



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

SECOND SECTION

CASE OF SIDDIK ASLAN AND OTHERS v. TURKEY

(Application no. 75307/01)

JUDGMENT
(Preliminary objection)

STRASBOURG

18 October 2005

FINAL

18/01/2006

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 *Siddik Aslan and Others v. Turkey*,

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

Mr J.-P. COSTA, *President*,

Mr R. TÜRMEŒ,

Mr V. BUTKEVYCH,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

Mrs E. FURA-SANDSTRÖM,

Ms D. JOČIENĚ, *judges*,

and Mrs S. DOLLĚ, *Section Registrar*,

Having deliberated in private on 27 September 2005,

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

PROCEDURE

1. The case originated in an application (no. 75307/01) 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 Siddik Aslan, Mr Yasin Aslan, Mrs Türkan Aslan and Mrs Nihari Aslan (“the applicants”), on 4 October 2001.

2. The first and second applicants were represented by Mr Cihan Aydın, Ms Reyhan Yalçındağ, Mr Metin Kılavuz and Ms Ayla Akat, lawyers practising in Diyarbakır. The third and fourth applicants were represented by Mr Sezgin Tanrikulu, a lawyer also practising in Diyarbakır. The Turkish Government (“the Government”) did not designate an agent for the purposes of the proceedings before the Court.

3. The applicants alleged, in particular, that two of their relatives had been unlawfully killed by security forces in September 2001 and that the authorities had failed to investigate the circumstances of the killings. They invoked Articles 2, 3, 13 and 14 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 27 November 2001 the application was given priority under Rule 41 of the Rules of Court.

6. By a decision of 19 October 2004, the Court declared the application admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were born in 1960, 1952, 1965 and 1945 respectively, and live in the city of Van.

A. Introduction

10. The facts of the case, particularly concerning the events which occurred between 7 and 15 September 2001, are disputed by the parties.

11. The facts as presented by the applicants are set out in Section B below (paragraphs 12-17). The Government's submissions concerning the facts are summarised in Section C below (paragraphs 18-25). The documentary evidence submitted by the parties is summarised in Section D (paragraphs 26-65).

B. The applicants' submissions on the facts

12. Mr Ebuzeyt Aslan is the first applicant's elder brother and is the husband of the third applicant, Mrs Türkan Aslan. Mr Halit Aslan is the second applicant's cousin and is the husband of the fourth applicant, Mrs Nihari Aslan.

13. On 7 September 2001 Ebuzeyt Aslan and Halit Aslan left their homes in Van for Beytüşşebap, a town within the administrative jurisdiction of the city of Şırnak. Nothing was heard from them until 15 September 2001 when Zübeyt Aslan, a relative, received an anonymous telephone call. The caller told Zübeyt Aslan that Ebuzeyt and Halit had been killed in an operation conducted by village guards and soldiers in the Dereyatağı area (*Dereyatağı Mevkii*) near the Geçitli hamlet, within the boundaries of Yeşilöz village. The person then hung up. After the call, the relatives of Ebuzeyt and Halit Aslan went to the local branches of the Human Rights Association in Diyarbakır and Van to ask for assistance.

14. A group of 30 relatives went to the Prosecutor's office in Beytüşşebap. The Prosecutor confirmed what had been said by the anonymous caller. The Prosecutor further stated that the place where the incident had taken place was in a dangerous area and that he could not

therefore hand the bodies over to them. He told the relatives to talk to the commander of the Provincial Gendarmerie Regiment. The identity cards of the members of the group who subsequently went to the Regiment were taken by the soldiers and they were kept waiting at the barracks for the rest of the day. The group was later escorted by soldiers to the outskirts of Beytüşşebap and told not to return or they would suffer the same fate as their relatives.

15. On 21 September 2001 the Diyarbakır Branch of the Human Rights Association by letter informed the Ministry of the Interior, the Human Rights Commission of the Turkish Parliament, the Governor of the Emergency Region, the Secretary of State Responsible for Human Rights, the Şırnak Governor, the Prosecutor's Office in Şırnak, the offices of the Prosecutor and the Governor in Beytüşşebap, of the deaths of Ebuzeyt and Halit Aslan. They requested the authorities to investigate this incident and to find the perpetrators. They further requested that official identifications of the bodies and autopsies be carried out.

16. Amnesty International was also informed and requested to make an urgent appeal.

17. The applicants claim that neither Halit Aslan, who was born in 1939, nor Ebuzeyt Aslan, who was born in 1954, had any connections with the PKK¹. Moreover, Halit Aslan had been suffering from health problems.

C. The Government's submissions on the facts

18. On 10 September 2001 a military operation was initiated by the Beytüşşebap Gendarmerie Regiment's Commander (*Beytüşşebap Jandarma Alay Komutanlığı*) in the Yeşilöz-Faraşın area.

19. At around 5.30 p.m. on 12 September 2001, i.e. on the third day of the operation, the gendarme soldiers were confronted by a group of terrorists in the vicinity of Dereyatağı. When the terrorists refused to surrender an armed clash ensued.

20. A search was conducted in the area by the soldiers after the clash had ended. In the course of the search the bodies of two terrorists were found together with a Kalashnikov rifle, four cartridges, 27 rockets and 22 empty bullet shells.

21. The search of the vicinity continued the next morning and during this search the body of a third terrorist was found. The booby trap on this third body was made safe by the soldiers.

22. It was established by the soldiers that the remaining terrorists had escaped towards the city of Van.

23. According to a record of the operation drawn up by the soldiers, it had been impossible to transport the bodies of the terrorists since the area

¹ The Kurdistan Workers' Party.

was very mountainous, the distance between the location of the bodies and the city centre too great, and the soldiers had no vehicles at their disposal. A decision had therefore been taken to leave the corpses in the area and they had been covered with stones to protect them from wild animals. It was also impossible for the soldiers to take photographs of the bodies since they had no cameras with them.

24. Following the incident, the weather conditions allowed the authorities to visit the site on 29 September, 17 October, 22 October, 4 November, 21 November, 17 December 2001 and, finally, on 8 January 2002. On those dates the authorities visited the site in order to take photographs of the bodies and to carry out autopsies. However, despite extensive searches, the bodies, allegedly those of Halit Aslan and Ebuzeyt Aslan, could not be found. It was assumed that the bodies had decomposed or been taken by terrorists.

25. It has not yet been established whether the bodies found after the operation on 12 September 2001 were those of the applicants' relatives. Furthermore, contrary to what was alleged by the applicants, the Beytüşşebap Prosecutor did not make any claim that it was not possible to hand over the bodies to the relatives.

D. Documentary evidence submitted by the parties

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

1. Documents pertaining to the military operation

27. According to the record of the operation drawn up on 13 September 2001 by the gendarme soldiers who took part in an operation on 12 September 2001, the bodies of three terrorists were found in the operation area. Quantities of food and ammunition were also found. The report further listed the amount of ammunition used by the soldiers. According to this list, the gendarme soldiers from the 5th Gendarme Battalion had used a total number of 1,553 bullets, 15 hand grenades and 3 RPG-7 rockets. The soldiers from the Beytüşşebap District Gendarme had used a total of 1,128 bullets.

28. On 18 September 2001 the ammunition left by the PKK was handed over to the Beytüşşebap Gendarme Commander's office.

29. On 19 September 2001 this record of the operation was forwarded to the Prosecutor's office in Beytüşşebap, together with the ammunition that had been found.

2. *Documents pertaining to the investigation carried out by the Beytüşşebap and Şırnak Prosecutors' offices*

30. On 17 September 2001 Hazım Aslan, Zübeyt Aslan and Hacı Aslan submitted two petitions to the Van Prosecutor's office and informed the Prosecutor about the anonymous telephone call that had been received by Zübeyt Aslan, who had been told about the killing of Ebuzeyt and Halit Aslan. They asked the Prosecutor to assist them in obtaining the bodies of their relatives. On the same day, the Van Prosecutor forwarded these petitions to the Beytüşşebap Prosecutor's office in whose jurisdiction the incident had taken place.

31. On 17 September 2001 the Beytüşşebap Prosecutor asked the Beytüşşebap Gendarme Commander's office to clarify the accuracy of the allegations contained in the petitions.

32. On 19 September 2001 the Beytüşşebap Prosecutor questioned Hazım Aslan, Zübeyt Aslan and Hacı Aslan in connection with their petitions. The three men gave a description of their disappeared relatives and stated that neither Ebuzeyt nor Halit had ever been involved in any PKK activity. They also stated that Yeşilöz village, where their relatives had allegedly been killed, had been evacuated and that no one was living there. Zübeyt Aslan further stated that his brother Halit Aslan might have gone to that area to smuggle Iraqi and Iranian persons into Turkey.

33. On 24 September 2001 the Beytüşşebap Prosecutor questioned Kürşat Soysal, the gendarme captain in charge of the military operation, and Tevfik Baştürk, a sergeant-major who also took part in the operation. Captain Soysal stated that, as he and the soldiers under his command had approached the Geçitli hamlet on 12 September 2001, they had been informed by radio that an armed man was walking towards the lower part of the village. Captain Soysal had also seen an armed man near the Dereyatağı area. Captain Soysal stated, *inter alia*, the following:

"I then ordered my soldiers to be quick and not to lose sight of the armed men. It was around 5.30 p.m. As far as I know, the village where these two men were seen had been uninhabited between 8 to 10 years. The area is not suitable for grazing animals. It is an area used by the terrorist organisation. The firing began approximately one minute after I alerted my soldiers. After the firing had stopped I saw one of the bodies. There was a Kalashnikov rifle next to the body. The body belonged to a man over 40 years of age. There were no documents on the body to help identify the person. When I examined the rifle it became apparent that it had recently been fired. We also found four empty cartridges in the area. I was informed by the soldiers that there was another body at the upper part [of the village] but I did not personally see that body. We aborted the search as it was getting dark and moved to a more secure area. When we resumed the search next morning, I saw the other body. It was that of a man of approximately 35 years of age. There were no weapons near the body. Also, there were no identification documents on the body. We then saw the third body of a man of approximately 25 years of age. His body had been badly damaged, possibly by a rocket missile. I thought it possible that he had killed himself. There was a booby trap on this body and we made it safe. We covered the bodies with

stones as we did not have any equipment with which we could dig graves for them. The area where we left the bodies is approximately 45 kilometres from here. We did not have any vehicles at our disposal. There are also landmines on the roads in that area.”

34. Sergeant-major Baştürk gave a similar statement to the Prosecutor.

35. On 24 September 2001 the Beytüşşebap Prosecutor asked the Beytüşşebap Governor to clarify whether anyone was living in the Geçitli area near the Yeşilöz village and whether the area was being used by villagers to graze their animals.

36. On the same day the Prosecutor also asked for copies of registry documents relating to the two disappeared persons to be forwarded to him.

37. Again on the same day, the Prosecutor asked the Beytüşşebap Gendarmerie Commander’s office about the possibility of the bodies being brought down from the area where they had been killed. In the alternative, the Prosecutor asked for body and hair samples to be obtained from the bodies for identification purposes.

38. On an unspecified date in September 2001 General Yavuz Ertürk instructed the forces under his command to find the bodies in order to obtain body samples.

39. Captain Soysal informed the Beytüşşebap Prosecutor on 29 September 2001 of an attempt made by him and his soldiers the previous day to recover the bodies. Their attempt to reach the area had been hampered by fog and heavy rain.

40. On 1 October 2001 Hakan Torun, a first lieutenant and commander of the Beytüşşebap Gendarmerie Headquarters, informed the Prosecutor that bringing the bodies back could only be achieved if the security forces organised an operation. Given the limited number of soldiers under his command, it was not possible for him to carry out such an operation alone. If it was not possible to organise such an operation, then it might be possible to obtain body and hair samples from the corpses.

41. On 2 October 2001 the Beytüşşebap Governor informed the Prosecutor that the Geçitli hamlet of Yeşilöz had been evacuated in 1989 and that no one had lived there since. Furthermore, the villagers were not allowed to take their animals out to graze in the area.

42. On 5 October 2001 the Beytüşşebap Prosecutor asked the Prosecutor in the town of Özalp, in whose jurisdiction the two disappeared persons used to live, to establish the date on which the latter had left their homes. He also asked whether any official complaints had been lodged in relation to the disappearance. The Prosecutor finally asked his colleague in Özalp to question Hacı Aslan, the son of the disappeared Halit Aslan.

43. On 9 September 2001 a statement was taken from Hacı Aslan by the Özalp Prosecutor. Mr Aslan stated that his mother – that is the fourth applicant Nihari Aslan – had told him that his father and Ebuzeyt Aslan had left for Beytüşşebap where they had relatives. He thought that his father had

possibly been shot by the soldiers for having entered a military area. He stated that his father had left the Beytüşşebap area because of his fear of the PKK and it was therefore improbable that his father was a terrorist or that he had carried weapons. His father had never been arrested in the past; in fact, he had never set foot in a police station. Even assuming that his father was a terrorist, this would not justify the refusal of the gendarmerie to hand over his father's body. At the Beytüşşebap gendarmerie commander's office he had been told that the bodies could not be handed over because the deceased were terrorists. He had also been told that he would be shot if he attempted to recover the bodies himself.

44. On 10 October 2001 the Beytüşşebap Prosecutor asked the 23rd Gendarmerie Border Division Commander's office (*23. Jandarma Sınır Tümen Komutanlığı*) whether it would be possible to recover the bodies or, in the alternative, to obtain body samples from them.

45. According to a report drawn up on 17 October 2001 by a gendarme sergeant-major, another attempt to recover the bodies had been made on 16 October 2001 by two fully equipped gendarme teams, joined by two commando units. This operation had to be aborted the following day as it was too cold, foggy and wet.

46. On 18 October 2001 the 23rd Gendarmerie Border Division Commander's office replied to the Beytüşşebap Prosecutor's request that the bodies could only be recovered by means of an operation conducted in the area. The Prosecutor was also informed in the same letter that work on the feasibility of such an operation had already begun.

47. On 18 October 2001 Hazım Aslan, a relative of the two disappeared men, said in a statement made to the police that the family had made applications to the Beytüşşebap Prosecutor's office as well as to the Şırnak Brigade Commander's office (*Şırnak Tugay Komutanlığı*).

48. According to a report drawn up on 22 October 2001 by a gendarme major, a third attempt to recover the bodies had been made on 21 October 2001. It too had had to be aborted as the area was covered with snow.

49. Similar attempts were made on 3 November, 20 November and 16 December 2001 and, finally, on 8 January 2002. The snow had by then reached a height of 50-60 centimetres and there was also a risk of avalanches, with the result that these operations had to be aborted.

50. A meeting was held on 20 November 2001 by the Provincial Human Rights Council (*İnsan Hakları İl Kurulu*). The Council, which was presided over by the provincial Governor, consisted of the local mayor, the provincial gendarmerie commander, the police chief of the province as well as a number of civil servants. According to the minutes of the meeting, the Council, having examined the evidence in the file, reached the conclusion that no innocent civilians had been killed in the operation. The Council further noted that the preliminary investigation was still continuing and that autopsies could not be carried out due to the lack of transportation facilities

and geographic difficulties. The Council stated that efforts to recover the bodies would continue.

51. On 21 December 2001 Hacı Aslan, son of the disappeared Halit Aslan, said in a statement made at the Özalp Prosecutor's office that the family had not made any official complaints in relation to the disappearance of their relatives.

52. On 25 January 2002 the Beytüşşebap Prosecutor asked the Beytüşşebap gendarmerie commander's office to forward him copies of the documents concerning the evacuation of the Yeşilöz village. The Prosecutor also asked whether it could have been possible for the two disappeared men to have gone to the Dereyatağı area on foot. The Prosecutor finally asked for copies of documents concerning the clashes between the security forces, the village guards and terrorists in the area and also of documents concerning the cultivation of cannabis in the vicinity.

53. The same day the Beytüşşebap gendarmerie replied to the Prosecutor's request that the Geçitli hamlet had been evacuated due to the actions of the PKK and on the request of the villagers. There was no reason, therefore, for Halit Aslan and Abuzeyt Aslan to go to the area.

54. On 28 January 2002 the Beytüşşebap gendarmerie commander's office further informed the Beytüşşebap Prosecutor that the villagers had left the village of their own free will because of PKK terrorist activities. The Prosecutor was also informed that the two persons could have taken the bus from Van to the town of Beytüşşebap, but that there were no roads to the village and the area was not safe. The Prosecutor was finally informed that there had been 31 attacks by the PKK in the area between 1989 and 2001.

55. On 5 March 2002 the Beytüşşebap Prosecutor drew up a report (*fezleke*) in which he set out the developments in his investigation and forwarded it to the Ministry of Justice on 19 March 2002. The Prosecutor asked the Ministry to grant authorisation for the prosecution of Hakan Torun, the commander of the Beytüşşebap Gendarmerie Headquarters, for his alleged professional negligence in the failure to produce the bodies for an autopsy.

56. On 1 May 2002 another attempt was made by the gendarmerie to reach the area in order to find the bodies. This time the soldiers were able to reach the area but, despite carrying out a search on 1 and 2 May, they were unable to find the bodies.

57. On 8 May 2002 the Ministry of Justice granted the authorisation requested by the Beytüşşebap Prosecutor (see paragraph 55 above).

58. On 20 May 2002 the Prosecutor in Şırnak sent a letter to his colleague in Beytüşşebap, requesting him to ask the gendarmerie to make yet another attempt to find the bodies. The Beytüşşebap Prosecutor was also asked to summons Hakan Torun to the Prosecutor's office in Şırnak.

59. On 24 May 2002 Hakan Torun was served the summons to appear before the Şırnak Prosecutor.

60. On 12 July 2002 the Şırnak Prosecutor drew the attention of his colleague in Beytüşşebap to Hakan Torun's failure to appear before him and urged his colleague to find him.

61. Hakan Torun, who was found by the Beytüşşebap Prosecutor on 12 July 2002, informed the latter of his intention to go to the Şırnak Prosecutor's office as soon as possible.

62. On 23 July 2002 the Şırnak Prosecutor sent a letter to the Ministry of Justice, saying that he had carried out an investigation into the actions of Hakan Torun and had concluded that Hakan Torun had not been negligent in the failure to find the bodies. According to the Prosecutor, finding the bodies would have required a major operation and it was impossible for Hakan Torun to carry out such an operation with the limited number of soldiers under his command. It appears from this letter that Hakan Torun had been questioned by the Şırnak Prosecutor.

63. On 12 November 2002 the Beytüşşebap Prosecutor handed over the investigation file to his colleague in Şırnak.

64. On 20 November 2002 the Şırnak Prosecutor decided not to prosecute Hakan Torun on the ground that an investigation had already been carried out and the Ministry of Justice had been informed.

65. On 30 January 2003 the Gendarmerie Headquarters in Ankara sent a letter to the Ministry of Interior setting out their answers to questions put by the Court as to whether and what serious attempts had been made to recover the bodies during the spring and summer of 2002 and whether the ammunition recovered had been examined for fingerprints. According to the Gendarmerie Headquarter's letter, eight attempts had been made between 29 September 2001 and 8 January 2002 but the bodies had not been found. It was possible that the bodies had decomposed naturally or that they had been taken away by the terrorist organisation. The area where the bodies had been left was 2,668 metres in altitude and, because of the weather conditions, it had not been possible to reach the area by helicopter. The distance to the area had rendered it difficult for the soldiers to bring back the ammunition that had been found, and an examination of the ammunition carried out at the military base had not revealed any prints.

II. RELEVANT DOMESTIC LAW AND PRACTICE

66. The relevant part of Article 79 of the Turkish Code on Criminal Procedure provides as follows:

“An official examination of a corpse must be made in the presence of a physician. An autopsy shall be performed in the presence of a judge and, in those cases where it is necessary to avoid prejudicial delay, the autopsy shall be performed by two physicians in the presence of the public prosecutor, at least one of the physicians being a forensic practitioner. ...

When it is deemed necessary [during a preliminary investigation] to carry out an autopsy on a body which has already been buried, the permission of the public prosecutor is required and the necessary action will be taken by the [prosecutor].”

67. Article 80 of the Turkish Code on Criminal Procedure provides as follows:

“Unless there are reasons requiring otherwise, the formal identification of a body is carried out prior to an autopsy by showing the body to the people who knew the deceased and, if a suspect has already been apprehended, the body is also shown to him or her.”

68. Article 152 of the Turkish Code on Criminal Procedure provides as follows:

“If there is evidence to suggest that a deceased has not died of natural causes, the police officers or other public officials who have been informed of that fact are required to advise the public prosecutor or a criminal court judge. The body can only be buried after a written burial licence has been issued by the public prosecutor or by a criminal court judge.”

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

THE LAW

I. THE GOVERNMENT’S PRELIMINARY OBJECTION

70. The Court notes that, in its decision of 19 October 2004, it considered that the question whether the criminal investigation at issue could be regarded as effective under the Convention was inextricably linked to the substance of the applicants’ complaints, and that that question should be joined to the merits.

71. On 28 February 2005 the Government submitted to the Court additional observations, together with a number of documents, and asked the Court to declare the application inadmissible in the light of the information provided in those additional observations. The following information appears from the documents appended to the Government’s additional observations:

72. On 20 August 2004 the fourth applicant, Mrs Nihari Aslan, made a statement at a police station, apparently in order to register her husband Halit Aslan’s death in the records of the Registry Office for Births Marriages and Deaths so that she might obtain a death certificate. Mrs Aslan submitted in this statement that her husband Halit Aslan had fallen ill and

died at their family home on 11 November 2003. The family had had him buried at the Şabaniye cemetery.

73. On 20 August 2004 a certain Mr Osman Kotaş and one Mr Kadir Narin also made statements at the same police station and submitted that they had been the neighbours of the Aslan family. They confirmed that Halit Aslan had fallen ill and died at his home on 11 November 2003. Mr Narin further submitted that he had attended the funeral at the cemetery.

74. On 13 April 2005 the Court forwarded the Government's additional observations and its appendices to the applicants and invited them to submit their comments on these documents.

75. In their reply of 2 May 2005, the lawyers for the applicants confirmed that Mrs Nihari Aslan had indeed made the above mentioned statement of 20 August 2004. They further submitted that Mr Halit Aslan had previously applied to the Van Agriculture Directorate for a farming grant. Funding for such grants had been obtained from the World Bank and the Agriculture Directorate had been making it available to farmers in the form of subsidies. Following Halit Aslan's killing, his wife Mrs Nihari Aslan had contacted the Agriculture Directorate, informing them of her husband's death. She had then asked for the grant to be made available to her. The Directorate had asked her for proof of the death of her husband. Upon this, Mrs Aslan had contacted the headman (*muhtar*) of her neighbourhood. The *muhtar* had advised her to go to the police station and make a statement and then submit that statement to the Agriculture Directorate in order to be able to claim the grant.

76. The lawyers submitted that this had been the sole reason for Mrs Aslan's statement of 20 August 2004. She was a very poor person and in need of the grant. The other applicants and Mr Narin (see paragraph 73 above) were prepared to make a statement before the prosecutor to this effect. The lawyers also submitted to the Court two letters drawn up by two *muhtars* who claimed to have been told about the killing of Halit Aslan in the Faraşın area. They confirmed that they had advised Mrs Nihari Aslan to obtain a death certificate in order to be able to claim the agriculture grant.

77. The lawyers further submitted that, during their most recent meeting with the applicants, the latter had shared with them some very important information which, because of their fears, they had not imparted before. According to this information, six or seven days after the killing of their relatives, the applicants had gone to the place where their relatives had been killed and had buried the bodies.

78. The lawyers submitted that the applicants were prepared to assist the authorities to recover the remains of their relatives. The area in question was now safe and it would be fairly straightforward for the authorities to find the bodies and then establish their identities and carry out autopsies.

79. The lawyers further submitted that the authorities, by remaining completely indifferent in the matter, were trying to mislead the Court. The

authorities had not provided the applicants with any information about the identities of the three dead men or the circumstances of their killing. The applicants had had to bury their relatives themselves. Contrary to what was claimed by the Government, no reasons of security existed to prevent the recovery of the bodies; the Government's aim was to cover up the murders.

80. In the light of the above arguments presented by the parties and having particular regard to the new information brought to the Court's attention, the Court considers it appropriate to address the Government's preliminary objection concerning the effectiveness of the criminal investigation already at this juncture.

81. The Court calls to mind that in view of the urgency and seriousness of the applicants' allegations, and in particular of the possibility of vital evidence being destroyed due to the decomposition of the bodies, priority was given to the application under Rule 41 of the Rules of Court (see paragraph 5 above), and the Government were requested to search for the bodies and establish their identities. It now appears from the documents submitted by the Government that the national authorities had already started searching for the bodies after they had been informed about the applicants' allegations (see paragraphs 30-50 above).

82. In this connection the Court observes that the Beytüşşebap Prosecutor acted promptly after he received the information from the relatives by requesting information from the gendarmerie the same day (see paragraph 31 above). The prosecutor questioned the three relatives on 19 September 2001 in relation to the allegations set out in their petitions (see paragraph 32). On 24 September 2001 the Prosecutor questioned Captain Soysal, the commander of the security forces who had carried out the operation, and his deputy officer (see paragraphs 33-34 above). Also on 24 September the Prosecutor instructed the gendarmerie to recover the bodies (see paragraph 37 above).

83. Despite numerous attempts, the soldiers were unable to reach the site. However, the prosecutor continued his efforts to find the bodies and even sought permission from the Ministry of Justice to prosecute the commander for his alleged negligence in failing to find the bodies (see paragraph 55 above).

84. When the soldiers finally managed to reach the site, they were unable to find the bodies, even though they carried out an extensive search over a period of two days (see paragraph 56).

85. In the light of the foregoing, the Court finds that in order to find the bodies, the national authorities – particularly the Beytüşşebap Prosecutor – took every step within their power to the extent of the information they held. Their efforts were, however, seriously hampered by the actions of the applicants, who had buried the bodies six or seven days after death, and failed to inform the authorities and the Court of this essential fact. The Court is not convinced about the well-foundedness of the applicants' fears,

which allegedly prevented them from sharing this information with anyone. In this connection the Court observes that these purported fears did not prevent the applicants from making a number of very serious allegations both to the national authorities and to the Court, without any adverse repercussions or hindrance in their application and petitions.

86. Having regard to the fact that it was thus the applicants themselves who have misled the Court in the present case, the Court would characterise the applicants' allegation that the national authorities were trying to mislead the Court (see paragraph 79 above) as, at the very least, disingenuous, if not abusive. The Court cannot see how the national authorities could have provided the applicants with any information about the identities of the three dead men when the applicants themselves had, by the burials, hidden their whereabouts.

87. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants first to use the remedies provided by the national system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, § 65, and the case cited therein).

88. In the light of the foregoing, the Court concludes that it cannot be said that the national authorities remained passive in the face of the allegations brought to their attention by the applicants. Thus the authorities cannot be reproached for the failure to find the bodies. As the information concerning the burial of the bodies has only recently been disclosed by the applicants (see paragraphs 75-77 above), the national authorities have not yet had the opportunity to establish the identities of the bodies and to clarify the true facts concerning the deaths.

89. As regards the statement made by the fourth applicant to the police, to the effect that her husband had died on 11 November 2003 – and not in September 2001 as alleged in the application form –, the Court finds that the most appropriate forum to examine this contradictory information, and to establish the true facts concerning this death, is before the national authorities.

90. It follows that the applicants must be considered to have failed to exhaust domestic remedies in respect of their Convention grievances. The Government's preliminary objection is accordingly upheld (see, *mutatis mutandis*, *Aytekin v. Turkey*, judgment of 23 September 1998, *Reports* 1998-VII, § 85).

FOR THESE REASONS, THE COURT UNANIMOUSLY

Upholds the Government's preliminary objection and *holds* that it cannot consider the merits of the case as domestic remedies have not been exhausted.

Done in English, and notified in writing on 18 October 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President