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WHY DELISTING THE KURDISTAN WORKERS' PARTY (PKK) AS A TERRORIST ORGANISATION NEEDS TO BE CONSIDERED BY THE RELEVANT AUTHORITIES IN AUSTRALIA

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ACRONYMS

AKP	Justice and Development Party (Turkey)
HDP	Peoples' Democratic Party (Turkey)
HTS	Hayat Tahrir al-Sham (coalition led by Jabhat Fatah al-Sham)
ISIS	Islamic State of Iraq and Syria
KDP/PDK	Kurdistan Democratic Party (Iraq)
KRG	Kurdistan Regional Government (Iraq)
KRI	Kurdistan Region of Iraq
MHP	Nationalist Movement Party (Turkey)
MIT	National Intelligence Agency (Turkey)
PJCIS	Parliamentary Joint Committee on Intelligence and Security
PKK	Kurdistan Workers Party (Turkey)
PUK	Patriotic Union of Kurdistan (Iraq)
SDF	Syrian Democratic Forces
TAK	Kurdistan Freedom Falcons (Turkey)
UN	United Nations
YPG	Peoples' Protection Units (Syria)
YPJ	Women's Protection Units (Syria)

ABOUT KURDISH LOBBY AUSTRALIA

Kurdish Lobby Australia (KLA) is a not-for-profit incorporated association that was registered in NSW in 2015. It does not receive funding from any government, non-government or commercial entity. Its members are volunteer, non-partisan Australians from Kurdish and non-Kurdish backgrounds who wish to advocate for peace, prosperity and democracy in Turkey, Syria, Iraq and Iran, with a particular focus on the Kurdistan regions.

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WHY THE LISTING OF THE KURDISTAN WORKERS' PARTY (PKK) AS A TERRORIST ORGANISATION NEEDS TO BE RECONSIDERED BY THE RELEVANT AUTHORITIES IN AUSTRALIA

By Dr. Gina Lennox
5 February 2020

SUMMARY

Kurdish Lobby Australia submits that the Australian government's proscription of the Kurdistan Workers' Party (PKK) as a terrorist organisation does not take into account the UN Charter that gives people the right for political and cultural self-determination. We suggest the definition/s and criteria used as a basis of the decision are insufficient, especially as terrorism is a contested concept prone to misuse, for instance, by the Turkish state. Given the Turkish state's propensity for propaganda and false flag attacks, KLA recommends that evidence used to assess PKK's actions needs to be gathered from independent sources and rigorously tested. KLA argues there is ample verifiable evidence that the Turkish state commits ongoing physical and cultural genocide, including military offensives involving war crimes and crimes against humanity, on Kurds in Turkey and Syria, and, to a less extent, Kurds in Iraq. KLA further submits that PKK has not systematically targeted civilians in Turkey, and regularly calls for negotiations, which before 2013 and after 2015 the Turkish state has rejected. Nor has PKK targeted Australians, Australia's allies or Australian interests. In contrast, Turkey's aggression in Turkey, Syria, Iraq, the eastern Mediterranean, Libya and elsewhere, its support for militant Islamist extremists and intention to set up a Islamist belt in northern Syria directly threatens Australians, Australia's allies and interests. Turkey's actions put military and humanitarian workers in danger, and are providing opportunities for ISIS and other Islamist extremists to regroup, fanning war in which Australians and our allies are involved. We further argue that classifying PKK as a terrorist organisation makes Australia unwittingly complicit to the Turkish state's ongoing military, political and cultural aggression towards Kurds, in that the proscription of PKK provides a level of legitimacy for Turkey's actions. Turkey's treatment of and misinformation about Kurds, and the armed conflict between the state and PKK, highlight an urgent need for an international justice system that caters for non-state actors, and the necessity for independent investigations into PKK and Turkish state activities. To assess whether an organisation should be proscribed as terrorist, KLA urges the Australian government to adopt a more comprehensive definition of terrorism that distinguishes between contexts, targets and intentions; a more rigorous testing of evidence that is collected from independent sources and address all criteria in making a final assessment. Based on the evidence we present in this submission alone, we propose that the government delist PKK to send a strong message that it is time for the Turkish state to embark on political negotiations with Kurds in Turkey and Syria. This would help all people, but especially minorities, and contribute to regional stabilisation.

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BASIC PRINCIPLES

1. People have the right to oppose tyranny. A lack of legal means for non-state actors increases the likelihood that people will support an armed struggle.

In the social contract between a state and its people a state is obliged to protect its citizens in exchange for its citizens submitting to the laws and institutions of the state. When a state fails to protect the right to life, livelihood, and language, and instead denies that a people exist, and/or kills and imprisons them and destroys their homes, communities and culture because of their race, ethnicity, culture, religion and/or political views, then the social contract is broken. When there are no legal means to seek justice some people will more likely support an armed struggle.

For nearly a century the Turkish state has been the harshest of all four nation states where there is a large Kurdish minority. This is because a series of broken promises and lies contributed to the founding of modern Turkey. Before the signing of the Treaty of Lausanne in 1923, Mustafa Kemal Ataturk promised Kurds autonomy in a new nation state (Shi, 2018). At the conference of Lausanne Ataturk claimed that Turks and Kurds would be equal partners in governing the new state, and that only religious minorities needed constitutional protection. Once established, the state demanded a uniform nationalist identity that denied Kurds existed. Kurds were called 'mountain Turks' and were imprisoned, tortured or killed for speaking Kurdish, or for saying or writing 'Kurd' or 'Kurdistan'. Incidents of Kurds being imprisoned or killed for speaking Kurdish, claiming to be Kurdish or saying 'Kurdistan' continue to this day.

In the 1960s, the state gave all Kurdish named towns and villages Turkish names. For a child to be registered s/he required a Turkish name. Southeast Turkey remained militarised, poverty stricken and underdeveloped. In the late 1980s Kurdish villages remained without tap water, electricity or telephones. Following the 1980 military coup many thousands of Kurds were imprisoned and tortured, sometimes to death, for being members of banned organisations. In these extreme conditions the Kurdistan Workers' Party (PKK) was founded in 1978, and officially launched an armed struggle in 1984, as their forefathers had done in 1925, 1927 – 1930 and 1937 – 1938. PKK's armed struggle is the longest in Turkey's 97-year history.

The state responded militarily. Even when President Recep Tayyip Erdogan's Justice and Development Party (AKP) began addressing Kurdish rights between 2009 and 2015, by 2013, 40,000 people had been arrested for having links to a 'terrorist organisation'. In 2013, at the start of the first bilateral ceasefire between the AKP and PKK, the PKK withdrew from Turkey in the hope that AKP would keep its promises of political concessions (see Gurcan, 2015). Instead, the village guard system was strengthened (Gurcan, 2015) pitting Kurd against Kurd (Belge, 2016), and 130 new military posts were constructed in areas PKK vacated inside Turkey (Sentas, 2018), while new military posts were established in northern Iraq. Today, pro-Kurdish organisations continue to be banned and Kurdish populations continue to be subjected to sieges, military operations and displacement.

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Back in the 1990s the state dismissed and imprisoned democratically elected Kurdish parliamentarians like Leyla Zana. History is being repeated. In the June 2015 national elections the Kurdish-led multi-ethnic People's Democratic Party (HDP) won 80 parliamentary seats to become the first Kurdish-led party to pass the 10 percent threshold for a party to be represented in parliament. The success of non-AKP parties meant that AKP failed to win a parliamentary majority. One month later, Erdogan declared an end to the bilateral ceasefire with PKK. A state of emergency was declared. Curfews and sieges on Kurdish-majority urban neighbourhoods and villages were accompanied by air and ground offensives in southeast Turkey and northern Iraq. In response, Kurdish youth barricaded neighbourhoods and declared self-rule. Their stance was militarily squashed at much cost to life and infrastructure. In this state of war, Erdogan ordered a re-run of the elections. Against all odds, in November 2015, 60 HDP candidates were elected to parliament.

In 2016, the Turkish parliament voted in favour of dropping a parliamentarian's immunity from prosecution. The state began dismissing and imprisoning elected Kurdish parliamentarians, mayors and municipal councillors. In January 2020, ten former HDP parliamentarians remained in prison, including former HDP co-chairs, Selahattin Demirtaş, who has twice run for president, and Figen Yüksekdağ. Despite several Turkish courts and the European Court of Human Rights ordering Demirtaş's release, Demirtaş remains in prison awaiting trial for terrorist charges related to speeches he made before 2016.

Between September 2016 and February 2018, 100 elected pro-Kurdish mayors in 94 municipal councils were dismissed and replaced with state-appointed trustees. Ninety-three dismissed mayors spent time in prison. In March 2019, 40 to 50 remained in prison. After the municipal elections at the end of March 2019, of the 97 HDP candidates who were elected mayor, 14 were refused office, each being replaced by the runner up candidate from AKP or MHP. Of those who were allowed to take office, 31 had been removed by 20 December 2019, the majority for opposing Turkey's invasion of northeast Syria on 9 October 2019. Government-appointed trustees replaced them. At the end of November 2019, 29 of the recently elected HDP mayors had been detained, and 16 were in prison. Another 43 elected HDP members of municipal councils had been denied their positions, 37 had been removed from their positions, and 51 had been either detained or imprisoned. Between 2015 and 2019, 16,500 HDP members were detained, 5,000 were charged and 3,500 imprisoned. Arrests are on going. All are assumed to have links with PKK. This is because the current Islamist and ultra-nationalist AKP-MHP coalition government accuses all pro-Kurdish parties of being political wings of PKK. In making these accusations, successive Turkish governments have relegated Kurdish issues to being 'separatist', a threat to national security and terrorist in nature.

Turkey's political leaders, media and many citizens repeatedly claim that Turkey has no problem with Kurds, only PKK. In contrast, the Permanent Peoples Tribunal, OHCHR, the UN, Amnesty International, Human Rights Watch and others have

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documented and concluded that the Turkish state has committed systematic war crimes and crimes against humanity, including ethnic cleaning against Kurds in southeast Turkey, Turkey-occupied Afrin and northeast Syria.

Given the state's political, cultural and military persecution of Kurds and others, people are forced to rely on the justice system. In Turkey, investigations can be cursory with 'the European Court [of Human Rights having] found repeated violations of Articles 2, 3, and 13 for lack of investigation and lack of remedy in Turkey … point[ing] to a pattern of ineffective investigation.' For instance, the state does not allow independent investigators, journalists or lawyers into militarised zones in southeast Turkey or into Turkey-occupied Syria. People are detained without charge because they belong to an ethnicity, organisation or profession, or have a political view. Grotesque tortures or other coercions elicit 'confessions'. Witnesses can be anonymous, coerced or defamed. Defence lawyers can be denied access to the prosecution's evidence and/or be severely limited in the time they have with their clients. In taking on a terrorist case, defence lawyers have received threats, or have been denied the ability to continue practicing law, and/or have ended up in prison. By contrast, it is common for those suspected of being ISIS to not be detained or be released before appearing before a court.

In the absence of domestic justice, Kurds look to international institutions. Despite the UN Charter giving people rights for self-determination in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the International Covenant on Economic, Social and Cultural Rights, the international justice system fails non-state actors. Turkey and Syria are not signatories to the Rome Statute of the International Criminal Court, i.e. this court cannot hear cases involving Turkey. Turkey and Syria are signatories to the International Court of Justice (ICJ), but the ICJ only hears cases brought by nation states. Although Kurds could find a nation state willing to take on Turkey, the needs of a state take precedence. The only other recourse, after citizens have exhausted all legal avenues inside Turkey, is the European Court of Human Rights (ECHR).

In 2018, 7,100 cases against the Turkish state were filed in the ECHR. The ECHR rejected many cases for not having exhausted all domestic avenues, such as the case of Orhan Tunc and Omer Elci, who were among 130 Kurds trapped in basements and killed by the Turkish military in Cizre between December 2015 and February 2016. By the end of 2018, another 33 cases related to Cizre were pending. Turkey settled 146 cases out of court. In 2018, the ECHR ruled on three cases: the detentions of two journalists, Selahattin Demirtaş and Constitutional Court judge, Alparslan Altan. In each case the court ruled the detention was unlawful and the individual/s should be released. Despite Turkey having ratified the European Convention on Human Rights in 1954, and having accepted the compulsory jurisdiction of the ECHR in 1990, courts in Turkey rejected all three rulings. Having done so with impunity, Turkey continues to reject ECHR rulings, as it did for imprisoned philanthropist Osman Kavala in January 2020.

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Other options for justice require a non-state actor to have a state actor present their case to the UN Security Council, which then has to unanimously support the proposed action. Possible actions include establishing an International Criminal Tribunal, as what occurred after the Rwandan genocide, or enacting the 2005 'Responsibility to Protect' principle, or having the UN Security Council pass a special resolution.

The fight for justice is made more difficult when the non-state actor is designated a terrorist organisation. Presumably in full knowledge that the Turkish state denies Kurdish citizens their basic rights to express their Kurdishness, and that PKK changed its tactics, strategies and goals in the mid-1990s, the Australian government listed the PKK as a terrorist organisation in 2005. As Sentas (2018) notes: 'the legal designation of the PKK as a terrorist … was integral to the criminalization of the Kurds' … 'constituting them as a priori terrorists'.

This designation of PKK discounts people's right to life, and to political and cultural expression, and the failures of national and international justice systems to cater for non-state actors. The lack of legal avenues for non-state actors denies a world history that has been shaped by struggles against tyranny as much as struggles for power. It will be shown that this designation justifies the Turkish state's perpetuation of violence, and its rejection of political solutions. It is therefore reasonable to assume that the militarisation of Kurdish issues and the Turkish state's blatant attacks on democratic processes and relentless propaganda serve to fuel Kurds' desire for equality before the law and some form of political representation and, for an unknown portion, support for an armed struggle. It is unlikely the struggle will end unless Kurds achieve these basic principles.

2. Terrorism is a contested and misused concept.

The PKK is classified as a terrorist organisation by national and international regulatory frameworks that lack coherency, especially as 'terrorism' is a contested concept that lacks a universally accepted definition or set of criteria. This leads to political and arbitrary decisions with one person's terrorist being another person's freedom fighter, prime examples being Nelson Mandela and the African National Congress (ANC).

The Turkish state defines terrorism as a form of violence that is politically motivated. The definition includes verbal 'crimes' such as criticising the president, a branch of the state, or a state action, or claiming an identity that seeks to 'divide' or otherwise damage the state. A state prosecutor can then accuse the offending individual of being a member of a terrorist organisation without having to prove his or her membership, or without that person having committed any other 'crime'. The net is cast so wide that it includes any individual or organisation that makes a statement in support of human rights or peace in or outside Turkey. Not only does the Turkish state justify its operations against Kurds in Turkey, Syria and Iraq in this way, it is also trying to convince countries and NATO to similarly classify Syrian Kurdish groups like the People's Protection Units (YPG), Women's Protection Units (YPJ), the Syrian

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Democratic Forces (SDF), the Democratic Union Party (PYD), and the Autonomous Administration of North and East Syria as terrorist organisations. Turkey claims these groups are not just linked to PKK, they *are* PKK, but provides no evidence that there is a systematic exchange of commands, personnel, weapons, actions or ultimate goal.[1]

Turkey has multiple reasons in pressuring countries to proscribe such entities. Fundamentally, Turkey fears the increase in military and administrative status of Syrian Kurds and their allies, and the possibility that they could establish an autonomous region in a federal Syria. This would fuel the aspirations of Kurds in Turkey. This is a reasonable assumption, except that KLA would argue that whatever happens in Syria, Turkey cannot realise its full potential until it embraces its ethnic, cultural and religious diversity.

Having these Syrian Kurdish-led organisations classified as PKK (related) terrorists would cement PKK's terrorist classification by fulfilling a criterion held by a number of UN treaties, resolutions and countries that a group have a transnational element. For example, in Australia, one of six criteria used to proscribe an organisation is that the organisation has 'links to other terror groups'. Although this criterion is not enshrined in Australian law, and has yet to be applied to PKK, Turkey's attempt to incorporate this transnational element enhances the potential for this criterion to be used in the future. In addition, Turkey's classification of these groups as terrorists justifies Turkey's offensives and occupation of three regions in northern Syria; its use of ill disciplined mercenaries to commit war crimes, including ethnic cleansing, in these regions; its pressure on the US-led coalition to cut links with Syrian Kurdish political and military groups; its rejection of these groups participating in political negotiations, and its prevention of humanitarian aid entering regions administered by these groups.

In Australia, the criteria theoretically used to proscribe an organisation are:

- Engagement in 'terrorism' i.e. an act that causes or intends to cause harm to advance a cause;
- Links to other terrorist groups;
- Links to Australia;
- Threats to Australian interests;
- Proscription by the UN or like-minded countries; and
- (Un)willingness to engage in peace/mediation processes.

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[1] What these Syrian Kurdish-led organisations share with PKK is a respect for Abdullah Öcalan, the intention to uphold women's rights, minority rights, ecological sustainability and democratic federalism, and the wish to resolve tensions with Turkey through internationally supported negotiations. These features do not make them terrorists or PKK, given these Syrian entities pursue different alliances, strategies and goals when compared to the PKK, including a strong alliance with the US and the aspiration for autonomy within a federal Syria.

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The Australian Security and Intelligence Organisation (ASIO) and Australian law have incorporated the notion of political intent but make no reference to context (i.e. the reasons for the armed struggle), the structure of the organisation, or the nature of the violence or targets. Hence, the Australian government does not appear to distinguish between:

- A group that strictly follows a chain of command and international rules of engagement in an armed struggle, and ill-disciplined mercenaries, despite international rulings (e.g. in Belgium courts) that armed conflict falls outside laws pertaining to terrorism;
- A group that systematically targets non-combatants from one that systematically targets (state) arms of oppression, unlike other jurisdictions that identify a terrorist act as one targeting non-combatants with the intent to shock and terrify in order to achieve a strategic outcome. This lack of distinction has a huge bearing on what is acceptable evidence; and
- A group that wants to liberate people and one that uses violence to oppress, as does ISIS.

Additional considerations suggested by Emerson (2006) are that the assessment should justify why the organisation should be singled out for criminalisation in ways that go beyond criminal law, and should take into account the proscription's likely impact on Australia and Australians.

PROCESS

3. In Australia, the process of proscribing PKK and other organisations is subject to a non-transparent political decision made by the Attorney General. Another mechanism may be more rigorous, credible and transparent.

When supplying reasons and evidence to relist PKK as a terrorist organisation, ASIO does not address every criterion, and does not supply verifiable evidence for criteria it does address. For instance, there is no evidence that PKK targets Australians or Australian national security or other interests (Lynch, McGarrity & Williams, 2009) or that PKK has links to other groups Australia classifies as terrorists. Meanwhile, there is abundant evidence that PKK regularly calls for international mediation and negotiations. It is the Turkish state that rejects serious multi-stakeholder negotiations, just as it is the Turkish state that provides 'evidence' that PKK has broken its numerous unilateral ceasefires, and one bilateral ceasefire. Nor is the PKK classified a terrorist organisation by significant others, including the UN, Israel, Norway, Switzerland and Russia. This means that the Attorney General's decision and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) review process is not based on all six criteria, which KLA argues are already inadequate. The situation is particularly problematic given that the pre-emptive nature of the proscription impacts the grounds considered reasonable for an organisation to be proscribed, and there is no rigorous testing of evidence that is embedded in international understandings of what defines a terrorist organisation.

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For these and other reasons, some argue that the executive proscription process threatens the rule of law, as the process devolves too much discretion to the government of the day without adequate checks and balances. This contributes to decisions being arbitrary and politically expedient. Hence, political considerations behind the US proscribing PKK include that the PKK is in an armed conflict with a NATO ally and the US needs access to Turkey's military bases. Europe has the additional need for Turkey to stem the flow of refugees. Australia's political considerations are less acute but include Australia wanting access to Gallipoli for annual ANZAC commemorations, and needing Turkey's co-operation in tracing Australians who travel through Turkey to join ISIS.

When it comes to relisting or delisting an organisation a fundamental flaw in Division 102 is that it does not specify what criteria the Attorney General must take into account. Nor does it specify the process or time frame. Even if a court was to declare a designation invalid, it remains within the discretion of the Attorney General to override the court's decision, given any judicial review is limited by restricted access to crucial information and ambiguities inherent in the definition of terrorism. For these and other reasons, no organisation has yet been de-listed as a terrorist organisation in Australia (Lynch et al., 2009).

This reticence to de-list an organisation also occurs in the US. For example, the main political parties in the Kurdistan Region of Iraq (KDP and PUK) remained on the US list of terrorist organisations until 2014, well after Iraqi Kurds proved staunch allies of the US-led coalition in 1990-1991 and 2003, and after these parties established an internationally recognised semi-autonomous regional government in 2005.[2]

The decision to relist PKK in review after review has yet to be tested in an Australian court of law, despite its impact on generally accepted liberties such as freedom of association and expression. To limit or eliminate the political and arbitrary discretionary powers of the Attorney General, one option would be to have a judicial review model, (which is also an alternative avenue to proscription) but this model has inherent problems of secrecy, confidentiality and difficulties in validating information independent of the source organisation (Lynch et al., 2009). Lynch, et al. (2009) argue a better option is to have an expanded and clearer set of criteria for proscription and review, that an organisation must be tested against all criteria, and that greater transparency and procedural fairness be achieved by establishing an independent body of retired judges and people experienced in security legislation, investigation and policing to collect information and present their findings and advice to the Attorney General and the public.

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[2] In these cases, Australia did not follow the US and proscribe the Kurdistan Democratic Party (KDP) or the Patriotic Union of Kurdistan (PUK) as terrorist organisations.

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EVIDENCE USED TO PROSCRIBE PKK AS A TERRORIST ORGANISATION

4. In an armed conflict, innocent civilians are harmed, but the scale of crimes against civilians committed by the Turkish state far exceeds any harm to civilians caused by PKK, and unlike PKK's actions, the state's actions are intentional and systematic.

In an armed conflict no party is innocent of harming civilians, but there is a difference between systematic intention and a single act, collateral damage, a crime of passion and retribution. An oft-quoted figure is that 40,000 people have been killed in 36 years of armed conflict between PKK and the Turkish state. However, the Turkish state, many Turks and international media repeatedly make the false claim that PKK is responsible for killing those 40,000 people. The figure has remained static since 2010, after which the armed conflict has killed at least another 5,000 people, while the breakdown of who killed whom is hotly disputed, especially in regards to civilians. Meanwhile, the Turkish state and PKK tend to minimise their own casualties, and maximise the casualties of the 'other'. For an indication of the statistics, Table 1 sets out 'Deaths in the Armed Conflict between the Turkish State and PKK'.

Although the review process is meant to examine an organisation's actions since the last review, 'evidence' is often repeated from one Statement of Reasons to the next. Hence, this submission provides a brief history of the armed conflict.

After announcing an armed struggle in 1984, PKK's focus was on killing soldiers, gendarmerie, police, village guards and 'spies', with most actions occurring in rural areas. Kurdish village guards were controversial targets. The state established the village guard system in 1985 on the pretext of paying and arming people to protect Kurdish villages from PKK 'bandits', despite Turkey having the second largest army in NATO and well-resourced police and a gendarmerie. In two years the village guard system expanded from 800 guards in three provinces to 40,000 guards in nine provinces. By 1993 the system covered 22 provinces (Belge, 2016). By 2003 – 2005 there were 60,000 paid village guards and 25,000 voluntary guards (Gurcan, 2015).

Village guards were tasked to identify villagers that had PKK sympathies. Those identified were arrested, charged and imprisoned, or worse. Hence, PKK viewed village guards as traitors to their people and the cause, and therefore legitimate targets (Gurcan, 2015), especially as village guards often abused their positions of power. However, PKK was held responsible for not only killing village guards but also massacring their wives and children. PKK sympathisers insist that in most cases security forces or village guards would dress up as PKK and wreak havoc in order to tarnish the reputation of PKK. In fact, false flag attacks by Turkish state security forces, village guards and non-state and state-supported criminal gangs were common (as outlined in Appendix A), while there were and still are so many radical leftist, ultra-nationalist, Islamist and Kurdish groups in Turkey, that without independent investigations, in many cases there is no way of knowing the truth about what actually happened and who was responsible.

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Turkish Security deaths	PKK/SDF deaths	Civilian Deaths	Number displaced	Source
South East Turkey 1984 – 1996				
			2,685 to 3,400 villages destroyed; 2 to 4.5* million displaced.	Human Rights Watch *Gambetti & Jongerden, 2001; Belge, 2016
South East Turkey 1984 – 2013				
6,764	26,774	5,478		Unal, 2016
South East Turkey 1989 – 1999				
		3,438* killed by Turkish Security plus 20,000 civilians killed by state sponsored or unidentified individuals.		*Belge, 2016; Demirhan, 2007
		1,205* by PKK		
South East Turkey July 2015 – November 2019				
1,220	2,806	490 + 223 w. unknown affiliation killed by the State	350,000 civilians	Crisis Group
	10,000+ 'neutralised'			Turkish state
Afrin, Syria January 20 – March 20, 2018				
71 soldiers & 318 – 2,541 proxies	1,500 – 4,458	289 – 621+	200,000	KLA
North East Syria October 9 – November 16, 2019				
11 Turkish soldiers; 327 Turkey's Proxy SNA	435	251* 490#	300,000 reduced to 100,000	Amnesty Reliefweb Syrian Observer *Rojava Information Centre # WKI 10 Dec.
North Iraq 2018				
???	500	20+	350 villages	KLA
North Iraq May 27 – October 4, 2019				
9	57 255 by July			Crisis Group

Table 1: Deaths in the Armed Conflict between the Turkish State and PKK in Turkey and Iraq, and between the Turkish state and the SDF in Syria.

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Available statistics shown in Table 1 indicates PKK has not systematically targeted civilians. If independent sources are correct, of the 5,000 civilians killed in 36 years of armed conflict, around 1,205 civilians were killed by PKK. Turkish National Police data claims PKK killed more civilians, but their statistics include 1,658 village guards (Gurcan, 2015). Claims that PKK killed many thousands of civilians are also incongruent with PKK's early emphasis on Maoist principles and its rapid gain in recruits and civilian support, PKK militants numbering 15,000 by 1996.

In contrast to the lack of independent evidence that PKK systematically terrorised Kurdish villagers, there is a plethora of evidence that the Turkish state systematically terrorised its Kurdish population with the implementation of emergency rule in southeast Turkey, the formation of the village guard system, and in ethnically cleansing Kurdish regions by evacuating and destroying up to 4,500 Kurdish villages and neighbourhoods. In fact, in the 1990s, the implementation of emergency rule was more common in provinces that had larger Kurdish populations, as opposed to provinces where PKK attacks were more frequent (Belge, 2016). Emergency rule suspended the rule of law, where punishment is linked to individual guilt, and allowed mass arrests and torture, and the evacuation and destruction of villages, as well as 20,000 extrajudicial killings and disappearances. This figure is in addition to the oft-cited 40,000 killed in the armed conflict. Thus:

> … By early 1992 scores of people were being gunned down in the first of hundreds of street killings by small groups of assassins in the cities in the southeast. In most cases the killers were never identified but there is evidence that the security forces were orchestrating the killings by arming and paying the assassins. Most of the victims were … people who worked for left wing or Kurdish nationalist publications, and people who had previously been detained or imprisoned on suspicion of membership of the PKK or other illegal Kurdish groups. (Norwegian Refugee Council/Global IDP Project, 2004, p. 39)

Extrajudicial killings targeted Kurdish lawyers, journalists, human rights activists, protesters and villagers. As emphasised by Human Rights Watch:

> "The killings committed by state perpetrators in the early 1990s should not be treated as individual cases of murder. Instead, accompanying a pattern of enforced disappearances, they were part of a planned and systematic policy and therefore must be counted as crimes against humanity, a crime of universal jurisdiction, which is now also a crime under Turkish law." … "The judgments against Turkey by the European Court of Human Rights provide the strongest grounds for arguing that the statute of limitations should not be counted as applicable for cases of murders allegedly perpetrated by state actors in the southeast and eastern provinces of Turkey in the early 1990s."

In the mayhem, the village guard system served to divide tribes, clans, villages, and families into those willing to become village guards or have village guards in their villages, and those who refused. Some village guards became notorious for abusing

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their power, whether this was to 'resolve' family, land, livestock or other disputes, rob, kidnap or kill. Between 1992 and 2009 village guards were responsible for 52 village burnings, 183 murders, and 562 incidents of torture (Belge, 2016). An extended family could join the guard system and fuel a local conflict, leading to a massacre, and another party (possibly PKK) could administer a form of summary 'justice'. Gurcan (2015) notes that some village guards conducted false flag attacks dressed up as PKK, and from 1991, that many were being used by security forces in military offensives against PKK. Despite the government assuming a village that refused the system was pro-PKK, resulting in the state destroying these villages, Belge (2016) found that in emergency zones, villages with a higher number of village guards experienced more coercion and displacement than those with no guards. This suggests that the actions of village guards and/or PKK's response to them were causing the displacement.

Between 1984 and 2004 the state evacuated, burned and/or bombed between 2,685 and 4,500 Kurdish villages causing the displacement of up to 4.5 million Kurds. The state claims that during this time 'only' 362,000 to 560,000 people were forced out of their villages and assigned to a city in western Turkey. Even where there was little or no PKK violence, where civilians voted for a Kurdish political candidate their villages were more likely to be evacuated and destroyed (Belge, 2016). The following is an account of what was happening in the 1990s:

> Helicopters, armored vehicles, troops and village guards surrounded village after village. They burned stored produce, agricultural equipment, crops, orchards, forests and livestock. They set fire to houses, often giving the inhabitants no opportunity to retrieve their possessions. During the course of such operations, security forces frequently abused and humiliated villagers, stole their property and cash, and ill-treated or tortured them before herding them onto the roads and away from their former homes. There were many 'disappearances' and extrajudicial executions. By 1994, more than 3,000 villages had been virtually wiped from the map and more than a quarter of a million peasants had been made homeless. (Extract from a Human Rights Watch report, 30 October, 2002, featured in Norwegian Refugee Council/Global IDP Project, 2004, p. 38)

The state did not provide alternative housing for evacuated civilians. Most displaced people would erect a slum on the edge of town that had no access to water, electricity or sewerage. Sixty percent of displaced women could not speak Turkish. Most suffered discrimination in getting employment. The state's right-of-return options were resettlement programs in new towns surrounded by tight security far from the villagers' agricultural lands. Those who were allowed to settle in the new towns 'were forced to sign a document stating that they fled their homes due to PKK terrorism and not to government actions, and attest that they would not seek Government assistance to return' … to their original village (Norwegian Refugee Council/Global IDP Project, 2004, p. 130). This prompts the question: how many of these signed declarations have wrongfully incriminated the PKK?

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Returning to one's original village was not allowed by the state-appointed governor, or was made dangerous by the state having laid land mines around the village, or the local gendarmerie would declare the village a prohibited zone, or village guards could block the return having taken over the evacuated houses. If a family was fortunate to navigate the hurdles and be given the right of return, they then needed permission to leave the village for any reason, even to pasture their livestock. It was common for people working for an organisation that helped displaced villagers to be arrested for 'aiding and abetting an illegal organisation', i.e. PKK.

Fast forward to 2015, when the Turkish state again militarised Kurds' historic homelands, and began bombing and burning more than 330 urban neighbourhoods and villages and displacing at least 350,000 Kurds in eastern Turkey, and from 2016, invading and Turkifying Kurd-majority regions in northern Syria, displacing another 500,000 Kurds in Afrin, other parts of northern Aleppo, Tel Abyad (Kurdish: Gire Spi) and Ras al-Ain (Kurdish: Sari Kani), all in the name of fighting PKK.

5. The 2018 Statement of Reasons for relisting the PKK as a terrorist organisation repeats unsubstantiated information, and lacks accurate, verifiable evidence for the criteria it does address. This is unacceptable given that the Turkish state regularly holds PKK responsible for acts committed by other parties.

In Australia, the US and most other countries, evidence used to justify the proscription of the PKK as a terrorist organisation has not been tested in a court of law. The standard of evidence reflects this. Even the PJCIS has noted that the evidence does not necessarily substantiate a claim against PKK, despite ASIO claiming it fact checks the claims with open source and/or classified intelligence and only passes on information that has been corroborated. The PJCIS must take ASIO's word on this, given the PJCIS does not have the resources to conduct its own rigorous review (Lynch et al., 2009).

This lack of scrutiny leads to unsubstantiated information being included in a review and even repeated from one review to the next, indicating past allegations can influence a current relisting. For instance, the 2018 Statement of Reasons repeated an unsubstantiated claim from the 2015 Statement of Reasons that PKK kidnapped 300 children between December 2013 and May 2014. Another questionable claim in the 2018 Statement of Reasons is that the Kurdistan Freedom Falcons/Hawks (TAK) is another name for PKK. This claim is highly controversial. A commonly held understanding is that people left the PKK and formed TAK in 2004 accusing the PKK of becoming too moderate in relinquishing armed struggle and striving for regional autonomy inside Turkey instead of an independent Kurdistan. In 2006, TAK conducted three attacks in western cities of Turkey, and in 2015 and 2016 claimed responsibility for acts that killed civilians and security forces. PKK vehemently denied responsibility for any of these acts and TAK claims it does not follow PKK orders. Independent investigations are needed into TAK's reasons for not claiming responsibility for a terrorist act since March 2016. Whatever the relationship, verifiable evidence,

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preferably from non-Turkish sources, is required for the Australian government to categorically claim PKK and TAK are the same organisation, or that PKK orders or supports actions claimed by TAK.

Such allegations could be examples of ASIO attributing credibility to unverifiable information passed on by MIT (Turkey's National Intelligence Organisation). Even if ASIO's resources were unlimited, it would be difficult to check the veracity of many claims because Turkish authorities do not permit entry into the heavily militarised zones of eastern Turkey and Turkey-occupied Syria, and have not permitted any independent investigation into the atrocities for which the Turkish authorities claim PKK is responsible. One would think that if the state were certain that PKK was responsible, it would be keen for this to be confirmed by independent investigations.

There are good reasons for Turkey to reject international scrutiny. Turkish state security forces, including the air force, soldiers, police, gendarmerie, the notorious JİTEM (*Jandarma İstihbarat ve Terörle Mücadele* or Gendarmerie Intelligence and Counter-Terrorism), and government-armed village guards have been responsible for a number of civilian massacres attributed to PKK. Years later, a whistle blower, a Human Rights organisation, or even the European Court of Human Rights rules that evidence points to one of these forces having been responsible, as shown in Appendices A, B and C. The Turkish state has even admitted to conducting false flag attacks in Greece in 1955 and in Cyprus in the 1970s.

Then there are people who are sympathetic with PKK but are not members of PKK, and who may or may not be responsible for an act Turkey blames on PKK. A prime example is the assassination of a Turkish 'diplomat', Osman Kose, at an Erbil restaurant on July 17, 2019. MIT claimed PKK was responsible. The Kurdistan Regional Government arrested Mazlum Dag from Diyarbakir (whose brother is an HDP parliamentarian) and two others, none of who were members of PKK. Days later, Turkey killed the alleged instigator, Erdogan Unal, and two others allegedly involved in the assassination. The 'diplomats' assassination occurred after a Turkish F-16 targeted and killed one of seven members of the PKK's central committee, Diyar Gharib Muhammad, in Sinjar, when he was travelling in a vehicle on June 27. Diyar Gharib Muhammad was responsible for overseeing PKK in Sinjar and logistical connections between PKK in Rojava and the Kurdistan Region of Iraq. The assassinated 'diplomat' was said to have been the MIT officer who supplied the intelligence leading to the death of Diyar Gharib Muhammad. Yet PKK rejected all responsibility for the assassination. In another incident – the bombing of a riot police bus in Adana on September 25, 2019, that wounded five people – news outlets, even Turkish ones, did not assign blame.

Into this mix of ambiguous culpability is the Turkish state's unrelenting smear campaign against PKK and any individual or entity it chooses to link with PKK. Examples include calling PKK 'baby killers' on a daily basis in the media, or accusing the PKK of financing activities through drug trafficking, despite Europol Director Patrick Byrne stating that there was no independently verifiable evidence that the

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PKK has trafficked drugs (Sentas, 2018). The Turkish government goes to elaborate lengths to provide 'evidence' to support media propaganda and justify the arrest and imprisonment of HDP politicians at the national and municipal level. In 2019, coinciding with AKP's purge of HDP mayors and municipal council members based on the unsubstantiated claim that HDP is a front for PKK, Turkish media widely publicised Kurdish mothers claiming that HDP had tricked or kidnapped their children into joining the PKK and YPG. For months, there were daily reports of multiple mothers pleading for the HDP to return their sons and daughters 'from the mountains'. The timing of these demonstrations, the images of these women comfortably seated at tables and in tents protesting outside government buildings, and that they were fettered by media rather than brutalised by police (as is usual for Kurdish demonstrators) made many observers highly suspicious that the AKP-MHP government was orchestrating these demonstrations, which are ongoing.

The Turkish state does not limit the spread misinformation about Kurds to those in Turkey. After Turkey's invasion of northeast Syria on October 9, 2019, Turkey's leaders intensified their vilification of the SDF and its Commander-in-Chief, Mazloum Abdi Kobane. On October 29, after the SDF helped the US locate Abu Bakr al-Baghadi in Idlib, only five kilometres from the border with Turkey, *The Daily Sabah* headline claimed that "Al-Baghdadi's death exposes YPG-*Daes*h [ISIS] ties." Turkey's propaganda defies logic. Why would a secular YPG that has lost thousands of fighters in the war against ISIS, liaise with ISIS for the benefit of ISIS? Turkish authorities regularly fabricate videos and news reports claiming that the SDF committed this or that atrocity. These fabrications are spread on social and mainstream media, and are believed by large numbers of people in Turkey, if not elsewhere. For instance, Turkey accuses the SDF of being behind every IED bomb in the Turkey-occupied Syrian towns of Tel Abyad and Ras al- Ain in north east Syria, even after ISIS or one or more of Turkey's proxy mercenaries are found to be responsible. Nor is the misinformation limited to Turkey and Syria. Back in 2007 – 2008, Turkey's political leaders repeatedly called Iraqi President Jalal Talabani and President of the Kurdistan Region of Iraq, Massoud Barzani, 'terrorists'.

The daily barrage of misinformation generated by the Turkish state and Turkish media highlights the need for ASIO, the Attorney General, the PJCIS and Department of Foreign Affairs and Trade to treat any information supplied by MIT, other Turkish authorities and media with extreme caution. Internationally supported independent enquiries are essential to ascertain who is responsible for attacks, particularly on civilians, and the statistics of who killed and injured whom in the long running civil war in Turkey, that has now spread to Syria. Until investigations are mounted and the outcomes disseminated, at the very least, it is imperative that assessors cross check evidence supplied by Turkish authorities with truly independent sources.

Such requests are supported by the rulings of a number of organisations and courts that have examined the armed conflict between the Turkish state and PKK. In 2017, the United Nations High Commissioner for Human Rights released a report condemning the brutality and human rights abuses of the Turkish military against

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Kurdish citizens in operations conducted in southeast Turkey in 2015 – 2016. Other assessments have concluded that PKK is not a terrorist organisation, but rather is engaged in a protracted armed conflict with the Turkish state with the aim of gaining cultural, political and economic self-determination for Kurds and other minorities in Turkey. In May 2018, the Permanent People's Tribunal ruled that the Turkish military had committed war crimes against the Kurds in 2015 – 2016, and that PKK complied with the Geneva Convention in a legitimate armed struggle. In November 2018, the Court of Justice of the European Union (CJEU) determined that, on grounds of procedural fairness, it was wrong for the Council of Europe to have listed the PKK as a terrorist organisation between 2014 and 2017. In January 2020, in line with three previous rulings of two other Belgium courts – a 2016 ruling of the Court of First Instance, the 2017 ruling of the Chamber of Indictments, and the March 2019 ruling of the Chamber of Indictments of the Court of Appeal of Brussels (also called the Court of Last Resort) – the Court of Cassation went against its first ruling of February 13, 2018, and found that the PKK is a 'party to an armed conflict' inside Turkey and not a 'terrorist organisation', and therefore that PKK should come under international humanitarian law rather that terrorism laws. After a ten-year battle in the courts, the ruling means that terrorism laws could no longer be used against Kurds and companies in Belgium simply for supporting or advocating for PKK. These rulings are the first serious judicial testing of the evidence. As such, they call into question the continued classification of PKK as a terrorist organisation by Australia, the US and other countries like the UK, Canada, Germany, Spain and Iran.

KLA argues that given the dire need for political solutions for Turkey, Syria, Iraq and Iran, it is time to review the status quo. PKK is vital to a lasting peace in Turkey. Internationally mediated negotiations between multiple stakeholders could end Turkey's military offensives in three countries. Early in the process, mediators and observers could conditionally declassify PKK, if they have not already done so. KLA would go further. Whether or not Turkey agrees to negotiations, if the Australian government supports political solutions then it should seriously reconsider any relisting of PKK as a terrorist organisation.

6. The classification of PKK as a terrorist organisation discounts the significant changes in tactics, strategies and goals that the PKK has undergone since 1994. These changes have made the PKK qualitatively different from its earlier self and other organisations classified as terrorist organisations.

PKK began as a Marxist-Kurdish nationalist movement in 1978 with the aim of attaining an independent nation state called Kurdistan in the Kurdish-majority regions of Turkey, Iraq, Syria and Iran. Relying on sympathetic villagers for food, money and information, PKK embarked on an armed struggle in 1984. Before and after its announcement PKK committed some highly controversial actions, but by 1993, PKK realised it could not reclaim territory by defeating Turkish security forces and village guards, and announced it was open to a political solution.

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Since 1993, PKK has implemented several unilateral ceasefires, which, according to PKK sympathisers, only ended with acts of extreme provocation by the Turkish state. In March 1994, PKK's co-founder and symbolic leader, Abdullah Öcalan, promised to stop all armed activity if the government embarked on negotiating a political solution. In August 1994, PKK committed to abiding by Common Article 3 of the 1949 Geneva Convention that stipulates non-combatants be treated humanely. The incidents of PKK killing civilians, even those considered 'traitors', fell dramatically. That PKK was the most organised entity defending Kurdish rights in Turkey, and that its goal (if not its secular nature and/or armed struggle), had become popular was demonstrated in a 1994 academic survey of Kurds in southeast Turkey. Seventy-five percent of those surveyed supported federalism, autonomy or an independent Kurdistan.

In 1995, a pragmatic Öcalan changed PKK's goal of establishing a nation state to achieving regional autonomy in Turkey. In 1999 the captured, imprisoned Öcalan renounced armed struggle. All PKK militants were to leave Turkey for the Qandil Mountains of northern Iraq. For five years 30,000 PKK militants attempted to uphold a unilateral ceasefire. In 2003 PKK officially endorsed non-violent tactics, although it reserved the right of self-defence, but the Turkish state refused to grant PKK amnesty (Marcus, 2008). It was after this that TAK split from PKK. Others describe a 'limited war' between 2004 and 2013 (Plakoudas, 2018), by which time PKK realised it needed to focus on influencing urban populations (Gurcan, 2015). During this period the AKP government made a number of cultural concessions to Kurds and in 2013 negotiated a bilateral ceasefire with Abdullah Öcalan. This lasted until July 2015, one month after the national elections, when Turkey launched military operations against 'PKK' in southeast Turkey and northern Iraq. Since 2015, PKK has suffered significant losses, but continues to launch attacks on military and police targets in Turkey and Iraq. If PKK has inadvertently killed civilians, far from seeing collateral damage as acceptable, the PKK has publicly taken responsibility and apologised for the loss of life.

Since its establishment, PKK has actively supported women's rights, minority rights, cultural rights and religious freedom. From the mid-1990s, PKK has supported democracy, international law, and from 2002, ecological sustainability and democratic federalism. Since 2014, PKK has co-operated with the US-led coalition in the fight against ISIS in Iraq. One remarkable achievement was PKK's rescue of ISIS besieged Yezidis on Mount Sinjar in August 2014. In the lead up to Turkey's national elections in June 2015, November 2015 and June 2018, and in the constitutional referendum in April 2017 and the municipal elections in March 2019, the PKK has refrained from military actions in support of democratic processes. This is significant given one basis for relisting the PKK was that the PKK aims to 'monopolise Kurdish political power, including by attacking the interests of rival Kurdish political parties.' Unlike other proscribed organisations, the PKK has not conducted any terrorist attacks on civilians outside Turkey, (unless one includes defending themselves against Turkish soldiers in Iraq, this point being why getting to the bottom of the assassination of the Turkish diplomat in Erbil is so important) and has not systematically or deliberately targeted innocent civilians inside Turkey. These features set PKK apart from others listed as terrorist organisations.

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7. PKK has not targeted Australians or Australia's national security.

The 2018 Statement of Reasons claims PKK endangers Australians, for example tourists in Turkey, but so do car accidents and earthquakes. The Statement of Reasons also noted that there was an on-going court case for the one and only individual in Australia charged with being a member of PKK – Renas Lelikan, and that his presence may have endangered Australia or Australians. In May 2019, Renas Lelikan pleaded guilty to being an informal member of PKK between April 2011 and August 2013. Justice Lucy McCallum found that Lelikan was not a militant or a propagator of radical ideology, and that he had spent this time searching for the remains of his dead brother and writing about life with PKK. For this she gave Lelikan a three-year community correction order involving 500 hours of community service, i.e. she found him no threat to the community. Until now, PKK has not posed a threat on Australian soil and has not targeted Australians anywhere in the world, unless that citizen was a member of ISIS in Sinjar (Iraq), Baghouz (Syria) or elsewhere.

8. PKK's proscription is problematic for residents of Australia who support PKK's aims, if not its armed struggle.

Despite PKK not being a threat to Australia or Australians, its proscription as a terrorist organisation reinforces tensions between ethnic communities and within the 15 to 20,000 strong Australian Kurdish community. KLA has first hand experience of both. An example of discrimination from the Turkish community was when an imam refused to talk to members of KLA because KLA 'appeared to be sympathetic with PKK' based on KLA advocating human rights and democracy in Turkey, and opposing military offensives and ethnic cleansing in Turkey and Syria. A spate of police raids against Australian-Kurdish community group offices and individuals in Sydney, Melbourne and Perth in 2010 frightened many Australian Kurds. Before and after, Turkey-influenced tensions between PKK and KDP, and between PYD and KDP, have inhibited the Australian Kurdish community from commemorating Newroz together, or uniting to advocate on behalf of Kurds in Turkey, or on behalf of all Kurds as an oppressed and stateless people (Sentas, 2018).

In Australia, an individual accused of being a member of a terrorist organisation has a higher legal burden to prove their innocence, faces more severe penalties if found guilty, and the offences are more wide ranging compared to those of an individual accused of supporting a non-terrorist illegal organisation. Offenses for a member of a terrorist organisation can include 'advocacy', 'providing support' or 'associating with a member of a terrorist organisation' and this includes an 'informal' member, such as a person who attends a meeting, distributes literature or talks to a member. Even humanitarian engagement may constitute a criminal offence in terms of 'material support' (Lynch, et al., 2009), and in the USA, the criminal offence of humanitarian engagement with a terrorist organisation is 'extraterritorial', i.e. it applies whether the defendant is a US citizen or not (Sentas, 2018). Such conditions inhibit the Kurdish diaspora combining resources to provide humanitarian aid to those affected by military offensives in Sur, Cizre and Nusbayin in Turkey; Afrin, Tel Rifaat, Tel Abyad,

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Ras al-Ain, Qamishli and Kobani in Syria; and Kurdish refugees from Turkey, Syria and Iran living in the Kurdistan Region of Iraq.

9. Turkey's direct and indirect threats to Australians and Australia's national security are expanding.

Since 2011, Turkey's actions in and outside Turkey have prolonged the war against ISIS, the Syrian civil war and the Libyan civil war, and thus increased the likelihood of more terrorism and war, including in the eastern Mediterranean, and decreased the likelihood that Syria and/or Libya will become more democratic, or that the region will become stable. Turkey is endangering the security of Australian military personnel, humanitarian workers and Australian citizens visiting family etc., as well as Australian national interests, and the citizens and interests of Australia's allies:

- By permitting 40,000 ISIS fighters, including 230 Australian citizens, to cross into Syria and Iraq;
- In allowing ISIS cells and ISIS money exchange enterprises to exist in Turkey;
- In MIT providing weapons and members of Erdogan's family and others providing medical care to ISIS in Turkey;
- In making deals with and protecting Hayat Tahrir al-Sham (HTS) and its administrations in Idlib;
- In training, paying and supplying weapons to Islamist extremists, including former ISIS fighters in the Turkey-backed Syrian 'National' Army;
- In resettling Islamist extremists and their families in a Kurdish populated belt across northern Syria;
- In conducting air and ground offensives and opening up new war fronts in Syria with the intention to squash Syrian Kurds' aspirations for a multi-ethnic democratic autonomous region. These actions have forced the SDF to defend towns and villages, which has allowed ISIS prisoners to escape and ISIS fighters to regroup;
- In transporting Syrian mercenaries (including ISIS) to Libya, from where more than 40 escaped to Europe over one 48-hour period in January;
- In supporting the Muslim Brotherhood, Hamas and other groups;
- Invading northern Iraq to conduct air and ground offensives against PKK; and
- Because at any time, Turkey-backed Syrian mercenaries that are being directed to fight Kurds in Syria and General Khalifa Haftar's Libyan National Army in Libya could seek revenge on Turkey, Europe, the US or Australia for having been misled and betrayed by Turkey steering them away from their original intention of overthrowing Bashar al-Assad and establishing an Islamic State in Syria; and
- Because Turkey's destabilising policies in the Middle East, the Mediterranean and north Africa could lead to war in which Australia will likely play a part, at considerable cost to Australian taxpayers, families, individuals, government and trade.

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COST/BENEFITS

10. The proscription of PKK as a terrorist organisation makes countries like Australia unwittingly complicit in Turkey's military, political, social and cultural oppression of Kurds in Turkey, Iraq and Syria. Declassifying PKK sends a strong message that it's time for Turkey to embark on non-military solutions.

Labelling the 'other' as a 'terrorist' is a powerful political tool that generates a self-perpetuating cycle of violence (Barrinha, 2010). By labelling the PKK as a terrorist organisation, and having influenced so many countries to do likewise, and by expanding the label to include Syrian Kurdish political parties, administrations and security forces, Turkey has granted itself a licence to defy international law, treaties and alliances, create new war fronts and undermine Kurds' efforts to achieve cultural and political self-determination inside Turkey (Sentas, 2018), Iraq and Syria. By demonising all Kurds that support cultural and political self-determination, the Turkish state is further destabilising three countries, and is diverting attention away from its unwillingness to consider non-military solutions to systemic problems.

Having destroyed Kurdish-majority towns and villages and displaced hundreds of thousands of people in eastern Turkey with impunity since mid 2015, Turkey expanded its military operations in Iraq and Syria. In northern Iraq, Turkey's air and ground offensives, the latter including ground operations from at least nine military bases, have killed more than 20 Iraqi Kurdish civilians, burned crops and livestock, and caused the evacuation of 350 villages. In Syria, Turkey has used Syrian Islamist mercenaries to kill, kidnap, arrest and displace Kurdish, Assyrians and Arabs civilians and prisoners in the Euphrates Shield Triangle, Afrin and northeast Syria, bomb hospitals and ambulances, and loot, burn and confiscate homes, businesses and farms in zones Turkey was meant to make 'safe'. Since November 2019, the presence of Russian, Syrian and US troops in northeast Syria has not stopped convoys of Turkey-backed Islamist mercenaries and their families arriving to settle in Tel Abyad and Ras al-Ain, whose original populations were forcibly displaced. Having Turkified Azaz, Jarablus, al-Bab, and Afrin, Turkey has now replaced local administrations, appointed mayors, rewritten the school curriculum and banned the Kurdish language in schools and on street signs in Tel Abyad and Ras al-Ain. The administrations that Turkey has dismantled, and others Turkey intends to dismantle, introduced relative stability to 30 percent of Syrian territory. The security forces that Turkey intends to kill or capture helped the US-led coalition defeat the ISIS caliphate, track down the 'caliph' and detain ISIS fighters and their families. It is Turkey that refuses to negotiate with these groups because Turkey, like the current Syrian regime, rejects the dilution of power that comes with truly representative democratic decentralised governance.

The lack of strong international responses to Turkey's activities against Kurds in Turkey, Iraq and Syria has emboldened Erdogan. He is determined to settle up to 3.5 million Syrian refugees living in Turkey, and Turkey's mercenaries and their families displaced from Idlib, in Turkey-occupied Syrian territory, particularly northeast Syria to change the demography of the region. In November 2019, the UN Secretary

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General Secretary Antonio Guterres agreed to 'consider' Turkey building new towns for refugees in Turkey's northeast 'safe' zone at the expense of the international community, providing the refugees went voluntarily. In January 2020, German Chancellor Angela Merkel told Erdogan Germany would consider funding the resettlement of internally displaced people from Idlib in Turkey's northeast 'safe' zone. In contrast, Putin has repeatedly maintained that Syrian refugees should return to their original places of residence.

In classifying PKK as a terrorist organisation, coupled with not sufficiently objecting to Turkey's actions against Kurds and their allies, countries become unwittingly complicit to Turkey's aggression in three countries, and serve to decrease the likelihood of Turkey embarking on non-military solutions. Declassifying the PKK as a terrorist organisation is one way in which countries could send a clear message to Turkish leaders that oppressing its large Kurdish minority, conducting military operations in northern Iraq, and invading and occupying northern Syria are unacceptable, and that it is time for non-military solutions.

11. The classification of PKK as a terrorist organisation limits opportunities for Kurdish issues to be resolved in all four regions of Kurdistan for the benefit of everyone.

The Australian government needs to weigh up the costs and benefits of keeping PKK on the list of terrorist organisations. KLA argues that there are multiple benefits in declassifying the PKK as a terrorist organisation, and very little cost, especially if co-ordinated with other countries. The main benefits rest on the fact that the label 'terrorism' and 'terrorist organisation' stymies initiatives to address the root causes of conflict (Lynch, et al., 2009) in four countries and reduces the international community's ability to influence PKK, for example, in becoming more accommodating of other Kurdish parties. If countries were to consider relisting PKK as a terrorist organisation only if independent investigations conclusively proved it was violently coercing non-combatants into a course of action, this may convince Turkey to allow independent investigations, or be more careful with the facts. If countries felt that declassification was warranted they would be in a stronger position to argue that Turkey needs to review its justice system and in particular its terrorism laws and drop terrorism charges for peacefully expressing a point of view. Such countries would be in a better position to monitor multi-stakeholder negotiations that could have internationally supported outcomes in Turkey and Syria, with the potential for expanding democratic processes in Turkey and Syria, for example, by recognising the administrative and security structures of north and east Syria enabling these structures to contribute to a more democratic future. Before delisting the PKK, countries could point out the mutually beneficial economic and social benefits for Turkey in making peace with Kurds, as demonstrated by the economic benefits in improved relations between Turkey and the KRG between 2009 and 2017. Even after the KRG held a referendum on independence in 2017, unlike Iraq and Iran, Turkey did not completely block its border with the Kurdistan Region because that would be too damaging to the Turkish economy. The declassification of PKK would also influence

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the politics of Iranian Kurds and potentially Iran as a whole, given a vital ingredient for Iran to become more democratic is for minorities to network with each other and Persian groups, and Kurds are deeply divided between PKK and KDP orientated groups.

There are other benefits. Declassification would significantly relieve those sympathetic with PKK's aspirations in the diaspora of fear of being prosecuted for advocacy, or for sending humanitarian relief in support of Kurdish individuals and humanitarian organisations. It would also benefit the Australian government in arguing for justice if an Australian citizen working in Turkey, Syria or Iraq was killed or injured by a Turkish state or non-state force or proxy that was fighting alleged PKK terrorists.

Declassification could be conditional, for example, on the PKK leadership unilaterally agreeing to cease all armed activities for a specified period, during which time other matters could be worked on. Turkish leaders often claim they do not negotiate with terrorists, but between 2009 and 2015 members of the AKP negotiated with Abdullah Öcalan, although AKP refused to involve other stakeholders, parties or institutions to avoid giving the negotiations legitimacy. In other ways these negotiations fell short of a genuine effort to arrive at a lasting peace. Then in 2019, prior to the election rerun for Mayor of Istanbul, members of AKP again negotiated with Öcalan about making a statement in support of voting for the AKP candidate in the election.

What makes the refusal to negotiate with alleged 'terrorists' more hypocritical is the well documented evidence that MIT, other security forces, the Ministry of Interior, Directorate of Religion, provincial governors and even Erdogan's own family have collaborated with known terrorists, including ISIS, Hayat Tahir al-Sham (HTS) and a host of Turkey's Islamist proxies in the Syrian National Army, including ex-ISIS, and ex-al-Qaida in Azaz, Jarablus and Al-Bab, Afrin, Tel Abyad and Ras al-Ain.

Having deployed blackmail and war as political tools, Erdogan will resist embarking on negotiations with the PKK. Yet, if the Turkish economy and military adventures face increased obstacles, Erdogan may be more willing to adopt another path.

CONCLUSION

To understand why the Turkish state feels so threatened by Kurds, one must examine the history of how modern Turkey rose from the ashes of the Ottoman Empire. In employing a fierce form of nationalism to replace Islam as the nation's glue, Mustafa Kemal Ataturk set the stage for any unassimilated Kurd to be seen a threat to the new nation state i.e. The actual threat may be that Kurds exist at all, given that Kurds currently comprise 15 to 25 percent of the population, and Kurdish-majority provinces cover 30 percent of the territory, while the awareness of what it means to be a Kurd is growing stronger over time. What is particularly threatening for the Turkish state is the increased military and political status of Kurds, and their growing

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sense of confidence, hence, the indefinite imprisonment of Selahattin Demirtaş. The paradox is that if Turkey continues down a path of denial and persecution, its greatest fear may be realised: that Kurds will demand an independent nation state that will cover eastern Turkey, northern Syria and Iraq, and western Iran. Whatever outcome eventuates, a political rather than military pathway is preferred.

KLA suggests that one of the first steps to reconciliation between the Turkish state and PKK is to acknowledge that the PKK has been involved in a legitimate armed struggle against a repressive state. As such, KLA requests ASIO, the Attorney General and PJCIS to consider declassifying the PKK, if necessary after:

- Re-evaluating and improving the definition and assessment criteria used to proscribe an organisation to include context, intention, the nature of the violence and its targets, and the impacts of proscription on Australian law and Australians;
- A rigorous testing of evidence, distinguishing that which is verifiable from that which is not, and attaching no weight to what is not verifiable by non-Turkish sources; and
- An assessment of the benefits and costs of delisting the PKK including that it would withdraw any perceived or actual complicity in Turkey's licence to marginalise, attack and ethnically cleanse Kurds in and outside Turkey; highlight the importance of finding non-violent solutions; and enable the Australian Kurdish community to provide support for organisations that work for democratisation, human rights and distribute humanitarian aid in their communities of origin, a right available to most other diaspora communities in Australia.

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APPENDICES

Appendix A: Massacres Attributed to PKK found to be conducted by Turkish state security forces

In an armed conflict, innocent civilians are harmed yet the scale of harm caused by the Turkish state is exponentially higher than any caused by PKK, the latter being unverified and in some cases, unverifiable. This is because there is sufficient evidence to be sceptical of the exceedingly long list of claims made by the Turkish state in regards the terrorist actions attributed to the PKK. It is beyond the capacity of KLA to examine each case, but in the following cases a whistle blower, Amnesty International or a Turkish or European court has absolved PKK of responsibility. Most of the massacres listed below occurred before 1996, by which time the militarisation of southeast Turkey had reached 300,000 security force personnel despite the PKK having made significant changes to its ideology, tactics and aims, and having withdrawn to the Qandil Mountains of northern Iraq. There are many other cases of massacres and targeted assassinations not included in this list for which former JITEM and MIT operatives such as Abdülkadir Aygan and Tuncay Güney have offered incriminating testimonies against JITEM, and in some cases a court has found JITEM responsible. It must be noted that JITEM has been very active since the end of the bilateral ceasefire in mid-2015.

Case 1: On 20 June 1987, 30 Kurdish civilians were killed in the village of Pınarcık, in the Omerli district of Mardin province. Among the dead were eight village guards, eight women and 16 children. PKK was held responsible. A PKK publication allegedly claimed responsibility, claiming that village guards and their families were targeted as traitors to warn others not to become state collaborators (Belge, 2016). The attack came a day after the European Parliament passed a resolution condemning Turkey's ongoing repression of Kurds (and Turkey's refusal to recognise the Armenian genocide). In 2011, ex-Turkish Special Forces soldier, Ayhan Çarkin, who investigated the crime scene immediately after the attack, claimed that the massacre was an act of provocation conducted by JITEM.

Between Case 1 and Case 2 Turkey conducted a major military crackdown on the Kurdish population in southeast Turkey. On 10 June 1990, 27 civilians were killed, including eight people employed by the government, 12 children and seven women, in the village of Cevrimli, near Güclükonak, in the province of Sirnak. The Turkish state blamed PKK. In the area at the time there were intense clashes between Turkish security forces and PKK so it is not possible to assign responsibility without a thorough investigation.

In April 1991 the Turkish parliament passed President Turgut Ozal's request for people to have the right to speak the Kurdish language in private. At the end of 1991, President Ozal (himself part Kurdish) offered to discuss cultural rights and a federation with PKK. In response, Abdullah Öcalan declared an intention to negotiate. But these conciliatory moves were blown up at the Newroz celebrations in March

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1992, when state security forces killed 91 people celebrating in Cizre, Sirnak and Nusbayin, and on June 10 when state security forces killed 27 women and children in the village of Gere, near Sirnak. Then, on 18 August 1992, in the city of Sirnak, a three-day state security force operation killed 54 people, causing another 25,000 people to flee the city. The state claimed that PKK had tried to take over the city but at the end of the operation not a single corpse of a PKK member was found. Around the same time, the state executed Diyarbakir Chairman, Vedat Aydin, and at his funeral opened fire and killed six people, wounding another 119. Finally, in the 1992 - 1993 period the state assassinated or imprisoned, tortured and killed more than 30 Kurdish journalists, writers and cultural activists as well as 48 elected politicians.

This list of actions is the tip of the iceberg yet on March 20, 1993, PKK declared a unilateral ceasefire. In April 1993, President Ozal died in mysterious circumstances. In May 1993, the European Parliament passed a resolution that Turkey recognise the political, social and cultural rights of Kurds. It was not to be.

Case 2: PKK was immediately blamed, 20 people were arrested and two were found guilty for burning down the village of Başbağlar 220 kilometres from Erzincan, on 5 July 1993, causing the deaths of 33 Turkish civilians. Later, ex-Special Forces soldier, Ayhan Çarkin, claimed the Turkish deep state (i.e. JITEM) was behind the massacre.

Case 3: On October 3, 1993, a house was burned down in the village of Vartinis near the town of Mus, causing the deaths of nine members of the Ogut family: Mehmet Ogut, his pregnant wife and seven children. It became known as the Vartinis massacre. The State immediately held PKK responsible. In 2013, Kurdish lawyers, led by Tahir Elci, re-opened the case. People in the village, including the only surviving member of the family, bore witness in court that Turkish soldiers burnt down the family home, blocking all exits and thus killing all inside. After the state put up a series of obstacles, including moving the case to another province, in 2015 a court sentenced three gendarmerie officers, a member of the Special Forces and nine soldiers to life imprisonment for this and other crimes committed at the time. However the case is ongoing, despite another court confirming that soldiers were responsible.

Case 4: PKK was immediately blamed and subsequently found guilty in a Turkish court for the deaths of 38 Kurdish people – mostly women, children and the elderly – killed in the villages of Koçağılı and Kuşkonar on 23/26 March 1994. Villagers appealed and the European Court of Human Rights (ECHR) finally heard the case. The ECHR found that a heavy artillery bombardment by the Turkish armed forces was responsible for the 38 deaths. (See Appendix B for the link to the European Court of Human Rights 2014 Ruling on the Koçağılı - Kuşkonar massacre.)

Case 5: On 14 December 1995 the PKK declared a unilateral ceasefire. The Turkish state accused the PKK of breaking the ceasefire on 15 January 1996 when a minibus came under fire and 10 Kurdish men and the driver of the minibus were killed and the bus burnt. This became known as the Güclükonak massacre. Journalists were flown in

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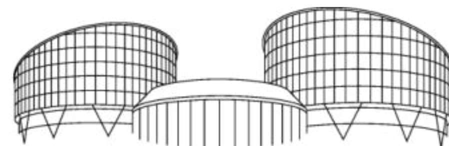
and briefed but were not allowed to talk to villagers. Later it was revealed six of the murdered people had been in custody at the Taskonak Gendarmerie Battalion Headquarters for having refused to become a village guards. They were suspected of being members of PKK. According to the daughter of one of these prisoners, the six men were killed inside the Gendarmerie Headquarters. A gendarmere rung for a minibus and four village guards and a driver came to take the detainees away. After the village guards expressed horror at the sight of the dead prisoners they were immediately killed. The driver was ordered to take the minibus full of dead bodies to the nearby Tigris River but before he got there a helicopter came, soldiers alighted and burned the minibus (Gambetti & Jongerden, 2001.) The driver was killed outside the bus. Three people launched an independent investigation of the case but were imprisoned for insulting the armed forces under Article 159 of the Turkish Penal code. In 2009 the case was reopened when former State Minister Adnan Ekmen alleged that the unofficial state security unit known as JİTEM committed the massacre. Appendix C has the link to Amnesty International's Account of the Güclükonak massacre.

Case 6: The Turkish state held PKK responsible for a massacre of 12 Kurdish people travelling in a minibus in Sirnak on 29 September 2007, when eye witness accounts, including accounts by village guards, as well as evidence collected by NGOs corroborate allegations that the massacre was committed by JITEM.

Case 7: On 28 December 2011, the Roboski massacre, also known as the Sirnak massacre, took place when Turkish airstrikes killed 34 civilian smugglers crossing from Iraq into Turkey with cigarettes, diesel etc. to sell in the local markets. Most were teenagers. The Turkish state claimed PKK was responsible. In January 2014, the Military Prosecutors Office declined to initiate prosecutions against those responsible (Sentas, 2018). Kurdish sources say Erdogan ordered the attack in case a PKK militant was among the smugglers. To this day, no-one has been held accountable. A speech made by Gultan Kisanak about this massacre can be found on:
https://www.youtube.com/watch?v=kaJ3J_O0NWo

Appendix B: European Court of Human Rights 2014 Ruling on the Koçağılı - Kuşkonar massacre.
Link retrieved 26 January 2020: Copy and Paste:
FINAL 24/03/2014 - HUDOC - Council of Europe

Appendix C: Amnesty International's Account of the Güclükonak massacre.
https://www.amnesty.org/download/Documents/152000/eur440241998en.pdf



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

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.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Review of the re-listing of five organisations as terrorist organisations under the Criminal Code
Submission 6 - Attachment 3

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.

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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.

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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.

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

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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

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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.

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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.

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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

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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

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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.

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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

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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".

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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.

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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:

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(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.

..."

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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;

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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

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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

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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.

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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.

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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.

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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

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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

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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

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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

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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

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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*

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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.

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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.

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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,

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§ 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

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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

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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

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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

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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".

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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.

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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.

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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).

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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

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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

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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*

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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		105,00 0
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

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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;

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(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

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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

TURKEY

“Birds or earthworms”: the Güçlükonak Massacre, its alleged cover-up, and the prosecution of independent investigators

In February 1996 the Turkish “Together for Peace” movement commissioned a fact-finding mission to investigate the killings of 11 Kurdish men which had taken place on 15 January near the town of Güçlükonak in _irnak province, southeast Turkey. The massacre had been the subject of controversy: the official explanation that the illegal armed Kurdish Workers' Party (PKK) had committed the killings had been challenged and it seemed that in key respects the government version of events was unsound.

The region in which the massacre took place is under state of emergency rule where independent investigation is a difficult task. Nevertheless the fact-finding mission revealed previously undisclosed facts and shed important new light on the crime. Evidence uncovered by the mission suggested that Turkish security forces were involved in the killings.

Mission delegates called publicly for further investigation and for the perpetrators of the massacre to be identified and brought to justice. The authorities responded by charging three leading members of the fact-finding mission with “insulting the security forces”.

In February 1998 the three were each sentenced to 10 months' imprisonment.

The Güçlükonak Massacre

Since 1984 a bitter conflict has been fought between the Turkish security forces and the PKK which seeks autonomy for Turkey's Kurdish minority. The conflict has been waged mainly in the rural areas of the southeastern provinces, which have been under martial law or state of emergency rule since the 1970s.

This mountainous terrain is policed by the Turkish military and by gendarmes (soldiers acting as police officers) operating from small posts attached to villages or as larger units in towns and cities. The gendarmerie is supported by village guards - local auxiliaries armed and paid by the Turkish Government. In theory, enrolment in the village guard corps is voluntary, but the authorities view villagers who refuse service with great suspicion, as possible PKK sympathizers. Recalcitrant villagers have in many cases been threatened, tortured, burned out of their villages, killed or “disappeared”. On the other hand, any village that agrees to provide guards may suffer reprisals from the PKK. PKK members have periodically targeted such villages, “executing” captured guards and killing civilians, including in some cases women and children.

On 14 December 1995 the PKK had declared a unilateral cease-fire. The Turkish Government had not matched this PKK truce with a cease-fire of its own and was under political pressure to respond.

On 15 January 1996, at around 10am, a minibus was ambushed on a mountain road near Güçlükonak. The road runs between two villages, Ta_konak and Koçyurdu, which are a few kilometres apart and both house gendarmerie units[1]. The site at which the ambush took place is narrow, bound on one side by the river Tigris and on the other by cliffs and a steep mountainside immediately above the road.

After the attack the minibus had been set on fire and the charred bodies of 10 men were found still inside the vehicle. The body of the driver, unburned, lay on the ground a short distance away. The victims of the massacre - Abdullah Ilhan (aged 40), Neytullah Ilhan (25), Halit Kaya (60), Ahmet Kaya (50), Ali Nas (48), Ramazan Oruç (65), Mehmet Öner (63), Lokman Özdemir (19), Abdulhalim Y_lmaz (18), Hamid Y_lmaz (26) and the minibus driver, Be_ir Nas (23) - were all Kurdish men from local villages. Many of the passengers were serving or former village guards.

Official account is disputed

The Turkish military authorities promptly announced that a PKK unit had committed the killings, in violation of the PKK's own cease-fire. On 16 January the Turkish General Staff - the military high command - flew a group of selected Turkish and foreign journalists from Ankara to Ta_konak Gendarmerie Battalion Headquarters, near the scene of the killings. There, three high-ranking military officers, one from the army and two from the navy, told the journalists that the PKK had perpetrated the massacre. It was a plausible claim. The PKK had concluded an earlier cease-fire in May 1993 by abducting 33 unarmed members of the security forces and four civilians near Bingöl and killing them all.

[1] The civilian population at Ta_konak had previously been forcibly cleared from the village.

The journalists were taken to the scene of the massacre, where the military had gone to unusual lengths to enhance the media impact of the killings. Reportedly the charred bodies, which had been carried away to Koçyurdu village in the immediate aftermath of the killings, had been returned to the site as a photograph opportunity for the visitors. The army Chief of Staff stated that the minibus had been attacked by the PKK with RPG-7 rockets "and all inside the vehicle were burned to death". He went on to cite the atrocity as "an explicit example of the unreliability of terrorist claims of a unilateral truce". The official account added that four Turkish soldiers from a nearby gendarmerie post had intervened and that the attackers had fled after a brief exchange of fire. When asked how it was known that the attackers were PKK, a spokesperson for the military said that they had found a distinctive type of headscarf traditionally worn by PKK members and that PKK radio communications which disclosed PKK responsibility had been intercepted.

The state television channel TRT1 reported the incident on 16 January saying:

> "A TRT correspondent has been told by the State of Emergency Region Governor's Office that terrorists stopped a minibus travelling from Siirt to _irnak's Güçlükonak district at the village of Koçyurdu on the Eruh-_irnak road yesterday evening and killed 11 passengers with automatic weapons fire. The terrorists later fled the area after setting fire to the minibus... The security forces have launched extensive operations in the region."

Understandably, public expressions of outrage followed. The then Prime Minister Mrs Tansu Çiller commented:

> "These enemies of humanity who believe that the state authority has weakened and turned their guns on our innocent citizens will definitely drown in the hole that they have fallen into. Such attacks which are against the existence of the Turkish Republic prove how just we are in the struggle against terrorism. I extend my condolences to the relatives of these innocent citizens killed in the inhuman attack and wish they may rest in peace."

However, on 17 January, the Diyarbak_r branch of the Turkish Human Rights Association (HRA) circulated a different account of the incident, based on information supplied by relatives of the victims. The HRA reported that six of the passengers had been detained by gendarmes four days before the attack. It provided additional information that a group of village guards who had heard gunfire and telephoned the Ta_konak gendarmerie offering to assist had been ordered not to interfere.

The previous day, the European representative of the National Liberation Front of Kurdistan (ERNK), the popular front of the PKK, had denied that the PKK was responsible for the killings. The ERNK spokesperson maintained that the PKK's unilateral cease-fire was still intact.

Peace movement organizes fact-finding mission

The "Together for Peace" initiative sought to resolve the contradictory claims of what had taken place at Güçlükonak. "Together for Peace" (in Turkish, Bar__ için bir araya - BIBA) was a movement of people from different cultural traditions and political perspectives which aimed to identify common ground between the Kurdish minority and the Turkish State, and to bring an end to the conflict through dialogue.[2]

When in February 1996 "Together for Peace" launched its appeal for respected Turkish and foreign citizens to take part in a fact-finding mission, the difficulties seemed immense. Güçlükonak is situated in the heart of the state of emergency region where an

[2]"Together for Peace" was the title of a meeting in 1996 at the Marmara Hotel in Istanbul attended by representatives of non-governmental organizations, some political parties and prominent individuals. The primary aim was to forge a strong peace movement but the main achievement of the working group set up by this meeting was to send delegations of investigation to look into human rights violations taking place in the context of the conflict.

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independent investigation of this kind would be difficult to achieve. Movement is strictly controlled in the region, where the Governor in Diyarbak_r has the power to expel unwanted visitors. In October 1994 even the Turkish Deputy Prime Minister had been prevented by a military commander "for safety reasons" from visiting an area where villages had been burned by security forces. The risks of probing in such an area could not be ignored. Critics of the security policy in southeastern Turkey were, and are still, regarded as potential enemies of the state. During the early 1990s hundreds of the state's supposed "enemies" were tortured to death, shot dead in the street or "disappeared".

Nevertheless, many of the organizations and individuals approached by "Together for Peace" were enthusiastic about the initiative. A delegation was formed of representatives from a wide spectrum of political opinion and professional background in order to avoid possible charges of partiality. The delegation included academics, authors and journalists, human rights monitors, trade union leaders and politicians, many of them notable national figures whom the military would find difficult to turn away. Three overseas representatives also took part in the fact-finding mission: the Vice-President of International PEN UK, a German writer and a German member of Parliament of Turkish origin[3].

[3] The members of the delegation to Güçlükonak were: Ihsan Arslan (General President of Mazlum-Der, a human rights organization), Ismail Arslan (Deputy President, People's Democracy Party, HADEP), Sadik Bayantimur (Hak-I_, a trade union), Akin Birdal (President of the Turkish Human Rights Association), Ali Bulaç (writer), Münir Ceylan (former President, Petrol-I_ trade union), Siyami Erdem (President, Public Workers' Union KESK), Ali Riza Gülçiçek (President, European Federation of Alevi Unions), Prof Tahir Hatipo_lu (Ankara Gazi University), Lütfü Kaleli (Writer), Ercan Kanar (President, Human Rights Association, Istanbul branch), Güliz Kaptan (Social Democracy Foundation representative), Mehmet Metiner (Writer), Prof Ali Nesin, Hüseyin Okçu (Publisher), Hüsnü Öndül (General Secretary of HRA), Cem Özdemir (Parliamentary deputy, Green Party, Germany), Veli Özdemir (journalist), Leyla Peköz (Medical doctor), Bernice Rubens (Writer,

Deputy President of UK PEN), Hasan San (Tunceliler Culture Association, General Secretary), Server Sarica (Turkish Medical Association), Christoph Schwennicke (Journalist), Hakan Tahmaz (ÖDP Freedom and Democracy Party), Altan Tan (Writer and researcher), Ferhat Tunç (Singer), Osman Tunç (Writer, publisher), Ali Ürküt (President, Diyarbakir Democracy Platform), _anar Yurdatapan (Musician).

Mission uncovers new evidence

The delegation travelled to the region on 12 February 1996. They spoke to the Deputy Governor of the State of Emergency Region in Diyarbak_r, who repeated the government assertion that the PKK had committed the attack. The delegation then travelled on to the Güçlükonak district to interview the relatives and fellow villagers of the victims at length. The delegation also visited the scene of the massacre.

In the course of the next few days, the fact-finding mission was able to confirm some of the details already reported and to uncover several items of previously undisclosed information:

☐ *Detentions*

On 13 and 14 January 1996 six of the victims of the massacre - Abdullah Ilhan and Neytullah Ilhan from Gümü_yaz_ village; Halit Kaya and Ahmet Kaya, from Yata_ankaya; and Ali Nas and Ramazan Oruç from Çevrimli village - had been detained by gendarmes in Güçlükonak. Neytullah Ilhan, Ahmet Kaya, Halit Kaya, Ramazan Oruç and Ali Nas were reportedly former village guards. Abdullah _lhan, a farmer, had not served as a village guard. The reasons for the arrests are unclear: Amine Ilhan, widow of Abdullah, was told that her husband was suspected of arms smuggling; others suggested that the men were detained because they were suspected of aiding relatives who were PKK members.

All the detainees were transferred to the gendarmerie battalion headquarters at Ta_konak. Bahattin Altu_, the mayor of Güçlükonak and a well-known village guard chief, spoke by radio on behalf of worried relatives to the gendarmerie commander in Ta_konak about one particular detained village guard and was assured that this man would shortly be released. The man was indeed released and later reported having been tortured while in custody.

☐ *Sequence of events leading to massacre*

From interviews with relatives, villagers, and local village guards the delegation established the following sequence of events:

On 15 January at around 6am a gendarme from Ta_konak called the gendarmerie post in the neighbouring village of Koçyurdu and asked for a minibus to be sent to

Review of the re-listing of five organisations as terrorist organisations under the Criminal Code
Submission 6 - Attachment 3

transport the six detainees to Güçlükonak. Shortly afterwards the minibus driver, Be_ir Nas, who lived in Koçyurdu, was summoned. Reportedly on the orders of the Koçyurdu gendarmerie commander, he picked up an escort of four village guards from Koçyurdu: Mehmet Öner, Lokman Özdemir, Abdulhalim Y_lmaz and Hamid Y_lmaz.

At around 7am the minibus left Koçyurdu for Ta_konak. Villagers reported that at this point an army helicopter appeared and hovered nearby. The minibus reached Ta_konak, where the detainees, village guards and driver were joined on board by a Turkish army special sergeant and two conscript soldiers. One account of the incident states that the initial six detainees had already been executed, and that the four village guards were killed when they arrived and expressed horror at the murders.If so, then Be_ir Nas must have been forced by the gendarme sergeant and soldiers to drive the minibus with ten corpses back towards Koçyurdu. The gendarmes dismounted and presumably instructed Be_ir Nas to drive on.

At around 10am several minibuses and tractors coming from the south were stopped by gendarmes at Koçyurdu village and ordered to wait. However, one minibus arriving a few minutes later was allowed to proceed up the road towards Ta_konak because it was carrying official documents. The civilian driver subsequently went into hiding, but he reportedly told locals that he passed the minibus on the road and that "all the passengers in the minibus were blindfolded".

Shortly after 10am the villagers at Koçyurdu say that they saw the helicopter again and heard prolonged machine-gun fire. They also claim they heard the explosions of two or three rockets.

Village guards stationed across the river on the opposite hillside allegedly saw the smoke and the vehicle burning. They reported the incident to the gendarmerie post in Koçyurdu, but were told not to interfere. The same village guards saw a helicopter land two or three times nearby, disembarking soldiers.

☐ *Aftermath*

At 3pm soldiers finally allowed the large number of people who had gathered at Koçyurdu down the road towards the burned-out minibus. Apparently the special sergeant and two soldiers who had been on board the minibus shortly before the attack were at the scene, unharmed, and told villagers that there had been an incident.

The villagers reported that the bus was riddled with small arms fire, with all its windows smashed. They saw the unburned body of the driver, Be_ir Nas, who had apparently tried to flee, a few paces from the vehicle. The other dead and badly charred bodies were still inside the minibus, in sitting positions. The village guard escort on the minibus still had their firearms between their knees.

That afternoon the State Prosecutor arrived by helicopter to assess the scene. At this point the sergeant involved is said to have produced the identity cards of the victims, untouched by the fire, from the next room in the Koçyurdu gendarmerie station. (According to villagers, as soon as the State Prosecutor saw the unburned identity cards, he realized their significance and left the village shortly afterwards, abandoning any attempt at an investigation: "He understood everything!") The identity cards of Lokman Özdemir and Abdulhalim Y_lmaz, two of the escort guards, were later returned to their

families intact.

Soldiers and villagers from Koçyurdu then reportedly took the bodies to the village, where they were lined up on the ground. The driver's body was taken away to be washed and buried, since it had not been burned. Koçyurdu was by now full of people from the village and surrounding areas, many of whom were upset - shouting and protesting. The crowd called for the battalion commander, the Governor and Public Prosecutor and a tense stand-off between the crowd and the security forces ensued.

The ten burned bodies seem to have been returned to the scene of the crime the following morning, 16 January, for the benefit of visiting journalists (the covered bodies, laid by the side of the road, are visible in press photographs of the scene). The correspondents were brought to the site by helicopter in the early afternoon. The journalists stayed for approximately half an hour, but were not allowed to speak to any witnesses: "We stayed there for a very brief time," one foreign journalist said, "and had no opportunity to make our own investigations. We saw no locals around." For their part, the villagers reported that they had been barred from going to the site at the time of the journalists' visit.

Later that day the village guards of Koçyurdu were told to take the bodies back again to the village but they reportedly refused, saying to the security forces: "You killed them, you bury them!" The bodies were buried by troops, without any medical examination to establish the cause and time of death.

□ *Inspection of the site*

The burned-out remains of the minibus were left at the site for some weeks and the vehicle was still there when the delegation arrived to carry out the inspection. No attempt had been made by the Turkish authorities to remove the vehicle for a full examination.

While conceding that the bus had probably been subjected to rocket fire, the delegation came to the conclusion that the bus had been deliberately set on fire by the attackers. The delegation also examined the numerous bullet holes on the vehicle.

Around the vehicle were still found "...scattered remains of the victims: extremities, half-burnt pieces of human arms and legs, rags remaining from their garbs and cartridges seemingly fired from G-1, G-3 and AK-47 assault rifles, all used by the army, the PKK and the village guards alike".

The delegation also noted the topography of the site: "...between two gendarmerie outposts located three kilometres to the west and east of the spot. On the north side the site is overlooked by a steep hill while on the south it is banked by the River Tigris and the hills on the other side of the river are patrolled by village guards...."

□ *Witness testimony*

When the delegation visited Koçyurdu, all the villagers blamed the military for the killings and expressed outrage that their children, husbands and brothers, who had accepted arms in service of the state, had been, as they believed, murdered by the forces of the state. The following exchange takes place in a filmed interview with one of the villagers:

> "My husband, Mehmet Öner, was a village guard for seven years, and the last three years here in this village."
>
> "*Who killed your husband?*"
>
> "Soldiers!"
>
> "*But they say the PKK did that*."
>
> "PKK? What PKK? Have you not seen the scene of the event? On one side runs the river Tigris below with village-guards' positions just across the river. On the other side: sharp rocks with military positions at the top. Two kilometres to the north, Ta_konak Gendarmerie. Three kilometres to the south, Koçyurdu Gendarmerie. PKK guerrillas must be birds or earthworms to carry out such an attack and disappear so soon...."

The brother of driver Be_ir Nas recalled that:

> "All the victims' burned bodies were found in a sitting position, as if they were tied to their seats. Imagine, they are burning to death and not moving even a finger!"

☐ *Allegations of torture and intimidation of witnesses*

In the days following their return from the fact-finding mission, the delegation wrote to the Interior Ministry, the Prosecutor of the State Security Court in Diyarbak_r, the Emergency Region Governor and the Chief of General Staff, not only about the original incident but about intimidation and alleged torture of a witness they had spoken to during their visit to the region. No replies were received to these letters.

One of these witnesses, a village guard, had informed the delegation that he had been detained in Ta_konak Gendarmerie at the same time as the other six detainees, and had been tortured, suffering injuries to his testicles, legs, forearms and hands. His family had persuaded Bahattin Altu_, a village guard chief, to appeal on his behalf. This village

guard believes that as a result of this intervention he narrowly escaped becoming the twelfth victim. Apparently as a reprisal for his talking to the delegation, his home village of Yata_ankaya was raided by security forces the following week and five houses burned.

Mission findings

Upon their return to Istanbul, the delegation submitted their findings in writing to the authorities, pointing out the inconsistencies in the official version of events, calling for further investigation and for the perpetrators to be unmasked and brought to justice.

The delegation also called a press conference on 16 February to announce their findings. The video evidence collected by the delegation was shown to the media. The delegation drew attention to the elements which they believed implicated the security forces in the massacre:

1. Six of the victims were people detained for allegedly supporting the PKK -- unlikely targets for an attack by the PKK.

2. The delegation considered the scene of the massacre as particularly unsuitable for a PKK attack and escape in broad daylight. The road was bound by a wide river and steep cliffs with a gendarmerie post at either end. The hillsides were patrolled by village guards, who maintained outposts dominating the scene.

3. The delegation found that the vehicle had been destroyed by fire. They thought it inconceivable that four armed guards would burn in their seats with their weapons - apparently undischarged - between their knees without moving or attempting to retaliate.

4. The appearance of unburned identity cards when the bodies of the victims sat incinerated in the minibus was clear confirmation to the delegation that the official account was flawed. While identity cards of the six detainees would certainly have been taken from them when they were taken into custody, the escort guards and driver could not have been expected to venture out onto heavily controlled roads, pass checkpoints and enter gendarmerie stations without their identity cards on them.

5. Village guards in established positions on the opposite bank of the Tigris who offered to intervene were told not to move. Village guards in Koçyurdu who saw the smoke and asked to intervene were likewise prevented from doing so by the Koçyurdu gendarmerie post. To the delegation, this suggested that a security force

operation was being conducted, rather than a PKK action. The presence of the helicopter was in the delegation's view further confirmation of this.

Issuing a call for an official investigation, _anar Yurdatapan said: "Any commission of investigation must have powers to protect witnesses, to question the military, to demand evidence and to initiate prosecutions. This is unlikely to happen unless very intense pressure is applied by non-governmental organizations inside Turkey and also by international organizations like Amnesty International. The people who committed this massacre must be found and tried. If no investigation is initiated then we must blame the General Staff of the armed forces."

"This case was a legal scandal the like of which I don't think has been seen in the history of Turkish law. The proper practice would have been to deal with our accusation first, to establish whether or not our allegations were well founded. The courts ignored the original far more serious crime, and decided to put us in prison instead."

- Ercan Kanar

Prosecution of mission delegates

No action was taken by the authorities in response to the delegation's findings. Three months later, on 16 April, exasperated at the lack of official action, three leading mission delegates, Münir Ceylan, former president of Petrol-I_ (the Petroleum Workers' Union), Ercan Kanar, lawyer and president of the Istanbul branch of the Human Rights Association, and _anar Yurdatapan, musician and coordinator of "Together for Peace", submitted a formal complaint to the Chief State Prosecutor in Istanbul accusing Turkey's Chief of General Staff of responsibility for the massacre and of engaging in a cover-up. They made these charges on the basis that on 16 January, on the orders of the General Staff, journalists had been airlifted to the scene where three high-ranking officers had briefed the journalists with a version of events that the delegation believed was manifestly flawed and calculated to mask the real perpetrators.

Again, no official response to this formal complaint was forthcoming. But the authorities did not remain entirely idle. The Public Prosecutor charged Münir Ceylan, Ercan Kanar and _anar Yurdatapan with "insulting the armed forces" under Article 159 of the Turkish Penal Code. This charge seems to have been made at the prompting of the Deputy Chief of General Staff, who had written to the Ministry of Justice. Whole phrases of his application to the Ministry were later repeated word for word in the formal accusation against the three men.

IN COURT: **Ercan Kanar** (left), a lawyer, has been a member of the Turkish Human Rights Association (HRA) since its foundation in 1986. Since 1990 he has been president of the Istanbul branch of the association and from 1992 to 1995 was Deputy President of the association as a whole. He has twice previously been convicted under Article 159 of "insulting the organs of state" but these sentences were suspended. If the sentence in connection with the Güçlükonak Massacre is confirmed, he may also have to serve these sentences. Meanwhile, he faces approximately twenty other prosecutions arising from HRA activities.

anar Yurdatapan (centre) is a well-known composer and song writer. In addition to contributions to popular and traditional music he has written music for films and plays and was a winner of the Golden Orange Award at the Antalya Film Festival. Following the military coup of 1980, he and his wife, the singer and actress Melike Demira, spent more than 11 years in exile in Germany. The Turkish authorities stripped them of their citizenship in 1983. They returned to Turkey in 1991. _anar Yurdatapan is spokesperson for "Together for Peace" and "Freedom for Freedom of Expression", a civil disobedience movement in which 1080 intellectuals have published a book containing convicted writings, and forced the courts to try them.

After a career in the Turkish petrochemical industry, **Münir Ceylan** (right) was elected President of Petrol-I_ trade union in 1986. He served as President until 1994 when he was convicted under Article 312 of the Turkish Penal Code for alleged "incitement to enmity" in a magazine article which he had written. He served eight months in prison as a prisoner of conscience. As a consequence of this conviction he was barred for life from political or trade union activities. He has 17 other ongoing trials because of his speeches and writings and three convictions totalling more than four years' imprisonment which are awaiting the judgment of the Appeal Court.

"There was a massacre - people shot and their [illegible]. As a human being you have to respond to that, whatever your political views, and that's why we went to see what happened. I have no hesitation in pressing on with this issue until we get an answer, and I am willing to pay the price - imprisonment or whatever."

The case opened in February 1997 at Istanbul Criminal Court No 4. At hearings over the course of a year, attended by Amnesty International observers, the three defendants were keen to defend the charge on the grounds that the massacre did indeed appear to have been carried out by the security forces. The court refused to admit any of the evidence collected by the delegation and on 3 February 1998 the three were each sentenced to 10 months' imprisonment. They are currently at liberty pending an appeal which is likely to be heard over the course of the next year. All three have other sentences and prosecutions pending on freedom of expression charges for speeches and statements they have made on other issues.

Conclusion and recommendations to the Turkish Government

The Güçlükonak Massacre is one example of how prosecutors and judges in Turkey have failed properly to investigate the many allegations of extrajudicial execution in the region under state of emergency legislation. According to the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, there should be "a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances". The principles go on to describe in detail how such an expert and impartial commission of investigation should be composed, their methods, and their powers to seize evidence and protect witnesses. Amnesty International has repeatedly urged the government to establish commissions in line with the UN Principles, to investigate official involvement in the two thousand political killings committed since 1991, but no such commissions have been established.

In the case of the Güçlükonak massacre, there appears to have been no official investigation at all. The Turkish Government has indicated to the UK Government's Foreign & Commonwealth Office that "they consider the case closed and are not prepared to initiate an independent enquiry" [4]. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions raised the case with the Turkish authorities

[4] Unpublished letter from the Rt Hon David Davis MP, Foreign & Commonwealth Office, to Lord Avebury, Chairman of the UK Parliamentary Human Rights Group, 17 April 1996. Cited in the Parliamentary Human Rights Group June 1996 report on the massacre.

who replied only that the victims had died in an attack by members of the PKK, and that the case was "*sub judice*"[5].

Amnesty International deplores the fact that the Turkish authorities have ignored internationally recognized standards, preferring instead to prosecute members of a delegation which had tried, in good faith, to cast some light on the events at Güçlükonak that winter morning. Amnesty International urges that the verdicts against _anar Yurdatapan, Münir Ceylan and Ercan Kanar be immediately quashed. If the verdicts are enforced, Amnesty International will consider the three as prisoners of conscience, since their imprisonment would be in breach of Article 19 of the Universal Declaration of Human Rights, which safeguards the right to freedom of opinion and expression, including the "freedom to hold opinions without interference and to seek, receive and impart information and ideas ...", and of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which Turkey is a State Party.

Many questions regarding the killings at Güçlükonak remain unanswered. Amnesty International therefore calls upon the Turkish Government to abide by UN Principles and establish a thorough and impartial investigation into the massacre at Güçlükonak, the methods and findings of which should be made public, and to bring to justice those responsible for the killings[6].

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[5] E/CN.4/1998/68/Add.1. The government also reported that compensation had been paid to the families of Mehmet Öner, Be_ir Nas, Lokman Özdemir, Abdulhalim Y_lmaz and Hamid Y_lmaz.

[6] The Social and Legal Research Foundation (TOHAV), a lawyers' organization based in Istanbul, registered a personal petition to the European Commission of Human Rights in September 1996 on behalf of the relatives of those killed and against the Republic of Turkey. The petition is still under consideration by the Commission.