

EXECUTIVE SUMMARY


ENFORCED

DISAPPEARANCES

THE CONDUCT OF

JUDICIARY

TRUTH JUSTICE MEMORY CENTER

HAFIZA  MERKEZİ

I- IMPUNITY AS A STATE

TRADITION

It is an established fact that in almost every situation in Turkey when law enforcement officers are held responsible for being implicated in human rights violations, a colossal shield of impunity is put in effect, the responsible parties are protected and supported, and the evidences are immediately covered up.

In Turkey, where democracy has continuously been interrupted by coups, state of emergency regimes and various antidemocratic forms of governing, unfortunately the security forces of the state enjoy a tacit, special privilege to commit crimes.

State practice has confirmed time and again that legislative, executive and judicial actors recognize the state as the primary entity which must be protected at all costs and under all conditions and circumstances, while the rights and freedoms of the citizen always remain secondary. If that were not the case, then each time law enforcement officers' names were implicated in human rights violations, immediate recourse would not be sought in the legislation that calls for permission to launch investigations; the state would not resort to the obstacle of permission; and in cases when investigation permission is granted the quest for justice would not be dampened with ineffective and frivolous judicial proceedings allowing for the application of the statute of limitations.

The ongoing practice blatantly demonstrates that all three constitutional powers share the same approach on impunity, do not have the desire to truly struggle against this continuous state tradition, and do not have much regard for accountability. However much it may be denied,

the analysis of legal data clearly reveals how the web of impunity operates to protect and support the perpetrators.

In its simplest definition, the concept of impunity is described as the impossibility of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties.

In Turkey, impunity is an extremely widespread state practice manifested across the board in a range of crimes committed against political dissidents, Armenians, Kurds, Greeks, women, human rights defenders, LGBTI individuals, the press, and during Gezi events. When talking about impunity it must be noted that the human rights violations against Kurds stand out significantly in terms of their duration, systematic nature and prevalence.

On the whole, Turkey has not brought to account those militarily, administratively and politically responsible for neither past nor recent and current grave human rights violations against Kurds, the systematic and widespread violence exerted in the 90s, or the savage practices perpetrated during periods of military coup regimes.

However, uncovering the truths about grave human rights violations and ending impunity is a fundamental issue of democracy which concerns not only the victims but the entire society. We all have the right to know who committed these crimes, under whose orders, and how; in this

sense, the “right to truth” is a collective right involving not only the relatives of the victims but everyone who lives in this country, all of us. Evidence of the grave human rights violations must be collected, the fate of the victims must be brought to light, and those responsible for the violations must be exposed. Taking every

measure necessary to ensure the prosecution and punishment of the perpetrators is imperative both in terms of the right to truth and Turkey's obligations that stem from national law and international treaties; the state has to internalize the respect for universal values of human rights. The crime of enforced disappearance was

II-ENFORCED DISAPPEARANCES AND THE CONDUCT OF THE JUDICIARY

Through its focus on the subject of enforced disappearances, the Truth Justice Memory Center aims to open the neglected issue of “state violence” to discussion, expose the method of “enforced disappearance” employed by the state as a means of unconventional warfare, provide documentary verification of disappearances, discuss the problem in terms of political science and jurisprudence, and analyze the state policy of impunity on the basis of the research study results. If the failure to investigate and try all official/ unofficial government authorities, military/ paramilitary/civilian forces involved in acts of enforced disappearance represents a deliberate choice, it is then necessary to seriously consider the meaning of that choice, the challenges it poses to democracy and ways in which those challenges can be overcome.

An approach that relegates human life to the status of “minor detail” when “the supreme interests of the state” are at stake should in fact first and foremost draw the ire of the members of the legal profession. The silence, negligent attitude and occasional active support of the judiciary to the aforementioned process of

impunity should come to an end. In order to create pressure to this end, it is necessary to substantiate and expound the biased conduct of the judiciary.

Tackling the problem of impunity with all its dimensions requires the removal/eradication of all reasons comprising the shield of impunity one by one ranging from the problems in legislation to the perception and competency of judicial actors, from the approach of protracting the investigations to the barrier of the statute of limitations. The state has to be persistently reminded of its responsibilities and obligation to act within legal norms.

Since 2012 to date, Truth Justice Memory Center has conducted fieldwork of various scales in eight cities, namely Şırnak, Diyarbakır, Mardin, Batman, Hakkari, Bursa, İstanbul and Ankara and in numerous districts of these cities. Information/ data obtained through the fieldwork have been analyzed in accordance with the criteria of the state's national law and obligations under international law.

Our aim is to render visible the state violence exerted by the state under the name of “fight against terrorism” and document the sociological truth in this field on one hand, and on the other, to reveal, based on tangible data, how the judicial processes concerning forcibly disappeared people are carried out. To the extent possible, we want to arrive at an explicit profile concerning the judicial practice in such cases where government officials are being tried.

More than two decades have passed since the 90s; the things that happened were attempted to be erased from public memory and the case files withheld for the expiration of the statute of limitations gathered dust in courthouse archives. However, neither the victims nor large segments of the public who witnessed the events forgot the things that happened; they are still waiting in hopes of justice.

At the time of the writing of this report, despite the thousands of enforced disappearances and arbitrary executions that have taken place, only a handful of cases were opened against a few soldiers, village guards and informants; a significant number of these cases followed a judicial process evolving towards the acquittal of the defendants.

We are faced with a judiciary that does not have the desire or courage to uncover the truth, a biased judiciary extremely dependent on the executive power. There are a myriad of problems stemming from this gigantic obstacle: among others, the existence of untouchable/un-investigable persons and institutions like JİTEM (Gendarmerie Intelligence and Fight against Terror Unit) , no evidence collection, lack of protection for victims and witnesses, limited scope of criminal charges confined merely to perpetrators whose names are in the fore, inaccurate records not reflecting the truth, the state not sharing the archive documents, and classifying everything under the sun as state secret and hiding them from the court, etc. In the absence of judicial police, since evidence collection in investigations is carried out by

government officials who are suspects in the case, the evidences in question can of course never be obtained! The transfer of trials is an obstruction of access to justice all on its own. Our goal is to expose all these problem areas based on research and documentation to the best extent possible.

Even though large segments of the society in Turkey do not raise a strong voice to confront the past, the victims and relatives of the victims care about criminal justice. It is necessary to spread this demand beyond one of only the victims to the society at large, expand this demand by recalling its relationship to law and democracy, and persistently remind the state of its responsibilities. This report is a contribution to the efforts carried out by numerous nongovernmental organizations working in this field and a culmination of this endeavor to hold the state accountable.

III-REPORT CONTENT

analyzed The crime of enforced disappearance was analyzed by different authors under four main sections:

1. The Conduct of the Judiciary in Enforced Disappearances
2. Enforced Disappearances in International Law
3. The Recognition of Enforced Disappearance as a Crime under Domestic Law and the Statute of Limitations: a Problematic of International Criminal Law
4. Enforced Disappearance Cases from the Perspective of the European Court of Human Rights (ECtHR)

The first section was drafted in light of the data obtained through the fieldwork conducted by Truth Justice Memory Center. The executive summary essentially contains the findings resulting from the analysis of these data. The analysis of the data pertaining to investigation

and trial files can be summarized under the following main headings, where it was found that;

- A. The law enforcement forces did not follow legal detention procedure and the records were inaccurate and did not reflect the truth;
- B. Cruel killing methods were used for purposes of intimidation;
- C. Graves were unidentified, and the bodies were not returned to families;
- D. Effective, expeditious and independent investigations were not conducted;
- E. Expectations of justice have begun to be lost;
- F. "Claiming of rights" has been obstructed with psychological and physical barriers;
- G. Relatives of the victims share the perception of a tyrant state structure, dependent/biased judiciary, and concur that the state should apologize for what has happened, while on the subject of reparations there are different expectations.

IV- ANALYSIS RESULTS IN BRIEF

The research findings that form the basis of the analyses in the report as of the drafting of this executive summary are as follows:

Objective

To establish based on tangible data how, against whom, and through which persons/institutions the policy of enforced disappearance was employed as an “anti-terror” strategy, and the attitude adopted by the “judiciary” in the face of these widespread rights violations.

Data

At the time of the drafting of the report's executive summary, legal data pertaining to a total of 296 forcibly disappeared people had been obtained, and these data were compared with the factual narratives of the relatives of the disappeared and evaluated.

Perpetrators

The results revealed that the complaints are specifically about five groups of government officials and/or paramilitary forces; primarily JİTEM, and also MİT (National Intelligence Organization), the Special Forces Command and police officers, informants and village guards affiliated with them.

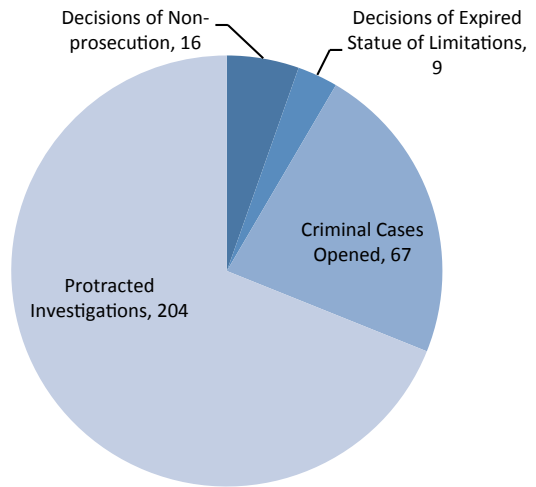
Duration

Average time elapsed since the date of the crime to present day is 19 years and 9 months.

Status of Investigation

Analysis of the legal data on 296 forcibly disappeared people have shown that despite the long period of time elapsed since, the investigations into the disappearance of 204 people were protracted, the investigation concerning nine people was closed with the decision of expired statute of limitations, and

the decision of non-prosecution concerning 16 people led to no charges being pressed against their perpetrators. Criminal cases have been filed concerning the enforced disappearance of 67 people.



Statutory Basis

In Turkey, the date of crime is taken as the basis in the investigations/proceedings of such crimes, and thus articles 448-450 of the former Turkish Criminal Code no. 765 are applied.

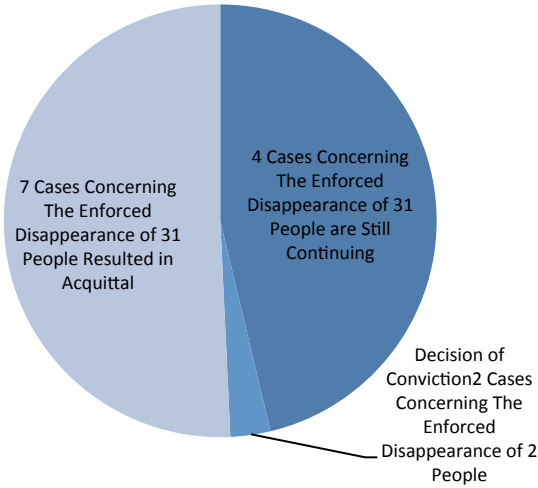
Statute of Limitations

Courts hold that the statute of limitations is 20 years. Thereby, the statute of limitations concerning a large number of investigations into the crimes committed in the 90s are either expired or at the risk of expiring.

Status of Proceedings

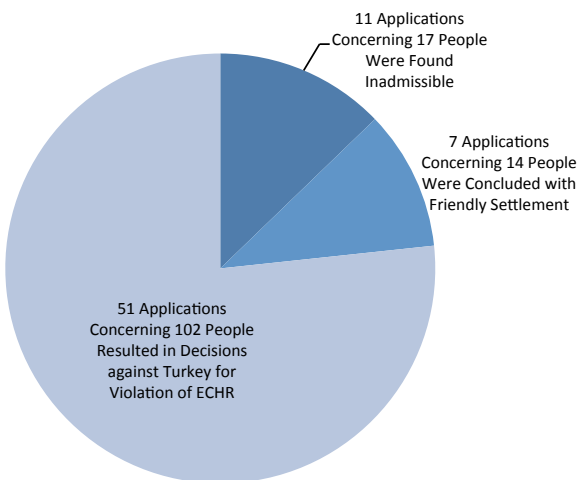
A total of 13 criminal cases were opened concerning the enforced disappearance of 67 people. Seven of these cases, which pertained to the enforced disappearance of 34 people, resulted in acquittals. Four cases concerning the enforced disappearance of 31 people are still continuing.

Only two cases concerning two people resulted in decisions of conviction.



ECtHR Judgments

It has been established that 69 applications have been made to the European Court of Human Rights concerning 131 of the 296 forcibly disappeared people whose legal data have been analyzed. According to the data, the European Court of Human Rights, contrary to the course of domestic proceedings, ruled that Turkey has violated the European Convention of Human Rights in 51 applications concerning 102 people. In seven applications concerning 14 people the state proposed friendly settlements. Thus, the responsibility of Turkey was established in 116 of the 131 forcibly disappeared people and 58 of the 69 applications on the whole. 11 applications concerning 17 people were found inadmissible and not reviewed.



The study results have clearly demonstrated that the practice of enforced disappearance in the 90s has targeted the civilians, was carried out in a widespread and systematic manner, and despite the fact that these crimes comprised the elements constituting “crimes against humanity”, judicial authorities failed to conduct effective investigations in face of this state practice and hid behind the rules of the statute of limitations. The study has undeniably revealed that the problem of impunity must be addressed holistically with all its dimensions, and all reasons ranging from problems in legislation to the perception and competency of judicial actors, from the approach of protracting the investigations to the barrier of statute of limitations and the shield of impunity have to be eliminated one by one.

We thank Professor Gökçen Alpkaya, Lawyer İlkem Altıntaş, Assistant Professor Öznur Sevdiren and Lawyer Emel Ataktürk Sevimli who contributed to this report with their work and hope that this publication contributes to the establishment of a democratic Turkey governed by legal norms, the efforts to crack the shield of impunity, and the institution of accountability.