COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF AKKUM AND OTHERS v. TURKEY

(Application no. 21894/93)

JUDGMENT

FINAL

24/06/2005

This version was rectified on 26 January 2006
under Rule 81 of the Rules of the Court

STRASBOURG

24 March 2005

In the case of Akkum and Others v. Turkey,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr S. NIELSEN, *Registrar*,

Having deliberated in private on 3 March 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 21894/93) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Turkish nationals, Mr Zülfi Akkum[1], Mr Hüseyin Akan and Mrs Rabia Karakoç ("the applicants"), on 4 May 1993.

2. The applicants, who had been granted legal aid, were represented by Mr Kevin Boyle and Ms Françoise Hampson, lawyers practising in the United Kingdom. The Turkish Government ("the Government") were represented by their Agent.

3. The applicants alleged, in particular, that their relatives were killed unlawfully by members of the security forces during a military operation on 10 November 1992 and that the authorities have failed to carry out an adequate investigation into the killings. They invoked Articles 2, 3, 6, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1 to the Convention. In their observations submitted on 10 April 1998, the applicants informed the Commission that they no longer wished to maintain their complaints under Article 6 of the Convention.

4. A hearing was held in Strasbourg on 18 October 1994 and the application was declared admissible by the Commission on 5 March 1996 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

[1] Rectified on 26 January 2006. The name of Zülfi Akkum read Zülfü Akkum in the former version of the judgment.

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr Rıza Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr Feyyaz Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants, Mr Zülfi Akkum, Mr Hüseyin Akan and Mrs Rabia Karakoç, are Turkish citizens of Kurdish origin and were born in 1944, 1928 and 1930 respectively. They are the father, brother and mother of Mehmet Akkum, Mehmet Akan and Derviş Karakoç, who were killed, allegedly by members of the security forces, on 10 November 1992. At the time of their deaths the applicants' relatives were respectively 29, 70 and 33 years of age.

A. Introduction

9. The facts of the case, particularly concerning events which took place on 10 November 1992, are disputed by the parties.

10. The facts as presented by the applicants are set out in Section B below (paragraphs 12-29). The Government's submissions concerning the facts are summarised in Section C below (paragraphs 30-34). The documentary evidence submitted by the applicant and the Government is summarised in Section D (paragraphs 35-97).

11. The Commission, in order to establish the facts disputed by the parties, conducted an investigation with the assistance of the parties, pursuant to former Article 28 § 1 (a) of the Convention. It appointed three delegates who took evidence in Ankara from 10 March 1997 to 13 March 1997. They interviewed the second and the third applicants as well as the following 17 witnesses: Abdurrahman Karakoç, Güllü Güzel-

Karakoç, Zeliha Karakoç, Hayriye Karaman, Hacire Ceylan, Hüseyin Yılmaz, Alaattin Aydın, Koray Türkan, Nihat Turan, Ömer Faruk Köksal, Hüseyin Bakır, Ersan Topaloğlu, Mürşit Yılmaz, Muhammed Özdemir, Tuncer Arpacı, Murat Koç and finally Ramazan Dal. A summary of the oral evidence given by these witnesses is found in Section E below (paragraphs 98-174).

The first applicant, Zülfi Akkum, and Hediye Akelma Akodun were also summoned but did not appear before the Commission's delegates. Mr Akkum's lawyer explained that Zülfi Akkum feared for his life and that for that reason he did not want to give evidence before the delegates. Hediye Akelma Akodun, an alleged eye-witness to the events in question whose name was put forward by the applicants, also did not wish to give evidence before the delegates. She did not give any reasons for this. Finally, Mehmet Güranioğlu, who was the mayor of the town of Dicle at the relevant time and whose name was put forward by the applicants, failed to appear before the delegates.

B. The applicants' submissions on the facts

12. The applicants Zülfi Akkum and Hüseyin Akan are from the village of Kurşunlu, located within the administrative jurisdiction of the district of Dicle, near Diyarbakır. Rabia Karakoç is from the hamlet of Kayaş in the village of Kırkpınar, which is also in the Dicle district.

13. The village of Kurşunlu and the hamlet of Kayaş are located in a fairly mountainous region and approximately 45 minutes' walk from each other. Close to Kurşunlu village and about an hour's walk from Kayaş is the Kurşunlu plain. This plain is completely flat with very little growth. It is surrounded, however, by mountains, which are forested in part. The plain and the surrounding mountainside were used by the Kurşunlu villagers for grazing their animals. To the north of the Kurşunlu plain, about two and a half hours' walk from Kayaş, is the village of Çevrecik. To the south-east of Kurşunlu village is the village of Kelekçi, where on 10 November 1992 security forces burned down the houses of nine villagers, including that of the village headman (*muhtar*) Hüseyin Akdıvar (see *Akdıvar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV).

14. On 10 November 1992 Zülfi Akkum was *muhtar* of Kurşunlu village. His son Mehmet did not live permanently in the village with him; however, on 10 November, Mehmet was on one of his visits to the village. As it turned out, while Mehmet was in the village it fell to him to undertake his duties as a shepherd according to the village rota. There were four villagers in all assigned to look after the animals belonging to the villagers: Mehmet Akkum, Mehmet Akan and two women, Hacire Ceylan and Hediye Akodun.

15. At around 8 or 9 a.m. on 10 November Mehmet Akan and Mehmet Akkum left Kurşunlu village together to take the village animals out to graze on and around the Kurşunlu plain. Almost immediately after they had left the village, the two women shepherds also left Kurşunlu village with their herds to go to the Kurşunlu plain. The two Mehmets took their herds up onto the mountainside surrounding the plain, whereas the two women stayed with their herds on the plain so that the herds would be kept separate.

16. They had not been on the plain for long when it became clear that a military operation was going on. As the two Mehmets were on the mountainside, they came across the path of the soldiers first. They were surrounded by soldiers who had hidden on the mountainside.

17. Hacire and Hediye were on the plain when they realised that there was an operation going on and that the soldiers were hidden throughout the surrounding mountainsides. They came across the soldiers when they were close to the edge of the plain. Some of Hacire's goats had begun to wander away from the plain into the forested area on the mountainside. Hacire had pursued the goats to prevent them from going into the shrubbery as she feared she would lose sight of them on account of her poor eyesight.

18. However, at the edge of the forested area, two soldiers stopped Hacire. They told her and Hediye to forget about the animals and to go away from the plain and go home. Hediye began to leave but Hacire insisted that she wanted to get her goats before she returned to the village. Her protests to the soldiers earned her a beating from the soldiers with their rifle butts. Eventually Hacire gave in and turned around to follow Hediye in the direction back to the village. After they returned to the village they told Hüseyin Akan that they had seen Mehmet Akan, who had been calling out as he was being hit by the soldiers. Mehmet Akan and Mehmet Akkum were last seen alive on the mountains, where there were a large number of soldiers.

19. As the two women were crossing the length of the plain to return home, they came across Derviş Karakoç, who was on his horse with his two children. His mother, Rabia Karakoç, his wife Güllü, his sister Hayriye Karaman and finally Zeliha Karakoç, a relative, were following him on foot. They were going to the village of Çevrecik to visit their relatives.

20. Derviş passed by Hacire and Hediye on the horse but Hacire and Hediye stopped the women, one of whom they knew to be Rabia Karakoç. They told Rabia that she should not continue her journey any further, that there were soldiers everywhere and that Derviş might be arrested by the soldiers. Derviş, meanwhile, had halted the horse 10 or 15 metres further along the path and had called back to see what had happened to hold up the party of women. When his mother told him what the women had said about the soldiers, Derviş replied that it would be all right.

21. However, at that moment the soldiers who had told Hacire to go home came out from the edge of the forested area and approached Derviş.

They told him to dismount from his horse and to show his identity card. Derviş dismounted and handed the children to his wife and to his mother. He tried to hand over the horse but the soldiers prevented him from doing so. The soldiers looked at Derviş's identity card and put it back in his pocket. The soldiers then took hold of him from either side and led him towards the mountainside. The women were left watching.

22. The soldiers hit Derviş on his shoulder with their rifle butts. There was then a single pistol shot and almost immediately afterwards firing began to take place from all around the plain. Rabia saw a flame hitting her son Derviş. There was dust everywhere as bullets caused the dust from the plain to rise. The women, terrified, ran to take shelter and returned to their village. They were not able to approach Derviş's body before the continuous firing began.

23. The women returned to their own villages. On the next day Rabia went to Kurşunlu village to see if anyone would accompany her to look for her son. However, nobody would accompany her. The villagers had already tried in the morning to approach the area of the plain to look for Mehmet Akan and Mehmet Akkum, who had failed to return to the village the previous evening, but had only seen a multitude of animal corpses and had returned to the village before completing their searches for the two Mehmets.

24. Rabia spoke to Zülfi Akkum's wife but Zülfi himself had gone to the town of Dicle to make enquiries about his son. Hüseyin Akan had gone with him to enquire about the fate of his brother. They wanted to know what had become of them after the soldiers had surrounded them on the hills by the plains. They met Mehmet Güranioğlu, the mayor of Dicle, who went with them to Dicle central gendarme station. A lieutenant-colonel told them that the soldiers had not yet returned. They stayed in Dicle that night.

25. The following morning, on 12 November, they went to the office of the Dicle public prosecutor. When they telephoned the village at around midday there was still no word about the fate of the two Mehmets. However, when they telephoned again at 2.30 p.m. they were told that the bodies of Mehmet Akan and Derviş Karakoç had been found. They informed the prosecutor and asked him to send a car to collect the bodies. Zülfi returned to the village to collect the bodies.

26. The villagers had found the body of Derviş where he had been killed and the body of Mehmet Akan on the slopes surrounding the Kurşunlu plain. The corpse of Derviş's horse was also on the plain. There were several dead animals around, as well as spent cartridges.

27. The villagers took the bodies of Mehmet Akan and Derviş Karakoç to their respective villages. Zülfi arrived by taxi to take the bodies to Dicle so that autopsies could be conducted.

28. Zülfi Akkum did not learn of the fate of his son until 16 November, when he went to the police headquarters in the city of Elazığ. On

14 November he had been told by a gendarme captain that two bodies had been found in Elazığ and that one of them might be that of his son. While at the police headquarters he was shown the photographs of two bodies, one of which was that of his son, Mehmet. The body was severely wounded and his ears had been cut off. The skin on his upper left arm had been cut away.

29. When the necessary legal formalities had been completed, Zülfi Akkum collected the body, which had been exhumed from the Elazığ cemetery where it had been buried because no one had claimed it. He took the body back to the village for burial.

C. The Government's submissions on the facts

30. On 10 November 1992 the gendarme forces of Elazığ carried out a military operation against the militants of the PKK near the village of Bukardi, in Elazığ. Mehmet Akkum died during the fighting which broke out between the armed militants of the PKK and the security forces. Several documents from the PKK, ammunition for firearms and stocks were seized at the site of the incident.

31. Proceedings which had been instituted against Mehmet Akkum by the public prosecutor of the Kayseri State Security Court were discontinued after his death.

32. Also on 10 November 1992, a violent clash broke out near the village of Arıcak between the gendarme forces of Dicle and the armed militants of the PKK. Mr Karakoç and Mr Akan died during this clash.

33. At the end of the preliminary investigation instituted in respect of the killing of the three persons, an indictment was filed with the Kayseri State Security Court on 19 August 1994. Seven gendarme soldiers and officers were charged with the offence of killing more than one person.

34. The criminal case was transferred to the Military Court attached to the 8th Army Corps of Elazığ (the "Military Court"). Unsuccessful efforts were made by that court to trace the applicants and the witnesses named by them. It was only possible to trace two of those witnesses, who subsequently denied having been eyewitnesses to the events. On 21 December 1995 the Military Court acquitted the gendarmes of the killing of the applicants' relatives.

D. Documentary evidence submitted by the parties

35. The following information appears from the documents submitted by the parties.

1. The military operation

36. A handwritten on-site report of a military operation was drawn up and signed by seven gendarme officers and soldiers on 11 November 1992. At the top of the document is a reference to the so-called Sancak-1 Operation Plan of 8 November 1992. A copy of this plan has not been made available to either the Commission or the Court.

37. The report states that four gendarme commando teams from Elazığ, two gendarme commando teams from Palu, four gendarme commando teams from Alacakaya, three gendarme commando teams from Kovancılar, four gendarme commando teams from Arıcak, one gendarme team from Üçocak, one gendarme team from Arıcak and a number of gendarme commando teams from Dicle began a planned military operation at 3 a.m. on 10 November 1992. The operation was codenamed Sancak-1.

38. At 6.30 the same morning an armed clash began on the Payidar hills, near the village of Bukardi, at coordinates (00, 59), between a group of terrorists and four gendarme commando teams from Arıcak. The clash continued intermittently until 6 p.m. that day. In the course of the clash the soldiers returned fire at the terrorists, who were hiding behind a herd of animals owned by villagers from Kurşunlu village and were firing at the soldiers. A number of animals were killed during the clash.

39. A body was found during the search that was carried out at dawn the following morning by the soldiers. It was deemed by the soldiers to be that of a person assisting and harbouring the terrorists. There were no identity documents on the body. During the search, the soldiers also recovered a number of spent cartridges, including five spent G3 rifle cartridges, 11 spent Kalashnikov rifle cartridges and 136 spent BKC rifle cartridges.

40. A shelter was also discovered at coordinates (00, 59) and was destroyed by the soldiers, together with the food hidden in it. There were no casualties among the soldiers who took part in the operation which ended at 1.30 p.m. on 11 November 1992.

41. It appears that this on-site report was typed up at a later stage. Both versions of the report were submitted to the Commission. However, there are two contradictions between the handwritten and the typed version. According to the typed version of the report, four gendarme commando teams from Palu participated in the operation, whereas according to the handwritten version, only two such teams from Palu took part. Also, according to the handwritten report, four gendarme commando teams from Alacakaya participated in the operation but the typed version makes no reference to the teams from Alacakaya.

42. Both reports and the spent cartridges found in the operation area were handed over to the Palu public prosecutor's office on 20 November1992 by Captain Mürşit Yılmaz, commander of the Arıcak gendarme headquarters.

43. Another military report was drawn up and signed on 11 November 1992 by four persons, including Colonel Hüseyin Yılmaz (see paragraphs 113 to 124 below). This report was sent to a number of authorities, including the office of the Ministry of the Interior. It states that the body found after the operation was that of a person who was either a member of the terrorist organisation or was harbouring members of that organisation. The body was later handed over to the public prosecutor in the town of Palu for the establishment of its identity and for an autopsy to be carried out.

44. This report contradicts both the handwritten and the typed versions of the on-site operation report. According to the report, one gendarme commando team from Palu, four gendarme commando teams from Alacakaya and three gendarme teams from Arıcak took part in the operation. It makes no reference to the gendarme team from Üçocak but states that two gendarme teams from Karakoçan, which were not mentioned in either of the versions of the earlier report, participated in the operation. Furthermore, according to this report, the coordinates of the terrorist shelter were (97, 59) and not (00, 59) as stated in the on-site report.

2. The preliminary investigation

45. A body examination report was drawn up and signed on 12 November 1992 by Mr Nihat Turan, the public prosecutor of Palu, and Dr Alaattin Aydın.

46. The report states that the body was that of a man of approximately 30 to 35 years of age. Both ears were missing and there was an entry hole above the stomach and another one on the right side of the back of the body. A bullet had entered the left hand and had exited. There were also a large number of other injuries, possibly caused by shrapnel, as well as a 10-centimetre-long bullet injury with burn marks. The doctor established the cause of death as shooting. As the cause of death was thus established, it was decided not to carry out a full autopsy.

47. There were no documents on the body to help establish its identity. It was subsequently buried after a burial licence had been issued by the Palu public prosecutor on 12 November 1992.

48. On 13 November 1992 Zülfi Akkum, the first applicant, submitted a petition to the public prosecutor's office in the town of Dicle, near Diyarbakır. He informed the prosecutor that his son Mehmet Akkum and another villager, Mehmet Akan, had taken their animals out to graze early in the morning on 10 November 1992 and that they had failed to return to their homes in the evening. The villagers had been scared to look for them since there were soldiers everywhere. However, on 12 November 1992 he and a number of his fellow villagers had gone to look for the two missing persons and they had found the bodies of Mehmet Akan and Derviş Karakoç, the

latter with his hands tied behind his back. Zülfi Akkum asked the prosecutor to assist him in bringing the bodies into the town.

49. On 13 November 1992 Ali Akan, the son of Mehmet Akan, and Musa Karakoç, a cousin of Derviş Karakoç, each submitted a petition to the Dicle public prosecutor and informed him that their relatives had been killed by members of the security forces. They asked the prosecutor to carry out autopsies on the bodies.

50. On 13 November 1992 İbrahim Engin, the public prosecutor of Dicle, and Dr Koray Aydın carried out external examinations of the bodies of Mehmet Akan and Derviş Karakoç. During the examination, Mehmet Akan's son identified his father's body and a cousin identified Derviş Karakoç's body. According to the report, the cause of death of Mehmet Akan, who was 66 years of age, was a bullet which had entered from behind the right ear and had exited above the left ear. The death of Derviş Karakoç, who was 25 years of age, had been caused by nine bullets which had entered and exited the trunk of his body. As the causes of the deaths were established it was decided not to carry out full autopsies on the bodies.

51. The applicants' lawyers submitted to the Court a report which was prepared on 7 July 1993 by Dr Peter Vanezis, a forensic expert at the Charing Cross and Westminster Medical School in London. The findings of this report were based on a number of photographs of the bodies of Mehmet Akkum and Mehmet Akan.

52. Dr Vanezis' report lists the extensive injuries to the body of Mehmet Akkum, which include grazes and bruises to the face, mutilation of both ears, a collection of bruises to the front of the neck, extensive bruising to the left lower chest and abdomen, and a circular hole in the right armpit. It was also recorded in this report that, after death, skin had been excised from the chest, the upper abdomen, the left upper arm, and the back of the left hand. Dr Vanezis concluded that the injuries to the trunk could have been caused by a number of blows to this region with a long, possibly rounded, stick or bar. Furthermore, kicking or stamping on this region could not be ruled out. Such impacts in this area could have resulted in a rupture of the spleen, which was likely to have been fatal without prompt medical attention. The injuries to the face could have been due to blows, possibly from a fist. Dr Vanezis further observed a gunshot entry wound on the upper part of the left ear of Mehmet Akan, the firearm having been discharged close to the head.

53. On 16 November 1992 Zülfi Akkum was shown a photograph of the body which had been buried by the authorities in Elazığ (see paragraph 47 above). Mr Akkum identified the deceased person as his son Mehmet Akkum. The following day the body was handed over to him at the cemetery.

54. On 17 November 1992 Major Ersan Topaloğlu, the commanding officer of the Dicle gendarme command, informed the prosecutor's office in Dicle that the place where the bodies of Mehmet Akan and Derviş Karakoç

had been found was within the jurisdiction of the town of Arıcak. Major Topaloğlu further informed the prosecutor that he had understood from radio communications that a planned operation had been carried out in the area where the bodies had been found.

55. On 25 November 1992 Güllü Karakoç and Rabia Karakoç made detailed statements to the Diyarbakır branch of the Human Rights Association and described their eyewitness account of the events leading up to the killing of Derviş Karakoç. On 26 November 1992 Hüseyin Akan and Zülfi Akkum also gave statements to the Human Rights Association.

56. On 23 December 1992 the Palu public prosecutor Nihat Turan examined the documents relating to the preliminary examination and decided that he lacked jurisdiction to investigate the killing "on 9 November 1992 of an unidentified terrorist during the clash between members of the PKK and soldiers on the Payidar hills". Mr Turan sent this decision to the prosecutor's office at the Kayseri State Security Court.

57. On 30 December 1992 the prosecutor at the Kayseri State Security Court returned the decision to Mr Turan and asked him to complete the investigation file, enclose the photographs of the body and then send the file back.

58. On 8 January 1993 Mr Turan asked the Arıcak gendarme headquarters if there were any photographs of the body at the headquarters.

59. On 18 February 1993 the Elazığ chief public prosecutor sent Mr Turan the documents concerning the establishment of the identity of the body of Mehmet Akkum (see paragraph 53 above).

60. On 24 February 1993 Mr Turan informed the prosecutor at the Kayseri State Security Court that the name of the dead person was Mehmet Akkum.

61. On 10 March 1993 Mr Turan, notwithstanding the information he had received from the Elazığ chief public prosecutor on 18 February 1993, asked the commander of the Arıcak gendarme headquarters whether any photographs of the body of the "unidentified terrorist who had been killed on 9 November 1992" had been taken.

62. On 17 March 1993 the commander of the Arıcak gendarme headquarters informed Mr Turan that no operation had been conducted on 9 November 1992 and that no bodies had therefore been recovered. An operation had, however, been conducted on 23 January 1993, during which a terrorist had been killed, but the soldiers had not had an opportunity to take any photographs of the body.

63. On 29 March 1993 Mr Turan, apparently in response to a request from the Dicle prosecutor, informed the latter that the previously unidentified body had finally been identified as that of Mehmet Akkum.

64. On 30 March 1993 Mr Turan sent to the Kayseri State Security Court the operation reports obtained from Arıcak gendarme headquarters.

65. On the same day Mr Turan, despite his previous discovery of the identity of Mehmet Akkum's body, continued his efforts to identify "the dead terrorist" and sent a letter to the Elazığ police headquarters enquiring whether the latter had any photographs of the body in their files. Mr Turan then described the body in his letter.

66. Also on the same day Mr Turan sent another letter to the commander of the Arıcak gendarme headquarters and informed the latter that in his letter of 10 March 1993 (see paragraph 61 above) the date of the operation had been mistakenly referred to as 9 November 1992. Mr Turan then asked the commander whether any photographs existed of the body of the terrorist who "was killed during the operation on 9 November 1992".

67. On 3 April 1993 the commander of the Arıcak gendarme headquarters informed Mr Turan that no operation had taken place on 9 November 1992 but that a body had been recovered on 11 November 1992 following an armed clash. He did not, however, have a photograph of this body.

68. On 8 April 1993 the Elazığ police headquarters sent Mr Turan a copy of the photograph of the body and informed him that the body had already been identified on 16 November 1992 as that of Mehmet Akkum.

69. On 19 April 1993 Mr Turan sent a letter to the registry office for births, marriages and deaths, asking it to "register the death of the terrorist Mehmet Akkum".

70. On 14 May 1993 Mr Turan took another decision declining jurisdiction and sent the file to the Kayseri State Security Court. The offence in question was referred to in this decision as "the killing of Mehmet Akkum, a terrorist, during an armed clash that took place between the PKK and the security forces on 9 November 1992".

71. On 21 May 1993 the chief public prosecutor at the Kayseri State Security Court, who was now entrusted with the duty of investigating the killing of Mehmet Akkum, referred to the above-mentioned decision of non-jurisdiction and decided not to prosecute Mehmet Akkum since he was dead. In this decision the deceased was referred to as "the suspect".

72. It appears from the documents submitted to the Commission by the Government that both on 22 October 1993 and on 3 November 1993 the Ministry of Justice's International Law and Foreign Relations Directorate ("the Directorate") requested information from Mr Turan and from the prosecutor at the Kayseri State Security Court about the investigation into the killings. The Directorate required this information in order to be able to prepare the observations which would be submitted to the European Commission of Human Rights.

73. On 10 November 1993 Mr Turan sent four letters to his opposite number in Dicle and requested the latter to contact the Dicle gendarme headquarters and ask for any documents that might exist concerning the killings. Mr Turan also informed the Dicle prosecutor of the petitions

submitted by relatives of the deceased persons a year previously (see paragraphs 48 to 49 above), and asked him to obtain information from these relatives about the killings.

74. On 25 November 1993 the prosecutor at the Kayseri State Security Court informed the Directorate about the decision not to prosecute Mehmet Akkum taken by his office on 21 May 1993 (see paragraph 71 above), and further informed the Directorate that that decision had concluded the investigation into the killing of Mehmet Akkum. The decision had not been communicated to the complainants as there had not been any. Furthermore, no one had been questioned as the file contained no names of witnesses.

75. By letter of 3 December 1993 Mr Turan informed the Directorate that his office was still continuing the investigation into the killings of Mehmet Akan and Derviş Karakoç, that he had not had yet been able to establish the identities of the soldiers who had participated in the operation and that he was also trying to obtain information from possible eyewitnesses. It appears from this letter that Mr Turan had not been informed about the decision not to prosecute taken by the prosecutor at the Kayseri State Security Court, which had concluded the investigation into the killing of Mehmet Akkum.

76. On 16 December 1993 the Dicle prosecutor, further to the request by Mr Turan (see paragraph 73 above), took a statement from Zülfi Akkum. Mr Akkum confirmed that the day after the killings he had informed the Dicle governor and also the Dicle gendarme commander about the killings and had tried to obtain information as to how they might have occurred.

77. In response to Mr Turan's request of 10 November 1993 to find the relatives of the deceased men (see paragraph 73 above)**,** the authorities made unsuccessful attempts to find a certain Musa Karakuş (*sic*) and a certain Ali Alkan (*sic*). These attempts continued until 7 March 1994.

78. Between 3 August 1994 and 1 November 1995 the investigation carried out by the authorities in Dicle and Palu was limited to the tracing of the relatives of the deceased persons. It was recorded in a letter of 10 October 1994 that it had not been possible to find these relatives since the villages where they used to live had been evacuated a year previously as a result of intense pressure from the PKK.

79. On 13 and 14 October 1994 Hüseyin Akan and Rabia Karakoç made further statements to the Human Rights Association in Diyarbakır and stated that they still had not been questioned by any authorities in relation to the killing of their relatives.

3. The trial

80. It appears from a document drawn up on 7 November 1995 by the Elazığ chief prosecutor's office and addressed to the Directorate that the seven gendarme officers who had signed the military report of 11 November

1992 (see paragraph 36 above) were indicted on 19 August 1994 for the killing of the applicants' three relatives.

81. It also appears from the same document that the Elazığ Assize Court, before which the seven gendarmes were indicted, decided on 22 June 1995 that it lacked jurisdiction to try the gendarmes and sent the file to the Military Court. The Government have not sent the Commission or the Court copies of the indictment or of the decision of non-jurisdiction taken by the Elazığ Assize Court.

82. The Military Court was unable to contact and summon the applicants during the trial because they could not be found. It appears, however, that it was possible to locate Hacire Ceylan and Hediye Akodun, the village shepherds (see paragraph 14 above), and take statements from them during the trial.

83. Hacire Ceylan stated in her testimony given on 17 May 1995 that on the day in question she had been grazing her animals outside her village when soldiers had told her that they were carrying out an operation and asked her to return to her house. She had complied with this request. She had not seen soldiers beating up Mehmet Akan or any other person.

84. Hediye Akodun stated in her testimony given on 23 May 1995 that she was not aware of any military operation having taken place, of the killing of Mehmet Akan or of the killing of the other two persons.

85. In the course of the trial the seven defendants, by then all working at different places around the country, all informed the Military Court that they did not wish to appear before it to testify. The Military Court, accepting their wishes, sent letters rogatory to criminal courts in the towns where the defendants were working and asked these courts to take statements from the defendants. The statements were subsequently forwarded to the Military Court.

86. With the exception of Şaban Bozkurt, the defendants all confirmed that an operation had taken place on 10 November 1992. Şaban Bozkurt had been on duty elsewhere on the day of the operation.

87. The defendants stated that they had returned fire when a group of terrorists had opened fire on them. The defendants did not know who had actually shot the three persons since approximately 250-300 soldiers had taken part in the operation.

88. Adem Kolukısa, one of the seven defendants, stated in his testimony of 5 May 1995 that he had personally seen two bodies and that he had also heard from his fellow soldiers that there was another body. The bodies he had seen were those of two men of approximately 30-35 years of age.

89. Recep Tombak stated in his testimony of 23 May 1995 that he and his fellow soldiers had seen the three bodies the day after the operation.

90. Tuncer Arpacı, another defendant and an army captain, stated in his testimony of 20 November 1995 that he had personally found the three bodies and had recorded this finding in the operation reports. One of the

bodies was that of a bearded man of approximately 50-60 years of age, found on the Kurşunlu plain. Mr Arpacı stated that the terrorists had been surrounded by the soldiers and that Cobra helicopters and mortar had also been used in the operation. It had therefore been impossible to identify who had actually shot these persons.

91. On 21 December 1995 the Military Court unanimously acquitted all seven defendants. It stated in its judgment that it had not been able to question the relatives of the deceased persons because their addresses were not known. The court also noted that the allegations made by the deceased persons' relatives had not been corroborated by the testimonies given by Hacire Ceylan and Hediye Akodun. On the other hand, the defendants were found to have been consistent in their eyewitness accounts of the military operation which had been carried out pursuant to the Sancak-1 Operation Plan of 8 November 1992. The Military Court decided, therefore, to disregard the allegations made by the relatives that the three persons had been killed by the soldiers.

92. The Military Court's decision to acquit the soldiers was based on the following analysis of the evidence:

> "The deceased persons were killed during a military operation conducted by the security forces against the terrorist organisation. However, it is not possible to say with certainty that they were killed as a result of the fire opened by the soldiers since it was the terrorists who had opened fire first. Moreover, 136 BKC-type spent cartridges, which are not used by the [Turkish] armed forces, were found in the area. If it had not been for the armed clash, the defendants would have had no reason to use firearms against the deceased persons. At the site of the incident there were seven military divisions and an unknown number of terrorists. The clashes continued all day long... There is no evidence suggesting that the defendants opened fire at the deceased persons..."

93. The testimonies given by three of the defendants during the trial, namely Murat Koç, Ramazan Dal and Yavuz Akın, have not been submitted to the Commission or to the Court. Therefore, the following information is taken from the above-mentioned judgment of the Military Court, which contains a summary of the testimonies of these three defendants.

94. Murat Koç stated in his testimony that he had heard during the operation that a number of terrorists had been killed.

95. Ramazan Dal stated in his testimony that after the operation he and his fellow soldiers had found a body and that he had seen the corpses of a horse and of sheep in the area.

96. Yavuz Akın stated in his testimony that he had personally seen one body, which he and his fellow soldiers had taken to the station; he did not know how that person had died. He also stated that fighter jets and helicopters had been used in the operation. Finally, Mr Akın denied having signed the on-site operation report of 11 November 1992 (see paragraph 36 above).

97. It further appears from the judgment of the Military Court that Major Ersan Topaloğlu was also questioned during the trial. His testimony was not made available to the Commission or to the Court, but according to the summary contained in the judgment, Major Topaloğlu stated that he had been informed by Zülfi Akkum that his son Mehmet Akkum and a fellow villager were missing. Major Topaloğlu had then made some inquiries and had discovered that a military operation was being carried out in the area. He confirmed that two bodies had been taken to the morgue in Elazığ and that one of them had been that of the son of Zülfi Akkum.

E. Oral evidence

1. Rabia Karakoç (the first applicant), mother of Derviş Karakoç

2. Güllü Güzel-Karakoç, wife of Derviş Karakoç

3. Zeliha Karakoç, a relative of Derviş Karakoç

4. Hayriye Karaman, sister of Derviş Karakoç

98. On 10 November 1992, early in the morning, these four witnesses left their homes in the village of Kayaş, together with Derviş Karakoç and his two children, to go to the village of Çevrecik to visit a relative. Derviş was on horseback with his children and the women were walking behind him. After walking for about half an hour they came to a flat area where animals were grazing and they saw the two women shepherds, Hediye and Hacire, running towards them. Hediye and Hacire told the group to go back to their village as there were soldiers everywhere and it would not be safe to continue. However, Derviş decided to press on, saying that he had nothing to fear from the soldiers.

99. After they had continued the journey for a few minutes, two soldiers came out of the bushes on the side of the road and asked Derviş to get off the horse and to show them his identity card. The soldiers then told the women to go back to the village. They took Derviş by his arms and walked away slowly. They took Derviş's horse with them as well. Rabia Karakoç saw the soldiers taking Derviş behind the bushes and saw one of them hitting Derviş with the butt of his rifle. A few minutes later, Rabia heard a single gun shot from a pistol; however, she was unable to tell whether it was a shot in the air or whether it had been aimed at Derviş. Following this single gun shot, firing started from all over the field and almost 500-600 soldiers appeared from behind the woods. Rabia saw a flame hit Derviş in his lower abdomen. This incident took place on the plain outside Kurşunlu village.

100. The witnesses then returned to their village together with the two children and started waiting for Derviş to come back. Derviş did not return to the village that day and the villagers were afraid to help the witnesses to go and look for him since the military operation was still continuing. During the operation, machine guns and helicopters were also used.

101. When the operation was over, Rabia Karakoç and a number of villagers from Kurşunlu went to the area concerned, where they saw several dead animals. When Rabia arrived at the spot where she had last seen her son, she saw her son's horse and dog, which were also dead. Around 30-40 metres away from the horse she saw her son's body, lying on its side, with a large number of gunshot wounds between the chest and hips.

102. About a year after Derviş's death, the witnesses' village, Kayaş, was raided by soldiers. The villagers fled the village, too scared to take any of their belongings with them. After they had left the village, the soldiers burned down all the houses.

103. None of the four witnesses was ever questioned by the investigating authorities in relation to the killing of Derviş.

5. Abdurrahman Karakoç, brother of Derviş Karakoç

104. This witness did not see any of the events that occurred on 10 November 1992 as at that time he was living in Istanbul. He was informed about the incidents when his uncle telephoned him at about 4 p.m. on that day. He was told that his brother Derviş had been detained by the soldiers. Following this telephone call, the witness went to Batman, where he was told that his village was under the control of the soldiers and that he was not allowed to go there. A few days later, when he was finally able to go to his village, he found out that his brother Derviş had been killed. Derviş had already been buried by the time the witness arrived in the village. Hacire Ceylan told him everything that had taken place on 10 November 1992.

105. The witness recalled that, in the past, Derviş had often been asked to become a village guard and because of this pressure the latter had wanted to leave the village.

106. On 7 November 1993 the witness returned to the village to organise a gathering for the first anniversary of the death of his brother. However, helicopters came to the village and started shooting. His cousin was wounded during this shooting and the witness had to take his cousin to Diyarbakır for treatment. When he returned to the village, the village was almost empty. The soldiers had forced everyone to leave the village.

6. Hacire Ceylan

107. At the time of the events the witness was living in Kurşunlu village and was the village shepherd.

108. At around 9 a.m. on the morning of 10 November 1992 the witness left her house in Kurşunlu village with a fellow shepherd, Hediye Akelma Akodun, and their animals. They followed Mehmet Akkum and Mehmet Akan, who were also taking their animals out to graze. On their way they met two soldiers, who told them to return to their village. The witness wanted to take her animals with her as well but the soldiers did not allow her to do so and when she resisted, they beat her.

109. The witness also saw some other soldiers taking Mehmet Akan and Mehmet Akkum towards the woods. The two Mehmets were in the middle of a group of soldiers but her poor eyesight prevented her from seeing clearly what they were doing. The soldiers were shouting so much that she could not hear what was going on.

110. On their way home, the witness and Hediye Akodun met Rabia Karakoç and her family. The witness told Rabia that there were soldiers everywhere. Later she saw Derviş Karakoç being ordered off his horse by the same two soldiers they had come across earlier. Derviş was taken a few yards away and the witness saw him showing his identity card to the soldiers. He had a soldier on either side of him. The soldiers ordered the women to go home. When she heard Derviş's wife shouting that her husband had been hit by a rifle butt, the witness turned around and saw that Derviş was still standing at the same point where the soldiers had taken him. Thereafter she heard a single gun shot, followed shortly afterwards by continuous firing. Some of the shots were aimed at the group of people which included the witness, and they ran to take shelter behind a rock. She heard Rabia screaming and saying that her son had been killed.

111. When the firing was over, they went back to their respective villages. When the witness returned to her village she told Mehmet Akkum's father that she had seen his son being taken away by the soldiers. After the bodies had been found she went to the area and saw Derviş's body lying at the spot where she had last seen him.

112. A statement was taken from the witness by the authorities and she was asked when Derviş had been killed and whether he had been beaten up by the soldiers. She stated that she did not know whether he had been killed in the morning or in the evening; she had later seen that he had been killed on the spot. She also stated that the soldiers had beaten Derviş.

7. Hüseyin Yılmaz

113. This witness is a gendarme colonel and at the time of the incident was the commanding officer of the Elazığ provincial gendarmerie headquarters. He is one of the signatories of the military report referred to in paragraph 43 above.

114. In November 1992 his headquarters were informed that around 300 terrorists were present in an area called the Payidar hills, near the district of Arıcak within Elazığ province. Terrorists had been known to take shelter in

this area and the security forces had already conducted several operations there, during which there had been seven or eight armed clashes with members of the PKK. Upon receiving this intelligence, a decision was made to organise a military operation in the area and the witness was responsible for its planning.

115. On 8 November 1992 an operation plan was drawn up and the operation was named Sancak-1. The plans of the operation clearly indicated the position each military unit would take up. Approximately 250 soldiers would participate in the operation, which was to cover an area of seven or eight square kilometres. The operation plan included the names of the officers who would take part in the operation and also named the military units involved. The plan would have been put in the archives upon completion of the judicial investigation.

116. As all the operations were planned in strict confidentiality, the villagers who lived in the area concerned were not informed beforehand. Nevertheless, some local villagers – being a common source of intelligence for the gendarmerie – would have known that the security forces were to conduct operations and would refrain from leaving their homes during the operations. Informing the villagers in advance of an operation would compromise its success. However, the soldiers in the operation area would ensure that no civilians entered the area.

117. On 10 November 1992 the operation began at dawn in the Payidar hills. The witness followed the operation by radio communication from a temporary command unit established at Erimli gendarme station, which was located outside the operation area but had a view of it.

118. Members of the terrorist organisation would normally use automatic rifles, called BKCs, and the soldiers used MG3 automatic rifles and RPGs. No helicopters were used in the operation.

119. Although the operation was carried out under his general command, he did not have judicial responsibility. During a military operation, the district gendarme commanders in charge of the participating units were the officers with judicial responsibility and were in direct contact with the public prosecutors. In the instant case, these officers would have been the Palu and Dicle district gendarme commanders. The incident reports prepared by the officers taking part in the operation would have been submitted to the local prosecutor and also to the witness.

120. When questioned about the discrepancies between the military reports concerning the number of military units which had taken part in the operation (see paragraphs 41 and 44 above), the witness stated that these were simply innocent omissions.

121. The witness had never been informed of the allegation that Derviş Karakoç had been killed by soldiers. He considered that the allegations were baseless since the relatives of Derviş Karakoç had failed to submit their complaints to the commanders of the military units who had been in the area

during the operation, which had lasted for more than two days, or to the judicial authorities. Had he been informed about the killing of Derviş Karakoç, he would have investigated it personally.

122. The body of Mehmet Akkum was found in an area in which the Arıcak division had taken up position. The bodies of Mehmet Akan and Derviş Karakoç were found in the area where military units from Kovancılar and Alacakaya had taken up position. The deaths of the latter two persons were not recorded in his report submitted to the Ministry of the Interior (see paragraph 43 above) because their bodies had not been found until after the report was drawn up. However, there would have been another report, entitled "final report" or "detailed operation report", setting out the details of the entire operation with greater precision. This report would have been sent, together with all other documents pertaining to the operation, to the gendarme headquarters in Ankara. This document would have been confidential and would not have been submitted to the judicial authorities. By examining the operation reports it would be possible to pinpoint which military unit was responsible for a particular area.

123. The witness had no knowledge of the subsequent trial of a number of soldiers under his command on suspicion of having killed three persons, allegedly during the operation for which he was responsible. He had not been summoned or requested to attend any court hearing in order to give evidence.

124. According to the witness, Sancak-1 could be considered a successful operation. The measure to gauge the success of an operation was the degree of damage caused to the terrorist organisation. In this operation there were no casualties on the side of the security forces. The witness stated that he did not know whether the citizens who were killed during the operation were innocent or not, and he explained that every operation entailed risks. Nobody would have wanted ordinary citizens to be killed during a military operation. According to the witness, all the necessary measures had been taken to reduce that risk in this particular operation.

8. Dr Alaattin Aydın

9. Dr Koray Türkan

125. At the time of the events the witnesses were practising at health centres in Palu and Dicle, respectively. They were not trained forensic experts but were nevertheless responsible for external body examinations and post mortem examinations since there were no forensic experts in the two towns where they were working.

126. Dr Aydın carried out the examination of the body of Mehmet Akkum whereas Dr Türkan examined the bodies of Mehmet Akan and Derviş Karakoç (see paragraphs 45 and 50 above).

127. Dr Aydın agreed with the findings in the report compiled by Dr Vanezis (see paragraph 51 above), in which the injuries on the body of Mehmet Akkum were described in detail.

128. When asked why the large number of bruises and injuries on the body of Mehmet Akkum, observed by Dr Vanezis, had not been recorded in his examination report, Dr Aydın stated that no such wounds had been observed on the body during his examination.

129. Dr Aydın initially suggested that Mehmet Akkum's ears could have been severed by flying shrapnel but later stated that the ears must have been cut off *post mortem* as there was no bleeding in that area. However, as this had no bearing on the cause of death he had not deemed it important to include this information in his report.

130. Both witnesses maintained that there had been no need to carry out full autopsies since their examinations of the bodies had enabled them to establish the cause of death.

131. Dr Türkan was unable to state with certainty the distance from which Mehmet Akan had been shot. As regards his examination of Derviş Karakoç's body, Dr Türkan stated that as he had observed a corresponding exit hole for every entry hole, it did not occur to him that there could be more bullets, traces of bullets or any other evidence trapped in the body.

10. Nihat Turan

132. The witness, who was the public prosecutor in Palu at the time of the events, was present at the examination of the body of Mehmet Akkum. He noted the absence of the ears but did not consider it his duty to find out how the body had been mutilated. He concluded, on the basis of the information given by the gendarmes, that Mehmet Akkum was a terrorist. For this reason he decided that he lacked jurisdiction to investigate the killing and sent the file to the prosecutor's office at the Kayseri State Security Court in accordance with usual practice. If state security courts required further information, they would put a request to the local prosecutor, who would carry out further investigations.

133. In his investigation he repeatedly referred to 9 November 1992 as the date of the military operation (see paragraphs 56, 61, 66 and 70 above), since a gendarme had informed him by telephone that the operation had taken place on that date.

134. In around December 1993, the investigation into the killing of Derviş Karakoç and Mehmet Akan was also referred to his office as these persons had been killed in the district of Arıcak, which fell within the jurisdiction of Palu. In late 1993 the witness was appointed to a different post; he was therefore unable to provide any information concerning the outcome of the investigation into the killing of these two persons. However, the witness confirmed that the file on the investigation into the killing of Mehmet Akan and Derviş Karakoç had also been submitted to the Kayseri

State Security Court by his office, together with a record (*fezleke*) summarising the investigation. The Kayseri State Security Court then sent the file back on the grounds that it contained no "PKK-related elements", and the Palu public prosecutor's office therefore had jurisdiction to continue the investigation. The office of the Palu public prosecutor then sent the file to the Elazığ Assize Court, where seven gendarmes were indicted.

135. The witness did not question any soldiers because the killings had occurred during an armed confrontation and he had no information as to which military units had participated in that operation. In any event, it would not be possible to establish whether a crime had been committed in an armed confrontation.

11. Ömer Faruk Köksal

136. This witness, who was the Elazığ public prosecutor at the time of the events, was not involved in the investigation into the death of the three persons. His office only attempted to find the addresses of the deceased persons' relatives and other potential eyewitnesses, as requested by the Elazığ Assize Court.

137. In response to a question concerning the duties of a public prosecutor with whom relatives of murdered persons lodge a complaint, the witness explained that in such circumstances the public prosecutor should first question the relatives. Furthermore, a prosecutor should gather all the evidence during the preliminary investigation and only then, if necessary, give a decision declining jurisdiction.

12. Hüseyin Bakır

138. The witness is a gendarme officer and was the commanding officer of the gendarme commando division in the town of Dicle at the time of the events.

139. He remembered the Sancak-1 operation. However, his military unit was not involved in the operation and he had no idea as to what had actually happened during the operation. As an explanation for the fact that his unit was mentioned in the military report as having participated in the operation, he submitted that this was probably because his unit had been sent to the area the day after the operation to prevent any terrorists from fleeing the area.

140. While he was in the area there were no clashes and he did not hear any shooting. He did not draw up a report detailing his involvement in the operation.

141. He did not hear about the deaths until four or five days after the operation. He did confirm, however, that while the operation was still continuing, Zülfi Akkum had informed him that two shepherds from his village were missing.

142. He said that the Kurşunlu plain was about two kilometres long and 600-800 metres wide. It was flat with three or four sporadic trees. It was completely surrounded by mountains. In the forested area there were oak trees, bushes and rocks. He identified the location shown on two photographs of the places where the bodies of Mehmet Akan and Derviş Karakoç had been found as being on the Kurşunlu plain. He could not exclude the possibility that a third photograph shown to him was a picture of the area leading to the slopes.

13. Hüseyin Akan, the second applicant and brother of Mehmet Akan

143. At around 6 a.m. on 10 November 1992 Mehmet Akan and his friend Mehmet Akkum left the village to take the animals out to the meadow. After they had left the village Hacire and Hediye, the village shepherds, also took their animals out.

144. At around 9 a.m. the witness saw a helicopter, which flew over the village and continued to the east towards the plain. Thereafter he heard gunshots and half an hour later some of the animals came back to the village, most of them wounded. Hacire came back to the village at around noon. She told the villagers that the helicopter had landed and that the soldiers who had come out of the helicopter had forced the women to go back to their village. However, she had seen Mehmet Akan and Mehmet Akkum being apprehended and had heard the voice of Mehmet Akan, who was surrounded by soldiers.

145. As Mehmet Akan and Mehmet Akkum did not return to the village that evening, the witness went to Dicle the following morning, together with the *muhtar* of the village, Zülfi Akkum, to ask for information. They first went to the district governor's office, where they were referred to the gendarmerie barracks. A gendarme major at the barracks told them not to worry and that the two shepherds would be back soon.

146. The following day they went back to the barracks and were told that two persons had been arrested by soldiers from the Palu gendarmerie. That day, the applicant did not go back to the village and stayed in Dicle. The following morning he was informed that the bodies of his brother and of Derviş Karakoç had been found. Although he informed the public prosecutor about this, the latter refused to go the scene of the incident.

14. Ersan Topaloğlu

147. The witness is a gendarme officer. He was the commanding officer at the Dicle gendarme command and the superior of Hüseyin Bakır (see paragraph 138 above) at the time of the events.

148. He did not remember the incidents of November 1992 very clearly because he had not taken part in the operation. However, he did remember that an operation had been conducted and he had heard on the wireless that

there had been an armed conflict. When asked why units under his command were named in the operation reports when in fact they had not taken part in the operation, the witness stated that their involvement had been limited to blocking their side of the operation area in order to prevent any terrorists from escaping. However, it was not the practice of commando units to keep records of their activities during an operation and hence no reports existed pertaining to their involvement in this particular operation.

149. In December 1995 the witness gave evidence before the Ankara Criminal Court. In his statement to that court, he confirmed that he had contacted the operating forces by radio after he had been asked by the *muhtar* of Kurşunlu, Zülfi Akkum, to make enquiries as to the two people missing from that village. The reply he received by radio was that one terrorist had been found dead. He then referred Zülfi Akkum to the public prosecutor's office in Elazığ, thinking that the dead terrorist might be his son. It later turned out that the body was indeed that of Mr Akkum's son.

15. Mürşit Yılmaz

150. The witness is a gendarme officer and was the Arıcak gendarme commander in November 1992.

151. The witness personally participated in the operation in question. The clash started at about 6 a.m. in the Payidar hills, located to the north of Kurşunlu and to the south of Palu. His division was in the process of carrying out a search of the area when the terrorists opened fire on them. The terrorists were scattered over a wide area where visibility was limited because of the small bushes in a hilly region. There must have been nearly a hundred terrorists. There were no casualties amongst the soldiers. Firing continued at intervals all that day and the following day.

152. The clash took place over a wide area where villagers would not have gone, not even to take their animals to graze. It was illogical to believe that anyone would go near an armed clash where there was continuous firing.

153. He was informed that a terrorist had been captured dead during the clash. The body had been taken to the gendarme station in Palu, since that location possessed the necessary facilities for an autopsy to be carried out.

154. Three or four days after the incident, he was informed that two more persons had been killed in crossfire. The witness did not personally see the bodies.

155. No helicopters or aircraft were used during the operation. Although it was not a major operation, several units were involved in it.

156. He had no information as to whether any of his men had been prosecuted in connection with the death of three villagers.

16. Muhammed Özdemir

157. The witness is a commando officer and was in charge of the commando division in Arıcak at the time of the events.

158. He participated in the operation named Sancak-1. The operation was planned after intelligence had been received which indicated that members of the terrorist organisation were hiding in the area and were planning to spend the winter there. The presence of the terrorists constituted a great threat to the security forces and the gendarme stations in the area and the aim of this operation was therefore to eliminate that threat. His own unit was in charge of blocking the roads to prevent any terrorists from escaping from the operation area.

159. At about 5.45 a.m. on 10 November 1992 the witness was informed by a radio message that two military teams under his command had come under fire while advancing towards the Payidar hills and that a clash had ensued. At about 2 p.m. the witness and his teams approached the area. There was a distance of about 40-50 metres between his team and the terrorists. The terrorists started firing at his team and a clash broke out, lasting until 4 p.m. Neither Cobra helicopters nor any other aircraft were deployed in the operation.

160. The security forces suffered no casualties. On the second day, the witness heard that a terrorist had been killed on the other side of the hills. He sent a team to the area, under the command of Tuncer Arpacı, to take away the body. The body was later transferred by helicopter to the district of Palu. The witness did not see the body for himself and had not been informed that the ears had been cut off. During the operation, the witness was not informed that two villagers had been found dead on the Kurşunlu plain.

161. The witness had very recently been informed that seven gendarmes had been tried for the killing of the three persons. He was not called to give a statement to the Military Court.

17. Tuncer Arpacı

162. The witness was the commanding officer of the gendarme station in Arıcak. He is one of the seven gendarmes who was tried for, and acquitted of, the killing of the applicants' three relatives.

163. He remembered the operation named Sancak-1. The operation was planned on the basis of intelligence indicating that PKK terrorists were present in the area known as the Payidar hills.

164. His unit was involved in the operation and its task was to block the roads. As the unit approached the area towards the north-eastern part of the Payidar hills, terrorists started shooting at them and a clash ensued. He could not remember whether soldiers in his unit had killed the terrorists

during the clash, which lasted from about 5.30 a.m. until 9 p.m. During the night of 10-11 November the witness stayed in the area.

165. As the station commander in Arıcak, the witness had certain judicial obligations. He prepared the incident report and the incident map relating to the clash, which were sent to the public prosecutor. The witness explained the contradictions between the incident report of 11 November 1992 and his statement to the Military Court by saying that, at the court hearing, he had been very excited and confused and had therefore mistakenly stated that he had found three bodies. The truth was, however, as he had stated in the on-site operation report, that only one body had been found.

166. The witness was informed over the wireless by Muhammed Özdemir that a body had been found. As he had judicial responsibilities, he was sent to the area. He searched the body to find an identity card. Although he did not examine the body, he did remember that both ears were missing. He could not recall whether there had been any firearms near the body. He deduced that the body belonged to a PKK terrorist since it had been found in the conflict zone. No ordinary villager would have entered the area while an operation was being conducted.

167. Contrary to what he had said in his statement to the Military Court, no helicopters were used in the operation. The witness did not know which unit was responsible for the Kurşunlu plain but this could be established by examining the operation order prepared prior to the operation.

18. Murat Koç

168. The witness was a non-commissioned officer in the Arıcak commando unit at the time of the events. He is one of the seven gendarmes who was tried for, and acquitted of, the killing of the applicants' three relatives.

169. He participated in a joint operation with military units from Palu and at some point, terrorists started firing towards them. He remained in the area all night long with his men and the following day they conducted a search of the area.

170. During the search they found a terrorist shelter and supplies but they did not find any corpses. He signed the incident report dated 11 November 1992 but at the time he did not know anything about the body referred to in that report and did not deem it necessary to verify the accuracy of the contents of the report before he signed it.

171. The witness was familiar with the Kurşunlu plain; however, he did not have any information as to whether the operation had extended that far. The witness explained the inconsistencies between the two military reports (see paragraph 41 above) by saying that the on-site operation report had been prepared in the area where there had recently been an operation –

hence, in the heat of the moment, it was possible that certain things had been omitted in the report.

19. Ramazan Dal

172. The witness was the commander of one of the commando teams in Arıcak at the time of the events. He is one of the seven gendarmes who was tried for, and acquitted of, the killing of the applicants' three relatives.

173. In November 1992 his commanding officer informed him that his team was to participate in an operation and briefed him and his team about their duties in it. In accordance with the instructions received from the unit commander, the witness's team started off towards the operation area. When the team reached the Payidar hills at about 6 a.m., terrorists started firing and a clash broke out, lasting, intermittently, until 9 p.m.

174. The following morning they conducted a search of the area. The fourth team, which was under the command of Murat Koç, found a shelter containing food, a cartridge clip, a rucksack and many other items. The members of the witness's team were further informed over the wireless by their commanding officer that a body had been found in the direction of Brektepe-Ulaştepe, and the witness was ordered to go to that area together with his station commander, Tuncer Arpacı. When they reached the spot where the body lay – which was within the area covered by the operation – the station commander drafted a report in which he related all his findings. The witness co-signed the report. The location of the body was approximately four to five kilometres from Kurşunlu village. Although the witness had no authority to examine the body, he did, however, notice that the dead person's ears had been cut off. He was then ordered to take the body to the village of Çevrecik. The body was later transferred to the Palu public prosecutor's office.

II. RELEVANT DOMESTIC LAW

175. A description of the relevant domestic law may be found in *Ergi v. Turkey* (judgment of 28 July 1998, *Reports* 1998-IV, pp. 1767-68, §§ 46-52).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

176. In supplementary observations submitted by the Government to the Commission following the decision on admissibility, they elaborated on

their claim that the applicants had failed to exhaust domestic remedies. In this connection they pointed to the availability of a number of remedies, in particular administrative remedies.

177. The Court, noting that this issue has been adequately dealt with by the Commission in its decision on admissibility, does not deem it necessary to re-examine it. It therefore rejects the Government's preliminary objection.

II. THE COURT'S ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS

A. Arguments of the parties

1. The applicants

178. The first and second applicants argued that Mehmet Akkum and Mehmet Akan had last been seen alive on a mountainside with a large number of soldiers. The evidence showed that they had been killed at very close range by members of the security forces. Zülfi Akkum, the first applicant, also argued that his son's ears had been severed *post mortem*.

179. According to the first and second applicants, the Commission had not been able to take evidence from eyewitnesses because, given the circumstances of the killings, it had not been possible for them to call witnesses who had seen the two Mehmets being killed. This did not mean, however, that the responsibility for their deaths could not be determined. Such an interpretation would, in the view of these applicants, lead to the conclusion that unless a smoking gun was found in the hands of a State agent, a State would never be responsible for a killing in violation of Article 2 of the Convention.

180. The first and second applicants further argued that in the circumstances of the case, the Government were required to provide a plausible explanation of how the two Mehmets had been killed. In support of their arguments, they referred to the judgment of the Inter-American Court of Human Rights in the case of *Godinez Cruz v. Honduras*, in which that court had held that "in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation" (judgment of 20 January 1989, Inter-Am. Ct. H. R. Ser. C No. 5, § 141). Moreover, the Human Rights Committee had also adopted a similar approach. In this context the applicants referred to *Barbado v. Uruguay* (Human Rights Committee Communication No. 84, 1981, § 9.6), in which it had been considered that "with regard to the burden of proof, the

Committee has already established in other cases that the said burden cannot rest alone on the complainant, especially considering that the author and the State Party do not always have equal access to the evidence and that frequently the State Party has access to the relevant information".

181. Lastly, the third applicant argued that Derviş Karakoç had been shot at point-blank range by the security forces of the respondent Government. She further argued that his horse and dog had also been shot and killed.

2. The Government

182. The Government submitted that the operation that had taken place was of an ordinary nature and that the inhabitants of the nearby villages had been informed beforehand so that they would not enter the operation area. The operation had not been aimed at punishing or intimidating the villagers but had been intended to prevent the PKK from re-establishing itself in the area, a large PKK base having previously been dismantled.

183. There was no evidence that the three deaths had been caused by the actions of members of the security forces. The facts had been duly investigated by a judicial body, which had tried seven persons.

184. In the Government's view, the oral evidence of the applicants and their witnesses was insufficient to establish beyond reasonable doubt the accuracy of the applicants' allegations. The testimonies of the gendarme witnesses, on the contrary, were coherent and shed light on the events in question.

B. Article 38 § 1 (a) and consequent inferences drawn by the Court

185. Before proceeding to assess the evidence, the Court would stress, as it has previously held, that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999–IV). It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI).

186. In this context, the Court has noted with concern a number of matters concerning the Government's response to the Commission's requests for documents and information. Apart from individual requests for specific documents, the Government were also requested on a number of occasions, including during the fact-finding hearing in Ankara in 1997, to submit to the Commission and, subsequently, to the Court all the documents pertaining to the military operation of 10 November 1992 and those pertaining to the investigation into the killing of the applicants' relatives.

187. As regards these documents, the Court observes, firstly, that, according to the testimony of Colonel Hüseyin Yılmaz, a senior gendarme officer (see paragraph 122 above), a report entitled "final report/detailed operation report" should exist, setting out, with great precision, the details of the entire operation. The Commission requested the Government on 21 March 1997 and on 5 June 1997 to submit a copy of this document. If they were not in a position to submit this document, the Government were invited to provide a formal written explanation of the national security interests militating against making the document available to the Commission. No replies to these requests have been received.

188. Secondly, it appears from a number of documents, including the judgment of the Military Court and the incident report of 11 November 1992, that an operation plan, called Sancak-1 Operation Plan, was drafted on 8 November 1992 (see paragraphs 36 and 91 above). This document has likewise not been submitted by the Government. The importance of the failure to submit these two important documents will be further examined in subsequent paragraphs of this judgment, but the Court would stress already at this stage that the documents in question might have assisted the Commission in its task of identifying the witnesses whose testimony could be relevant for the establishment of the facts of the case. In this connection the Court notes that, according to Colonel Yılmaz, the military units from Kovancılar and Alacakaya were responsible for the Kurşunlu plain, where two of the bodies were found (see paragraph 122 above). However, none of the gendarme witnesses put forward by the Government belonged to these units.

189. Finally, a number of documents which have been submitted by the Government during the Convention proceedings make reference to a number of other, potentially important, documents pertaining to the investigation, which have likewise not been made available to the Convention institutions. These documents include:

(a) the record (*fezleke*) drafted by the Palu public prosecutor Mr Turan and sent to the Kayseri State Security Court, summarising the investigation into the killing of Derviş Karakoç and Mehmet Akan (see paragraph 134 above);

(b) the response of the State Security Court, sent to the Palu public prosecutor's office (see paragraph 134 above);

(c) the indictment of 19 August 1994 setting out the charges against the seven gendarmes;

(d) the decision of non-jurisdiction taken by the Elazığ Assize Court on 22 June 1995; and

(e) the testimonies given by a number of gendarme personnel during the trial (see paragraph 93 above).

190. The Government have not advanced any explanation to account for their failure to submit the documents referred to above. Referring to the importance of a respondent Government's cooperation in Convention proceedings as outlined above (paragraph 185), the Court finds that in the present case the respondent State fell short of its obligation under Article 38 § 1 (a) of the Convention to furnish all necessary facilities to the Commission and to the Court in their task of establishing the facts.

C. The Court's evaluation of the facts

1. The killing of Derviş Karakoç

191. According to the third applicant, Rabia Karakoç, her son Derviş Karakoç was shot at point-blank range by soldiers on 10 November 1992. The Government denied this.

192. The Court notes that it is not in dispute between the parties that a military operation took place on 10 November 1992 near the third applicant's village and that the dead body of her son Derviş, hit by nine bullets, was found after the operation. What is disputed is whether Mr Karakoç was killed by soldiers as alleged by the third applicant.

193. In a case such as the present one, in which there are contradictory and conflicting accounts of what actually occurred, the Court particularly regrets the absence of a thorough domestic judicial investigation and of documentary evidence. In this latter connection, the Court notes that the documents detailed above, and in particular the operation plan of 8 November 1992 and the "final report/detailed operation report", which have been withheld by the Government, are of a nature which make them indispensable for the correct and complete establishment of the facts of the case. The Court expects that these documents would have enabled it to gain a more accurate insight into which military units had actually taken part in the operation, and into their positions during the operation. In the absence of the documents, the Court has had to base its findings on only a limited number of other documents filed in the course of the proceedings before the Convention institutions, and on the evidence given orally to the Commission's delegates.

194. As regards the documents concerning the investigation into the killing of Derviş Karakoç, the Court notes at the outset that despite Mr Karakoç's body having been found by the soldiers after the operation

(see paragraphs 88 to 90 above), this fact was not recorded in the operation reports with which it has been provided. Mr Karakoç's body was not taken away by the soldiers who had found it, but by his mother and a number of villagers from Kurşunlu who had gone to look for him after the operation had ended. An examination of the body was only carried out after Zülfi Akkum had taken the body to Dicle.

195. Concerning the operation reports of 11 November 1992 that have been made available, the Court cannot but conclude that they are full of omissions and contradictions. In view of the serious nature of these inaccuracies, the Court is not convinced that they can be explained by the fact that the reports were drafted in a "heated atmosphere" shortly after a military operation, as claimed by Murat Koç (see paragraph 171 above), or that they were "innocent omissions", as argued by Colonel Yılmaz (see paragraph 120 above). In addition, it appears that no records whatsoever were drawn up of the actions of some of the units participating in the operation. According to Major Ersan Topaloğlu's testimony to the delegates, it was not the practice of the commando units to keep records of their activities during an operation, and hence no reports existed pertaining to the involvement of the commando teams in the operation under his command (see paragraph 148 above).

196. As for the report of the examination of Mr Karakoç's body, the Court notes that this merely consists of a record of the number of bullet entry and exit holes found on the body. No thought was given by Dr Türkan, who performed the examination, to the possibility that traces of bullets or other evidence might still be lodged in the body. No attempts were made to establish either the distance from which the bullets had been fired or the type of weapon or weapons that had been used. The finding that the death had been caused by gunshot wounds was sufficient for Dr Türkan and the public prosecutor İbrahim Engin to conclude that a full autopsy was not necessary (see paragraph 50 above). This report, therefore, is not capable of throwing up any leads that could have assisted in the establishment of the authors of the killing.

197. In respect of the written evidence, the Court notes, lastly, that although the Palu public prosecutor Nihat Turan claimed in his letter of 3 December 1993 that the investigation by his office into the killings of Mehmet Akan and Derviş Karakoç was still continuing, no documents pertaining to this inquiry were submitted to the Military Court or indeed to the Convention institutions, despite the fact that such documents do exist (see paragraph 134 above).

198. As regards the oral evidence, the Court considers that the accounts given to the Commission's delegates by the five women Rabia Karakoç, Güllü Güzel-Karakoç, Zeliha Karakoç, Hayriye Karaman and Hacire Ceylan – the last civilians to have seen Derviş Karakoç alive – were convincing in their detail and consistent with, as well as corroborative of, each other (see

paragraphs 98 to 103 and 107 to 112 above). Rabia Karakoç, Güllü Güzel-Karakoç, Zeliha Karakoç and Hayriye Karaman told the delegates how they had set off early in the morning and had come across the two women shepherds, Hacire Ceylan and Hediye Akodun, who had warned them not to proceed further as there was an operation in progress. Furthermore, Rabia Karakoç explained how she had heard a single shot from a pistol, followed by continuous firing. This version of events was confirmed by Hacire Ceylan – herself also an eyewitness to the events – in her testimony to the delegates. Moreover, in her statement of 17 May 1995 to the Elazığ Assize Court Ms Ceylan also confirmed that an operation had taken place on 10 November 1992 and that soldiers had told her to return home (see paragraph 83 above). In the light of the foregoing, the Court attaches little relevance to Hediye Akodun's statement to the Assize Court that no operation had taken place (see paragraph 84 above). In addition, Ms Ceylan maintained before the delegates that she had also been questioned by the Assize Court in relation to the killing of Derviş Karakoç, but it appears that this was not recorded in her statement.

199. Furthermore, the testimony of Rabia Karakoç was also largely consistent with the statements she had made to the Human Rights Association and with her account of events as set out in the application form.

200. On the other hand, the Court finds the testimonies of the gendarme officers to the delegates to be contradictory and often less than frank. In this connection it refers, firstly, to the testimony of Tuncer Arpacı, who was also one of the defendants in the criminal proceedings before the Military Court. In the latter proceedings, Mr Arpacı declared that he had personally found the three bodies and that he had recorded this discovery in the operation report. He further stated that Cobra helicopters had been deployed in the operation (see paragraphs 90 above). However, when questioned by the delegates and the lawyers representing the parties, Mr Arpacı stated that only one body had been found after the operation and that no helicopters had been used (see paragraphs 165 and 167 above). In view of Mr Arpacı's precise and detailed description to the Military Court of the three bodies and the locations where they had been found, the Court is wholly unconvinced by the explanation proffered by him for the contradictions in his statements, namely that he had been mistaken in the account he had given to the Military Court (see paragraph 165 above). For this reason, it considers Mr Arpacı to be an unreliable witness.

201. Secondly, the Court observes that the testimony given to the delegates by the gendarme Murat Koç, who also stood trial before the Military Court, contains similar contradictions. Thus, in his testimony to the Military Court, Mr Koç stated that, during the operation, he had heard that a number of terrorists had been killed. However, he told the delegates that, after the operation, no bodies had been found. He had not deemed it

necessary to verify the facts before signing the operation report in which it was stated that a body had in fact been found (see paragraph 170 above).

202. As regards the evidence of Colonel Hüseyin Yılmaz to the delegates, the Court is struck by his dismissal of the contradictions between the military reports as "innocent omissions" (see paragraph 120 above). The Court considers that such an explanation sits ill with the professional standards to be expected from a senior military officer. Furthermore, given the fact that Colonel Yılmaz had personally planned and overseen the operation, the Court is not persuaded that he genuinely lacked knowledge of the killing of Derviş Karakoç. It is even less prepared to believe that he would have been unaware of the fact that seven gendarmes who had taken part in an operation under his command had been prosecuted for killings which had taken place in the course of that operation (see paragraph 123 above). The same applies to the testimony of Mürşit Yılmaz, the commander of the Arıcak gendarmerie, who also claimed to have no knowledge of a number of his personnel having been prosecuted for their alleged actions during the military operation in which he had personally participated (see paragraph 156 above).

203. The Court is thus confronted with a situation where information provided by State agents and relating to the facts of the case is not only contradictory but also, at least as regards statements made by a number of those agents, cannot be accepted as truthful. In the absence of any explanation, let alone a satisfactory one, for this state of affairs, and bearing in mind its assessment of the written evidence and that of the oral evidence given by the other witnesses, the Court considers that, in the present case, this situation justifies the drawing of inferences as to the well-foundedness of the third applicant's allegations (see *Timurtaş*, cited above, § 66).

204. In the light of the foregoing, the Court finds it established that Derviş Karakoç, his horse and his dog were killed by the soldiers in the circumstances alleged by the third applicant.

2. The killings of Mehmet Akkum and Mehmet Akan

205. The first and the second applicants alleged that Mehmet Akkum and Mehmet Akan had last been seen alive on a mountainside with a large number of soldiers and that they had subsequently been killed by members of the security forces. Zülfi Akkum also alleged that his son's ears had been severed *post mortem*.

206. The Government conceded that the two persons had indeed died, but they maintained that this had occurred in the crossfire between soldiers and members of the PKK and that it was not possible to establish who had actually shot them.

207. The Court notes, therefore, that it is not in dispute between the parties that the bodies of Mehmet Akan and Mehmet Akkum were found in the area where the Sancak-1 operation had been carried out on 10 November

1992. It is also not disputed that the ears of Mehmet Akkum had been severed. What is disputed, however, is how they met their death.

208. The Court considers that in order to prove their allegations, the first and second applicants have done everything that could reasonably and realistically be expected from them. Unlike the third applicant Rabia Karakoç – who had a number of eyewitnesses to the events leading to the killing of her son by the soldiers – they did not have any eyewitnesses other than Hacire Ceylan. As already mentioned above (see paragraph 186 to 187), the Government's failure to submit the operation plan of 8 November 1992 and the "final report/detailed operation report" – which, according to Colonel Yılmaz, would have made it possible to identify the units responsible for a particular area (see paragraph 122 above) – meant that the applicants were unable to propose as witnesses, and the Commission was unable to summon, the relevant military personnel with first-hand knowledge of what had occurred in the area in question. The Court further points out that it does not appear that the "final report/detailed operation report" was submitted to the domestic investigating authorities or even to the Military Court. In these circumstances, the applicants, and indeed the Convention institutions, had no means of access to these documents without the Government's cooperation.

209. In the circumstances of the present case, the Court finds it inappropriate to conclude that these applicants have failed to submit sufficient evidence in support of their allegations, given that such evidence was in the hands of the respondent Government. At this stage the Court would once more reiterate (see also paragraph 185 above) that where it is solely the respondent Government who have access to information capable of corroborating or refuting allegations made by an individual applicant, a failure on that Government's part – without a satisfactory explanation – to submit such information may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations.

210. In addition, the Court has previously held that where the events in issue lie wholly, or to a large extent, within the exclusive knowledge of the authorities – as in the case of persons in custody under those authorities' control – strong presumptions of fact will arise in respect of injuries and deaths occurring during such detention. Thus, it has found that where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue will arise under Article 3 of the Convention (see *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, §§ 108-111; *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, pp. 25-26, § 34; and *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V). Indeed, in such situations the burden of proof may be regarded as resting on the

authorities (see, *inter alia*, *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

211. The Court considers it legitimate to draw a parallel between the situation of detainees, for whose well-being the State is held responsible, and the situation of persons found injured or dead in an area within the exclusive control of the authorities of the State. Such a parallel is based on the salient fact that in both situations the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities. It is appropriate, therefore, that in cases such as the present one, where it is the non-disclosure by the Government of crucial documents in their exclusive possession which is preventing the Court from establishing the facts, it is for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred, failing which an issue under Article 2 and/or Article 3 of the Convention will arise.

212. The Government have failed to adduce any argument from which it could be deduced that the documents withheld by them contained no information bearing on the applicant's claims. Therefore, the Court will examine whether the Government have discharged their burden of explaining the killings of the applicants' two relatives and the mutilation of the body of Mehmet Akkum. In doing so, the Court will assess the oral evidence given before the delegates and will also have particular regard to the investigation carried out at domestic level in order to establish whether that investigation was capable of leading to the identification and punishment of those responsible (see, *mutatis mutandis*, *İpek v. Turkey,* no. 25760/94, § 170, ECHR 2004-... (extracts), and the authorities cited therein).

213. The only evidence which the applicants were able to submit in support of their allegation that their two relatives had last been seen in the hands of soldiers was the eyewitness testimony of Hacire Ceylan. The Court observes that, in her statement of 17 May 1995 to the Elazığ Assize Court (see paragraph 83 above), Ms Ceylan said that on the day in question she had been grazing her animals outside her village when soldiers had told her that they were carrying out an operation and asked her to return to her house. She had not seen soldiers beating up Mehmet Akan or any other person. It does not appear from this statement that Ms Ceylan was questioned as to whether she had seen soldiers taking the two Mehmets away with them.

214. As to the testimony given by Ms Ceylan to the Commission's delegates (see paragraphs 107 to 112 above), the Court finds that this was remarkably convincing. She maintained her version of events throughout the questioning by the Commission's delegates and the applicants' representatives and also during the cross-examination by the Government's

representatives. She confirmed, as she had done in her statement of 17 May 1995, that she had seen the soldiers, who had told her to go back to her village. She stated that her poor eyesight had prevented her from seeing what the soldiers were doing to the two Mehmets but she was adamant that she had seen the two men in the hands of the soldiers.

215. Hüseyin Akan, the second applicant, also confirmed in his testimony to the delegates that Ms Ceylan, on her return to the village, had informed him and the other villagers that she had seen the two Mehmets in the hands of the soldiers (see paragraph 144 above).

216. As regards the testimonies of the gendarme witnesses – all of whom had been put forward by the Government – the Court would note that none of them turned out to have belonged to the military units which, during the operation, were responsible for the area where the bodies had been found. In any event, the Court would refer to its above assessment of the testimonies of the gendarme witnesses in relation to the killing of Derviş Karakoç, which is also applicable to the events surrounding the killing of the two Mehmets.

217. The Court considers that it cannot be said either that the oral evidence warrants the conclusion that the applicants' allegations are unfounded, or that it provided a satisfactory and convincing explanation on the part of the Government as to how the events in question occurred.

218. As regards the investigation carried out at domestic level, the Court's observations relating to the examination of the body of Derviş Karakoç (see paragraph 196 above) are equally valid in respect of the examination of the bodies of Mehmet Akkum and Mehmet Akan. Thus, the reports of those examinations merely recorded the number of bullet entry and exit holes; no thought was given to the possibility that traces of bullets, shrapnel or other evidence might be lodged in the bodies (notwithstanding Dr Aydın's own conclusion that some of the injuries could have been caused by shrapnel – see paragraph 129 above); and no attempts were made to establish the distance from which the bullets had been fired or the type of firearm used. Also with regard to these deaths, Dr Türkan and the public prosecutor, Mr Engin, were content to conclude that they had been caused by gunshot wounds and that for that reason it was not necessary to conduct a full autopsy (see paragraphs 50 and 131 above). Furthermore, no checks were carried out to find out whether the deceased men had been involved in a clash or had handled a firearm; such checks could have entailed an examination of the fingertips of the bodies for traces of gunpowder.

219. The Court further observes that no ballistics examination of the scene where the bodies were found was carried out. In fact, in the case of Mehmet Akan and Derviş Karakoç it was the villagers who recovered the bodies and took them to Dicle for them to be examined.

220. The Court cannot but remark critically on the investigation carried out by the Palu public prosecutor Nihat Turan. For example, Mr Turan

concluded at the very beginning of his investigation that Mehmet Akkum was a terrorist – notwithstanding the lack of any reference to the deceased as such in any of the military documents which had been brought to his attention – and that he therefore lacked jurisdiction to investigate the killing (see paragraphs 56 and 70 above). He also took no steps to question any of the gendarmes who had taken part in the operation, since he was of the belief that it would not be possible to establish whether a crime had been committed in an armed confrontation during a military operation when he had no information as to which military units had participated in that operation (see paragraph 135 above). However, the Court observes that as early as 20 November 1992, one month before he decided that he lacked jurisdiction to investigate the killings, Mr Turan did have access to the military reports (see paragraph 42 above). Nevertheless, this did not lead him to enquire of the gendarmes who had taken part in the operation whether they had any information about the killings. Mr Turan again referred to the body of Mehmet Akkum as that of a terrorist on 23 December 1992, which indicates that he had had no regard to the document in which Zülfi Akkum had identified his son's body on 16 November 1992 (see paragraphs 53 and 56 above). Moreover, the fact that Mr Turan only forwarded the military reports to the Kayseri State Security Court on 30 March 1993 (see paragraph 64 above) further raises doubts as to whether he in fact took any notice of the contents of those reports before deciding that he lacked jurisdiction.

221. Mr Turan also failed to question the relatives of the deceased persons at that time, despite the fact that they had filed official complaints with the public prosecutors' offices in Palu and Dicle, alleging that the killings had been carried out by soldiers (see paragraphs 48-49 above). The first time Mr Turan considered questioning relatives was when the Directorate informed him on 22 October 1993 and then on 3 November 1993 – almost a year after the killings – of the application lodged with the Commission and asked him how the investigation into the killings was progressing (see paragraph 72 above).

222. It appears, therefore, that the only "preliminary investigation" carried out by Mr Turan before he decided that he lacked jurisdiction was his participation in the examination of the body of Mehmet Akkum.

223. The Court is further struck by Mr Turan's repeated references to 9 November 1992 as the date on which the military operation had taken place, when, in fact, all the documents submitted to his office gave the relevant date as 10 November 1992. His insistence, for a period of at least three months, on 9 November as the date of the operation caused misunderstandings, and therefore delays, at the crucial early stages of the investigation (see paragraphs 56, 61, 66 and 67 above).

224. The decision of 21 May 1993 by the prosecutor at the Kayseri State Security Court not to prosecute the deceased Mehmet Akkum (see

paragraph 71 above) constitutes a further indication of the low level of seriousness with which the domestic authorities approached their duty of investigating the killings of the applicants' relatives. It is important to note that this prosecutor had not been asked to prosecute Mehmet Akkum, but to investigate his death (see paragraph 70 above). Yet when, on 22 October 1993, the Directorate informed him of the application lodged with the Commission and asked him how the investigation into the killings was progressing, he stated in his reply of 25 November 1993 that his decision not to prosecute had closed the investigation and that it had been impossible to question any eyewitnesses as the file did not contain the names of any such witnesses (see paragraph 74 above). This suggests that the prosecutor at the State Security Court disregarded the military records which listed the names of the military units having taken part in the operation (see paragraphs 36-37 above).

225. As regards the trial of seven gendarmes conducted by the Military Court, the Court reiterates at the outset that a number of crucial documents concerning these proceedings, including the indictment and the statements of a number of defendants and witnesses, have not been made available to the Commission or to the Court. It would appear that the only reason why these particular seven gendarmes were indicted was because they were the authors of the incident report of 11 November 1992 (see paragraph 36 above). The fact that one of these gendarmes, namely Şaban Bozkurt, had not even participated in the operation did not prevent the authorities from indicting him as well (see paragraph 86 above).

226. The Court is further struck by the fact that all the defendants were excused from appearing before the Military Court. As a result, the defendants were not called to account for the serious contradictions between the incident report of 11 November 1992, signed by them, and the statements subsequently made by them on commission, and in particular for the discrepancies in the number of bodies stated to have been found after the operation. In this connection, the Court notes with surprise that the Military Court considered that the seven gendarmes had been consistent in their accounts (see paragraph 91 above).

227. Furthermore, it does not appear that the Military Court was made aware of the existence of the "final report/detailed operation report". It did not, therefore, have information as to which military units were responsible for the areas where the bodies had been found, or of other details of the operation.

228. As regards the Military Court's reliance on the statements taken from Hacire Ceylan and Hediye Akodun in its decision to acquit the defendants, the Court observes that although Hediye Akodun denied having seen anything, Hacire Ceylan confirmed that an operation had indeed taken place. Ms Ceylan was not, however, asked whether she had seen the soldiers taking the two Mehmets away. She merely stated that she had not seen the

soldiers beating Mehmet Akan or any other villager (see paragraph 83 above).

229. It appears that the Military Court did not deem it necessary to verify the presence in the operation area of any terrorists who might have been responsible for the killing of the applicants' relatives. The Court notes, however, that despite the submission that Sancak-1 was a large-scale operation, involving hundreds of soldiers firing at a large number of terrorists, no bodies of terrorists were found and neither were any soldiers injured or killed. Indeed, other than a number of spent bullet cartridges which, according to the Military Court, were not of the type used by the armed forces (see paragraph 92 above), there is no evidence of any PKK presence during the operation. In any event, in the absence of a forensic examination or a full autopsy linking these BKC-type bullet cartridges to the killings, the Court is reluctant to attach any evidential value to them.

230. As regards the mutilation of the body of Mehmet Akkum, the Court observes that no documents have been submitted to the Commission or the Court indicating that this issue ever received serious attention from the domestic authorities. On the contrary, the Court observes that Mr Turan affirmed before the delegates that he had not considered it his duty to find out how the body had come to be mutilated (see paragraph 132 above). Finally, during the proceedings before the Military Court, none of the defendants were questioned in relation to this issue.

231. On the basis of its examination of the domestic investigation and of the criminal proceedings before the Military Court, the Court concludes that no meaningful investigation was conducted at domestic level capable, firstly, of establishing the true facts surrounding the killings of Mehmet Akkum and Mehmet Akan and the mutilation of the body of Mehmet Akkum, and, secondly, of leading to the identification and punishment of those responsible.

232. In the light of the above, it follows that the Government have failed to account for the killing of Mehmet Akkum and Mehmet Akan and also for the mutilation of the body of Mehmet Akkum.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

233. Article 2 of the Convention provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The killing of Derviş Karakoç

1. Submissions of the parties

234. The third applicant submitted that her son Derviş Karakoç had been killed by the soldiers on the Kurşunlu plain, in violation of Article 2 of the Convention. He had been unarmed and had posed no threat to the security forces. He had not been killed for any purpose provided for in the Convention, nor had the force used to kill him been necessary.

235. The Government argued that it had not been established that Mr Karakoç had been killed in the manner alleged by the third applicant.

2. The Court's assessment

236. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147).

237. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor, however, to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (ibid., p. 46, §§ 148-149).

238. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Use of force by State agents in pursuit of one of the aims delineated in paragraph 2 of Article 2 may be justified where it is based on an honest belief which is perceived for good reasons to be valid at the time but which subsequently turns out to be mistaken (ibid., pp.58-59, § 200).

239. The Court has already established that Derviş Karakoç was killed by the soldiers on 10 November 1992 (see paragraph 204 above). The respondent Government initially averred that the three persons had been killed in an armed clash with security forces who were acting in self-defence in the struggle against terrorism. Subsequently, they denied that it was the soldiers who had shot Derviş Karakoç; they have not sought to argue that the use of force was not more than absolutely necessary for one or more of the legitimate purposes set out in paragraph 2 of Article 2 of the Convention. The Court, considering that this should have been a matter for the Government to advance, does not deem it necessary to examine whether the killing of Derviş Karakoç was justified under Article 2 § 2 of the Convention.

240. It follows that there has been a violation of Article 2 of the Convention in respect of the killing of Derviş Karakoç.

B. The killing of Mehmet Akkum and Mehmet Akan

1. Submissions of the parties

241. The first and the second applicants submitted that their relatives, Mehmet Akkum and Mehmet Akan, had been killed unlawfully and in violation of Article 2 of the Convention.

242. The Government submitted that there was insufficient evidence to prove that the two Mehmets had been killed in the circumstances alleged by the applicants.

2. The Court's assessment

243. The Court has already established that the Government have failed to account for the killing of Mehmet Akkum and Mehmet Akan (see paragraph 232 above). It follows that there has been a violation of Article 2 of the Convention in respect of the killing of the two Mehmets.

C. Alleged lack of care in the planning and control of the operation

244. The applicants argued that the Government had failed to protect the right to life of their relatives. In this connection they argued, in particular, that the Government had failed to plan and conduct the Sancak-1 operation in such a way as to minimise the risk of life to their relatives; to carry out a proper investigation into the killings of their relatives; and, finally, to initiate genuine legal proceedings to determine whether or not those responsible for the deaths had acted lawfully.

245. The Government did not address this issue specifically.

246. The Court, having regard to its above findings of violations of Article 2 of the Convention, does not find it necessary in the circumstances of this case to reach any separate finding on this issue.

D. Alleged inadequacy of the investigation

247. The applicants submitted that if the protection of the right to life was to be meaningful in practice, then an effective investigation and the initiation of legal proceedings to determine whether or not a deprivation of life was lawful – followed by the imposition of punishment where it was deemed to have been unlawful – was essential. In this connection they argued that the investigation and the criminal proceedings in the present case, far from being effective, had been so defective as to amount to a perversion of justice.

248. The Government denied these allegations and submitted that the authorities had taken all the necessary steps to investigate the killings, including a criminal prosecution.

249. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis, McCann and Others*, cited above, p. 49, § 161; and the *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105).

250. The Court has already examined the investigation and trial of the seven gendarmes in the context of the question whether the respondent Government had accounted for the deaths of the first and second applicants' relatives, and concluded that the authorities had failed to conduct a meaningful investigation which could have been capable of establishing the true facts surrounding the killings. It notes that this investigation was the same as the investigation of the killing of Derviş Karakoç. In the light of the shortcomings identified in its above-mentioned examination, the Court

concludes that the domestic authorities have failed to carry out an adequate and effective investigation into the killings of the applicants' three relatives, as required by Article 2 of the Convention.

251. The Court finds, therefore, that there has been a violation of Article 2 of the Convention under its procedural limb.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

252. The first applicant, Zülfi Akkum, submitted that his son's ears had been severed *post mortem* by the soldiers. This applicant, referring to Article 15 of the Geneva Convention I of 1949, applicable in international conflicts, and also to common Article 3 of the four Geneva Conventions of 1949, applicable in non-international conflicts, submitted that even in time of war, the dead should not be despoiled or mutilated. Violations of common Article 3 were crimes of universal permissive jurisdiction.

253. He further argued that the mutilation of his son Mehmet Akkum represented inhuman treatment contrary to Article 3 of the Convention in relation to him, and that the mutilation of a body was offensive to a Muslim, given that he had had to bury an incomplete and mutilated body.

254. Article 3 of the Convention provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

255. The Government, beyond denying the applicant's allegations, did not address this issue.

256. The Court reiterates at the outset that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, for example, *Labita v. Italy* [GC], no 26772/95, § 119, ECHR 2000-IV).

257. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX). The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account, but the absence of any such purpose cannot conclusively rule out a violation of Article 3 (see, for example, *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III, and *Kalashnikov v. Russia*, no. 47095/99, § 101, ECHR 2002-VI).

258. The Court has already held (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 98, ECHR 1999-IV) that the question whether a family member of a "disappeared person" is a victim of treatment contrary to

Article 3 will depend on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond – the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. In *Çakıcı*, the Court also emphasised that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct (see also *Timurtaş*, cited above, §§ 96-98).

259. In the same vein, the Court considers that Zülfi Akkum, as a father who was presented with the mutilated body of his son, can legitimately claim to be a victim within the meaning of Article 34 of the Convention. Furthermore, the Court has no doubts that the anguish caused to Mr Akkum as a result of the mutilation of the body of his son amounts to degrading treatment contrary to Article 3 of the Convention. It follows that there has been a violation of Article 3 of the Convention in relation to the first applicant, Zülfi Akkum.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

260. The applicants complained that they had not had an effective remedy within the meaning of Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

261. The Government submitted that a thorough investigation into the events at issue had taken place and had led to the indictment of seven gendarme officers. However, the applicants had failed to join the criminal proceedings.

262. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief,

although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2286, § 95); *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; and *Kaya*, cited above, pp. 329-30, § 106).

263. Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure (see *Kaya*, cited above, pp. 330-31, § 107).

264. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is responsible under Articles 2 and 3 of the Convention for the death of the applicants' relatives and also for the degrading treatment suffered by the first applicant. The applicants' complaints in this regard are therefore "arguable" for the purposes of Article 13 (see *Salman*, cited above, § 122, and the authorities cited therein).

265. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the death of the applicants' relatives and the mutilation of the body of Mehmet Akkum. For the reasons set out above (see paragraphs 218 to 231), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Article 2 (see *Kaya*, cited above, pp. 330-31, § 107). The Court finds, therefore, that the applicants have been denied an effective remedy in respect of the death of their relatives and the mutilation of the body of Mehmet Akkum, and have thereby been denied access to any other available remedies at their disposal, including a claim for compensation.

266. Consequently, there has been a violation of Article 13 of the Convention.

VI. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLES 2 AND 13 OF THE CONVENTION

267. Relying on Article 2 of the Convention, the applicants maintained that there existed in Turkey a practice of conducting inadequate investigations into the killings of individuals in south-east Turkey where agents of the State were alleged to have been involved, and a practice of

failure to prosecute those responsible. This was evidenced by the large number of cases in which the Commission and the Court had also held that the domestic authorities in Turkey had failed to carry out effective investigations. Furthermore, the applicants submitted that the evidence showed that there existed a practice of failure to provide effective remedies within the meaning of Article 13 of the Convention.

268. Having regard to its findings under Articles 2 and 13 above, the Court does not find it necessary to determine whether the failings identified in this case are part of a practice adopted by the authorities.

VII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, IN CONJUNCTION WITH ARTICLES 2 AND 13 OF THE CONVENTION

269. The applicants maintained that, because of their Kurdish origin, they and their deceased relatives had been subjected to discrimination in breach of Article 14 of the Convention, in conjunction with Articles 2 and 13 of the Convention. Article 14 provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

270. The applicants argued, in particular, that as villagers of Kurdish origin their relatives had been guaranteed the right to life to a lesser extent than a person of non-Kurdish origin.

271. The Court notes its findings of a violation of Articles 2 and 13 of the Convention and does not consider that it is necessary also to consider these complaints in conjunction with Article 14 of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

272. The applicants also submitted that there had been a violation of Article 18 of the Convention on grounds of the attempted cover-up of the killing of Mehmet Akkum and the instigation of legal proceedings so flawed that they could only have been instigated in order to vindicate the security forces and to prevent the truth from ever coming to light. Article 18 of the Convention provides as follows:

> "The restrictions permitted under the Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

273. Having regard to its above findings, the Court does not consider it necessary to examine this complaint separately.

IX. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

274. The applicants maintained under Article 1 of Protocol No. 1 to the Convention that the soldiers, as well as killing their relatives, had been responsible for the killing of their livestock, and in particular for the killing of the horse and dog belonging to Derviş Karakoç. Article 1 of Protocol No. 1, in so far as relevant, provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> ..."

275. The Government did not address this issue as such.

276. The Court has already found it established that the soldiers killed the dog and the horse belonging to Derviş Karakoç (see paragraph 204 above). It considers that the killing of the horse and the dog constituted an unjustified interference with Mr Karakoç's right to the peaceful enjoyment of his possessions. The Court therefore concludes that there has been a violation of Article 1 of Protocol No. 1 to the Convention in respect of the killing of the horse and the dog.

277. As regards the killing of the livestock, the Court observes that Mehmet Akkum and Mehmet Akan were shepherding the animals owned by the villagers from Kurşunlu, which were found dead in the operation area. The applicants allege that 89 sheep were killed during the operation. However, the Court observes that no evidence was submitted by the applicants concerning the number of killed animals belonging to them and the Court has been unable to establish the circumstances in which they were killed. In these circumstances, the Court does not find it established that there has been a violation in this respect.

X. APPLICATION OF ARTICLE 41 OF THE CONVENTION

278. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

279. Zülfi Akkum claimed the sum of 47,877.45 pounds sterling (GBP) in respect of the estimated loss of earnings of his son. He also claimed the sum of GBP 4,045.05 in respect of 89 sheep which had allegedly been killed during the operation. Hüseyin Akan claimed the sum of GBP 10,211.04 in respect of the estimated loss of earnings of his brother. Finally, Rabia Karakoç claimed the sum of GBP 40, 073.59 in respect of the estimated loss of earnings of her son. Taking into account the average life expectancy in Turkey in that period, the calculations according to actuarial tables resulted in the capitalised sums quoted above.

280. The Government disputed the applicability of the actuarial tables used by the applicants which were designed for use in the United Kingdom. They also submitted that the sums claimed were excessive and devoid of any basis. The Government lastly argued that the amounts awarded by the Court should not lead to unjust enrichment.

281. As regards the applicants' claim for loss of earnings, the Court's case-law has established that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in appropriate cases, include compensation in respect of loss of earnings (see, among other authorities, *Barberà, Messegué and Jabardo v. Spain* (*Article 50*), judgment of 13 June 1994, Series A no. 285-C, pp. 57-58, §§ 16-20, and *Çakıcı*, cited above, § 127).

282. Concerning the first applicant's claim for loss of earnings, the Court observes that there is no information in the case file suggesting that his deceased son Mehmet Akkum was married or had children. Neither did the first applicant claim that he was in any way dependent on his son. The Court does not find it appropriate, therefore, to make any award to the first applicant under this head.

283. As regards the first applicant's claim in respect of the 89 sheep which were allegedly killed during the operation, the Court notes that it has not found a violation under this head (see paragraph 277 above). It therefore considers that no award can be made in respect of the sheep.

284. Concerning the second applicant's claim for loss of earnings, the Court observes that his deceased brother Mehmet Akan had four children. However, it has not been claimed by the second applicant that Mehmet Akan's children were dependent on their father. In any event the Court, having regard to the fact that Mehmet Akan was 70 years old at the time of his killing (see paragraph 8 above), does not find it probable that his children were financially dependent on Mehmet Akan. It follows that no award can be made to the second applicant under this head.

285. As regards the third applicant's claim for loss of earnings, the Court observes that her deceased son Derviş Karakoç was 33 years old at the time of his killing (see paragraph 8 above) and was married with two children

(see paragraph 19 above) who were dependent on him. The Court also observes that it has found that the authorities were liable under Article 2 of the Convention for his death (see paragraph 240 above). In these circumstances, there was a direct causal link between the violation of Article 2 and the loss suffered by Derviş Karakoç's family of the financial support provided by him.

286. Having regard, therefore, to the detailed submissions by the third applicant concerning the actuarial basis for the calculation of an appropriate capital sum to reflect the loss of income due to the death of her son, the Court awards Rabia Karakoç the sum of 57,300 euros (EUR) which corresponds to GBP 40,073, the estimated loss of earnings of her son, to be held by her for the wife and children of Derviş Karakoç. It holds that this sum is to be converted into Turkish liras at the rate applicable at the date of payment.

B. Non-pecuniary damage

287. The applicants claimed the sum of GBP 40,000 per victim, in relation to all the violations suffered by the dead men, to be held for the benefit of their heirs. Zülfi Akkum also claimed GBP 10,000 in relation to the violations of Article 3 and 13 of the Convention and Hüseyin Akan and Rabia Karakoç each claimed GBP 2,500 in relation to the violation of Article 13 of the Convention.

288. The Government submitted that it was unnecessary to make any awards in respect of non-pecuniary damage since, in their opinion, any finding of a violation would afford sufficient redress.

289. The Court observes that it has found that the authorities were accountable for the deaths of the applicants' relatives and also for the mutilation of the body of Mehmet Akkum. In addition to the violation of Article 2 and 3 in those respects, it has further found that the authorities failed to provide an effective investigation and remedy in respect of those violations, contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13 of the Convention. In these circumstances, and having regard to the awards made in comparable cases, the Court, on an equitable basis, awards each of the second and the third applicants the sum of EUR 20,000, which amounts to GBP 14,000, for non-pecuniary damage, to be held by them for the heirs of their deceased relatives. It awards the first applicant, Zülfi Akkum, the sum of EUR 20,000 for non-pecuniary damage, for himself and for other possible heirs of his deceased son Mehmet Akkum. Finally, it also awards the first applicant Zülfi Akkum the sum of EUR 14,000, which amounts to GBP 9,800, and each of the remaining two applicants the sum of EUR 3,500, which amounts to GBP 2,450, for non-pecuniary damage sustained by them in their

personal capacity. It holds that the above sums are to be converted into Turkish liras at the rate applicable at the date of payment.

C. Costs and expenses

290. The applicants claimed a total of GBP 29,219.40 for the fees and costs incurred in bringing the application, less the amounts received by way of legal aid from the Council of Europe. This included fees and costs incurred in respect of attendance at the taking of evidence before the Commission's delegates at the hearing in Ankara and attendance at the hearing before the Court in Strasbourg. Their claim comprised:

(a) GBP 12,470 for the fees of their United Kingdom-based lawyers;

(b) GBP 12,870 for the fees of their lawyers based in Turkey;

(c) GBP 121.40 for administrative costs incurred by the United Kingdom-based lawyers;

(d) GBP 853 for administrative costs incurred by the lawyers based in Turkey;

(e) GBP 370 for administrative costs incurred by the Kurdish Human Rights Project (KHRP); and

(f) GBP 2,535 for translation costs incurred by the KHRP.

291. The Government argued that the fees claimed for the lawyers based in Turkey deviated from the rates set by the Turkish Bar Association. Although the applicants and their lawyers might have agreed on those fees, such a contract could not bind the Government. Moreover, the Government considered that no documentary substantiation of the costs allegedly incurred had been provided.

292. The Court notes that the present case involved complex issues of fact and law requiring detailed examination, including the taking of evidence from witnesses in Ankara. However, it is not convinced that the costs of the KHRP were necessarily and reasonably incurred, since the work carried out by this organisation, as set out in its schedule of costs, appears to a large extent to have duplicated the activities carried out by the lawyers based in the United Kingdom and Turkey. Furthermore, the Court considers the sum of GBP 12,870 claimed by the lawyers based in Turkey to be excessive.

293. Making its own estimate based on the information available, the Court awards the applicants EUR 20,000, which amounts to GBP 14,000, in respect of costs and expenses – exclusive of any value-added tax that may be chargeable – less EUR 3,000, which corresponds to the sum of 19,595 French francs (FRF) already received in legal aid from the Council of Europe, the net award to be paid in pounds sterling into the applicants' representatives' bank account in the United Kingdom as requested and identified by the applicants.

D. Default interest

294. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that the respondent State has failed to fulfil its obligation under Article 38 of the Convention to furnish all necessary facilities to the Commission and Court in their task of establishing the facts;

3. *Holds* that the Government is liable for the death of the three relatives of the applicants in violation of Article 2 of the Convention;

4. *Holds* that it is unnecessary to determine whether there has been a violation of Article 2 of the Convention on account of the alleged lack of care in the planning and control of the operation;

5. *Holds* that there has been a violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the circumstances of the killing of the three men;

6. *Holds* that there has been a violation of Article 3 of the Convention in respect of the first applicant;

7. *Holds* that there has been a violation of Article 13 of the Convention;

8. *Holds* that it is unnecessary to determine whether there has been a practice by the authorities of infringing Articles 2 and 13 of the Convention;

9. *Holds* that it is unnecessary to determine whether there has been a violation of Article 14 of the Convention in conjunction with Articles 2 and 13 of the Convention;

10. *Holds* that it is unnecessary to determine whether there has been a violation of Article 18 of the Convention;

11. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention on account of the killing of Derviş Karakoç's horse and dog;

12. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention on account of the killing of the livestock belonging to the villagers of Kurşunlu;

13. *Holds*

(a) that the respondent State is to pay the third applicant Rabia Karakoç, for pecuniary damage, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the sum of EUR 57,300 (fifty-seven thousand three hundred euros), together with any tax that may be chargeable. It further holds that this sum is to be converted into Turkish liras at the rate applicable at the date of settlement and held by Rabia Karakoç for the wife and children of her son Derviş Karakoç.

(b) that the respondent State is to pay the applicants in respect of non-pecuniary damage, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement:

(i) to Zülfi Akkum, EUR 20,000 (twenty thousand euros) for himself and for other possible heirs of his son Mehmet Akkum, and EUR 14,000 (fourteen thousand euros) in his personal capacity;

(ii) to Hüseyin Akan, EUR 20,000 (twenty thousand euros) to be held for the heirs of his brother Mehmet Akan, and EUR 3,500 (three thousand five hundred euros) in his personal capacity;

(iii) to Rabia Karakoç, EUR 20,000 (twenty thousand euros) to be held for the heirs of her son Derviş Karakoç, and EUR 3,500 (three thousand five hundred euros) in her personal capacity;

(iv) any tax that may be chargeable on the above amounts;

(c) that the respondent State is to pay the applicants, within three months and into the bank account identified by them in the United Kingdom, EUR 20,000 (twenty thousand euros) in respect of costs and expenses, together with any value-added tax that may be chargeable, less EUR 3,000 (three thousand euros) granted as legal aid, to be converted into pounds sterling at the exchange rate applicable at the date of delivery of this judgment;

(d) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

14. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 24 March 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President