SECOND SECTION

CASE OF ANIK AND OTHERS v. TURKEY

(Application no. 63758/00)

JUDGMENT

STRASBOURG

5 June 2007

FINAL

05/09/2007

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 Anık and Others v. Turkey,
The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mrs F. Tulkens, *President,*
Mr A.B. Baka,
Mr I. Cabral Barreto,
Mr R. Türmen,
Mr M. Ugrekhelidze,
Mrs A. Mularoni,
Ms D. Jočienė, *judges,*

and Mrs S. Dollé, *Section Registrar*,
Having deliberated in private on 15 May 2007,
Delivers the following judgment, which was adopted on that date:
PROCEDURE
1. The case originated in an application (no. 63758/00) 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 twelve Turkish nationals, Mr Mahmut Anık, Mrs Medina Anık, Ms Meryem Anık, Ms Susin Anık, Mr Ebubekir Anık, Mr Ömer Anık, Mr Cemal Anık, Ms Halim Anık, Mr Osman Sanrı, Mrs Fatım Sanrı, Mr Ömer Sanrı and Mr Ramazan Sanrı ("the applicants"), who were born in 1954, 1969, 1987, 1988, 1990, 1993, 1996, 1998, 1940, 1940, 1972 and 1975 respectively. At the time of the events giving rise to the present application the applicants lived in the Balveren village, located within the administrative jurisdiction of Şırnak in south-east Turkey. On 25 September 2005 the ninth applicant, Mr Osman Sanrı, died.
2. The applicants were represented before the Court by Mr Mustafa Sezgin Tanrıkulu, a lawyer practising in Diyarbakır. The Turkish Government ("the Government") did not designate an agent for the purposes of the proceedings before the Court.
3. On 15 March 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.
THE FACTS
I. THE CIRCUMSTANCES OF THE CASE
4. The first applicant is the brother and the second applicant is the wife of Mr Ahmet Anık, who was born in 1959 and killed by members of the security forces on 19 August 1999. The third to eighth applicants are the children of Mr Ahmet Anık.
5. The ninth applicant was the father and the tenth applicant is the mother of Mr Abdulkerim Sanrı, who was born in 1981 and also killed by members of the security forces on 19 August 1999. The eleventh and twelfth applicants are the brothers of Mr Abdulkerim Sanrı.
A. Introduction
6. The facts of the case as presented by the applicants and the Government are based on a number of documents drawn up in the course of the domestic investigation. The following information appears from the parties' submissions as well as from the documents submitted by them.
B. The Facts
1. Background
7. Ahmet Anık and Abdulkerim Sanrı (hereinafter "the two village guards") had been living in the Balveren village and employed by the State as

provisional village guards. Their duties included providing guidance to the armed forces about a particular area near their village where there was intense PKK activity.

8. The area in question was situated to the south of an asphalt road which ran between the city of Şırnak and the town of Uludere. The two village guards and a team of soldiers from the nearby Milli gendarmerie station would take up positions on Yaylatepe, a hill from where they could maintain the security of the road. The distance between the top of Yaylatepe and the road was approximately 600 metres and a footpath connected the two. From their positions, the soldiers and the two village guards would also observe another footpath which ran in a river bed between Yaylatepe and the Ömerağa hills. This footpath was frequently used by PKK terrorists on their way to and from Northern Iraq. Ömerağa was 1,500 metres to the south-east of Yaylatepe. 2,500 metres to the north-east of Yaylatepe was Elmalı, from where soldiers would monitor the area at night with the help of thermal cameras.

9. In the morning the two village guards would walk the short distance of 400 metres from their village to the gendarmerie station where they would report their arrival at 6 a.m. From the gendarmerie station they would walk, together with the soldiers, to Yaylatepe, a distance of two kilometres. At the end of their shift they would return to the gendarmerie station together with the soldiers. If it was dark, they would be driven to their village from the gendarmerie station in military vehicles, otherwise they would walk. For security reasons, no civilians or even village guards would be allowed to remain or enter the area in question or use the asphalt road during the hours of darkness. Any civilians who needed to use the road at night time in case of an emergency would inform the local gendarmerie station beforehand and they would be observed by night vision binoculars and thermal cameras until they were out of the area.

2. The killing of the two village guards

10. On 24 August 1999 sub-Lieutenant Hakan Paç submitted in his statement taken by the Şırnak prosecutor that he had been in charge of the soldiers and the two village guards, who had taken up positions on Yaylatepe on 18 August 1999. At 8 p.m. he had grouped his men and, upon the arrival of a team of soldiers at 8.45 p.m. who were to take over the command of the hill from him, his men had started walking down the hill. He had stayed behind to ensure that no one was left. In accordance with usual practice, the two village guards had been walking ahead of the soldiers. He had been able to see the soldiers reach the main road and thereafter continue to walk towards the station. However, he thought that the two village guards must have turned off the footpath before reaching the main road; it was not his duty to check whether the two village guards had safely reached their village.

11. It appears from a post-incident report drawn up on 20 August 1999 that, at 11 p.m. on 18 August 1999, the soldiers positioned on Elmalı had observed two persons on the slopes of Yaylatepe. Having established that no one had been given authorisation to be in that area, a number of military units were deployed to the vicinity of Yaylatepe. By 1.15 a.m. on 19 August the two persons had been surrounded by soldiers, some of whom had taken up positions on Yaylatepe.
12. Two groups of soldiers fired a number of 120 mm mortars in the direction of the two persons. Flares were also fired and the two were ordered to surrender. However, they started running towards Yaylatepe, and the distance between them and the soldiers on Yaylatepe was down to approximately 200 metres when the soldiers fired in the air to warn them. When the two failed to stop, the soldiers fired directly at them. The time by then was 1.30 a.m., according to the report.
13. At dawn the soldiers approached the bodies and established that they were the two village guards. In the opinion of the authors of this report – the military officers in charge of the operation – the two village guards had left the group of soldiers on their way down from Yaylatepe in order to help PKK members enter northern Iraq or plant land mines in the area.
14. According to the on-site report prepared by the soldiers on 19 August 1999, the two village guards had been shot in the head and chest. Their bodies had been found on the slopes of Yaylatepe, fifty metres from the top of the hill. Two hand grenades had exploded approximately 50 centimetres away from the bodies. The pins belonging to these hand grenades had been found 30 metres away from the bodies, further up the hill.
15. According to the same report, there was no ammunition on the body of Abdulkerim Sanrı, but there were three loaded bullet cartridges belonging to a Kalashnikov rifle and a hand grenade in a military style vest worn by the deceased Ahmet Anık. The rifles belonging to the two village guards were found two hundred metres away from their bodies, next to a rock, at the side of the main road. The barrels of the rifles smelt and bore traces of gun powder, indicating that they had been fired. Next to the two rifles was Abdulkerim Sanrı's military style vest with three loaded bullet cartridges belonging to a Kalashnikov rifle and a hand grenade in one of its pockets. Also, 30 metres away from the bodies were a number of spent bullet cases discharged from G3 and BKC rifles. A sketch, detailing the features of the area and showing the position of the bodies together with the discharged ammunition, was drawn up and appended to this report and forwarded to the public prosecutor's office in Şırnak.
3. Şırnak public prosecutor's investigation into the killings
16. On 19 August 1999 the Şırnak public prosecutor and a doctor visited the area to examine the bodies. According to the report drawn up by the prosecutor and the doctor, there were extensive injuries to the heads, chests

and various other parts of the bodies. It concluded that “as the cause of death was so obvious, there was no reason to carry out classical autopsies”.
17. The prosecutor took a number of statements in the course of his investigation. These statements, insofar as they are relevant to the Court's examination of the case, are summarised below.
18. Captain Ömer Arslan was the commander of the soldiers positioned on Elmalı on the day of the incident. He recounted in his statement of 24 August 1999 that, at 11.10 p.m. on 18 August 1999, with the use of thermal cameras, he had seen two persons in the area and informed the battalion commander. The battalion commander had ordered him to continue to observe and record the two people by thermal camera. As the two persons had been behaving suspiciously, he and the soldiers under his command had thought that they were terrorists.
19. The military unit on Elmalı had then been deployed to ambush the two people. He had been able to see that mortars and flares were fired. He had also heard Lieutenant Alpaslan Güldal asking the two to surrender and to lie on the asphalt road. At that moment the two persons, who were standing next to the road, had attempted to escape and the soldiers from his military unit had fired towards them. He thought that one of the two persons had been shot and, in his opinion, there were blood stains on an adjacent rock. The two people had then escaped towards the hill and “were exterminated there”.
20. Lieutenant Güldal recounted in his statement of 24 August 1999 that, on the day of the events, he had been in charge of the soldiers on Ömerağa hill. Upon receiving information that there were two persons in the area who were acting suspiciously, he had been ordered by the battalion commander to apprehend the two persons. He had then taken his team to Yaylatepe. As it was dark, he had been unable to see the two people but Captain Arslan, who was watching the area with a thermal camera, had provided him with information over the radio about their positions and their distance from his military team. The two persons had first attempted to escape in an easterly direction, but had turned around when a mortar was fired towards them. When the westerly direction was also shelled with mortar fire, the two men had started running towards the river bed down the side of Yaylatepe.
21. He had ordered the two persons to stop and lie on the asphalt road; had they complied with his orders, they could have been caught alive. However, it was possible that they had not heard him as they were 500 metres away at the time. The two people had then started running towards Yaylatepe where he and his soldiers were positioned. When the distance was about 100 metres he had fired in the air. He had also seen, using night vision binoculars, that the two were not armed. Nevertheless, one of them was wearing a military style vest in which ammunition could be carried and the other was wearing thick clothing. It was possible that they had strapped

their bodies with bombs. The two persons continued to approach the soldiers and, when at a distance of 50 metres, he had radioed the battalion commander for permission to open fire. After receiving authorisation from his commander, he had asked the two men, both in Turkish and Kurdish, to surrender. After having fired at the men he had thrown four hand grenades at them in order to destroy any explosives which might have been strapped to their bodies. It was not until the following morning that they had realised that the two people were in fact the two village guards.

22. Nuri Ünlü, an expert-sergeant who took part in the operation, recounted in his statement of 25 August 1999 that, when the distance between the two persons and the soldiers was approximately 50 metres, he and a number of soldiers had ordered the two people to stop. He had been unable to see the two persons but could hear them. He and the soldiers next to him had then fired warning shots, after which they had fired directly at the two men. Noting that the two were still alive, they had thrown hand grenades in order to "neutralise them".

23. On 25 August 1999 Hüseyin Sarıca, another expert-sergeant who had also participated in the incident, gave a similar statement to that of Mr Ünlü and added that he had been able to see, using night vision binoculars, that the two persons were not armed but were wearing thick clothing. Lieutenant Güldal, who was in charge of the soldiers, had then asked and obtained permission from the battalion commander to open fire on the two men. They had then been warned that they would be shot at. After the firing had ceased, four grenades had been thrown at them when they fell to the ground. He had not heard or seen whether the two people had opened fire on the soldiers.

24. On the day of the events Asım Altay had been serving as a private soldier under the command of Lieutenant Güldal and was positioned on Yaylatepe. Private Altay recounted in his statement of 25 August 1999 that he had been using night vision binoculars and had thus been able to see that the two persons were not armed. One of them was wearing thick clothing and a military style vest. After having unsuccessfully ordered the two men – both in Turkish and Kurdish – to stop and surrender, the soldiers had fired at them. He had also heard a hand grenade explosion; he did not know the distance from which the hand grenade had been thrown or whether or not the two persons had been alive when the hand grenade was thrown.

25. Hasan Tecim had also been serving as a private soldier under the command of Lieutenant Güldal and was positioned on Yaylatepe at the relevant time. Private Tecim recounted in his statement of 25 August 1999 that one of the two people had been wearing thick clothing. The soldiers, thinking that the two men might be suicide bombers, had not wanted them to approach. When the distance between the two persons and the soldiers was approximately 50-60 metres, the soldiers had started firing. A bomb had also been thrown at the two men. The two had not fired at the soldiers.

26. Both the first applicant Mahmut Anık and the ninth applicant Osman Sanrı were questioned by the prosecutor on 20 August 1999. They asked the prosecutor to find and prosecute those responsible for the deaths of their relatives.
27. On 26 August 1999 the prosecutor decided that he lacked jurisdiction to investigate the killings and forwarded his decision and the above mentioned statements to the military prosecutor's office at the Air Force Headquarters in Diyarbakır. In his decision the prosecutor summed up the information he had been given by the above mentioned members of the military and concluded that the two village guards had been mistaken for terrorists and had thus been killed. According to the prosecutor, the killings had been carried out in the performance of military duties and, as such, had to be investigated by a military prosecutor.
28. In this decision the battalion commander Abdulveli Kayaş, Lieutenant Alpaslan Güldal, sub-Lieutenant Hakan Paç and expert-sergeants Hüseyin Sarıca and Nuri Ünlü were named as defendants in respect of the offence of "causing death by negligence and carelessness". The first and the ninth applicants, i.e. Mahmut Anık and Osman Sanrı, were referred to in the decision as the complainants.
4. The military prosecutor's investigation into the killings
29. On 8 October 1999 the applicants' lawyer asked the military prosecutor for information about the investigation and asked to be contacted if his presence was required.
30. On 12 October 1999 the military prosecutor asked the commander of the gendarmerie in the city of Van to appoint three high ranking officers as experts to assist him in the investigation. The military prosecutor specified that those three officers should not be chosen from among members of the military teams to which the defendants belonged.
31. On 5 November 1999 the military prosecutor visited the area where the two village guards had been killed. Two majors and a lieutenant-colonel who had been appointed as experts, the defendants and other eye-witnesses were also present during the military prosecutor's visit.
32. The military prosecutor observed that, at the time of the shooting, the distance between the two village guards and the soldiers was 40 metres. Furthermore, the place where the two village guards were killed was 20-30 metres away from the river bed which was often used by terrorists as an escape route.
33. During his visit, the military prosecutor also questioned Lieutenant Alpaslan Güldal, expert-sergeant Nuri Ünlü and the battalion commander Captain Abdulveli Kayaş, i.e. three of the five defendants.
34. Lieutenant Güldal stated that the two village guards had been trying to reach the river bed to escape. When fire was opened, the two village guards had been approximately 20 metres away from the river bed; had they been

able to proceed any further, it would have been impossible to find them again. He had not known at the time that the two persons were in fact the village guards. He had been informed at the time that the two men had been crouching frequently, thereby giving the impression that they were planting land mines. Lieutenant Güldal added that the two people had been "exterminated" by the soldiers after having obtained permission from the battalion commander. Although the two village guards had been unarmed, they were wearing thick clothing, thereby giving the impression that they had explosives on them. Thus, the reason for the soldiers to continue firing even after the two men had fallen to the ground was to destroy any explosives. It had been his duty to stop terrorists from using the area as an escape route and to exterminate them; on the day of the events he had carried out that duty.

35. Expert-sergeant Nuri Ünlü repeated the contents of his previous statement (see paragraph 22 above) and added that the reason for the presence of the military in that area at the time had been to prevent terrorists from using the area as a transport route. On the day of the events, they had exterminated two terrorists. He had not thought at the time that they could be village guards. Their priority was to catch terrorists alive so that they could obtain information from them, but that had not been possible on this particular occasion because the two persons had refused to surrender.

36. Battalion commander Captain Abdulveli Kayaş stated that he had been informed in a fax message, sent to him from the regimental headquarters some time before the incident took place, that a group of eight terrorists had used the area three to four days previously. He had been warned to be on high alert in case more terrorists tried to use the area. He knew that the locals helped terrorists by providing guidance around the area. Furthermore, land mines were being planted thereabouts. He confirmed that Lieutenant Güldal had kept him informed about the movements of the two persons and about the operation. He added that Lieutenant Güldal had told him that the two men were escaping and that it would have been impossible to find them again if they were allowed to do so. Furthermore, Lieutenant Güldal had also said that the two persons might have explosives on them and that it would be dangerous for the soldiers if they came close. He had thus authorised the firing. In his opinion the two village guards had been in the area in order to plant land mines or to help a group of terrorists.

37. On 16 November 1999 the first applicant Mahmut Anık and the ninth applicant Osman Sanrı applied to the military prosecutor for permission to intervene in the proceedings. In their statements taken by the military prosecutor the same day, the two applicants stated that their relatives had been killed intentionally or negligently. They asked the military prosecutor to establish the circumstances surrounding the killings and prosecute those responsible.

38. On 29 December 1999 the three experts submitted their opinions to the military prosecutor. They stated that, in reaching their conclusion, they had taken note of the above mentioned statements taken from members of the military and had watched the video footage of the operation recorded by Captain Arslan using the thermal camera (see paragraph 18 above). According to the experts, during the hours of darkness the area in question was out of bounds for all persons, with the exception of members of the military, because it was a transport route for terrorists to reach Northern Iraq. The village guards knew this well and their presence in that area could only be explained by their having ulterior motives. In fact, one and a half months before the killing of the two village guards, a military vehicle had been damaged by a land mine. On account of the heavy military presence in the area, it could not have been possible for terrorists to plant land mines themselves. In the experts' opinion, the deceased village guards had been responsible for planting the mines. Furthermore, they had intelligence suggesting that the deceased village guards had been assisting terrorists by providing guidance around the area.

39. According to the three experts, although the two village guards had been unarmed, their heavy clothing could reasonably have been mistaken for explosives. In fact, it was possible to see in the footage recorded by thermal cameras that the soldiers had continued to fire at the two persons after they had fallen to the ground. This was done in order to destroy any explosives. The military units which had taken part in this incident had been deployed in that particular area to ambush terrorists. It was “completely natural”, therefore, that the “village guards were exterminated on the assumption that they were terrorists”. The experts concluded by stating their opinion that “none of the defendants had been at fault; in fact, they had carried out their duties effectively and successfully”.

40. On 11 April 2000 the military prosecutor took a statement from Mehmet Zeki Bahşi. Mr Bahşi had performed his military service in the area in question at the relevant time but had since completed his service and been discharged from the army. He had taken part in the operation under Lieutenant Güldal's command. Mr Bahşi stated that on the night in question he had been using night vision binoculars and had thus been able to see the two persons. The soldiers had then started firing to the left and right of the two men, upon which the two had started running towards the river bed. When the soldiers opened fire in that direction, the two people had put their hands up and said “Stop firing; we surrender”. Lieutenant Güldal had then ordered the two men to lie on the road but they refused to do so, instead advancing towards the soldiers on Yaylatepe. One of the two persons had one hand up in the air, but the other hand was behind his back as if he was reaching for something. Although Mr Bahşi had been able to see that because he was wearing night vision binoculars, some of the soldiers who

were closer to the two persons had also been able to see it with the naked eye. When the two persons continued advancing towards the soldiers, Lieutenant Güldal had ordered the soldiers to open fire. The firing had continued after the two had fallen to the ground in order to eliminate the risk of a booby-trap.

41. On 10 May 2000 the military prosecutor questioned Sedat Dilmen and Asım Altay who, like Mr Bahşi, had been performing their military services and had taken part in the operation under the command of Lieutenant Güldal. Mr Dilmen stated that he had been the sniper of the military team. Mr Dilmen and Mr Altay both stated that the two persons had been given ample opportunity to surrender but had failed to do so. When the distance between the two persons and the soldiers was down to 50 metres, the soldiers had opened fire. They had not seen any weapons on the two people, but the clothes they were wearing had been very thick, which had led the soldiers to think that they were laden with explosives.

42. On 2 June 2000 the military prosecutor decided not to prosecute the defendants for the offence of "causing death by negligence and carelessness". The military prosecutor concluded in his decision that the soldiers had "shown more than necessary sensitivity in apprehending the two persons alive, but had been unable to do so because of the two person's refusal to surrender". According to the military prosecutor, "following the two person's refusal to surrender, killing them had become a duty for the soldiers" and that the soldiers had carried out that duty.

43. The decision not to prosecute was communicated to the applicants' lawyer on 15 June 2000. The lawyer contacted the military prosecutor the same day and asked to be provided with the documents from the investigation file. The military prosecutor authorised the release of the statements taken from the applicants only.

44. On 23 June 2000 the applicants lodged an objection against the decision not to prosecute. In their petition submitted to the Diyarbakır Military Court, the applicants argued that, due to the secret nature of the investigation, they had not been given access to the documents in the investigation file. Neither had they been able to participate in the investigation, notwithstanding their submission of petitions to intervene in the proceedings (see paragraph 37 above). The applicants argued, in particular, that their two deceased relatives had been unarmed and that it thus should have been possible to apprehend them alive. They submitted that everyone had the right to life; the killing of their two relatives and the military prosecutor's decision to discontinue the proceedings was a violation of their relatives' right to life, which was protected by the Constitution and by international conventions.

45. The applicants' objection was rejected on 30 June 2000 by the Diyarbakır Military Court, which concluded that the decision not to

prosecute was compatible with the legislation in force and the applicable procedure, and that there was no need to widen the scope of the investigation. The decision rejecting the objection was communicated to the applicants' lawyer on 19 July 2000.

II. RELEVANT DOMESTIC LAW AND PRACTICE AT THE TIME

46. The relevant domestic law and practice, applicable at the time of the events giving rise to the present application, are set out in the judgments in the cases of *Erdoğan and Others v. Turkey* (no. 19807/92, §§ 51-57, 25 April 2006), and *Ergi v. Turkey* (judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998-IV, §§ 46-52).

THE LAW

I. ADMISSIBILITY

47. The Government argued that the applicants had failed to exhaust domestic remedies as they had not claimed compensation from the administration under Article 13 of the Law on Administrative Justice Procedures (Law No. 2577) which provides that anyone who has suffered damage as a result of an act committed by the administrative authorities may claim compensation from the authorities within one year of the alleged act.

48. The Court observes that the Government's objection to the admissibility raises issues which are closely linked to those raised by the applicants' complaints concerning the effectiveness of the investigation into the killing of their two relatives. It thus considers it appropriate to address this point in its examination of the merits of the applicants' complaint under Article 2 of the Convention (see paragraph 79 below).

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

49. Article 2 of the Convention provides as follows:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

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

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

A. The killing of the applicants' relatives

50. The applicants argued that the force used by the soldiers against their two relatives had not been absolutely necessary and that the excessive nature of the use of force showed that the soldiers had in fact intended to

kill them. Indeed, the conclusion reached by the three experts appointed by the military prosecutor, i.e. that "the soldiers had carried out their duty satisfactorily", was another indication of the existence of an intention to kill their relatives in violation of Article 2 of the Convention.

51. The Government submitted that the deaths of the applicants' two relatives had resulted from the use of force which was no more than absolutely necessary in order to effect their arrests. In particular, the security forces had done all that was necessary to apprehend the two persons alive and had ordered them, both in Turkish and Kurdish, to surrender and had also fired warning shots. The only reason to throw a hand grenade at the two men had been to eliminate the risk of a booby-trap.

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

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

54. In determining whether the force used is compatible with Article 2, it may be relevant whether a law enforcement operation has been planned and controlled so as to minimise to the greatest extent possible recourse to lethal force or incidental loss of life (*ibid*, § 194, and *Ergi*, cited above, § 79). Finally, law-enforcement officers, such as the police or the gendarmerie, should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may

use force and firearms, in the light of the international standards which have been developed in this respect (see, *mutatis mutandis*, *Makaratzis v. Greece* [GC], no. 50385/99, § 59, ECHR 2004-XI).

55. The Court observes that it is not in dispute between the parties to the present case that the applicants' two relatives were killed as a result of the fire opened, and at least two hand grenades thrown, by members of the respondent State's security forces. According to the Government, the underlying reason for the soldiers to fire at the two persons was to arrest them and that opening fire and the subsequent throwing of hand grenades had been absolutely necessary.

56. Under the circumstances, it has to be established whether the force used by the soldiers was no more than absolutely necessary in order to achieve one or more of the purposes set out in Article 2 § 2 of the Convention.

57. The Court notes at the outset that the offence of which the soldiers were suspected was qualified by the prosecutors as "causing death by negligence and carelessness" (see paragraph 28 above). Noting that the soldiers all stated that they had opened fire directly at the two village guards before throwing at least two hand grenades at them, the Court finds it incomprehensible that the soldiers' actions could ever be qualified as "negligent" or "careless". It must be foreseeable for any person – let alone trained army officers – that shooting at a person at a distance of 40 metres with high velocity machine guns and then throwing a number of hand grenades at them would be lethal.

58. Indeed, notwithstanding this qualification of the offence, neither the military experts appointed by the military prosecutor, nor the military prosecutor himself, examined how and why exactly the soldiers had been "negligent" or "careless". The experts were satisfied that the "village guards were exterminated on the assumption that they were terrorists". For the military prosecutor, however, the two village guards' refusal to surrender was sufficient to justify their killing.

59. In fact, it appears from the decision not to prosecute that, rather than establishing whether the use of lethal force was warranted and complied with the applicable law and regulations, the military prosecutor and the military experts appointed by him were more concerned to establish the reason for the two village guards' presence in the area. No attempt was made by either the Government in their observations, or by the domestic authorities in their investigation, to establish that the soldiers who took part in the operation had followed any guidelines regulating the use of firearms.

60. As regards the question whether the domestic authorities have in any event examined if the force used by the soldiers was no more than absolutely necessary, the Court observes that the alleged refusal of the applicants' relatives to surrender was sufficient for the military prosecutor to reach the conclusion that "killing them had become a duty for the soldiers

and that the soldiers had carried out that duty" (see paragraph 42 above). The Court would stress that such a conclusion, which was upheld by the Diyarbakır Military Court, cannot in any way be reconciled with the Convention requirement of "absolute necessity".

61. The Court further observes that the military prosecutor did not make any attempt to eliminate the contradictory information contained in the statements made by certain members of the military. In this connection the Court would highlight, in particular, the statement of Mehmet Zeki Bahşi who stated that the two village guards had put their hands up and said "Stop firing; we surrender" (paragraph 40 above). Furthermore, Captain Ömer Arslan said in his statement that he had thought that the two persons were trying to escape and that one of them was shot before continuing to advance towards the hill where he was subsequently "exterminated" (paragraph 19 above). Finally, no attempt was made to eliminate the inconsistency as regards the number of hand grenades thrown at the two village guards. In this connection, the Court observes that, according to the report prepared by members of the military after the operation, two hand grenades had been used (paragraph 14 above). According to the testimonies of Lieutenant Güldal and expert-sergeant Sarıca, however, the soldiers had thrown four hand grenades (paragraphs 21 and 23 respectively).

62. The Court concludes that the above-mentioned matters constituted serious failings by the domestic authorities, which rendered the investigation insufficient and inadequate to establish, firstly, whether the soldiers had used their firearms lawfully and, secondly, whether the use of lethal force had been absolutely necessary. Having regard to the insufficiency and the inadequacy of the investigation, the Court must make its own examination and evaluation of the facts. To this end, the Court considers that the material before it provides a sufficient factual basis on which to examine whether the force used by the soldiers was absolutely necessary.

63. The Court notes at the outset that the operation in question had not been planned in advance but was carried out following the sighting of two suspicious persons in an area frequently used by terrorists. Nevertheless, the soldiers were able to observe the two village guards with the help of thermal cameras and night vision binoculars for a period of two and a half hours (paragraphs 11-12 and 18 above). During that time they were able to surround the two village guards and block all exit routes (paragraphs 19-20 above). The soldiers thus had adequate time and resources to give thought to possible ways of apprehending the two men alive by using non-lethal methods.

64. In the light of the foregoing, it cannot be said that the decision to open fire was taken, or that the execution of that decision by the soldiers had been

carried out in the heat of the moment (see, *a contrario*, *Bubbins v. the United Kingdom*, no. 50196/99, § 139, ECHR 2005-II, and *Andronicou and Constantinou v. Cyprus,* judgment of 9 October 1997, *Reports* 1997-VI, § 192). It follows from this that a higher standard of care for the protection of the right to life should have been displayed by the soldiers.

65. In so far as it might be argued that the soldiers opened fire in the belief that the two village guards were laden with explosives and that, had they been allowed to come closer, they could have detonated those explosives thereby killing the soldiers, the Court observes that allowing the two village guards to come that close was a decision taken by the soldiers themselves; it would have been possible for the soldiers to have stopped them earlier when they were hundreds of meters away. In this connection it is to be stressed that the soldiers were in total control of the area with which they were familiar. They largely outnumbered the surrounded suspects and had at their disposal sophisticated night vision equipment and at least one sniper for whom it might have been possible to shoot the two people without jeopardising their lives (paragraph 41 above).

66. In this connection the Court deems it important to highlight a striking inconsistency between the two statements provided by Lieutenant Güldal who, together with the soldiers of whom he was in charge, killed the applicants' two relatives. According to the statement he gave to the Şırnak public prosecutor, the reason for shooting the two persons had been to protect their own lives from a possible suicide bomb attack (paragraph 21 above). According to the statement he gave to the military prosecutor, however, the reason to shoot the two persons had been to prevent their escape through the river bed (paragraph 34 above). The Court observes with regret that the investigating authorities did not make any attempt to eliminate this inconsistency.

67. Having regard to the above, the Court is not persuaded that the killing of the applicants' two relatives constituted a use of force which was no more than absolutely necessary in order to achieve the purpose advanced by the respondent Government, i.e. to effect a lawful arrest within the meaning of Article 2 § 2 (b) of the Convention (see, *mutatis mutandis*, *McCann and Others*, cited above, § 213).

There has, therefore, been a violation of Article 2 of the Convention in its substantive aspect on account of the killing by the soldiers of the applicant's two relatives Ahmet Anık and Abdulkerim Sanrı.

B. Alleged inadequacy of the investigation

68. The applicants argued that the investigation into the killings of their relatives was neither impartial nor adequate for the purposes of the requirements of Article 2 of the Convention. In this connection, the applicants submitted, in particular, that the autopsy had not established which specific weapon had caused each of the injuries. Furthermore, neither

the military prosecutor, who carried out the investigation, nor the Diyarbakır Military Court, which upheld the military prosecutor's decision not to prosecute, could be regarded as independent or impartial. The military prosecutor had, in effect, investigated a possible offence committed by his hierarchical superiors.

69. They further submitted that, despite their willingness to assist the authorities, they had not been provided with any information about the investigation. Neither had they been invited to take part in the military prosecutor's visit to the area where their relatives were killed. Indeed, they had not been provided with any documents drawn up in the course of the investigation.

70. The Government submitted that the domestic authorities had made every effort to satisfy the procedural obligation inherent in Article 2 of the Convention. Three high-ranking officers with experience in military operations in that area had been appointed as experts to assist in the investigation. A number of soldiers who had since completed their military service and been discharged from the army had been summoned to give evidence.

71. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others*, cited above, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, § 105). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Anguelova v. Bulgaria*, no. 38361/97, § 137, ECHR 2002-IV).

72. The investigation must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means (see *Kelly and Others v. the United Kingdom*, no. 30054/96, §§ 96-97, 4 May 2001, and *Anguelova*, cited above, § 139). The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (e.g. *Kaya*, cited above, § 87). For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see *Güleç v. Turkey*, judgment of 27 July

1998, §§ 81-82, *Reports* 1998-IV, and *Oğur v. Turkey* [GC], no. 21954/93, §§ 91-92, ECHR 1999-III).

73. There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all instances, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç*, cited above, § 82).

74. Turning to the facts of the present case, the Court has already examined the investigation and concluded that it was not capable of fully establishing the circumstances surrounding the killings of the applicants' two relatives or whether the force used had been absolutely necessary (see paragraph 62 above).

75. As regards the remaining features of the investigation, the Court observes that two of the applicants, i.e. the fathers of the deceased, applied to the military prosecutor and asked for permission to intervene in the proceedings (see paragraph 37 above). Furthermore, the lawyer representing these applicants asked the military prosecutor for information about the investigation and requested the prosecutor to contact him if his presence was needed in the investigation (see paragraph 29 above). Notwithstanding their attempts to obtain information and their willingness to assist the authorities with the investigation, they were not provided with any information or documents about it.

76. Even after the decision not to prosecute was taken, the military prosecutor refused to give the applicants any documents from the investigation file, with the exception of the statements taken from the applicants themselves (see paragraph 43 above). As such, the applicants were not able to take cognisance of the documents in the file when they lodged their objection against the decision not to prosecute. To this end, the Court is of the opinion that, had the applicants been in possession of the documents from the investigation file at the time they lodged that objection, they could have drawn the attention of the Diyarbakır Military Court to the above mentioned inconsistent information provided to the military prosecutor by some of the defendants, as well as the other shortcomings in the investigation, and could have increased the prospect of success of their objection (see, *mutatis mutandis*, *Epözdemir v. Turkey* (dec.), no. 57039/00, 31 January 2002). That, in turn, might have prevented the violation of Article 2 of the Convention found above. However, the applicants were only able to take cognisance of the documents when they were forwarded to them by the Court following their submission by the Government after the case was communicated.

77. In the opinion of the Court, the failure of the authorities to involve the applicants in the investigation or even to provide information about it for

which the Government have not offered any explanation – deprived the applicants of the opportunity to safeguard their legitimate interests (see paragraph 73 above). The same failure also prevented any scrutiny of the investigation by the public.

78. This conclusion is sufficient for the Court to conclude that the authorities have failed to carry out an effective investigation into the deaths of the applicants' relatives, as required by Article 2 of the Convention, and it is unnecessary to examine the remaining alleged failures in the investigation.

79. In these circumstances, as highlighted above, the Court finds that the applicants were not required to bring proceedings under Article 13 of the Law on the Administrative Justice Procedures (see paragraphs 47-48 above). Noting that no other obstacle to its admissibility exists, the Court declares the application admissible and finds that there has been a violation of Article 2 of the Convention under its procedural limb.

III. ALLEGED VIOLATION OF ARTICLES 3, 8 AND 13 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

80. The applicants submitted that they had been the victims of a violation of Article 3 of the Convention on account of the destruction of the bodies of their relatives with high velocity machine guns and hand grenades. Under the same Article, the applicants also complained that the bodies of their relatives had been left in the open until the following morning.

81. Invoking Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention, the applicants submitted that there had been an unjustified interference with their right to family life and that they were deprived of the income generated by their two relatives.

82. Finally, under Article 13 the applicants argued that they did not have an effective remedy in respect of the violations of their Convention rights.

83. The Government were of the opinion that the security forces' decision to wait until sunrise to identify the deceased could not be regarded as ill-treatment within the meaning of Article 3 of the Convention.

84. As regards the complaints under Article 8 of the Convention and Article 1 of Protocol No. 1, the Government were of the view that there was no causal connection between the deaths of the relatives and the applicants' rights under these provisions.

85. Finally, concerning the applicants' complaint under Article 13 of the Convention, the Government maintained that the domestic investigation was sufficiently adequate to meet the requirements of Article 13 of the Convention.

86. The Court observes that the complaints made by the applicants under these Articles have already been examined in the context of Article 2 of the Convention. Having regard to the findings of a violation of Article 2

(paragraphs 67 and 79 above), the Court considers that, whilst they are admissible, it is not necessary to make a separate examination on the merits of these remaining complaints (see, *mutatis mutandis*, *Makaratzis*, cited above, §§ 84-86).

IV. 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. Pecuniary damage

1. Claims made by the relatives of the deceased Ahmet Anık

88. The wife and six children (born between 1987 and 1998) of the deceased village guard Ahmet Anık – i.e. the second to eighth applicants – claimed a total of 201,934 euros (EUR) in respect of the loss of financial support which they had purportedly suffered on account of the death of Ahmet Anık. In support of their claim the applicants submitted a report prepared by an expert witness specialising in the calculation of loss of income in compensation cases in Turkey. The report takes into account a number of parameters, including, in particular, the age and monthly income of Ahmet Anık at the time of his death, the statutory retirement age and the number of persons for whom he had been financially responsible.

89. The Government, referring to the Court's established case-law, submitted that there must be a causal connection between the damage claimed by the applicants and the violation of the Convention, and that this may, in appropriate cases, include compensation in respect of loss of earnings. However, according to the Government, there was no such clear causal link in the present case. Furthermore, according to the Government, other than speculative tables, the applicants had not produced any evidence to prove the alleged pecuniary damage, such as bills, etc. The Government invited the Court not to credit speculative calculations and thus not to allow the Article 41 procedure to be exploited by exaggerated claims lacking any evidence.

90. The Court disagrees with the Government and notes that there is a clear link between the killing of Ahmet Anık by agents of the State and the loss suffered by his family of the financial support which he had provided. In this connection the Court notes that the Government have not disputed that the deceased used to provide for his family financially.

91. Taking into account the family situation and the age of the deceased Ahmet Anık, the awards made in similar cases (see, *inter alia*, *Akkum and Others v. Turkey*, no. 21894/93, § 286, ECHR 2005-II (extracts), *Çelikbilek v. Turkey*, no. 27693/95, § 119, 31 May 2005, and *Koku v. Turkey*, no. 27305/95, § 195, 31 May 2005) and deciding on an equitable basis, the

Court awards Ahmet Anık's widow and six children, jointly, the sum of EUR 60,000.

2. Claims made by the relatives of Abdulkerim Sanrı

92. The father and mother of the deceased Abdulkerim Sanrı claimed that, on account of the killing of their son, they were deprived of the financial support provided by him which, according to the calculations of the above mentioned expert witness, amounted to EUR 69,353. The Court notes in this connection that Abdulkerim Sanrı's father, i.e. the ninth applicant Osman Sanrı, has since died (see paragraph 1 above).

93. The Government, in addition to their objections referred to above (paragraph 89 above), submitted that Abdulkerim Sanrı had been 18 years of age at the time of his death and had no obligation under domestic legislation to support his family financially.

94. The Court observes that at the time of his death Abdulkerim Sanrı had been employed by the State and lived with his parents. Although he had two brothers, i.e. the eleventh and twelfth applicants, the Court cannot exclude that Abdulkerim Sanrı had also been providing some financial support for his family. Taking into account the direct causal connection between Abdulkerim Sanrı's killing and his family's deprivation of that support, and deciding on an equitable basis, the Court awards the mother of Abdulkerim Sanrı, i.e. the tenth applicant Mrs Fatım Sanrı, the sum of EUR 16,500 for pecuniary damage (see *Kişmir v. Turkey*, no. 27306/95, § 154, 31 May 2005, and *Akdeniz v. Turkey*, no. 25164/94, § 150, 31 May 2005).

B. Non-pecuniary damage

95. With the exception of the eleventh and twelfth applicants, i.e. the brothers of the deceased Abdulkerim Sanrı, each applicant claimed EUR 20,000 for pain and suffering on account of the killing of their relatives. They submitted that these elements were exacerbated by the attitude displayed by the authorities in the course of the investigation as well as the lack of punishment of those responsible for the killings.

96. The Government submitted that the total amount of EUR 200,000 claimed by the applicants was excessive. According to the Government, in view of the lack of evidence to substantiate the applicants' losses, no compensation with respect to non-pecuniary damage should be payable; a finding of a violation, if need be, would constitute sufficient compensation for the applicants' alleged non-pecuniary damage.

97. The Court observes that it has found that the applicants' two close relatives were killed by soldiers in violation of Article 2 of the Convention. In addition, it has found that the authorities failed to provide an effective investigation into the killings, contrary to the procedural obligation under Article 2 of the Convention. It finds it obvious, and not requiring detailed substantiation, that the applicants have suffered grave non-pecuniary damage.

98. In these circumstances, and having regard to comparable cases (see, *inter alia*, *Erdoğan and Others*, cited above, § 109, and *Tanış and Others v. Turkey*, no. 65899/01, § 235, ECHR 2005-VII), the Court, on an equitable basis, awards the first applicant, i.e. the brother of the deceased Ahmet Anık, the sum of EUR 5,500, and applicants two to eight, i.e. the wife and six children of Ahmet Anık, jointly, the sum of EUR 40,000 for non-pecuniary damage. It also awards the tenth applicant, Abdulkerim Sanrı's mother, the sum of EUR 20,000 in non-pecuniary damage.

C. Costs and expenses

99. The applicants claimed the sum of EUR 5,800 in respect of the fees of their lawyer both in respect of the submissions made by that lawyer to the national investigating authorities and in the course of the proceedings in Strasbourg. The applicants also claimed the sum foreseen in the Court's legal aid rates in respect of costs and expenses, such as photocopying, postage, telephone and facsimile which they had incurred but for which they had no bills. In respect of the above mentioned sum the applicants submitted a document showing the number of hours – i.e. 50 hours – spent by the lawyer on their case.

100. The Government submitted that only expenses actually incurred could be reimbursed and that any such expenses should be documented. In the present case the applicants' lawyer had not submitted any invoices, receipts or other documents proving the claimed expenses.

101. Making its own assessment based on the information available, the Court awards the applicants the total sum of EUR 5,000, covering costs and expenses under all heads.

D. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a substantive violation of Article 2 of the Convention on account of the killing by soldiers of Ahmet Anık and Abdulkerim Sanrı;

3. *Holds* that there has been a procedural violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the circumstances of the deaths of Ahmet Anık and Abdulkerim Sanrı;

4. *Holds* that there is no need to examine separately the applicants' other

complaints;

5. *Holds*
(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts which are to be converted into new Turkish liras at the rate applicable at the date of settlement:
(i) to the first applicant, i.e. the brother of Ahmet Anık, EUR 5,500 (five thousand five hundred euros), in respect of non-pecuniary damage;
(ii) jointly, to applicants two to eight, i.e. the wife and children of Ahmet Anık, EUR 60,000 (sixty thousand euros) in respect of pecuniary damage and EUR 40,000 (forty thousand euros) in respect of non-pecuniary damage;
(iii) to the tenth applicant, i.e. the mother of Abdulkerim Sanrı, EUR 16,500 (sixteen thousand five hundred euros) in respect of pecuniary damage and EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage;
(iv) to the applicants, jointly, EUR 5,000 (five thousand euros) in respect of costs and expenses;
(v) plus any tax that may be chargeable on the above amounts;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.
Done in English, and notified in writing on 5 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. Dollé	F. Tulkens
Registrar	President