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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3730/2020*, **

Communication submitted by:	Mümüne Açikkollu (represented by counsel, the Association of Human Rights Defenders and the International Association for Human Rights Advocacy in Geneva)
Alleged victims:	The author and her husband, Gökhan Açikkollu (deceased)
State party:	Türkiye
Date of communication:	29 January 2020 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 1 April 2020 (not issued in document form)
Date of adoption of Views:	25 October 2022
Subject matter:	Detention, torture and death of the author's husband in police custody in 2016
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right to life; torture and ill-treatment; arbitrary arrest and detention; right to a fair trial
Articles of the Covenant:	6, 7, 9 and 14
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

1.1 The author of the communication is Mümüne Açikkollu, born on 21 January 1975, a national of Türkiye. She submits the communication on her own behalf and that of her deceased husband, Gökhan Açikkollu, born on 1 April 1974, also a national of Türkiye. She claims that the torture and death of her husband in police custody constitute violations by the State party of articles 6, 7, 9 and 14 of the Covenant. The Optional Protocol entered into force for Türkiye on 24 February 2007. The author is represented by counsel.

* Adopted by the Committee at its 136th session (10 October–4 November 2022).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Imeru Tamerat Yigezu and Gentian Zyberi.

1.2 The State party gave notice to the Secretary-General of a derogation under article 4 of the Covenant on 2 August 2016 regarding articles 2 (3), 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27. On 9 August 2018, the State party notified the Secretary-General that the state of emergency had ended as of 19 July 2018 and that the derogation had been terminated accordingly.

Facts as submitted by the author

2.1 The author's husband worked as a teacher in private educational institutions that were affiliated with the Gülen movement in Konya, Nevsehir and Aksaray. In 2012, he joined Istanbul's Atatürk Industrial Vocational High School operated by the Ministry of Education. The author's husband had been diagnosed with social anxiety due to stress suffered during his military service. In 2013, he was diagnosed with diabetes and simultaneously also suffered from panic attacks.

2.2 On 15 July 2016, the day of the failed coup attempt in Türkiye, the author and her husband were preparing celebrations for their son's birthday. The author's husband was shocked by the news of the coup attempt and, that evening, he prayed alongside his family, hoping for the day to end without any incidents.

2.3 On 22 July 2016, the author's husband was informed of his dismissal from the school. Thousands of teachers like him were dismissed under Emergency Decree Law No. 667, published on 23 July 2016, which aimed at closing institutions affiliated with the Gülen movement. On 23 July 2016 at 11 p.m., upon the orders of the prosecutor of Can Tuncay, 15 police officers raided the author's home. The author's husband was handcuffed behind his back and laid face down on the ground without being informed of what was happening. When he requested to see his lawyer and asked the policemen for explanations, he was beaten and told that his lawyer would not be contacted. The blood sugar levels of the author's husband increased during his arrest and he received an insulin shot while handcuffed. During the raid, the policemen seized his computer, mobile phone, camera, personal photographs and the receipts of his children's monthly school tuition fees. Once in the police car, the author's husband was subjected to further violence. He later reported to a doctor that, while in the police car, he had been hit on his back, the sides of his eyes and his shoulders.

2.4 On 24 July 2016, the author was informed of her husband's arrest after receiving a phone call from a policeman from the counter-terrorism unit. She was told that a lawyer would only be assigned to her husband if the prosecutor authorized it. On the same day, the author's husband underwent a first routine medical examination at Bayrampasa State Hospital where no signs of torture or assault was reported by the doctors. However, on the same day, another report by a doctor at Haseki Education and Research Hospital reported injuries, especially on the back. The report also indicated symptoms of dizziness, sweating and chest pain. In the report, the doctor indicated that the author's husband had suffered a panic attack and was on medication called Paxera. Before being taken to Haseki Education and Research Hospital, the author's husband had initially been treated by emergency services after he had fainted following an attack. He was provided with medical attention in the detention cell and pre-diagnosed with a F41 anxiety disorder. At Haseki Education and Research Hospital, a chest X-ray was conducted and further treatment was recommended.

2.5 On 25 July 2016, the author's husband was taken to the Central Forensic Sciences Branch Directorate for a routine medical check-up. He told the doctor that he had been tortured on the day of his arrest and that he suffered from panic attacks and was on regular medication. The health report indicated the presence of bruises on both of his shoulder blades and his right shoulder. It also indicated that the author suffered from pain when moving his left arm. Despite these observations and after examining him, the doctor stated that "no battery or assault was found". In another report dated 26 July 2016, the Central Forensic Sciences Branch Directorate described the torture and ill-treatment that he had suffered while in police custody, the apparent bruises on several parts of his body, his panic attacks and anxiety, and the suspicion of a heart problem without providing any diagnosis. The author's husband later told his cellmates that the doctor had photographed these marks of torture. In another health report dated 27 July 2016, the author's husband stated that he had been slapped on both sides of his face, kicked on the right side of his chest and that the back of his head had been banged against a wall. The report indicates the presence of abrasions on the right

side of his face, around his eyes and on his forehead, as well as pain in his chest. The author's husband had stated that his panic attacks were triggered by psychological pressure. He was recommended to undergo a psychiatric consultation to treat his panic attack disorder.

2.6 On 28 July 2016, after he suffered a severe attack, the emergency services took the author's husband to Haseki Education and Research Hospital, where he was hospitalized for approximately four hours. He received medication and was returned to custody. Additional reports of the Central Forensic Sciences Branch Directorate dated 28, 29 and 30 July 2016 continued to signal the previously reported signs of torture on his body (purple and green-coloured bruises on his face and left shoulder) and panic attacks despite the use of Paxera. The author's husband repeatedly expressed his fear and stress. One report noted that the right lens of his glasses had been broken.

2.7 On 31 July 2016, the author's husband was taken for the third time as an emergency to hospital following a panic attack. A mental health examination was conducted at the Psychiatric Polyclinic Emergency of Istanbul University's Faculty of Medicine, which found that he had developed hypervigilance after suffering verbal and physical abuse, that he had flashbacks, nightmares, symptoms of sweating, trembling, shortness of breath, fear of death, anticipation anxiety, panic disorder and acute stress disorder. His prescribed dose of Paxera was increased, while he was also prescribed Xanax. In contrast, a health report issued by Haseki Education and Research Hospital on the following days stated that his condition was good and that no wounds, abrasions, injuries or signs of torture or assault had been found. During an examination on 3 August 2016 at Haseki Education and Research Hospital, the doctors took note of the description of the torture and ill-treatment suffered by the author's husband and recommended orthopaedic treatment, which he reportedly refused. According to the author, the doctors were compelled by the police to report this in order to cover up the acts of torture.

2.8 On 4 August 2016, the health of the author's husband was reported as good, with no special condition signalled during an examination at Haseki Education and Research Hospital. No marks of physical coercion were detected according to the report, which also indicated that he had abnormal behaviour by refusing further examinations and treatments despite his repeated complaints about ill-treatment. The author submits that no X-ray of her husband's chest was taken in light of the numerous reports of his chest pains.

2.9 Video surveillance footage of the cell of the author's husband, taken on 5 August 2016, shows him apparently having convulsions. His cellmates appear to call for help and place him on his bed. Several minutes after, the author's husband was taken out of the cell by two policemen and a prison official. The footage from another surveillance camera outside the cell shows a person, later identified as a doctor also in detention, performing cardiopulmonary resuscitation on the author's husband. He was taken on a stretcher out of the police station by the emergency services and arrived at 5.30 a.m. at the Haseki Education and Research Hospital, where he continued to receive cardiopulmonary resuscitation for another 45 minutes. He was declared dead at 6.15 a.m. that day.

2.10 The detained doctor claims that he could not feel the pulse of the author's husband when he arrived to perform cardiopulmonary resuscitation on him, by which time he was already dead. In the voice recordings of the emergency services that day, the author's husband was reported to have died in custody. However, according to a statement by the Chief Public Prosecutor's Office and the investigation records, the author's husband died in hospital after he had suffered a heart attack.

2.11 The autopsy report dated 29 August 2016 of the Morgue Division of the Council of Forensic Medicine found several fractures in the ribs of the author's husband, bleeding at the level of the fifth intercostal space and a bruise on his neck. A forensic report by the Institute of Forensic Medicine I, dated 23 November 2016, concluded that there was no evidence suggesting that the author's husband had died from poisoning or trauma. The report stated that the fractures found in his chest area could have resulted from cardiopulmonary resuscitation and that it was unanimously agreed that he had died from a heart attack.

2.12 In an assessment of the doctors' reports and the autopsy report conducted by an expert in forensic medicine and head of the Human Rights Foundations of Turkey, it was concluded that the cause of death of the author's husband should have been recorded as torture. The

report argues that the types of injuries found on the body of the author's husband corresponded to his complaints of torture. The mental and physical traumas suffered while in custody, combined with his diabetes, represented important risk factors for the development of cardiovascular disease. An X-ray was never conducted, despite his claims of pain in his chest area. The report additionally points out that signs of torture were ignored in some of the medical reports and that, in those reports in which torture was signalled, the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) should have been applied.

2.13 The author submits that several of her husband's co-detainees witnessed the torture that he was subjected to and offered to testify. One of these witnesses filed a petition with the prison management stating that he had witnessed the ill-treatment of the author's husband and asking to be informed of the investigation file number. Another co-detainee, who also witnessed the events, provided information through his lawyer about how the author's husband had been beaten and was taken to medical check-ups handcuffed while police officers made fun of him. According to this witness, the author's husband was violently interrogated by the police officers, who accused him of being the "imam" of the police department and requested him to draw an organizational chart. He was taken out of his cell several times and beaten by the police officers. The witness claims that the night before his death, the author's husband had been severely hit in the chest and returned to his cell complaining of pain in his chest. He was not able to sleep that night and woke the other inmates with screams before being taken as an emergency to the hospital. This witness opined that the author's husband had died because of the torture inflicted on him. The author submits that the prosecutor investigating her husband's death refused to interview any of these witnesses.

2.14 After her husband's death, the author received a letter from the Ministry of Education stating that her husband had been found innocent of the charges against him and was reinstated as a teacher. The author submits that this demonstrates that her husband's detention was unlawful and arbitrary since he was innocent.

Complaint

3.1 The author claims that the State party violated her husband's right to life under article 6 of the Covenant by arbitrarily depriving him of his liberty and then intentionally torturing him to death, despite being clearly informed about his health problems. She claims that her husband was subjected to severe and long-term lethal torture and that the State party therefore violated the prohibition of torture under article 7 of the Covenant. The author also presents the claims under article 7 on her own behalf and on behalf of her family who suffered mental anguish and inhuman treatment due to the failure of the State party to properly investigate the death of her husband.

3.2 The author claims that her husband was arbitrarily arrested and detained, in breach of article 9 of the Covenant. He was detained without evidence on allegations that he had links with the unsuccessful coup attempt. On the contrary, he was found to be innocent and was even re-employed, which also demonstrates that the administration seemed unaware of his death. The author claims that her husband was arrested upon the orders of the executive, similar to thousands of other individuals, as part of a witch hunt and without due consideration as to the existence of any proof that crimes had been committed.

3.3 The author claims that the State party violated her husband's rights under article 14 of the Covenant, as he was never informed of the charges against him or able to appoint a lawyer. He never appeared before a judge and was presumed guilty despite the absence of any evidence.

3.4 The author submits that she has not presented the same matter to any other procedure of international investigation or settlement and that there are no effective domestic remedies available in her case. She filed a complaint before the Murder Bureau of the Istanbul Security Directorate on 12 August 2016, which was first reviewed by the Istanbul Public Prosecutor's Office. The public prosecutor did not take any statements from witnesses and decided, on 20 December 2016, to dismiss the complaint without further investigation, finding that no intentional or negligent act of any person had contributed to the death of the author's husband.

On 20 January 2017, the author appealed against the public prosecutor's decision before the Istanbul Criminal Court of Peace, which ruled in favour of the author and agreed to reconsider her complaint. Her complaint was still pending three years later, at the time of submission of the present communication.[1] The author claims that this undue delay is part of a deliberate tactic to prevent her and her family from bringing her complaint before an international body. The author also filed a separate complaint against the Ministry of the Interior on behalf of her children.

3.5 The author requests that the Committee urge the State party to: (a) effectively and independently investigate the case; (b) bring all the perpetrators of the violations to justice and publicly name those responsible; (c) prevent the occurrence of similar violations in the future, through legislative or institutional reforms and training of government officials; (d) provide adequate compensation to her family; and (e) make a separate apology for these violations.

State party's observations on admissibility and the merits

4.1 In a note verbale dated 1 December 2020, the State party submitted its observations on admissibility and the merits. It firstly submits that, on 15 July 2016, the Fetullahist terrorist organization, which infiltrated critical government positions, attempted to suspend the Constitution and take over the elected Government. On 21 July 2016, a nationwide state of emergency was declared and, in accordance with article 4 of the Covenant, the State party notified the Secretary-General of its derogation from the Covenant. The State party submits that it observed the principles of necessity, proportionality and legality throughout the state of emergency and that the notification of derogation made under the Covenant was withdrawn on 19 July 2018, once the state of emergency had ended. The State party underscores that various remedies against measures emanating from decree laws issued during the state of emergency are available, such as the Inquiry Commission on the State of Emergency Measures introduced by Decree Law No. 685, which was recognized as an available domestic remedy by the European Court of Human Rights. The State party submits that members of the Fetullahist terrorist organization have presented unfounded claims of arbitrary arrest and detention as a strategy to manipulate international public opinion.

4.2 As regards the issue of admissibility, the State party notes that the author admits to having not exhausted domestic remedies by alleging that these are unreasonably prolonged. It notes that the author's compensation claim, filed in accordance with article 141 of the Code of Criminal Procedure,[2] was initially rejected by the 1st Administrative Court of Istanbul on the grounds that judicial courts are competent to resolve such claims. Upon the author's appeal, on 29 January 2020, the 9th Administrative Court of Appeal of Istanbul confirmed the first-instance decision based on the same reasons and the case is currently pending before the Council of State. The author has, therefore, yet to exhaust this domestic remedy.

4.3 The State party also notes that the author filed a complaint before the Istanbul Public Prosecutor's Office, which issued, on 20 December 2016, after a meticulous investigation, a decision of non-prosecution. On 13 July 2017, following the author's appeal, the 12th Magistrate Office of Istanbul decided to further investigate the author's allegations and gather additional evidence. After the examination of camera footage, witnesses' testimonies and the autopsy report, the Istanbul Chief Public Prosecutor's Office issued another decision of non-prosecution, on 9 January 2020, arguing that the evidence collected did not raise any suspicion indicating that external factors contributed to the death of the author's husband or of any element of crime. The author appealed against this second decision of non-prosecution, which was confirmed on 18 February 2020 by the 11th Magistrate Office of

[1] As indicated in the State party's observations on admissibility and the merits, on 9 January 2020, the Istanbul Chief Public Prosecutor's Office issued another decision of non-prosecution, after the author had submitted her individual communication to the Committee.

[2] The State party submits that, under article 141 of the Code of Criminal Procedure, compensation claims related to alleged arbitrary custody and detention can be reviewed. Article 142 stipulates that compensation is delivered by the competent Assize Court. The State party further submits that, in *A.S. v. Turkey* (application No. 58271/10, Judgment, 13 September 2016), the European Court of Human Rights considered it as an available domestic remedy.

Istanbul. As the author has not lodged an individual application before the Constitutional Court, the State party submits that she has not yet exhausted domestic remedies.

4.4 In response to the author's claims regarding the unreasonable prolongation, unavailability and ineffectiveness of domestic remedies, the State party submits that the European Court of Human Rights has ruled in several cases that applicants should exhaust the individual application procedure before the Constitutional Court, including with respect to measures taken within the scope of the state of emergency.[3] The State party further notes that the European Court of Human Rights did not find that the temporary increase in the Constitutional Court's caseload following the coup attempt had led to breaches of the right to have the lawfulness of detention speedily examined by a court.[4] As regards the allegation that the Constitutional Court does not properly examine the individual applications of persons suspected or convicted of membership of a terrorist organization, the State party argues that several of the Constitutional Court's decisions prove the contrary. The State party considers the author's claims with respect to the ineffectiveness of this particular remedy are contradictory, as she herself lodged an application before the Constitutional Court following her dismissal from public duty due to her affiliation to the Fetullahist terrorist organization, clearly indicating that she does consider this remedy as effective.

4.5 On the facts of the case, the State party submits that the author's husband was taken into custody on suspicion of membership of the Fetullahist terrorist organization. Less than an hour after his arrest, a medical report stated that he had not been subjected to battery or physical coercion. During the investigation process, he was taken on a daily basis to hospital for medical examinations. He could access his medicines while in custody and daily medical reports for custody extension were obtained between 25 July and 4 August 2016. He was transferred to different medical institutions when declared ill on 24, 28 and 31 July 2016 and it was suggested, during one examination, to increase his prescribed dose of Paxera and to prescribe him, in addition, Xanax for his anxiety disorder. With regard to the events surrounding the death of the author's husband, the State party submits that he was first treated by a doctor who was also held in custody and then transferred by ambulance to Haseki Education and Research Hospital. Despite all the medical interventions, cautiously reflected in reports by the police officers, the author's husband could not be rescued.

4.6 As regards the author's claims under articles 6 and 7 of the Covenant, the State party refers to one of the autopsy reports indicating the absence of poisoning, traumatic change, fractures in the skull or damage to the internal organs or vessels, or any kind of evidence suggesting that the author's husband had died due to a traumatic effect. The report also mentions that the symptoms in his chest resulted from the cardiopulmonary resuscitation and that he had died of a heart attack. After a duly conducted investigation, the State party reiterates that two decisions of non-prosecution were issued. It therefore argues that the author's allegations are misleading and that, in light of the above, articles 6 and 7 of the Covenant were not violated.

4.7 Contrary to the author's allegations, the State party submits that the author's husband was informed on the first day of his arrest of the reasons thereof and of the charge of membership of a terrorist organization brought against him within the scope of an investigation led by the Istanbul Chief Public Prosecutor's Office. The State party submits that the author's husband used the encrypted communication application called ByLock, which is crucial evidence of his membership of the Fetullahist terrorist organization, according to decisions of the Court of Cassation and the Constitutional Court. His membership of Fetullahist terrorist organization was also evidenced by his bank account at Bank Asya, which is the main financial structure of the Fetullahist terrorist organization. The State party considers that the author's husband was, therefore, not arbitrarily arrested or

[3] The State party refers to European Court of Human Rights, *Uzun v. Turkey* (application No. 10755/13, Decision, 30 April 2013) and to the following judgments regarding measures within the scope of the state of emergency*: Mercan v. Turkey* (application No. 56511/16, Decision, 8 November 2016); *Bidik v. Turkey* (application No. 45222/15, Decision, 22 November 2016); and *Zihni v. Turkey* (application No. 59061/16, Decision, 29 November 2016).

[4] European Court of Human Rights, *Altan v. Turkey* (application No. 13237/17, Judgment, 20 March 2018).

detained, based on sufficient evidence justifying the charges brought against him and on article 91 of the Code of Criminal Procedure, which regulates the conditions of custody in situations in which the evidence indicates that an offence has been committed. The State party submits that articles 9 and 14 of the Covenant were therefore not violated.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 2 April 2021, the author submitted comments on the State party's observations on admissibility and the merits, reiterating that her complaints were raised before domestic judicial bodies. However, these were either unduly prolonged or dismissed without a proper investigation. Despite the proven ineffectiveness of the Constitutional Court's individual application procedure, especially in the aftermath of the coup attempt, the author states that she nevertheless lodged an application on 15 June 2020 anticipating the State party's claim regarding the non-exhaustion of domestic remedies. She simultaneously presented her communication before the Committee based on her distrust in the effectiveness of this domestic remedy and in order not to waste further time. The author also submits, as a preliminary comment, that torture and ill-treatment have become a systematic administrative practice in the State party following several decrees that exempt public officials from liability in the conduct of their functions within the scope of such decrees. The author points to reports indicating that incidents of torture and ill-treatment, including on persons in custody suspected of membership of the Gülen movement, have increased after the coup attempt and that no investigation or prosecution have been carried out for these incidents.[5] The author argues that, under such circumstances of normalization of torture and ill-treatment by the administration, the exhaustion of domestic remedies should not be required.[6]

5.2 Although the Constitutional Court's decisions have a final and binding character, the author refers to several cases in which the State party's lower courts did not comply with such decisions.[7] In particular, the author highlights the European Court of Human Rights' judgment in the *Altan* case, in which the Court ruled that it would reserve the right to examine the effectiveness of the Constitutional Court's individual application procedure in light of the case law of the courts of first instance.[8] The author also raises concerns regarding the effectiveness of this remedy, as the Constitutional Court ruled that it could not conduct any review of the constitutionality of the legislative decrees adopted in the context of the state of emergency. The author argues that the Constitutional Court's departure from the approach of the European Court of Human Rights, including its opposition to and lack of compliance with its judgments, is another sign of its ineffectiveness. The author submits that in the Yıldırım Turan case,[9] the Constitutional Court stated that, in light of the judgment of the European Court of Human Rights, it would re-examine the case but that it would not automatically enforce the judgment, thus contravening the binding nature of the judgments of the European Court and article 90 of the Constitution on the pre-eminence of international agreements over domestic law in cases of conflict between the two. The Constitutional Court also stated in this decision that its domestic courts were better suited than the European Court of Human Rights to interpret domestic law and that, since the European Court's judgment contained an interpretation of Turkish law, it could reach a different conclusion without contravening the importance of the European Court's judgments within its legal system. The author further submits that the Constitutional Court has rejected individual applications that would attract attention from the political powers and that one of the Court's members always signs decisions that favour the Government.

5.3 The author rejects the State party's excuse regarding the Constitutional Court's caseload, as it bears the responsibility to provide the Court with adequate resources in order

[5] The author refers to reports from the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Amnesty International, Freedom from Torture, the Ankara Bar Association and the Gazientep Bar Association.

[6] European Court of Human Rights, *Ireland v. United Kingdom* (application No. 5310/71, Judgment, 18 January 1978).

[7] European Court of Human Rights, *Alpay v. Turkey* (application No. 16538/17, Judgment, 20 March 2018); and *Altan v. Turkey*.

[8] *Altan v. Turkey*, para. 142.

[9] Constitutional Court, application No. 2017/10536, Decision, 4 June 2020.

to promptly examine applications. She argues that the cases referred to by the State party to support the effectiveness of the Constitutional Court's individual application procedure relate to a different subject matter. The author submits that the State party has yet to prove that an application lodged by persons charged with the crime of membership of the Fetullahist terrorist organization and who allege to have been subjected to torture and ill-treatment while in custody has ever succeeded. In light of the above, the author reiterates that the Constitutional Court is non-functional, lacks independence and should be considered as an ineffective remedy in practice that offers no prospect of success.

5.4 With regard to her claims under articles 6 and 7 of the Covenant, the author notes that the State party failed to duly consider the events that triggered her husband's heart attack, and ignored the contradictions in the medical reports and the witness statements corroborating the claim that he had been tortured. The State party has not provided any documentary evidence that the medicines vital to the treatment of the author's husband had been adequately administered. The author also notes that the State party did not refute the report by the head of the Human Rights Foundations of Turkey concluding that her husband's death had resulted from torture. The State party further ignored a decision by the Third Supreme Council of the Institute of Forensic Medicine according to which the conditions of detention had an effect on his death.

5.5 Although her husband's use of the ByLock application has not been proven, the author submits that this would, nevertheless, fall under his freedom of communication and could not serve as a basis for his custody. The author submits that her husband was arrested and detained in the absence of any evidence against him and that the onus was on the State party to prove the contrary. Furthermore, the supposed evidence of his use of ByLock was not lawfully obtained but seized by the National Intelligence Organization in the context of its intelligence work and subsequently shared with judicial authorities. The author argues that this practice breaches the Law on the National Intelligence Organization, which prohibits using intelligence information for other purposes or as evidence. Under the Code of Criminal Procedure, the seizure of digital material requires the authorization of a judge upon the request of a public prosecutor within the context of an ongoing investigation. In addition, the seizure of data from the ByLock application, situated on a server abroad, required a letter rogatory. As none of the above requirements were complied with, the author submits that the data obtained had no evidentiary value and could not serve as a basis for her husband's custody. Likewise, the author argues that the possession of an account at Bank Asya, which was a legal entity, could not be considered an offence or proof of membership of a terrorist organization. The author refers to decisions of the Criminal Chamber of the Court of Cassation ruling that ordinary deposit transactions at Bank Asya while it was legally operating could not be considered as criminal acts.

5.6 The author concludes that her husband was arbitrarily taken into custody. His statement was never taken, nor was he brought before a judge after 13 days in detention, which represent breaches of his right to a fair trial. The author requests that the Committee urge the State party to conduct an effective and independent investigation in order to clarify the events surrounding her husband's death, to hold the perpetrators to account and to provide her and her family with a fair and satisfactory amount in compensation.

State party's additional observations

6.1 On 12 July 2021, the State party submitted additional observations on admissibility and the merits of the complaint. The State party reiterates its zero-tolerance policy against torture and the comprehensive set of measures that it has adopted to ensure that allegations of torture and ill-treatment are duly investigated and that international standards on the matter are guaranteed under its Constitution and national legislation. As regards Decree Law No. 667, referred to by the author regarding the absence of liability of public servants, the State party clarifies that this only pertains to decisions and duties carried out under that decree law and aimed at the implementation of the state of emergency. It does not provide impunity to public officials who inflict torture or ill-treatment. The State party also submits that, following the coup attempt, the European Court of Human Rights received 40 applications for interim measures from applicants affiliated with the Fetullahist terrorist organization regarding their conditions of detention, which were all rejected by the Court. The State party,

therefore, refutes the author's allegations regarding the systematic use of torture and ill-treatment.

6.2 The State party reiterates that the communication should be declared inadmissible under articles 2 and 5 of the Optional Protocol as the author has not exhausted domestic remedies. The State party reasserts the well-established effectiveness of the Constitutional Court's individual application procedure, and that the Court's judgments are binding and legally enforceable under domestic law. In the Berberoğlu,[10] Altan and Alpay cases signalled by the author, the State party argues that she omits to provide the full facts and outcomes of these cases, and that the Constitutional Court judgments were effectively enforced. The allegation that the Constitutional Court has deviated from the case law of the European Court of Human Rights is equally unfounded. The State party submits that the Constitutional Court is the competent court to interpret the provisions of domestic law, whereas the European Court is limited to determining whether such interpretations are compatible with the Convention. In the cases referred to by the author, the State party indicates that the Constitutional Court interpreted domestic law and rendered its decisions accordingly, which does not prove in any way the ineffectiveness of this remedy.

6.3 The State party also rejects the author's allegations regarding the unlikely prospects of success of individual applications to the Constitutional Court. It indicates that, out of the 308,672 individual applications received, 14,793 were admissible. In 94 per cent of these admissible applications, the Constitutional Court found violations, which proves that there is a reasonable chance of success offered by this remedy. Contrary to the author's allegations, the Constitutional Court has found violations in cases regarding applicants prosecuted for membership of the Fetullahist terrorist organization, including with regard to allegations of torture and ill-treatment in the Ahmet Aşik case.[11] On the alleged unreasonable prolongation of this remedy, the State party considers that a delay of one year, as in the author's case, does not constitute an unreasonable prolongation, in light of the Committee's jurisprudence and the coronavirus disease (COVID-19) pandemic. The State party argues that the communication is manifestly ill-founded and should be declared inadmissible for lack of substantiation in view of the inaccurate and misleading information brought forward by the author.

6.4 Regarding the author's claims under articles 6 and 7 of the Covenant, the State party provides a medical prescription dated 31 July 2016 proving that the author's husband was provided with his medication without hindrance while in custody. During the period of his pretrial detention, which complied with the law on the state of emergency, he was able to meet his lawyers and the author was informed of his state of health. The State party reiterates that the two autopsy reports, which were prepared in compliance with international standards, concluded that no external factors had caused the death of the author's husband, other than his pre-existing medical conditions for which he received treatment. The State party concludes that articles 6 and 7 of the Covenant were not violated, as the investigation into the death of the author's husband was duly conducted and the reasons of his death were clearly determined.

6.5 The State party clarifies that it did not argue in its previous observations that the author's husband had been taken into custody based on his use of the ByLock application, but based on a witness statement identifying him as a member of the Fetullahist terrorist organization. In his statement taken on 27 July 2016, the author's husband recognized the witness and admitted his membership of the Fetullahist terrorist organization. The State party, therefore, rejects the author's allegations that her husband was detained in the absence of any evidence.

6.6 Regarding the evidentiary value of the use of the ByLock application, the State party submits that this evidence was obtained legally. In accordance with a decision of the Court of Cassation dated 24 April 2017, the National Intelligence Organization is required to deliver information gathered legally about a terrorist organization threatening national security to the relevant authorities. In accordance with the Code of Criminal Procedure, public prosecutors

[10] Constitutional Court, application No. 2018/30030, Decision, 17 September 2020.

[11] Constitutional Court, application No. 2017/27330, Decision, 26 May 2021.

are then obliged to conduct an effective investigation on the basis of such evidence. The State party reiterates that the Constitutional Court has found that the use of the ByLock application, established for the purpose of communication between members the Fetullahist terrorist organization, can be relied on as the sole or decisive evidence in convictions for membership of the organization, without finding a breach of the right to a fair trial. As the use of the ByLock application or its presence on any device constitutes a strong indication of having committed an offence, the Constitutional Court found no violation of the right to security and liberty in the Aydin Yavuz case.[12] In another case, the State party indicates that the Constitutional Court found that the right to protection of personal data and freedom of communication had not been violated, as the data obtained through the ByLock server were processed within the scope of an investigation by law enforcement units and judicial authorities. The State party maintains its view that articles 9 and 14 of the Covenant were thus not violated.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's submission that the communication should be considered inadmissible on the grounds of non-exhaustion of domestic remedies, as the author's application to the Constitutional Court is still pending. It notes the author's arguments that filing an individual application before the Constitutional Court is not an effective remedy as it does not offer in practice reasonable prospects of success owing to: (a) the non-enforcement of the Court's judgments by lower courts; (b) its bias in favour of the Government; (c) its disregard for the approach and case law of the European Court of Human Rights; (d) its inability to review the constitutionality of decree laws in the context of the state of emergency; and (e) the fact that applications regarding allegations of torture and ill-treatment by persons on charges of membership of the Fetullahist terrorist organization have never succeeded. The Committee notes the State party's submission that the European Court of Human Rights has held, in cases similar to the one at hand, that an individual application before the Constitutional Court constitutes an effective remedy, including in respect of measures taken within the scope of the state of emergency.[13] The Committee notes the State party's argument that, according to the Constitution, the Constitutional Court's judgments are binding on all organs of the State and that, in practice, lower courts have effectively enforced these. It also notes the State party's submission that the Constitutional Court does not deviate from the case law of the European Court of Human Rights but is better positioned to interpret domestic law and that it has found violations in an overwhelming majority of admissible applications, including those from persons prosecuted for membership of the Fetullahist terrorist organization who allege torture and ill-treatment.

7.4 Following its jurisprudence,[14] the Committee notes that the European Court of Human Rights has expressed concern regarding the effectiveness of the remedy of an individual complaint to the Constitutional Court in cases concerning pretrial detention, due to the non-implementation, by lower courts, of the Court's findings in two cases in which the Court had found violations of the applicants' rights. The European Court of Human Rights has also noted that it would be for the Government to prove that the remedy of an individual complaint to the Constitutional Court is effective, both in theory and in practice, in cases concerning

[12] Constitutional Court, application No. 2016/22169, Decision, 20 June 2017.

[13] European Court of Human Rights, *Uzun v. Turkey*; *Mercan v. Turkey*; *Zihni v. Turkey*; and *Catal v. Turkey* (application No. 2873/17, Decision, 7 March 2017).

[14] *Özçelik et al. v. Turkey* (CCPR/C/125/D/2980/2017); and *Alakuş v. Türkiye* (CCPR/C/135/D/3736/2020).

the right to liberty and security.[15] The Committee finds that, in the circumstances of the author's case, and in light of the authority accorded to Constitutional Court judgments by lower courts in recent cases, the State party has not shown that an individual complaint before the Constitutional Court would have been effective, in practice, to challenge the lawfulness of her husband's detention and subsequent death in custody.

7.5 The Committee notes the State party's submission that the communication should be declared inadmissible for lack of substantiation, as the author has provided inaccurate information to mislead the Committee, which shows the manifestly ill-founded nature of the communication. The Committee considers that the inadmissibility argument adduced by the State party is intimately linked to the merits and should thus be considered at that stage. Accordingly, the Committee considers as admissible the author's claims under articles 6, 7, 9 and 14 of the Covenant and proceeds to its examination of the merits.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

8.2 The Committee notes the State party's derogation under article 4 of the Covenant, which came into effect after the events giving rise to this communication, on 2 August 2016, after declaring a nationwide state of emergency (paras. 1.2 and 4.1 above). The Committee notes that a fundamental requirement for any measures derogating from the Covenant is that they be limited to the extent strictly required by the exigencies of the situation in accordance with the principle of proportionality. The Committee further recalls that the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation.[16] The Committee recalls that article 4 (2) of the Covenant explicitly prescribes that no derogation may be made from articles 6 and 7.[17] Although article 9 of the Covenant is not included in the list of non-derogable rights under article 4 (2), the Committee recalls that the fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances. The existence and nature of a public emergency that threatens the life of the nation may, however, be relevant to a determination of whether a particular arrest or detention is arbitrary.[18]

8.3 The Committee notes the author's claims under articles 6 and 7 of the Covenant that despite the authorities' knowledge of her husband's health problems, when he was in custody, he was subjected to torture and ill-treatment that resulted in his death. It also notes the author's claim that she and her family suffered mental anguish and inhuman treatment due to the failure of the State party to properly investigate the death of her husband. The Committee takes note of the State party's argument that the author's husband was provided with adequate medication and regularly examined and that, as indicated in the autopsy reports, he died from a heart attack without any indication that he was subjected to torture or ill-treatment. It also notes the State party's submission that the investigation into the death of the author's husband was duly conducted, in accordance with international standards and protocols, and based on tangible evidence.

8.4 The Committee recalls that the State party remains responsible for the life and well-being of its detainees, and that the duty to protect the life of all detained individuals includes providing them with the necessary medical care and appropriate regular monitoring of their health.[19] Loss of life occurring in custody, in unnatural circumstances, creates a presumption of arbitrary deprivation of life by State authorities, which can only be rebutted on the basis of a thorough, prompt and impartial investigation that establishes the State's compliance with

[15] *Altan v. Turkey*, para. 142; and *Alpay v. Turkey*, para. 121.
[16] General comment No. 29 (2001), para. 4.
[17] Ibid., para. 7.
[18] General comment No. 35 (2014), para. 66.
[19] General comment No. 36 (2018), para. 25.

its obligations under article 6.[20] The Committee further recalls that it is the duty of the State party to afford everyone protection as may be necessary against acts prohibited by article 7, such as torture and ill-treatment, which may seriously affect the physical and mental health of the mistreated individual, and could also generate the risk of deprivation of life.[21] When confronted with allegations of torture and ill-treatment, it is incumbent upon the State party to produce evidence refuting the allegations that its agents are responsible and showing that they applied due diligence in protecting the detainee through a prompt and impartial investigation applying the Istanbul Protocol. The Committee similarly recalls that prosecutions of potentially unlawful deprivations of life should be carried out in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death, and must be aimed at ensuring that those responsible are brought to justice, promoting accountability and preventing impunity, and drawing the necessary lessons for revising practices and policies with a view to avoiding repeated violations.[22]

8.5 In the present case, the Committee observes that the State party has provided two autopsy reports concluding that (a) the author's husband did not die due to a traumatic effect or from poisoning; (b) the colour changes in skin tissue and features of sternal and rib fractures observed are possibly due to cardiopulmonary resuscitation; and (c) he died as a result of an acute myocardial infarction. It also observes that the State party provides the public prosecutor's decision of non-prosecution stating that there were no suspicious circumstances that required the presence of an external factor to explain the death of the author's husband. However, the Committee observes that both the decision of non-prosecution and the autopsy report dated 23 November 2016 noted the statements of the author and her brother raising concerns that torture might be occurring.[23] The Committee also notes that the State party has not provided any information regarding the discrepancies in the medical reports of the author's husband while in custody, which in several cases confirmed injuries to his ribs, near to his neck, on his back, his psychological depression and symptoms of dizziness and sweating. The Committee notes that the State party did not establish that the allegations of the author's husband during a medical examination on 3 August 2016, namely that he had been exposed to physical and psychological trauma while in detention, were promptly, impartially and thoroughly investigated.[24] The Committee also observes that the State party did not investigate the doctors' assessment in their report that the injuries observed in the neck of the author's husband were "possibly due to old trauma". The Committee considers that, based on the information available to it on file, although the authorities were aware of the allegations of torture, it is not apparent that any ex officio investigation was conducted, in accordance with the Istanbul Protocol, on the basis of these allegations, of the apparent signs on the body of the author's husband and the medically reported psychological symptoms. The Committee considers that, in the circumstances of the present case, and in particular in light of the State party's inability to effectively explain either the visible signs of mistreatment that were witnessed on a number of occasions or to establish that serious investigations were carried out, due weight should be given to the author's claims. The Committee concludes that the State party failed to observe due diligence in protecting the author's husband from torture and ill-treatment, and ultimately in protecting his life while in detention, considering his known pre-existing health problems, in violation of articles 6 and 7 of the Covenant.

8.6 While recalling that it is not incumbent upon the Committee to evaluate facts and evidence and conclusions reached in the investigation, it considers that the State party has

[20] Ibid., para. 29; *Eshonov v. Uzbekistan* (CCPR/C/99/D/1225/2003), para. 9.2; *Zhumabaeva v. Kyrgyzstan* (CCPR/C/102/D/1756/2008 and Corr.1), para. 8.8; and *Khadzhiyev v. Turkmenistan* (CCPR/C/122/D/2252/2013), para. 7.3.

[21] General comment No. 20 (1992), para. 2; and general comment No. 36 (2018), para. 54.

[22] General comment No. 36 (2018), paras. 12 and 27. See also *Dhakal et al. v. Nepal* (CCPR/C/119/D/2185/2012), para. 11.6; *Chaulagain v. Nepal* (CCPR/C/112/D/2018/2010), paras. 11.3–11.5; and *Neupane and Neupane v. Nepal* (CCPR/C/120/D/2170/2012), para. 10.6.

[23] Decision of non-prosecution of the Istanbul Chief Public Prosecutor's Office, Decision No. 2016/81222, p. 3; and Report 5144 of the Institute of Forensic Medicine I, Forensic Medicine Specialization Board (23 November 2016), p. 1.

[24] Haseki Education and Research Hospital Report form, 3 August 2016, Protocol 542577316.

not demonstrated that a thorough and impartial investigation into the allegations of torture and the death of the author's husband took place, justifying on what basis several witness statements of co-detainees were not considered during the investigation or why his allegations of torture prior to his death were not effectively investigated at the time. The Committee further observes the uncertain conclusions in one autopsy report regarding his rib fractures, suggesting that it was possible that that happened during the cardiopulmonary resuscitation, which ignores the signs of injuries and allegations of torture reported prior to his death. The Committee concludes that the failure of the State party's authorities to investigate promptly and thoroughly the circumstances of the death of the author's husband effectively denied a remedy to the author and her children, and amounted to mental suffering in violation of their rights under article 7.

8.7 The Committee notes the author's claims, under articles 9 and 14 of the Covenant, that her husband was arbitrarily arrested and detained in the absence of evidence of his links to the coup attempt and that the supposed evidence of his use of the ByLock application could not serve as a sufficient basis to place him in custody and was unlawfully obtained. It further notes the author's allegations that: (a) her husband was never informed of the charges brought against him; (b) he was unable to appoint a lawyer; (c) his defence statement was never taken; (d) he was never presented before a judge during his 13 days in detention; and (e) he was presumed guilty despite the absence of proof against him. The Committee notes the State party's argument that the author's husband was immediately informed of the reasons for his arrest and of the charge of membership of a terrorist organization brought against him, based on his use of the ByLock application and possession of an account at Bank Asya, which constitute decisive and legally collected evidence of the criminal offence of membership of the Fetullahist terrorist organization. It takes note of the State party's submission that the charges were also based on a witness statement, which the author's husband recognized in his statement, and that during the period of his pretrial detention, which complied with the law on the state of emergency, he was able to meet with his lawyers.

8.8 The Committee notes that the author has not claimed that her husband's detention was unlawful by virtue of the decree laws under the state of emergency. The question before the Committee is therefore to consider whether his detention was arbitrary. The Committee recalls that the notion of "arbitrariness" must be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality and that remand in custody on criminal charges must be reasonable and necessary in all circumstances.[25] The Committee observes that the State party submitted in its initial observations that the charges brought against the author's husband were based on the crucial evidence of his use and installation of the ByLock application and ownership of an account at Bank Asya, clarifying in its second observations that he was taken into custody based on witness statements. Nevertheless, it notes that the State party has not provided any documentation, such as the alleged witness statements, an arrest warrant, detention order, conversation records on the ByLock application, or any proof regarding the evidence purportedly justifying detention of the author's husband. It also takes note that the State party has not provided comments on the letter from the Ministry of Education reinstating the author's husband as a teacher. Furthermore, the Committee notes that the judgments of the Constitutional Court, referred to by the State party, ruling that the use of the ByLock application can be relied on as sole or decisive evidence of the criminal offence of membership of the Fetullahist terrorist organization, were published after the arrest and detention of the author's husband. In this sense, the Committee considers that the State party has not provided information as to how, at the time of the arrest and detention of the author's husband, the judicial authorities had sufficient information on the nature of the ByLock application to conclude that the application was used exclusively by members of the organization for the purposes of internal communication, which could justify his detention.[26] The Committee further recalls that persons arrested for the purpose of investigating crimes that they may have committed or for the purpose of holding them for criminal trial must be

[25] General comment No. 35 (2014), para. 12.

[26] See, mutatis mutandis, European Court of Human Rights, *Akgün v. Turkey* (application No. 19699/18, Judgment, 20 July 2021), paras. 171–173.

promptly informed of the crimes of which they are suspected or accused.[27] The Committee notes that the State party has not submitted any documentation, such as the detention order, arrest warrant or transcripts of judicial proceedings, to substantiate its claim that the author's husband had been promptly informed of the reason for his arrest or the charges against him. It further notes that the State party has not provided any information on the questions posed to him during the investigation or a record of the interview dated 27 July 2016, which it claims to have conducted. In these circumstances, the Committee considers that the State party has not established that the author's husband was promptly informed of the charges against him and the reason for his arrest, nor substantiated that his detention met the criteria of reasonableness and necessity. It recalls that a derogation under article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary.[28] The Committee therefore finds that the detention of the author's husband amounted to a violation of his rights under article 9 (1) and (2) of the Covenant.

8.9 Having found a violation of articles 6, 7 and 9 (1) and (2) of the Covenant, the Committee decides not to separately examine the author's claims of a violation of articles 14 (2) and (3) (b) and (d).

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of the rights of the author's husband under articles 6, 7 and 9 (1) and (2) of the Covenant and of the rights of the author and her children under article 7.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to take appropriate steps to: (a) conduct a prompt, impartial and thorough investigation into the circumstances of the arbitrary arrest, torture and death of the author's husband; (b) prosecute those responsible; and (c) provide adequate compensation to the author and her children. The State party is also under an obligation to take all steps necessary to prevent the occurrence of similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official language of the State party.

[27] General comment No. 35 (2014), para. 29.

[28] Ibid., para. 66.

SONUÇ

Türkiye İnsan Hakları Vakfı İstanbul Temsilciliği'ne 02.01.2017 tarihinde Mümüne Açıkkollu vekili Av. Sermin Yüksel tarafından yapılan başvuru ile 24.07.2016 tarihinde gözaltına alınan ve gözaltındayken 05.08.2016 tarihinde fenalaşması sonucu yapılan canlandırma girişimlerine rağmen öldüğü bildirilen ve gözaltında iken işkenceye maruz kalıp kalmadığının araştırılması istenen 1974 doğumlu Gökhan AÇIKKOLLU hakkında düzenlenen ve Av. Sermin Yüksel aracılığı ile TİHV İstanbul Temsilciliği'ne iletilen klasör ve içindeki belgelerin incelemesi sonucunda;

1. Gözaltında bulunduğu süre içinde yapılan muayeneler ve düzenlenen adli raporlarda da belirtildiği üzere gözaltına alındığı ilk günden itibaren hakaret, tehdit ve fiziksel şiddete maruz kaldığını aktardığı, vücudunun değişik bölgelerinde –yüz, başın arka kısmı, boyun, omuz, göğüs sağ yanı ve sırtı kapsayan- değişik renk ve boyutlarda berelenmeler tanımlandığı, otopside de boyun ve sırt bölgesinde gerek çıplak gözle görülebilen gerekse mikroskopta doğrulanan kanama alanları saptandığı dikkate alındığında **bu yaralanma bulgularının boyut, renk ve yerleşim özellikleri itibarıyla kişinin aktardığı yumruk, tekme, başın duvara çarpılması şeklindeki kaba dayak uygulaması ile uyumlu olduğu,**
2. Gözaltında bulunduğu sürede yapılan psikiyatrik değerlendirmesinde sözel ve fiziksel kötü muamele sonrası artmış uyarılmışlık geliştiği, yeniden yaşantılamalarının olduğu, kabuslar gördüğü, geceleri titreyerek uyandığı, terleme, titreme, nefes darlığı, ölüm korkusu hissettiği, beklenti anksiyetesi tarifledığı, hastada Panik Bozukluğu + Akut Stres Bozukluğu tanısı konduğu dikkate alındığında panik bozukluğu bulunan kişide maruz kaldığı ruhsal ve fiziksel travmalar ile uyumlu akut stres bozukluğu geliştiği,
3. Gerek vücudundaki kaba dayak ile uyumlu yaralanmalar, gerekse ruhsal değerlendirmede saptanan akut stres bozukluğunun birlikte değerlendirildiğinde Dünya Sağlık Örgütü hastalık sınıflandırma kılavuzu ICD10' da yer alan "diğer kötü muamele sendromları" başlığı altında **Y.07.3** kodu ile tanımlanan "işkence" tanısı kapsamında değerlendirilmesi gerektiği,
4. Gözaltındayken 05.08.2016 tarihinde ölen kişinin ölümünde herhangi bir travmatik etkinin olmadığı ve akut miyokard enfarktüsü(kalp krizi) sonucu ölmüş olduğu belirtilmiş ise de bu alanda yapılmış çalışmalarda stres ve travmanın kalp damar hastalıklarının gelişiminde önemli bir risk faktörü olarak değerlendirilmesi gerektiğinin bildirildiği de dikkate alındığında gözaltında maruz kaldığı ve muayenelerde de tanımlanan ruhsal ve fiziksel travmaların (Y.07.3 işkence) bir başka risk faktörü olarak şeker hastalığı da bulunan kişide kalp krizi gelişmesini tetikleyici etkenlerden biri olarak kabulü gerektiği
5. Otopsi fotoğrafları ve videosunun temini halinde travma bulguları yönünden ayrıca ek inceleme yapılabileceği kanaatini bildirir ön değerlendirme raporudur. 18.01.2017

Prof. Dr. Şebnem KORUR FINCANCI
TÜRKİYE İNSAN HAKLARI VAKFI
Başkanı

T.C.
ÜMRANİYE KAYMAKAMLIĞI
İlçe Millî Eğitim Müdürlüğü

Sayı : 45174285-663.07-E.3599358
Konu: Göreve İade

20.02.2018

ÜMRANİYE ATATÜRK MESLEKÎ VE TEKNİK ANADOLU LİSESİ MÜDÜRLÜĞÜNE

İlgi: a) Bakanlık Makamının 19/07/2016 tarihli ve 73860670/20-E.7688877 sayılı oluru.
b) Bakanlık Makamının 15/12/2016 tarihli ve 73860670/20-E.14162869 sayılı oluru.
c) Bakanlık Makamının 07/02/2018 tarihli ve E.2561776 sayılı oluru.
ç) Milli Eğitim Bakanlığı İnsan Kaynakları Genel Müdürlüğünün 07/02/2018 tarihli ve E.3344993 sayılı yazısı.
d) İl Millî Eğitim Müdürlüğünün 19/02/2018 tarih ve 3514002 sayılı yazısı.

Türkiye Cumhuriyeti Devleti içerisinde yapılanan Fethullahçı Terör Örgütü/Paralel Devlet Yapılanmasının (FETÖ/PDY) sosyal medya üzerinden propagandasını yaptıkları, finansal destek sağladıkları, doğrudan ya da dolaylı yardımda bulunmak suretiyle işbirliği içerisinde oldukları düşünülen ve ilgi (a) ve ilgi (b) Makam olurları ile haklarında görevden uzaklaştırma tedbiri alınan okulunuz öğretmeni Gökhan AÇIKKOLU'nun görevden uzaklaştırma tedbirinin ilgi (c) olur ile kaldırıldığı ilgi (ç) yazı ile bildirilmiştir.

Bilgilerinizi ve ekli listede adı geçen personel hakkındaki gerekli iş ve işlemlerin yapılması hususunda gereğini rica ederim.

Süleyman GÖKÇİMEN
Müdür

Ek: İlgi (d) yazı ve eki (3 sayfa)

Kurum & Kodu : Ümraniye İlçe Milli Eğitim Müdürlüğü (162509)
Adres : İstiklal Mah. Mithatpaşa Cd. No:43 Ümraniye/İSTANBUL
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Ayrıntılı Bilgi İçin : C.NAS (Memur)

arkadaşlarım bu şahısta dahil diğer gözaltında bulunan şahısları saat merhumu olmadan devamlı surette kontrol altında gerek kameralar gerekse fiziki gözlemleyerek kontrol altında bulunduruyorduk. Şahsın şeker hastası olduğu ve düzenli olarak insülin kullandığını biliyorum. Kullandığı ilaçlar düzenli olarak kendisine verilmekte idi" dediği,

Tanık Gürol Berber'in 05.08.2016 tarihinde verdiği ifadesinde; "Saat:04.30 sıralarında nezarethane koğuşunda birlikte kaldığım arkadaşlardan eks şahıs Gökhan Açıkkollu'nun yanında yatan ismini bilmediğim şahsın gürültüsüne uyandım diğer arkadaşların hepsi uyanmış ve Gökhan Açıkkolu'yu tutuyorlardı daha öncede Gökhan Açıkkollu birkaç kez havasız kaldım diye panik atak belirtileri vardı ben öyle olduğunu düşünerekten müdahale etmedim. Yanımdaki diğer kalanlar görevli memura memur bey diye seslendiler. Bende memur bey diye yüksek ses ile seslendim. Görevli bir memur geldi ve diğerlerinde hemen çağırdı. Memurlar gelip koğuşun kapısını açıp içeri girdiler ben kendilerine hava alması için dışarı çıkarın dedim. O esnada Gökhan Açıkkollu kasılmalar yaşıyordu. Ben hala kendisinin kiriz geçirdiğini anlamamıştım. Daha sonra memurlar ve aynı koğuşta kaldığımız diğer arkadaşlar Gökhan'ı alıp dışarı çıktılar, çıkarırken arkadaşlara ve memurlara başını dik tutun ve bir yere çarpmasın diye telkinde bulundum Görevli memurlar ambulans çağırdılar. Sonra bende bir süre koğuşta kala kaldım. Daha sonra memurların arkasından koşup insülin kullanan şeker hastası olduğunu ve şeker verilmesinin uygun olacağını söyledim. Bir tane memur toz şeker getirdi. Bende Gökhan beyin yanına geçip şekeri ağzına parmağımla verdim. Bu esnada diğer gözaltında bulunan doktorları memurlar getirip ambulans gelene kadar ilkyardım müdahalesinde bulunulmasını istemişlerdir. Kalp masajı ve solunum yapmaya başladılar. Başka doktor gelip müdahale edeceği esnada ambulans geldi. O esnada nezaharethane görevlilerinden birisi benim içeri geçmemi söyledi ve ben de içeri geçtim. Ben Gökhan beyle birlikte 13 gündür aynı nezarethanede idim birçok kere memura seslenip hava almam lazım diyerek çıkmıştı. Ambulans gelip aldıktan sonrasında ne olduğunu bilmiyorum" dediği,

TEM Şube Görevlilerince düzenlenmiş 12.08.2016 tarihli tutanakta; "Gökhan Açıkkollu'nun üst aramasından çıkan ..., 1 adet Xanax 0.5 mg tablet yazılı ilaç kutusu, 1 adet Dramamine 12 tablet yazılı ilaç kutusu, 1 adet Paxera Paroksetin yazılı ilaç kutusu, 1 adet BD microfine plus kalem iğnesi yazılı ilaç kutusu, 1 adet Süssina tablet tatlandırıcı yazılı ilaç kutusu, 3 kutu Novarapid Flexpen yazılı insülin aspart enjeksiyon kalemi yazılı kutu, 3 kutu Levemir Flexpen yazılı insülin detemir enjeksiyon kalemi yazılı kutu, 1 adet Contour TS yazılı sağlık cihazı, ..., Mümüne Açıkkollu isimli şahısa tam ve eksiksiz teslim edildiği",

Müşteki Mümüne Açıkkollu adına vekilinin 20.01.2017 tarihli dilekçesinde; "Cumhuriyet Başsavcılığı eksik tahkikat yapmış ve soruşturmaya yer olmadığına dair karar vermiştir. Takipsizlik kararma dayanak yapılan 23.11.2016 tarihli Adli Tıp Kurumu 1. Adli Tıp İhtisas Kurulunca düzenlenen rapor eksiklikler içermektedir. Maktülün ilaçlarından ve perhizinden yoksun kalıp kalmadığı araştırılmamıştır. Türkiye İnsan Hakları Vakfı Başkam Prof. Dr. Şebnem Korur Fincancı tarafından hazırlanan raporda maktülün ölümünün gerçek sebepleri ortaya konmuşken Adli Tıp Kurumu 1. İhtisas Kurulunun verdiği rapor incelendiğinde söz konusu raporun eksiklikler içerdiği soruşturmaya dayanak olarak kabul edilemeyeceği ortadadır. Verilen ve diabet hastalığı nedeniyle düzenli kullanması gereken ilaçlarının nasıl ve ne şekilde verildiğinin de sorulması gerekmektedir. Engin Emrah Biçer'in dosyaya 20.09.2016 tarihinde intikal eden ihbar mektubu incelenmemiştir. İhbar mektubunun içeriği incelendiğinde maktulün dövüldüğü hatta dövülmesinin ölümüne sebep olduğu ihbar edilmiş ayrıca bu ihbar edilen olaya en az onbeş kişinin şahit olduğu da gayet net bir şekilde belirtmiştir" dediği,

2. Bayrampaşa Devlet Hastanesinin 24.07.2016 tarih, 15868 sayılı genel adli muayene raporunda; darp ve cebir olmadığı,

3. Haseki Eğitim ve Araştırma Hastanesinin 24.07.2016 tarihli, 4614729 protokol nolu adli muayene ve bildirim formunda; "Öyküsü: Gözaltındaki şahıs. Şikayeti: Terleme, baş dönmesi, göğüs ağrısı. Bilinen panik atak hastası, Paxera kullanıyor. Sistem muayenesi: Genel durum iyi, GKS: 15, Nbz: 80, TA: 120/80, bilinç açık, IR +/+, pupiller izokorik, solunum 18, sırt bölgesinde ekimotik bilateral lezyonlar mevcut. Başka lezyon yok. Sonuç: Semptomatik tedavi verildi. Yapılan kan tahlillerinde ve görüntülemede acil patoloji görülmedi. Erken dönem poliklinik kontrol önerildi. Rv geçici rapordur"

Anayasa Mahkemesi Başkanlığı

Bireysel Başvuru Sorgulama

Bu sayfada, Anayasa Mahkemesi'ne yapılmış olan bireysel başvurulardan sizinle ilişkili olanlar görüntülenir.

Bireysel Başvuru Listesi

Sıfatı	Başvuru Numarası	Başvuru Tarihi	Kayıt Tarihi	Üst Dosya Numarası	Dosya Durumu	Karar Tarihi	Karar Türü
Başvurucu	2020/17648	16/06/2020	29/06/2020	-	Bölümler Önünde İncelemede	-	-
Başvurucu	2016/28839	23/11/2016	29/11/2016	-	Kapalı	26/07/2017	Kabul Edilemezlik

İSTANBUL CUMHURİYET BAŞSAVCILIĞI'NA
Gönderilmek Üzere
SİLİVRİ KAPALI CEZA İNFAZ KURUMU MÜDÜRLÜĞÜ'NE

Tarafıma usul ve yasaya aykırı olarak 22.07.2016 tarihinde gözaltına alındım. 04.08.2016 tarihinde tutuklandım. Gözaltında iken yaklaşık 14 gün başka bir dosyadan gözaltına alınan öğretmen "Gökhan Acuhkalkı" ile birlikte kaldık.

Kendisi gözaltında iken dövülme dövülme olduğundan bu durum en az on beş kişi şahitten delillerle sabittir. Bu kişi için açılan bir soruşturma olup olmadığının var ise soruşturma numarasının tarafıma bildirilmesini saygılarımla talep olunur 20.09.2016

bilgi edinme kanunu çerçevesinde

Tutuklu
Engin Emanet
Bilgen
C-6 Blok
46 No'lu oda

Dilekçenin adı geçen
H/T'ye ait olduğunu tasdik ederim
İnfaz ve Koruma Başmemuru
...../...../20.....
20 Eylül 2016

C. İnfaz
20 Eylül 2016

T.C.
İSTANBUL
11. SULH CEZA HÂKİMLİĞİ

TÜRK MİLLETİ ADINA
DEĞİŞİK İŞ KARAR

DEĞİŞİK İŞ NO : 2020/1003 D.İş

HAKİM : Ali İhsan TABAK 179636
KATİP : Arzu BOŞLAMAZ 154052

DAVACI : K.H.
ÖLEN : GÖKHAN AÇIKKOLLU, AYHAN Oğlu ASYA'den olma, 01/04/1974 doğumlu
MÜŞTEKİ : MÜMÜNE AÇIKKOLLU, MEHMET Kızı HATİCE'den olma, 21/01/1975 doğumlu, Cemil Meriç Mah. Bestekar Sk. No:3G İç Kapı No:27 Ümraniye/ İSTANBUL ikamet eder.
VEKİLİ : Av. EROL BAYRAM, İSTANBUL Ali Rıza Gürcan Cad. Çırpıcı Yolu No:1 Meridyen İş Merkezi K:2/220 Merter Güngören / İSTANBUL
ŞÜPHELİ : İLGİLİ GÖREVLİLER, 'den olma, doğumlu, ili, ilçesi, köy/mahallesi, cilt, aile sıra no, sıra no'da nüfusa kayıtlı . İSTANBUL ikamet eder.
SUÇ : Taksirle Ölüme Neden Olma
SUÇ TARİHİ VE YERİ : 05/08/2016 İSTANBUL/FATİH

İstanbul Cumhuriyet Başsavcılığının 09/01/2020 tarih, 2017/104391 soruşturma 2020/4015 karar sayılı kovuşturmaya yer olmadığına dair kararına şikayetçi vekili itiraz etmiş olup, itirazen incelenmek üzere soruşturma dosyası hakimliğimize tevzi edilmiş olmakla,

Soruşturma dosyası incelendi.

GEREĞİ DÜŞÜNÜLDÜ:

İtiraz eden dilekçesinde özetle; savcılık tarafından verilen kovuşturmaya yer olmadığına dair kararın kaldırılmasını ve kamu davası açılmasını talep etmiştir.

CMK'nın 160/1. maddesinde, "Cumhuriyet savcısı, ihbar veya başka bir suretle bir suçun işlendiği izlenimini veren bir hali öğrenir öğrenmez kamu davasını açmaya yer olup olmadığına karar vermek üzere hemen işin gerçeğini araştırmaya haşlar.", 160/2. maddesinde "Cumhuriyet savcısı, maddi gerçeğin araştırılması ve adil bir yargılamanın yapılabilmesi için. emrindeki adli kolluk görevlileri marifetiyle, şüphelinin lehine ve aleyhine olan delilleri toplayarak muhafaza altına almakla ve şüphelinin haklarını korumakla yükümlüdür." 170. maddesinin 2. fıkrasında, "Soruşturma evresi sonunda toplanan deliller, suçun işlendiği hususunda yeterli şüphe oluşturuyorsa; Cumhuriyet Savcısı, bir iddianame düzenler. 172. maddesinin 1. fıkrasında, "Cumhuriyet savcısı, soruşturma evresi sonunda, kamu davasının açılması için yeterli şüphe oluşturacak delil elde edilememesi veya kovuşturma olanağının bulunmaması hâllerinde kovuşturmaya yer olmadığına karar verir.'" hükümleri düzenlenmiştir.

Kovuşturmaya yer olmadığına dair kararı itiraz üzerine inceleyen mahkeme, kamu davası açılması için yeterli delil bulunmaması durumunda itirazın reddine, yeterli delil

bulunması durumunda itirazın kabulüne veya eksik soruşturma nedeniyle soruşturmanın genişletilmesine karar verebilecektir.

CMK'nın 170/2. maddesine göre kamu davası açılabilmesi için soruşturma aşamasında toplanan delillere göre suçun işlendiğine dair yeterli şüphe bulunması gerekir. Suç ihbar veya şikayeti yoluyla soruşturma yaparak maddi gerçeğe ulaşma yükümlülüğü ve yetkisi bulunan Cumhuriyet savcısı, soruşturma sonucunda elde edilen delilleri değerlendirerek kamu davası açmayı gerektirir nitelikte yeterli şüphe olup olmadığını takdir edecektir. Bu durum delil değerlendirmesini gerektirir. Diğer bir deyişle Cumhuriyet savcısı elde edilen delillerin kamu davası açılması için yeterli olduğu kanaatine varırsa dava açacak, aksi durumda kovuşturmaya yer olmadığına karar verecektir. Bu nedenle Cumhuriyet savcısının delilleri değerlendirme yetkisi vardır. Aksi durumun kabulü, her ihbar veya şikayet üzerine kamu davası açılmasını, delil takdirinin ise mahkemelere bırakılmasını gerektirir ki bu kabul lekelenmeme hakkıyla bağdaşmayacak ve kanunun ruhuna uygun düşmeyecektir. (Yargıtay 18. Ceza Dairesi 15.02.2016 tarih, e, k, sayılı ilamından)

Açıklanan bilgiler ve yasal düzenleme ışığında, tüm dosya kapsamı birlikte değerlendirildiğinde; Cumhuriyet savcılığı, soruşturma sonucunda elde edilen delilleri değerlendirerek kamu davası açmayı gerektirir nitelikte yeterli şüphe olup olmadığını takdir etmiş ve kovuşturmaya yer olmadığına karar vermiştir. İncelenen dosya kapsamına göre, soruşturmaya konu somut olayda, Adli Tıp Kurumu Başkanlığı Üçüncü Üst Kurulu'nun 14/02/2019 tarihli 47 karar nolu rapor içeriğine göre atılı eylemin savcılık makamınca irdelenip takdir edildiği, karardaki gerekçelere göre, kovuşturmaya yer olmadığına dair kararın usul ve yasaya uygun olduğu, kararda değişiklik yapılmasını gerektirir bir neden görülmediğinden şikayetçi vekilinin itirazının reddine dair aşağıdaki şekilde karar verilmiştir.

KARAR; Gerekçesi yukarıda açıklandığı üzere;

İtirazın **REDDİNE,**

Karardan bir suretin **şikayetçi vekiline** İstanbul Cumhuriyet Başsavcılığınca tebliğine,

CMK 173/3 maddesi gereğince itiraz incelemesi nedeniyle yargılama gideri yapılmadığından karar verilmesine yer olmadığına, kararın tebliği için masraf yapılması durumunda, gereğinin İstanbul Cumhuriyet Başsavcılığınca takdirine,

Kararın ve dosyanın İstanbul Cumhuriyet Başsavcılığına iadesine,

Dair, dosya üzerinde yapılan inceleme sonucunda kesin olmak üzere karar verildi.**18/02/2020**

Katip 154052 Hakim 179636

e-imzalıdır *e-imzalıdır*