] International Convention for the Protection of All Persons from Enforced Disappearance Article 2.

[9] This chapter was prepared by making use of the article titled "The Conduct of the Judiciary in Enforced Disappearances: No Effective, Expeditious and Independent Investigations; Failing to Undertake Timely Investigations; and Protracting Investigations beyond the Statue of Limitations" written by Emel Ataktürk Sevimli. *Enforced Disappearances and the Conduct of the Judiciary*, Truth Justice Memory Center Publications, Istanbul, 2011. See: http://www.hakikatadalethafiza.org/images/UserFiles/Documents/Editor/Yay%C4%B1nlar/Zorla-Kaybetmeler-Yargi_ENG.pdf.

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.

23. 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.[10]

24. 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.

25. 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.

26. It is crucial for the state to monitor whether detention records accurately represent the facts, because of the major risk that arises of unrecorded detention, arbitrary detention, and placement of individuals outside the judicial review in terms of the crimes of disappearance and murder.

27. 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.[11]

VIOLATIONS DETECTED BY HUMAN RIGHTS ORGANIZATIONS

28. As is known to all, in Turkey, as a result of the military coup conducted by five force commander generals on 12 September 1980, the prime minister and the council of ministers were dismissed, the parliament was dissolved and the 1961 Constitution was abolished.

[10] Mahmut Kaya v. Turkey, see İlkem Altıntaş "Enforced Disappearance Cases from the Perspective of the European Court of Human Rights", p. 108.

[11] İlkem Altıntaş, "Enforced Disappearance Cases from the Perspective of the European Court of Human Rights", *Enforced Disappearances and the Conduct of the Judiciary*, Truth Justice Memory Center Publications, Istanbul, 2011, p. 105.

29. According to the estimated data of the Human Rights Association, during the military regime, 650,000 people were arrested; the detention period was 90 days and 95 percent of those detained were subjected to torture; 210,000 lawsuits were opened before Military Courts; 1,683,000 people were blacklisted; the death penalty was demanded for 6,353 people; 85,000 people were judged on account of the articles 141, 142 and 163 of the former Turkish Penal Code; 171 people died as a result of torture; 49 people were executed; passport restrictions were applied to 348,000 people; 14,509 public officials were dismissed in accordance with Martial Law; 18,000 civil servants, 2,000 judges and prosecutors, 4,000 police, 2,000 military officers and sergeants, 5,000 teachers were forced to resign; political parties and unions were closed down; 30,000 people were forced to move abroad as political refugees; widespread and systematic torture was applied in prisons; 113,607 books were burned in Mamak Prison by the Command of Martial Law; publishers were murdered and a total of 39 tons of books, magazines and newspapers were destroyed at SEKA (Turkey Cellulose and Paper Factories); 8 newspapers were closed down for 195 days; 937 movies were prohibited.[12]

30. The social devastation caused by the September 12 military coup can be better understood in view of the fact that according to the general census, the population of Turkey was 44,736,957 persons13 in 1980 and it would not be wrong to say that the effects of this social devastation on legislative, executive, judicial powers continued for many years.

31. After the abolition of temporary Article 15 of the Constitution by referendum on 12 September 2010, civil society organizations, unions, associations and victims of the military coup filed a criminal complaint against those who staged the September 12 military coup.

On 7 April 2011, the Specially Authorized Ankara Deputy Prosecutor's Office started the first investigation against Kenan Evren, Nejat Tümer and Tahsin Şahinkaya, the living members of the military junta that overthrew the civilian government under the name of the "National Security Council" regarding the following crimes: (A) crimes against humanity, which are recognized in the Charter of the Nuremberg Tribunal and as an imperative rule of international law, places all states under obligation to follow if the crime occurs, even if the crime is not part of their laws. (B) crimes against humanity within the scope of Articles 146, 147, 153, 174, 179, 180 and 181 of the former Turkish Penal Code and crimes to be appraised *ex officio*.

32. On 18 June 2014, Kenan Evren, 17th Chief of the General Staff of the Turkish Armed Forces and 7th President of the Republic of Turkey, and Tahsin Şahinkaya, former Chief of

[12] Hüsnü Öndül, "September 12 and the Violations of Rights [12 Eylül ve Hak İhlalleri]", Evrensel Newspaper, 2007.
[13] The census results by the Statistical Institute of Turkey.

the Air Staff and member of the National Security Council were sentenced by the Ankara Heavy Penal Court No 10 to aggravated life imprisonment and their ranks were reduced from full general to enlisted man for their responsibility in crimes of attempting to abrogate the Grand National Assembly of Turkey and submitting a military memorandum to the Prime Minister Süleyman Demirel on 12 September 1980.

33. The military junta regime abolished many laws and passed new ones in their place, including;

33.1. 'State of Emergency' Regional Governorship was formed with the Decree Law dated 10 July 1987[14]. Since 19 July 1987, 'State of Emergency' Law had been in force instead of Martial Law. As the long-standing Martial Law was lifted in the western part of the country, the 'State of Emergency' Regional Governorship was formed with the Decree Law dated 10 July 1987[15]. From 19 July 1987 on, the 'State of Emergency' Law entered in force instead of Martial Law in the region.

33.2.6 governors served during the 'State of Emergency' as State of Emergency Regional Governors. They were subject to the severe criticism of human rights organizations because of practices that led to serious human rights violations.

33.3. The 'State of Emergency' was initially implemented in eight provinces: Bingöl, Diyarbakır, Elazığ, Hakkari, Mardin, Siirt, Tunceli and Van. Later, Adıyaman, Bitlis and Muş provinces were included within its scope as neighboring provinces. In 1990, when Batman and Şırnak were elevated to the status of provinces, the number reached 13. Bitlis's status was changed from neighboring province to state of emergency province in 1994. 'State of Emergency' was extended every 4 months for a total of 46 times and remained in force from 1978 until 2002, for nearly 24 years, including the Martial Law era.[16]

34. According to the estimated data of the human rights organizations, 1,353 persons were forcibly disappeared between the years of 1990 – 2002 by forces alleged to be connected with the state, mostly in the 'State of Emergency' region and in the same period of time, thousands of murders were committed which remain unsolved.

[14] Published in the Official Gazette No. 19517, dated 14.07.1987.
[15] Published in the Official Gazette No. 19517, dated 14.07.1987.
[16] Sezgin Tanrıkulu, Serdar Yavuz, "The Balance Sheet of the Emergency State from a Human Rights Viewpoint [İnsan Hakları Açısından Olağanüstü Hal'in Bilançosu]", 2005, p. 493-521. For a more comprehensive discussion of this topic, see Kemal Gözler, "The Legal Regime of Decree Laws [Kanun Hükmünde Kararnamelerin Hukuki Rejimi]", Ekin Kitabevi Yayınları, Bursa, 2000; Mehmet Semih Gemalmaz, "Emergency Regime Standards [Olağanüstü Rejim Standartları]" Beta Basım Yayım, İstanbul, 1994.

STANCE OF THE JUDICIARY IN THE CONTEXT OF THE CRIME OF ENFORCED DISAPPEARANCE

35. The Grand National Assembly of Turkey's reports on subject, the narratives of victim relatives and researches conducted by human rights organizations lead to the following opinions:

35.1. 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.

35.2. No official detention records were kept, or authorities did not provide information on the identity of those 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 the detainees were held.[17]

35.3. Contrary to the requirements of their duties, Chief Public Prosecutors' Offices failed to inspect detention centers, custody suites and deposition rooms.[18]

35.4. 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, and that the aim here was to prevent the tracking of public officials involved in the crimes.

36. According to the law, the prosecutor is obligated 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 gather all evidence at risk of loss.[19]

37. 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 also necessary.

[17] Committee Against Torture, 45th Session, 1-19 November 2010.
[18] 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.
[19] CMK No. 5271, Article 43 *et seq*., Article 79 *et seq*., and CMUK No. 1412, Article 45 *et seq*.

38. As determined in the report of the Human Rights Investigation Commission of the Grand National Assembly of Turkey on victims' rights dated 12 July 201420, victims have a right to demand the collection of evidence, copies of investigation file documents, and the appointment of a lawyer to follow up investigations, as well as to check on the confiscated/retained documents/properties, and state officials are obligated to ensure the exercising of these rights without any obstacle.

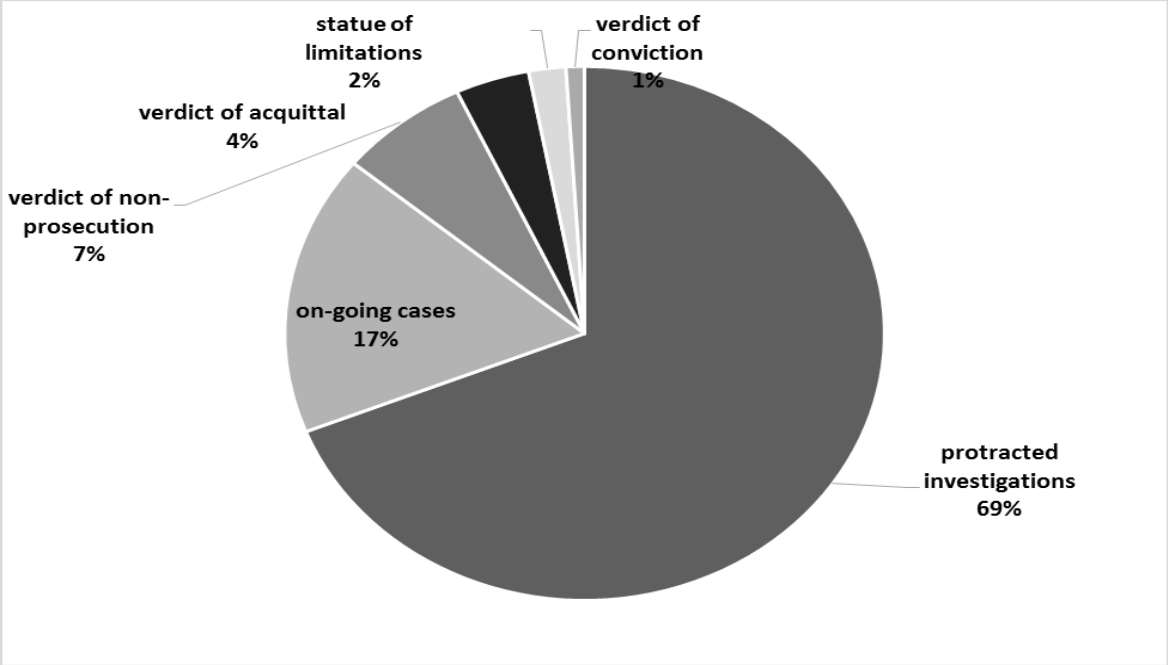
39. The results of the research conducted by the Truth Justice Memory Center, one of the signatory institutions, by reviewing the investigation/prosecution files and criminal complaints concerning the 257 forcibly disappeared persons, reveal that the investigating prosecutors' offices, in breach of the law, implemented very few or none of the procedures/mechanisms provided in criminal procedures and disregarded the rights of the victims.

40. The manner of the judiciary was reviewed and analyzed through these 257 investigation/prosecution files according to various criteria. Accordingly, it was confirmed that;

40.1. Despite the fact that a long period of time (on average 19 years and 7 months) has elapsed since the acts of enforced disappearance, 69 percent of the investigations still remain ongoing and are protracted,

40.2. Only 17 percent of criminal complaints were prosecuted, in total 13 percent of the investigations resulted in verdicts of non-prosecution, decisions of acquittal and barred by the statute of limitation, and there were verdicts of conviction in just 1 percent of the whole data.

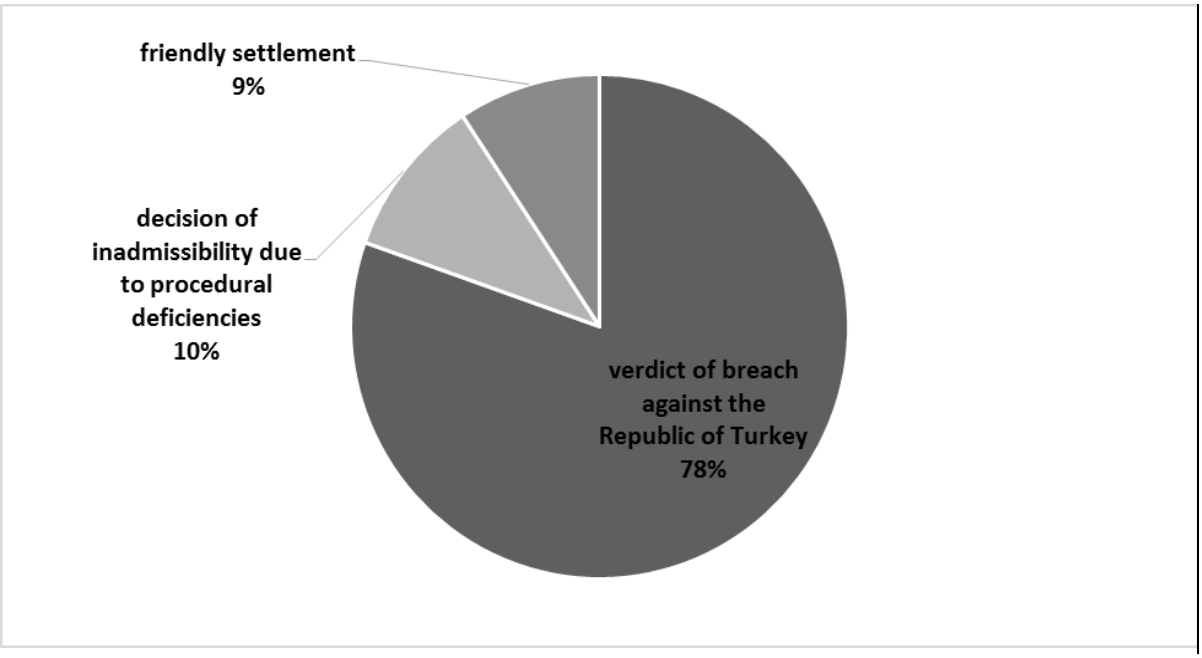
[20] 24th Period, 4th Legislative Year, Commission Meeting dated 12.06.2014, p.26.



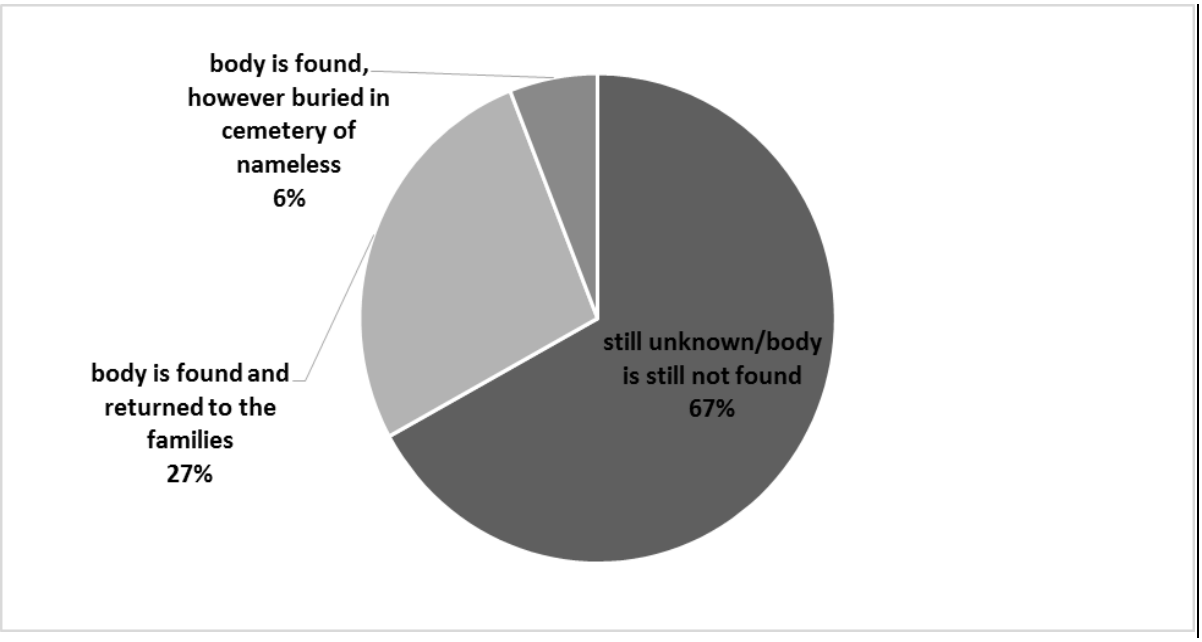
40.3. As common practice in Turkey, Articles 448-450 and 102/1 of the former Turkish Penal Code, which was the law in effect when the crime was committed, is applied to this type of crime, and it is held that the statute of limitations is 20 years in investigations/prosecutions related to enforced disappearances.

40.4. Once the link between enforced disappearances and state officials, and their systematic and widespread character is overlooked, and they are treated as singular cases of homicide, and subjected to the statute of limitations law of 20-years, a large portion of the investigations into the crimes committed in the 90s are either barred by the statute of limitations or under such risk constituting a violation of national and international law and breach of contractual obligations.

40.5.118 forcibly disappeared persons' files were brought before the European Court of the Human Rights, and in complete contrast with domestic law, the Court found Turkey responsible for the violation of the right to life and prohibition of torture, ill-treatment and its failure to conduct an effective investigation in 78 percent of the applications. In 9 percent of them a friendly settlement was offered by the state of Turkey, thus the responsibility of the Republic of Turkey is determinable in 87 percent of enforced disappearance cases.



40.6. Even though a period of time close to 20 years on average has elapsed since the acts of enforced disappearances, only 27 percent of the forcibly disappeared persons' bodies have been found and returned to their families, 6 percent of the forcibly disappeared persons' bodies were found yet buried in cemeteries of the nameless without their families being informed, and 67 percent of the forcibly disappeared persons' fate is still unknown. Therefore, it is evident that there is a violation of the right to truth of the victims' families and Article 3 of the European Convention of Human Rights.



41. Signatory institutions, who are submitting this legal opinion acting in the capacity of *amicus curiae*, are skeptical about the following issues in terms of the individual application file subjected to the submission, as well as most of the investigation and prosecution files concerning the allegation of enforced disappearances:

41.1. Necessary inquiries and identifications were not completed, and evidence was not collected at the 'crime scenes',

41.2. Information/documents given by suspect law enforcement officers on the detentions were taken at face value and necessary inquiries were not made,

41.3. Reasonable measures were not taken to protect the evidence which might emerge over time,

41.4. Usually no photographs of the 'crime scene' were taken,

41.5. In situations where the disappeared persons were killed as a result of torture, records were kept as if they had been killed in clashes,

41.6. Testimony was generally not taken from suspects, and in cases where it was taken, suspect statements were considered adequate,

41.7. There was no investigation of the organizational links among suspects,

41.8. The chain of command of which suspects were a part of was not taken into consideration,

41.9. Law-enforcement officers, government employees and administrative employees who could potentially provide information about the crime were not interrogated as required,

41.10. State agents who opposed the use of illegal methods and gave information on crimes could not be protected,

41.11. 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,

41.12. Relatives of the disappeared were not asked for information during investigations,

41.13. Inquests were rarely performed,

41.14. There were doubts that autopsy procedures were carried out completely and in keeping with legal standards.

JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON ENFORCED DISAPPEARANCES IN THE CONTEXT OF NATIONAL AND INTERNATIONAL LAW

42. As it is known, the basic civil rights which the state is obliged to protect at national level are to be found within the Constitution of the Republic of Turkey, the basic criminal sanctions of breaches within the Turkish Penal Code, the basic procedural rules on investigations and prosecutions within the Turkish Criminal Procedure Code.

43. According to Article 90/5 of the Constitution, "International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

44. As required by the hierarchy of norms acknowledged by the Article 90/5 of the Constitution, the Office of the Prosecutor is subjected to measures of the European Convention of Human Rights and its related Protocols, and measures of the United Nations Covenant on Civil and Political Rights as much as -and even more than- national legislation.

45. The right to life is guaranteed under article 17 of the Constitution, article 2 of the European Convention of Human Rights and article 6 of the Covenant on Civil and Political Rights.

45.1. According to article 17/1 of the Constitution, "*Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence*." According to article 5 of the Constitution the State shall "*provide the conditions required for the development of the individual's material and spiritual existence*."

45.2. According to Article 2/1 of the European Convention of Human Rights "*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*."

45.3. According to Article 6/1 of the International Covenant on Civil and Political Rights, "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*"

46. State parties, both under the European Convention of Human Rights and under the International Covenant on Civil and Political Rights, shall abstain from any action which could prejudice the rights of their citizens to liberty and security, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, as well as the right to life, and they shall take every measure to ensure the use of right to life in safety and liberty, and despite all these measures taken, in case of violation the state parties are under **the obligation to conduct an effective investigation.**

47. All these mentioned rights are regularized under articles 3 and 5 of the Universal Declaration of Human Rights, which is one of the most fundamental sources of international law.

48. If the State involved in a violation of the right to life and other related human rights through its agents or by persons or groups of persons acting with the authorization, support or acquiescence of its agents, citizens have the right to demand an effective investigation within the context of the rights entitled by article 13 of the European Convention of Human Rights, and the State has a duty to carry out an effective investigation under article 2 of the Convention.

49. Investigations relating to offences are carried out by the public prosecutor at the national level. According to article 160 of the Turkish Criminal Procedure Code (Article 153 of the Law No:1412), the public prosecutor shall initiate an investigation **immediately** following being informed, through denunciation or by any other means, of a condition having the impression that an offense has been committed, to determine if the conditions demand the filing of a public court case and to collect and protect all the evidence in favor of or against the suspect, through the judicial security forces under his or her command, for the investigation of the material truth and for the execution of a fair trial.

50. As required by article 161 of the Turkish Criminal Procedure Code (Article 153 *et seq*., Law No: 1412) it is the duty of the public prosecutor to conduct all types of investigations for offences, directly or through judicial security forces under his/her authority and to request any information **immediately** about the incidents from any public officers.

51. Under the same provision the judicial security officers shall be obliged to carry out the instructions given by the public prosecutor under whom they function without any delay, and to provide all information and documents required within the scope of the investigation being conducted, to the Public prosecutor without any delay.

52. According to Article 161(5) of Criminal Procedure Code; "*Public employees who misuse or neglect their duties stemming from the law, or duties required of them according to provisions in the law, as well as superiors and officers of the security forces who misuse or neglect to execute the oral or written demands or orders of the public prosecutors, shall be prosecuted by the public prosecutors directly. Governors and district governors shall be subject to provisions of the Law on Litigation of Public Servants and Other Public Employees dated 2 December 1999 and numbered 4483, and the highest-ranking superiors of the security forces shall be subject to the judicial procedure applicable to judges for offenses related to their duties.*"

53. For your Honourable Court's kind appraisal *we would like to submit considerations of the European Court of Human Rights regarding the criteria to determine whether* a *violation* of Article 2 of the European Convention of Human Rights occurred *within the framework of proceedings surrounding enforced disappearance cases*, and we would like to emphasize that we do not doubt the observance of the compliance with the criteria of the European Court of Human Rights by the Constitutional Court.

54. The assessment of the European Court of Human Rights regarding whether the state is responsible for the victim's death or enforced disappearance, is as follows:[21]

54.1.'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.**"

54.2. In this respect, **the period of time which has 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."[22]

54.3. In the enforced disappearance judgments against Turkey, the Court observed that in the general context of the situation and the violations of human rights, it cannot be ruled out that an unacknowledged detention of a disappeared person would be life-threatening, and 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.[23]

[21] This part is paraphrased from the article titled as "Enforced Disappearance Cases from the Perspective of the European Court of Human Rights" by İlkem Altıntaş in "Enforced Disappearances and the Conduct of the Judiciary", Truth Justice Memory Center, Istanbul, 2011, pp. 108 – 131.
[22] Taş v. Turkey, judgment dated 14 November 2000, Application no: 24396/94, par. 63-65.
[23] Ibid. par. 66.

54.4. In light of the Taş v. Turkey judgment, 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:

54.4.1. The period of time in which the victim was not heard from after being detained;

54.4.2. 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;**

54.4.3. The unavailability of credible records showing where the victim was held and of custody records;

54.4.4. State authorities' suspicion that the victim was involved in activities necessitating criminal prosecution; for instance, authorities suspecting that the victim had connections to an illegal organisation;

54.4.5. The state's failure to provide a satisfactory and plausible explanation of the victim's fate.

54.5. 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**.

55. The failure of the State to conduct an effective investigation is also a 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.

56. 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:

56.1. '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.'[24]

56.2. 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.

56.3. 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.[25]

56.4. 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. 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.[26]

57. Responsibilities of the prosecutor can be summarized, in the light of the Court's jurisprudence as follows:

[24] Acar v. Turkey, Grand Chamber judgment dated 8 April 2004, Application no: 26307/95, par. 226
[25] Osmanoğlu v. Turkey, judgment dated 24 January 2008, Application no: 48804/99, par. 88.
[26] Taş v. Turkey, judgment dated 14 November 2000, Application no: 24396/94, par. 71.

57.1. When an applicant makes a claim of enforced disappearance, or upon becoming aware of such a claim, the prosecutor must promptly initiate an investigation.

57.2. The prosecutor must act timely with respect to searching and gathering evidence and taking testimony from witnesses or complainants.

57.3. The prosecutor must personally examine the locations where the person is alleged to have been kept in custody and the custody records.

57.4. 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.

57.5. The Prosecutor needs to conduct an investigation if he or she has suspicions about the accuracy of custody records or other official documents.

57.6. The Prosecutor must interrogate security forces or, where necessary, their supervisors who are or may be connected with the incident.

57.7. The Prosecutor must establish whether security forces conducted any operations or whether paramilitary forces operated at the time of the claimed disappearance and at the location where the disappeared person is alleged to have been detained.

57.8. 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.

57.9. Investigation records must be kept in a complete manner.

57.10. The investigation must be both effective and timely and the prosecutor must not neglect the available evidence, and may not withhold a decision to initiate an investigation based on neglect of the evidence.

57.11. The prosecutor must ensure that the crime scene records 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.

58. As well as above-mentioned obligations of the prosecutor, for the fulfilment of the obligation to conduct effective investigation in the light of the case law of the European Court of Human Rights the following points should be noted:

58.1. Custody records must be kept diligently and 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.

58.2. 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.

58.3. By considering the responsibilities of the security forces relating to the records of custody, where this responsibility is not fulfilled or in the case of the absence of the records that should be taken into account that the burden of proof shifts and the state must prove that there is no detention or disappearance.

59. The positive obligation of the state to protect the right to life, as defined in article 2 of the European Convention of Human Rights 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.

59.1. 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.**[27]

59.2. 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.[28] 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

[27] Osman v. United Kingdom, judgment dated 28 October 1998, Application no: 87/1997/871/1083, par. 116
[28] Mahmut Kaya v. Turkey, judgment dated 28 March 2000, Application no: 22535/93, par. 101

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. In this case, 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, 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, and found that the state violated its obligation to protect the right to life**.[29]

59.3. 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 who identified themselves as police officers.[30] **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.[31] 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.[32]

59.4. 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.**

60. In an enforced disappearance case, state responsibility under Article 3 is examined in two respects; with respect to the forcibly disappeared person, and with respect to the applicant.

[29] Ibid. par. 76 and 87.
[30] Osmanoğlu v. Turkey, judgment dated 24 January 2008, Application no: 48804/99.
[31] Ibid. par. 57.
[32] Ibid. par. 84.

60.1. 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.

60.2. 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.[33]

60.3. 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.**

60.4. In the case of Akdeniz and others v. Turkey, the 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.[34]

60.5. 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 the respondent state cannot provide an explanation as to how those findings came into being**.[35]

60.6. The Court established its jurisprudence relating to the violation of Article 3 with respect to the applicant as **the relative of the disappeared person** because of the **uncertainty and anguish** they experienced due to the enforced disappearance of their relatives.

60.7. The Courts also considered the applicants' inability to bury their relatives in a proper manner as a violation of Article 3 of the Convention. In its 2008 judgment in the case

[33] Çakıcı v. Turkey, judgment dated 8 July 1999, Application no: 23657/94, par. 91.
[34] Akdeniz and others v. Turkey, judgment dated 31 May 2001, Application no: 23954/94, par. 98
[35] Mahmut Kaya v. Turkey, par. 110-118; Hayriye Kişmir v. Turkey, 31 May 2005, Application no: 27306/95, par. 122-132

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.[36] 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, and this must have caused **profound and continuous anguish and distress**, resulting in a breach of Article 3.

60.8. 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.

61. According to the determination of the European Court of Human Rights, for a detention to be lawful, it must rest on one of the grounds listed in paragraph 1 of Article 5 of the European Convention of Human Rights. 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.

62. 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. 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.

63. 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. 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

[36] Khadzhialiyev and Others v. Russia, judgment dated 6 November 2008, Application no: 3013/04.

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."[37]

64. The Court's jurisprudence on Article 13 of the European Convention on Human Rights, as it relates to enforced disappearances is as follows:

64.1. *'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. *'*[38]

64.2. 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**.[39]

[37] Akdeniz v. Turkey, judgment dated 31 May 2005, Application no: 25165/94, par. 130.
[38] Timurtaş v. Turkey, judgment dated 13 June 2000, Application no: 23531/94.
[39] Ibid. par. 112.

Jurisprudence of the Inter-American Court of Human Rights which constitute a ground in the case-law of the European Court of Human Rights[40]

65. The European Court of Human Rights gives place in its decisions, to the jurisprudence of the Inter-American Court of Human Rights within the context of forced disappearance cases.

65.1. The European Court of Human Rights, especially in its early judgments relating to the enforced disappearances in Turkey during the 1990s, addressed the jurisprudence of the Inter-American Court of Human Rights which has an important role in the improvement of the Latin American case-law on enforced disappearances. However, in contrast to the Latin American countries, member states of the European Convention of Human Rights such as Turkey and Russia where the crime of enforced disappearance is widespread and systematic could not develop their jurisprudence within the context of the crimes against humanity and the right to truth.

65.2. The European Court of Human Rights in its *Kurt v. Turkey* and *Ertak v. Turkey* judgements addressed the *Velásquez-Rodríguez v. Honduras*, *Godínez-Cruz v. Honduras* and *Caballero-Delgado and Santana v. Colombia* judgments of the Inter-American Court of Human Rights relating to enforced disappearances as relevant international law and practice.

65.3. The European Court of Human Rights in its *Akdivar and Others v. Turkey*[41] judgment dated 1988 addressed the *Velásquez-Rodríguez v. Honduras* judgment of the Inter-American Court of Human Rights and stated that:

"In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective

[40] This part paraphrases the Report of the Research Division of the Council of Europe "References to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights", August, 2012.
[41] Akdivar and Others v. Turkey, Application no. 21893/93, judgment dated 16 September 1996, Grand Chamber.

in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement." [42]

65.4. In its *Silih v. Slovenia* judgment in which the Court also addressed the Inter-American Court of Human Rights' judgments regarding *ratione temporis* jurisdiction in disappearance cases, The European Court of Human Rights states relating to the jurisdiction *ratione temporis* over procedural obligations under Article 2 ECHR arising from disappearances that;

"[…] the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent "interference" within the meaning of the Blečić judgment. In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date.

This approach finds support also in the jurisprudence of the United Nations Human Rights Committee and, in particular, of the Inter-American Court of Human Rights, which, though under different provisions, accepted jurisdiction ratione temporis over the procedural complaints relating to deaths which had taken place outside their temporal jurisdiction." [43]

65.5. Accordingly the European Court of Human Rights addressed the jurisprudence of the Inter-American Court of Human Rights regarding *ratione temporis* jurisdiction in disappearance cases in its *Varnava and others v. Turkey* judgment.[44]

65.6. In the *Cicek v. Turkey* judgment of the European Court of Human Rights, Judge Maruste in his concurring opinion addressed the jurisprudence of the Inter-American Court of Human Rights regarding enforced disappearances and stated that "disappearance is a recognised category in international law."[45]

65.7. In its *Lexa v. Slovakia* judgment the European Court of Human Rights also addressed the *Barrios Altos v. Peru* judgment of the Inter-American Court of Human Rights and cited that:

[42] Case of Velásquez-Rodríguez v. Honduras, Preliminary Objections. Judgment of 26 June 1987. Series C No. 1.
[43] Silih v. Slovenia, Application no. 71463/01, judgement dated 9 April 2009, Grand Chamber, par. 159-160.
[44] Varnava and others v. Turkey, Application no. 16064/90, judgment dated 18 September 2009, Grand Chamber, par. 147.
[45] Cicek v. Turkey, Application no. 25704/94, judgment dated 27 February 2001, First Section.

"[...] all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law." [46]

THE CRIME OF ENFORCED DISAPPEARANCES AND THE RIGHT TO TRUTH[47]

66. As stated above, the victims of gross human rights violations and their relatives have the "right to an effective remedy". This right also includes "the right to know" the identity of perpetrators who carried out the acts that led to this violation, the fate or whereabouts of the forcibly disappeared persons.

67. Uncovering the truth about what happened and who is responsible for gross human rights helps society to understand the reasons of past abuses and end them. It is considerably difficult for a society to prevent the repetition of this kind of violation without accurate knowledge of past violations. The truth assists in the healing process after traumatic events, as well as ensuring protection against impunity and public denial. While denial and silence increase mistrust and social polarization, establishing the truth may initiate the process of reconciliation. Besides, a political order and judiciary based on transparency and accountability procure the trust and confidence of citizens.

68. The right to the truth applies to all gross violations of human rights, but is most explicitly recognized in regard to enforced disappearances.

69. Knowing the truth "to the fullest extent possible" includes the following elements:

(i) Uncovering the identity of perpetrators,

(ii) Revealing the reasons that led to the violations,

(iii) Ascertaining the circumstances and facts of violations,

[46] Barrios Altos v. Peru judgment, Series C No. 75 [2001], IACHR 5, 14 March 2001, par. 41.

[47] This chapter was prepared by the use of the publication of the International Center for Transitional Justice titled "Truth Seeking: Elements of Creating an Effective Truth Commission". See: http://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf. Find attached the *amicus curiae* brief of the International Commission of Jurists (ICJ) submitted to case of Efrain Bamaca Velasquez/Guatemala of The Inter-American Human Rights Court concerning the right to the truth. The Inter-American Human Rights Court ruled in line with the legal opinions of ICJ.

(iv) Establishing the truth about the fate and whereabouts of forcibly disappeared persons.[48]

70. Although the basic elements of this right have been settled, its content continues to evolve.

70.1. The right to the truth is connected to the right to an effective remedy. This includes the right to an effective investigation, verification of facts, and public disclosure of the truth; and the right to reparation.

70.2. Victims and their families have the imprescriptible right to know the truth about the circumstances in which human rights violations took place.[49]

70.3. It is linked to the right of relatives and communities to commemorate and mourn human loss in forms that are culturally appropriate and dignified.

70.4. In addition to victims and their relatives, communities and society at large also have the right to know the truth about human rights violations.[50]

70.5. Some legal systems consider the right to the truth to be part of the "enjoyment of freedom" of information and the "freedom of expression".[51]

70.6. Amnesty for perpetrators cannot be brought forward to prevent the prosecution of certain international crimes including crimes against humanity, genocide, and certain war crimes.[52] Granting amnesty for such crimes relates to the right to the truth insofar as it relates to verification of the facts in question.[53]

70.7. The state has a duty to preserve documentary evidence for commemoration and remembrance, and protecting and ensuring adequate access to archives with information on violations.[54]

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[48] United Nations Human Rights Commission, Human Rights Resolution 9/11, "Right to the truth," 24.09.2008, A/HRC/RES/9/11. In this context, the investigations should include the opening of the graves of the nameless.

[49] United Nations Commission on Human Rights, Report of the Independent Expert Diane Orentlicher, "Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity," 08.02.2005, E/CN.4/2005/102/Add.1, Principle 4.

[50] Ibid.

[51] United Nations High Commissioner for Human Rights, Human Rights Resolution 2005/66, "Right to the truth," 20.04.2005, E/CN.4/RES/2005/66.

[52] Rome Statute of the International Criminal Court, adopted July 17, 1998; 2187 U.N.T.S. 90, 37 I.L.M. 1002, entered into force on 01.07.2002.

[5353] United Nations Human Rights Commission, Follow-up Report, "Study on the right to the truth",07.07.2007, A.HRC/5/7. ¶10.

[54] UN Updated Set of Principles, Principle 3.

71. The right to the truth has not yet been the object of a specific international convention. Nevertheless, the core elements of the right are recognized in international instruments.

71.1. There are explicit treaty references to the right to know certain facts, including in instruments such as the Additional Protocol I to the Geneva Conventions[55] and the International Convention for the Protection of all Persons from Enforced Disappearances. Both instruments recognize the right of relatives of the disappeared to learn the fate and whereabouts of their loved ones.

71.2. The most important development that arises with the International Convention for the Protection of all Persons from Enforced Disappearances is the confirmation of the right to the truth as an enforceable right in itself. The treaty, which entered into force in December 2010, guarantees the right of the victims to know the truth regarding the circumstances of enforced disappearances, the progress and results of investigations, and the fate of disappeared persons. It also sets out the obligations of state parties, the duty to provide restitution and guarantees of non-repetition.

71.3. Many UN resolutions and reports by independent experts contain explicit statements on the right to the truth. The UN General Assembly emphasized that the international community should "endeavor to recognize the right of victims of gross violations of human rights, and their families, and society as a whole to know the truth to the fullest extent practicable."[56]

72. The right to the truth is also recognized in judgments delivered by both national and regional courts.

72.1. The European Court of Human Rights states that when credible allegations of serious human rights violations are made, the state has a binding duty to undertake adequate investigations and uncover the truth in respect of violations.[57] In this context, the state must ensure that the investigation into the serious allegations are both prompt and thorough and procure that such investigation should be capable of leading to the identification and punishment of those responsible.[58]

[55] Protocol Additional to the Geneva Conventions of 12.08.1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, entered into force on 07.12.1978.
[56] United Nations Human Rights Commission, Human Rights Resolution 9/11, "Right to the truth," 24.09.2008, A/HRC/RES/9/11.
[57] Kelly and Others v. United Kingdom, Application No: 30054/96, Ramsahai and Others v. the Netherlands, Application No: 52391/99.
[58] Case of El-Masri v. The Former Yugoslav Republic of Macedonia, Application No: 39630/09.

72.2. According to the European Court of Human Rights, the right to the truth is the purpose behind the obligation to carry out an investigation with the quality requirements (transparency, diligence, independence, access, disclosure of results and scrutiny). In addition to this, the right to the truth reflects society's desire to strengthen confidence in public institutions and hence the rule of law.[59] This right is the means with respect to the victims' families for establishing the truth and securing and acknowledgement of gross violations of human rights, which constitute a form of redress, which is just as important as compensation.[60]

72.3. The European Court of Human Rights also states that a prolonged denial of giving information about the fate of the victims or dismissive replies from state authorities in respect of requests of the victims' families amounts to inhuman or degrading treatment within the meaning of Article 3 of the European Convention on Human Rights.[61]

72.4. The Inter-American Commission and the Inter-American Court have recognized that the right to the truth is protected in the following articles of the American Convention on Human Rights: general protection of human rights, right to fair trial, freedom of thought and expression and right to judicial protection.[62]

72.5. Courts in Argentina, Chile and Colombia have specifically recognized the right to truth. For instance the Supreme Court of Argentina held in the case of "Julio Hector Simón" that amnesty laws shielding perpetrators of crimes against humanity were unconstitutional.[63] In Peru, the Constitutional Tribunal in the case of "Villegas Namuche" recognized the right to the truth as a fundamental right directly protected by the constitution.[64] In Colombia, the Constitutional Court in the case of "Gustavo Gallón Giraldo and Others" stated that even the priority of contributing to the demobilization of illegal armed groups did not extinguish the state's obligation to seek the truth regarding the disappeared.[65]

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[59] Ibid.
[60] Ibid.
[61] Janowiec and Others v. Russia, Applications Nos: 55508/07 and 29520/09.
[62] See: Velásquez Rodríguez, Inter-Am. Ct. H.R. (Ser. C) No. 4, 77 (1988), Myrna Mack Chang, Inter-Am. Ct. H.R. (Ser. C) No. 101 274-75 (2003), Bámaca Velásquez, Inter-Am. Ct. H.R., (Ser. C) No. 91, 77 (2002), Barrios Altos, Inter- Am. Ct. H. R. (Ser. C) No. 75 (2001).
[63] Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 14.06.2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad", etc. Case S. 17.768 (Arg.).
[64] Constitutional Tribunal of Peru. Genaro Villegas Namuche. Case No. 2488-2002-HC/TC, 18.05.2004.
[65] Constitutional Court of Colombia. Gustavo Gallón Giraldo y Otros v. Colombia. Sentencia No. C-370/2006, 18.05.2006.

72.6. Some states, such as Guatemala and Brazil, also explicitly recognized the right to the truth. The Guatemalan peace treaties of 1994 recognizes that the people of Guatemala have a right to know the whole truth concerning the events of gross human rights violations, clarification of which will help avoid a repetition of these sad and painful events and strengthen the process of democratization in Guatemala.[66] In Brazil, the production of official truth began with a reparation process through the establishment of the Special Commission on Dead and Disappeared Political People in 1995 and the Amnesty Commission of the Ministry of Justice in 2001.[67]

The Latin American Experience and the Right to Know the Truth

73. Latin American countries witnessed gross human rights violations during the 1970s and 1980s, including crimes such as extrajudicial executions, enforced disappearances and torture which were often carried out by the security forces.

74. Domestic courts in these countries did not or could not show the necessary will to investigate and prosecute these crimes during the periods of intense violations and immediately after these periods. The civil governments which came to power after the military regimes were reluctant to make the necessary arrangements to ensure the prosecution of these crimes and the prevention of recurrence of such gross violations, thus it took a long time to make progress in this area.

75. In order to ensure the abolition of political and legal obstacles of prosecution of serious human rights violations of the past, families of the victims of enforced disappearances, lawyers, human rights defenders and journalists have continued to assert their demands for truth and justice before national courts and they have changed the perspective of the legislators and judges in the region.

76. Both the demand of the societies for uncovering the truth and the tendency of domestic courts to give place in their decisions to the measures of international human rights law and international humanitarian law, and also decisions of international human rights bodies, led to the emergence of a doctrine and case law which constitutes guidelines for countries all over the world which have not yet confronted the gross human rights violations in their history.

77. The principles prescribed by the Inter-American Court of Human Rights relating to the human rights violations of the past have led to major changes in the local courts' decisions.

[66] Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that Have Caused the Guatemalan Population to Suffer, UN Doc. A/48/954-S/1994/751, June 23, 1994.
[67] National Truth Commission of Brazil [Comissão Nacional da Verdade] created by Law No. 12.528, 18.11.2011.

78. *Amicus curiae* briefs presented by both national and international non-governmental organisations during the trials have played an important role in the decisions of local courts and the determination of these principles.

79. The treatment of both national and international Latin American case-law on enforced disappearances within the context of crimes against humanity and in its relation with the right to the truth, may serve as a guide for related judgments in Turkey.[68]

80. In Latin American countries, jurisprudence of the domestic courts emphasized the right to know the truth of victims, their families and the society as a whole.

81. Although the case-law of the Inter-American Court of Human Rights has significant influence, the jurisprudence of the domestic courts of Latin American countries was mainly based on the elements of a democratic society as well as constitutional norms and the norms of international law.

82. The Constitutional Court of Peru states its determinations within the context of the right to know the truth and the crime of enforced disappearance as follows:

"The Nation has the right to know the truth about unjust and painful facts and incidents brought about by the myriad forms of State and non-State violence. This right entails the possibility of ascertaining the circumstances of time, method, and place under which they occurred and the motives behind the perpetrators' actions. The right to truth is, in this sense, an inalienable collective legal interest.

In addition to the collective dimension, the right to truth has an individual dimension, which corresponds to the victims and their relatives and friends. Knowledge of the circumstances in which human rights violations were committed and, in the case of death or disappearance, the fate of the victim is inherently ***not subject to any statute of limitations [prescription].***

*Individuals who have been directly or indirectly affected by a crime of such magnitude always have the right to know—****even if a considerable amount of time has passed since the crime occurred****—inter alia, the identity of the perpetrator, the date and place of the crime, how it occurred, why it was committed, and where the mortal remains are located.*

The right to truth is derived not only from the Peruvian State's international obligations but also from the Political Constitution itself, which [...] sets forth the obligation of the State to

[68] Decisions of the Latin American local courts in this study are cited from the study of the Due Process of Law Foundation, titled "Digest of Latin American Jurisprudence on International Crimes" dated 2010, and translated into Turkish from the original text of the *amicus curiae* brief of the Truth Justice Memory Center.

safeguard all rights, and especially those that affect human dignity, since it is a historical circumstance which, if not duly clarified, could affect the very life of the institutions.

[…]while the ***right to truth*** *is not explicitly set out in our constitutional language,* ***it is a fully protected right*** *derived, in the first instance, from the State's obligation to safeguard fundamental rights and to provide judicial protection. Nonetheless, the Constitutional Court takes the view that, to the extent reasonably possible, and in the most recent special cases, implicit constitutional rights must be developed to enhance respect and protection for human rights, since this will help strengthen democracy and the State, as mandated by the current Constitution.*

The Constitutional Court believes that while the right to truth encompasses other fundamental rights such as, inter alia, life, liberty, or personal security, it also has an autonomous character in its own right, a unique quality that distinguishes it from other related rights, owing both to the protected interest and to the telos sought through its recognition.

[…]This right is derived directly from the principle of human dignity, since the harm inflicted upon the victims not only constitutes a breach of such important legal interests as life, liberty, and personal integrity, but also creates a situation of ignorance about what really happened to the victims of the crimes committed. Not knowing where the mortal remains of a loved one are located or what happened to him or her is perhaps one of the most perversely subtle, yet no less violent ways of damaging the psyche and dignity of human beings.

In its collective dimension, moreover, the right to truth is a direct manifestation of the principles of the democratic and social rule of law and the republican form of government, since, through the exercise of this right, we can all come to understand the levels of degeneration to which we are capable of sinking, whether through the wielding of public force or through the actions of criminal terrorist groups.

[…]In this regard, the State has a specific obligation to investigate and to inform, which not only entails facilitating the access of relatives to documents in the possession of the State, but also means investigating and corroborating the events that have been reported." [69]

83. The Federal Criminal Court of Argentina states the following on the right to the truth in a decision relating to the crime of genocide:

[69] Ibid. p. 247, Habeas corpus submitted by María Emilia Villegas Namuche to the Constitutional Court of Peru, Extraordinary Appeal, 18 March 2004.

"*[…]The allusions frequently heard in cases—such as the one on trial here—concerning the need for "reconciliation" or for "looking ahead," and the futility of "stirring up the past," are diametrically opposed to the [concept] of law as a "producer of truth," [...][and as] the only means upon which memory can be validly constructed, which in turn is an essential first step toward making some kind of reparation and, above all, preventing future exterminations.*

By considering the instant cases in this way—as genocide—and under that overarching legal umbrella, in my opinion, we are able to situate the acts under investigation in their appropriate context, thereby complying with the obligation set out in the famous Velásquez Rodríguez judgment to undertake investigation seriously and not as a mere formality.

All of this is also part of reconstructing the collective memory, and will make it possible to build a future based on knowing the truth, which is a keystone for the prevention of future massacres."[70]

84. The Inter-American Court of Human Rights stated the following on the obligations imposed by the right to the truth:

"[…] the positive obligations inherent in the right to truth demand the adoption of institutional structures that permit this right to be fulfilled in the most suitable, participatory, and complete way. These structures should not impose legal or practical obstacles that make them illusory. The Court emphasizes that the satisfaction of the collective dimension of the right to truth requires a legal analysis of the most complete historical record possible. This determination must include a description of the patterns of joint action and should identify all those who participated in various ways in the violations and their corresponding responsibilities.

Moreover, ***the investigation must be undertaken by the State as its own legal obligation, and not as a superficial administration of private interests, which depends upon the procedural initiative of the victims or their next of kin, or upon the production of evidence by private parties***."[71]

[70]Ibid. p. 248, Case of "Circuito Camps" and others (Miguel Osvaldo Etchecolatz), the Oral Tribunal of the National Federal Court of La Plata, Case No. 2251/06, 19 September 2006.

[71] Inter-American Court of Human Rights, Case of the Rochela Massacre v. Colombia, Merits, Reparations and Costs, Judgment of May 11, 2007, Series C, No. 163.

ENFORCED DISAPPEARANCE IN THE CONTEXT OF CRIMES AGAINST HUMANITY

Non-applicability of the Statute of Limitations

85. Under international law, if it becomes a common practice for states, in time of war as well as in peacetime, to commit crimes such as arbitrary and illegal executions, and enforced disappearances against their own citizens, and thus the gross breaches and violations of the rights and freedoms recognized by international human rights treaties, it constitutes "crimes against humanity."

86. As it is stated within the first article of the International Convention for the Protection of All Persons from *Enforced Disappearance,* **"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."**

87. As it is known, it is possible to find the guidelines in various legal documents for the scope and conditions of the concept of "crimes against humanity" such as the Nuremberg Tribunal Charter, Statute of the International Criminal Tribunal for the former Yugoslavia, Statute of the International Criminal Tribunal for Rwanda, and the Rome Statute of the International Criminal Court. There is also a jurisprudence composed of accumulated decisions relating to the implementation of measures of these documents which fall into the scope of customary law sources.

88. In this context, it is certain that murder, enforced disappearance, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions and any other inhumane acts on political, racial and religious grounds, constitute crimes against humanity.

89. As it is known, although it was not included in the former Turkish Penal Code No. 765, crimes against humanity are arranged in the current Turkish Penal Code No. 5237.

87.1. Under Article 77 of the Turkish Criminal Code, commitment of the acts of voluntary manslaughter, willful infliction of injury, torture, inflicting severe harm, or enslavement, deprivation of liberty, subjection to scientific experiments, sexual violence, sexual abuse of children, forced pregnancy, enforced prostitution, 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.

87.2. According to the fourth paragraph of article 77 of the Turkish Criminal Code, **"These offenses are not subject to the statute of limitation."**

90. Considering the international customary law sources and binding international treaties, it is unlawful to take the criminal provisions concerning the crime of murder as the basis in enforced disappearance cases 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 and in favour of the accused, and declare the verdict of non-prosecution because of the expiration of the prescription time.

91. As required by the hierarchy of norms acknowledged by Article 90/5 of the Constitution, and considering that international agreements duly put into effect have the force of law, and in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail, and in the light of the decisions of the European Court of Human Rights mentioned above, decisions of non-prosecution based on the statute of limitations is contrary to the provisions of domestic law and international treaties.

92. According to article 7/(1) of the European Convention of Human Rights; "*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*"; and according to article 7/(2) of the European Convention of Human Rights which constitutes an exception to article 7/(1) in accordance with the general principles of law "***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.*"** In the same manner, according to article 15/(1) of the International Covenant on Civil and Political Rights "*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*" and according to article 15/(2) of the Covenant which constitutes an exception to article 15/(1) "***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.***" These provisions are certain and binding with regard to the judicial authorities therefore the statute of limitations is non-applicable to these related investigations.[72]

[72] See Öznur Sevdiren, "The Recognition of Enforced Disappearance as a Crime under Domestic Law and the Statute of Limitations: A Problematic of International Criminal Law" in "Enforced Disappearances and the Conduct of the Judiciary", Truth Justice Memory Center, Istanbul, 2011, pp. 66 – 106.

The Concept of Crimes against Humanity and Non-Applicability of Statute of Limitations in Latin American Jurisprudence

93. The treatment of both national and international Latin American case-law on enforced disappearances within the context of crimes against humanity may serve as a guide for related judgments in Turkey.

94. In Latin American judgments on enforced disappearances, in line with the relevant international jurisprudence, it is stated that the crimes against humanity mainly focus on the protection of fundamental rights such as, inter alia, life, liberty, physical integrity and psycho-sexual freedom. In the same decision also the severity of the harm inflicted and its consequences for the victims and their families are described.

95. While the international definition and the historical background of the development of crimes against humanity is described, it is also stated that the brutality inherent to these crimes as a critical factor distinguishes them from other war crimes and their commitment both during the time of peace and of war leads to them being described as crimes against humanity if they are committed in a widespread or systematic manner.

96. The Constitutional Court of Colombia, in one of its decisions where it determines the historical background of the evolution of crimes against humanity and assesses the Constitutionality of the Rome Statute of the International Criminal Court stated that*:*

"The concept of crimes against humanity has evolved to cover a series of atrocious acts committed in a massive or systematic manner; they are primarily customary in their origins and have been proscribed under international law for several centuries. Although a nexus with war crimes or crimes against peace was required at first, this condition is gradually disappearing.

[…]The problem posed by this new category was that the Allies could be accused of ex post facto judgments based on a strict interpretation of the principle of legality. The nexus to war crimes and crimes against peace was created precisely to circumvent such a charge. The extension of criminal liability was based on the recognition that certain provisions pertaining to war crimes were applicable to civilians and other protected persons and, therefore, their punishment was justified if there was a nexus to a war crime or a crime against peace within the jurisdiction of the Nuremberg.

Under Law No. 10 of the Allied Control Council, the Allies tried German officers and soldiers in their respective areas of occupation for crimes against humanity, but they did not

require the nexus between crimes against humanity and the initiation of the war or war crimes [...] Because many Nazi criminals went into hiding to avoid trial, several States kept the criminal cases initiated in the 1950s open for years. In the 1980s and early 1990s, for example, France tried Klaus Barbie and Paul Touvier for crimes against humanity.

Outside the context of World War II, other States have prosecuted atrocious crimes against humanity. Latvia and Estonia, for example, tried police officers for murder, torture, and forced deportation, while leaders of the Dergue regime in Ethiopia were made to stand trial for atrocious crimes against humanity.

A proposal to eliminate the requirement of a nexus between crimes against humanity and war crimes was introduced into the discussion of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. It was ultimately agreed that such crimes could be committed "in time of war or time of peace", a definition which, despite all efforts, did not totally eliminate the nexus with war. This nexus was also preserved in the Statute of the [International Criminal] Tribunal for the former Yugoslavia, although not for the Rwanda tribunal. In the Rome Statute, such crimes are delinked from the existence of an armed conflict.

As international humanitarian law was being developed and consolidated, the United Nations General Assembly adopted several declarations on the protection of human rights that gradually solidified the international consensus repudiating [certain] acts [...].

An example of this is the general prohibition against racial discrimination embodied in binding instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. The convention served as a springboard for the subsequent recognition of apartheid as an international crime. The United Nations General Assembly approved the International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973, which characterized as crimes against humanity policies and practices of segregation and racial discrimination implemented for the purpose of maintaining domination by one racial group over another. This offense was expressly included in the Rome Statute, Article 7(j), as one of the acts considered to be a crime against humanity.

Something similar occurred in the case of torture, which is prohibited under a wide range of human rights treaties. It has been defined as an international crime in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [...] and in the Inter-American Convention to Prevent and Punish Torture [...]

The list of conducts considered to be crimes [against humanity], the punishment of which is of interest to the international community, has since been expanded to include forced disappearance and summary execution [...]"[73]

97. The Uruguay Criminal Court has described crimes against humanity in the Case "Condor Plan" as follows:

"The crimes, each comprising multiple human rights violations, committed during the de facto government, in the context of State terrorism, and conducted in a systematic, massive, and planned manner—which included forced disappearances, murders, torture, prohibitions against political, social, and labor rights and freedom of expression, violations of freedom of movement, etc.—amount to practices that international law considers "crimes against humanity." Such crimes are not subject to any statute of limitations and it is incumbent on all States to prosecute them.

Rather than remaining frozen in the Nuremberg Statute, the concept of a "crime against humanity" continued to evolve, improve, and gain autonomy. Its essential characteristics were defined (non-applicability of the statute of limitations, inadmissibility of amnesty, pardon, indulgence, political asylum, and refuge). It was solidified as a general principle of international law with the rank of "jus cogens," making the punishment of the perpetrators of crimes against humanity a universal imperative.

[The existence of crimes against humanity] has been confirmed by the jurisprudential and normative evolution of recent decades. […] In the context of this evolution, the systematic practice of torture, forced disappearance, and murder, ideologically driven by the national security doctrine, constitutes a "crime against humanity."[74]

98. In the motion submitted by the private accusation in representation of the Government of Chile to the Argentine Supreme Court on statute of limitations, the concept of crimes against humanity were assessed as follows:

"[…]Crimes such as genocide, torture, forced disappearance of persons, [intentional] murder, and any other acts designed to persecute and exterminate political adversaries—among which we must include belonging to a group whose purpose is to carry out this

[73] Case No: C-578/02, File No: LAT-223, President Eduardo Cifuentes Muñoz, the Constitutional Court of Colombia, 30 July 2002.

[74] Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 036 of March 26, 2009, "Gavazzo Pereira, Jose Nino. Arab Fernandez, Jose Ricardo- a crime of deprivation of liberty," record 98-247/2006.

persecution—may be considered crimes against humanity, because they violate jus gentium norms, as set forth in Article 118 of the National Constitution. [Emphasis added]"[75]

99. In this respect, the Argentine Supreme Court concluded that the crimes against humanity were among the norms of customary international law between the years 1974-1978, thus the crimes committed during the period were not subject to the statute of limitations even if they were undefined in domestic law on the date of the commitment of the crime.

100. The Supreme Court of Peru determined the elements of crimes against humanity in its Barrios Altos, La Cantuta and SIE Basement Case as follows:

"Specifically, the requirements set out in international instruments and tribunals have consistently included;

(i) the status of the perpetrator (an organ of State power or a criminal organization that has assumed de facto control over a territory),
(ii) the nature of the infraction (organized and generalized or systematic acts—the term "generalized," which is quantitative, alludes to the number of victims, while the adjective "systematic" connotes a methodical plan),
(iii) the context for the commitment of the crime (situation of internal or external conflict), and
(iv) the characteristics and status of the victims (civilian population and defencelessness)."[76]

101. In the same decision the Supreme court of Peru, on the definition of concepts "systematic" and "widespread" as elements of crimes against humanity made the following assessment:

"As indicated in the AMICUS CURIAE from the University of Texas at Austin, citing the judgment on appeal in PROSECUTOR V. BLASKIC [...] only the attack—not the specific acts with which the accused is charged—must be widespread or systematic; furthermore, citing the Inter-American Court of Human Rights, ALMONACID ARELLANO V. CHILE, of September 26, 2006, paragraph 96, even a single act, committed in the context of a generalized or systematic attack, suffices to produce a crime against humanity."[77]

[75] Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) — Arancibia Clavel, Enrique Lautaro s/ homicide and other illicit association , Cause no. 259 (Appeal of fact) , Case A. 533 XXXVIII ,Supreme Court of Justice , August 24, 2004 .
[76] Barrios Altos, La Cantuta and SIE Basement Case (Supreme Court of Peru, Special Criminal Chamber), File No. AV-19-2001, Judgment, 7 April 2009.
[77] Ibid.

Enforced Disappearance as a Crime against Humanity and Abduction (or kidnapping and Deprivation of Liberty) as a Permanent (Continuous) Crime in Latin American Jurisprudence

102. The initial decision on enforced disappearances as crimes against humanity, which deemed determinant and applied by the domestic courts of Latin American countries, was the decision of the Inter-American Court of Human Rights in the Velásquez Rodríguez/Honduras case dated 1989. In this decision, the Court examined all necessary elements required to consider an act of enforced disappearance as a crime against humanity, within the context of the case. The Court's decision in this regard is as follows:[78]

"Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear, is a recent phenomenon. Although this practice exists virtually worldwide, it has occurred with exceptional intensity in Latin America in the last few years.

The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion.

The establishment of a Working Group on Enforced or Involuntary Disappearances of the United Nations Commission on Human Rights, by Resolution 20 (XXXVI) of February 29, 1980, is a clear demonstration of general censure and repudiation of the practice of disappearances, which had already received world attention at the UN General Assembly (Resolution 33/173 of December 20, 1978), the Economic and Social Council (Resolution 1979/38 of May 10, 1979) and the Subcommission for the Prevention of Discrimination and Protection of Minorities (Resolution 5B (XXXII) of September 5, 1979). The reports of the rapporteurs or special envoys of the Commission on Human Rights show concern that the practice of disappearances be stopped, the victims reappear and that those responsible be punished.

Within the inter-American system, the General Assembly of the Organization of American States (OAS) and the Commission have repeatedly referred to the practice of disappearances and have urged that disappearances be investigated and that the practice be stopped.

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[78] Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

International practice and doctrine have often categorized disappearances as a crime against humanity, although there is no treaty in force which is applicable to the States Parties to the Convention and which uses this terminology (InterAmerican Yearbook on Human Rights, 1985, pp. 368, 686 and 1102). The General Assembly of the OAS has resolved that it " is an affront to the conscience of the hemisphere and constitutes a crime against humanity " (AG/RES.666, supra) and that " this practice is cruel and inhuman, mocks the rule of law, and undermines those norms which guarantee protection against arbitrary detention and the right to personal security and safety " (AG/RES.742, supra).

Without question, the State has the right and duty to guarantee its security. It is also indisputable that all societies suffer some deficiencies in their legal orders. However, regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.

The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention […].

The practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention […].

The practice of disappearances, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention. The existence of this practice, moreover, evinces a disregard of the duty to organize the State in such a manner as to guarantee the rights recognized in the Convention, as set out below."[79]

103. In the same decision the Court determined the relevant facts that it finds to have been proven, as follows:

[79] Ibid. Par. 149-159.

"a. During the period 1981 to 1984, 100 to 150 persons disappeared in the Republic of Honduras, and many were never heard from again (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

b. Those disappearances followed a similar pattern, beginning with the kidnapping of the victims by force, often in broad daylight and in public places, by armed men in civilian clothes and disguises, who acted with apparent impunity and who used vehicles without any official identification, with tinted windows and with false license plates or no plates (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

c. It was public and notorious knowledge in Honduras that the kidnappings were carried out by military personnel or the police, or persons acting under their orders (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

d. The disappearances were carried out in a systematic manner, regarding which the Court considers the following circumstances particularly relevant:

i. The victims were usually persons whom Honduran officials considered dangerous to State security (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Inés Consuelo Murillo, José Gonzalo Flores Trejo, Zenaida Velásquez, Cesar Augusto Murillo and press clippings). In addition, the victims had usually been under surveillance for long periods of time (testimony of Ramón Custodio López and Florencio Caballero);

ii. The arms employed were reserved for the official use of the military and police, and the vehicles used had tinted glass, which requires special official authorization. In some cases, Government agents carried out the detentions openly and without any pretense or disguise; in others, government agents had cleared the areas where the kidnappings were to take place and, on at least one occasion, when government agents stopped the kidnappers they were allowed to continue freely on their way after showing their identification (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López and Florencio Caballero);

iii. The kidnappers blindfolded the victims, took them to secret, unofficial detention centers and moved them from one center to another. They interrogated the victims and

subjected them to cruel and humiliating treatment and torture. Some were ultimately murdered and their bodies were buried in clandestine cemeteries (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Florencio Caballero, René Velásquez Díaz, Inés Consuelo Murillo and José Gonzalo Flores Trejo);

iv. When queried by relatives, lawyers and persons or entities interested in the protection of human rights, or by judges charged with executing writs of HABEAS corpus, the authorities systematically denied any knowledge of the detentions or the whereabouts or fate of the victims. That attitude was seen even in the cases of persons who later reappeared in the hands of the same authorities who had systematically denied holding them or knowing their fate (testimony of Inés Consuelo Murillo, José Gonzalo Flores Trejo, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Diaz, Zenaida Velásquez, Cesar Augusto Murillo and press clippings);

v. Military and police officials as well as those from the Executive and Judicial Branches either denied the disappearances or were incapable of preventing or investigating them, punishing those responsible, or helping those interested discover the whereabouts and fate of the victims or the location of their remains. The investigative committees created by the Government and the Armed Forces did not produce any results. The judicial proceedings brought were processed slowly with a clear lack of interest and some were ultimately dismissed (testimony of Inés Consuelo Murillo, José Gonzalo Flores Trejo, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Zenaida Velásquez, César Augusto Murillo and press clippings);

e. On September 12, 1981, between 4:30 and 5:00 p.m., several heavily-armed men in civilian clothes driving a white Ford without license plates kidnapped Manfredo Velásquez from a parking lot in downtown Tegucigalpa. Today, nearly seven years later, he remains disappeared, which creates a reasonable presumption that he is dead (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Zenaida Velásquez, Florencio Caballero, Leopoldo Aguilar Villalobos and press clippings).

f. Persons connected with the Armed Forces or under its direction carried out that kidnapping (testimony of Ramón Custodio López, Zenaida Velásquez, Florencio Caballero, Leopoldo Aguilar Villalobos and press clippings).

g. The kidnapping and disappearance of Manfredo Velásquez falls within the systematic practice of disappearances referred to by the facts deemed proved in paragraphs a-d. To wit:

i. Manfredo Velásquez was a student who was involved in activities the authorities considered " dangerous " to national security (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López and Zenaida Velásquez).

ii. The kidnapping of Manfredo Velásquez was carried out in broad daylight by men in civilian clothes who used a vehicle without license plates.

iii. In the case of Manfredo Velásquez, there were the same type of denials by his captors and the Armed Forces, the same omissions of the latter and of the Government in investigating and revealing his whereabouts, and the same ineffectiveness of the courts where three writs of HABEAS corpus and two criminal complaints were brought (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Zenaida Velásquez, press clippings and documentary evidence).

h. There is no evidence in the record that Manfredo Velásquez had disappeared in order to join subversive groups, other than a letter from the Mayor of Langue, which contained rumors to that effect. The letter itself shows that the Government associated him with activities it considered a threat to national security. However, the Government did not corroborate the view expressed in the letter with any other evidence. Nor is there any evidence that he was kidnapped by common criminals or other persons unrelated to the practice of disappearances existing at that time."[80]

104. Based upon the above, the Court finds that the following facts have been proven in this proceeding: ,

(1) a practice of disappearances carried out or tolerated by Honduran officials existed between 1981 and 1984;

(2) Manfredo Velásquez disappeared at the hands of or with the acquiescence of those officials within the framework of that practice; and

(3) the Government of Honduras failed to guarantee the human rights affected by that practice."[81]

105. Domestic courts of Latin American countries have consistently revealed the distinction between the commitment of enforced disappearance, which is in itself a serious violation of human rights, as a single crime and as part of a systematic or widespread attack against a

[80] Ibid. par. 147
[81] Ibid. par. 148.

civilian population (that is required to be considered a crime against humanity) in line with the judgment of the Inter-American court of Human Rights which is cited above and with some similar other judgments.

106. The Supreme Court of Costa Rica, on constitutional review of the bill to approve the Inter-American Convention on Forced Disappearance of Persons states that:

"[…]It is important to understand that the systematic practice of forced disappearance of" persons constitute a crime against humanity, because of the means and methods used to perpetrate it, which are usually shrouded in complex power mechanisms. From the foregoing, it is also possible to infer its patent incompatibility with the constitutional and democratic rule of law, which promotes the consolidation of freedom, dignified treatment, and the full development of persons. [Emphasis added]"[82]

107. The Supreme Court of Chile in its decision on an enforced disappearance determined the civilian population element of crimes against humanity as follows:

"*[The characteristics of being widespread or systematic] must be conclusive elements in establishing any of the crimes against humanity. In other words, it is an attack by State agents and that attack must be directed against any civilian population. The latter term is used and taken normatively from international criminal law pursuant to Law No. 10 of the Allied Control Council [and] Article 6(c) of the Nuremberg Charter. [Emphasis added]*

[…]The latter element presents more than one difficulty in interpretation, inasmuch as it deals with the victim, or "the status that might be attributed to the victim […], which must be clarified or interpreted in keeping with the purpose of covering to the maximum extent 'any category of individual persons.' Therefore, even when it is a matter of a number of people, some of whom might have been engaging in an act of armed resistance, it must be understood that they formed part of 'any civilian population.'"[83]

108. The Supreme Court of Panama in its decision about the enforced disappearance of Cruz Mojica Flores, determines the elements of crimes against humanity as follows:

"Important characteristics that inform [the] definition [of a crime against humanity] refer to acts committed as part of a widespread or systematic attack against a civilian population, with knowledge of the attack; these acts include murder and forced disappearance of persons. In this context, [an attack] is defined as a pattern of behavior that leads to the

[82] Case 00230, Case 95-006543-0007 - CO, Supreme Court, January 12, 1996.
[83] Case of the Detained - Disappeared in La Moneda (Fernando Burgos, et al.) - No. 24471, Court of Appeals of Santiago, April 20, 2006.

repeated commitment of such acts against the civilian population in accordance with a State policy, with the organization that commits such acts to further that policy, or with the group holding de facto political power. The systematic or generalized element means that many individuals are affected by a multiplicity of acts. In the political sense, the State must promote or encourage such acts, or deliberately refrain from acting to prevent them."[84]

109. Latin American domestic courts have given two types of decisions on the statute of limitations in the context of enforced disappearances. The first is based on the definition of crimes against humanity and asserts that if the crime of enforced disappearance is systematic or widespread, it is not subject to the statute of limitations. The second is the interpretation of the crime of abduction (or kidnapping), which already existed in domestic law, as a permanent or continuous crime, thus the time limit for the statute of limitations cannot expire before the termination of the act of abduction.

110. This interpretation is fully compatible with the definition of continuous crimes in article 66 of the Turkish Penal Code and the definition of the crime of deprivation of liberty, which is continuous unless the fate or whereabouts of the victim become evident, under article 109 of the Turkish Penal Code.

111. The Supreme Court of Chile, on enforced disappearance as a continuous crime states the following:

"[…]This Court [...] deems it necessary to point out that, while the notion of a permanent crime comes from the doctrine, inasmuch as it is not explicitly set out in any precept of our positive law, it is also true that in the classification of offenses only certain exceptional cases [...] are described specifically in the law. The vast majority of crimes are based instead on the various rules derived from the Criminal Code itself, such as a legally protected value or the structure of the criminal definitions set out in the special part. Hence, the distinction between instantaneous and permanent offenses lies in the fact that the legally protected value in the latter case can be harmed over prolonged period and the actions described in the criminal definition are specifically intended to produce that progressive breakdown. If the crime is consummated in a single instant—that is, if the process of commitment, which culminates in the completion of all of the defining components of the crime, is over within a single, defined moment—then we would be dealing with an instantaneous crime. [...] Conversely, in permanent crimes the moment of consummation is prolonged over time. In such cases, there is still a particular moment in which the criminal behavior is completed, but the latter gives rise to a status or situation that may become prolonged over time, which

[84] Appeal motion (Case Mojica Cruz Flores) - Case 636- E, MP . Aníbal Salas Cespedes, Supreme Court , Panama, January 26, 2007 .

renders the behavior continuous. Such is the case with kidnapping: the agent confines his victim, thereby completing the criminal act, but that is only the beginning of a continuous confinement, which may last for a longer or shorter period at the will of the perpetrator."[85]

112. It should be noted that the jurists in Chile started to use the interpretation of **continuous kidnapping** during the era of civil government that was elected by the first free election 17 years after the military coup that was staged in 1978 and led to all of these gross human rights violations. However the jurists, who adopted the interpretation of continuous kidnapping on the crime of enforced disappearance, thought that they could use the logic of law of the repressive state against itself. "Unfortunately the public prosecutors, who have used this argument to break the cycle of impunity, were dismissed or forced to neutralize in the early 1990's. […] Nevertheless, after nearly 10 years, the interpretation of **continuous kidnapping** became a current issue again, surprisingly. […] While the young public prosecutors and judges, who do not have personal ties with the era of dictatorship, have started to give some thought to the human rights cases much more severely, the senior generation were uncomfortable. One of them was Judge Juan Guzmán, who has supported the Pinochet regime in the past.

It was much debated what motivated Guzmán, known as a bien-pensant judge, in 1999; even a documentary film was shot about him for the American PBS television, called "The Judge and General". Whatever the reason was, the cases filed by Guzmán led to very serious transformation. His first target was the gang of Caravan of Death (*Caravana de la Muerte*), which formed right after the military coup and destroyed the bodies of the opponents after murdering them in different cities by the order of Pinochet. The argument of **contentious kidnapping**, which was perceived as 'raving' 10 years ago, was the fundamental legal basis of these cases."[86]

113. The Supreme Court of Venezuela, on the continuous character of the crime of abduction (or kidnapping) states the following:

"[…] Article 17 of the Declaration on the Protection of All Persons from Enforced Disappearances stipulates that ***any act constituting enforced disappearance shall be considered a permanent or continuous offense*** *as long as the perpetrators continue to conceal the fate and the whereabouts of the persons who have disappeared and these facts have not been clarified.*

[85] Case of Miguel Angel Sandoval (Juan Miguel Contreras Sepulveda, et al.) - No. 517-04, Supreme Court, Chile Criminal Division, November 17, 2004.
[86] Onur Bakıner, "Devam Eden Bir Suç Olarak Zorla Kaybedilme Suçu: Şili Örneği," [Enforced Disappearance as a Continuous Crime: Chile Example], Failibelli -blog for monitoring human rights cases, <http://failibelli.org/yorum-analiz/devam-eden-bir-suc-olarak-zorla-kaybedilme-sucu-sili-ornegi/> 2014.

[…] according to criminal doctrine, permanent or continuous crimes "are those in which the perpetrator's actions are prolonged over time, so that the consummative process persists until such time as it is ended either by the decision of the agent, or as a result of actions taken by the victim, or due to circumstances beyond the control of the protagonists of the action".

Permanent or continuous crimes "entail the prolongation of an antijuridical situation for a specific period of time at the will of the perpetrator (...); this prolongation perpetuates the crime, which continues to be consummated until the perpetrator desists from the antijuridical situation".

Permanent or continuous crimes include kidnapping, abduction, and forced disappearance of persons, inter alia, inasmuch as in all of these cases the consummative process is prolonged over the time period in which the victim remains deprived of his freedom."[87]

CONCLUSION

The opinion of the signatory non-governmental organizations submitting *amicus curiae* is as follows:

114. Taking into account the allegation that the inquiry initiated for the investigation of the fate of the forcibly disappeared Hasan Gülünay, it has been determined that the closing of the investigation on the basis of the statute of limitation constitutes a breach of Articles 3, 17 and 19 of the Constitution of the Republic of Turkey, Articles 2, 3, 5 and 15 of the European Convention of Human Rights, Articles 2, 4, 6, 9, 10, 14, 16 and 26 of the International Covenant on Civil and Political Rights, Articles 3, 5 and 8 of the Universal Declaration of Human Rights and all other positive/negative obligations based on domestic and international legal norms set forth in this opinion.

115. It has also been determined that, in the event of a verdict of breach, in order to eliminate the outcomes of the breach, the verdict based on the statute of limitations must be referred back to the Public Prosecutor for it to be lifted and for the inquiry to be re-initiated, and all manners of reparation must be provided to relatives of the victims to compensate for the anguish they have had to endure.

[87] Review motion (Case Monasteries Marco Antonio Perez) (Casimiro José Yáñez) – Case 1747, Case 06-1656, MP . Carmen Zuleta de Merchan, Supreme Court, Chile, August 10, 2007.

116. It has further been determined that the obligation to investigate the phenomenon of enforced disappearance as a continuous human rights violation will continue until the conditions under which the victim was disappeared, his or her fate and his or her whereabouts are brought to light, and that the statute of limitations cannot be applied under such circumstances.

117. It has again been determined, since the crime of enforced disappearance is not defined in domestic law, that in accordance with the regulation regarding the crime of 'deprivation of freedom' in Article 109 of the Turkish Penal Code the status of disappearance will continue uninterruptedly until the location and fate of the victim is known.

118. It has also been determined that, in the event that the interpretation of continuous crime is not accepted, in line with the jurisprudence of the European Court of Human Rights, taking into account that in the context of the crime of enforced disappearance, the presumption of death is ruled on according to the length of time lapsed since the event, the duration subject to the statute of limitations need begin at the date when the declaration for a legal presumption of death was made.

119. It has also been determined that, taking into account that in the period from 1990 to 2000, enforced disappearance and illegal arbitrary executions were widespread administrative practices, there is a strong possibility that the crime subject to individual application was carried out by public officials and/or related people and groups as part of a systematic and/or widespread implementation, and therefore the crime subject to application should be treated, in line with domestic and international legal regulations and jurisprudence within the scope of crimes against humanity.

120. It has also been determined that, even though the concept of crime against humanity was not defined in domestic law, the crime was foreseeable in view of the general sources of international law and customary law, and that it should be investigated in accordance with Article 7/2 of the European Convention of Human Rights, and Article 15/2 of the International Covenant on Civil and Political Rights that introduce an exception to the principal of legality in line with the general principles of law.

121. In this respect, it has also been determined that, even if the crime was committed at a time when there existed no related regulation in domestic law, that the statute of limitations cannot be entered into force in the investigation of crimes within the scope of crimes against humanity.

122. It has also been determined that, in the event that the principal of legality is interpreted in favour of the suspects, in accordance with the 1982 Constitution and the State of Emergency Law, suspension of prescription shall be applied for the period between 12 September 1980

and 12 September 2010, when there was no opportunity to take legal action and an effective remedy was not available.

123. As distinguished from all the rights the state is obliged to guarantee, in the context of the right to the truth of both victims and relatives of victims of human rights violations, and also the society of Turkey as a whole, independently of the violations listed above and elimination methods regarding these violations and their consequences, it has been determined that the State of the Republic of Turkey has an obligation to bring to light all the circumstances related to the enforced disappearance of Hakan Gülünay, his fate and the location of his remains, and to shed light on all perpetrators or those responsible who have carried out this gross human rights violation, or may have colluded in, or overlooked it.

In conclusion, it is the opinion of the signatory non-governmental organizations that the verdict based on the statute of limitations must be lifted, that the investigation must be re-initiated, and that the material truth that will thus emerge must be shared with the applicant and the public.

With our highest regards,

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