ANKARA BAR ASSOCIATION HUMAN RIGHTS CENTER

Joint Monitoring Report

Applicants **:** Sümeyye YILMAZ, Fatma Betül ZEYBEK, Aycan KAYA, Zehra Genç TÜRKMEN, Nilüfer IRMAK, Mikail UGAN, Nuray TUNÇ
Application No **:** 1-7/2019
Subject **:** Enforced Disappearance

I. FACTS

A. Introduction and Procedures

1. Sümeyye Yılmaz, Fatma Betül Zeybek, Aycan Kaya, Zehra Genç Türkmen, Nilüfer Irmak, Mikail Ugan, and Nuray Tunç filed applications with the Human Rights Center of the Ankara Bar Association on 25.04.2019, 03.05.2019, 13.05.2019, 17.05.2019, 24.05.2019, 14.05.2019, and 29.08.2019 respectively, and lawyers that are member to the Human Rights Center of the Ankara Bar Association recorded these applications.

2. Pursuant to Article 5/1/a of the Directive of the Human Rights Center of the Ankara Bar Association, when the Center receives an application on violation of human rights, it conducts a preliminary review of these applications, and upon receiving approval of the Board of Directors of the Ankara Bar Association related to applications that are in its purview, takes relevant decisions and actions.

3. The preliminary review has revealed that the allegation of enforced disappearance under the knowledge and authorization of public officers indicates a structural problem, and these applications in fact play a critical role in the fight given to protect human rights since it is possible that the right to live and prohibition on ill-treatment might have been violated. Therefore, Human Rights Center of the Ankara Bar Association determined that these applications are in its purview.

4. The Board of Directors of the Ankara Bar Association decided on 22.05.2019 that necessary inquiries should be made on Sümeyye Yılmaz's application and a report should be issued. The Human Rights Center of the Ankara Bar Association issued the report on 14.06.2019 and submitted and published the report on 27.06.2019.

5. Following the developments that occurred upon finding six of the relatives of the applicants, the Human Rights Center decided to consolidate similar applications of Fatma Betül Zeybek, Aycan Kaya, Zehra Genç Türkmen, Nilüfer Irmak, Mikail Ugan, Nuray Tunç and to issue a joint monitoring report.

B. Summary of Applications

6. Applicant Sümeyye Yılmaz applied to our Center stating that her husband Mustafa Yılmaz was abducted by unknown people when he was going to work on 19.02.2019, and according to a camera footage she got hold of, her husband was forced to get on a black Transporter, and taken away by these unknown people. Mustafa Yılmaz worked as a physiotherapist in a private healthcare organization, and a 6 year 3 month prison sentence given by the 32nd High Criminal Court in Ankara against Yılmaz on charges of being a member of FETÖ/PDY was pending an appeal review. The applicant stated that she was called by the police at 23.30 on 22.10.2019, and informed that her husband was at the Karapürçek Police Station.

7. Applicant Fatma Betül Zeybek applied to our Center stating that when she, her husband Salim Zeybek and their children were driving on Edirne highway towards Havsa toll stations on Thursday 21.02.2019, a Dacia Duster cut them off trying to stop them, and the driver of their car did not stop, and started quickly to drive on the opposite direction, and they crashed into the traffic island and the cars coming from the opposite direction, and when their car was heavily damaged, their driver told them to "Run away", and they started running without any idea on what was going on, and heard a few shots behind them, and individuals, who were armed, and introduced themselves as police officers in plain clothes, made her husband Salim Zeybek lay on the ground first, and then put him in a car, whereas she and her children were put in another car, and these individuals, who hid their faces, left her and the children in front of their home in Ankara, and her husband Salim Zeybek was abducted by these unknown individuals by a car, and she had not heard from her since that date. It was determined that Salim Zeybek was a suspect in the investigation file no. 2017/69394 of the Chief Public Prosecutor's Office in Ankara, and an arrest warrant has been issued against him on allegations of being a FETÖ/PDY member. On 28.07.2019, the police reported that Salim Zeybek was in detention at the Anti-Terrorism Department in Ankara, and he was caught during a criminal record check when he was walking to the police station to surrender. The applicant stated that after her husband was found, she was not allowed to meet his counsels that he selected at the Anti-Terrorism Department in Ankara, and her requests to have her husband examined by an independent physician were denied, and no written document was given stating that these requests were denied, and she visited her husband at the Anti-Terrorism Department in the company of police officers, and when she asked about what has happened in the past six months, the police officers intervened, and her husband, who always wore his eyeglasses normally, was not wearing them this time, and lost a significant amount of weight, and was unable to maintain his balance while sitting, and her husband remained in detention for 12 days, and he was not brought before a judge for extending his the detention, and her husband told her not to wait for him in front of the courthouse, and refused to meet the counsel she selected, and another counsel was following the procedures, but she did not contact this counsel, who did not even call her for his fees, and the prosecutor's office denied her request for a medical examination by an independent physician, but she was not given a document including such decision to deny her request.

8. Applicant Aycan Kaya applied to our Center through her lawyer stating that unknown individuals abducted her husband Özgür Kaya on 13.02.2019. There were almost forty people, who were heavily armed and introduced themselves as police officers, and they were dressed in plain clothes and wearing vests on which letters TEM (Anti-Terrorism) was written. Many neighbors witnessed his abduction. The applicant stated that her husband was working as a teacher in a private institution connected to Gülen movement, and he voluntarily left home, when a search was made in September 2016 in the house he was residing with his family. The applicant stated that at the time of taking him into custody in Ankara, which could not be confirmed officially later, the individuals, who introduced themselves as police officers gave an investigation number of the Chief Public Prosecutor's Office in Ankara to those who were present there, and she was also taken into custody as part of the same investigation a short period before the abduction, and when she was in detention, she was asked whereabouts of her husband. On 28.07.2019, the police informed the applicant that Özgür Kaya was detained at the Anti-Terrorism Department in Ankara, and he was caught during a criminal record check when he was walking to the police station to surrender. The applicant stated that after her husband was found, she visited him for almost half an hour at the Anti-Terrorism Department in Ankara in the company of police officers, and her husband

lost too much weight, and asked her to withdraw her applications, shut down her social media accounts, and not to meet deputies. She also stated that her husband remained in detention for 12 days, and at the end of the fourth day, she waited at the court house until 20.00 thinking that he would be brought before a judge for extension of his detention, but no one came, and her husband did not want to meet the counsel she found, and told her that he found a counsel at the police station as a coincidence, and her request for medical examination of her husband by an independent physician when he was brought to the courthouse from detention, was denied, and after her husband was arrested, she could visit her husband in the prison in the company of guardians, and she did not talk to her husband's counsel after the arrest.

9. Applicant Zehra Genç Türkmen applied to our Center stating that her husband Gökhan Türkmen left his family's home in Antalya on 07.02.2019, and no one heard from him since then. In the application it is stated that Gökhan Türkmen was working for the Agricultural and Rural Development Support Authority, and his employment contract was terminated on 21.07.2016 on allegations that he was a FETÖ/PYD member. In the application it is also stated that police officers from the Special Forces Department searched Gökhan Türkmen's house in August 2017, and the applicant was notified that there was an arrest warrant against Gökhan Türkmen, and he was not taken into custody since he was not at home, and he did not surrender later. On 5 November 2019, the police informed the applicant that he was at the Antalya Police Department.

10. Applicant Nilüfer Irmak stated that three individuals in plain clothes abducted her husband Erkan Irmak on 16.02.2019. Her husband was cornered at a turning point very close to İstiklal Secondary School, which was close to their home, and two of the abductors came from his behind, and the third one came in front of him, to corner him. The investigation of the Chief Public Prosecutor's Office in Ankara into Erkan Irmak on allegations of being a FETÖ/PYD member continued when he was missing. There was an arrest warrant against Erkan Irmak when he was missing. On 28.07.2019, the police informed the applicant that Erkan Irmak was in detention at the Anti-Terrorism Department in Ankara, and he was caught during a criminal record check when he was walking to the police station to surrender. The applicant stated that after her husband was found, she visited him for almost half an hour at the Anti-Terrorism Department in Ankara in the company of a police officer, her husband lost almost 15 kilos, and remained in detention for 12 days, and was not examined by an independent physician, and she visited him twice in the company of officers in the prison after he was arrested, and there were cameras in the room where they met.

11. Applicant Mikail Ugan applied to our Center on 14.05.2019 stating that his brother Yasin Ugan was taken into custody at around 15.00-16.00 on 13.02.2019 from a house in Çamlık neighborhood in Altındağ District, by armed individuals, who introduced themselves as police officers in plain clothes, and a black plastic bag was placed on his head, and these individuals claimed that there was a pending investigation before the prosecutor's office, and although they went to all units of the police department and the prosecutor's office, they could not learn where his brother was detained, therefore he was concerned that his brother was abducted and tortured, and worried about his life. The applicant stated that his abducted brother was an accountant working in the private sector. On 28.07.2019, the police informed the applicant that Yasin Ugan was detained at the Anti-Terrorism Department in Ankara, and he was caught during a criminal record check when he was walking to the police station to surrender. Applicant Selda Ugan stated that after her husband was found, she visited him for almost half an hour at the Anti-Terrorism Department in Ankara in the company of police

officers in plain clothes, and her husband lost too much weight, and he seemed too pale, and her husband remained in detention for 12 days, and she waited with their counsel at the courthouse at the end of the fourth day of detention, but her husband was not taken to a judge, and another counsel was present when her husband was giving his testimony, and she learned from a news site that her husband hired that counsel while he was at the police department as a coincidence, and this counsel refused to meet her, and her husband told her that this counsel should follow the procedures, and her husband was not examined by an independent physician, and after her husband was arrested, she visited him at the prison, in the company of officers, and there were cameras in the room.

12. Applicant Nuray Tunç applied to our Center on 29.08.2019 stating that she did not hear from her husband since 06.08.2019, and she was concerned that her husband could have been abducted, because of the reports on similar disappearances. Yusuf Bilge Tunç was working as a Financial Services Expert at the Undersecretariat of Defense Industry, and he was removed from public office with the Decree Law No. 675 issued in the Official Journal of 29 October 2016. There are two investigations conducted against him by the Chief Public Prosecutor's Office in Ankara, one of them is on suspicions of being a FETÖ/PDY member and the other is related to leakage of (Public Personnel Selection Examination (KPSS) questions. It is stated that after being removed from office with the Decree Law, Yusuf Bilge Tunç tried to make his livelihood by selling packaging products to wet markets and restaurants. No one has heard from Yusuf Bilge Tunç yet.

C. Application Documents

13. Upon review of the application documents, it has been determined that the applicants had applied to Police Centers, Chief Public Prosecutor Offices, the Constitutional Court, the Ombudsman's Office, the Office on Missing and Wanted Persons at the Police Department, Governor's Office, the Turkish Parliament's Committee on petitions, the Ministry of Interior, General Directorate of International Law and Foreign Relations, the Office on Human Rights at the Police Headquarters, the Office on Reviewing Human Rights Violations at the Civil Inspection Board, the Turkish Human Rights and Equality Authority, the Ministry of Health and General Directorate of Public Hospitals, Assistant General Manager's Office responsible for European Council and Human Rights, the Office on Human Rights and Gendarmerie Headquarters, and the Presidential Communication Center (CİMER).

14. The applicants had also applied to the Human Rights Association, the UN Working Group on Enforced or Involuntary Disappearances, the Human Rights Office of the Turkish Medical Association, the Human Rights Center of the Turkish Bar Association, the Human Rights Commission of Ankara Chamber of Medicine, and the International Amnesty Organization.

15. The European Court of Human Rights notified applications of applicants Sümeyye Yılmaz, Fatma Betül Zeybek, Aycan Kaya, Nilüfer Irmak and Mikail Ugan to the government.[1]

D. Applications of Applicants Filed with Other Authorities

Yılmaz :

[1] Yılmaz v. Turkey, Application no. 30957/19, 06/09/2019, Zeybek and Others v. Turkey, Application no. 21330/19, 30/04/2019, Kaya and Others v. Turkey, Application no. 14443/19, 09.04.2019, Irmak and Others v. Turkey, Application no. 18036/19, 09/04/2019, Ugan v. Turkey, Application no. 26429/19, 28/08/2019

16. The Office on Missing and Wanted Persons at the Police Department reported that they had camera footage of a metro station, but this footage was not included in the investigation file. The Chief Public Prosecutor's Office in Ankara made a decision on 09/03/2019 with no. 2019/27773 in the investigation no. 2019/32930 and decided that there was no need to prosecute because there was no evidence which demonstrated that Mustafa Yılmaz was abducted or constrained, and the applicant filed an objection with the 5th Criminal Court of Peace in Ankara. The 5th Criminal Court of Peace in Ankara accepted the objection of the applicant with its decision of 30.04.2019, and returned the decision to the Chief Public Prosecutor's Office in Ankara. In another investigation with no. 2019/90003, the Chief Public Prosecutor's Office in Ankara decided that there was no need to prosecute because the missing person was not a minor, and left home on his own will.

17. Legal applications of the applicant were inconclusive, and although the applicant requested, no enquiries were made in the investigation into metro camera recordings, city surveillance camera recordings, HTS, Base, Signal and GPRS recordings. The applicant determined that the camera footage displayed to the applicant by the Office on Missing and Wanted Persons at the Police Department belonged to another day, not the day her husband disappeared, because the reading hours of the transportation card and the camera footage did not match.

18. The applicant's application filed with the Constitutional Court on 30.04.2019 with no. 2019/13374 requesting an injunction was also dismissed.

Zeybek :

19. Edirne Provincial Directorate of Security stated that no event described in the application has occurred in its purview, and no proceedings were launched against the husband of the applicant, whereas, Edirne Governor's Office Provincial Gendarmerie Command stated that this event has not occurred, and the General Directorate of Security stated that they did not find any missing person application when they made enquiries into the Smuggling and Intelligence Unit (KİHBİ), National Judiciary Informatics System (UYAP), and Law Enforcement Procedures Project (EKİP PROJE). The applicant filed a criminal complaint with the Ankara Chief Public Prosecutor's Office on 25.02.2019 alleging that the perpetrators committed offences of deprivation of liberty and armed threat. On 25.02.2019, the applicant testified before the Public Prosecutor's Office on Duty in the Ankara Courthouse. The applicant requested the prosecutor's office to determine the owner and driver of the car that brought her and their children to Ankara giving the plate number of this car; and to ask 155, 156, and 112 call centers in order to learn whether a call was made related to a "car driving on the opposite direction" between 18.00 and 21.00 on 21.02.2019, to identify the reports on accidents that occurred on that route on the given date, and to determine public officers that emitted signals at base stations on the same date and at the same time, but these requests were not met. Although the applicant stated that she wanted to testify before the prosecutor conducting the relevant investigation, review of the documents demonstrated that she has not been asked to testify until today. On 05.04.2019, the applicant filed an application with the Constitutional Court requesting an injunction, and this application was responded on 17.04.2019, stating that there was no need to send the application to the relevant unit for evaluation of the request for injunction, and admissibility of the application would be evaluated separately.

Kaya :

20. The applicant stated that when she went to the police, she was told that her husband was not in detention, but fled abroad. When the applicant filed a criminal complaint, the Chief Public Prosecutor's Office in Ankara launched an investigation into the abduction on 16.02.2019 (hereinafter "initial investigation"). When the applicant sent letters to the Ministry of Interior and the Turkish Parliament Human Rights Investigation Commission, Deputies Sezgin Tanrıkulu and Ömer Faruk Gergerlioğlu submitted written questions to the Turkish Parliament Human Rights Investigation Commission.

21. On 27.02.2019, the applicant requested the Chief Public Prosecutor's Office in Ankara via her lawyer to have testimony of eyewitnesses, and collect security camera recordings. The Chief Public Prosecutor's Office in Ankara issued a written order to the police, asking the police to make certain enquiries, but when no reply was given, and this request was repeated on 15.03.2019 and 27.03.2019.

22. On 26.02.2019, the applicant filed an individual application with the Constitutional Court, seeking an injunction, and this application was dismissed on 14.03.2019 on grounds that the public prosecutor's office was dealing with this event, the relevant police units were working on the case, and evidence was being collected.

23. On 18.02.2019, the applicant applied to CİMER and upon this application, her statement was taken at the Şentepe Şehit Cevdet Yeşilay Police Station on 12.03.2019.

24. On 24.05.2019, the Legal Affairs Unit in Ankara Governor's Office, wrote letters to Ankara Provincial Security Directorate and the Public Prosecutor's Office in Ankara in response to the application filed by the applicant on 21.05.2019, and requested these authorities to make necessary enquiries and examinations and to inform Ankara Governor's Office for the issue to be discussed at Provincial Human Rights Board.

25. The initial investigation file was joined with the second investigation, which is still conducted by the Chief Public Prosecutor's Office in Ankara, where Özgür KAYA is a suspect. Since there is a confidentiality order in this second investigation file, the applicant has not been able to learn anything on the actions taken to find the missing person after the decision to join the files, and the Chief Public Prosecutor's Office in Ankara has not informed the applicant.

Türkmen :

26. The applicant stated that Gökhan Türkmen's father went to Antalya Varsak Polic Station on 12 February for the first time, and he testified there, and later, police officers coming to their house from the Anti-Terrorism Department took his statement once more, and the police officers told them that the car registered to her husband was seen in Ulus, Ankara 10 days ago through city surveillance cameras. The applicant stated that this was impossible, because this car was in their house's garage for the last two years.

27. The Chief Public Prosecutor's Office in Antalya launched an investigation into this missing person case (hereinafter "initial investigation"), and decided on 26.02.2019 that Office on Missing and Wanted Persons, Public Security Branch Office at Ankara Provincial Security Directorate were handling procedures related to Gökhan Türkmen, and it was not necessary to prosecute since there was no criminal element.

28. Zehra Genç Türkmen, who applied to the General Directorate of Prisons and Detention Houses, Ministry of Justice, also applied to CİMER and asked whether the missing person was in any penal institution, and on 14.03.2019, she was informed that an enquiry was made

into the records of convicts and detainees in the National Judiciary Informatics System, and Gökhan Türkmen's name was not found in these records.

29. The Chief Public Prosecutor's Office in Kayseri launched an investigation, after the applicant applied to CİMER (hereinafter "second investigation"), and decided on 20.03.2019 that "if Gökhan Türkmen was a victim of any offense, an investigation could be conducted upon his complaint."

30. On 27.03.2019, the Chief Public Prosecutor's Office in Antalya reviewed the initial investigation documentation, and reentered the investigation into records in order to deepen the investigation, and to summon telephone records and historical traffic search entries. Letters were sent to the Preparation Office of the Chief Public Prosecutor's Office in Antalya, and Antalya Varsak Police Station to make necessary enquiries, to allow examination of historical traffic search records, and to interview the family of the applicant's spouse.

31. On 04.04.2019, Zehra Genç Türkmen testified at Kayseri Melikgazi Police Station and stated that on 07.03.2019 at 02.34, three messages were sent to the Twitter account she opened for her husband Gökhan Türkmen on the phone she was using: "He cannot die before he answers with whom he shared the data he stole from the state and did not belong him. He is looking at me begging, like a sewer rat squeezed under a manhole cover. If he does not reply the questions with supplementing evidence he will suffer and be destroyed", "Ok", "He is secure now." She also stated that this account called "15 Temmuz @vforvendetta TUR" was than renamed as "NÖBET@nobetdizisi7_24". She stated that she believed that individual or individuals using this account abducted her husband, and therefore, she was complaining them. She also stated that when she checked the accounts once more, she noticed that these accounts were no longer in use.

32. On 07.05.2019, the Chief Public Prosecutor's Office in Antalya contacted the Chief Public Prosecutor's Office in Kayseri and asked to contact applicant Zehra Genç Türkmen to have her witness statement, to ask whether she contacted the victim, and whether the victim has called her, and wanted to be informed on the developments, later, the applicant gave her testimony once more.

33. On 05.03.2019 Zehra Genç Türkmen applied to Ombudsman's Office with no 2019/54540, and this application was dismissed and "Ineligible for Review" decision was made on 02.05.2019 with no. 2019/1671-S.2507.

Irmak :

34. The application filed with the İstanbul Governor's Office on 02.02.2019 with registration no. 63800 was not replied, and in response to the application filed with CİMER with no. 1900532752 was replied by Ümraniye District Security Department on 07.03.2019 as follows "you will be informed if you personally apply to competent authorities related to confidential aspects of your application."

35. Counsel to the applicant filed a request to receive information on 01.03.2019, under an investigation launched by the Chief Public Prosecutor's Office in İstanbul upon complaint of the applicant, and with this request, the applicant asked the prosecutor's office to review the footage from city surveillance cameras no 046-g-34 umr and 048-g-34 umr that cover the area, where the incident has occurred. On 24.04.2019, the initial investigation file was joined with the investigation, which is still conducted by the Chief Public Prosecutor's Office in Ankara, where Erkan IRMAK is a suspect (hereinafter "second investigation"). Since there is a confidentiality order in this second investigation file, the applicant has not been able to learn

anything on the actions taken to find the missing person after the decision to join the files was taken, and the Chief Public Prosecutor's Office in Ankara has not informed the applicant.

36. On 11.03.2019, the counsel to the applicant filed an individual application with the Constitutional Court, seeking an injunction, and this application was dismissed on 26.03.2019 on grounds that the investigation was pending and there was no need for an injunction.

37. On 02.04.2019, an application was filed with the European Court of Human Rights, seeking an injunction, and on 11.04.2019, the Court notified that an injunction was not issued, and this case would be given priority according to Article 41 of the internal directive of the ECtHR. Furthermore, the application was notified to the Government on 10.04.2019. The application filed with the UN Working Group on Enforced or Involuntary Disappearance has not been replied yet.

38. Deputy Ömer Faruk Gergerlioğlu brought the abduction case to the Parliament, and submitted a parliamentary question, asking Vice President Fuat Oktay to answer this question.

Ugan :

39. In response to the application filed with CİMER, on 27.03.2019 the Altıntağ District Security Directorate replied as follows: "The inquiry made by Hüseyingazi Şehit İdris Aydın Police Center revealed that Yasin Ugan is not in prison, and he is not detained at any police department that he could have been detained". Also, on 02.04.2019, the Gölbaşı District Security Directorate replied as follows: "Anti-Terrorism Department – Security Office has not performed any judicial proceedings involving Yasin Ugan". When the Human Rights Association wrote to the Ministry of Interior, the Ministry of Interior replied as follows on 20.03.2019 related to allegations of enforced disappearance of Yasin Ugan and Özgür Kaya: "No missing person application has been found when enquiries were made into the Smuggling and Intelligence Unit (KİHBİ), National Judiciary Informatics System (UYAP), and Law Enforcement Procedures Project (Ekip Proje)." The Ombudsman's Office issued an "Ineligible for Review" decision on 05.04.2019. Under the initial investigation file, the Chief Public Prosecutor's Office in Ankara wrote a letter on 22.02.2019 to the Anti-Terrorism Department in Ankara Security Directorate and asked "to notify whether Yasin Ugan was in detention, and to send a copy of the notice informing his next-of-kin, if this was the case." This letter has not been replied. The initial investigation file was joined with the second investigation file against Yasin Ugan related to FETÖ/PDY structure within National Intelligence Organization, and the applicant was not asked to testify again. The Constitutional Court dismissed the request for an injunction on 20.03.2019 with no. 2019/8172 on grounds that the investigation was still continuing.

Tunç :

40. The Chief Public Prosecutor's Office in Ankara received Nuray Tunç's application on 08.08.2019, and issued an investigation number, however, did not assign a prosecutor for a long period of time, and after the applicant followed up the issue persistently, they wrote a letter on 19.08.2019 to the Office on Missing Persons, asking them to make an enquiry about Yusuf Bilge Tunç, but city surveillance camera recordings were not examined.

41. The applicant and relatives of the missing person filed a criminal complaint with the Chief Public Prosecutor's Office in Ankara on 12.08.2019, and requested an enquiry into the car, as well as into the camera footage, and the Chief Public Prosecutor's Office in Ankara issued an investigation number but did not take any action regarding this request. On 04.09.2019, the counsel to the applicant requested the Chief Public Prosecutor's Office in

Ankara to conduct a survey in the area, to identify camera footage/pictures, examine all the footage from the city surveillance cameras, OTS, KGYS, private business on the route, to look into location of the missing person using his telephone number, and to identify public officers who emitted signal from the same base station, however, no action was taken in response to this request.

42. Above-mentioned investigation files, including the file of the Chief Public Prosecutor's Office in Ankara containing the missing person application were joined with the investigation file of the Chief Public Prosecutor's Office in Ankara, where Yusuf Bilge Tunç is a suspected FETÖ/PDY member. On 09.08.2019, the applicant applied to CİMER, but could not receive any response. On 21.08.2019, a criminal complaint was filed with the Judges and Prosecutors Board against the prosecutor and law enforcement officers who did not conduct an effective investigation, but no action has been taken related to this complaint. No decision has yet been made related to the individual application and request for an emergency injunction that had been filed with the Constitutional Court.

E. Minutes of Meeting of Human Rights Center of Ankara Bar Association

43. Members of the Human Rights Center of the Ankara Bar Association went to the Anti-Terrorism Department in Ankara to visit relatives of the six applicants, who appeared and were detained at different times. Law enforcement officers and the prosecutor's office did not allow our members to visit detained relatives of the applicants.

44. On 27.08.2019, members of the Human Rights Center of the Ankara Bar Association went to Sincan No 1. Type F Closed Penitentiary Institution to visit detained Erkan Irmak, Yasin Ugan, Özgür Kaya an Salim Zeybek. Guardians told that Erkan Irmak, Yasin Ugan, and Özgür Kaya did not want to meet the lawyers, who are members of the center. The meeting of the members of the Center with Salim Zeybek was recorded by a camera, and there was a guardian in the room during the interview. Zeybek stated that he was not missing during the time when no one heard from him; he did not feel the need to call his relatives, he received legal assistance, was examined by a physician, and was not subject to torture and ill treatment and his statements were recorded in the form of minutes. Members of the center were asked to deliver the original of the minutes of the meeting without any court order, but the members explained that it would be unlawful to deliver the original minutes of the meeting without a court order. Then prison officers threatened and treated the members unlawfully, and the minutes of the meeting including statements of Zeybek were taken from them by force. Ankara Bar Association filed a complaint against these officers.

F. General Findings related to Missing Person Applications

45. It is important to note some common features of the above-summarized 7 applications that were filed with our Center.

46. Relatives of the applicants remained missing for minimum 5 months, maximum 9 months. Yusuf Bilge Tunç, the husband of the last applicant Nuray Tunç was still missing at the time of writing this report. Applicants filed applications with numerous authorities for their missing relatives but all of these applications remained inconclusive.

47. Relatives of six applicants were found after the application. It is interesting that all of these individuals appeared in police units, and four of them allegedly were caught during a criminal record check, when they were going to a police station to surrender. Individuals, who

were missing for months, are stated to have surrendered to security forces without informing their families.

48. All the applications describe detention processes in the same way. The statements of the applicants related to their relatives' physical condition, are also very similar. None of the applicants had to opportunity to see their relatives alone, and there was always at least one police officer present during their visits. It is also indicated that when they visited their relatives after the arrest these visits were recorded.

49. All the applicants stated that their relatives did not want the counsel brought by their families, and they wanted all the applications to be withdrawn. Moreover, the applicants stated that they did not meet the private counsels that their spouses have found as a coincidence, and the counsels that were appointed under the Code of Criminal Procedure system.

50. The applicants do not have reliable information on whether their relatives were examined by a physician when they were in detention. Although the detained individuals persistently stated that they would not claim they were subject to torture and ill treatment, in none of these cases, these statements were made to their families or private counsels in an environment, out of hearing and sight of others.

51. The fact that individuals who are still under investigation on suspicions of being FETÖ/PYD members appeared at a police station after remaining missing for more than six months, and stated that they did not want any counsel, other than those shown to them at the police station, strengthens the suspicion that they made their statements under duress. Given that relatives of the applicants have not communicated with the external world where the camera or sound recorders were not used and there were no law enforcement officers, the truthfulness of their statements should be approached with suspicion.

II. LEGAL STANDARDS TO BE APPLIED TO ENFORCED DISAPPEARANCE CASES

52. Turkey is not a party to the International Convention for Protection of All Persons from Enforced Disappearance [2] (ICCPED) of the UN. However, international legal standards for protection of all persons from enforced disappearance are regulated in customary law in addition to general and specific international conventions, and these standards are binding on Turkey. Humanitarian law, human rights law, and international criminal law govern prohibition on enforced disappearance.

53. The International Convention on Civil and Political Rights[3], the European Convention on Human Rights[4], the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [5] where Turkey is a contracting party, as well as the UN

[2] See, http://www.un.org.tr/humanrights/images/pdf/butun-kisilerin-zorla-kaybedilmeden-korunmasina-dair-uluslararasi-sozlesme.pdf , the most recent access 13.01.2020.
[3] See, Official Journal dated 21/07/2003 and numbered 25175.
[4] See, Official Journal dated 19/03/1954 and numbered 8662.
[5] See, Official Journal dated 10/08/1988 and numbered 1989.

Declaration on Protection of All Persons From Enforced Disappearance[6] lay down obligations of the states and standards related to enforced disappearance.

54. Enforced disappearance; is defined as *"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".*[7]

55. Above definition of enforced disappearance exists in international instruments, particularly in the International Convention for Protection of All Persons from Enforced Disappearance, where Turkey is not a party, as well as in customary law and interpretation of general agreements.

56. Prohibition on enforced disappearance is an absolute prohibition in international law. Pursuant to Article 7 of the 1992 Declaration on Protection of All Persons Against Enforced Disappearance (Declaration), no circumstances whatsoever, whether a threat of war or any other public emergency may be invoked to justify enforced disappearances. Enforced disappearance is a continuous violation, which begins at the time of abduction until the fate of the individual is found out.

57. In fact, an enforced disappearance case is a special type of violation, where multiple human rights violations occur at the same time. The Human Rights Committee (HRC) determined that enforced disappearance violated multiple rights protected under the International Convention on Civil and Political Rights. According to the HRC, enforced disappearance violates the right to liberty and security of a person (Article 9), prohibition on subjecting any person to torture or to cruel, inhuman or degrading treatment or punishment (Article 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person. This act also violates or seriously threatens the right to life (Article 6). [8]

58. Pursuant to the human rights law and the humanitarian law, anyone violating the prohibition on enforced disappearance has to be punished under the criminal law in proportion to the offense. In fact, according to Article 17 of the Declaration, an act constituting enforced disappearance is considered a continuing offense as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared. Enforced disappearance is an offense, where perpetrators cannot benefit from amnesty law or similar measures that may exempt them from criminal sanctions.

59. Violation of prohibition on enforced disappearance may also constitute an international offence in case of existence of certain conditions. According to Article 7.1.i. of the Rome Statute of the International Criminal Court, enforced disappearance of a person is considered a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population. It is possible to say that this rule reflects customary law. In other words, systematic enforced disappearance offense is a crime against humanity in the international criminal law.

[6] See, www.ombudsman.gov.tr/contents/files/312b12--Zorla-Kayip-Edilmeye-Karsi-Herkesin-Korunmasina-Dair-Bildiri.pdf , the most recent access 13.01.2020.
[1] UN International Convention for Protection of All Persons From Enforced Disappearance, Article 2.
[8] Communication No. 950/2000, Sarma v. Sri Lanka, 16 July 2003, para. 9.3.

60. In addition to international conventions which apply as domestic laws, according Article 77 of the Turkish Criminal Court, voluntary manslaughter, malicious injury, torture, deprivation of liberty constitute crimes against humanity when committed systematically as part of a plan against any part of the society with political, philosophical, racial, or religious motives. There is no doubt that enforced disappearance cases, that are not a systematic or widespread attack will be subject to different provisions of the Turkish Criminal Code depending on the circumstances.

A. Obligations of the States related to Enforced Disappearance

1. Obligation to Protect Life

61. When a person disappears under conditions that threatens his or her life, the state has to take operational measures to protect the life of the disappeared person in line with its positive obligation enshrined in Article 2 of the European Convention on Human Rights (ECHR).[9] ECtHR held that if a person had been threated beforehand and the authorities are informed on the next day of abduction, that disappearance has occurred under life threatening conditions.[10] In such case, if the state cannot prevent disappearance of that person, it should take operational measures to protect that person, who may be victim of other criminal acts.[11] In 1992 and 1998, ECtHR decided that enforced disappearance of persons suspected to be linked to PKK is life threatening.[12]

62. Under these circumstances, any negligence displayed by the investigating or supervising authorities in the face of real and imminent threats to an identified individual's life emanating from state agents, such as police, who are acting outside their legal duties, might entail a violation of the positive obligation to protect life. [13] ECtHR concluded that by their failure to act rapidly and decisively, the authorities that are involved had not taken operative measures within the scope of their powers which, judged reasonably, might have been expected to avoid risking the missing man's life.[14]

2. Obligation to conduct an effective investigation

63. As a natural consequence of the absoluteness of the prohibition on enforced disappearance, the obligation of the state to conduct an effective investigation continues as long as the fate of the person is unaccounted for. Enforced disappearance cases are characterized by an ongoing situation of uncertainty and unaccountability. This may be due to lack of information or deliberate concealment of what has occurred. Therefore, in such cases, the obligation of the state to conduct a thorough investigation as long as the fate of the person is unaccounted for. Failure to provide the requisite investigation will be considered as a continuing violation. This is so, even where death may, eventually, be presumed.[15]

---

[9]Koku v. Turkey, Application no. 27305/95, 31/05/2005, §132; Osmanoğlu v. Turkey, Application no. 48804/99, 24/01/2008, §75.

[10]Koku v. Turkey, Application no. 27305/95, 31/05/2005, Osmanoğlu v. Turkey, Application no. 48804/99, 24/01/2008

[11] Koku v. Turkey, Application no. 27305/95, 31/05/2005, §132, Osmanoğlu v. Turkey, Application no .48804/99, 24/01/2008, §76.

[12] Meryem Çelik and Others v. Turkey, Application no. 3598/03, 16/04/2013, §58; Enzile Özdemir v. Turkey, 54169/00, 08/01/2008, §45.

[13] Gongadze v. Ukraine, Application no. 34056/02, 08/11/2005, §170; Turluyeva v. Russia, Application no. 63638/09, 20/06/2013, § 100.

[14] Turluyeva v. Russia, Application no. 63638/09, 20/06/2013, §101

[15] Varnava and Others v. Turkey, Application no .6064/90 16065/90 16066/90 16068/90 16069/90 16070/90 16071/90 16072/90 16073/90, 18/09/2009,§148.

64. The necessity to effectively investigate allegations on violation of right to life also applies to enforced disappearance cases. ECtHR case law sets out four principles on how this obligation should be fulfilled. Accordingly, an effective investigation should have below elements:

a) Independence of investigatory authorities
b) Adequacy
c) Promptness and reasonable expedition of investigations
d) Public scrutiny and participation of the next-of-kin.[16]

65. When there is possibility of violation of right to life and prohibition on torture and ill treatment, the state has the obligation to conduct an effective investigation notwithstanding whether such violation has been committed by public officers. Pursuant to jurisprudence of the ECtHR[17] the obligation of the state to conduct an effective investigation requires the state to uncover the circumstances in which the disappearance has occurred, to find the missing person, to prosecute and if necessary to impose penal sanctions on the perpetrators, and to compensate the damage suffered by relatives of the victim.[18] Authorities conducting the investigation in disappearance cases have to start with a very small amount of evidence, and to look for more evidence to trail the missing person, or to find out his fate.

66. In fact, in the below examples ECtHR has identified how an investigation meeting these standards should be conducted.

67. ECtHR concluded as follows in Mustafa Tunç and Fecire Tunç v. Turkey judgment related to effective investigation obligation: *"The obligation to conduct an effective investigation is an obligation not of result but of means: the authorities must take the reasonable measures available to them to secure evidence concerning the incident at issue. In any event, the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and (...) provides a complete and accurate record of (...).*

175. In particular, the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. "[19]

68. ECtHR concluded as follows in its Ak v. Turkey judgment "*Article 3 of the Convention imposes an obligation on the authorities to conduct an effective investigation to uncover facts and relevant circumstances and to identify and prosecute perpetrators. When natural persons are involved, these obligations apply notwithstanding who the perpetrators are. The obligation to provide an effective investigation implies reasonable promptness and duty of care. Protection mechanisms of the domestic law should be operated in practice in a reasonable period of time allowing conclusion of substantive review of the cases and preventing the perpetrators from enjoying impunity for violent acts. In fact, if the protection mechanisms of the domestic law only exist in theory, the State will not be deemed to have fulfilled its obligation under Article 3 of the Convention: These mechanisms should be*

[16] For detailed information on these obligations See. Osman Doğru (2018), Yaşama Hakkı (Right to Life), (Ankara: Constitutional Court Publications), s. 295-321.
[17] Varnava and Others v. Turkey, Application no 6064/90 16065/90 16066/90 16068/90 16069/90 16070/90 16071/90 16072/90 16073/90, 18/09/2009; Er and Others v. Turkey, Application no. 23016/04, 31/07/2012
[18] Varnava and Others v. Turkey, Application no. 6064/90 16065/90 16066/90 16068/90 16069/90 16070/90 16071/90 16072/90 16073/90, 18/09/2009.
[19] Mustafa Tunç and Fecire Tunç v. Turkey, Application no. 24014/05, 14/04/2015, §173.

functioning effectively particularly in practice, and therefore the case must be reviewed promptly and without undue delay."

69. In G.U. v. Turkey judgment, the duty to provide an investigation is defined as follows: "*In order to consider an investigation effective, it has to be conducted with reasonable care and promptness. In order to prevent giving the impression that any unlawful act is allowed or tolerated and to avoid losing the trust of the public, it is very important for the authorities to act promptly in line with principle of legality*."[20]

70. ECtHR described the obligation to provide an investigation in disappearance cases in more detail in its Osmanoğlu v. Turkey judgment: "*The Court is of the opinion that a number of basic steps could have been taken by the investigating authorities which would have offered a reasonable prospect of success in finding the applicant's son. To that end, the starting point for the prosecutor should have been to obtain more information from the applicant and to question the neighboring shop owners who, the applicant claimed, had witnessed his son being taken away by the two men. In the light of the descriptions given by the applicant, the prosecutor could have made attempts to verify whether the two men who took the applicant's son away were indeed police officers. Furthermore, the Court takes judicial notice of the fact that, during the relevant period, there were a large number of police and gendarmerie checkpoints on the roads in the area, which could have been alerted to be on the lookout for the applicant's son in case he was transported through one of the checkpoints.*

a. *an inspection of the relevant gendarmerie or police headquarters or any other premises to which the applicant's son might have been brought after he had been abducted;*
b. *the making of enquiries and the taking of statements from those in custody in the relevant gendarmerie or police headquarters at the time of the disappearance, in an attempt to establish whether or not the applicant's son had been taken into custody;*
c. *the making of enquiries and the taking of statements from those officers who were on duty on the relevant dates; and*
d. *attempts to secure potential eyewitnesses to the incident.*

As pointed out above, according to Turkish law it is a criminal offence to deprive an individual unlawfully of his or her liberty. Public prosecutors have a duty to investigate offences reported to them. Despite this, the prosecutor in the instant case remained completely and incomprehensibly inactive at a time when many people were being killed in that region of Turkey. By failing to take any steps, neither the prosecutor, nor indeed the Turkish authorities in general, did everything within their power to protect the right to life of the applicant's son after his abduction.

These obligations apply in the same way to cases where individuals disappear under conditions, which can be considered as life threatening. Therefore, the Court concluded that disappearance of the applicant's son can be considered life threatening. Nevertheless, as conceded by the Government themselves, no investigation was carried out into the disappearance of the applicant's son. In this connection, the Court also regrets that the allegations made by Mr Aygan did not spur the Government into action. The Court disagrees with the Government that Mr Aygan's allegations were abstract and unsubstantiated, and is of the view that the specific allegations at issue merited consideration by the domestic authorities. In this connection the Court cannot but remark that a decision not to carry out an investigation into those allegations on the ground that they were "unsubstantiated" reveals

[20] G.U. v. Turkey, Application no. 16143/10, 18/10/2016

an illogical decision-making process, as allegations cannot be found to be unsubstantiated unless they are investigated first. 92. In the light of the total failure to carry out an investigation – which has already given rise to a violation of Article 2 of the Convention in its substantive aspect – the Court concludes that there has also been a violation of Article 2 of the Convention under its procedural limb."[21]

a) Applying the Principles to the Facts

71. It is apparent that Salim Zeybek, who was abducted by armed individuals stopping his car, Özgür KAYA, who was abducted by almost forty heavily armed individuals wearing TEM (Anti-Terrorism Department) vests, Yasin UGAN and other missing persons, who were subject to legal proceedings on suspicions of being a member to a terror organization, disappeared under life threatening conditions. As underlined by the ECtHR in Osmanoğlu v. Turkey judgment, when individuals disappear under life-threatening conditions, the state has the obligation to conduct an effective investigation into the disappearance case. Therefore, even if public officers have not committed the enforced disappearance, disappearance cases that constitute the subject matter of the application must be duly investigated to avoid giving the impression that any unlawful act is allowed or tolerated.

72. The prosecutor's office, that was aware of the disappearances that constitute the subject matter of the applications, has the testimonies of the applicants, and joined investigation files of the missing persons with a FETÖ/PDY membership investigation, which was subject to confidentiality restrictions. It has been determined that the authorities, particularly the prosecutor's office has not provided any information or documents to the applicants or their counsels, demonstrating that below listed actions, which had to be promptly taken, were actually taken as long as the whereabouts of the disappeared persons has not been identified:

- Inspection of the relevant gendarmerie or police headquarters or any other premises to which the individual might have been brought after abducted and attempts to secure potential eyewitnesses to the incident;
- Making of enquiries and the taking of statements from those in custody in the relevant gendarmerie or police headquarters at the time of the disappearance in an attempt to establish whether or not the person had been taken into custody;
- Taking of statements from law enforcement officers who were on duty in the area, where abduction is alleged to have taken place on the relevant dates;
- Making of enquiries related to city surveillance camera recordings and if any, private camera recordings in the area where abduction is alleged to have taken place, collecting and examining footage from these cameras;
- Collecting information on the plate number, model, physical properties of the care alleged to have been used in abduction and making of enquiries to find the owner and why it is used;
- Making enquiries into GPRS records etc. to identify the location;
- Informing other law enforcement units, particularly the national intelligence organization and consulting other units that may be involved;

[21] Osmanoğlu v. Turkey, Application no. 48804/99, 24/01/2008.

- Taking statements of the applicant and relatives and associates of the disappeared person, and assessing any potential risks.

73. Since the applicants were not given any information which would indicate that above listed actions to secure evidence were taken promptly gives the impression that disappearance cases were not investigated effectively. Although six of the disappeared persons were found at different police stations months later, it is still not clear where and by whom these persons were held during that time. Moreover, no reasonable of logical explanation has been made to public on a matter, which closely involves the public. It is a coincidence quite difficult to explain in the ordinary course of life that individuals alleged to be abducted on different dates from different places had in fact surrendered to the police and appeared in a very similar way. There is no doubt that the authorities have the obligation to inform the public.

74. There is no information which indicates whether any investigation has been provided related to disappearance allegations of these 6 individuals who appeared later, and whether accuracy of these allegations have been inquired. As it will be discussed below, it is against the international standards to accept without questioning the accuracy of the statements made by these individuals to their families and counsels under police supervision that they did not have any complaints. If it is alleged that a person has disappeared and tortured, it should be taken into account that this person could be under duress. Under these circumstances, it has to be examined carefully whether this person has made a statement on his free will.

75. Examination of the facts of these cases as a whole does not indicate that an effective investigation has been conducted into the enforced disappearance allegations in order to identify perpetrators if these allegations prove to be true, and to prosecute and if necessary to impose sanctions on those perpetrators and to compensate the damage suffered by relatives of the victim.

b) Public Scrutiny of the Investigation and Participation of the Next-of-kin

76. An effective investigation should allow public scrutiny and participation of the next-of-kin of the victim to the extent it is possible. This requirement is graver in disappearance cases where applicants have difficulty in receiving information on their relatives, and uncertainty of their fate causes significant physiological damage.

77. According to the ECtHR, when there are allegations that there is a violation of right to life: "*The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."*[22]

78. Therefore, relatives of the victim should not be prevented from accessing contents of the investigation, excluding circumstances, which may prevent the investigation from being conducted reliably. In fact, in its Benzer and Others v. Turkey judgment, the ECtHR reached the following conclusion: "*The Court considers that the military investigating authorities' attempts to withhold the investigation documents from the applicants is on its own sufficiently serious as to amount to a breach of the obligation to carry out an effective investigation. To this end, the Court is of the opinion that, had the applicants been in possession of the military prosecutor's investigation file, which presumably contained the flight log, they could have increased the prospect of success of the search for the perpetrators. The Court also considers*

[22] Al-Skeini and Others v. United Kingdom, Application no. 55721/07, 07/07/2011, §167.

that the withholding of the flight log from the applicants prevented any meaningful scrutiny of the investigation by the public".[23]

79. As such in Dimitrova and Others v. Bulgaria judgment; "*Court concludes that applicants were not given any meaningful opportunity to participate in the investigation into their relative's death, and therefore, requirements of Article 2 were violated*".[24]

80. The investigation should not be accessible only by the family; it should be accessible by the public. According to the ECtHR: *"There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts*".[25]

81. ECtHR concluded that under below listed circumstances, the investigation is not open for public scrutiny and accessible by the victim's relatives:

- the investigation or case file was not accessible to the victim's relatives,[26] the victim's relatives were not informed of significant developments in the investigation;[27]
- victim's wife was not provided with any information on the progress of the investigation, was not allow to study the case file appropriately, and was not given any record concerning the witness statements or other procedural steps undertaken;[28]
- discontinuation order issued for the investigation was not notified to the victim's father, and the investigation was conducted without participation of the father, who is acting as the complainant;[29]
- the victim's relatives was required to lodge a criminal complaint to join the proceedings as a civil party if they wish to be involved in the investigation proceedings;[30]
- prosecution authorities attempted to conceal investigation documents from the applicants.[31]

82. Since multiple disappearance investigations were joined with a single investigation on terror organization membership, which was subject to confidentiality restriction, the applicants could not receive any information on the developments related to the fate of their disappeared relatives. However, disappearance allegations are not directly related to an on-going terrorism investigation. Moreover, when it is alleged that there has been a grave violation of human rights, it is evident that such confidentiality restriction has to be removed if it will cause continuation of violation or at least the disappearance investigation has to be separated from the main investigation file. The applicants complain that despite their persistent requests, they were not allowed to access the file by the prosecutor's office and neither them nor their lawyers were informed on the steps taken and the developments that occurred. Furthermore, the applicants' requests from the prosecutor's office to secure evidence were not evaluated, dismissed or responded. As underlined in the ECtHR's Oğur v.

[23] Benzer and Others v. Turkey, Application no. 23502/06 , 12/11/2013, §193.
[24] Dimitrova and Others v. Bulgaria, Application no .44862/04, 27/01/2011, §87.
[25] Kolevi v. Bulgaria, Application no. 1108/02, 05/11/2009,§39.
[26] Oğur v. Turkey, Application no. 21594/93, 20/05/1999, §92.
[27] Betayev and Betayeva v. Russia, Application no. 37315/03, 29/05/2008, §88.
[28] Mezhiyeva v. Russia, Application no. 44297/06, 16/04/2015, §75.
[29] Güleç v. Turkey, Application no. 21593/93, 27/07/1998, §82.
[30] Slimani v. France, Application no. 57671/00 , 27/07/2004, §47.
[31] Benzer and Others v. Turkey, Application no. 23502/06 , 12/11/2013, §193.

Turkey judgment, the fact that the victim's relatives were not able to access the investigation or case file, led to violation of the obligation to conduct an effective investigation.

B. The accused's right to communicate with his counsel out of a hearing of a third person

83. The right of any accused person to communicate with his counsel without the risk of being overheard by a third party is one of the basic requirements of a fair trial.[32] This is how ECtHR interpreted the right stipulated in Article 6(3)(c) of the European Convention on Human Rights providing that any person charged with a criminal offense is entitled to defend himself through legal assistance of his choosing.[33] In Brennan v. United Kingdom judgment, the ECtHR concluded that if a counsel were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness.[34]

84. As regards the attorney-client privilege, European Council Standard Minimum Rules on the Treatment of Prisoners, Article 93 provides as follows: "Untried prisoners shall be entitled, as soon as imprisoned, to choose a legal representative, or shall be allowed to apply for free legal aid where such aid is available and to receive visits from that legal adviser with a view to their defense and to prepare and hand to the legal adviser, and to receive, confidential instructions. On request, they shall be given all necessary facilities for this purpose. In particular, they shall be given the free assistance of an interpreter for all essential contacts with the administration and for their defense. Interviews between prisoners and their legal advisers may be within sight but not within hearing, either direct or indirect, of the police or institution staff." [35]

85. According to Article 5 of the Basic Principles on the Role of Lawyers, government shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

86. UN Human Rights Council has stated that the right to access a lawyer must be provided from the beginning of detention.[36] UN Special Rapporteur on Torture underlines that access to counsel must be provided immediately after the moment of deprivation of liberty and unequivocally before any questioning by authorities.[37] The accused's right to consult his lawyer immediately is also recognized by the UN Human Rights Committee.[38]

87. According to UN Basic Principles on the Role of Lawyers, consultation between the lawyer and his client cannot be heard, and they should take place without delay, interception or censorship and in full confidentiality.[39] According to Article 61/1 of the UN Standard

[32] Castravet v. Moldovia, Application no. 23393/05, 13.03.2007, §49, Sakhnovskiy v. Russia, [BD], Application no. 21272/03, 02.11.2010, §97.
[33] Brennan v. United Kingdom, Application no. 39846/98, 16.10.2001, §58
[34] Brennan v. United Kingdom, Application no. 39846/98, 16.10.2001, §58
[35] European Council Standard Minimum Rules on the Treatment of Prisoners, Recommendation of the Committee of Ministers No. R (87) 3, Article 93. See. https://rm.coe.int/16804f856c
[36] UN Human Rights Council Resolution, 24.03.2016, A/HRC/RES/31/31, §7.
[37] Special Rapporteur on Torture Juan E. Méndez's report, UN Doc A/71/298, §69.
[38] General Comments No. 32, Un Human Rights Committee, CCPR/C/GC/32, §34
[39] Basic Principles on Role of Lawyers, Principle 8; and Nelson Mandela Rules 61.1.

Minimum Rules on Treatment of Prisoners[40] or so-called Nelson Mandela Rules, prisoners should be provided with adequate opportunity to communicate and consult with a legal adviser of their choosing in full confidentiality, and this consultation cannot be within hearing of the prison staff.

88. UN Human Rights Committee's General Comments on Article 14 of the UN Convention on Civil and Political Rights, which governs right to a fair trial, indicate that the lawyer should have the power to consult and confer with the suspect in a setting, where confidentiality is absolutely maintained.[41] The Convention is considered to have been violated if confidentiality cannot be maintained.[42] In Öcalan v. Turkey judgment, the ECtHR Grand Chamber reminded European standards on this matter and noted that consultation of the suspect with his lawyer within hearing of others will make such assistance lose much of its usefulness. When the government objected that this was done for the safety of the subject, the court replied that this risk could easily be avoided if the consultation is made within the sight but out of hearing of others.[43] Under these conditions, the right of the suspects to confer and consult with their lawyers out of hearing of others cannot be restricted, and it is possible to consider this right as an absolute right.

89. Detainees should be able to confer and consult with their lawyers without censorship and interception. Places of detention should provide an opportunity to consult the legal adviser in confidentiality. In a case, where the detainee and his lawyer had to yell to communicate, ECtHR decided that detention was unlawful because it breached the right to liberty and security.[44] In the event the lawyer of the detainee holds a genuine belief on reasonable grounds that their discussion was being listened to will hamper the detainee's right to effectively challenge the lawfulness of this detention.[45]

90. Four of the disappeared relatives of the six applicants appeared on the same date, and the rest appeared on different dates. Relatives of the applicants, who have appeared insistently, stated that they did not want to confer with the lawyers their families brought. Yılmaz told his lawyer, to whom he had given a power of attorney in the past, that he did not want to confer with him. Zeybek, Kaya, Ugan, and Irmak stated that they were receiving legal assistance from two lawyers that they met as a coincidence at the Anti-Terrorism Department, where they were detained. Later, the families stated that they did not talk to these lawyers. The families also stated that there was always a police officer when they were visiting their relatives. There is no information, which indicates that six people, claimed to have disappeared could confer with and consult their lawyers when in detention, in full confidentiality in compliance with international standards. On the contrary, there are serious suspicions that they did not have the opportunity to confer with and consult a lawyer of their choosing out of hearing of others.

91. When members of the Human Rights Center of the Ankara Bar Association were visiting Salim Zeybek at Sincan Type F Closed Penitentiary Institution, their visits were recorded by a camera, and during their visit, a guardian was present, and listened to them. The

[40] Nelson Mandela Rules, Rule 61.1, See. http://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf
[41] UN Human Rights Committee, General Comment No. 32, Article 14, *Right to equal treatment before courts and fair trial*, 23.08.2007, CCPR/C/GC/32, §34.
[42] *Nazira Sirageva v. Uzbekistan*, No 907/2000 (12 December 1999)
[43] Öcalan v. Turkey (BD), no. 46221/99, 12.5.2005, §133.
[44] Modarca v. Moldova, 10.05.2007, Application no. 14437/05, §51.
[45] Castravet v. Moldova, Application no. 23393/05, 13 June 2005, §49-50

minutes of meeting, which contained statements of Zeybek, were taken from the members by force. When it is taken into account that lawyers selected by the applicants were not allowed to communicate with the disappeared persons, and lawyers, who participated when disappeared persons were testifying during their detention, were not consulted, it is not certain whether individuals, who are charged with criminal offenses and constitute the subject matter of applications, could have exercised their right to confer with and consult their lawyers in confidentiality.

92. Particularly when the subject matter of the complaints is taken into account, it is considered that not allowing relevant individuals to meet lawyers sent by the Bar Association out of hearing of others is a clear violation of international standards.

C. Right to defend himself through legal assistance of his own choosing

93. The accused's right to defend himself through legal assistance of his own choosing is enshrined in Article 6(3)(c) of the European Convention on Human Rights, Article 14(3)(d) of the UN International Convention on Civil and Political Rights, and Principle 5 of UN Basic Principles of Role of Lawyers.

94. ECtHR frequently reminded that authorities must respect the accused's choosing of his legal assistance.[46] If the accused's right to a free choice of counsel is restricted, which is turn has an adverse affect on his defense; this is a violation of right to a fair trial.[47] The right to a free choice of counsel right from the beginning of the proceedings is protected under the right to access a lawyer. If a person charged with a criminal offence is deprived of his right to have recourse to legal assistance of his choosing, the rights of the defense may be adversely affected to such an extents as to undermine overall fairness of the proceedings.[48]

95. ECtHR held in its Dvoski v. Crotia judgment that Article 6 of the Convention protecting right to a fair trial does not prevent a person from waiving on his free will of the guarantees of a fair trial. However, such a waiver of fair trial guarantees on free will must be established in an unequivocal manner and attended by minimum safeguards commensurate with its importance.[49] This means that it is possible for a person to waive on his own will of his right to a legal assistance of his own choosing, but there should be no uncertainty as to whether such waiver has been made willingly. If the person has waived of this right under duress, in circumstances where he cannot express his own will freely, this waiver must be questioned and enquired.

96. In its Martin v. Estonia judgment ECtHR held that the applicant's wish to replace counsel of his own (his parents') choosing could not be considered genuine given the applicant's young age and seriousness of charges. [50] In this judgment, ECtHR considered the counsel chosen by the applicant's parents, as the counsel chosen by the applicant. The Court concluded that the authorities' failure to make use of the formal procedure for the removal of counsel in case there were doubts about a conflict of interests on his part and their reliance, instead, on informal talks with the applicant, the applicant's apparent instability, which

[46] Meftah and Others v. France [BD], Application no. 32911/96, 26.07.2002, §45.
[47] Croissant v. Germany, 25.09.1992, §31; Meftah and Others, 26.07.2002, Application no. 32911/96, 35237/97 34595/97, §46-47; Vitan v. Romania, Application no. 42084/02,25.03.2008, , §53-55; Zagorodniy v. Ukraine, Application no. 27004/06, 24.11.2011,§55.
[48] Dvorski v. Crotia, Application no. 25703/11, 20.10.2015, §78.
[49] Dvorski v. Crotia, Application no. 25703/11, 20.10.2015, §100, Sejdovic v. Italy [BD], Application no. 56581/00, 01.03.2006, §86, Poitrimol v. France, Application no. 56581/00, 23.11.1993,§31.
[50] Martin v. Estonia Application no. 35985/09, 30.05.2013, §93

prompted his subsequent psychiatric and psychological expert examination on two occasions, therefore there was an infringement of the applicant's right to defend himself through legal assistance of his own choosing.

97. In Simeonovi v. Bulgaria[51] and Pishchalnikov v. Russia[52] judgments, the ECtHR concluded that waiver of legal assistance can only be voluntarily which requires knowledge of consequences of such waiver and waiver can only be in compliance with the Convention if these consequences are accepted. According to the Court, a waiver of a right covered by the right to a fair trial and made knowingly should not conflict with an important public interest.[53] In İbrahim and Others v. United Kingdom judgment[54] the ECtHR underlined that knowing and intelligent waiver standard[55] is inherent in the privilege against self-incrimination, the right to silence and the right to legal assistance.

98. It has been observed that disappeared persons that constitute the subject matter of application were found at a police station 5 to 8 months later, lost a significant amount of weight, their skin color faded and seemed very unsettled. Applicants stated that their relatives who were found, stated that they should immediately withdraw their applications, and they were taking assistance from a lawyer they first saw at the police headquarters, and therefore they did not want legal assistance from lawyers, who represented them in the past, or from other lawyers.

99. These coincidental developments in choosing of counsel seem to conflict with what is told by the law enforcement officers, it is considered that potential victims could not exercise their right to have legal assistance of their own choosing. Given that the communication between applicants and their relatives is recorded and guardians accompanied their meeting makes it more likely that these persons, who were found months after their disappearance were under duress and could not make statements on their free will. Moreover, this does not only apply to one applicant, it has happened exactly in the same way for six different individuals. The fact that the prosecutor's office has not made any enquiries into this incident, which was also covered by press, and has not started any proceedings against perpetrators, left these individuals, who were probably under duress, completely vulnerable.

100. It cannot be known for certain whether these individuals, who had disappeared for a long period of time, were subject to torture and ill treatment. However, the possibility of existence of undue pressure on individuals whose reasons of disappearance and the time they disappeared under life threatening conditions have not been explained yet, raises doubts as to whether they decided to change counsels chosen by themselves (their families) voluntarily. This doubt over whether the waiver was voluntary, was the justification of the violation judgment made against Estonia in Martin v. Estonia ruling.[56]

101. When there is uncertainty as to whether the waiver was made voluntarily, it is also possible to consider that those whose whereabouts were finally determined, did not actually choose a counsel with their free will and had to accept the counsel shown by law enforcement officers to them. In fact, what makes this possibility even more stronger is the fact that law enforcement officers and applicants stated that counsels who participated when the

[51] Simeonovi v. Bulgaria, Application no. 21980/04, 12.05.2017, §115.
[52] Pishchalnikov v. Russia, Application no. 7025/04, 24.09.2009, §77.
[53] Håkansson and Sturesson v. Sweden, Application no. 11855/85, 21.02.1990, §66.
[54] Ibrahim et al v. United Kingdom [BD], Application no. 50541/08, 13/09/2016, §272.
[55] Vizgirda v. Slovenia, Application no. 59868/08, 28/08/2018, §87.
[56] Martin v. Estonia, Application no .35985/09, 30.05.2013, §93.

individuals were making their statements in detention, were there as a coincidence. It is not known whether the individuals, who constitute the subject matter of applications, replaced their counsels willingly and knowing consequences thereof that will meet standard of knowing and intelligent waiver. This uncertainty may lead to violation of right to defend him through legal assistance of his choosing. This possibility has to be inquired extensively and if relevant requirements are met, perpetrators should be persecuted.

D. Right to be brought promptly before a judge

102. Bringing anyone arrested or detained promptly before a judge is mandatory to determine ill treatment and reducing arbitrary intervention into right to freedom.[57] According to Article (9)(3) of the UN Civil and Political Rights Convention anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.

103. Right to be promptly brought before a judge is also protected under Article 5(3) of the European Convention on Human Rights,[58] Article 10 of the 1992 Declaration on Protection of All Persons from Enforced Disappearance[59], Articles 11 and 37 of 1998 Body of Principles for the Protection of All Persons under Any form of Detention of Imprisonment[60], Article 59(2) of the Rome Statute of the International Criminal Court[61], and Article 7(5) of the 1969 American Convention of Human Rights[62]

104. According to the ECtHR, at first glance, any period of time exceeding four days is too long for the requirement of promptness.[63]Any delay in bringing any detainee before a judge should be justified with special challenges or exceptional conditions. Otherwise, even periods shorter than four days may violate requirement of promptness.[64] According to Article 5 (3) of

[57] McKay v. United Kingdom [BD], 03.10.2006, Application no. 543/03, §33.

[58] ECHR Article 5 (3): Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

[59] 1992 UN Declaration on the Protection of all persons from Enforced Disappearance Article 10. Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.

[60] 1988 Body of Principles for the Protection of All Persons under Any form of Detention of Imprisonment 1988 Principle 11: "A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.". Principle 37: "A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest.. https://www.ombudsman.gov.tr/contents/files/528b7--Herhangi-Bir-Bicimde-Tutulan-veya-Hapsedilen-Kisilerin-Korunmasi-Icin-Prensipler-Butunu.pdf

[61] 1998 Rome Statute of the International Criminal Court Article 59/2: A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that: (a) The warrant applies to that person; (b) The person has been arrested in accordance with the proper process; and (c) The person's rights have been respected.

[62] 1969 American Convention on Human Rights Article 7(5): "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power."

[63] Oral and Atabay v. Turkey, 23.06.2009, Application no. 39686/02, §43; McKay vs. United Kingdom [BD], 03.10.2006, Application no. 543/03, §47; Năstase-Silivestru v. Romania, 04.10.2007, Application no. 74785/01, §32

[64] Gutsanovi v. Bulgaria, 15.10.2013, Application no. 34529/10, §154-59; İpek et al v. Turkey, 03.02.2009, Application no. 17019/02 Application no. 30070/02, §36-37; Kandzhov v. Bulgaria, 06.11.2008, Application no. 68294/01, §66.

the ECHR, there is no exception to right to be promptly brought before a judge after being arrested or detained.[65]

105. A judge should automatically control detention, without requiring the detainee to lodge an application.[66] Before a decision is made, the person brought before a judge should be heard.[67] Although it is not an obligation to make available a lawyer during a hearing, preventing participation of a lawyer in a hearing may have an adverse effect on the defense of the applicant.[68]

106. Article 13 of the Law No. 7145 added Provisional Article 19 to the Anti-Terrorism Law No. 3713. Accordingly: "As regards offenses listed in Sections Four, Five, Six and Seven in Chapter Four, Book Two of the Turkish Criminal Code No. 5237 and the offenses subject to Anti-Terrorism law No. 3713 or offenses committed as part of a criminal organization:

a) Time of detention may not be more than forty eight hours starting from the time of arrest, and four days in offenses committed collectively, excluding the time spent to send the detainee to the judge or court that is nearest to the place of arrest. The time of detention may be extended maximum two times due to difficulty in securing evidence or complexity of the case, provided that the time periods set forth in the first sentence are complied with. The decision to extend detention shall be made by a judge upon request of the public prosecutor, and the judge will hear the detained person. This provision shall apply to any person, who is caught relying on an arrest warrant."

107. According to this provision, which is pending before the Constitutional Court on unconstitutionality claims, "extended detention time" is applied in our law. Accordingly, the detainee has to be brought before a judge at the end of the fourth day, but remains in detention. Although conformity of this provision to the Constitution and ECHR is disputable, it is known that it is applied extensively. Moreover, there is no example, where the prosecutor office has requested an extension, and the judge denied this request.

108. This new provision was also applied to these six individuals, for whom applications were made. However, it is not certain whether these individuals that constitute the subject matter of applications, were brought before a judge during the time they remained in detention for 12 days after being found at different police stations. Applicants explained that they waited at the courthouse on the days the criminal courts of peace decided to extend the detention for 4 days, but could not see their relatives, and they were not informed which criminal court of peace would make the decision. As such, it is not known why detention period of these individuals were extended. Although participation of applicants - who are relatives of the individuals that are alleged to be victims of enforced disappearance - in the investigation, is a part of the state's obligation to conduct an effective investigation, the violation of this obligation, led to uncertainty whether the relevant individuals had benefited from the right to be promptly brought before a judge. The decisions of the criminal courts of peace to extend detention were not given to applicants. Therefore, the reasons for extending

[65] Bergmann v. Estonia, 29.05.2008, Application no. 38241/04, §45.
[66] McKay v. United Kingdom [BD], 03.10.2006, Application no. 543/03, §34; Varga v. Romania, 01.04.2008, 73957/01, §52; Viorel Burzo v. Romania, 30.06.2009, Application no. 75109/01, 12639/02, §107.
[67] Schiesser v. Switzerland, Application no. 7710/76, 04/12/1979, §31; De Jong, Baljet and Van den Brink v. Netherlands, Application no.8 805/79 8806/79 9242/81, 22/05/1984 §51; Nikolova v. Bulgaria [BD], Application no. 31195/96, 25/03/1999, §49; Aquilina v. Malta [BD], Application no. 25642/94, 29/04/1999, §50.
[68] Schiesser v. Switzerland, Application no. 7710/76, 04/12/1979, §36, Lebedev v. Russia, 25.07.2013, Application no. 11082/06, §83-91.

detention are not known, and they did not have the opportunity to object to extension decisions.

E. Right to access of a person deprived of his liberty to access a physician

109. According to standards set by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) under the European Convention on Preventing Torture and Inhuman or Degrading Treatment or Punishment, persons in police custody should have a right of access to a physician as soon as deprivation of liberty. [69] The right of access to a physician should include the right of a person in custody to be examined, if the person concerned so wishes, by a doctor of his own choosing in addition to any medical examination carried out by a physician called by the police. In a recent report, the UN Special Rapporteur on Torture referred to right of persons deprived of their liberty, to access to a physician of their own choosing as part of guarantees against torture and ill treatment.

110. In its Aksoy v. Turkey judgment and many other subsequent judgments the ECtHR concluded that where an individual is taken into police 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 as to the causing of the injury. The right of access to a physician before and after detention is important because of the role it plays in preventing torture.[70]

111. Medical examination of an individual under police custody should not be made in the presence of police officers, and the police officers should not hear the conversations during medical examination, or see the examination. The statements of the person under custody made during medical examination, and the findings of the physician, should be recorded by the physician.[71]

112. It is not known whether a physician examined these individuals, after they were taken into police custody. It is not known whether a law enforcement officer was present during medical examination, if an independent physician made such an examination. Even if medical examinations were made, and the relevant physicians issued medical reports, such reports were not given to the applicants. Therefore, it has not been possible to raise an objection against such report. Due to these reasons, it is still not certain if and under which conditions individuals deprived of their liberty had the opportunity to exercise their right of access to a physician.

III. ASSESSMENT :

113. Under the light of above listed duties and principles, it has been determined that in present cases, the investigations into enforced disappearance allegations were not open for public scrutiny, and relatives of possible victims could not participate. It has also been determined that disappearances, which constitute the subject matter of applications, were not duly investigated to prevent creating an impression that public officers allow or tolerate any unlawful act.

Enforced Disappearance Allegations

[69] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Developments concerning CPT standards in respect of police custody, CPT/Inf(2002)15, https://rm.coe.int/16806cd1eb

[70] Aksoy v. Turkey, Application no. 21987/93, 18/12/1996.

[71] Aksoy v. Turkey, Application no. 21987/93, 18/12/1996, §38.

114. **Since whereabouts of Yusuf Bilge Tunç, the husband of applicant Nuray Tunç is still not known, an investigation into complaints of this person should be conducted without any delay, and in compliance with international standards.**

115. In addition to Nuray Tunç's application, the state's obligation to provide an investigation has also not ended for the other applications. **Allegations of enforced disappearance, torture and ill treatment should be promptly investigated in compliance with the Constitution and international standards, and perpetrators who acted intentionally or negligently should be punished in proportion with their acts.**

Right to access a Lawyer and a Physician and to be brought before a Judge

116. The individuals, for whom applications were made, were not allowed to communicate with lawyers chosen by their families, and lawyers, who are members of the Human Rights Center could only communicate with Salim Zeybek. Prison officers were present during the visit at Sincan No 1. Type F Closed Penitentiary Institution, and were able to hear the conversation. There is no information, which indicates that these individuals had the opportunity to communicate with their lawyers, chosen by law enforcement officers, in full confidentiality whether in detention or thereafter. Therefore, it is concluded that these individuals charged with criminal offenses were allowed to benefit from their right to communicate with their lawyers in full confidentiality.

117. There are uncertainties as to whether the individuals - for whom applications were made - voluntarily waived of their right to receive legal assistance from a lawyer of their own choosing. It is not known whether these individuals changed the lawyers their families chose, willingly, and knowing consequences thereof. Since there is doubt over whether the waiver is voluntary, it is concluded that the right of these individuals to receive legal assistance from a lawyer of their own choosing was violated. **The relatives of the applicants should immediately be allowed to exercise their right to communicate with their lawyers in full confidentiality.**

118. It is not known whether the individuals - for whom applications were made - had been able to exercise their right to be promptly brought before a judge. Applicants stated that on the fourth and eight days of detention on which their relatives had to be brought before a court to decide on extension of detention, they waited at the courthouse all day long, but their relatives were not brought to the court. **It has to be clarified whether relatives of the applicants, who remained in detention for 12 days, were brought before a judge during this period of time.**

119. It is not known whether the individuals - for whom applications were made - had been able to exercise their right to access a physician. Even if there are medical reports issued after examination of these individuals, such reports were not given to their relatives or lawyers, and no opportunity was given to raise an objection.

120. Six out of seven disappeared person charged with being a FETÖ/PDY member, appeared at police headquarters months later. **Investigation into enforced disappearance should be separated from the investigation where these individuals are suspects, and information, which would not jeopardize the investigation into disappearance cases, should be shared with the public, and families should be informed on the progress of the investigation, and allowed to participate in the investigation.**

Conclusion: Based on above grounds, it has been found out that the investigation conducted into allegations of enforced disappearance of 7 individuals, for whom applications were made, and their subsequent detention process do not comply with international standards of human rights law. It is beyond purview of the Human Rights Center to further investigate this finding. However, given the gravity of alleged violations, it has been concluded to submit this report together with its annexes to the Management of Ankara Bar Association to be forwarded to the Ankara Chief Public Prosecutor's Office to pursue a thorough investigation.

Ankara Bar Association, Human Rights Center
Monitoring Sub-Committee