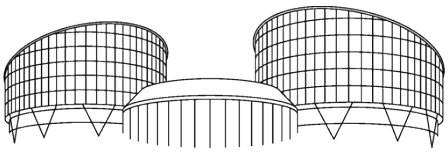

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FORMER SECOND SECTION

CASE OF BENZER AND OTHERS v. TURKEY

(Application no. 23502/06)

This version was rectified on 2 September 2014
under Rule 81 of the Rules of Court

This judgment was revised in accordance with Rule 80 of the Rules of Court in a judgment of 13 January 2015

JUDGMENT

STRASBOURG

12 November 2013

FINAL

24/03/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Benzer and Others v. Turkey,

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

Guido Raimondi, *President,*
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Işıl Karakaş,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 22 October 2013,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 23502/06) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by 41 Turkish nationals ("the applicants"), on 26 May 2006.

2. The applicants, whose names, dates of birth and places of residence are set out in the attached table, are Turkish nationals. They were represented before the Court by Mr Tahir Elçi, a lawyer practising in Diyarbakır. The Turkish Government ("the Government") were represented by their Agent.

3. The applicants alleged, in particular, that the bombing of their two villages by aircraft belonging to the Turkish military, which had caused the deaths of 34 of their close relatives and during which some of the applicants themselves had also been injured, had been in breach of Articles 2, 3 and 13 of the Convention.

4. On 1 September 2009 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Introduction

5. Until 1994 the applicants lived and worked as farmers in the villages of Kuşkonar and Koçağılı, which were located close to each other in a mountainous area within the administrative jurisdiction of the province of Şırnak, in south-east Turkey.

6. The events which took place on 26 March 1994 are disputed by the parties. Thus, the parties' submissions will be set out separately. The facts as presented by the applicants are set out in Section B below (paragraphs 7-19). The Government's submissions concerning the facts are summarised in Section C below (paragraph 20). The documentary evidence submitted by the parties is summarised in Section D (paragraphs 21-87).

B. The applicants' submissions on the facts

7. In 1994 PKK[1] activity in the area where the applicants' villages were located was at its peak and frequent armed clashes were taking place between PKK members and the Turkish security forces. A number of the surrounding villages whose residents had refused to become village guards[2] were evacuated by the security forces who suspected that those villagers had been providing logistical support to the PKK. Villages whose residents had become village guards, on the other hand, were being subjected to armed attacks by members of the PKK. The applicants and other residents of their two villages had refused to become village guards and the security forces believed that the PKK was being assisted by them.

8. The military considered that, so long as the villages in the area continued to exist, their fight against the PKK would not be successful, and carried out a big military operation in order to evacuate the villages forcibly. During the operation almost all the villages in the area were either bombed or set on fire by the soldiers and their residents were forced to flee. The circumstances surrounding the destruction of one such village in that particular region were examined by the Court in its judgment in the case of *Ahmet Özkan and Others v. Turkey* (no. 21689/93, §§ 404-408, 6 April 2004). According to a report prepared by the Turkish Parliament, 3,428

[1] The Kurdistan Workers Party, an illegal organisation.

[2] Village guards are villagers employed by the State to assist security forces in the fight against the PKK in south-east Turkey.

villages had been evacuated in east and south-east Turkey between 1987 and1996.

9. In the morning of 26 March 1994 most male residents of the applicants' two villages were working in the fields outside the villages. As the weather was sunny, most of the children were playing outside. The women and the elderly were either in their homes or sitting on the terraces outside their houses. When they first heard aircraft flying nearby at around 10.30 a.m. and 11.00 a.m. they did not get scared because military planes and helicopters often flew in the area for reconnaissance and bombing missions against the PKK on the mountains. Such missions had never caused any damage to the villagers or to their villages. Furthermore, there were no PKK members in the village at the time.

10. That day, however, military planes and a helicopter circled the applicants' two villages and then started to bomb them. The bombs dropped from the planes were very large; some villagers described them "as big as a table". Subsequently, machine gun fire was opened from the helicopter. Some of the people were hit directly and some were trapped under the rubble of the houses that were destroyed in the bombing. Those who survived tried to take cover. The men working in the nearby fields ran to the village and tried to rescue people from underneath the rubble.

11. As a result, 13 people in Koçağılı village and 25 people in Kuşkonar village lost their lives. Most of those who were killed were children, women or elderly. Thirty four of the dead, including seven babies and a number of older children, were the applicants' close relatives. In addition, a total of 13 people, including some of the applicants, were injured. Most of the houses and livestock belonging to the applicants were also destroyed in the bombing. The names of those killed and their relationship to the applicants, as well as the names of the applicants who were injured, are set out below (see paragraphs 92 and 93).

12. The bombing from the aircraft continued in the surrounding areas. Although the local gendarmerie[3] and local prosecutors became aware of the bombing, they did not go to the applicants' villages to establish the identities of the deceased and to carry out post-mortem examinations. No national authority offered the villagers any help. Villagers from the nearby Kumçatı village went to the applicants' villages and helped the surviving villagers to take their injured relatives to hospitals in their tractors.

13. The surviving residents of Kuşkonar village put the remains of their deceased relatives in plastic bags and buried them in a mass grave without any religious ceremony.

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[3] Gendarmerie is a branch of the Turkish military, responsible for maintaining safety, security and public order in mostly rural areas.

14. As the village of Koçağılı was located close to a main road, the villagers there were able to take the bodies of their relatives to the nearby Kumçatı village and bury them in the cemetery there.

15. After having buried their dead, all surviving villagers quickly abandoned their villages and what was left of their houses and belongings, and moved to different parts of the country. Some of them stayed behind but settled in the nearby Kumçatı village. The applicants' two villages are still uninhabited.

16. When the bombing was widely reported in the national and international media and was condemned by human rights organisations, members of the military exerted pressure on the villagers and warned them not to make official complaints to the judicial authorities. Journalists were prevented from entering the hospitals where the injured were being treated, and from speaking to the villagers. Although it would have been impossible for the Air Force of another State to carry out the bombing, and despite the fact that the PKK could obviously not have any fighter jets in its armoury, the then Prime Minister of Turkey Ms Tansu Çiller declared that "the military aircraft which bombed the villages did not belong to the State".

17. Subsequently, gendarmes questioned the villagers who had resettled in Kumçatı village. Some of the villagers were so traumatised as a result of the bombings and scared in the presence of the gendarmes that they did not tell the gendarmes that their villages had been bombed by military aircraft, but merely referred to the bombing as the "incident". Some told the gendarmes that "bombs had fallen on [their] village but that [they] did not want to make any complaints". The headman of Koçağılı village, Halil Seyrek, however, informed the Şırnak prosecutor on 1 April 1994 that military aircraft had bombed the villages.

18. Despite the fact that the prosecutors were informed about the incident, and the widespread coverage of the bombings in the media, no investigating authority ever visited the villages or opened any investigations.

19. Even after they appointed a lawyer in October 2004 and that lawyer made a number of representations on their behalf, no effective investigatory steps were taken by the national authorities. The investigation file was being repeatedly transferred between prosecutors without any active steps being taken.

C. The Government's submissions on the facts

20. In their observations the Government summarised a number of the steps taken by the national authorities (which are also summarised below), and submitted that the applicants' villages had been under pressure from PKK members and had subsequently been attacked by the PKK because the villagers had refused to help them. There was no evidence to show any State

involvement in the incident and the applicants had made their allegations under the influence of their legal representative.

D. Documentary evidence submitted by the parties

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

22. According to a report prepared by three gendarmes on 26 March 1994, it had not been possible for the gendarmes to go to Koçağılı village to investigate the "explosion" which had killed 13 and injured another 13 persons, because the village had been too far and there had been insufficient gendarmes and vehicles at their disposal.

23. The same day the fortieth applicant Mehmet Aykaç was questioned by two police officers. Mr Aykaç stated that there had been an operation and an explosion in his village of Koçağılı during which he was injured.

24. Also on the same day a large number of injured people were examined at the local hospital in the town of Cizre. Some of the injured persons whose condition was deemed to be critical were referred to Mardin State Hospital. These included the thirty-ninth to forty-first applicants, Cafer Kaçar, Mehmet Aykaç and Fatma Benzer; the twenty-first applicant Kasım Kiraç's[4] daughter and the twenty-second applicant İbrahim Kiraç's[5] sister Zahide Kıraç, who was three years old; the twenty-ninth applicant Yusuf Bengi's partner and the thirty-fifth applicant Adil Bengi's mother Zülfe Bengi; the thirty-fourth applicant Mustafa Bengi's five-year-old daughter Bahar Bengi; and the thirty-eighth applicant Mahmut Erdin's wife Lali Erdin. The thirty-sixth applicant Mahmut Bayı's mother Hatice Bayı, who had sustained a leg injury, was also examined by a doctor, who concluded that her condition was not life-threatening. She was also transferred to the Mardin Hospital.

25. Later that same day three-year-old Zahide Kıraç died before she could be transferred to the hospital in Mardin, and her body was examined by a doctor at the Şırnak Hospital in the presence of the Şırnak prosecutor. According to the post-mortem report, Zahide's skull had been shattered. There were no injuries on her body caused by a firearm or by a sharp object. A villager officially identified Zahide's body and told the prosecutor present there that, according to the information he had received, Zahide's village Koçağılı had been bombed by aircraft. The bombing had caused the deaths of many people. The same day the prosecutor instructed the local gendarmerie to investigate Zahide's death.

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[4] Rectified on 2 September 2014; the applicant's surname was "Kasım Kıraç" in the previous version.

[5] Rectified on 2 September 2014; the applicant's surname was "İbrahim Kıraç" in the previous version.

26. On 29 March 1994 the Şırnak prosecutor forwarded to the Şırnak Gendarmerie Command a cutting from a national newspaper detailing the bombing of Koçağılı village by aircraft at midday on 26 March, and asked for an investigation to be carried out.

27. Two gendarmes questioned the headman of Koçağılı village, Halil Seyrek, on 31 March 1994. Mr Seyrek told the gendarmes that he had not been in the village at the time of the incident but had subsequently been informed about it by his fellow villagers. According to the information provided to him, a helicopter and a plane had flown over the village and some 5-10 minutes later explosions had taken place in and outside the village. A total of 13 persons had been killed in his village and a number of people had been injured and taken to hospitals.

28. On 1 April 1994 the twenty-first applicant, Kasım Kiraç, told two gendarmes that at the time of the incident he had been on the outskirts of Koçağılı village but had returned to the village immediately after he had heard "loud explosions". On his arrival at the village he had found the body of his wife Hazal and his injured daughter Zahide. Many of his fellow villagers had also been killed. He had taken his injured daughter Zahide to a hospital but she had not survived.

29. On 1 April 1994 another statement was taken from Koçağılı village headman Halil Seyrek, this time by the Şırnak prosecutor. Mr Seyrek told the prosecutor that the villagers from his village did not support the PKK but took sides with the State. Earlier that year the villagers had refused to take part in Newroz celebrations and had subsequently been threatened by the PKK. He had heard that PKK members had been talking about "punishing" the villagers. In his statement Mr Seyrek also added that, according to the information he had received from his fellow villagers, the village had been bombed by aircraft. A total of four bombs had been dropped. One bomb had hit the village square and another one had hit the school. The remaining two bombs had hit houses. 13 villagers had been killed and 13-14 persons injured. Although the security forces had been informed about the incident, no one had visited the village. No post-mortem examinations of the deceased had been carried out. The villagers had buried their dead relatives themselves.

30. On 4 April 1994 the chief doctor at Diyarbakır State Hospital informed the Şırnak prosecutor that 13 persons had been treated at his hospital for injuries caused by explosives.

31. On 7 April 1994 the Şırnak prosecutor decided that the bombing of the village of Koçağılı had been carried out by members of the PKK, and forwarded the case file to the prosecutor's office at the Diyarbakır State Security Court which had jurisdiction to investigate terrorism-related incidents. According to the prosecutor, PKK members had attacked the village with "mortars and other explosives", killing 13 persons and injuring another 13.

32. On 10 April 1994 the prosecutor at the Diyarbakır State Security Court instructed the gendarmerie and the police to investigate the "killings perpetrated by members of the PKK".

33. Between 20 April and 8 June 1994 gendarmes questioned nine villagers, mostly from Koçağılı village. These included the applicants Ata Kaçar, Mehmet Aykaç and Cafer Kaçar. The villagers told the gendarmes that there had been explosions in their villages which had killed and injured people. In the statements the villagers were also quoted as having stated in identical sentences that they did not know the "cause or source" of the explosions.

34. The prosecutor at the Diyarbakır State Security Court observed on 13 March 1996 that there was no evidence showing PKK involvement, and returned the file to the Şırnak prosecutor's office. In the prosecutor's decision of non-jurisdiction the subject matter of the investigation was stated as "the killing of a number of persons as a result of a bomb dropped on the village".

35. On 22 April 1996 eight of the nine villagers who had been questioned by gendarmes between 20 April and 8 June 1994 (see paragraph 33 above) were questioned once more, this time by the Şırnak prosecutor. The villagers said that bombs had "fallen" on their village, killing a number of people and injuring a number of others, but that they did not want to make an official complaint.

36. On 7 August 1996 the Şırnak prosecutor returned the file to the Diyarbakır State Security Court prosecutor, insisting that the bombings in the Koçağılı village had been carried out by members of the PKK.

37. The Diyarbakır State Security Court prosecutor instructed the gendarmerie on 15 August 1996 to find the PKK members "responsible for the attacks" on Koçağılı village.

38. In its letter of 22 October 1997 the Şırnak governor's office asked the local gendarmerie whether Adil Oygur, who is the brother of the twelfth applicant Abdulhadi Oygur, was alive or dead. On 14 November 1997 a gendarme captain, who was the commander of the Şırnak gendarmerie, sent a reply to the Şırnak governor's office. The captain stated in his letter that, according to their investigation, Mr Oygur and all members of his family had been killed during "the aerial bombing" of Kuşkonar village and buried there.

39. There are no documents in the Court's possession to detail any of the steps, if any, taken in the investigation between November 1997 and June 2004.

40. On 4 June 2004 the prosecutor at the Diyarbakır State Security Court sent a letter to the Şırnak gendarmerie command, urging for the investigation into "the armed attacks by the PKK" on Koçağılı village to be continued until the expiry of the prescription period on 27 March 2014.

41. On 4 and 5 October 2004 the applicants, with the assistance of their newly appointed lawyer, filed official complaints with the offices of the Şırnak and Diyarbakır prosecutors. They submitted that two planes and a helicopter had bombed their villages. The holes made by the bombs were still visible and the bodies of the people who had been killed were in the mass grave. The applicants asked the prosecutors to investigate the bombing of their villages and prosecute those responsible.

42. The applicants also argued in their petitions that when they were questioned in the aftermath of the bombing they had been so scared that they could not tell the authorities that their villages had been bombed by aircraft. In any event, on account of the wide coverage of the incident in the national and international media, it was public knowledge that the villages had been bombed by military aircraft.

43. On 19 October 2004, on the basis of the documents in the investigation files and the statements taken from the villagers, the chief prosecutor in Diyarbakır concluded in a decision of non-jurisdiction that the bombings had been carried out not by PKK members but by planes and helicopters. The chief prosecutor forwarded the applicants' petitions to the Şırnak prosecutor and requested him to carry out an effective investigation "so that our country would not encounter problems from the standpoint of Articles 2 and 13 of the European Convention on Human Rights". The prosecutor asked his opposite number in Şırnak personally to take a number of investigative steps, such as visiting the villages with a view to establishing how many bombs had been dropped in each village and how many persons had been killed.

44. The decision reached by the Diyarbakır chief prosecutor was widely publicised in the national media and the lawyer representing the applicants was quoted in a newspaper as having stated that this was a "promising development".

45. On 31 January 2005 police officers questioned three of the applicants, namely Abdullah Borak, Zeynep Kalkan and Şahin Altan, and another villager, Salih Oygur. Abdullah Borak, who had lost his father in the incident, and Salih Oygur, who had lost a number of his relatives, told the police officers that they had not been in the village on 26 March 1994.

46. Zeynep Kalkan, who had lost her husband, told the police officers that she had been living in Kuşkonar village at the time and had seen a plane and a helicopter. When she had heard a loud explosion she had hidden in the cellar of her house. When she had come out she had seen that everything in the village had been destroyed and that bodies of villagers were lying around.

47. Şahin Altan, who had lost his wife and two children aged twelve and three, told the police officers on 31 January 2005 that he had been hunting outside Kuşkonar village at the time when he had seen a plane and a helicopter over his village. The plane had then dropped three bombs and he

had immediately returned to the village. When he had reached the village he had seen that most of the houses had been destroyed and a large number of his fellow villagers had been killed.

48. On 3 February 2005 the applicant Ahmet Yıldırım was also questioned by the police officers. Mr Yıldırım told the police officers that he and his wife Elmas had been outside their house in Kuşkonar at the time when they had heard the planes flying over the village. They had run towards their cellar but his wife had not made it. When he had come out of the cellar he had seen his wife's dismembered body lying by the door. He and his fellow villagers had then buried the dead and left the village. He had never returned to the village since then.

49. On 28 March 2005 the applicant Hatice Benzer was heard by a prosecutor. She told the prosecutor that she had been gathering wood outside her village of Kuşkonar at the time of the bombing and had heard planes and subsequently explosions. On her return she had seen that her village had been bombed and her two sons, her daughter-in-law Ayşe, and her grandchildren had been killed.

50. The applicant Selim Yıldırım was also questioned by a prosecutor, on 8 April 2005. He told the prosecutor that he had been in his village of Kuşkonar on the day of the bombing and seen a helicopter flying overhead at 11.00 a.m. The helicopter had continued to fly around for a period of 15-20 minutes and then two planes had arrived. The planes, which had been flying in formation, had then dropped two bombs each over the village. The bombs had been as big as tables. His wife and their 3-month-old daughter, as well as their three other children, aged 3, 4 and 10 years, had all been killed in the bombing. There had been twenty houses in the village and during the bombing seven or eight of them had been destroyed completely and the remainder had been damaged. After the bombing he and the other villagers had abandoned their village.

51. On 11 April 2005, in a written petition, the applicants urged the prosecutor to expedite the investigation and to pay a visit to their villages in order to examine the scale of the devastation and search for evidence. They stated that the craters caused by the bombs were still clearly visible.

52. The Şırnak prosecutor joined the two separate complaints lodged by the applicants on 4 and 5 October 2004, and between 30 January 2005 and 10 June 2005 he questioned a number of the applicants who were by then living in different parts of the country. The applicants Sadık Kaçar, Mahmut Erdin, Mustafa Bengi, Hasan Bedir, Haci Kaçar, Ahmet Bengi, İbrahim Kıraç, Hamit Kaçar, Abdurrahman Bengi and Mahmut Bayı described the bombing of their village of Koçağılı by aircraft, and added that they did not know what type of airplanes they had been. They told the prosecutor that, after the bombing, their houses had become uninhabitable and they had had to leave their village. The applicant Mahmut Erdin added in his petition of 26 April 2005 that his wife Lali Erdin had suffered a head injury and

continued to suffer complications because of this injury. In his statement of 26 April 2005 Mustafa Bengi also informed the prosecutor of the injury to his wife Adile Bengi.

53. On 15 June 2005 the Şırnak prosecutor stated in a decision of non-jurisdiction that, in light of the documents in the file, in particular the statements taken from the applicants and the eyewitnesses according to whom the bombings had been carried out by planes and helicopters, military prosecutors had jurisdiction to carry out the investigation. He thus forwarded the case files to the military prosecutor's office at the 2nd Air Force Command in Diyarbakır.

54. On 13 February 2006 the military prosecutor asked the 2nd Air Force Command in Diyarbakır whether any flights had been conducted over the applicants' two villages between 10.00 a.m. and midday on 26 March 1994.

55. On 17 February 2006 the 2nd Air Force Command in Diyarbakır informed the military prosecutor in a letter that "no planes or helicopters from our Command conducted flights in the Şırnak region between 10.00 a.m. and midday or at any other time on 26 March 1994".

56. After having received the response from the 2nd Air Force Command in Diyarbakır, the military prosecutor concluded on 28 February 2006 that there was no evidence to support the applicants' allegations that their villages had been bombed by military aircraft. He thus decided that he also lacked jurisdiction to investigate the killings, and returned the case files to the Şırnak prosecutor's office. In support of his decision the military prosecutor also referred to the statements taken from some of the applicants by the Şırnak prosecutor, in which those applicants had stated that they did not know what type of aircraft had bombed their villages (see paragraph 52 above).

57. The military prosecutor also rejected the applicants' requests for copies of all the documents from his investigation file to be handed over to their lawyer. When challenged by the applicants' lawyer before a military court, the military court agreed with the military prosecutor that the applicants should not be given the entire file. Eventually, the only documents given to the applicants were "those which supported the military prosecutor's decision of non-jurisdiction" but the disclosure of which to the applicants would not, in the opinion of the military authorities, "jeopardise the investigation".

58. On 17 May 2006 the applicants lodged an objection with a military court against the military prosecutor's decision of non-jurisdiction, and drew that court's attention to the military prosecutor's alleged failure to carry out a proper investigation. They argued, in particular, that the military prosecutor had not examined the witness statements but had been content with the response he had received from the 2nd Air Force Command. They also pointed to the possibility that the aircraft could have taken off from other airbases located nearby, such as Malatya or Batman.

59. The applicants also argued that the military prosecutor, by referring to some of the applicants' inability to identify the aircraft as belonging to the Turkish military (see paragraphs 52 and 56 above), had unjustly implied that the bombing could have been carried out by foreign aircraft. The applicants also noted that the military prosecutor's implications had been shared by the then Prime Minister of Turkey, Ms Tansu Çiller. The applicants questioned the logic behind those implications, and argued that explanations were needed as to how a number of aircraft belonging to another State would be able to penetrate Turkish airspace, bomb villages, and then leave Turkish airspace undetected.

60. Another military prosecutor, who forwarded to the military court his opinion on the objection lodged by the applicants, noted that the villages had never been visited by any civilian investigating authority to verify the applicants' allegations or to search for evidence. The military prosecutor considered that the military investigating authorities could carry out an investigation in the villages before making a decision on the issue of jurisdiction.

61. On 29 May 2006 the military court rejected the applicants' objection and the military prosecutor's suggestion to carry out further investigative steps. It held that there was no evidence implicating any personnel "within the jurisdiction of the 2nd Air Force Command's military prosecutor" in the incident.

62. The investigation files were then returned to the Şırnak prosecutor's office where another statement was taken from the headman of Koçağılı village, Halil Seyrek, on 17 November 2006. Mr Seyrek repeated the contents of his earlier statements. In response to a question from the prosecutor, Mr Seyrek stated that he had never heard of Provide Comfort (*Çekiç Güç*), a joint US, British and French military task force deployed to Incirlik Military Airbase in southern Turkey in 1991 during the first Iraq war. Mr Seyrek told the prosecutor that the only military force he had been aware of in the region was the Turkish military.

63. On 16 March 2007, in response to a query from the Şırnak prosecutor, the Şırnak gendarmerie informed that prosecutor that "the flight plans for aircraft movements between 10.00 a.m. and midday on 26 March 1994" were not in their archives.

64. The Şırnak prosecutor sent a letter to the prosecutor's office in Diyarbakır on 24 October 2007, and stated that the allegations of the villagers concerning an aerial bombardment of their villages showed that the incident, "even if it was caused by another State or by illegal organisations", was not an ordinary incident. In the opinion of the Şırnak prosecutor the Diyarbakır prosecutor had jurisdiction to continue the investigation, and he sent him the case files.

65. On 5 December 2007 the Diyarbakır prosecutor opened a new investigation file (no. 2007/1934) and sent a letter to the Şırnak prosecutor.

In his letter the Diyarbakır prosecutor stated that the investigation file only contained Zahide Kıraç's post-mortem report and that there were no documents in it to show that the villages had been visited by an investigative body. He asked the Şırnak prosecutor to send him, *inter alia*, all post-mortem reports, information pertaining to any visits to the applicants' villages by the investigating authorities, and any evidence collected in the villages by those authorities. When the Şırnak prosecutor continued to fail to respond, the Diyarbakır prosecutor sent him reminders on 11 March 2008 and then on 3 June 2008. In his letter of 3 June 2008 the Diyarbakır prosecutor informed the Şırnak prosecutor that in response to his request of 5 December 2007 he had received some information from the gendarmerie but that that information was incomplete. He urged the Şırnak prosecutor to collect the required evidence himself and not to leave it to the gendarmerie. On account of the Şırnak prosecutor's continued failure to cooperate in the investigation the Diyarbakır prosecutor sent him another reminder on 28 July 2008.

66. Between 18 January 2008 and 28 April 2008 gendarmes took statements from ten villagers. Seven of them, who had been living in villages other than Koçağılı and Kuşkonar at the time of the incident, stated that they had not witnessed the incident but that they had heard that PKK members had raided the villages on 26 March 1994 and killed the applicants' relatives. They also stated that, according to rumours, a lawyer had located the relatives of the deceased villagers one year ago, and told them that if they alleged that their villages had been bombed by aircraft, he would seek and obtain compensation for them. In the opinion of these seven villagers, the applicants were making these allegations in order to taint the reputation of the Turkish military forces.

67. The headman of Koçağılı village, Halil Seyrek, was among the villagers questioned by the gendarmes. In his statement of 11 April 2008 he was quoted as having stated that he had not been in the village at the time of the events but that his fellow villagers had informed him that members of the PKK had carried out the attacks. In Mr Seyrek's opinion, the whole thing was a provocation orchestrated by persons with "legal knowledge" with the aim of tainting the good name of the State.

68. In a statement dated 17 April 2008 another one of the questioned villagers, Mehmet Belçi, who was employed by the State as a village guard, was quoted as having stated that he had been in the Koçağılı village on the date of the incident when PKK members had come to the village and fired rocket-propelled grenades and opened fire on the villagers. In the opinion of this village guard, civilian wings of the PKK had been fabricating the allegations of an aerial bombardment.

69. In his statement of 24 April 2008 Mehmet Bengi, a villager from Koçağılı village, was quoted as having stated that he had been in the village

on 26 March 1994 and that two aircraft had bombed the village, killing, among others, his mother and nieces.

70. On 24 April 2008 the applicant Kasım Kiraç told the same gendarmes that he had already made statements and that he had nothing to add to those statements.

71. In the meantime the applicants, with the assistance of their lawyer, submitted a detailed letter to the Diyarbakır prosecutor and maintained their complaints and requests for further investigative steps to be taken. They informed the prosecutor, in particular, that the questioning of witnesses by gendarmes and police officers, rather than directly by civilian prosecutors, was not satisfactory because such persons could not be expected to be impartial and independent in an investigation into allegations of killings perpetrated by the military.

72. In their letter the applicants also challenged the testimonies, summarised in the preceding paragraphs, given to gendarmes by villagers between 18 January 2008 and 28 April 2008. The applicants informed the prosecutor that the persons who were putting the blame for the attacks on their villages on the PKK were employed by the State as village guards, had personal vendettas with the PKK, and, in any event, had not been in the villages at the time of the events. They gave the prosecutor the names of the persons who had witnessed the bombing of their villages first hand, and asked the prosecutor to question those persons.

73. On 17 April 2008 and 12 May 2008, a number of soldiers, acting on a request from the Diyarbakır prosecutor, visited the applicants' two villages to search for evidence. According to the reports prepared by the soldiers after their visits, "as 14 years have passed since the incident, and a number of clashes between the security forces and PKK members had taken place in the area, the villages were completely destroyed and there was therefore no evidence left to be collected".

74. On 3 June 2008 the Diyarbakır prosecutor sent letters to the Air Force Base in Malatya (Erhaç) and the 2nd Air Force Command in Diyarbakır, and asked for details of all flights conducted by them on 26 March 1994 and the names of the crews. When the two military authorities failed to reply, the Diyarbakır prosecutor sent them reminders on 29 July 2008.

75. The headman Halil Seyrek was questioned again, this time by a prosecutor, on 5 September 2008. Mr Seyrek stated that he had not been in the village at the time of the incident but that his fellow villagers had informed him the same day that the PKK had raided the village. He had then requested the authorities to visit the village but they had not been able to do so for reasons of safety. He had also heard about the lawyer who had convinced the applicants to make the allegations. Mr Seyrek also told the prosecutor that he "stood by the contents of his previous statements".

76. On 8 September 2008 two more villagers were questioned by the prosecutor. They told the prosecutor that they had not been in either of the applicants' two villages on the day of the incident but had been told subsequently that members of the PKK had attacked the villages.

77. On 12 September 2008 the applicant Kasım Kiraç repeated his version of events to a prosecutor, and maintained that the village had been bombed by aircraft. During the bombing his wife and daughter had been killed.

78. The Şırnak prosecutor sent a letter to the Şırnak Gendarmerie Command on 18 September 2008, and asked whether the military could take the necessary safety measures if the judicial authorities were to visit the applicants' two villages. On 8 October 2008 the Gendarmerie Command informed the Şırnak prosecutor that the villages were located in an area frequently used by members of the PKK in the past, that it was thus not safe to visit them, and that the gendarmes would not be able to provide security to any judicial authority.

79. On 5 November 2008 the commanding officer of the 2nd Air Force Command in Diyarbakır replied to the Diyarbakır prosecutor's letters, and stated that "no records had been found to show that any flights concerning national security had been conducted on 26 March 1994 from the air bases under their command."

80. After having received a second reminder from the Diyarbakır prosecutor, the base commander of the Malatya Erhaç Airbase also replied on 11 November 2008 and stated that "no records had been found to show that any flying activity had taken place at their base on 26 March 1994."

81. On 24 February 2009 the Diyarbakır prosecutor sent the Dicle University Hospital in Diyarbakır a list of the deceased and injured villagers, and asked whether any of them had been treated at the hospital between March and June 1994.

82. On 25 March 2009 the Dicle University Hospital replied to the Diyarbakır prosecutor's letter, and informed him that there were no records to show that any of the persons named in his letter had been treated at the hospital between March and June 1994.

83. On 27 June 2012 the applicants' lawyer sent to the Court a photocopy of a flight log of a number of fighter jets belonging to the Turkish Air Force, and a copy of the letter accompanying the flight log drawn up by the Civil Aviation Directorate of the Ministry of Transport on 13 February 2012. In this letter, addressed to the Diyarbakır public prosecutor, the Director of the Civil Aviation Directorate stated that the Directorate had no information to show that any military or civilian flights had been carried out over the city of Şırnak on 26 March 1994. However, two flying missions had been carried out on the day in question by the Turkish Air Force to locations ten nautical miles to the west and north-west of Şırnak.

84. According to the flight log, 2 F-4 fighter jets with the call-sign "Panzer 60" and armed with two MK83 bombs, had taken off at 10.24 a.m. on 26 March 1994. Their time over their target had been 11.00 a.m. and they had landed at 11.54 a.m. Two F-16 fighter jets, with the call-sign "Kaplan 05" and armed with four MK82 bombs, had taken off at 11.00 a.m. the same day, had been over their target at 11.20 a.m., and had landed at exactly midday. According to the entry in the flight log, all aircraft had achieved their missions. The flight log does not mention the names of the air bases where the aircraft had taken off and landed and the targets are referred to as "A" and "B".

85. On 23 July 2012 the applicants sent a letter to the Diyarbakır prosecutor. It appears from the applicants' letter that at their request the Diyarbakır prosecutor had requested the Civil Aviation Directorate to provide information on the flying activity in the region, and that that Directorate had sent the prosecutor the above-mentioned flight log in reply to that request.

86. In their letter addressed to the prosecutor the applicants submitted that the information in the flight log had confirmed the accuracy of the allegations which they had been bringing to the attention of the investigating authorities since 1994, and they reminded the prosecutor that the military authorities had been denying that they had bombed their villages. The applicants asked the prosecutor to identify the crew of the fighter jets which had bombed their villages, as well as their superiors who had given the orders to bomb the villages, and to question them.

87. No information has been submitted to the Court by the parties to show that any steps were taken by the prosecutors further to the applicants' requests of 23 July 2012.

II. RELEVANT DOMESTIC LAW

88. According to section 448 of the Criminal Code which was in force at the time of the events, any person who intentionally killed another was liable to be sentenced to a term of imprisonment of from twenty-four to thirty years. According to section 450, the death penalty could be imposed in cases of, *inter alia*, multiple murder.

III. RELEVANT INTERNATIONAL MATERIALS

89. Common Article 3 of the 1949 Geneva Conventions, ratified by Turkey in 1954, governs non-international armed conflicts. The relevant provisions state:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities ... shall in all circumstances be treated humanely ... To this end the following acts are and shall be prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

...

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

...

(2) The wounded and sick shall be collected and cared for."

90. Relevant paragraphs of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990)) provide as follows:

"1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.

...

6. Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.

7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

..."

THE LAW

I. ADMISSIBILITY

91. The applicants complained that the killing of their relatives and the injury caused to some of them, the terror, fear and panic created by the bombardment, coupled with the lack of an effective investigation into the circumstances of the bombing, had been in breach of Articles 2, 3 and 13 of the Convention.

92. The applicants submitted that the names of their 34 relatives who had been killed during the bombing, and the applicants' relationship to those deceased relatives, were as follows:

i. Mahmut Benzer: the applicants Hatice Benzer's son and Ahmet and Mehmet Benzer's brother;

ii. Ali Benzer: the applicants Hatice Benzer's son and Ahmet and Mehmet Benzer's brother;

iii. Nurettin Benzer: the applicant Hatice Benzer's grandchild;

iv. Ömer Benzer: the applicant Hatice Benzer's grandchild;

v. Abdullah Benzer: the applicant Hatice Benzer's grandchild;

vi. Çiçek Benzer: the applicant Hatice Benzer's grandchild;

vii. Fatma Benzer: the applicant Hatice Benzer's daughter-in-law;

viii. Ayşe Benzer: the applicant Hatice Benzer's daughter-in-law;

ix. Ömer Kalkan: the applicants Zeynep Kalkan's husband and Durmaz, Basri, Asker and Mehmet Kalkan's father;

x. İbrahim Borak: the applicants Abdullah and Sabahattin Borak's father;

xi. Ferciye Altan: the applicant Şahin Altan's wife;

xii. Hacı Altan: the applicant Şahin Altan's son;

xiii. Kerem Altan: the applicant Şahin Altan's son;

xiv. Mahmut Oygur: the applicants Abdulhadi Oygur, Abdullah Oygur Taybet Oygur, Halime Başkurt Oygur and Hatice Başkurt Oygur's father;

xv. Ayşi Oygur: the applicants Abdulhadi Oygur, Abdullah Oygur, Taybet Oygur, Halime Başkurt Oygur and Hatice Başkurt Oygur's mother;

xvi. Adil Oygur: the applicants Abdulhadi Oygur, Abdullah Oygur, Taybet Oygur, Halime Başkurt Oygur and Hatice Başkurt Oygur's brother;

xvii, Elmas Yıldırım: the applicant Ahmet Yıldırım's wife;

xviii. Şerife Yıldırım: the applicants Selim Yıldırım's wife and Felek Yıldırım's mother;

xix. Melike Yıldırım: the applicants Selim Yıldırım's daughter and Felek Yıldırım's sister;

xx. Şaban Yıldırım: the applicants Selim Yıldırım's son and Felek Yıldırım's brother;

xxi. İrfan Yıldırım: the applicants Selim Yıldırım's son and Felek Yıldırım's brother;

xxii. Hunaf Yıldırım: the applicants Selim Yıldırım's daughter and Felek Yıldırım's sister;

xxiii. Huhi Kaçar: the applicants Sadık Kaçar's wife and Haci and Ata Kaçar's mother;

xxiv. Şemsihan Kaçar: the applicants Sadık Kaçar's daughter and Haci and Ata Kaçar's sister;

xxv. Ahmet Kaçar: the applicant Haci Kaçar's son;

xxvi. Şiri Kaçar: the applicants Hamit, Sadık, Osman and Halil Kaçar's father;

xxvii. Şehriban Kaçar: the applicant Hamit Kaçar's daughter;

xxviii. Hazal Kıraç: the applicants Kasım Kiraç's wife and İbrahim Kiraç's mother;

xxix. Zahide Kıraç: the applicants Kasım Kiraç's daughter and İbrahim Kıraç's sister;

xxx. Fatma Bedir: the applicant Hasan Bedir's daughter;

xxxi. Ayşe Bengi: the applicants Yusuf Bengi's wife and Abdurrahman, Ahmet, İsmail, Reşit, Mustafa Bengi's mother;

xxxii. Huri Bengi: the applicant Ahmet Bengi's daughter;

xxxiii. Fatma Bengi: the applicant Mustafa Bengi's daughter; and

xxxiv. Asiye Erdin: the applicant Mahmut Erdin's daughter.

93. The following applicants also complained that either they or their relatives had been injured in the bombing:

i. the applicant Mehmet Benzer himself;

ii. the applicant Yusuf Bengi's partner and Adil Bengi's mother Zülfe Bengi;

iii. the applicant Mustafa Bengi's daughter Bahar Bengi;

iv. the applicant Mustafa Bengi's wife Adile Bengi;

v. the applicant Mahmut Bayı's mother Hatice Bayı;

vi. the applicant Süleyman Bayı himself;

vii. the applicant Mahmut Erdin's wife Lali Erdin;

viii the applicant Cafer Kaçar himself;

ix. the applicant Mehmet Aykaç himself; and

x. the applicant Fatma Coşkun herself.

94. The Government contested the applicants' arguments.

A. Victim status

1. The injury of the applicants' relatives Zülfe Bengi, Bahar Bengi, Adile Bengi, Hatice Bayı and Lali Erdin

95. The Court observes that, as well as complaining about the killing of his wife Ayşe Bengi, the twenty-ninth applicant, Yusuf Bengi, also

complained on behalf of his partner Zülfe Bengi who, he claimed, had been injured in the incident and had subsequently died of natural causes. Moreover, the thirty-fifth applicant, Adil Bengi, also complained about the injury caused to Zülfe Bengi, his mother; the thirty-fourth applicant, Mustafa Bengi, as well as complaining about the killing of his mother Ayşe Bengi and his daughter Fatma Bengi, also complained about the injuries caused to his other daughter, Bahar Bengi, and his wife, Adile Bengi; the thirty-sixth applicant, Mahmut Bayı, complained about the injury caused to his mother, Hatice Bayı; and the thirty-eighth applicant, Mahmut Erdin, as well as complaining about the killing of his one-year-old daughter Asiye Erdin, also complained about the injury caused to his wife, Lali Erdin.

96. The Court observes that, according to the various medical reports summarised above, the applicants' relatives Zülfe Bengi, Bahar Bengi, Adile Bengi, Hatice Bayı and Lali Erdin did indeed suffer injuries after the events and some of those injuries were life-threatening (see paragraphs 24 and 52).

97. It also notes, however, that the applicants Yusuf Bengi, Adil Bengi Mustafa Bengi, Mahmut Bayı and Mahmut Erdin did not explain in the application form or subsequently in their observations the reasons why their relatives had not joined the application as applicants in their own names. In this connection, although the applicants stated in the application form that Zülfe Bengi had subsequently died of natural causes, they did not inform the Court of the date of her demise.

98. The Court reiterates that the system of individual petition provided under Article 34 of the Convention excludes applications by way of *actio popularis*. Complaints must therefore be brought by or on behalf of persons who claim to be victims of a violation of one or more of the provisions of the Convention. Such persons must be able to show that they were "directly affected" by the measure complained of (see *İlhan v. Turkey* [GC], no. 22277/93, §§ 52-55, ECHR 2000-VII).

99. It is true that a close relative may be allowed to pursue an application concerning ill-treatment lodged by an applicant who dies in the course of the proceedings before the Court (see *Aksoy v. Turkey*, no. 21987/93, Commission decision of 19 October 1994, Decisions and Reports (DR) 79, p. 67). However, this is not the case in the present application.

100. In the present application, Zülfe Bengi, Bahar Bengi, Adile Bengi, Hatice Bayı and Lali Erdin were allegedly direct victims of the attacks on their villages but they did not introduce an application themselves and did not join the present application as applicants. Moreover, and as pointed out above, the five applicants who applied on their behalf did not explain the reasons for their relatives' failure to lodge the application in their own names and did not, for example, argue that on account of their state of health their relatives were in a particularly vulnerable position and could

not, therefore, introduce and pursue the application in their own names (*ibid*).

101. In light of the foregoing the Court cannot but conclude that the applicants Yusuf Bengi, Adil Bengi, Mustafa Bengi, Mahmut Bayı and Mahmut Erdin do not have the requisite standing under Article 34 of the Convention to bring the application on behalf of their relatives Zülfe Bengi, Bahar Bengi, Adile Bengi, Hatice Bayı and Lali Erdin.

102. It follows that the application, in so far as it concerns the complaints made on behalf of Zülfe Bengi, Bahar Bengi, Adile Bengi, Hatice Bayı and Lali Erdin is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) of the Convention and must be rejected in accordance with Article 35 § 4 of the Convention.

103. Since the applicants Adil Bengi and Mahmut Bayı's complaints relate solely to their above-mentioned relatives, this entails that the application in so far as it was introduced by these two applicants is rejected in its entirety.

104. The Court will continue its examination of the complaints made by the applicants Yusuf Bengi, Mustafa Bengi and Mahmut Erdin concerning the killing of Ayşe Bengi, Fatma Bengi and Asiye Erdin.

2. Alleged killing of Fatma Benzer

105. The first applicant Hatice Benzer alleged that her two sons and their wives and four children had been killed in the bombing.

106. The Court notes from the documents in its possession that 33 of the 34 person listed above (see paragraph 92), including the applicant Hatice Benzer's two sons Mahmut and Ali Benzer, Mahmut's wife Ayşe Benzer, and Mahmut and Ayşe Benzer's four children Nurettin, Ömer, Abdullah and Çiçek Benzer, were indeed killed in the attacks. However, there are no documents in the Court's possession to indicate that Fatma Benzer, who was Ali Benzer's wife, was killed. Indeed, even in the official complaint petitions which the applicants submitted to the prosecutors' office on 4 and 5 October 2004 Fatma Benzer's name is not listed among those who were killed. Neither did Mrs Benzer mention in her statement of 28 March 2005 that Fatma Benzer had also been killed (see paragraph 49 above).

107. In light of the above, the applicant Hatice Benzer cannot legitimately claim that her daughter-in-law Fatma Benzer was a victim of a violation of Article 2 of the Convention. It follows that the application, in so far as it concerns the alleged killing of Fatma Benzer's death, is also incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) of the Convention and must be rejected in accordance with Article 35 § 4 of the Convention.

B. Exhaustion of domestic remedies

108. The Government argued that the applicants had failed to comply with the requirement of exhaustion of domestic remedies because the investigation into their allegations was still continuing at the national level.

109. The Court considers that the examination of the Government's objection to the admissibility of the application requires an assessment to be made of the effectiveness of the investigation still pending at the national level. As such, it is closely linked to the substance of the applicants' complaints and cannot be examined at this stage of the proceedings. The Court thus concludes that the Government's objection should be joined to the merits (see paragraph 198 below).

C. Six months

110. The Government argued that the applicants, who considered that the investigation had been ineffective, should have applied to the Court within six months from the incident. Nevertheless, they had not done so but had applied to the Court some twelve years after the incident. In support of their submission, the Government referred to the decision of inadmissibility in the case of *Bulut and Yavuz v. Turkey* ((dec.), no. 73065/01, 28 May 2002).

111. In inviting the Court to declare the application inadmissible for non-respect of the six-month rule, the Government also referred to the judgment in the case of *Varnava and Others v. Turkey* in which the Court held that in cases concerning violent or unlawful death, as opposed to cases concerning disappearances, the requirements of expedition may require an applicant to bring such a case before Strasbourg within a matter of months, or at most, depending on the circumstances, a very few years after events ([GC] nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 § 162, ECHR 2009).

112. The applicants argued that the bombing had been an extraordinary incident: planes and helicopters belonging to the armed forces of the respondent State had deliberately bombed them, their close relatives and their houses. After the bombing they had been traumatised and had had to move to different parts of the country in order to save their lives. They had not been in a state of mind or in a position to make complaints before the national authorities or, indeed, before the Court. Furthermore, in the aftermath of the bombing of their villages the authorities had put them under continuous pressure, and had threatened and warned them not to make any complaints.

113. Another feature which distinguished their position from the position of a victim whose rights had been breached by individual agents of the State was that they had been victimised "by the might of the State,

complete with its planes and helicopters"; it had not, therefore, occurred to them very easily that they could make an official complaint about it. Having regard to the "peoples' perception of the State in Turkey", coupled with their terrifying ordeal, they could not have been expected to make a complaint in the immediate aftermath of the bombing. Indeed, the stereotyped statements prepared by the gendarmes in the aftermath of the bombing which they had been asked to sign (see paragraphs 33 above) illustrated the extent to which the national authorities had been prepared to go in covering up this highly sensitive and politically damaging bombardment.

114. The applicants also invited the Court to take into account the human rights situation in the Şırnak region where their villages had been located, and the atmosphere of fear that had prevailed there in the 1990s. In support of their submissions the applicants referred to a number of judgments in which the Court found violations of various Convention provisions on account of enforced disappearances, intentional destruction of villages and killings perpetrated by agents of the State in the Şırnak area, as well as on account of the failures to carry out effective investigations into those incidents (see *Ertak v. Turkey*, no. 20764/92, ECHR 2000-V; *Ahmet Özkan and Others*, cited above; *Timurtaş v. Turkey*, no. 23531/94, ECHR 2000-VI; *Taş v. Turkey*, no. 24396/94, 14 November 2000; *Dündar v. Turkey*, no. 26972/95, 20 September 2005; *Tanış and Others v. Turkey*, no. 65899/01, ECHR 2005-VIII). They argued that in such an atmosphere it was not possible to make a complaint and argue that military planes had bombed them.

115. The applicants submitted that towards the end of 2002 the emergency rule in south-east Turkey had come to an end and Turkey had begun its accession negotiations with the European Union. As a result, there had been a relative improvement in the human rights situation and they had then appointed their legal representative to assist them in their attempts to have the perpetrators brought to justice. Nevertheless, the campaign of threats against those complaining about the bombing had continued even after that date. For example, after their fellow villager Mehmet Bengi had informed the authorities that the villages had been bombed by aircraft (see paragraph 69 above), he had been threatened by members of the Gendarmerie Anti-Terrorism Intelligence Branch (*JİTEM*).

116. After their legal representative had urged the authorities to take a number of important investigatory steps, the Diyarbakır prosecutor had found it established that the bombing had been perpetrated not by members of the PKK, but by military planes. Nevertheless, the military prosecutor who had subsequently examined the file had closed his investigation after having been informed by the Air Force that no flights had been conducted. The military prosecutor had also refused to hand over to their legal representative the documents from the investigation file.

117. The Court reiterates that the six-month time-limit provided for by Article 35 § 1 of the Convention has a number of aims. Its primary purpose is to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time. It also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised and facilitates the establishment of facts in a case, since with the passage of time, any fair examination of the issues raised is rendered problematic (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 39, 29 June 2012 and the cases cited therein).

118. That rule marks out the temporal limit of the supervision exercised by the Court and signals, both to individuals and State authorities, the period beyond which such supervision is no longer possible. The existence of such a time-limit is justified by the wish of the High Contracting Parties to prevent past judgments being constantly called into question and constitutes a legitimate concern for order, stability and peace (*ibid*. § 40, and the cases cited therein).

119. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of such acts or their effect on or prejudice to the applicant. Where an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 of the Convention to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (see *El Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, § 136, ECHR 2012 and the cases cited therein).

120. The determination of whether the applicant in a given case has complied with the admissibility criteria will depend on the circumstances of the case and other factors, such as the diligence and interest displayed by the applicant, as well as the adequacy of the domestic investigation (see *Narin v. Turkey*, no. 18907/02, § 43, 15 December 2009).

121. As it appears from the principles referred to above, the determination of the compliance or otherwise of an applicant with the six-month rule is intrinsically connected to the issue of exhaustion of domestic remedies and the Court will examine the Government's objection in this regard with reference to the steps taken by the applicants in having their allegations investigated by the national authorities.

122. In the *Bulut and Yavuz* case referred to by the Government, as well as in a number of comparable cases which were declared inadmissible for non-respect of the six-month time-limit, short-lived investigations had been conducted in the immediate aftermath of the killings of the applicants' relatives which had then become dormant with very few, if any, steps being taken (see, *inter alia*, *Narin*, cited above; *Bayram and Yıldırım v. Turkey* (dec.), no. 38587/97, ECHR 2002-III; *Hazar and Others v. Turkey* (dec.), no. 62566/00, 10 January 2002; *Şükran Aydın and Others v. Turkey* (dec.), no. 46231/99, 26 May 2005). After having waited for lengthy periods for those investigations to yield results, the applicants had contacted the investigating authorities and asked for information. When they were told by those investigating authorities that the investigations were still pending but that there had been no developments, the applicants had applied to the Court and complained about the killings of their relatives and the alleged ineffectiveness of the investigations.

123. Similarly, in the present case the official investigation instigated by the authorities in the aftermath of the attacks on the applicants' villages in March 1994 also quickly became dormant; indeed, as set out above, there are no documents in the Court's possession to show that any steps were taken by the authorities between November 1997 and June 2004 (see paragraph 39 above). However, the crucial difference between the situation in the present application and the situations in the applications referred to in the preceding paragraphs is that the applicants in the present application claim that for a long period after the attack on their villages they were unable to complain about the events to the national authorities. In other words, unlike the applicants in the aforementioned cases, the applicants in the present case do not claim that they introduced their application with the Court pending the initial investigation because they found the latter ineffective (see *Meryem Çelik and Others v. Turkey*, no. 3598/03, § 40, 16 April 2013). After that period of inactivity they went on to make official complaints to the authorities in 2004, and a number of steps were taken by the prosecutors. As a result of those steps two prosecutors concluded that the applicants' villages had been bombed by aircraft as alleged by them (see paragraphs 43 and 53 above). Indeed, as can be seen from the steps taken by the national authorities summarised above, more numerous and more meaningful steps were taken in the investigation at the domestic level after the introduction of the complaints by the applicants in 2004 than had been taken before then.

124. The Court will now examine whether this difference between the circumstances of the present case and the circumstances of the similar cases referred to above which were declared inadmissible, lends support to the applicants' arguments that they have complied with the six-month rule. To that end, the Court stresses that there may also exist specific circumstances which might prevent an applicant from observing the time-limit laid down

in Article 35 § 1 of the Convention and such circumstances are relevant factors for the Court's examination (see *Bayram and Yıldırım*, cited above).

125. It is to be observed at the outset that the applicants applied to the Court on 26 May 2006, that is shortly after the military prosecutor closed his investigation as soon as he had received the letter from the Air Force in which its involvement in the attacks on the applicants' villages was denied, and he refused to hand over to the applicants a full copy of his investigation file (see paragraphs 56-57 above). The Court thus finds it reasonable that, having failed to have their allegations investigated properly, and having been hindered by the military authorities in their attempts to seek justice, the applicants must have lost all hope and realised that the domestic remedies would not yield any results, and introduced their application (see, *mutatis mutandis*, *Mladenović v. Serbia*, no. 1099/08, § 46, 22 May 2012).

126. As reiterated above, one of the important rationales behind the existence of the six-month time-limit is to facilitate the establishment of the facts of a case, since with the passage of time, any fair examination of the issues raised would be rendered problematic (see also *Nee v. Ireland* (dec.), no. 52787/99, 30 January 2003). The Court fully endorses that rationale, but notes that in the exceptional circumstances of the present application, it was the official complaints made by the applicants in 2004 which prompted the national authorities to begin establishing the facts surrounding the attacks on the applicants' villages. Since, as noted above, according to the domestic legislation, the investigation file would be open for a period of twenty years (see paragraph 40), the complaints made by the applicants were not rejected because of any failure to comply with the domestic statutory time-limits.

127. Moreover, the applicants' inactivity for a period of ten years did not present any obstacles in the way of the national authorities establishing the facts. For example, after the applicants introduced their complaints with them the civilian prosecutors questioned the applicants for the first time in the investigation, and heard their version of the events first-hand. The names of the deceased persons and their relationship to the applicants were recorded in official documents and the applicants' victim status was thus officially recognised. In this connection it must be reiterated that Article 35 § 1 of the Convention cannot be interpreted in a manner which would require an applicant to seize the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level *Mladenović*, cited above, § 44).

128. Regard must also be had to two of the other stated justifications of the six-month rule referred to above; namely the wish of the High Contracting Parties to prevent past judgments being constantly called into question and the legitimate concern for order, stability and peace (see paragraph 118 above). In the present case the applicants are not challenging a past judgment dealing with their Convention complaints; indeed no final decision has yet been taken in the investigation which is still open. Neither

does the aim of preventing the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time lend support to the Government's objection, as the Court considers that that justification cannot be interpreted in a way so as to prevent human rights violations from being punished each time national authorities remain inactive in an investigation.

129. It can, moreover, not be excluded that important developments may occur in an otherwise dormant investigation into a killing with a potential to shed light on events. Indeed, the Court has already indicated that there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity (see *Brecknell v. the United Kingdom*, no. 32457/04, § 69, 27 November 2007).

130. The Court has also examined the applicants' submissions that they had been unable to bring their complaints to the attention of the authorities until 2004, and considers that that argument cannot be rejected as being untenable. When it forwarded the applicants' above-mentioned submissions to them, the Court invited the Government to submit "any further observations they wish to make". The Government have not submitted any such observations and neither have they sought to challenge the applicants' allegations that they had been subjected to threats and warned not to make any complaints to the national authorities in the aftermath of the incident (see paragraphs 112 and 115 above).

131. The Court therefore considers reasonable the applicants' submissions, supported by the conclusions it has reached in a number of its judgments in relation to a series of incidents in the area surrounding the applicants' villages (see the judgments referred to by the applicants in paragraph 114 above), that in an atmosphere of fear where serious human rights violations were not being investigated, it was not possible to make a complaint and say that their villages had been bombed by military planes. The applicants' submissions in this regard are further supported by the Court's conclusion in its judgment in the case of *Akdıvar and Others v. Turkey* in which it held that the situation in south-east Turkey at around the time of the events which are the subject matter of the present application was such that complaints against the authorities might well have given rise to a legitimate fear of reprisals (see *Akdıvar and Others v. Turkey*, 16 September 1996, § 105, *Reports of Judgments and Decisions* 1996-IV).

132. In the same judgment the Court also added that the situation existing in south-east Turkey at the time was characterised by significant civil strife due to the campaign of terrorist violence waged by the PKK and the counter-insurgency measures taken by the Government in response to it. In such a situation it must be recognised that there may be obstacles to the

proper functioning of the system of the administration of justice. In particular, the difficulties in securing probative evidence for the purposes of domestic legal proceedings, inherent in such a troubled situation, may make the pursuit of judicial remedies futile and the administrative inquiries on which such remedies depend may be prevented from taking place (*ibid*. § 70).

133. Another factor to be taken into account is that it is not in dispute that the applicants' villages and their belongings were destroyed and that it thus appears that their way of life was destroyed unexpectedly and abruptly and as a result they had to abandon their villages and move to different parts of the country. Furthermore, the Court considers it of paramount importance that the applicants complained of a major attack on their villages which had caused dozens of deaths and injuries among the civilian population and which, they maintained, had been carried out by war planes belonging to the Air Force of the respondent State (see, *mutatis mutandis*, *Abuyeva and Others v. Russia*, no. 27065/05, § 179, 2 December 2010). It is thus reasonable to assume that the applicants might have legitimately expected that the authorities' response would be proportionate to the gravity of the incident and the number of victims. In such circumstances, it is understandable that they might have waited longer for the investigation to yield results without themselves taking the initiative given that in any event the authorities had already been aware of the attacks on the villages (see, *mutatis mutandis*, *ibid*.).

134. In light of the foregoing, the Court considers that the circumstances of the present application were different and that, unlike the applicants in the cases referred to above (see paragraphs 120 and 122 above), the applicants in the present case cannot be held to have failed to show diligence and cannot be reproached for not having made an official complaint to the national authorities until 2004. The Court accepts that, as soon as the applicants considered that the situation in their region had improved after the emergency rule had been lifted and that there was a reasonable chance of the perpetrators of the attacks on their villages being identified and punished, they instructed a lawyer and introduced official complaints with the national authorities. Although, initially, there were a number of positive developments in the investigation and the applicants' complaints were taken seriously, that investigation quickly lost steam and decisions were taken once again to transfer the investigation file between different prosecutors' offices. This, coupled with the military investigation authorities' attempts to withhold their investigation documents from the applicants, led the applicants to form the view that the investigation would not be capable of leading to the identification and punishment of those responsible, and they introduced their application with the Court within six-months of the military prosecutor's decision to close his investigation. Indeed, the pertinent arguments advanced by the applicants in their petition

to challenge the military prosecutor's decision were not taken into account by the military court and, three days after they introduced their application with the Court, the military court rejected the objection lodged by the applicants against the military prosecutor's decision (see paragraph 61 above).

135. In view of the aforementioned considerations, the Court dismisses the Government's objection based on the six-month time-limit.

D. Complaints introduced by the applicants Mehmet Benzer and Süleyman Bayı

136. The Court notes that, as well as complaining about the killing of his two brothers, the third applicant, Mehmet Benzer, also complained that he himself had been injured in the incident. Moreover, the thirty-seventh applicant, Süleyman Bayı, also alleged that he had been injured in the incident.

137. The Court notes that, unlike the applicants Cafer Kaçar, Mehmet Aykaç and Fatma Coşkun – who submitted documents to the Court detailing their injuries (see paragraph 24 above) –, the applicants Mehmet Benzer and Süleyman Bayi have not submitted to the Court any documents in support of their allegation that they were injured in the incident. Neither did these two applicants seek to argue that they had been unable to document their injuries. In fact, no information was provided by these two applicants as to the nature and extent of their injuries. Moreover, the Court notes from the documents in its possession that these applicants do not seem to have made any complaints at the national level about their injuries. Indeed, the only mention of their names in the file in the Court's possession is to be found in the powers of attorney.

138. In light of the foregoing the Court considers that the complaints made by Mehmet Benzer and Süleyman Bayı about their alleged injuries are devoid of any basis and must therefore be declared inadmissible as being manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

139. As the applicant Süleyman Bayı's complaints relate solely to his alleged injuries, the application in so far as it concerns him must be rejected. The Court will continue to examine the complaints introduced by Mehmet Benzer concerning the killing of his two brothers.

E. Conclusion

140. The Court notes that the complaints made under Articles 2, 3 and 13 of the Convention by the remaining thirty-five applicants, namely Hatice Benzer, Ahmet Benzer, Mehmet Benzer, Zeynep Kalkan, Durmaz Kalkan, Basri Kalkan, Asker Kalkan, Mehmet Kalkan, Abdullah Borak, Sabahattin

Borak, Şahin Altan, Abdulhadi Oygur, Abdullah Oygur, Taybet Oygur, Halime Başkurt, Hatice Başkurt, Ahmet Yıldırım, Selim Yıldırım, Felek Yıldırım, Haci Kaçar, Kasım Kiraç, İbrahim Kiraç, Hasan Bedir, Hamit Kaçar, Sadık Kaçar, Osman Kaçar, Halil Kaçar, Ata Kaçar, Yusuf Bengi, Abdurrahman Bengi, Ahmet Bengi, İsmail Bengi, Reşit Bengi, Mustafa Bengi and Mahmut Erdin concerning the killing of their thirty-three relatives, namely Mahmut Benzer, Ali Benzer, Nurettin Benzer, Ömer Benzer, Abdullah Benzer, Çiçek Benzer, Ayşe Benzer, Ömer Kalkan, İbrahim Borak, Ferciye Altan, Hacı Altan, Kerem Altan, Mahmut Oygur, Ayşi Oygur, Adil Oygur, Elmas Yıldırım, Şerife Yıldırım, Melike Yıldırım, Şaban Yıldırım, İrfan Yıldırım, Hunaf Yıldırım, Huhi Kaçar, Şemsihan Kaçar, Ahmet Kaçar, Şiri Kaçar, Şehriban Kaçar, Hazal Kıraç, Zahide Kıraç, Fatma Bedir, Ayşe Bengi, Huri Bengi, Fatma Bengi and Asiye Erdin; as well as the complaints introduced by Cafer Kaçar, Mehmet Aykaç and Fatma Coşkun concerning their own injuries, are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

141. Any references in subsequent parts of this judgment to "the applicants" will thus be to the thirty-eight applicants mentioned in the preceding paragraph and will exclude the three applicants, namely Adil Bengi, Mahmut Bayı and Süleyman Bayı whose complaints were rejected in their entirety above (see paragraphs 103 and 139).

II. ALLEGED VIOLATION OF ARTICLES 2 AND 13 OF THE CONVENTION

142. The applicants complained that the indiscriminate bombing of their villages which caused the deaths of many of their relatives and injuries to some of them, coupled with the failure to investigate the bombing and the killings, had been in breach of Articles 2 and 13 of the Convention.

143. The Court notes at the outset that the Government did not challenge the applicability of Article 2 of the Convention in respect of the applicants who did not die in the incident but were injured, namely Cafer Kaçar, Mehmet Aykaç and Fatma Coşkun (see paragraph 137 above). In any event, it is not in doubt that an attack was carried out on the applicants' villages which caused death and destruction. That attack, which caused these three applicants' injuries, was so violent and caused the indiscriminate deaths of so many people that these three applicants' fortuitous survival does not mean that their lives had not been put at risk. The Court is thus satisfied that the risks posed by the attack to these three applicants call for examination of their complaints under Article 2 of the Convention (see *Makaratzis v. Greece* [GC], no. 50385/99, §§ 52 and 55, ECHR 2004-XI; *Osman v. the*

United Kingdom, 28 October 1998, §§ 115-122, *Reports* 1998-VIII; *Yaşa v. Turkey*, 2 September 1998, §§ 92-108, *Reports* 1998-VI).

144. Furthermore, the Court considers it appropriate to examine all of the applicants' complaints solely from the standpoint of Article 2 of the Convention, which reads 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. Arguments of the parties

1. The applicants

145. The applicants submitted that the bombing by aircraft belonging to the armed forces of the respondent State had been carried out with a view to punishing them on account of their refusal to become village guards, as well as on account of the authorities' suspicion that PKK members had been provided with logistical support by them.

146. The applicants also submitted that they did not take seriously the Government's allegations that they had invented this story with a view to obtaining compensation. They stated that what had happened was not a conspiracy theory, but one of the most serious human right violations in Turkey's recent history, during which scores of people had been killed. As such, a case of this magnitude should be discussed and examined with the seriousness which it deserved.

147. The applicants pointed out that the persons on whose statements the Government had based their submissions had all been employed as village guards, bore personal grudges against the PKK and, in any event, had not lived in either of the two villages which were bombed. They maintained that their allegations of aerial bombardment of their villages were supported by eyewitness testimonies and by the flight log.

2. The Government

148. In their observations the Government summarised the statements taken from a number of villagers in 2008 (see paragraphs 66-68 and 75-76 above), and submitted that according to those consistent testimonies, the applicants' allegations of aerial bombardment were baseless. The applicants had been advised by their legal representative to make the allegation of aerial bombardment so that they could obtain compensation.

149. The above-mentioned statements had shown that the applicants' villages had been attacked and their relatives killed by members of the PKK because the villagers had refused to celebrate Newroz. The applicants' villages were located in an area where there had been intense PKK activity.

150. Furthermore, the Dicle University Hospital had confirmed that none of the injured or deceased persons had been treated there. Also, according to the post-mortem report, Zahide Kıraç had not been killed by a firearm.

151. An effective investigation had been conducted into the applicants' allegations and the judicial authorities had taken all important steps. The conclusions reached by the prosecutors in 1994 and 1996, namely that PKK members had bombed the villages, had been based on a number of witness statements.

152. Because of a heavy presence of PKK members in the area, it had not been possible to visit the villages until 2008. In 2008 a number of gendarmes had visited the villages and, according to the report of their visits, they had been unable to recover any evidence because of the passage of time and they had noted that during that time there had been a number of armed clashes in the area.

153. During the investigation eyewitnesses and some of the victims had also been questioned. Although some eyewitnesses had told the prosecutors about the involvement of a helicopter and planes, they had been unable to identify what type of planes and helicopters they had seen. In any event, their eyewitness accounts had been rebutted by the response received from the 2nd Air Force Command according to which no planes had flown in the Şırnak region on 26 March 1994.

B. Article 38 of the Convention and the consequent inferences drawn by the Court

154. As set out above, the flight log and its accompanying letter drawn up by the Civil Aviation Directorate (see paragraph 83 above) were submitted to the Court by the applicants on 27 June 2012, that is after the Government had already submitted their observations on the admissibility and merits of the application and the applicants had responded to them.

155. On 5 July 2012 the Court forwarded to the Government the flight log and the accompanying letter, and requested the Government to submit comments on them. In response, the Government sent a letter to the Court on 11 September 2012 and stated the following: "... the Diyarbakır prosecutor instigated an investigation (no. 2007/1934) into the allegations made by the applicants and the documents submitted by them, and that investigation is still continuing".

156. The Court observes, firstly, that the Government have not contested the authenticity of the flight log or the veracity of its contents. It observes, secondly, that the Government have not sought to argue that they or their investigating authorities were unaware of the flight log. Nevertheless, and despite the fact that they were expressly requested by the Court, at the time that notice of the application was given to them in 2009, to submit to the Court a copy of the entire investigation file, the Government did not submit the flight log together with their observations and did not mention its existence in their observations. Instead, the Government argued in their observations that there was no information to prove the applicants' allegations of an aerial bombardment, and relied on the official letters in which various Air Force commanders had untruthfully stated that no flying activity had taken place in the area that day (see paragraphs 55, 79 and 80 above).

157. The Court reiterates that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation). It is inherent in proceedings relating to cases of this nature, where individual applicants accuse State agents of violating their rights under the Convention, that in certain instances solely the respondent State has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information as is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 of the Convention, but may also give rise to the drawing of inferences as to the well-foundedness of the allegations (see *Timurtaş*, cited above, § 66).

158. Moreover, according to the Court's settled case-law, in cases where an applicant makes out a *prima facie* case and in response to the applicant's allegations the Government fail to disclose crucial documents to enable the Court to establish the facts, it is for the Government to either argue conclusively why the documents withheld by them cannot serve to corroborate the allegations made by the applicant, 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 (see *Akkum and Others v. Turkey*, no. 21894/93,

§ 211, ECHR 2005-II (extracts); *Toğcu v. Turkey*, no. 27601/95, § 95, 31 May 2005; *Varnava and Others*, cited above, § 184).

159. It is thus 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 (*Timurtaş*, cited above, § 66).

160. The Court has held in numerous judgments that, by failing to submit to the Court an unexpurgated copy of the investigation file (*Tanış and Others*, cited above, § 164) and by withholding crucial documents from the Court, respondent Governments had fallen short of their obligations under Article 38 of the Convention to furnish all necessary facilities to the Court in its task of establishing the facts (see, most recently, *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, §§ 202-216, 21 October 2013; see also *Yasin Ateş v. Turkey*, no. 30949/96, §§ 84-87, 31 May 2005; *Kişmir v. Turkey*, no. 27306/95, §§ 77-80, 31 May 2005; *Koku v. Turkey*, no. 27305/95, §§ 103-109, 31 May 2005; *Toğcu*, cited above, §§ 77-87; *Süheyla Aydın v. Turkey*, no. 25660/94, §§ 137-143, 24 May 2005; *Akkum and Others*, cited above, §§ 185-190).

161. In the present case the Court observes that the Government have not advanced any explanation for their failure to submit the flight log to the Court. Having regard to the importance of a respondent Government's co-operation in Convention proceedings, the Court finds that the Government fell short of their obligations under Article 38 of the Convention to furnish all necessary facilities to the Court in its task of establishing the facts. It also considers that, pursuant to Rule 44C § 1 of the Rules of Court, it can draw such inferences from the Government's failure as it deems appropriate (see also *Timurtaş*, cited above, §§ 66-67).

C. The Court's assessment of the facts

162. The Court reiterates that Article 2 of the Convention, which safeguards the right to life and sets out the circumstances in which deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. Together with Article 3 of the Convention, 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 of the Convention be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-147, Series A no. 324).

163. The text of Article 2 of the Convention, read as a whole, demonstrates that it covers not only intentional killings but also 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*, §§ 148-149).

164. Furthermore, a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. 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 their 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 by, *inter alia*, agents of the State (*ibid*. § 161).

165. The Court will examine the applicants' complaints in light of the principles set out in the preceding paragraphs.

1. The attack on the applicants' villages

166. The Court observes that the Government, which maintained that the villages had been attacked by members of the PKK, did not rely on any evidence in support of their submissions other than referring to the statements taken from a number of villagers in 2008 and the decisions of non-jurisdiction taken by the civilian prosecutors in 1994 and 1996 and the military prosecutor in 2006. The Government's submissions are not supported by any other evidence such as bullets, spent bullet cases or mortar shells which might have been fired from weapons by members of the PKK. In this connection, the Court considers that the Government's references to the report of the post-mortem examination of Zahide Kıraç, which confirms that her body did not bear any injuries caused by firearms, lend more support to the applicants' version of the events than the one suggested by the Government.

167. The Court notes that the statements relied on by the Government had been given by persons most of whom had not witnessed the events because they had not been residents in either of the applicants' two villages and they had been elsewhere at the time of the events (see paragraphs 66, 67 and 76 above). The evidence given by them to the authorities was thus no more than hearsay evidence. Moreover, most of those villagers were

questioned by members of the military and not by an independent judicial authority, such as a prosecutor.

168. Thus, the Court cannot see why persons who had not witnessed the events were questioned and their statements subsequently heavily relied on by the Government, and it considers that the manner in which these persons were selected gives rise to certain misgivings as to the exact motives of the investigating authorities (see, *mutatis mutandis*, *Menteş and Others v. Turkey*, 28 November 1997, § 91, *Reports* 1997-VIII). In almost identical statements drawn up by military officials, these persons were all quoted as having stated that PKK members had attacked the villages and that the allegation that the Air Force had carried out the attack was an attempt to taint the good name of the State, orchestrated by the lawyer representing the applicants (see paragraphs 66-68 and 75 above).

169. Noting that these villagers' opinion about the legal assistance provided to the applicants by their legal representative is also shared by the respondent Government (see paragraphs 20 and 148 above), the Court concurs with the applicants' misgivings about the tone of the Government's observations (see paragraph 146 above), and considers that it was disingenuous for the Government to devote, in a case of such exceptional seriousness as the present one, a substantial part of their already scant submissions to this issue.

170. The Court notes that only one of the persons whose testimony is relied on by the Government claimed to have been in one of the two villages on the date of the incident. Mehmet Belçi alleged that PKK members had come to the village and fired rocket-propelled grenades and opened fire on the villagers. In the opinion of this person, civilian wings of the PKK had been fabricating the allegations of an aerial bombardment (see paragraph 68 above). The Court observes that this person was employed by the State as a village guard. It thus considers that his independence and impartiality is questionable and that his statement cannot be considered decisive. Indeed, he is the only person who was allegedly in one of the two villages on the day of the incident and who claimed that PKK members, rather than planes, had carried out the bombing.

171. In contrast to the above-mentioned persons on whose testimonies the Government appear to have built their entire argument, the villagers who lived in the two villages, including the applicants, told the authorities on many occasions that the villages had been bombed by aircraft (see, *inter alia*, paragraphs 46-50, 52, 69 and 77, above). Their testimonies were taken seriously by a number of prosecutors who concluded that the military were responsible for the bombing and sent the file to the military prosecutor (see paragraphs 43 and 53 above).

172. As set out above, in support of their submissions the Government also referred to the conclusions reached by the Şırnak prosecutor in 1994 and 1996 that the villages had been attacked by members of the PKK (see

paragraphs 31 and 36 above). It is to be noted, however, that contrary to what was suggested by the Government, there are no documents in the file to show on what exact information that prosecutor based his conclusions. At the time those decisions were taken, there was not a single document in the investigation files containing even a suggestion that the PKK were involved in the attacks. Indeed, other than the Şırnak prosecutor's gnomic conclusions, his decisions do not contain any reasons to substantiate such an involvement in the attacks.

173. In so far as it may be argued that the decision taken by the military prosecutor in 2006 lends support to the scenario suggested by the Government, the Court observes that that prosecutor's decision was based on two grounds. The first one is the information provided to the military prosecutor by the Air Force that no flying activity had taken place over the applicants' villages (see paragraph 55 above). The second ground is the applicants' inability to identify the type and make of the airplanes which bombed their villages (see paragraph 52 above). Although the military prosecutor's investigation will be examined below when the effectiveness or otherwise of the investigation into the applicants' allegations is assessed (see paragraphs 186-198 below), the Court deems it important to comment already at this stage on these two grounds relied on by that prosecutor when he closed his investigation.

174. Having regard to the information contained in the flight log, the Court observes that the first ground relied on by the military prosecutor was based on incorrect information given to him by the Air Force and, as such, cannot be entertained by the Court as tenable. As for the second ground, the Court, like the applicants (see paragraph 59 above), also considers that it clearly lacks any logic as it assumes that either foreign military aircraft had entered Turkish airspace, bombed the two villages, and then left without being detected, or that there existed a civilian aircraft capable of dropping large bombs, causing such large-scale destruction and flying undetected. Moreover, it does not appear to have occurred to the military prosecutor that villagers with no specialist knowledge of military aviation would naturally be unable to identify the type or make of fighter jets which flew over their villages at speeds of hundreds of miles per hour.

175. In light of the above, the Court cannot attach any importance to the conclusions reached by the military prosecutor and does not consider that they support the Government's submissions.

176. In contrast to the conclusions reached by the Şırnak prosecutor in 1994 and 1996, and subsequently by the military prosecutor in 2006, the Diyarbakır chief prosecutor and subsequently another prosecutor in Şırnak found it established, respectively on 19 October 2004 and on 15 June 2005, and on the basis of the documents in their investigation files and eyewitness testimonies, that the villages had been bombed by aircraft and not by members of the PKK (see paragraphs 43 and 53 above). At the time notice

of the application was given to them, the Court invited the Government to elaborate on the question whether the conclusions reached by the two prosecutors in 2004 and 2005 supported the applicants' allegations, but the Government did not comply with that request.

177. Further support for the applicants' allegation of aerial bombardment is to be found in the letter drawn up by the commander of the Şırnak gendarmerie on 14 November 1997. In this letter the commander informed the Şırnak governor's office, in response to the latter's request for information about one of the applicants' deceased relatives, that according to the gendarmerie's investigation, Mr Oygur and all members of his family had been killed "during the aerial bombing of Kuşkonar village" and buried there (see paragraph 38 above).

178. Without clarifying its relevance, the Government referred in their observations to a request made by the Diyarbakır prosecutor to the Dicle University Hospital and to the information provided by that hospital in response, according to which none of the deceased or injured persons had been treated at that hospital between March and June 1994 (see paragraphs 81-82 above). If the Government's reference to that exchange of correspondence is to be understood as a suggestion that no one had been injured or killed in the applicants' two villages on 26 March 1994, the Court would draw attention to the fact that the injured persons had been treated at the Cizre, Şırnak and Mardin hospitals and the Diyarbakır State Hospital and not at the Dicle University Hospital (see paragraphs 24-25 and 30 above).

179. The Court has examined the flight log and its covering letter which are summarised above (see paragraphs 83-84) and which were withheld from the Court by the Government in breach of their obligations under Article 38 of the Convention (see paragraph 161 above). It surmises, firstly from the Government's failure to submit the flight log to the Court, and secondly from their submission - made in spite of the fact that they must have been aware of the existence of the flight log - that the villages had been bombed by the PKK, that the flight log must be a crucial piece of evidence with a direct bearing on the applicants' allegations. Indeed the Government, which bear the burden of showing to the Court why the documents withheld by them cannot serve to corroborate the allegations made by the applicants (see paragraph 158 above and the cases referred to therein), have not attempted to do so and have not challenged the evidentiary value of the flight log.

180. The Court notes that the village of Koçağılı is located exactly ten nautical miles to the west of the city of Şırnak. The village of Kuşkonar is located almost ten nautical miles to the north-west of Şırnak. In his letter accompanying the flight log the Civil Aviation Directorate confirmed that the flying missions had been carried out to "locations ten nautical miles to the west and north-west of Şırnak".

181. Moreover, the entries in the logbook which show the aircrafts' arrival times over their targets as 11.00 a.m. and 11.20 a.m. provide further support for the applicants' account, maintained throughout the domestic proceedings, of their villages having been bombed late in the morning (see paragraphs 9 and 50 above).

182. Finally, the bombs that the fighter jets were equipped with, namely 227 kilogram MK82s and 454 kilogram MK83s (see paragraph 84 above), further corroborate the applicants' allegations in that some of them as well as some of the eyewitnesses stated that the bombs dropped on their villages had been as large as a table (see paragraphs 10 and 50 above).

183. In light of the foregoing the Court finds that the flight log lends support to the applicants' allegation that their two villages were bombed by military aircraft belonging to the Turkish Air Force, killing thirty-three of the applicants' relatives and injuring three of the applicants.

184. The Court observes that the Government have limited their submissions to denying that the applicants' villages were bombed by aircraft, and have not sought to argue that the killings were justified under Article 2 § 2 of the Convention. In any event the Court considers that an indiscriminate aerial bombardment of civilians and their villages cannot be acceptable in a democratic society (see *Isayeva v. Russia*, no. 57950/00, § 191, 24 February 2005), and cannot be reconcilable with any of the grounds regulating the use of force which are set out in Article 2 § 2 of the Convention or, indeed, with the customary rules of international humanitarian law or any of the international treaties regulating the use of force in armed conflicts (see paragraph 89 above).

185. In the light of the foregoing the Court finds that there has been a violation of Article 2 of the Convention in its substantive aspect on account of the killing of the applicants' thirty-three relatives, namely, Mahmut Benzer, Ali Benzer, Nurettin Benzer, Ömer Benzer, Abdullah Benzer, Çiçek Benzer, Ayşe Benzer, Ömer Kalkan, İbrahim Borak, Ferciye Altan, Hacı Altan, Kerem Altan, Mahmut Oygur, Ayşi Oygur, Adil Oygur, Elmas Yıldırım, Şerife Yıldırım, Melike Yıldırım, Şaban Yıldırım, İrfan Yıldırım, Hunaf Yıldırım, Huhi Kaçar, Şemsihan Kaçar, Ahmet Kaçar, Şiri Kaçar, Şehriban Kaçar, Hazal Kıraç, Zahide Kıraç, Fatma Bedir, Ayşe Bengi, Huri Bengi, Fatma Bengi and Asiye Erdin, as well as on account of the injuries sustained by the applicants Cafer Kaçar, Mehmet Aykaç and Fatma Coşkun.

2. The investigation into the attacks

186. A reading of the investigation file, which was summarised above (see paragraphs 21-87 above), alone reveals that the investigation into the bombing was wholly inadequate and that many important steps were omitted. In the absence of any meaningful steps the effectiveness of which can be assessed from the standpoint of the procedural obligation under Article 2 of the Convention, the Court's examination of the applicants'

allegations concerning the adequacy of the investigation will be limited to highlighting the failures in the investigation.

187. The Court observes that the local prosecutor was informed about the aerial bombardment of the two villages on 26 March 1994 that same day. He was also present at the post-mortem examination of three-year-old Zahide Kıraç which, in fact, was to be the only post-mortem examination in the entire investigation into the killings of thirty-eight persons (see paragraph 25 above). Subsequently the same prosecutor instructed the gendarmerie to investigate Zahide Kıraç's killing and the allegations of aerial bombardment published by a newspaper (see paragraphs 25-26 above).

188. Other than that, the prosecutors did not carry out any investigative steps in the immediate aftermath of the bombing during which it would have been most likely that crucial evidence could be secured. For example, no prosecutor made any attempt to visit the villages with a view to verifying the allegations of an aerial bombardment having been carried out. As observed above, no autopsies were carried out on the bodies of the deceased persons, with the exception of that of Zahide Kıraç. Moreover, the investigating authorities did not seek to question any members of the military; in fact, not a single member of the military has been questioned by the prosecutors in the course of the entire investigation.

189. Without taking any other steps or obtaining any other information, the Şırnak prosecutor decided on 7 April 1994 that the villages had been bombed by members of the PKK (see paragraph 31 above) and sent the file to the Diyarbakır prosecutor. Subsequent to that decision, gendarme officials – and not an investigating authority independent from the military, such as a prosecutor – questioned a number of villagers (see paragraph 33 and 35 above). Not a single investigative step appears to have been taken between the taking of the last statement from those villagers on 8 June 1994, and the adoption of the decision of non-jurisdiction by the Diyarbakır prosecutor and the sending of the file back to the Şırnak prosecutor almost two years later on 13 March 1996 (see paragraphs 33 and 34 above).

190. Once again, and despite the lack of any information in his file to support his conclusion, the Şırnak prosecutor decided on 7 August 1996 that PKK members had carried out the attacks, issued another decision on lack of jurisdiction, and sent the file back to the Diyarbakır prosecutor (see paragraph 36 above).

191. The prosecutors' aforementioned conclusions, and the express instructions issued by some of them to the gendarmerie and the police to investigate the "killings by members of the PKK" (see paragraphs 32, 37 and 40 above), demonstrate that none of them had an open mind as to what might have happened in the applicants' two villages. As was generally the case in the south-east of Turkey at the time of the events, they hastily blamed the killings on the PKK without any basis.

192. The Court observes that the investigation carried out by the military prosecutor also left a lot to be desired, and was limited to asking the military officials whether any flight had been conducted over the applicants' villages (see paragraph 54 above). As pointed out above, the military prosecutor did not ask to examine the flight logs personally, and left it to the behest of the military who, in fact, were the suspects in his investigation.

193. In this connection the Court also notes the military prosecutor's and subsequently the military court's reluctance to hand over to the applicants' legal representative their investigation file, and their decision to give to that lawyer only the documents "which would not jeopardise the investigation" (see paragraph 57 above). The Court considers that the military investigating authorities' attempts to withhold the investigation documents from the applicants is on its own sufficiently serious as to amount to a breach of the obligation to carry out an effective investigation. To this end, the Court is of the opinion that, had the applicants been in possession of the military prosecutor's investigation file which presumably contained the flight log, they could have increased the prospect of success of the search for the perpetrators. The Court also considers that the withholding of the flight log from the applicants prevented any meaningful scrutiny of the investigation by the public (see *Anık and Others v. Turkey*, no. 63758/00, §§ 73-78, 5 June 2007).

194. After the investigation file had been transferred to his office by the military prosecutor, the Diyarbakır prosecutor expressed his surprise, in his letter of 5 December 2007, at the fact that the investigation file in a case concerning the deaths of scores of people contained only one post-mortem report and no documents to indicate that the villages had ever been visited. Despite his repeated requests, his colleague in Şırnak refused to cooperate with him and had to be urged on a number of occasions to take even the simplest of investigative steps (see paragraph 65 above).

195. When a prosecutor finally gave thought to visiting the applicants' two villages some fourteen years after the bombing, he was told by the military that they would not be able to provide security during any such visit to protect the prosecutor (see paragraph 78 above). When the soldiers visited the villages themselves, they were unable to recover any evidence because of the passage of time (see paragraph 73 above).

196. Most crucially, no investigation seems to have been conducted into the flight log which constituted a key element in the possible identification and prosecution of those responsible.

197. Having regard to the abundance of information and evidence showing that the applicants' villages were bombed by the Air Force, the Court cannot but conclude that the inadequacy of the investigation was the result of the national investigating authorities' unwillingness officially to establish the truth and punish those responsible.

198. In light of the foregoing the Court dismisses the Government's preliminary objection based on non-exhaustion of domestic remedies (see paragraph 109 above), and concludes that there has been a violation of Article 2 of the Convention in its procedural aspect on account of the failure to carry out an effective investigation.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

199. The applicants further complained that the terror, fear and panic created by the bombardment had amounted to inhuman treatment within the meaning of Article 3 of the Convention which provides as follows:

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

200. The applicants submitted that no national authority had come to their villages to offer help after the bombing. Those killed in Kuşkonar village had had to be buried without a religious funeral and in an atmosphere of terror and fear, and the injured had had to be taken to hospitals by the applicants themselves with the help of inhabitants from neighbouring villages. After the incident they had had to abandon their villages and flee, and no national authority had given them any assistance or investigated the bombing.

201. The Government contested the applicants' arguments, and repeated their submission that there was no proof to show that the incident had been perpetrated by the military. The applicants' villages had been subjected to attacks by the PKK in the past. In order to invoke the responsibility of the State, the applicants had been forced to make the allegations that their villages had been bombed by aircraft.

202. 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).

203. 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 of the Convention (see, for example, *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III; *Kalashnikov v. Russia*, no. 47095/99, § 101, ECHR 2002-VI).

204. The Court reiterates that whilst a family member of a "disappeared person" may in certain circumstances claim to be a victim of treatment contrary to Article 3 of the Convention on account of their suffering (see *Kurt v. Turkey*, 25 May 1998, §§ 130-134, *Reports* 1998-III; see also, most recently, *Er and Others v. Turkey*, no. 23016/04, § 96, 31 July 2012), the same principle would not usually apply to situations where a person is killed by an agent of the State (see, for example, *Tanlı v. Turkey*, no. 26129/95, § 159, ECHR 2001-III (extracts)). In the latter cases where a family member of a person killed by an agent of the State complains under Article 3 of the Convention about his or her suffering on account of the killing, the Court would limit its findings to Article 2 of the Convention (see *Akhmadov and Others v. Russia*, no. 21586/02, § 125, 14 November 2008).

205. However, in the present case, the applicants do not complain under Article 3 of the Convention about their suffering stemming from the deaths of their relatives, but about the circumstances surrounding the bombing and its aftermath.

206. In a number of cases the Court has been called to examine from the standpoint of Article 3 of the Convention certain similar actions carried out by members of the Turkish security forces in the course of their military operations in the south-east of Turkey. For example, in its judgment in the case of *Akkum and Others* (cited above, § 259), the Court examined the mutilation of the body of a person after his death in an area where a major military operation had been conducted. It concluded that the anguish caused to the father of the deceased whose body had been mutilated amounted to degrading treatment (see also *Akpınar and Altun v. Turkey*, no. 56760/00, §§ 86-87, 27 February 2007).

207. Deliberate destruction of the homes and possessions of villagers by members of the security forces has also been the subject matter of examination by the Court in a number of its judgments. It held in those cases that the burning of the applicants' homes had deprived them and their families of shelter and support and obliged them to leave the place where they and their friends had been living, and found that the destruction of the applicants' homes and possessions, as well as the anguish and distress suffered by members of their families, must have caused them suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3 of the Convention (see, *inter alia*, *Selçuk and Asker v. Turkey*, 24 April 1998, §§ 77-79, *Reports* 1998-II; *Ayder and Others v. Turkey*, no. 23656/94, §109-111, 8 January 2004; *Hasan İlhan v. Turkey*, no. 22494/93, § 108, 9 November 2004).

208. The Court considers that the applicants' complaints under Article 3 of the Convention in the present case must be examined against the background described in the preceding paragraphs.

209. It is not disputed between the parties that the applicants witnessed the violent deaths of their children, spouses, parents, siblings and other

close relatives. In the immediate aftermath of their relatives' deaths, the applicants personally had to collect what was left of the bodies and take them to the nearby villages for burial, and, in the case of the applicants from Kuşkonar village, had to place the remains of the bodies in plastic bags and bury them in a mass grave (see paragraph 13 above). The three applicants who had been critically injured in the attack (see paragraph 137 above) had to be taken to hospital on tractors by villagers from the neighbouring villages.

210. The Court considers that parallels can be drawn between the applicants' ordeals in the present case and the anguish suffered by the father in the above-mentioned case of *Akkum and Others* who had been presented by soldiers with the mutilated body of his son. Furthermore, witnessing the killing of their close relatives or the immediate aftermath, coupled with the authorities' wholly inadequate and inefficient response in the aftermath of the events, must have caused the applicants suffering attaining the threshold of inhuman and degrading treatment proscribed by Article 3 of the Convention (see *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, § 169, 26 July 2007; *Esmukhambetov and Others v. Russia*, no. 23445/03, § 190, 29 March 2011).

211. In addition to the apparent lack of the slightest concern for human life on the part of the pilots who bombed the villages and their superiors who ordered the bombings and then tried to cover up their act by refusing to hand over the flight logs, the Court is further struck by the national authorities' failure to offer even the minimum humanitarian assistance to the applicants in the aftermath of the bombing.

212. Moreover, the Court considers that parallels can be drawn between the destruction by individual members of the security forces of houses and belongings in respect of which the Court has found breaches of Article 3 of the Convention in its above-mentioned judgments, and the wanton destruction of the applicants' houses and belongings by bombings carried out by fighter jets. In this connection the Court considers that whether or not the purpose behind the bombing of the villages was to subject the applicants to inhuman treatment or to cause moral suffering is irrelevant; as set out above, the absence of any such purpose cannot conclusively rule out a violation of Article 3 of the Convention (see *Peers*, cited above, § 74; see also, *a contrario*, *Esmukhambetov and Others*, cited above, § 188). In any event, it is not disputed that the bombing of the applicants' homes deprived them and their families of shelter and support and obliged them to leave the place where they and their friends had been living. The Court considers the anguish and distress caused by that destruction to be sufficiently severe as to be categorised as inhuman treatment within the meaning of Article 3 of the Convention.

213. In the light of the foregoing the Court finds that there has been a violation of Article 3 of the Convention in respect of the suffering of the

applicants Hatice Benzer, Ahmet Benzer, Mehmet Benzer, Zeynep Kalkan, Durmaz Kalkan, Basri Kalkan, Asker Kalkan, Mehmet Kalkan, Abdullah Borak, Sabahattin Borak, Şahin Altan, Abdulhadi Oygur, Abdullah Oygur, Taybet Oygur, Halime Başkurt, Hatice Başkurt, Ahmet Yıldırım, Selim Yıldırım, Felek Yıldırım, Haci Kaçar, Kasım Kiraç, İbrahim Kiraç, Hasan Bedir, Hamit Kaçar, Sadık Kaçar, Osman Kaçar, Halil Kaçar, Ata Kaçar, Yusuf Bengi, Abdurrahman Bengi, Ahmet Bengi, İsmail Bengi, Reşit Bengi, Mustafa Bengi, Mahmut Erdin, Cafer Kaçar, Mehmet Aykaç and Fatma Coşkun.

IV. ARTICLE 46 OF THE CONVENTION

214. Relevant parts of Article 46 of the Convention provide as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
>
> ..."

215. The Court points out that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore, to the fullest extent possible, the situation existing before the breach. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to make all feasible reparation for its consequences in such a way as to restore, as far as possible, the situation existing before the breach (*Assanidze v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II).

216. As the Court's judgments are essentially declaratory, the respondent State remains free, subject to the supervision of the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (*Scozzari*

and Giunta v. Italy [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

217. However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46 of the Convention, the Court will seek to indicate the type of measure that might be taken in order to put an end to a situation it has found to exist (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V; *Burdov v. Russia (no. 2)*, no. 33509/04, § 141, ECHR 2009). In a number of exceptional cases, where the very nature of the violation found was such as to leave no real choice between measures capable of remedying it, the Court has indicated the necessary measures in its judgments (see, *inter alia*, *Abuyeva and Others*, cited above, § 237, and the cases cited therein; *Nihayet Arıcı and Others v. Turkey*, nos. 24604/04 and 16855/05, §§ 173-176, 23 October 2012).

218. In the present case the Court has found that thirty-three of the applicants' relatives were killed and three of the applicants injured as a result of the aerial bombardment of their villages, in breach of Articles 2 and 3 of the Convention (see paragraphs 185 and 213 above). It also found that no effective investigation had been conducted into the bombing (see paragraph 198 above).

219. Having regard to the fact that the investigation file is still open at the national level, and having further regard to the documents in its possession, the Court considers it inevitable that new investigatory steps should be taken under the supervision of the Committee of Ministers. In particular, the steps to be taken by the national authorities in order to prevent impunity should include the carrying out of an effective criminal investigation, with the help of the flight log (see paragraphs 83-84 above), with a view to identifying and punishing those responsible for the bombing of the applicants' two villages.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

220. 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. Damage

221. The applicants claimed the following sums in respect of pecuniary and non-pecuniary damage:

Name of applicant	**Name of deceased relative(s) and their relationship to the applicant**	**Claim in respect of non-pecuniary damage (in euros)**	**Total claim in respect of pecuniary damage (in euros)**	**Total**
Hatice Benzer	Mahmut Benzer (son) Ali Benzer (son) Nurettin Benzer (grandchild) Ömer Benzer (grandchild) Abdullah Benzer (grandchild) Çiçek Benzer (grandchild) Fatma Benzer (daughter-in-law) Ayşe Benzer (daughter-in-law)	50,000 50,000 10,000 10,000 10,000 5,000 5,000	15,000	155,000
Ahmet Benzer	Mahmut Benzer (brother) Ali Benzer (brother)	30,000 30,000		60,000
Mehmet Benzer	For his own injury Mahmut Benzer (brother) Ali Benzer (brother)	30,000 30,000		60,000
Zeynep Kalkan	Ömer Kalkan (husband)	30,000	15,000	45,000
Durmaz Kalkan	Ömer Kalkan (father)	15,000		15,000
Basri Kalkan	Ömer Kalkan (father)	15,000		15,000
Asker Kalkan	Ömer Kalkan (father)	15,000		15,000
Mehmet Kalkan	Ömer Kalkan (father)	15,000		15,000
Abdullah Borak	İbrahim Borak (father)	40,000	15,000	55,000
Sabahattin Borak	İbrahim Borak (father)	40,000	15,000	55,000
Şahin Altan	Ferciye Altan (wife) Hacı Altan (son) Kerem Altan (son)	80,000 80,000 80,000		240,000
Aldulhadi Oygur	Mahmut Oygur (father) Ayşi Oygur (mother) Adil Oygur (brother)	20,000 20,000 10,000	15,000	65,000
Abdullah Oygur	Mahmut Oygur (father) Ayşi Oygur (mother) Adil Oygur (brother)	20,000 20,000 10,000	15,000	65,000
Taybet Oygur	Mahmut Oygur (father) Ayşi Oygur (mother) Adil Oygur (brother)	20,000 20,000 10,000	15,000	65,000
Halime Başkurt	Mahmut Oygur (father) Ayşi Oygur (mother) Adil Oygur (brother)	20,000 20,000 10,000	15,000	65,000

Hatice Başkurt	Mahmut Oygur (father) Ayşi Oygur (mother) Adil Oygur (brother)	20,000 20,000 10,000	15,000	65,000
Ahmet Yıldırım	Elmas Yıldırım (wife)	80,000		80,000
Selim Yıldırım	Şerife Yıldırım (wife) Melike Yıldırım (daughter) Şaban Yıldırım (son) İrfan Yıldırım (son) Hunaf Yıldırım (daughter)	50,000 50,000 50,000 50,000 50,000		250,000
Felek Yıldırım	Şerife Yıldırım (mother) Melike Yıldırım (sister) Şaban Yıldırım (brother) İrfan Yıldırım (brother) Hunaf Yıldırım (sister)	30,000 30,000 30,000 30,000 10,000		130,000
Haci Kaçar	Huhi Kaçar (mother) Şemsihan Kaçar (sister) Ahmet Kaçar (son)	30,000 10,000 50,000		90,000
Kasım Kiraç	Hazal Kıraç (wife) Zahide Kıraç (daughter)	50,000 70,000		120,000
İbrahim Kiraç	Hazal Kıraç (mother) Zahide Kıraç (sister)	30,000 10,000		40,000
Hasan Bedir	Fatma Bedir (daughter)	80,000		80,000
Hamit Kaçar	Şiri Kaçar (father) Şehriban Kaçar (daughter)	20,000 80,000		100,000
Sadık Kaçar	Şiri Kaçar (father) Huhi Kaçar (wife) Şemsihan Kaçar (daughter)	20,000 30,000 30,000	15,000	95,000
Osman Kaçar	Şiri Kaçar (father)	30,000	15,000	45,000
Halil Kaçar	Şiri Kaçar (father)	30,000	15,000	45,000
Ata Kaçar	Huhi Kaçar (mother) Şemsihan Kaçar (sister)	30,000 25,000		55,000
Yusuf Bengi	Ayşe Bengi (wife) Zülfe Bengi (partner; she was injured in the incident but later died of natural causes)	25,000 5,000		30,000
Abdurrahman Bengi	Ayşe Bengi (mother)	15,000		15,000
Ahmet Bengi	Ayşe Bengi (mother) Huri Bengi (daughter)	15,000		15,000
İsmail Bengi	Ayşe Bengi (mother)	15,000		15,000
Reşit Bengi	Ayşe Bengi (mother)	15,000		15,000
Mustafa Bengi	Ayşe Bengi (mother) Fatma Bengi (daughter)	15,000 80,000		185,000

	Bahar Bengi (daughter; injured) Adile Bengi (wife; injured)	80,000 10,000		
Mahmut Erdin	Asye Erdin (daughter) Lali Erdin (wife; injured)	80,000 25,000		105,000
Cafer Kaçar	For his own injury	25,000		25,000
Mehmet Aykaç	For his own injury	25,000		25,000
Fatma Coşkun	For her own injury	25,000		25,000

222. The Government considered that there was no causal link between the applicants' claims and the violations alleged by them. They were also of the opinion that the applicants had failed to substantiate their claims with documentary evidence.

223. Having regard to the absence of documentary evidence or other information substantiating the applicants' claims for pecuniary damages, the Court rejects these claims. On the other hand, having regard to its conclusions under Articles 2 and 3 of the Convention and the sums claimed by the applicants, it awards the following applicants the following sums in respect of non-pecuniary damage:

224. 135,000 euros (EUR) to the first applicant Hatice Benzer for the killing of her two sons Mahmut and Ali Benzer and her four grandchildren Nurettin, Ömer, Abdullah and Çiçek Benzer.

225. EUR 60,000 to the second applicant Ahmet Benzer for the killing of his two brothers, namely Mahmut and Ali Benzer.

226. EUR 30,000 to the third applicant Mehmet Benzer for the killing of his brother Mahmut Benzer.

227. EUR 30,000 to the fourth applicant Zeynep Kalkan, and EUR 60,000 jointly to the fifth to eighth applicants, namely Durmaz Kalkan, Basri Kalkan, Asker Kalkan and Mehmet Kalkan, for the killing of Ömer Kalkan, husband of the fourth applicant's and father of the other four applicants.

228. EUR 80,000 jointly to the ninth and tenth applicants, namely Abdullah Borak and Sabahattin Borak, for the killing of their father İbrahim Borak.

229. EUR 240,000 to the eleventh applicant Şahin Altan for the killing of his wife Ferciye Altan and his two children Hacı Altan and Kerem Altan.

230. EUR 250,000 jointly to the twelfth to sixteenth applicants, namely Abdulhadi Oygur, Abdullah Oygur, Taybet Oygur, Halime Başkurt and Hatice Başkurt, for the killing of their father Mahmut Oygur, mother Ayşi Oygur and brother Adil Oygur.

231. EUR 80,000 to the seventeenth applicant Ahmet Yıldırım for the killing of his wife Elmas Yıldırım.

232. EUR 250,000 to the eighteenth applicant Selim Yıldırım and EUR 130,000 to the nineteenth applicant Felek Yıldırım for the killing of, respectively, their wife and mother Şerife Yıldırım and their children and

siblings Melike Yıldırım, Şaban Yıldırım, İrfan Yıldırım and Hunaf Yıldırım.

233. EUR 90,000 to the twentieth applicant Haci Kaçar for the killing of his son Ahmet Kaçar, mother Huhi Kaçar and sister Şemsihan Kaçar.

234. EUR 120,000 to the twenty-first applicant Kasım Kiraç and EUR 40,000 to the twenty-second applicant İbrahim Kiraç for the killing of, respectively, their wife and mother Hazal Kıraç, and daughter and sister Zahide Kıraç.

235. EUR 80,000 to the twenty-third applicant Hasan Bedir for the killing of his daughter Fatma Bedir.

236. EUR 100,000 to the twenty-fourth applicant Hamit Kaçar for the killing of his daughter Şehriban Kaçar and his father Şiri Kaçar.

237. EUR 80,000 to the twenty-fifth applicant Sadık Kaçar for the killing of his wife Huhi Kaçar, daughter Şemsihan Kaçar and father Şiri Kaçar.

238. EUR 60,000 jointly to the twenty-sixth and twenty-seventh applicants Osman Kaçar and Halil Kaçar for the killing of their father Şiri Kaçar.

239. EUR 55,000 to the twenty-eighth applicant Ata Kaçar for the killing of his mother Huhi Kaçar and sister Şemsihan Kaçar.

240. EUR 25,000 to the twenty-ninth applicant Yusuf Bengi for the killing of his wife Ayşe Bengi.

241. EUR 15,000 to the thirtieth applicant Abdurrahman Bengi for the killing of his mother Ayşe Bengi.

242. EUR 15,000 to the thirty-first applicant Ahmet Bengi for the killing of his daughter Huri Bengi and his mother Ayşe Bengi.

243. EUR 30,000 jointly to the thirty-second and thirty-third applicants İsmail Bengi and Reşit Bengi for the killing of their mother Ayşe Bengi.

244. EUR 95,000 to the thirty-fourth applicant Mustafa Bengi for the killing of his daughter Fatma Bengi and his mother Ayşe Bengi.

245. EUR 80,000 to the thirty-eighth applicant Mahmut Erdin for the killing of his daughter Asiye Erdin.

246. EUR 25,000 to the thirty-ninth applicant Cafer Kaçar for his injury.

247. EUR 25,000 to the fortieth applicant Mehmet Aykaç for his injury.

248. EUR 25,000 to the forty-first applicant Fatma Coşkun for her injury.

B. Costs and expenses

249. The applicants also claimed EUR 3,600 for the costs and expenses incurred before the domestic courts and EUR 2,950 for those incurred before the Court. EUR 850 of the total sum of EUR 6,550 was claimed in respect of various expenses incurred by their legal representative, such as travel, stationery and postal expenses for which the applicants did not

submit to the Court any documentary evidence. The remaining EUR 5,700 were claimed in respect of the fees of their legal representative in respect of which the applicants sent to the Court a breakdown of the hours spent by the legal representative in representing them before the national authorities and before the Court.

250. The Government considered that the sum claimed by the applicants was not supported with documentary evidence.

251. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicants jointly the sum of EUR 5,700 covering costs under all heads.

C. Default interest

252. The Court considers it appropriate that the default interest rate 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. *Joins to the merits* the Government's preliminary objection of non-exhaustion of domestic remedies, and *dismisses* it;

2. *Declares* the complaints made by the applicants Hatice Benzer, Ahmet Benzer, Mehmet Benzer, Zeynep Kalkan, Durmaz Kalkan, Basri Kalkan, Asker Kalkan, Mehmet Kalkan, Abdullah Borak, Sabahattin Borak, Şahin Altan, Abdulhadi Oygur, Abdullah Oygur, Taybet Oygur, Halime Başkurt, Hatice Başkurt, Ahmet Yıldırım, Selim Yıldırım, Felek Yıldırım, Haci Kaçar, Kasım Kiraç, İbrahim Kiraç, Hasan Bedir, Hamit Kaçar, Sadık Kaçar, Osman Kaçar, Halil Kaçar, Ata Kaçar, Yusuf Bengi, Abdurrahman Bengi, Ahmet Bengi, İsmail Bengi, Reşit Bengi, Mustafa Bengi and Mahmut Erdin, concerning the killing of their relatives Mahmut Benzer, Ali Benzer, Nurettin Benzer, Ömer Benzer, Abdullah Benzer, Çiçek Benzer, Ayşe Benzer, Ömer Kalkan, İbrahim Borak, Ferciye Altan, Hacı Altan, Kerem Altan, Mahmut Oygur, Ayşi Oygur, Adil Oygur, Elmas Yıldırım, Şerife Yıldırım, Melike Yıldırım, Şaban Yıldırım, İrfan Yıldırım, Hunaf Yıldırım, Huhi Kaçar, Şemsihan Kaçar, Ahmet Kaçar, Şiri Kaçar, Şehriban Kaçar, Hazal Kıraç, Zahide Kıraç, Fatma Bedir, Ayşe Bengi, Huri Bengi, Fatma Bengi and Asiye Erdin; and the complaints made by the applicants Cafer Kaçar, Mehmet

Aykaç and Fatma Coşkun concerning their own injuries; as well as the complaints by the above-mentioned applicants under Article 3 of the Convention, admissible and the remaining of the application inadmissible;

3. *Holds* that there has been a failure by the respondent Government to comply with Article 38 of the Convention;

4. *Holds* that there has been a violation of Article 2 of the Convention in its substantive aspect on account of the killing of Mahmut Benzer, Ali Benzer, Nurettin Benzer, Ömer Benzer, Abdullah Benzer, Çiçek Benzer, Ayşe Benzer, Ömer Kalkan, İbrahim Borak, Ferciye Altan, Hacı Altan, Kerem Altan, Mahmut Oygur, Ayşi Oygur, Adil Oygur, Elmas Yıldırım, Şerife Yıldırım, Melike Yıldırım, Şaban Yıldırım, İrfan Yıldırım, Hunaf Yıldırım, Huhi Kaçar, Şemsihan Kaçar, Ahmet Kaçar, Şiri Kaçar, Şehriban Kaçar, Hazal Kıraç, Zahide Kıraç, Fatma Bedir, Ayşe Bengi, Huri Bengi, Fatma Bengi and Asiye Erdin; as well as on account of the injuries caused to the applicants Cafer Kaçar, Mehmet Aykaç and Fatma Coşkun;

5. *Holds* that there has been a violation of Article 2 of the Convention in its procedural aspect on account of the failure to carry out an effective investigation into the bombing of the applicants' two villages;

6. *Holds* that there has been a violation of Article 3 of the Convention on account of the circumstances surrounding the bombing of the applicants' villages and the lack of any assistance provided to the applicants by the national authorities;

7. *Holds*

(a) that the respondent State is to pay the following applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage:

(i) EUR 135,000 (one hundred and thirty five thousand euros) to the first applicant Hatice Benzer;

(ii) EUR 60,000 (sixty thousand euros) to the second applicant Ahmet Benzer;

(iii) EUR 30,000 (thirty thousand euros) to the third applicant Mehmet Benzer;

(iv) EUR 30,000 (thirty thousand euros) to the fourth applicant Zeynep Kalkan;

(v) EUR 60,000 (sixty thousand euros) jointly to the fifth to eighth applicants, namely Durmaz Kalkan, Basri Kalkan, Asker Kalkan and Mehmet Kalkan;
(vi) EUR 80,000 (eighty thousand euros) jointly to the ninth and tenth applicants, namely Abdullah Borak and Sabahattin Borak;
(vii) EUR 240,000 (two hundred and forty thousand euros) to the eleventh applicant Şahin Altan;
(viii) EUR 250,000 (two hundred and fifty thousand euros) jointly to the twelfth to sixteenth applicants, namely Abdulhadi Oygur, Abdullah Oygur, Taybet Oygur, Halime Başkurt and Hatice Başkurt;
(ix) EUR 80,000 (eighty thousand euros) to the seventeenth applicant Ahmet Yıldırım;
(x) EUR 250,000 (two hundred and fifty thousand euros) to the eighteenth applicant Selim Yıldırım;
(xi) EUR 130,000 (one hundred and thirty thousand euros) to the nineteenth applicant Felek Yıldırım;
(xii) EUR 90,000 (ninety thousand euros) to the twentieth applicant Haci Kaçar;
(xiii) EUR 120,000 (one hundred and twenty thousand euros) to the twenty-first applicant Kasim Kıraç;
(xiv) EUR 40,000 (forty thousand euros) to the twenty-second applicant İbrahim Kiraç;
(xv) EUR 80,000 (eighty thousand euros) to the twenty-third applicant Hasan Bedir;
(xvi) EUR 100,000 (one hundred thousand euros) to the twenty-fourth applicant Hamit Kaçar;
(xvii) EUR 80,000 (eighty thousand euros) to the twenty-fifth applicant Sadık Kaçar;
(xviii) EUR 60,000 (sixty thousand euros) jointly to the twenty-sixth and twenty-seventh applicants Osman Kaçar and Halil Kaçar;
(xix) EUR 55,000 (fifty-five thousand euros) to the twenty-eighth applicant Ata Kaçar;
(xx) EUR 25,000 (twenty-five thousand euros) to the twenty-ninth applicant Yusuf Bengi;
(xxi) EUR 15,000 (fifteen thousand euros) to the thirtieth applicant Abdurrahman Bengi;
(xxii) EUR 15,000 (fifteen thousand euros) to the thirty-first applicant Ahmet Bengi;
(xxiii) EUR 30,000 (thirty thousand euros) jointly to the thirty-second and thirty-third applicants İsmail Bengi and Reşit Bengi;
(xxiv) EUR 95,000 (ninety-five thousand euros) to the thirty-fourth applicant Mustafa Bengi;

(xxv) EUR 80,000 (eighty thousand euros) to the thirty-eighth applicant Mahmut Erdin;
(xxvi) EUR 25,000 (twenty-five thousand euros) to the thirty-ninth applicant Cafer Kaçar;
(xxvii) EUR 25,000 (twenty-five thousand euros) to the fortieth applicant Mehmet Aykaç; and
(xxviii) EUR 25,000 (twenty-five thousand euros) to the forty-first applicant Fatma Coşkun.

(b) that the respondent State is to pay the applicants jointly, within the same three months, EUR 5,700 (five thousand seven hundred euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
(c) 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;

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

Done in English, and notified in writing on 12 November 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President

ANNEX

List of applicants

	Name	**Date of birth**	**Place of Residence**
1	Ms Hatice Benzer	1942	Mersin
2	Mr Ahmet Benzer	1953	Mersin
3	Mr Mehmet Benzer	1963	Mersin
4	Ms Zeynep Kalkan	1948	Siirt
5	Mr Durmaz Kalkan	1984	Siirt
6	Mr Basri Kalkan	1978	Siirt
7	Mr Asker Kalkan	1980	Siirt
8	Mr Mehmet Kalkan	1982	Siirt
9	Mr Abdullah Borak	1971	Siirt
10	Mr Sabahattin Borak	1982	Siirt
11	Mr Şahin Altan	1946	Siirt

12	Mr Abdulhadi Oygur	1972	Mersin
13	Mr Abdullah Oygur	1965	Mersin
14	Ms Taybet Oygur	1974	Mersin
15	Ms Halime Başkurt Oygur	1955	Mersin
16	Ms Hatice Başkurt Oygur	1981	Mersin
17	Mr Ahmet Yıldırım	1945	Siirt
18	Mr Selim Yıldırım	1954	Siirt
19	Ms Felek Yıldırım	1982	Siirt
20	Mr Haci Kaçar	1964	Şırnak
21	Mr Kasım Kiraç	1945	Şırnak
22	Mr İbrahim Kiraç	1976	Şırnak

23	Mr Hasan Bedir	1960	Şırnak
24	Mr Hamit Kaçar	1959	Şırnak
25	Mr Sadık Kaçar	1945	Şırnak
26	Mr Osman Kaçar	1955	Şırnak
27	Mr Halil Kaçar	1946	Şırnak
28	Mr Ata Kaçar	1965	Şırnak
29	Mr Yusuf Bengi	1907	Şırnak
30	Mr Abdurrahman Bengi	1968	Şırnak
31	Mr Ahmet Bengi	1964	Şırnak
32	Mr İsmail Bengi	1965	Şırnak
33	Mr Reşit Bengi	1963	Şırnak
34	Mr Mustafa Bengi	1960	Şırnak

35	Mr Adil Bengi	1966	Şırnak
36	Mr Mahmut Bayı	1971	Şırnak
37	Mr Süleyman Bayı	1979	Şırnak
38	Mr Mahmut Erdin	1941	Şırnak
39	Mr Cafer Kaçar	1970	Şırnak
40	Mr Meymet Aykaç	1954	Şırnak
41	Ms Fatma Coşkun	1968	Şırnak