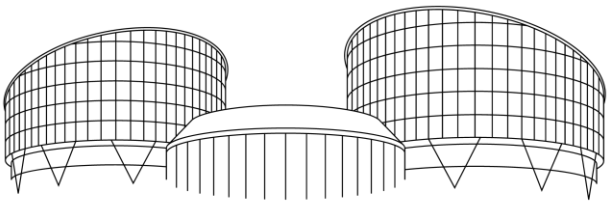

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

SECOND SECTION

CASE OF GASYAK AND OTHERS v. TURKEY

(Application no. 27872/03)

JUDGMENT

STRASBOURG

13 October 2009

FINAL

13/01/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gasyak and Others v. Turkey**,**

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş, *judges,*

and Françoise Elens-Passos, *Deputy Section Registrar,*

Having deliberated in private on 8 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 27872/03) 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 four Turkish nationals, Mr Sabri Gasyak, Ms Leyla Gasyak, Mr İsa Akman and Ms Hanım Candoruk ("the applicants"), on 13 June 2003.

2. The applicants were represented 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 four of their relatives had been killed by agents working for or on behalf of the State and that the authorities had failed to carry out an effective investigation into the killings.

4. On 22 January 2008 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1975, 1974, 1961 and 1972 respectively. They all live in the town of Cizre.

6. In March 1994 Abdulaziz Gasyak, Süleyman Gasyak, Yahya Akman and Ömer Candoruk were killed. The applicants were related to these people as follows: Sabri Gasyak is the brother of Abdulaziz Gasyak; Leyla Gasyak was the wife of Süleyman Gasyak; İsa Akman is the father of Yahya Akman and Hanım Candoruk was the wife of Ömer Candoruk. The application was brought by the applicants on their own behalf and on behalf of the remaining heirs of the four deceased men.

A. Introduction

7. The facts of the case, particularly concerning events which took place on 6 March 1994, are disputed by the parties.

8. The facts as presented by the applicants are set out in Section B below (paragraphs 9-21). The Government's submissions concerning the facts are summarised in Section C below (paragraph 22).The documentary evidence submitted by the applicant and the Government is summarised in Section D (paragraphs 23-50).

B. The applicants' submissions on the facts

9. The applicants' four relatives were working as tradesmen, buying food, tea and tobacco from the area near the Turkish-Iraqi border and selling them in the nearby town of Cizre and the surrounding areas.

10. On 6 March 1994 the four men were travelling from Cizre to Silopi in a vehicle which was being driven by Ömer Candoruk. They were stopped by gendarmes at a checkpoint approximately five to six kilometres outside the town of Silopi. Two unmarked Renault cars were parked nearby. At that point, a certain Mr A.M., who lived in Cizre and who knew the four men, was travelling from Cizre to Silopi in a minibus and saw the four men arguing with a group of gendarme officers in plain clothes. Abdulhakim Güven and Adem Yakın, who used to be PKK[1] members but who had been working for the gendarmerie since their arrests, were also with the gendarme officers. MM. Güven and Yakın were referred to in the area as "confessors"[2]. The applicants' relatives were then put into vehicles. They were joined by gendarme officers and the confessors and the cars began driving in the direction of Cizre.

11. Mr A.M. then saw something being thrown out of one of the vehicles. He stopped and picked it up and realised that it was Ömer

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

[2] A term used to describe an ex-member of an illegal organisation who provides the authorities with information about that organisation.

Candoruk's driving licence. The vehicles then turned off the main road and started heading towards Holan village. Mr A.M. did not see the vehicles again.

12. According to the information the applicants subsequently gathered from a number of villagers living in Holan village, one of their relatives had jumped out of the moving vehicle and tried to run away, but was shot by one of the confessors or the gendarme officers. His body was put in the boot of one of the vehicles.

13. The three surviving men were then taken to the gendarme station in Bozalan village, which is located approximately seven to eight kilometres from Cizre. Before sunset they were taken in the same vehicles to a place nearby and were shot and killed.

14. The killing was witnessed by a certain Mrs E.T. and her female friends who were working in a nearby field.

15. The following day, 7 March 1994, Mr A.M. told the applicants what he had seen and gave them Ömer Candoruk's driving licence. The applicants then contacted the police and the gendarmerie in Silopi, but were unable to obtain any information from them. The same day Mrs E.T. told the applicants about the fate of their relatives. The applicants then contacted the gendarmerie and informed the offices of the prosecutor and the governor.

16. On 8 March 1994 gendarmes found the bodies of the four men covered with soil and stones. They had all been shot dead and their heads smashed with stones. An on-site report prepared the same day stated that the killings had probably been carried out by members of the PKK in a revenge attack because the deceased had been village guards. However, the deceased had never agreed to become village guards, contrary to the advice of the gendarmerie.

17. No other action was taken in the area by the gendarmes. They did not question the applicants or any of the persons present in the vicinity.

18. Furthermore, no steps were taken by the Cizre prosecutor who, on 5 April 1994, sent the investigation file to the prosecutor at the Diyarbakır State Security Court who had jurisdiction to continue the investigation.

19. The investigation carried out by the prosecutor in Diyarbakır was limited to the sending of occasional letters to the gendarmerie, asking them to search for the perpetrators. The gendarmerie replied that they had been unable to find the perpetrators despite their searches.

20. The number plate of the vehicle in which the applicants' relatives had been travelling on 6 March 1994 was subsequently changed, and the vehicle continued to be used by confessors and other plain clothes officials in Cizre.

21. The authorities unsuccessfully searched for the two confessors, MM. Güven and Yakın. The requests by the prosecutor to be informed of their whereabouts were ignored by the gendarmerie for a long time. Mr Güven was subsequently found and questioned by a police officer.

Although the applicants were able to find Mr Yakın's address and gave it to the authorities, no steps were taken to question him. During the eventual trial of the two confessors for homicide (see paragraphs 36-45 below), neither of them ever appeared before the Şırnak Assize Court (hereafter "the trial court") to give evidence.

C. The Government's submissions on the facts

22. The Government's submissions were based on the documents drawn up by the national authorities in the course of the investigation, the trial and the compensation proceedings, which documents are summarised below.

D. Documentary evidence submitted by the parties

1. Documents pertaining to the criminal investigation into the killings

23. On 8 March 1994 the bodies of the four men were recovered by gendarmes and identified by villagers who were present in the area at the time. The gendarmes found five *Kalashnikov*-type spent bullet cases around the bodies. It was concluded in an on-site report prepared by the gendarmes that the four men had probably been killed by members of the PKK in order to deter other members of their families from becoming village guards. It was established that the four men had been killed where they were found.

24. The same day the bodies were examined *in situ* by a doctor who concluded that the four men had been killed by gunshot wounds. The doctor, who observed a large number of bullet entry and exit holes on the bodies, deemed it unnecessary to conduct a full autopsy; the cause of death was established and that was sufficient. A bullet which had entered and exited the body of Abdulaziz Gasyak was secured for further examination. The Cizre prosecutor was also present at the time of the doctor's examination.

25. Also that day the Cizre prosecutor decided that his office lacked jurisdiction to investigate the killings "perpetrated by members of the illegal organisation" and sent the file to the Diyarbakır State Security Court prosecutor's office ("the Diyarbakır prosecutor").

26. The Diyarbakır prosecutor instructed the gendarmerie on 18 April 1994 to search for the perpetrators of the killings.

27. According to a ballistic examination, the five spent bullet cases had been fired by two separate weapons.

28. On a number of occasions between 1 September 1995 and 22 March 2002, the gendarmerie reported to the Diyarbakır prosecutor that they had been "unable to find the perpetrators of the killings which, in all likelihood, had been carried out by members of the PKK". On 16 February 2002 a

number of soldiers had visited the place where the bodies had been found in 1994, but they had been unable to establish the identities of the perpetrators.

29. On 11 July 2002 a lawyer representing the applicants wrote to the Diyarbakır prosecutor and asked him to investigate the killings. The lawyer pointed to the fact that none of the relatives of the deceased men or anyone living in the area where the bodies had been found had been questioned by the authorities. He also informed the prosecutor that Mr A.M. and Mrs E.T had witnessed the incidents.

30. The applicants, who were questioned by the Diyarbakır prosecutor on 15 July 2002, stated that after the killing of their relatives they had been warned by the security forces not to make any complaints. They also told the prosecutor that no investigating authority had ever questioned them.

31. The same day Mr A.M. and Mrs E.T were also questioned by the Diyarbakır prosecutor. They gave the prosecutor their eyewitness accounts of the events – which are summarised above (see paragraphs 10-11 and 14-15 above) – leading up to the killing of the four men.

32. Also that day the Diyarbakır prosecutor decided that he lacked jurisdiction to investigate the killings because, although it had been stated by his opposite number in Cizre in 1994 that the killings had been carried out by members of the PKK (see paragraph 25 above), it was now being alleged by the applicants that their relatives had been killed on account of their refusals to become village guards. The two confessors and "their accomplices whose identities could not be determined" were referred to in this document as the "accused". The Diyarbakır prosecutor then forwarded the file to the office of the Cizre prosecutor.

33. The applicants and the two eyewitnesses, Mr A.M. and Mrs E.T, were questioned by the Cizre prosecutor on various dates in December 2002 and January and May 2003. They repeated their respective complaints and eyewitness accounts of the events. Mr A.M. also told the prosecutor that he would be willing to identify the two confessors in an identity parade.

34. On 17 March 2003 Abdulhakim Güven, one of the two confessors allegedly involved in the killings, was questioned by a police officer. He denied the accusations against him.

35. The other confessor, Adem Yakın, was questioned by the Cizre prosecutor on 15 July 2003. He also denied the accusations and stated that he had been performing his military service at the material time.

36. On 5 August 2003 the Şırnak prosecutor filed an indictment with the Şırnak Assize Court ("the Şırnak court"), charging the two confessors with the offence of multiple homicide.

37. In the course of its first hearing on 7 August 2003 the Şırnak court sent letters rogatory to the Assize Courts in Diyarbakır and Batman where the two defendants were living, and asked those courts to question the defendants.

38. On 12 September 2003 the Diyarbakır Assize Court questioned Abdulhakim Güven who disputed the allegations and stated that at the time of the killings he had been in prison.

39. During a hearing held on 9 October 2003, Mr A.M. and Mrs E.T repeated their eyewitness accounts before the Şırnak court. The same day the Şırnak court issued an arrest warrant for Adem Yakın. It also ordered that Abdulhakim Güven be photographed with a view to showing his photographs to the eyewitnesses.

40. On 14 November 2003 Adem Yakın was arrested and questioned by the Batman Assize Court pursuant to the letters rogatory mentioned above. He denied the accusations and maintained that he had been performing his military service at the time of the killings. He was released the same day.

41. On 30 March 2004 the lawyer for the applicants sent a letter to the Şırnak court, requesting permission for his clients to join the proceedings as interveners. This request was accepted on 12 October 2004.

42. During the subsequent stages of the proceedings it transpired that on 28 February 1994 – that is, some six days before the killings – Abdulhakim Güven had been released from prison for a period of ten days with the permission of the Diyarbakır State Security Court so that he could "help the security forces with their anti-terrorism operations". In fact, on various dates in 1994 he had been released from prison to help the security forces.

43. The Şırnak court had to postpone a number of its hearings to wait for the photographs of Abdulhakim Güven.

44. After having sent a number of reminders, on 27 January 2005 the Şırnak court was finally provided with the photographs of Abdulhakim Güven taken on 17 January 2005. During a hearing held on 29 March 2005, the eyewitness Mr A.M. was shown the photographs but was unable to identify Abdulhakim Güven. Mr A.M. told the Şırnak court that he had last seen Mr Güven more than ten years ago and that at that time Mr Güven had had a long beard; the person in the photograph did not have a beard.

45. At the same hearing the prosecutor asked the Şırnak court to acquit the defendants. The Şırnak court accepted that request and acquitted the defendants for lack of sufficient evidence. It considered, in particular, that although Mr A.M. had been in a minibus with a number of other persons, he had been the only person to witness the alleged abduction of the four men. In any event, the defendants had been working as informers and helping the security forces. Such informers were not well regarded by the residents of the region and, as such, the testimony of Mr A.M. implicating the confessors in the killings was disregarded. According to the Şırnak court, the fact that Abdulhakim Güven was not in prison at the time of the killings did not prove that he had taken part in them. He had been helping the security forces with their operations and, as such, it was not logical that he would be involved in a killing. The Şırnak court also decided to inform the relevant prosecutor to continue with the search for the perpetrators.

46. The applicants appealed. In their appeal petition they referred to the obligations under Articles 2 and 13 of the Convention to carry out effective investigations into incidents of killings, and alleged that the investigation into the killing of their relatives had been flawed. They maintained that the eyewitnesses had been consistent throughout the criminal investigation. The confessor Abdulhakim had lied to the investigating authorities when he said that he had been in prison on 6 March 1994 (paragraph 38 above). The Şırnak court had contented itself with showing the photographs of one of the defendants to an eyewitness and had not summoned the defendants to the trial. Furthermore, the investigating authorities had failed to follow up leads concerning the involvement of the gendarmerie and the security services and had only prosecuted the two confessors. They argued that the trial court had also failed to ensure an identity parade so that the eyewitnesses could have seen and identified the two confessors.

47. On 14 November 2006 the Court of Cassation rejected the appeal and upheld the two defendants' acquittals.

48. In their letter of 20 August 2009 the applicants informed the Court that the same two confessors (that is, Mr Abdulhakim Güven and Mr Adem Yakın), a high-ranking army official and three intelligence officers working for the gendarmerie had been indicted in July 2009 and put on trial for the killing of their four relatives as well as the killing of a number of other persons at around the same time.

2. Documents pertaining to the compensation proceedings

49. On 25 July 2005 the second to fourth applicants, together with a number of other heirs of their deceased relatives, submitted petitions to the Şırnak Governor's office and claimed compensation under the provisions of the Law on Compensation of the Losses resulting from Terrorism and the Measures Taken against Terrorism (Law no. 5233 of 27 July 2004). In their petitions the three applicants repeated their allegations of State involvement in the killings**.**

50. On 10 July 2006 the Şırnak Governor's office partially accepted the compensation claims made by the three applicants in respect of the killings of their relatives "by members of the PKK". The second applicant Leyla Gasyak was awarded approximately 2,500 euros (EUR) in respect of the killing of her husband Süleyman Gasyak. The third applicant İsa Akman was awarded approximately EUR 5,000 in respect of the killing of his son Yahya Akman. The fourth applicant Hanım Candoruk was awarded approximately EUR 2,500 in respect of the killing of her husband Ömer Candoruk. Other heirs of these three deceased men were also awarded various sums of money.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 2 AND 13 OF THE CONVENTION

51. The applicants complained that their four relatives had been killed by agents of the respondent State in violation of Article 2 of the Convention. Relying on Article 13 of the Convention they further complained that they had not had an effective remedy in respect of the killing of their relatives because the investigation had been flawed.

52. The Government denied any State involvement in the killings and maintained that the investigation had been effective.

53. The Court considers it appropriate to examine both 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. Admissibility

1. Six months

54. The Government argued that the applicants had failed to comply with the six-month rule laid down in Article 35 § 1 of the Convention. Referring in particular to the decision in the case of *Bayram and Yıldırım v. Turkey* (no. 38587/97, ECHR 2002-III), the Government submitted that the applicants, who claim that the investigation was ineffective, should have introduced their application within a reasonable time after the bodies of their relatives had been found in April 1994. Nevertheless, they had failed to do so and waited nine years before lodging their application.

55. The applicants submitted that as soon as they had been informed about the apprehension of their relatives at the gendarmerie check point they had informed the prosecutor and the governor who, in turn, had told them that their relatives were not in custody. They had subsequently been threatened by members of the security forces not to make any complaints.

56. Furthermore, they had made official complaints to a number of authorities as soon as life in the region had begun to return to normal following the lifting of the emergency rule in November 2002.

57. The Court notes that it was held in the case of *Bayram and Yıldırım* referred to by the Government and in a number of other similar cases that, if no domestic remedies are available or if they are judged to be ineffective, the six-month time-limit in principle runs from the date of the act complained of. Special considerations could apply in exceptional cases where an applicant first pursues a domestic remedy and only at a later stage becomes aware, or should have become aware, of the circumstances which make that remedy ineffective. In that situation, the six-month period might be calculated from the time when the applicant becomes aware, or should have become aware, of these circumstances (see *Bulut and Yavuz v. Turkey* (dec.), no. 73065/01, 28 May 2002 and the cases cited therein).

58. Turning to the circumstances of the present case, the applicants' relatives were killed in 1994 and an investigation was started the same year. Nevertheless, there is no information in the file to suggest that the applicants made any attempts to take part in the investigation or to obtain information about its progress until they applied to the prosecutor on 11 July 2002. Even assuming that the investigation was not being carried out in an efficient manner, the Court finds that the applicants must be considered to have been aware of the ineffectiveness of the criminal investigation long before they petitioned the public prosecutor on 11 July 2002.

59. The Court concludes, therefore, that the applicants' complaints concerning the killing of their relatives and the alleged ineffectiveness of the investigation into the killings conducted during the period up to 11 July

2002 have been introduced out of time and are inadmissible under Article 35 §§ 1 and 4 of the Convention.

60. The Court considers, however, that in some cases information purportedly casting new light on the circumstances of a killing may come into the public domain at a later stage. The issue then arises as to whether, and in what form, the procedural obligation to investigate is revived. To that end, the Court considered in its judgment in the case of *Brecknell v. the United Kingdom* (no. 32457/04, § 71, 27 November 2007) that, where there is a plausible or credible allegation, the discovery of any new piece of evidence or item of information relevant to the identification and eventual prosecution or punishment of the perpetrator of an unlawful killing, would require the authorities to take further investigative measures. The steps which would be reasonable to take will vary considerably according to the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence

61. The Court will therefore examine whether the information provided by the applicants in the present case to the domestic authorities on 11 July 2002, suggesting the involvement of agents of the State and the two confessors in the killing of their relatives, amounted to the kind of new evidence alluded to in the preceding paragraph. In this connection the Court observes that a new investigation was started into these allegations by the authorities who thus discovered new leads and information about the killing. Subsequently, the trial of the two confessors began before the Şırnak Court. The applicants joined the proceedings as interveners and appealed against the judgment acquitting the two suspects (see paragraph 45 above). Furthermore, it is to be noted that, in the proceedings before the Court, the applicants not only challenge the effectiveness of the investigation carried out between March 1994 and July 2002, but also the effectiveness of the investigation and trial conducted after July 2002.

62. By contrast, in the above-mentioned *Bayram and Yıldırım* and *Bulut and Yavuz* cases, the search for the perpetrators had been ongoing for a long time without any active steps being taken by the authorities or the applicants, and without any evidence being brought to the authorities' attention.

63. In light of the foregoing, the Court considers that the information submitted to the authorities by the applicants in July 2002 led to significant new developments and, as such, the procedural obligation to investigate the killing of the applicants' relatives was revived after that date (see also, *mutatis mutandis*, *Hüsna Kara and Others v. Turkey* (dec.), no. 37446/97, 3 December 2002; *Kavak v. Turkey*, no. 53489/99, §§ 84-90, 6 July 2006).

64. The Court deems it important to reiterate at this juncture 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 (*Brecknell*, cited above, § 69).

65. It follows that the Government's objection to the admissibility of the complaint under Article 2 of the Convention, in so far as it concerns the effectiveness of the investigation and the trial carried out after July 2002, must be dismissed.

2. Victim status

66. Referring to the decisions of inadmissibility in the cases of *İçyer v. Turkey* (no. 18888/02, 12 January 2006) and *Uca v. Turkey* (no. 3743/06, 29 April 2008), the Government argued that the applicants could no longer claim to be victims within the meaning of Article 34 of the Convention because they had applied for and received compensation for the deaths of their relatives.

67. The Court reiterates at the outset that a decision or measure favourable to an applicant is not in principle sufficient to deprive that individual of his or her status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 49, 20 December 2007 and the case cited therein).

68. Moreover, in cases concerning deprivations of life, Contracting States have an obligation under Article 2 of the Convention to conduct an effective investigation capable of leading to the identification and punishment of those responsible. The Court considers that that obligation would be rendered illusory if, in respect of complaints under Article 2 of the Convention, an applicant's victim status were to be remedied by merely awarding damages (see, *mutatis mutandis*, *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, § 74; see also, more recently *Nikolova and Velichkova*, cited above, § 55 and the cases cited therein). Confining the authorities' reaction to incidents of deprivations of life to the mere payment of compensation would also make it possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibitions on killing, despite their fundamental importance, would be ineffective in practice (*Leonidis v. Greece*, no. 43326/05, § 46, 8 January 2009).

69. It is on account of the above-mentioned requirement under Article 2 of the Convention, to carry out effective investigations into incidents of deprivations of life, that the Court has held in a number of cases against Turkey concerning such issues that the applicants did not have to exhaust

the non-fault based administrative remedy because it was not capable of leading to the identification and punishment of those responsible. It could not therefore be regarded as an effective remedy within the meaning of Article 35 § 1 of the Convention (see, *mutatis mutandis*, *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 79, ECHR 1999-IV).

70. In the present case the Şırnak Governor's office awarded compensation to three of the four applicants for the killing of their relatives "by members of the PKK". There is no information or documents in the Court's possession to show that any kind of investigation had been carried out by the office of the Governor – or by any authority on behalf of that Governor – with a view to identifying the perpetrators of the killings before awarding compensation to the three applicants. Indeed, no information or documents were submitted by the Government to suggest that the compensation procedure in question would meet the requirements of an effective investigation under Article 2 of the Convention and thereby an effective remedy for the purposes of that provision.

71. In the light of the foregoing and having particular regard to the Court's established case-law referred to above (see paragraphs 67-69 above), the Court considers that the compensation procedure of which three of the four applicants made use cannot be regarded as an effective remedy for the purposes of Article 2 of the Convention as it did not afford them adequate redress. It follows that the Government's objection to the applicants' victim status must also be dismissed.

72. The Court notes that the applicants' complaint concerning the effectiveness of the investigation and the trial conducted after July 2002 is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

73. The applicants submitted that the national authorities had failed to carry out an adequate and effective investigation into the killings of their relatives. They also alleged that the authorities would have investigated the killings and identified those responsible had it not been for the involvement of the gendarmerie and the security services in the killings.

74. The Government maintained that the investigation had been effective. In the opinion of the Government, the Şırnak court's failure to locate and question the personnel working at the checkpoint on the day of the abduction of the applicants' relatives had been due to the applicants' failure to inform the authorities in a timely fashion. As regards the Şırnak court's failure to question the contradictory information provided by Abdulhakim Güven about his whereabouts at the time of the incident (see paragraphs 38 and 42 above), the Government stated that Abdulkadir Güven

had been released from prison on a number of occasions to help the security forces and, as such, it was normal that some eight years after the events he could not remember the exact dates of his releases. In any event, even when he had been released from prison, he was not allowed to move freely and remained under the control of the security forces.

75. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann v. the United Kingdom*, no. 19009/04, § 161, 13 May 2008; *Kaya v. Turkey*, judgment of 19 February 1998, *Reports*, 1998-I, § 105). In that connection, the Court points out that this obligation is not confined to cases where it is apparent that the killing was caused by an agent of the State (see *Salman v. Turkey* ([GC], no. 21986/93, § 105, ECHR 2000-VII).

76. The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Oğur v. Turkey* [GC], no. 21954/93, § 88, ECHR 1999-III). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony (see *Tanrıkulu,* cited above, § 109). Any deficiency in the investigation which undermines its ability to identify the person responsible will risk falling foul of this standard.

77. Turning to the facts of the present case, the Court observes at the outset that, despite the applicants' and the eyewitnesses' repeated submissions as to the alleged involvement of gendarmes in the abduction and subsequent killing of the four relatives, there is no information in the file to suggest that attempts were made to identify and question the personnel working at the checkpoint or the personnel at the nearby Bozalan gendarmerie station. Indeed, the national authorities' failure to give serious thought to the possibility of security force involvement in the killing is apparent from the trial court's conclusion (see paragraph 45 above) – which was also adopted by the Government (see paragraph 74 above) – that, as one of the defendants had been helping the security forces with their operations at the time, it was not logical that he would be involved in any killings.

78. The Court observes that the two confessors – who were the only persons charged with the killings – never appeared before the trial court. The Court notes that, according to Turkish law, defendants who are not detained on remand during the course of criminal proceedings against them have the right not to attend the trial court hearings. As happened in the present case, pursuant to letters rogatory issued by trial courts, such

defendants' statements are taken by criminal courts located in the areas where they live. Nevertheless, the Court considers that, in the circumstances of the present case, the trial court's failure to ensure the attendance of the two defendants was not compatible with the requirements of an effective investigation. That failure not only prevented the trial court from questioning the defendants directly in the presence of the applicants' lawyer, but also prevented the eyewitnesses from identifying them. In this connection the Court observes that the key eyewitness to the events informed the prosecutor that he would be willing to identify the two confessors in an identity parade (see paragraph 33 above). For their part, the applicants drew the Court of Cassation's attention to the trial court's failure to ensure such a procedure (see paragraph 46 above). Nevertheless, as pointed out by the applicants in their appeal petition, the Şırnak court contented itself with showing photographs of one of the defendants to that eyewitness. In this connection the Court cannot but note that even obtaining those photographs took the trial court more than a year and required many reminders (see paragraphs 39 and 43-44 above).

79. Moreover, the Court finds it wholly unsatisfactory that, even the misleading information provided by one of the defendants about his whereabouts at the time of the killings (see paragraph 38 above) did not spur the trial court into questioning him directly or even indirectly with the assistance of another court by a letter rogatory.

80. In light of the shortcomings identified in the foregoing examination, the Court concludes that the national authorities failed to carry out any meaningful investigation into the killing of the applicants' relatives as required by Article 2 of the Convention.

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

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

82. The applicants complained that the indifference displayed by the authorities to their allegations 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."

83. The Government did not deal with this complaint in their observations.

84. The Court considers that the question whether the authorities' failure to conduct an effective investigation amounted to treatment contrary to Article 3 of the Convention in respect of the applicants is a separate complaint from the one brought under Article 2 of the Convention which relates to procedural requirements and not to ill-treatment as understood by

Article 3 of the Convention (see *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 237, 8 April 2004).

85. Although the inadequacy of the investigation into the killing of their relatives will obviously have caused the applicants feelings of anguish and mental suffering, the Court considers that it has not been established that there were special factors which would justify finding a separate violation of Article 3 of the Convention in relation to the applicants (*ibid*, at § 239, and the cases cited therein; see also *Dündar v. Turkey*, no. 26972/95, § 91, 20 September 2005; *Çelikbilek v. Turkey*, no. 27693/95, §§ 98-99, 31 May 2005 and the case cited therein).

86. It therefore concludes that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

87. 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

88. The first applicant Sabri Gasyak claimed 100,000 euros (EUR) in respect of pecuniary and EUR 200,000 in respect of non-pecuniary damage.

89. Each of the remaining three applicants claimed EUR 92,000 in respect of pecuniary and EUR 200,000 in respect of non-pecuniary damage. In formulating their claims for pecuniary damage these three applicants have taken into account the sums of compensation received by them and their relatives from the office of the Governor (see paragraphs 49-50 above).

90. The Government argued that the applicants had failed to submit any evidence in support of their claims and that the sums requested by them were not justified in the circumstances of the case.

91. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, having regard to similar cases (see *Nesibe Haran v. Turkey*, no. 28299/95, § 107, 6 October 2005; see also *Dündar*, cited above, § 109), and deciding on an equitable basis, it awards each applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

92. The applicants also claimed EUR 6,400 for the costs and expenses incurred before the domestic courts and for those incurred before the Court. In support of their claims the applicants submitted a schedule of the hours spent by their lawyer on the case.

93. The Government contested the claim.

94. 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 were 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 to the applicants, jointly, the sum of EUR 4,000 covering costs and expenses under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 2 of the Convention relating to the effectiveness of the investigation into the killing conducted after July 2002 admissible, and by a majority, the remaining complaints inadmissible;

2. *Holds* unanimously that there has been a violation of Article 2 of the Convention in its procedural aspect on account of the failure of the authorities of the respondent State to conduct an effective investigation;

3. *Holds* unanimously
   (a) that the respondent State is to pay the 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 national currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros) to each of the four applicants plus any tax that may be chargeable, in respect of non-pecuniary damage,

(ii) EUR 4,000 (four thousand euros), to the four applicants jointly, plus any tax chargeable to the applicants, in respect of costs and expenses;

(b) 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;

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

Done in English, and notified in writing on 13 October, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos Deputy Registrar	Françoise Tulkens President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint concurring opinion of Judges Sajó, Tsotsoria and Karakaş is annexed to this judgment.

F.T.
F.E.P.

JOINT CONCURRING OPINION OF JUDGES SAJÓ, TSOTSORIA AND KARAKAŞ

We voted with the majority in declaring admissible the complaint under Article 2 of the Convention relating to the effectiveness of the investigation conducted after July 2002 into the killing. However, we consider that all the complaints under Article 2 should also have been declared admissible.

In fact, the Court is of the opinion that the application that was submitted on 13 June 2003 regarding killings that occurred in March 1994 is admissible because new information that casts new light on the circumstances of the killing came into the public domain at a later stage (see paragraph 60 of the judgment). In this case the Court finds that the information submitted to the authorities by the applicants in July 2002 led to significant new developments. The Court therefore limits itself to a review of the investigations carried out after July 2002 and finds a violation of Article 2 of the Convention under its procedural limb. We agree with that position: the investigations carried out after July 2002 did not satisfy the requirements of Article 2 of the Convention.

It seems to us that in 1994 the applicants were already aware of the crucial facts that were sufficient to substantiate their claims that the killings had occurred and that they provided enough information for an intense and thorough investigation such as is required in a case where four people were killed by Kalashnikov-type gunshots. Between 1994 and 2002 the gendarmerie were unable to find the perpetrators and attributed the killings "in all likelihood" to the PKK (see paragraph 28).

The Government submitted that the applicants, who claimed that the investigation was ineffective, should have lodged their application within a reasonable time after the bodies of their relatives had been found in April 1994. However, they had waited nine years. The Court noted that it had held in the case of *Bayram and Yıldırım v. Turkey* ((dec.), no. 38587/97, ECHR 2002-III), referred to by the Government, and in a number of other similar cases that, if no domestic remedies were available or if they were judged to be ineffective, the six-month time-limit in principle ran from the date of the act complained of. However, in the decision cited the Court found that the applicants had failed to satisfy an additional requirement too: they had "*failed to substantiate the existence of specific circumstances which might have prevented them from observing the time-limit laid down in Article 35 § 1*" (emphasis added).

The Court's decision in *Bayram and Yıldırım* does not exempt it from considering the extent to which an applicant was hindered from submitting an application.

In a number of its judgments the Court has had regard to the situation which existed in south-east Turkey during the time of emergency rule, which was characterised by violent confrontations between members of the

PKK and the security forces, and considered that "in such a situation it must be recognised that there may be obstacles to the proper functioning of the system of the administration of justice. In particular, the difficulties in securing probative evidence for the purposes of domestic legal proceedings, inherent in such a troubled situation, may make the pursuit of judicial remedies futile" (see, *inter alia*, *Akdivar and Others v. Turkey*, 16 September 1996, § 70, *Reports of Judgments and Decisions* 1996-IV). Nevertheless, the considerations entertained by the Court in such cases concerned the effectiveness of judicial remedies in south-east Turkey at that time and related only to the Court's examination of the applicants' compliance with the rule of exhaustion of domestic remedies. Thus, in a number of cases the Court concluded that there existed special circumstances, dispensing the applicants from the obligation to use certain domestic remedies (ibid., § 75).

Although the existence of such specific circumstances absolved the applicants from having recourse to domestic remedies, the Court has not yet exempted applicants from complying with the six-month rule.

Even assuming that the applicants were aware of the ineffectiveness of the investigation, the *specific circumstances* arising from the emergency rule might conceivably have prevented them from making use of a national or international remedy. It is not only in regard to the exhaustion rule that admissibility criteria have to be applied with "due allowance for the fact that [they are] being applied in the context of machinery for the protection of human rights, [and therefore] with some degree of flexibility and without excessive formalism" (see *Akdivar and Others*, cited above, § 69).

The applicants claimed that after reporting the killings they had been threatened by members of the security forces not to make any complaints and that they had made complaints as soon as life in the region had begun to return to normal. The circumstances of the killings and the existence of the state of emergency substantiate their claim. The Court has previously placed reliance on "the vulnerable position of the applicant villagers and the reality that in South-East Turkey complaints against the authorities might well give rise to a legitimate fear of reprisals" (ibid., § 105). In comparable cases such fears have been voiced a number of times by applicants and the Court has found that during emergency rule people were actually killed for not being willing to join the village guards (see, for example, *Acar and Others v. Turkey* (nos. 36088/97 and 38417/97, 24 May 2005). The Government failed to provide information to rebut the presumption that these fears were substantiated and not imaginary.

It follows that the application should have been found to have been submitted within the six–month time-limit and therefore admissible as to the killings that occurred in March 1994. The investigations and related trials are still going on and their length (15 years) constitutes *per se* a violation of Article 2 under its procedural limb.