REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

DECISION

THE APPLICATION OF RAHİL DİNK AND OTHERS

(Application Number: 2012/848)

Date of Decision: 17/7/2014

Off. Gaz. Date-Issue: 12/11/2014 -29173

FIRST SECTION

DECISION

President	:	Serruh KALELİ
Members	:	Zehra Ayla PERKTAŞ
		Burhan ÜSTÜN
		Nuri NECİPOĞLU
		Zühtü ARSLAN
Rapporteur	:	Özcan ÖZBEY
Applicants	:	Rahil DİNK
		Hosrof DİNK
		Delal DİNK
		Arat DİNK
		Sera DİNK
Counsels	:	Att. Fethiye ÇETİN, Att İsmail Cem HALAVURT,
		Att. Hakan BAKIRCIOĞLU, Att Ayşenur DEMİRKALE

I. SUBJECT OF APPLICATION

1. The applicants asserted that the investigation that had been launched upon the incident whereby an individual who was their first-degree relative was murdered was not carried out in an effective manner especially with a view to public officials, that the investigation file had been kept secret from them and that no document was provided to them, that the requirements of the decision delivered by the European Court of Human Rights (ECtHR) on 14/9/2010 were not fulfilled within domestic law, that for these reasons, articles 2, 10, 11, 17, 36 and 40 of the Constitution were violated.

II. APPLICATION PROCESS

2. The first application was lodged on 12/11/2012 via the Judge's Office No. 3 of Istanbul (Tasked with Article 10 of CFaT), the second application was lodged on 3/3/2014 via the Regional Administrative Court of Istanbul. As a result of the preliminary examination of the petitions and annexes thereof as conducted in terms of administrative aspects, it was found that there was no deficiency that would prevent submission thereof to the Commission.

3. It was decided on 10/6/2013 by the Third Commission of the First Section and by the First Commission of the Second Section on 12/3/2014 that the admissibility examination be carried out by the Section, that the file be sent to the Section.

4. Due to the fact that a legal connection was determined to exist in terms of the subject and the individual in the examination of the applications lodged by the applicants with the claim that the right to life had been violated, it was decided by the Section on 25/3/2014 that the file numbered 2014/3045 be joined and examined with the individual application file numbered 2012/848.

5. In the session held by the Section on 26/6/2013, it was decided that the examination of admissibility and merits of the application be carried out together.

6. The facts and cases, which are the subject matter of the application, were notified to the Ministry of Justice on 27/6/2013. The Ministry of Justice presented its opinion to the Constitutional Court at the end of the additional period that was granted on 28/8/2013.

7. The opinion submitted by the Ministry of Justice to the Constitutional Court was notified to the counsel of the applicants on 18/9/2013. The applicants submitted their written opinion to the Constitutional Court on 21/10/2013.

8. The Constitutional Court on 19/6/2013 with statement numbered 2012/848 requested within the scope of the present application"*an explanatory information note containing the actions and decisions that have been taken with regard to this investigation as well as approved copies of documents that are of a decisive nature and are deemed to be necessary in the file in order to determine the stage reached by the investigation file and the applicants' participation status to the investigation*" from the Office of the Chief Public Prosecutor of Istanbul. Upon the request a DVD regarding the investigation which is the subject of the present application was submitted by the Office of the Prosecutor to the Constitutional Court on 12/11/2013.

9. Although additional information was requested with the correspondence of the Constitutional Court dated 24/2/2014 and numbered 2012/848 from the Office of the Chief Public Prosecutor of Istanbul in order to determine the effectiveness of the investigation that had been conducted, it was stated in the written response of the Office of the Prosecutor dated 26/2/2014 that "*there is a decision of restriction regarding the investigation file in question, that a copy of the investigation file was sent via digital media on 30/10/2013 on the condition that it be within the discretion of the Constitutional Court to prevent the secrecy of the investigation from being undermined and the evidence gaining public nature*", a reference was made to the previous instruction note.

10. As a result of the ensuing correspondence and telephone conversations by the Constitutional Court, some additional information and documents were obtained from the Offices of Chief Public Prosecutors of Samsun, Trabzon and Istanbul on the following dates 10-18-24-27/6/2014.

11. On the other hand the Ministry, in its opinion dated 28/8/2013 pertaining to the facts that are the subject of the application , included certain information, which was confirmed by the applicants in their statements in response to the opinion of the Ministry.

12. The ministry also indicated that they were not able to submit a detailed opinion pertaining to the course and content of the investigation to the Constitutional Court due to their inability to provide any investigation documents apart from the correspondence of the Office of the Chief Public Prosecutor of Istanbul dated 12/7/2013 as a result of the decision of restriction on the investigation in question within the scope of article 153 of the Code numbered 5271.

III. FACTS AND CASES

A. Facts

13. As expressed in the application form and its annexes thereof as well as the opinion of the Ministry and in the correspondence that has been carried out, the facts are summarized as follows:

1. The Murder of Hrant Dink

14. Hrant Dink, the founder and chief editor of Agos Newspaper, was killed as a result of the armed assault he suffered on 19/1/2007 whilst he was leaving his work place in Istanbul.

15. Of the pursuers of this incident, Rahil Dink is the spouse of the deceased Hrant Dink, Hosrof Dink is his sibling, Delal, Arat and Sera Dink are his children.

2. Initiation of the Investigation and the Restriction Introduced to the Investigation

16. An investigation was launched by the Office of the Specially Authorized Public Prosecutor of Istanbul based on the file numbered Invs.2007/972 (and Invs.2007/115) on the day Hrant Dink was murdered.

17. Upon the request made by the Office of the Chief Public Prosecutor of Istanbul within the scope of the investigation that was being conducted for the crime of "*being a member of a terrorist organization*" based on the file numbered Invs.2007/972, it was decided with the correspondence of the 12th Assize Court of Istanbul dated 8/10/2007 and numbered D.2007/286 that "*given the fact that a decision of restriction is deemed to be necessary in light of the possibility that the wanted individuals may learn that they are wanted and flee, destroy items and evidence of crime, that it may become more difficult to collect evidence and uncover all suspects and crimes in the event that the documents contained within the investigation file is examined and copies thereof are taken by the defense counsel and the attorneys, the examination and taking copies of the documents contained within the file by the attorney of the suspect, defense counsel and the attorney of the party damaged by the crime be restricted except for legal exception*".

18. Although a case was filed with regard to certain suspects who were determined to have taken part in the incident as a result of the evidence obtained in the investigation conducted by the Office of the Prosecutor, the investigation file was left open considering the wide scope of the investigation and the possibility of obtaining new evidence, the file is pending as of the date when the applicants resorted to individual application.

3. Judicial Actions Carried Out Pertaining to Civilian Individuals Who Became Involved in the Act of Murder

19. The investigation that was launched upon the fact of murder was completed on 20/4/2007 with regard to 18 civilian suspects, a case was filed at the 14th Assize Court of Istanbul via the indictment numbered M.2007/368.

20. O.S., who is among the principal perpetrators of the Hrant Dink murder and whose file was separated due to being a minor, was sentenced to 21 years and 6 months in prison by the 2nd Juvenile Assize Court of Istanbul for the crime of willful murder. This decision was approved by the Supreme Court of Appeals and finalized on 21/3/2012.

21. The decision pertaining to the other accused was declared by the 14th Assize Court of Istanbul on 17/1/2012. In the decision, the accused Y.H. was sentenced to aggravated life imprisonment with the justification that he had instigated O.S. to commit the crime of murdering Hrant Dink with premeditation. The accused E.Y. and A.İ were sentenced to 15 years each in prison with the justification that they had aided and abetted O.S. in the crime of murdering Hrant Dink with premeditation. On the other hand, with the justification that the crime of Y.H. of "*being a leader of an armed terrorist organization*" and the crime of A.İ. of "*being a member of an armed terrorist organization*" were not proven, it was decided that they be acquitted.

22. This decision was appealed by the Office of the Chief Public Prosecutor of Istanbul with the justification that the decision of acquittal, which had been delivered with reference to organized crime and a lack of evidence regarding some of the accused, was unlawful.

23. The Office of the Chief Public Prosecutor of the Supreme Court of Appeals drafted a letter of notification on 10/1/2013 in favor of the reversal of the decision with the justification that the crime of willful murder had been committed within the framework of the organization's activity.

24. The 9th Criminal Chamber of the Supreme Court of Appeals, which carried out the appeal examination, decided on 13/5/2013 to reverse the judgment in question due to the fact that it had been decided to acquit the accused Y.H. of the crime of establishing and leading an armed criminal organization, the accused A.İ and E.Y. of the crime of being members of an armed criminal organization, the accused E.T, T.U. and Z.A.Y. of the crimes of being a member of an armed criminal organization and assisting to murder. It was stated in the decision that the required conditions for an organization were assembled within the circumstances of the present case, that Y.H., one of the accused, decided upon the fact of Hrant Dink's murder as a crime that was aimed to be committed by the organization, that the other accused, who were understood to be members of the criminal organization, participated in the crime of murder by means of encouraging O.S. to commit the crime, reinforcing the resolution to commit the crime, leading him in terms of how to commit the crime. This case is being carried out based on the file of the 5th Assize Court of Istanbul numbered M.2014/221.

4. Judicial Actions Carried Out Pertaining to Public Officials Due to Their Negligence in the Act of Murder

25. As per the information and documents mentioned above, the judicial actions that the Office of the Prosecutor carried out pertaining to public officials whose connections with the fact were determined are summarized as follows:

a. Criminal proceedings conducted as regards to the officials of the Trabzon Gendarmerie

26. As a result of the investigation it carried out ex officio in addition to the complaint petition of the applicants dated 17/1/2008, the Public Prosecutor of Istanbul issued a decision of lack of jurisdiction regarding the Office of the Chief Public Prosecutor of Trabzon for the crime of "*misconduct*" regarding officials of the Gendarmerie Command of Trabzon with its decision dated 25/1/2008 and numbered D.2008/33 and for the crime of "*willful murder via negligent behavior*" with its decision dated 28/4/2008 and numbered D.2008/201.

27. Through its indictments dated 30/10/2007 and numbered M.2007/2815, dated 25/12/2008 and numbered M.2008/4010, the Office of the Chief Public Prosecutor of Trabzon filed a case at the 2nd Criminal Court of Peace of Trabzon with regard to certain Gendarmerie personnels for the crime of "*neglect of duty*".

28. With the decision dated 2/6/2011 and numbered M.2008/615, D.2011/669 of the Court in question, it was decided to sentence the accused A. Ö., M. Y., V. Ş., O. Ş., H. Y. and H. Ö. Ü., who are gendarmerie personnels, to prison terms ranging between 4 to 6 months with the justification that "*even though they obtained detailed information pertaining to the assault, they did not notify the competent authorities of this information and thus they neglected their duty*".

b. Criminal proceedings conducted as regards to the officials of Istanbul Police

29. As a result of the investigation carried out by the Office of the Chief Public Prosecutor of Fatih regarding the public officials, who are members of Istanbul police, claimed to be negligent with regard to the Hrant Dink murder as per article 9 of the Code on the Trial of Civil Servants and other Public Officials numbered 4483, in line with the decision dated 20/3/2008 issued by the Governor of Istanbul, it was deemed appropriate not to give permission for the investigation regarding C.C., the Istanbul Police Commissioner and B.K., the Intelligence Section Vice-Chief, to give permission for the investigation regarding the other six police officers assigned to intelligence and their superiors.

30. Upon the objection of the parties to this decision, while the decision pertaining to the non-provision of permission for investigation was approved with the decision of the Regional Administrative Court of Istanbul dated 27/6/2008 and numbered M.2008/374, it was decided to reverse the decision with a view to the officials regarding whom the permission for investigation had been granted by indicating that "*sufficient information and documents for the conduct of an investigation do not exist as per the contents of the file*" and it was decided not to give permission for investigation with regard to these individuals.

31. It was thus decided by the Office of the Chief Public Prosecutor of Fatih, which was conducting the investigation, with the decision dated 22/10/2008 and numbered D.2008/9680 that there were "*no grounds for prosecution*" regarding the public officials in question.

c. Criminal proceedings conducted as regards to the officials of Samsun Police

32. Within the scope of the investigation that was carried out by the Office of the Chief Public Prosecutor of Samsun due to acts that amount to misconduct and violation of secrecy during actions taken by the relevant officials of Samsun Police with regard to O.S., who was apprehended in Samsun having fled after murdering Hrant Dink, a public case was filed in 2007 regarding M.B., the Head of Anti-Terrorism Section and İ.F., who was serving as a superintendent.

33. As a result of the trial conducted by the 4th Criminal Court of First Instance of Samsun due to the failure to take the suspect into custody despite the written order of the Public Prosecutor and non-compliance with the rules that the statement of the suspect, who was a minor, could only be taken by the Public Prosecutor and that in the absence of an order by the Prosecutor video and audio recording could not be made and a photograph could not be taken and published, it was decided with the decision dated 22/10/2008 and numbered M.2007/521, D.2008/587 to acquit the accused in question based on the justification that "*the action may require disciplinary sanction and there is no element of intention to the crime*".

34. Upon the appeal made by the Public Prosecutor and the applicants, the acquittal decision of the Court was reversed with the decision of the 4th Criminal Chamber of the Supreme Court dated 17/12/2012 and M.2010/27631, D.2012/30616 with the justification that "*given the fact that the accused acted in violation of the provisions of the Code and the Regulation and thus led to the violation of the right to a fair trial of the suspect and the victims of the death fact covered under article 36 of the Constitution and article 6/2 of the ECHR and thus to the victimization of individuals by means of acting in violation of the requirements of their duties; it was unlawful to have delivered a decision of acquittal regarding the accused with undue justifications whereby the nature of the crime was wrongly evaluated without taking into consideration whether or not the material and moral circumstances of the crime of misconduct via executive action covered under article 257/1 of the TCC were assembled..., without discussing whether or not the intention of the accused was to send a message to the public opinion to the point that the crime committed by O.S., who was a suspect of the crime of murder, was the correct kind of behavior and whether or not it was possible to implement article 215 of the TCC with regard to them*". As a result of the retrial conducted by the court by complying with the reversal, it was decided on 18/6/2013 to "*adjourn the public action*" as per article 1/1 of the Code numbered 6352 by considering the action of the two officials in question of publishing the photograph they had taken with the accused O.S. within the scope of the crime of "*praising the crime and the criminal*" and also taking into account the date of the crime, also to postpone the pronouncement of the judgment of the prison sentence of 5 months issued with regard to M.B. for the crime of "*misconduct*".

5. Application of the Applicants to the European Court of Human Rights (ECtHR)

35. The applicants applied to the ECtHR in 2008 and 2009 as a result of Hrant Dink's murder in addition to a number of claims with the allegation that the right to life had been violated from a material and procedural point of view. The ECtHR examined the five applications lodged by the applicants, who are Hrant Dink and his relatives, by joining them together (see *Dink v. Turkey*, App. No: 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010).

36. The ECtHR decided on 14/9/2010 that, in addition to some other reasons of violation, article 2 of the Convention, which regulates the right to life, had been violated from a material point of view with the justification that despite the presence of a clear and imminent danger against Hrant Dink's life, official instances had not taken due precautions to prevent the murder from happening; that the mentioned article had also been violated from a procedural point of view by concluding that the State had acted in violation of the liability to conduct an effective investigation with a view to determining and punishing the individuals who had been observed to be negligent due to the fact that the investigations that had been launched with regard to officials of the police and gendarmerie as a result of their negligence in protecting Hrant Dink's life had been concluded with decisions of no further prosecution and found it appropriate that 100.000 euros be paid jointly to the applicants Rahil Dink, Delal Dink, Arat Dink and Sera Dink and 5000 euros to the applicant Hasrof Dink under the present circumstances of the fact by taking into account some other factors that constituted reason for violation.

37. The ECtHR made the following observations with regard to the actions carried out by relevant units regarding the public officials who had failed to prevent the occurrence of the fact through their negligent behavior:

The ECtHR determined

- That officials of the Trabzon Police Department officially informed the Istanbul Police Department on 17/1/2006 that Y.H. was planning the murder of Hrant Dink, that his criminal record and personality were suitable to commit this crime, that however, the Istanbul Police Department had not taken any action upon the intelligence in question, that the office of the Prosecutor of Istanbul had filed a public action with the indictment dated 20/4/2007 with regard to eighteen accused for the crimes of constituting criminal organizations for terrorist acts and murder and being members of these or instigating these kinds of actions, that this case continued to be heard by the Assize Court of Istanbul,
- That a criminal case had been filed regarding the gendarmerie officials V.S. and O.S. with the indictment of the Office of the Prosecutor of Trabzon dated 30/10/2007 at the Criminal Court of First Instance of Trabzon, that however, the application that had been made by the attorneys of the applicants against the decision of the Office of the Governor dated 4/4/2007 and included the request that the responsibility of the superiors of the gendarmerie officials also needed to be sought was dismissed by the Regional Administrative Court of Trabzon on 6/6/2007,
- That upon the denunciation of the Office of the Prosecutor of Istanbul, an investigation was filed by the Office of the Prosecutor of Trabzon with regard to those responsible at the Trabzon Police Department, that a decision of no further prosecution was issued on 10/1/2008 as a result, that the objection made to this no further prosecution decision was dismissed by the Assize Court of Rize on 14/2/2008,
- That the investigations conducted by the Prosecutor of Istanbul with a view to certain officials at the Istanbul Police Department were concluded with no further prosecution due to the decisions of the Regional Administrative Court of Istanbul dated 23/5/2007, 27/6/2008 and

15/11/2008 of not granting permission for investigation or canceling permissions that had already been granted,

- That the applicants had filed a criminal complaint with regard to the officials of the police and the gendarmerie who had posed with O.S. for praising the murder of Hrant Dink and misconduct due to the fact that members of the Samsun Police Department and Gendarmerie Command had apprehended O.S., who was the suspected murderer of Hrant Dink, at Samsun bus terminal as he was returning from Istanbul to Trabzon on the day after the murder and took a photo with the suspect in whose hands there was a Turkish flag, that however, as a result of the judicial investigation conducted by the Office of the Prosecutor of Samsun, a decision of no further prosecution was delivered on 22/6/2007, that nevertheless, the Prosecutor had not excluded the possibility that certain procedural mistakes committed by members of security forces (especially with a view to the confidentiality of the investigation regarding minors) could be the subject of disciplinary trial, that the disciplinary investigations that were initiated against the security forces were concluded with the issuance of disciplinary sanctions for violating the principle of confidentiality of criminal trial and undermining the reputation of security forces.

38. The ECtHR made the following observations while outlining the justifications for the violation of article 2 of the Convention from a procedural point of view:

In summary, the ECtHR made the observations;

- That in the present case, the Office of the Prosecutor of Istanbul conducted a detailed and meticulous investigation regarding the manner in which the security forces of Istanbul and Trabzon managed the information they had obtained with a view to the probability of this crime, that the Prosecutor of Istanbul had uncovered the series of potential acts of negligence among the security forces and that he had conveyed the information he had thus obtained to the investigation units in Istanbul and Trabzon also by indicating the identities of the officials who had been negligent in fulfilling the liability of protecting the life of the applicant,
- That at the end of the investigations launched upon the denunciation of the Office of the Prosecutor of Istanbul and the order of the Ministry of Interior, the Governor did not give permission for the trial of the concerned members of the gendarmerie with the exception of two non-commissioned officers before a criminal court,... that no conclusion was achieved as to why the Gendarmerie officers of Trabzon, who were authorized to take suitable precautions, remained passive after the transmission of the information by the two non-commissioned officers,
- That the decision of no further prosecution issued by the Office of the Prosecutor of Trabzon regarding the irregularities and negligence of the Trabzon police within the framework of the prevention of the crime contained arguments that were in contradiction with otherfacts in the file, that the investigation did not provide any information as to why no action

had been taken against the perpetrators of the murder despite the information that the police officers had,

- That similarly no criminal prosecution could be undertaken against the Istanbul Police due to the annulment decision of the Regional Administrative Court of Istanbul (with regard to the decision of the Provincial Administration Board of the Office of the Governor of Istanbul), that the Police Commissioner had also been left outside the scope of the investigation by the Provincial Administration Board, that as a result, the matter as to why the Istanbul police did not act on the threat against Hrant Dink despite the information it had possessed prior to the murder could not be elucidated,
- That, as underlined by the Government, a currently-continuing criminal trial exist at the Assize Court of Istanbul against individuals claimed to be the perpetrators of the assault and all members of an extreme nationalist group, that however, apart from the cases that had been filed against the two non-commissioned officers in Trabzon, all trials that evoked the responsibility of official instances in preventing the crime only resulted in no further prosecution, that since the criminal investigation with regard to .... superiors, the result of the on-going trial regarding the two non-commissioned officers was not of such a degree as to affect the previous observations,
- That moreover, the accusations regarding the gendarmerie officers of Trabzon and police officers of Istanbul had been examined in terms of their merits only by other officers who were all members of the executive and not completely independent from those who had been involved in the facts (the Governor, the Provincial Administration Board), that this situation alone highlighted the weakness of the investigation in question, that the relatives of Hrant Dink had not been allowed to become intervenors to the trials regarding the officials of the Police and gendarmerie officers, that they had been only granted the right to object to the superior instance, which merely conducts an examination based on the file, that the fact that a police chief had publicly displayed his extreme nationalist views and affirmed the actions of the individual accused with murder was not made the subject of any in-depth investigation,
- That the fact that the investigations that had been launched against the officials of the Trabzon Police and Gendarmerie due to their negligence in protecting Hrant Dink's life resulted in decisions of no further prosecution amounted to the violation of the requirements of article 2 of the Convention, which brings the liability of conducting an effective investigation with a view to determining the individuals whose negligence was observed and sanctioning these acts of negligence.

6. Judicial Actions Carried Out Pertaining to Public Officials After the Decision of the ECtHR

39. A petition was submitted by Fethiye Çetin, the attorney of the applicants, to the Office of the Chief Public Prosecutor of Istanbul on 17/1/2011. In the petition, a reference was made to the Dink decision of the ECtHR that had been finalized on 14/12/2010 (*Dink v. Turkey*, App. No: 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010)and it was

requested that an investigation be carried out and a public action be filed with regard to approximately 25 public officials including the Governor of Istanbul M.G. and the Police Commissioner of Istanbul C.C.

40. As a result of the complaint filed by the applicants following the decision of the ECtHR, a general investigation was filed by the Office of the Chief Public Prosecutor of Istanbul with regard to the public officials in question based on the file numbered Invs.2011/192 for the crimes of "*being a member of a terrorist organization, leading to willful murder via negligent behavior, forging documents and being an accessory to a willful murder*"

41. The investigation that was conducted based on the file numbered Invs.2011/192 was later joined with the pending initial investigation file numbered Invs.2007/972 on 13/10/2011.

42. On the other hand, upon the allegation of the applicants via their petition dated 20/7/2010 that M.G., who was the Governor of Istanbul on the date of the crime, had committed misconduct by means of not preventing the assassination that had been carried out against Hrant Dink with his negligent behavior, a decision of no further prosecution was issued by the Office of the Chief Public Prosecutor of Istanbul on 10/4/2013 as a result of the investigation that was conducted on the file numbered Invs.2007/972 with the justification that "*there are no grounds for the conduct of a prosecution with regard to the suspect since it has been understood that a decision of non- process had been delivered in the decision of the Office of the Chief Public Prosecutor of the Supreme Court dated 14/11/2007 and numbered Invs.2007/143, D.2007/57 due to the absence of evidence indicating that the Governor of Istanbul M.G. had direct or indirect responsibility in Hrant Dink's murder and that it had been made the subject of a writ of incurred expenses*".

7. Judicial Actions Carried Out Pertaining to Public Officials Whom the Applicants Made the Subject of the Individual Application Registered Under the Number 2014/3045

43. Relying on the decision of the ECtHR dated 14/9/2010, as per the provision "*In the event that it is determined that the decision on no grounds for prosecution is made without conducting an effective investigation by the final decision of European Court of Human Rights, an investigation shall be re-conducted if requested within three months following finalization of the decision.*" regulated in paragraph (3) that was added to article 172 of the Code numbered 5271 with article 19 of the Code dated 11/4/2013 and numbered 6459 the applicants filed a complaint at the Office of the Chief Public Prosecutor of Istanbul on 1/7/2013 so that the requirement of the mentioned decision of the ECtHR be fulfilled and that a new investigation be launched with regard to the public officials assigned to the Trabzon Police Department and Gendarmerie as well as the Governor's Office of Istanbul and Istanbul Police Department regarding whom a decision had been delivered that there was no grounds for investigation and whose names are included in the complaint petition.

44. The complaint petitions of the applicants were registered under the investigation numbered 2013/93822 of the Office of the Prosecutor that is assigned to conduct general investigations. It was indicated by the Office of the Prosecutor in question that some of the officials were executing their duties in Trabzon at the time when the crime was committed, the separated documents were registered under the investigation number 2013/102053 and sent to the Office of the Chief Public Prosecutor of Trabzon on 19/7/2013 with a decision of

rejection of venue. The file regarding M.G., the Governor of Istanbul, who was among those regarding whom a complaint had been filed, was separated and sent to the Office of the Chief Public Prosecutor of the Supreme Court of Appeals, which is competent and has venue to conduct investigations pertaining to governors, based on the investigation number 2013/101995 along with the decision of lack of jurisdiction dated 19/7/2013.

45. The Office of the Prosecutor made a request to the Office of the Governor of Istanbul for the granting of permission for investigation regarding E.G, the Deputy Governor of Istanbul, C.C., the Police Commissioner of Istanbul, Commissioners A. İ. G., B. K., İ. P., Chief Superintendent İ.Ş.E., Superintendent V.A. and police officers Ö. Ö. ve B. T. regarding whom a complaint had been filed within the scope of the same investigation and whereby the legal process had been finalized since a permission for investigation with regard to them had not been granted as per the Code numbered 4483 due to the fact that the action alleged to have been committed by the suspects arose from administrative duty also by taking into account the amendment made in the Code numbered 5271.

46. In the report dated 21/11/2013 that was prepared by the Civil Service Inspector who was assigned to conduct a preliminary examination; it was indicated that the decision of the ECtHR regarding Hrant Dink had been finalized on 14/12/2010, that paragraph (3) that was added to article 172 of the Code numbered 5271 came into force on 30/4/2013, that therefore investigations could be renewed only for those actions which are the subject of decisions of the ECtHR that were finalized after this date, that in the present case it was not possible for the investigation to be renewed, that on the other hand, the entirety of the matters alleged by the applicants in their petition dated 1/7/2013 had been evaluated in previous preliminary examinations and that these preliminary examinations that had been conducted were finalized after having gone through the oversight of administrative justice, that no additional information and documents that could affect the outcome of these preliminary examinations were submitted in the petition of complaint in question in order for the application to be put into action as per the Code numbered 4483 and it was concluded that the permission for investigation with regard to the security officials whose names were cited should not be granted. Moreover, it was indicated in the same report that no preliminary examination had been conducted previously with regard to E.G., the Deputy Governor of Istanbul, that however, the individual whose name were cited met with Hrant Dink on 24/2/2004, together with two officials of the NIA, that it was neither alleged in the statements made by Hrant Dink nor in the petition of complaint in question that there was a situation constituting a crime mentioned during this meeting, that the Deputy Governor did not have the duty of the President of the Provincial Protection Board between the dates of 6/10/2004 – 22/12/2008 when he was in office, that no recommendation had been made to him as to placing Hrant Dink under protection, that even if an accusation was made, the 5-year statue of limitations had expired with regard to the crime of misconduct as per the Code numbered 765 when the date of this meeting was taken into consideration, that for these reasons the permission for investigation regarding him should not be granted.

47. It was decided by the Governor H.A.M. with the decision of the Directorate General of the Provincial Administration Board of the Office of the Governor of Istanbul dated 28/11/2013 and numbered D.2013/141 "*not to grant permission for investigation*" regarding the nine public officials whom a complaint had been filed in line with the observations and justifications contained within the preliminary examination report.

48. Upon the objection filed by the applicants against this decision on 23/12/2013, it was decided with the decision of the Regional Administrative Court of Istanbul dated 22/1/2014 and numbered D.2014/14 that the objection be dismissed based on the justification that "*as per the contents of the file, sufficient information and documents do not exist for the conduct of a preliminary examination given that the existence of a finding as to the point that new evidence has been obtained with a view to the claims that constitute the subject of the decision of non-granting of permission for investigation that has been delivered with regard to the matter and went through an objection has not been brought forward"*, that the decision pertaining to the non-granting of permission for investigation be approved. This decision was notified to the applicants on 31/1/2014, the applicants lodged an individual application with the reference that the investigation had not been conducted in an effective manner within the legal period.

49. On the other hand, it was understood that a decision regarding the point that there were no grounds for prosecution (that it be removed from proceedings) had been delivered on 21/2/2014 with the correspondence of the Public Prosecutor of Istanbul (Bureau of Investigation for Terrorism and Organized Crime) dated 18/6/2014 in the investigation conducted based on the file numbered 2013/93822 due to the decision of the Regional Administrative Court in question.

50. The 8th Assize Court of Bakırköy, which examined the objection filed by the applicants on 19/3/2014, accepted the objection with its decision dated 21/5/2014 and removed the decision to the point that there were no grounds for prosecution. In addition, a petition dated 4/6/2014 containing the opinion that the decision needed to be reversed for the sake of law with the justification that this decision was in violation of article 9/3. of the Code numbered 4483, that it was not possible to conduct an investigation with regard to this crime and file a public case after the final decision delivered by instances of Administrative Justice was sent by the Office of the Chief Public Prosecutor of Istanbul to the Directorate General of Criminal Affairs of the Ministry of Justice.

8. Action for Compensation That the Applicants Filed Against the Administration

51. On the other hand, an action for material compensation for the total amount of 400.000 TL was filed by the applicant Hosrof Dink and his sibling Yervant Dink against the Ministry of Interior with the claim that the administration had gross service negligence and objective responsibility in the fact of Hrant Dink's murder.

52. In the trial that was conducted by the 10th Administrative Court of Istanbul, it was ruled with the decision dated 27/10/2010 and numbered M.2008/421, D.2010/1539 that a total of 100.000 TL be paid in moral compensation with the mention that "*it has been concluded that it was officially notified by the Trabzon Police Department to the Istanbul Police Department Directorate of Intelligence Section on 17/2/2006 that Y.H. plotted to murder Hrant Dink, that there was an explicit and imminent threat to Hrant Dink's life due to articles which were published in Agos Newspaper and attracted the reaction of some extreme nationalist groups, that the requirement of taking protection measures without waiting for Hrant Dink's request in person was not fulfilled under these circumstances, that what was done remained limited to the correspondence phase and the phase pertaining to*

the taking of protection measures was not initiated, that therefore the administration has gross service negligence in terms of protecting Hrant Dink's right to life."

9. Participation of the Applications to the Investigation and Certain Actions Undertaken by the Office of the Prosecutor

53. It has been observed that the action of joining investigations carried out under different files by the Office of the Chief Public Prosecutor upon Hrant Dink's murder continued as of 2013 (the file with the investigation number Invs.2011/1345 was joined with the file numbered Invs.2007/972 on 15/2/2013), that while a general investigation is carried out with regard to public officials based on the file numbered Invs.2007/972 on the one hand, an investigation within the scope of the Code numbered 4483 under the investigation file numbered 2013/93822 of the Office of the Prosecutor is currently pursued following the request of the applicants dated 1/7/2013 regarding the conduct of a new investigation on the other.

54. In order to contribute to the investigation actions that are carried out, the applicants have had the opportunity to talk face to face with the competent Public Prosecutor in person several times, to analyze the findings in the report of the State Supervisory Council of the Office of the President, to submit new petitions.

55. In the correspondence of the Office of the Chief Public Prosecutor of Istanbul (its Section Tasked With Article 10 of CFaT) dated 12/7/2013 and numbered Invs.2007/972, it was indicated that correspondence had been carried out with relevant institutions such as the Gendarmerie Command of Trabzon, the Police Department of Istanbul, the Directorate of Silivri Prison and the Office of the Chief Public Prosecutor of Malatya, that the evidence collection was still ongoing, that the investigation could be expanded depending on the responses coming from relevant institutions.

56. In line with the matters included in the Research and Examination Report of the State Supervisory Council dated 2/2/2012 and numbered 2012/1 with regard to the Hrant Dink murder and some new information obtained within the scope of the investigation: It has been observed that information pertaining to military personnel serving at certain places during periods including the date on which Hrant Dink was murdered and the time prior to it has been requested from military instances, that these kinds of correspondence continued as of 2012-2013; that due to the impossibility of fully elucidating the investigation and determining the suspects as well as collecting the evidence of crime in full, deciphering and uncovering the hierarchical structure of the group and apprehending them along with the evidence of crime through physical pursuit and observation and the lack of any other means of obtaining evidence, the registry, caller-called, message sent-message received and contacted telephone information for the years 2000-2012 pertaining to numerous telephone numbers that were determined was requested with the judge's decision dated 2/5/2012 and 11/10/2013; that correspondence was carried out with various institutions such as the National Security Council, universities, ministries, prisons and other prosecutors' offices with regard to individuals whose identities were determined within this framework, that their statements were obtained, that the owners of the statements were asked whether or not public officials had any negligence or premeditation and that this situation was examined, that the taking of statements and declarations of witnesses, anonymous witnesses and suspects (some of whom are military personnel) who came upon instruction or with summons from different places continued as of 2012-October 2013; that the administrative investigation files and the

evidence contained therein were examined and the information of certain public officials were sought in 2011, that samples of certain information and documents from other courts where the other accused were being tried were made to be included in the investigation file; that the content of the denunciation letters regarding the fact that had been sent by different individuals as well as documents and petitions understood to have a connection with the investigation that was being carried out in the trial that was being heard at the 14th Assize Court of Istanbul and requested to be joined with the file was taken into account and that the investigation was expanded accordingly; that the applicants were able to contribute to the investigation via the reports, phone records, names and petitions (numerous petitions dated 2011) they submitted; that certain documents from the file were notified by the Office of the Prosecutor to the applicants, that the applicants were able to request the expansion of the investigation in response (for instance it is indicated in the petition of the applicants dated 22/3/2012 regarding Hrant Dink's murder that the report dated 22/2/2012 that had been prepared by the State Supervisory Council was notified to them on 27/2/2012 and that it was requested to expand the investigation regarding 18 matters within the scope of the issues covered in the report).

57. In addition, it has been determined that in the correspondence of the Office of the Chief Public Prosecutor of Istanbul (Bureau of Investigation for Terrorism and Organized Crime) dated 10-18/6/2014 it was decided that the investigation of the Office of the Chief Public Prosecutor of Istanbul numbered 2007/972 be conducted by the "*Bureau of Terrorism and Organized Crime*" that had been constituted within the framework of the new regulation based on the investigation numbered 2014/40810 due to the fact that the Assize Court tasked with article 10 of the Code on the Fight Against Terrorism had been abolished as per article 1 of the Code numbered 6526.

58. In the mentioned correspondence; it was indicated that a sample of the whole file had been provided to Hakan Bakırcıoğlu, the attorney of the applicants, upon his request and due to the amendment in article 153 of the TCC numbered 5271, that the relevant Prosecutor had evaluated the stages of the investigation along with the Attorney whose name is cited, that there had been an effort to determine the connection of public officials with the murder, that information and documents had been requested from numerous places within this framework, that 45 people had been heard as witnesses, 3 people as anonymous witnesses and 8 people as statement owners between the dates of 10/12/2010 – 8/5/2014, that the liaison report associated with HTS had been obtained by experts in order to determine whether or not the accused who had been involved in the Hrant Dink murder had a connection with the accused who had been tried in the Malatya Zirve Publishing House murder, Ergenekon, Balyoz and Kafes cases, that the report of the investigation that had been conducted pertaining to the matter of deletion of the records regarding the telephone inquiries at the Department of Intelligence on 20/5/2014 had been obtained, that they had arrived at the phase whereby individuals deemed to be suspects would be summoned and heard by means of deepening the investigation in order to determine whether or not public officials had had actions that would amount to assisting in criminal organization and whether or not they had responsibilities in the death of the individual via negligent behavior.

10. Restriction Introduced to the Applicants' Authority to Examine Files

59. As a result of the complaint filed by the applicants following the decision of the ECtHR, upon the request filed within the scope of the investigation that was conducted by

the Office of the Chief Public Prosecutor of Istanbul with regard to the public officials in question based on the file numbered Invs.2011/192 for the crimes of "*being a member of a terrorist organization, leading a willful murder via negligent behavior, forging documents and being an accessory to a willful murder*" it was decided with the correspondence of the 9th Assize Court on Duty of Istanbul dated 7/2/2011 and numbered D.2011/56 that "*the right of the attorney of the suspect, defense counsel and the attorney of the party damaged by the crime to examine and take copies of the documents contained within the file be restricted, except for legal exception, due to the examination of the documents by the suspects and their attorneys being objectionable as a result of the nature of the investigation, the presence of the identities and telephone numbers of the suspects, the places where elements of crime belonging to the organization are hidden in the documents contained within the file, the names of several members of the organization in the communication interception minutes and due to the other documents being of the same nature.*"

60. Although the applicants applied to the Office of the Prosecutor with their petition dated 10/9/2012 with the aim of obtaining copies of the documents and digital data contained within the file, the request in question was dismissed on the same day with the justification that there was a decision of confidentiality on the file.

61. The applicants applied to the Assize Court on Duty of Istanbul on 17/9/2012 and requested that the decision of confidentiality on the investigation file be removed by indicating that "*there had been numerous detailed news items or media outlets regarding the evidence and the accused in the case, that the public opinion had information pertaining to the investigation and case in question, that the continuation of the decision of confidentiality and the restriction of their right to take samples from the file as a party despite this was unlawful.*"

62. The Judge's Office No. 3 of Istanbul (Tasked with Article 10 of CFaT) dismissed the request of the applicants in final fashion with its decision dated 25/9/2012 and numbered Miscellaneous Action 2012/121 with the justification that "*As per article 153 of the TCC, the decision of restriction is valid until removed. It is clear that copies can be obtained from the relevant court as per TCC 153/4 following the acceptance of the indictment of the case*." This decision was notified to the applicants on 10/10/2012.

11. Report of the State Supervisory Council of the Office of the President

63. A report was prepared by the State Supervisory Council of the Office of the President regarding the fact of Hrant Dink' murder, which is understood to consist of 650 pages, on 2/2/2012, the 34-page summary section of the report was published on the website of the Institution (http://www.tccb.gov.tr/ddk/ddk50.pdf) "*due to the confidentiality of the preliminary investigation that is being conducted by the Office of the Prosecutor regarding the same matter and other reasons*". In summary, the following matters are included in the published part of the report;

> "*It has been observed that numerous allegations have been made both in reports that have been prepared with regard to the matter and in media outlets, that almost all of these are*

the subject matter of judicial and administrative examinations and investigations and/or are being handled in ongoing investigations and prosecutions,

That 28 reports have been drafted by administrative units with regard to the fact of Hrant Dink's murder, that around 50 decisions have been delivered by judicial instances with regard to lack of jurisdiction, rejection of venue and no grounds for prosecution, that moreover cases have been filed with two main indictments, that decisions of conviction have been delivered at both courts regarding the accused,

That it has been observed that in the fact of the murder of Hrant Dink, the chief editor of AGOS Newspaper, on 19/1/2007, the investigation regarding the personnel of the Gendarmerie Command of Trabzon was partially taken to the attention of the judiciary and that certain personnel have been convicted of the crime of neglect of duty, that the permission for investigation regarding the personnel of the NIA was granted, that however a decision of no further prosecution was delivered by the Office of the Chief Public Prosecutor with the justification of statue of limitations, that decisions of conviction were delivered regarding the murder suspect and the instigators of the murder, that the investigations of the offices of prosecutors as to whether other perpetrators and instigators were behind the murder and those initiated with regard to certain public officials in the aftermath of the decision of the ECtHR were still ongoing,

That despite the fact that those who murdered Hrant Dink were apprehended by the security forces in a very short period of time, that the administrative investigation processes regarding the fact were completed and that the matter was referred to judicial instances with its several aspects and that the trial by courts of first instance was completed, the investigation and trial process could not be pursued in a fashion that is as effective, orderly and speedy due to certain systemic problems, that therefore the public opinion and the family of Hrant Dink were not satisfied with the investigations/prosecutions that had been carried out by both the administration and the judicial instances with regard to the murder, that especially, the allegations that the public officials alleged to have responsibility in the process during which Hrant Dink was murdered could not be tried and that the real perpetrators of the murder apart from those who had been apprehended could not be reached constituted the basis of the criticism starting from the beginning of the investigation/prosecution processes,

That the first matter that needs to be expressed with regard to the failure to protect Hrant Dink's right to life is the existence of certain structural problems pertaining to the security sector, that both the coordination gaps and internal/external supervision and civilian oversight gaps need to be bridged in this sector, that the 'basic perception error' that has existed for a long time in the implementation of the Code on the Trial of Civil Servants and other Public Officials numbered 4483 also became apparent in the investigation and prosecution of the actions allegedly committed by public officials in the process during which Hrant Dink was murdered, that therefore, within the scope of the main action that took place with regard to Hrant Dink's murder; the negligence and mistakes of public officials need to be primarily investigated by instances of judicial justice as per articles 37, 38, 39 and 83 of the Code numbered 5237, that the primary nature of certain actions of public officials appearing as misconduct and negligence that surfaced prior to and after the murder need to be absolutely clarified during the judicial investigation and especially the trial phase within the scope of the main crime, that similarly, the evidence pertaining to actions that appear as misconduct and negligence need to be collected by the Office of the Prosecutor without any restriction despite the administrative investigation processes that have been initiated, that due to the failure of not proceeding in this way, the capacity of the relevant Courts to have access to evidence and the truth has been restricted in the main case that has been heard at an instance of judicial justice,

That the deficiency in the administrative examinations and investigations that have been carried out with regard to public officials in connection with Hrant Dink's murder is a 'method error', that the acts of negligence of public officials that followed each other in succession were not examined as a whole within the framework of the Code numbered 4483 and that separate investigations and examinations were conducted by different units as per both the venue and the location where the crime was committed, that the method error in question corresponds to one of the implementation errors brought forward by the Code numbered 4483, that the method in question that was followed in administrative investigations and examinations led to the failure to evaluate the facts by means of considering them as a whole and to question all allegations together, that this situation resulted in the failure to grasp the severity of the actions of public officials during this process, to question whether or not there is a causality relation with the principal action and thus to obtain a result fromthe administrative examination and investigations, that at the same time, the method in question that was followed also led in time to the emergence of reflexes such as each of the administrative units trying to shift/put the acts of negligence and errors on other units,

To conclude, after having evaluated the information and documents pertaining to all of the examinations, research and investigations with regard to public officials in connection with the matter; the security department and gendarmerie personnel knew the existence of a threat against Hrant Dink, that the intelligence units did not conduct the necessary work and engage in cooperation with regard to Hrant Dink's protection, that although administrative instances were in a position to be able to know the risks that emerged vis-a-vis Hrant Dink, the precautions that were necessary to prevent the hazard were not taken as a result of the chain of actions of those responsible at all levels, that the hazard materialized and Hrant Dink lost his life, that therefore the positive liability to protect the right to life, which is expressed both under article 17 of the Constitution and article 2 of the European Convention of Human Rights which is part of our domestic law, and that a gross service negligence was thus created, that with a view to ensuring the effective utilization of the rules of domestic law that guarantee the right to life in the aftermath of the occurrence of the fact of death and displaying the responsibilities of State officials or organs; the State organs immediately launched the required investigations in the domains of both criminal law and disciplinary law regarding the perpetrators of the fact that could be identified and the public officials who had negligence and fault in the fact, although the legally foreseen processes were abided by in the investigations that were conducted by administrative organs, it has been concluded that an effective outcome could not be obtained from the investigations that were conducted due to both the nature of legislative regulations pertaining to the trial of public officials and the errors/mistakes in the methods that were pursued with regard to the matter of investigating public officials as well as other deficiencies, in this respect, the fact that certain public officials were included in the previously initiated investigation process by the Office of the Chief Public Prosecutor of Istanbul in the aftermath of the decision of the ECtHR is considered to be positive, albeit belated, in terms of rectifying the erroneous practice mentioned above".

B. Relevant Law

64. Paragraph (1) of article 157 of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271 with the side heading of *''Confidentiality of Investigation''* is as follows:

"*On the condition that cases in which the law applies another provision are reserved and it does not harm the defense rights, the procedural actions at the investigation stage shall be confidential.*

65. The text of article 153 of the Code numbered 5271 with the side heading "*Authority of defense counsel to examine the file*" prior to the amendment made on 21/2/2014 is as follows:

The defense counsel may examine the content of the file and take a copy of the documents of his/her choosing free of charge at the investigation stage.

(2) If the defense counsel's examination of and taking a copy of the content of the file might jeopardize purpose of the investigation, said authority may be restricted by a decision of the criminal judge of peace upon request of the Public prosecutor.

(3) Provision of paragraph two shall not apply to the minutes containing the statement of the arrested person or suspect and the minutes concerning the experts' reports and other judicial actions during which the above mentioned are authorized to be present.

(4) The defense counsel may examine the content of the file and the safeguarded evidence, take copies of all minutes and documents free of charge as of the date on which the indictment is accepted by the court.

(5) The attorney of the person damaged by the crime shall also benefit from the rights stipulated in this article."

66. Paragraphs (2), (3) and (4) of the mentioned article were abolished via the amendment that was made in article 153 of the Code numbered 5271 with article 19 of the Code dated 21/2/2014 and numbered 6526.

67. Paragraph (1) of article 234 of the Code numbered 5271 with the side heading *'' Rights of the victim and the complainant" is as follows*:

"*1) Rights of the victim and the complainant are as follows:*

a) At the investigation stage;

1. Requesting collection of evidence,

2. Requesting the copy of a document from the Public prosecutor on the condition that it does not impair the purpose and confidentiality of the investigation,

...

4. Having the investigation documents and the seized and safeguarded property inspected through his/her attorney on condition that it complies with article 153,

..."

68. Paragraph (1) of article 267 of the Code numbered 5271 with the side heading *"Decisions which may be opposed"* is as follows:

> *"Decisions of the judge and, in cases shown by the law, decisions of the court may be opposed."*

69. Paragraph (3) with the side heading *"Decision on No Grounds for Prosecution"* that was added to article 172 of the Code numbered 5271 as per article 19 of the Code dated 11/4/2013 and numbered 6459 and entered into force on 30/4/2013 is as follows:

> *"(3) (Additional clause: 11/04/2013-6459 D.N./19. art) In the event that it is determined that the decision on no grounds for prosecution is made without conducting an effective investigation by the final decision of European Court of Human Rights, an investigation shall be re-conducted if requested within three months following finalization of the decision."*

IV. EXAMINATION AND JUSTIFICATION

70. The individual application of the applicants dated 12/11/2012 and numbered 2012/848 was examined during the session held by the court on 17/7/2014 and the following were ordered and adjudged:

A. Claims of the Applicants

71. The applicants indicated that the investigation that had been conducted based on the file numbered 2007/972 with regard to the fact of the murder of Hrant Dink, who was their relative in the first degree, had not been carried out with reasonable care and speed, that the investigation file had been kept confidential vis-a-vis themselves, that potential suspects had been left without punishment and that the requirements of the decisions of the ECtHR had not been fulfilled as of the current state of affairs, that in the investigation file of the same Office of Prosecutor numbered 2013/93822 no permission for investigation with regard to public officials had been granted as a result of the investigation that had been conducted as per the Code numbered 4483 and alleged that the right to life guaranteed under article 17 of the Constitution had been violated from a procedural point of view; that moreover, since there is no effective remedy against the decision of confidentiality of the investigation, article 40 of the Constitution had also been violated in conjunction with article 17.

72. In addition, the applicants alleged that they had requested documents from the file of theOffice of the Chief Public Prosecutor of Istanbul numbered Invs.2007/972 on 10/9/2012, that however, this request of theirs had been dismissed due to the decision of confidentiality, that in this way their right to bring forward claims and guide the course of the trial by having access to information as plaintiffs had been prevented, that taking copies of the minutes and documents in the investigation file constituted an integral part of the right to legal remedies and thus the right to a fair trial, that in the investigation file of the same Office of Prosecutor numbered 2013/93822 no permission for investigation with regard to public officials had been granted as a result of the investigation that had been conducted as per the Code numbered 4483, that as a result of the state's self-protection reflex these had been made to benefit from special protection methods by committees that are not independent or impartial, that for these reasons articles 2, 10 and 36 and article 11 in conjunction with these articles had been violated and requested 500.000 TL in compensation.

B. Evaluation

1. In Terms of Admissibility

a. The Claim That The Right to Life Was Violated

73. While an assessment as to the admissibility of the complaints was done in the opinion of the Ministry with a view to the applicants' claim that article 17 of the Constitution was violated, it was stated that it needed to be considered that the investigation process was still going on, that in accordance with paragraph (2) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2012 and numbered 6216, an individual application could be lodged only after the entirety of application remedies had been exhausted, that this condition had not been fulfilled.

74. In response to the opinion of the Ministry with regard to the admissibility of the application, the applicants claimed that they were aware that the investigation was still going on, that however, they could not access the content of the file due to the decision of confidentiality, that their request for the removal of the decision of confidentiality had been dismissed and that the remedies to this end had been exhausted, that therefore the objection of the Ministry to the effect that the remedies had not been exhausted was not justified.

75. Firstly, whether or not the applicants have application capacity and benefit from the examination of the claim of violation should be examined. In paragraph (1) of article 46 of the Code numbered 6216, it is adjudged that only those whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation have the right to individual application. In line with the natural quality of the right to life, an application towards this right in terms of people who lose their lives can only be lodged by the late people's relatives who suffer from the fact of death that occurs (App. No: 2012/752, 17/9/2013, § 41). The applicants are the spouse, children and sibling of the individual who lost his life in the fact that is the subject of the application, they submitted a petition of complaint with regard to the fact and participated in the investigation and prosecution phases since the beginning. Therefore, the applicants have to benefit in the determination that the investigation that had been conducted with regard to the fact of death that had taken place amounted to the violation of the right to life under article 17 of the Constitution, there is no deficiency in terms of their capacity of application.

76. Secondly, in order for an action or decision to be the subject of an individual application, all legal remedies that are envisaged in that regard needs to be exhausted. The condition of exhausting the legal remedies included under paragraph (2) of article 45 of the Code numbered 6216, is a natural outcome of the fact that the individual application is a final and extraordinary remedy to prevent the violation of fundamental rights. In other words, the fact that administrative instances and courts of instance are primarily liable to resolve violations of fundamental rights renders compulsory the condition of exhausting legal remedies (App. No: 2012/1027, § 20-21, 12/2/2013). Even though this condition is not absolutely necessary with regard to whether or not an investigation has been effective, the expectation as to how it will be concluded by the public instances that are concerned with the condition that the investigation that is being conducted does not exceed a reasonable period would be in harmony with the secondary quality of the protection mechanism that is introduced with individual application. Even though there are pending cases and investigations that are still being conducted and that have been finalized in addition to cases that have been filed and concluded as a result of both the complaint of the applicants and the

investigations that were ex officio conducted with regard to the fact that is the subject of the application, the fact that the procedural aspect of the State's positive liabilities within the scope of the right to life in the fact that is the subject of the application is examined by the Constitutional Court at this stage to determine whether or not behavior in line with these liabilities has been displayed will not clash with the secondary protection mechanism.

77. As soon as the moment they realize or need to realize that an investigation will not be launched, that there is no progress in the investigation, that an effective criminal investigation has not been carried out and that there is not the smallest realistic chance that this kind of an investigation will be conducted in the future, individual applications lodged by applicants should be able to be accepted. In this kind of a situation that concerns the right to life, the applicants need to display the required care, be able to take initiatives and submit their complaints to the Constitutional Court without too much time elapsing. With regard to the investigation lasting too long and an application being lodged without the investigation process being completed, a very harsh attitude should not be adopted vis-a-vis the relatives of the deceased. However the determination of this situation will be naturally evaluated depending on the circumstances of each case (for decisions of ECtHR in the same vein, see*Varnava and others v. Turkey* [BD], App. No: 16064/90, 18/9/2009). Thus, in order to make a decision pertaining to the matter of exhausting legal remedies while the admissibility examination pertaining to the complaints of the applicants with regard to article 17 of the Constitution is continuing, the scope of the State's positive liability to "*establish an effective judicial system*" in order to protect the right to life within the framework of article 17 of the Constitution needs to be determined. Due to the fact that they are intertwined, it has been concluded that this evaluation regarding the matter of admissibility should be conducted together with the examination regarding the merits.

78. Therefore, it has been determined that the applicants' claims to the effect that article 17 of the Constitution was violated is not clearly devoid of grounds as per article 48 of the Code numbered 6216. As no other reason for inadmissibility was found, it should be decided that this part of the application is admissible.

79. The applicants also claimed that a decision of confidentiality had been delivered in the investigation that had been conducted with regard to the fact of the murder of Hrant Dink, who was their relative, that since there is no effective remedy against this decision, article 40 of the Constitution was also violated in conjunction with article 17.

80. While a qualification-related assessment was made in the opinion of the Ministry with regard to the claim of the applicants that article 40 of the Constitution had been violated, it was indicated that the way the complaints were phrased in the present application and their scope needed to be taken into consideration and that the complaint in this regard needed to be examined within the scope of article 17 of the Constitution.

81. Even though no opinion has been submitted by the Ministry with regard to the allegations that article 40 of the Constitution had been violated, in response to the opinion of the Ministry as regards the qualification, the applicants stated that the allegations pertaining to article 40 of the Constitution also needed to be examined by the Constitutional Court in addition to other allegations of violation. In their opinion regarding the merits of the application, the applicants alleged that the remedy of application to the judge who examined the removal of the decision of confidentiality on the investigation file was not an effective remedy that granted the guarantees required by article 40 of the Constitution to the applicants

in the present case with a view to the fact that an adversarial trial had not been conducted, that no hearings had been organized, that the decision had been delivered without justification.

82. Since the applicants' allegations that the investigation had not been conducted in an effective manner were not found to be clearly devoid of grounds and were examined within the framework of article 17 of the Constitution, it was not deemed necessary in this context to evaluate the allegation that article 40 of the Constitution had been violated, complaints to this end were also examined within the framework of article 17 of the Constitution.

b. The Claim That The Right To A Fair Trial Was Violated

83. The applicants alleged that, due to the confidentiality of the investigation, their right to bring forward claims and guide the course of the trial by having access to information as plaintiffs had been prevented, that taking copies of the minutes and documents in the investigation file constituted an integral part of the right to claim rights and thus the right to a fair trial, that conducting investigations with regard to public officials was subject to permission, that therefore these individuals were made to benefit from special protection methods, that as a result articles 2, 10 and 36 of the Constitution as well as article 11 in conjunction with these articles had been violated.

84. In response to these allegations of the applicants, it was indicated in the opinion of the Ministry that under article 6 of the ECHR that regulates the right to a fair trial, the rights and principles with regard to a fair trial were applicable during the conclusion on the merits of *''disputes pertaining to civil rights and obligations''* and *''a criminal charge'',* that the fact that the applicants were not under any criminal charge in the criminal investigation in question needed to be taken into consideration and that a decision of lack of venue in terms of subject needed to be delivered for this reason.

85. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant, it appraises the legal definition of the facts and cases itself. For this reason, these allegations of the applicants have been considered by the Court to be related with article 36 of the Constitution and evaluated within the scope of the right to a fair trial.

86. As per clause three of article 148 of the Constitution and clause (1) of article 45 of the Code numbered 6216, real and legal persons who claim that, out of their fundamental rights and freedoms which are guaranteed by the Constitution, any right or freedom that is within the scope of the European Convention on Human Rights and its additional protocols, to which Turkey is a party, is violated by public force are granted the right to individual application to the Constitutional Court.

87. According to the provisions of the Constitution and Code that are cited, in order for the merits of an individual application that is lodged with the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public force, must fall within the scope of the ECHR (the Convention) and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution. In other words, it is not possible to decide on the admissibility of an application which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention

88. Paragraph one of Article 36 of the Constitution with the side heading of *"Freedom to claim rights"* is as follows*:*

"Everyone has the right to make a claim and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means."

89. As it is indicated in decisions of the Constitutional Court, in paragraph one of article 36 of the Constitution, it is stated that everyone has the right to make claims and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means. Since the scope of the right to a fair trial is not regulated within the Constitution, the scope and content of this right needs to be determined within the framework of article 6 of the Convention with the side heading "*Right to a fair trial*" (App. No: 2012/1049, 26/3/2013, § 22-27).

90. It is indicated under article 6 of the ECHR that regulates the right to a fair trial that the rights and principles with regard to a fair trial are applicable during the conclusion on the merits of *''disputes pertaining to civil rights and obligations''* and *''a criminal charge'',* the scope of the right is thus restricted to these subjects. It is understood from this expression that in order to be able to lodge an individual application with the justification that the right to claim rights has been violated, either the applicant needs to be the party of a dispute pertaining to his/her civil rights and liabilities or a decision needs to have been delivered regarding a criminal charge pertaining to the applicant. Therefore, applications based on the claim that the right to a fair trial has been violated that are outside the circumstances that have been referred to cannot be the subject of an individual application as they would be outside the scope of the Constitution and the Convention.

91. As per the case law of the ECtHR, individuals who have the quality of being the victim, those damaged by the crime, the plaintiff or the intervenor who request that third persons be indicted or sentenced in a criminal case are outside the field of protection of article 6 of the Convention. The exceptions to this rule are the circumstances whereby a system that allows for claiming a civil right in the criminal case has been adopted or the decisions delivered as a result of the criminal case are also effective or binding in terms of the civil case (see *Perez v. France*, App. No: 47287/99, 12/2/2004, § 70).

92. With the entry into force of the Code numbered 5271, the possibility of claiming a personal right in criminal trial was removed. Therefore, the applicants do not have the possibility of claiming their civil rights during the criminal trial process.

93. The applicants filed a criminal complaint with a view to ensuring the initiation of an investigation with regard to the individuals whom they believe to have committed crimes, their request is limited with the point that their right to claim rights and in this context their right to a fair trial had been violated due to their inability to reach all information and documents pertaining to the criminal investigation actions that were conducted and the lack of an effective remedy against this.

94. For this reason, since the subject of the applicants' allegation of violation, which is based on article 36 of the Constitution, is outside the field of protection of fundamental rights and freedoms that are guaranteed in the Constitution and within the scope of the Convention, it should be decided that this part of the application is inadmissible due to "*lack of venue in terms of subject*".

2. In Terms of Merits

a. Claims of the Applicants and the Opinion of the Ministry

95. The applicants alleged that article 17 of the Constitution, which guarantees the right to life, had been violated from a procedural point of view by indicating that the investigation that had been conducted with regard to the fact of the murder of their first degree relative had not been conducted with reasonable care and speed, that the investigation file had been kept confidential vis-a-vis themselves, that there was no effective remedy against the decision of confidentiality, that the suspects were left unpunished as a result of the examinations that had been conducted as per the Code numbered 4483 and that the requirements of the decisions of the ECtHR had not been fulfilled as of the current state of affairs.

96. In the opinion of the Ministry, while the complaints as to the point that article 17 of the Constitution had been violated were being evaluated, it was indicated that it was decided by the ECtHR upon the application lodged by the applicants with regard to the murder of Hrant Dink that the right to life had also been violated from a procedural point of view in addition to having been violated on merits, that following the decision of the ECtHR (see *Dink v. Turkey*, App. No: 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010), new progress was achieved in the trial processes in terms of the effectiveness of the investigation.

97. In the opinion of the Ministry, a reference was also made to the principles that were adopted by the ECtHR in terms of the right to life, it was indicated that, within the context of the ECtHR case law, the investigation needed to be as open (accessible) as it needs to be to public review and the relatives of the victim in order for their legitimate interests to be protected, that however, the condition of openness could not be considered as a definitive (automatic) requirement of article 2 of the European Convention on Human Rights (ECHR) that would apply in all circumstances given the fact that the announcement or publication of police minutes or investigation documents could lead to certain sensitive (important) problems that could harm private individuals or other investigations, that therefore, the condition of openness of the investigation vis-a-vis the public or the relatives of the victim could be fulfilled at other appropriate phases of the procedure, that in some circumstances even announcing the result that is obtained to the public despite the fact the investigation has been conducted in confidentiality could suffice, that article 2 of the Convention did not charge to the investigation instances the liability of fulfilling every request made by the relatives of the deceased in order for the investigation precautions to be taken.

98. In the opinion of the Ministry, it was finally indicated that the provisions of the legislation that is in force are in line with the ECtHR principles to a great degree and it was emphasized that evaluating complaints to the effect that the right to life has been violated from the procedural aspect was in the discretion of the Constitutional Court.

99. Against the opinion of the Ministry regarding the merits of the application, the applicants indicated that the investigation file was close to access due to the decision of restriction, that therefore it could not be claimed that they had been included in the investigation, that the fact that the access to all documents had been absolutely prohibited without justification and in an arbitrary fashion, that the investigation had not been carried out with reasonable care and speed and that the investigation had not been explained to themselves and the public opinion violated the liability of effective investigation.

b. General Principles

100. Paragraph one of Article 17 of the Constitution with the heading *"Inviolability and material and spiritual existence of the individual" is as follows:*

> *"Everyone has the right to life and the right to protect and improve their material and spiritual existence."*

101. The right to life and the right to protect and improve his/her material and spiritual existence of an individual are among his/her rights which are closely tied, inalienable and indispensable. As specified by the Constitutional Court, the fundamental right over the integrity of life and body imposes positive and negative liabilities on states (see CC, M.2007/78, D.2010/120, D.D. 30/12/2010).

102. Within the scope of the right to life regulated in article 17 of the Constitution, as a negative liability, the state has the liability not to end the life of any individual who is within its jurisdiction in an intentional and illegal way. Furthermore, as a positive liability, the state has the liability to protect the right to life of all individuals who are within its jurisdiction against the risks which may arise out of the actions of public authorities, other individuals or the individual himself/herself (CC, M.1999/68, D.1999/1, D.D. 6/1/1999). The state is responsible for protecting the material and immaterial existence of an individual from all kinds of dangers, threats and violence (CC, M.2005/151, D.2008/37, D.D. 3/1/2008; M.2010/58, D.2011/8, D.D. 6/1/2011).

103. In cases where the loss of life occurs under the conditions which can require the responsibility of the state, article 17 of the Constitution imposes the State with the duty of taking effective administrative and judicial measures which will ensure that the legal and administrative framework that is formed in order to protect the right to life is duly applied and that the violations as regards this right are stopped and punished by making use of all available facilities. This liability is valid for all types of activities, public or not, in which the right to life can be in danger.

104. However, by taking into consideration of the preference of the action to be performed or the activity to be carried out by evaluating, in particular, the unpredictability of human behaviors, priorities and resources; positive liability should not be interpreted in a way that will create extreme burden on officials. In order for a positive liability to be applicable, it needs to be known by officials that the life of a specific individual is in real and imminent danger or after the acceptance of the existence of circumstances where this should be known, within the framework of this kind of a situation, it needs to be determined that they have not taken any measures at all or they have not taken measures in the required fashion in order to prevent the realization of this danger within reasonable limits and the liabilities that are attributed to them (*for the decisions of the ECtHR in the same vein, see Keenan v. the United Kingdom, 27229/95, 3/4/2001, §§ 89-92 and A. and Others v. Turkey, 27/7/2004, 30015/96, § 44-45, İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey, 19986/06, 10/4/2012, § 28*).

105. As it is indicated in the decisions of the Constitutional Court, in circumstances where State officials or organizations are negligent to a point that surpasses a judgment error or lack of attention in facts of death occurring as a result of negligence, or in other

words in circumstances where the instances in question fail to take the required and sufficient measures to eliminate hazards occurring as a result of a hazardous activity by means of neglecting the duties attributed to them despite being aware of the potential consequences, regardless of the legal remedies that may have been applied to by individuals on their own initiative, the lack of any accusation against the individuals who have endangered the lives of people or the failure to try these individuals may result in the violation of article 17 (App. No: 2012/752, 17/9/2013, § 60).

106. Therefore, the state has the liability to conduct a comprehensive and effective criminal investigation with regard to facts of murder that occur as a result of the actions of third persons. From the losses of life which occur as a result of the fact that preventive measures are not taken, in cases which require the responsibility of the State, within the scope of "*an effective judicial system*" which needs to be formed as per article 17 of the Constitution, there needs to be an independent and impartial official investigation procedure which meets minimum standards which are determined in terms of effectiveness and ensures that judicial sentences are imposed within the framework of the findings of the investigation. In such cases, competent authorities should work hard and immediately and initiate an investigation *ex officio* in order to determine primarily, the conditions of occurrence of the fact and dwell on the disruptions in the functioning of the review system, secondarily, the State officials or authorities that play a role in any way in the chain of facts in question (App. No: 2012/752, 17/9/2013, § 62; for decisions of the ECtHR in the same vein see *Budayeva and others v. Russia*, 15339/02, 20/3/2008, § 142).

107. Therefore, the positive liabilities that the state has within the right to life also have a procedural aspect. Within the framework of this procedural liability, the state is obliged to carry out an effective official investigation which can ensure that those who are responsible for each fact of death which is not natural are determined and punished, if necessary, The main aim of this type of investigation is to guarantee the effective implementation of the law that protects the right to life and, in the facts in which public officials or institutions are involved, to ensure that they are accountable against the deaths which occur under their responsibility (for decisions of the ECtHR in the same vein see *Anguelova v. Bulgaria*, App. No: 38361/97, § 137; *Jasinskis v. Latvia*, 21.12.2010, App. No: 45744/08, § 72).

108. It is necessary to determine the type of investigation required by procedural liability in a fact depending on whether the liabilities as regards the essence of the right to life require a criminal sanction or not. In cases pertaining to facts of death occurring as a result of intention or assault or ill-treatment, the state has the liability to conduct criminal investigations of the nature to allow for the determination and punishment of those responsible for the case of lethal assault as per article 17 of the Constitution. In these kinds of facts, the mere payment of compensation as a result of the administrative and civil investigations and cases that are conducted is not sufficient to eliminate the violation of the right to life and to remove the title of victim (App. No: 2012/752, 17/9/2013, § 55).

109. The aim of criminal investigations conducted is to ensure that the provisions of the legislation which protect the right to life are implemented in an effective way and that those who are responsible are accountable with regard to the fact of death. This is not a result liability, but a liability to use the appropriate means. On the other hand, the

assessments included herein do not mean in any way that article 17 of the Constitution grants applicants the right to make third parties tried or punished due to a judicial crime (for decisions of the ECtHR in the same vein, see *Perez v. France*, 47287/99, 22/7/2008, § 70), imposes a duty of concluding all trials with a conviction or a certain criminal sentence (for decisions of the ECtHR in the same vein, see *Tanlı v. Turkey*, 26129/95, § 111) (App. No: 2012/752, 17/9/2013, § 56).

110. The criminal investigations to be conducted should be effective and sufficient so as to allow for those who are responsible to be determined and punished. In order to be able to say that an investigation is effective and sufficient, investigation authorities need to act *ex officio* and collect all evidence which can enlighten the death and can be suitable for the determination of those who are responsible. Deficiencies in the investigation that would reduce the likelihood of discovering the cause of the incident of death and/or those who are responsible bear the risk of clashing with the rule of conducting an effective investigation (for the decisions of the ECtHR in the same vein, see *Hugh Jordan v. the United Kingdom*, 24746/94, 4/5/2001, § 109; *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010, § 78).

111. One of the matters which ensures the effectiveness of the criminal investigations to be conducted is the fact that the investigation and the consequences thereof are open to public review in order to ensure accountability in practice as in theory. In addition, in each incident, it should be ensured that the relatives of the person who passes away are involved in this process to the extent that it is necessary so as to protect their interests (for decisions of the ECtHR in the same vein, see *Hugh Jordan v. the United Kingdom*, 24746/94, 4/5/2001, § 109).

c. Implementation of These Principles to the Present Application

112. In the fact that is the subject of the application, the relative of the applicants lost his life as a result of the armed assault he suffered due to the action of a third individual/individuals on 19/1/2007. With a view to the mentioned fact, the legal and administrative framework for the liability to protect the right to life, which is included in the liabilities of the state, needs to be constituted and it needs to be demonstrated (whether or not) the responsibility to implement this framework as it should be exists.

113. In order for a liability of the state to be applicable, it needs to be known by public officials that the life of a specific individual is in real and imminent danger or after the acceptance of the existence of circumstances where this should be known, within the framework of this kind of a situation, it needs to be determined that public instances have failed to take precautions in such a way as to prevent the realization of this danger within reasonable limits and the authorities they have (§ 104).

114. However, as a result of the examination it carried out in the *Dink v. Turkey* case that had been filed regarding the same fact, the ECtHR concluded that the security forces either knew or were in a position to be able to know the likelihood of a potential attack towards the concerned was high with regard to the matter of the presence of an open and imminent threat to Hrant Dink's life, that however, they did not take the precautions that needed to be resorted to in order to prevent the occurrence of the envisaged hazard, it decided that article 2 of the Convention had been violated from a material point of view and

found it appropriate, by taking into account some other matters that constitute reason for violation, that 100.000 Euros be paid jointly to the applicants Rahil Dink, Delal Dink, Arat Dink and Sera Dink and 5000 Euros be paid to the applicant Hasrof Dink within the circumstances of the present case (see *Dink v. Turkey*, App. No: 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010, § 66-75) Therefore, with regard to the right violation that had taken place as a result of the failure of the public instances to take precautions, the victimization of the applicants was resolved. As a result, since the applicants' title of victim was terminated, there is no legal benefit in the same reason of violation being examined by the Constitutional Court for a second time.

115. On the other hand, it was decided in the decision of the ECtHR that the procedural aspect of the right to life had also been violated due to the fact that an effective investigation had not been conducted regarding the determination of public officials who could have committed negligence in the death of Hrant Dink. Fulfilling the requirement of this decision is a duty of the State as per the Convention. When it is taken into account that as per article 46 of the Convention with the heading "*binding force and execution of judgments*", that the state parties have the liability to abide by the finalized decisions of the ECtHR, that the finalized decisions of the Court are sent to the Committee of Ministers that will supervise the execution, that in the event that the Committee of Ministers is of the opinion that a High Contracting Party refuses to abide by a final decision that has been delivered in a case to which it is a party, a formal notice will be served to the concerned Party, after which it has the authority to refer the matter of this State not fulfilling its obligation that is envisaged under paragraph 1 of the same article to the Court and that in the event that the Court determines that paragraph 1 has been violated, it can send the case to the Committee of Ministers for its assessment of the measures that can be taken, it is clear that whether or not the decision that was issued with regard to Hrant Dink was abided by needs to be supervised by the Committee of Ministers.

116. In order for the Constitutional Court to be able to conduct a new examination into the same matter despite the presence of a decision of violation that was issued by the ECtHR with regard to the procedural aspect of the right to life in the present case, the victimization of the applicants need to not have been resolved with the decision of the ECtHR. It is observed in the mentioned application that the investigation file pertaining to the murder of Hrant Dink has been open since the beginning and that the examination with regard to determining those responsible is still on-going. In this case, it cannot be claimed that the applicants' title of victim has been terminated with the decision of violation of the ECtHR. The Constitutional Court needs to examine especially whether or not, upon the decision of the ECtHR, an effective investigation was carried out by the Office of the Public Prosecutor with the aim of determining the public officials whose negligence has been observed in protecting Hrant Dink's life or who took part in the organization for committing the murder and sanctioning these actions.

117. The applicants alleged that the investigation that was conducted with regard to the fact was not carried out with reasonable care and speed, that the potential suspects were left unpunished and that the requirements of the decision of the ECtHR were not fulfilled (§ 95). In the opinion of the Ministry, it was indicated with regard to the matter that it was decided, upon the application lodged by the applicants, by the ECtHR on 14/9/2010 that the right to life had also been violated from a procedural point of view in addition to its violation in terms of the merits with regard to the murder of Hrant Dink, that following the decision of

the ECtHR new progress was achieved in the trial processes in terms of the effectiveness of the investigation (§ 96).

118. As it is also indicated in decisions of the ECtHR, in order to be able to refer to the effectiveness of an investigation, it is compulsory that the individuals who are assigned to conduct the investigation be independent from those individuals who could have been implicated in the facts. Independence does not only require hierarchical or institutional independence, but also independence in practical terms (see *Hugh Jordan v. United Kingdom*, App. No: 24746/94, 4/5/2001, § 120; *Kelly and others v. United Kingdom*, App. No: 30054/96, 4/5/2001, § 114). The investigation needs to be of the quality to be able to lead to the determination and punishment of those responsible (see*Paul and Audrey Edwards v. United Kingdom*, App. No: 46477/99, 14/3/2002, § 71). For an effective investigation in the sense of article 2 of the Convention, the investigation needs to be carried out with reasonable care and speed (see *Rantsev v. Cyprus and Russia*, App. No. 25965/04, 7/1/2010, § 233; *Çakıcı v. Turkey* [BD], App. No: 23657/94, 8/7/1999, § 80, 87, 106; *Kelly and others* mentioned above, § 97). In all of this process, the relatives of the victim need to take part to the extent required by the protection of their legitimate interests (see *Güleç v. Turkey*, App. No: 21593/93, 27/7/1998, § 82; Kelly and others mentioned above, § 98).

119. In the present case it is observed that the investigation was carried out by means of following two separate procedures regarding the public officials. Whereas in the first one, it is a question of an investigation that was conducted based on the file numbered Invs.2007/972 by the Office of the Specially Authorized Public Prosecutor of Istanbul within the framework of general principles independent from the individuals alleged to have been implicated in the fact, in the second, it is a question of an investigation that was conducted based on miscellaneous investigation numbers by the Offices of the Chief Public Prosecutors of Trabzon and Istanbul within the framework of the procedure envisaged by the Code numbered 4483 and that resulted in decisions to the effect that there were no grounds for prosecution or any action being taken with regard to the other public officials who were determined to have a connection with the fact, with the exception of several tangible judicial actions pertaining to a number of officials of the Trabzon Gendarmerie.

120. Accordingly, as it is also emphasized in the ECtHR decision pertaining to Hrant Dink (see*Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010, § 82), the fact that the public officials who are alleged to have been negligent with regard to the fact were not investigated by independent judicial units and that their roles in the fact were not determined from the date on which the murder occurred until the date of examination of the individual application (§ 39) despite the fact that the identities of the civil servants who had negligence in terms of fulfilling the liability of protecting the life of the deceased were determined and communicated to the investigation units in Istanbul and Trabzon after the murder by the Public Prosecutor of Istanbul has weakened the effectiveness of the investigation. It is not possible to claim that the investigations pertaining to the public officials who are alleged to have had responsibility in the process of Hrant Dink's murder were carried out as impartially, effectively, orderly and speedily as desired due to certain problems that are systemic and stem from practice.

121. When it is taken into account that in the process of Hrant Dink's murder, the investigation of some acts of public officials that were observed, such as misconduct or

neglect which occurred before or after the murder, were investigated within the scope of the Code numbered 4483, that therefore the conduct of investigations with regard to the security personnel alleged to have been negligent in the murder being committed was ensured by the Governor, who is their superior, that the Governor did not grant the permission for investigation as a result of the examination, that the objection that was filed against this decision was dismissed by the Regional Administrative Court, it has been observed that this situation prevented an effective investigation aimed at determining the responsibility of public officials and especially the clarification of the acts that could be attributed to these individuals at the investigation and trial phases within the scope of the principal crime. Competent authorities are expected to conduct effective investigations and prosecutions with the aim of reaching at the material reality. Under circumstances where the necessary rigor is not shown in regard to this matter, it can be said that the investigation procedure that is envisaged by the Code numbered 4483 leads to the failure to conduct an effective investigation that would uncover the potential responsibilities of public officials in terms of the protection of the right to life.

122. On the other hand, as it is indicated in the Report of the State Supervisory Council, it is understood that one of the practical errors led to by the Code numbered 4483 in administrative examinations and investigations that were carried out with regard to public officials in connection with Hrant Dink's murder was a "*method error*", that the acts of negligence of public officials that followed each other in succession were not examined as a whole within the framework of the Code numbered 4483, that separate investigations and examinations were conducted by different units according to both their authorities and the location where the crime was committed. It has been determined that this method resulted in the failure to consider and evaluate the facts as a whole, to question jointly all allegations, to grasp the severity of the acts of public officials during the process, to discuss whether or not there was a causality relationship with the principal act and thus to obtain a result out of the administrative examinations and investigations all together (§ 63).

123. In the present case, it is observed that an effective investigation was not carried out into the matters that are indicated in the Report of the State Supervisory Council and determined by the ECtHR to be the reason of the violation. Therefore, it is understood that the victimization, which is based on the violation, was not resolved either. Indeed, it has been determined that the assessments of the ECtHR were not taken into consideration as they should have been in fulfilling the state's positive duty pertaining to determining and, if necessary, punishing the public officials, who are alleged to have responsibility in the chain of events, within the scope of an effective judicial system, that the efforts to remedy the problems of the system and method errors were not exerted with due diligence, immediacy and responsibility, that the indications in this direction were far from being satisfactory. Moreover, given the fact that the decisions of no further prosecution that were issued during the investigation process without even referring to the statements of relevant public officials constitute reason for violation in and of themselves, and when it is also taken into account that no acceptable, transparent information and findings could be obtained to be able to consider the time that elapsed in the pursuit of the investigation to be reasonable, it cannot be said that the investigation was carried out in an effective manner in line with the state's positive liability.

124. Accordingly, since it has been understood that the statements of the public officials in Istanbul and Trabzon, whose identities had been determined with the allegation

that they were negligent in the fact, could not be taken by independent judicial units despite the fact that a lengthy period of time has elapsed since the murder, that their roles in the incident could not be determined, that the relatives of the murdered individual could become aware of the investigation process or participate to it only through their own efforts, that the investigation was not conducted with reasonable care and speed due to both the failure to display the required care in implementing the legislation pertaining to the trial of public officials and the errors in the methods that were pursued in the matter of investigating the public officials and the failure of judicial units to act with sufficient speed and care; it should be accepted that this investigation, which was conducted in such a way as to bear prejudice to the essence of the right, was ineffective as a whole.

125. Since it has been determined that the investigation was ineffective, it has not been deemed necessary to separately examine the complaint of the applicants to the effect that the fact that the file had been kept confidential vis-a-vis themselves through the decision of restriction that was issued in the investigation phase and that there was no effective remedy against this constituted a right violation.

126. For the explained reasons, it should be decided that the investigation that was relaunched especially upon the decision of the ECtHR with regard to the Trabzon gendarmerie and police personnel and Istanbul police officials and administrative superiors, who were alleged to have had responsibility and negligence in the murder of Hrant Dink, was not effective as a whole and that the procedural liability that is a result of the positive liability of the State envisaged by article 17 of the Constitution was violated.

V. IMPLEMENTATION OF ARTICLE 50 OF THE CODE NUMBERED 6216

127. Paragraphs (1) and (2) of article 50 of the Code numbered 6216 with the side heading of *''Decisions"* are as follows:

> *"(1) At the end of the examination on merits, it shall be decided that the right of the applicant has been violated or has not been violated. In the event that a decision of violation is delivered, what needs to be done for the removal of the violation and its consequences shall be adjudged. However, legitimacy cannot be reviewed, no decision with the quality of an administrative act and action cannot be delivered.*
>
> *(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

128. In the application, it has been concluded that paragraph one of article 17 of the Constitution was violated in terms of its procedural dimension. The applicants requested that the material and moral damages they had suffered be compensated.

129. Since it has been determined that it was decided that 105.000 Euros (§36) be paid in compensation with the decision of the ECtHR dated 14/9/2010 and that 100.000 TL be paid in compensation with the decision of the 10th Administrative Court of Istanbul dated

27/10/2010 (§ 52), it has not been deemed necessary that a separate compensation be paid in this matter.

130. It has been decided that the trial expenses of 1,886.20 TL in total composed of the application fee of 386.20 and the counsel's fee of 1,500.00 TL, which were made by the applicants and determined in accordance with the documents in the file, be paid to the applicants.

VI. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on 17/7/2014;

A. That,

1. the part of the application that contains the allegations as to the point that article 36 of the Constitution was violated is **INADMISSIBLE** due to the "*lack of venue in terms of subject*",

2. That its part that contains the allegations as to the point that paragraph one of article 17 of the Constitution was violated from a procedural point of view is **ADMISSIBLE**,

B. That paragraph one of article 17 of the Constitution was **VIOLATED** in terms of the State's procedural liability,

C. That the request of the applicants for compensation **BE DISMISSED**,

D. That the trial expenses of 1,886.20 TL in total composed of the application fee of 386.20 and the counsel's fee of 1,500.00 TL, which were made by the applicants and determined in accordance with the documents in the file, **BE PAID TO THE APPLICANTS**,

E. That the payments be made within four months as of the date of application by the applicants to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of payment,

F. That a copy of the decision be sent to the Offices of the Chief Public Prosecutors of Istanbul and Trabzon as per paragraph (1) of article 50 of the Code numbered 6216 in order for the violation and the consequences thereof to be removed; that a copy be sent to the applicants and the Ministry of Justice as per paragraph (3) of the same article.

President	Member	Member
Serruh KALELİ	Zehra Ayla PERKTAŞ	Burhan ÜSTÜN

Member	Member
Nuri NECİPOĞLU	Zühtü ARSLAN